

EUROPEAN UNION (WITHDRAWAL) BILL

SUPPLEMENTARY MEMORANDUM CONCERNING THE DELEGATED POWERS IN THE BILL FOR THE DELEGATED POWERS AND REGULATORY REFORM COMMITTEE

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SHORT SUMMARY OF AMENDMENTS TO POWERS IN THE BILL

The following powers are affected by the amendments tabled by the Government on Wednesday 18 April:

AMENDMENT	POWER(S)	JUSTIFICATION FOR THE AMENDMENT
Prohibit the establishment of new public authorities	<p><i>Clause 7(1)/Schedule 2 Part 1 - Powers to deal with deficiencies in retained EU law</i></p> <p><i>Clause 8/Schedule 2 Part 2 - Powers to comply with international obligations</i></p> <p><i>Clause 9/Schedule 2 Part 3 - Powers to implement the withdrawal agreement</i></p>	This amendment will prevent the powers in clause 7(1), 8 and 9 from being used to create new public bodies in the UK.
Prohibit the modification of the devolution statutes	<p><i>Clause 7(1)/Schedule 2 Part 1 - Power to deal with deficiencies in retained EU law</i></p>	<p>This amendment will prohibit the correcting power from being used to amend the Scotland Act, Government of Wales Act. It will also remove the ability to amend paragraph 38 of Schedule 3 to the Northern Ireland Act, which is otherwise protected from modification.</p> <p>These restrictions do not remove the ability for the power to make consequential amendments to these Acts arising from changes to other enactments.</p>

<p>Prohibit the imposition or increase of fees</p>	<p><i>Clause 7(1)/Schedule 2 Part 1 - Powers to deal with deficiencies in retained EU law</i></p> <p><i>Clause 9/Schedule 2 Part 3 - Powers to implement the withdrawal agreement</i></p>	<p>This amendment will prevent the powers in clause 7(1) and clause 9 from being used to impose or increase fees.</p>
<p>Provide for a ‘sifting’ process in the House of Lords</p>	<p><i>Clause 7(1) - Power to deal with deficiencies in retained EU law</i></p> <p><i>Clause 8 - Power to comply with international obligations</i></p> <p><i>Clause 9 - Power to implement the withdrawal agreement</i></p>	<p>This amendment will provide for the sifting mechanism established in the Bill to apply to the House of Lords as well as the House of Commons.</p>
<p>Explanatory statement of “good reasons” and “reasonable course of action”</p>	<p><i>Clause 7(1) - Power to deal with deficiencies in retained EU law</i></p> <p><i>Clause 8 - Power to comply with international obligations</i></p> <p><i>Clause 9 - Power to implement the withdrawal agreement</i></p>	<p>This amendment would require a statement to be made alongside all SIs made under the powers in clauses 7(1), 8 and 9 explaining why, in the relevant Minister’s opinion, there are good reasons for the instrument and that it is a reasonable course of action.</p>
<p>Explanatory statement in relation to the creation of new criminal offences</p>	<p><i>Clause 7(1) - Power to deal with deficiencies in retained EU law</i></p> <p><i>Clause 8 - Power to comply with international obligations</i></p> <p><i>Clause 9 - Power to implement the withdrawal agreement</i></p>	<p>This amendment would require a statement to be made alongside all SIs creating a new criminal offence explaining why, in the relevant Minister’s opinion, there are good reasons for creating the offence and for the penalty provided in respect of it.</p>

<p>Explanatory statement and reporting requirement in relation to legislative sub-delegation</p>	<p><i>Clause 7(1) - Power to deal with deficiencies in retained EU law</i></p> <p><i>Clause 8 - Power to comply with international obligations</i></p> <p><i>Clause 9 - Power to implement the withdrawal agreement</i></p> <p><i>Schedule 4, Part 1 - Powers in connection with fees and charges</i></p>	<p>This amendment would require a statement to be made alongside all SIs made under the powers in clauses 7(1), 8, 9 and Part 1 of Schedule 4 which delegate legislative power to be exercised other than by a Minister (or devolved Ministers and equivalents) by making SIs (or the equivalent in the devolved legislature). The Minister must explain why this is appropriate.</p> <p>The amendment also requires that the authority exercising the power must lay before Parliament an annual report on the exercise of the sub-delegated power, if it has exercised it that year.</p>
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SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Amendments to the scope of the power

Public authorities

1. To ensure that no important functions are lost as we leave the EU, the Bill was drafted to include within the scope of the clause 7(1), 8 and 9 powers the ability to create new public authorities after exit. This was thought necessary to allow for where a function would, at exit, be transferred from the EU to the UK and where no relevant body currently exists in the UK.
2. As the Bill has progressed through Parliament, the Government has continued to plan for multiple scenarios and it has become clear that the requirement to establish new public authorities may only be necessary in a very limited number of cases.. Therefore, in the interest of narrowing the scope of the powers wherever possible, the Government has tabled amendments to prohibit the establishment of new public authorities under the relevant powers in Bill.
3. In the event that no appropriate public authority currently exists in the UK to take on functions that need to be transferred from the EU, provision for a new public authority to take those functions will be made in primary legislation.

Devolution statutes

4. The Government recognises the importance of our devolution settlements and the Acts through which they are given effect. That is why we have sought to make as many corrections to those Acts as possible on the face of the Bill (Part 2 of Schedule 3) rather than through secondary legislation.
5. At the time of introduction, however, outstanding corrections to the Scotland Act and the Government of Wales Act were still being discussed with the Scottish and Welsh Governments. The Government did not make all of the corrections on the face of the Bill at introduction because the forms of the corrections to those Acts needed to be agreed with the Scottish and Welsh Governments, and some fall within devolved competence.
6. At introduction there was one outstanding correction to be made to the Northern Ireland Act, namely to remedy the deficiency in the reservation of 'technical standards' for products that flow from EU obligations. This reservation spans the three devolution settlements and a correction was required which worked for Northern Ireland, Wales and Scotland.
7. The Government has now reached the conclusion of the discussions with the devolved Governments. These amendments will remove the exemption relating to 'technical standards' from the Northern Ireland Act protection and then apply the same protection for the Scotland Act and the Government of Wales Act to the clause 7 correcting power, that applies to the Northern Ireland Act. This will mean

that this power cannot generally be used to amend any of the three devolution statutes.

8. These restrictions do not remove the ability for the power to make consequential amendments to these Acts arising from changes to other enactments. This does not allow for substantive changes to the Acts. It is a standard mechanism to ensure consistency across our laws, for instance by updating cross-references that would be impacted by amendments made under the power.

Fees

9. The Government's clear intention in this Bill has been to make bespoke provision in relation to all financial matters in the Bill. The Bill was introduced with a specific power to make provision in relation to fees and charges in Schedule 4.
10. The powers in clause 7(1) and 9 could not, even if it were appropriate to remedying a deficiency or implementing the Withdrawal Agreement, make provision for a charge, as such measures contain an element of taxation prohibited in the exercise of these powers.
11. The Government is tabling these amendments to prohibit the powers in clause 7(1) and 9 from imposing or increasing fees so as to provide clarity on the distinction between these powers and those in Schedule 4. The powers in clause 7(1) and 9 will still be able to repeal fees regimes that are no longer needed, reduce fees and make amendments to pre-exit powers to provide for fees and charges. An example would be correcting a deficiency in an existing fee setting power, such as a reference to the EU which is no longer appropriate. They will not, however, be able to impose or increase a fee or charge themselves.

Amendments to the scrutiny provisions attached to the power

'Sifting' by the House of Lords

12. When the Government accepted amendments proposed by the Commons sifting committee, it was always our expectation that we would make similar provision for the House of Lords, as the Leader of the House of Lords has made clear on a number of occasions. The Government has now tabled an amendment which would ensure that the House of Lords has equal opportunity to the House of Commons ensure that use of the main powers in this Bill is scrutinised properly and thoroughly.
13. As with the Commons Sifting committee this amendment will require Ministers of the Crown to lay SIs which they are proposing to make under the negative procedure under the key powers in the Bill (clauses 7(1), 8 and 9) before both the Houses of Commons Lords. Committees of both Houses would then have ten days either to accept the recommended procedure or propose upgrading to the affirmative procedure.
14. Ministers are not bound in law to accept the committees' proposals to accept the committees' proposals, however if both sifting committees were to reach the same, no doubt persuasive, recommendation the Government's expectation is that such recommendations are likely to be accepted.

15. Where the two committees disagree, the situation would of course need to be carefully considered on its merits. On the, hopefully very rare, occasions when the Government did not agree to a recommendation to use the affirmative procedure, we would expect to justify fully our reasons to the committee concerned.

Statements in relation to “good reasons”

16. The Government continues to believe that in the unique circumstances of EU exit, taking relatively broad delegated powers to deliver a functioning statute book is appropriate. I hope colleagues/noble Lords recognise that the situation that the Bill’s powers are designed to respond to is unprecedented. The incorporation of thousands of pieces of directly effective EU law, such as EU Regulations, into the UK statute book will clearly require a great many corrections to remedy deficiencies arising from withdrawal.

17. Much of the concern about the delegated powers has focused on the use of the word “appropriate” to describe the discretion afforded to Ministers when making regulations to correct deficiencies. “Appropriate” does not give Ministers unrestricted discretion to correct anything that they may wish or like. Corrections must not be “appropriate” *per se*; they must be “appropriate” to correct the particular deficiency that they are addressing, while the deficiency itself must arise from the UK’s withdrawal from the EU. The threshold for Ministerial decisions is set firmly within the context of those purposes. As the Government noted in our response to the Delegated Powers and Regulatory Reform Committee’s report of 1 February on the Bill, the more apparently wide a power is, the more the courts will feel obliged to impose some kind of limitation based on the context and probable legislative intent.

18. As the House of Lords Constitution Committee noted, comparable arguments were made during the passage of the Sanctions and Anti-Money Laundering Bill. That Committee recommended that the Bill be amended, in line with the Sanctions and Anti-Money Laundering Bill, to provide that, “*while the power remains available when ministers consider it “appropriate”, they must demonstrate that there are “good reasons” for its use and can show that the use of the power is a “reasonable course of action”*”.

19. The Government has accepted this recommendation and is tabling these amendments as part of delivering on our commitment to ensure an appropriate level of scrutiny is afforded to the provisions in the Bill. This amendment will increase transparency and ensure that where Ministers exercise the main powers in the Bill, their reasoning is clear and justified to Parliament.

Statements in relation to creating criminal offences

20. In response to the concerns raised in the House of Lords regarding the power to create criminal offences under the EU (Withdrawal) Bill, the Government has tabled an amendment requiring a statement to be made alongside an instrument or draft that creates a criminal offence, explaining why, in the relevant Minister’s opinion, there are good reasons for creating the offence and for the penalty provided in respect of it.

21. This amendment is in line with amendments made to the Sanctions and Anti-Money Laundering Bill where similar concerns were raised.
22. While unusual, the Government continues to believe that it may be necessary to take some steps in the context of EU exit which, in law, amount to the creation of new criminal offences. Examples of those circumstances were given during the debate at committee stage.
23. The Government is committed to ensuring an appropriate level of scrutiny is afforded to the provisions in the Bill. This amendment will increase transparency and ensure where the Government is seeking to create criminal offences that Ministers' reasoning is clear and justified to Parliament.

Statements in relation to legislative sub-delegation

24. In response to the concerns raised in the House of Lords regarding sub-delegation of legislative powers to public authorities other than Ministers and the exercise of legislative power without further direct reference to Parliament the Government has tabled an amendment requiring a statement to be made alongside an instrument that confers a delegated legislation making power to be exercised other than by Ministers (or devolved Ministers and equivalents) via SI (or the equivalents in the devolved legislatures).
25. This amendment will require that, where an SI made under the powers in clauses 7(1), 8, 9 and Part 1 of Schedule 4 provides for delegated legislative power to be exercised other than by a Ministers (or devolved Ministers and equivalents) via SI (or the equivalents in the devolved legislatures) the Minister making the SI which provides for this delegated power must make a statement explaining why this is appropriate.
26. The amendment also requires that the authority exercising the power must lay before Parliament an annual report to Parliament on the exercise of the delegated power if it has exercised it that year.
27. The Government has always recognised that such sub-delegation should be an unusual step, but remains of the view that there are circumstances in which it is the appropriate course of action and is in keeping with the UK's existing arrangements.
28. The Government is committed to ensuring an appropriate level of scrutiny is afforded to delegated powers. This amendment will increase transparency and ensure, where the Government is seeking to delegate legislative power to be exercised other than by a Minister (or devolved Minister and equivalents) via SI (or the equivalents in the devolved legislatures), that Ministers' reasoning is clear and justified to Parliament. This will also ensure that where a power is exercisable by a public authority without further direct reference to Parliament that that authority must continue to inform Parliament about the exercise of the power to allow Parliament to maintain oversight of the use of delegated powers.