

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 Monday 23 April:

AMENDMENT	POWER(S)	JUSTIFICATION FOR THE AMENDMENT
Removing clause 8 from the EU (Withdrawal) Bill	<i>Clause 8 - Power to comply with international obligations</i> <i>Schedule 2, Part 2 - Power to comply with international obligations</i>	This amendment will remove the powers to comply with international obligations from the Bill
Removing the ability of clause 9 to amend the EU (Withdrawal) Bill	<i>Clause 9 - Power to implement the withdrawal agreement</i>	This amendment will prevent clause 9 from modifying the EU (Withdrawal) Bill
Sunsetting the power in Schedule 4 Part 1 to provide for new fees and charges	<i>Schedule 4, Part 1 - Powers in connection with fees and charges</i>	This amendment will prevent new fees or charges being established under Schedule 4 from 2 years after exit day
Sunsetting the power in clause 17(1) to make consequential provision	<i>Clause 17(1) - Power to make consequential provision</i>	This will also sunset the power to make consequential provision at 10 years from exit day.
Increased scrutiny for statutory instruments under Schedule 4	<i>Schedule 4 - Powers in connection with fees and charges</i>	This amendment will require all adjustments to fees or charges under Schedule 4 which do not adjust for inflation to be subject to the affirmative procedure
'Sifting' of statutory instruments made under clause 17(1)	<i>Clause 17(1) - Power to make consequential provision</i>	This amendment will align the position of SIs under the clause 17(1) consequential power with the powers in clause 7(1) and 9(1) by requiring sifting of negative SIs under the clause 17(1) power.

		Allowing sifting to take place will also require giving ministers the discretion to choose between the affirmative or negative procedures for SIs made under the clause 17(1) power.
Explanatory statement in relation to statutory instruments made under clause 17(1)	<i>Clause 17(1) - Power to make consequential provision</i>	This amendment will require explanatory statements to be made by Ministers in relation to SIs made under clause 17(1). This would include statements of “good reasons”, in relation to equalities, and explaining the instrument.
Explanatory statement in relation to declarations of urgency	<p><i>Clause 7(1) - Power to deal with deficiencies in retained EU law</i></p> <p><i>Clause 9 - Power to implement the withdrawal agreement</i></p> <p><i>Clause 17(1) - Power to make consequential provision</i></p> <p><i>Schedule 1 - Power to provide for challenges to validity of retained EU law</i></p> <p><i>Schedule 4 - Powers in connection with fees and charges</i></p>	This amendment would require a statement to be made alongside all SIs made under these powers in relation to which a Minister has made a declaration of urgency. The Minister must explain the reasons for the declaration of urgency.
Sifting committee procedure for powers exercised by the Welsh Ministers	<p><i>Schedule 2, Part 1 - Power to deal with deficiencies in retained EU law</i></p> <p><i>Schedule 2, Part 3 - Power to implement the withdrawal agreement</i></p>	This amendment would require that negative SIs laid by the Welsh Ministers under their Schedule 2 powers will be subject to a sifting procedure in the National Assembly for Wales, equivalent to that of UK ministers’ SIs in the UK Parliament.

<p>Explanatory statements for powers exercised by the Scottish Ministers</p>	<p><i>Schedule 2, Part 1 - Power to deal with deficiencies in retained EU law</i></p> <p><i>Schedule 2, Part 3 - Power to implement the withdrawal agreement</i></p>	<p>This amendment would require explanatory statements to be made by the Scottish Ministers when exercising their powers in Schedule 2 [and Schedule 4], in the same circumstances where UK ministers would be required to make statements.</p>
<p>Explanatory statements for joint exercise of powers</p>	<p><i>Schedule 2, Part 1 - Power to deal with deficiencies in retained EU law</i></p> <p><i>Schedule 2, Part 3 - Power to implement the withdrawal agreement</i></p>	<p>The amendment would require the explanatory statements to be made by UK ministers where they exercise the powers in Schedule 2 jointly with devolved authorities.</p>
<p>Urgent scrutiny procedure for powers exercised by devolved ministers</p>	<p><i>Schedule 2, Part 1 - Power to deal with deficiencies in retained EU law</i></p> <p><i>Schedule 2, Part 3 - Power to implement the withdrawal agreement</i></p>	<p>The amendment would allow for devolved instruments made under the powers in Schedule 2 to be subject to an urgent scrutiny procedure, rather than the normal negative or affirmative procedure, in the same manner as UK ministers' instruments under the corresponding powers in clauses 7-9.</p>

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Amendments to the scope of the power

Removing clause 8 and Schedule 2, Part 2 from the EU (Withdrawal) Bill

1. The clause 8 power was originally included in the Bill to ensure that the UK's withdrawal from the EU did not affect its reputation as a nation which honours its promises and respects its international obligations. It would have given the Government the ability to meet any existing obligations requiring an imposition or increase of taxation, which was the subject of much debate in both Houses.
2. This was thought of as necessary to ensure that the UK could continue to comply with all of its existing international obligations by remedying or preventing any breaches which might occur as a result of our withdrawal from the EU.
3. As the Bill has progressed through Parliament, the Government has continued to plan for multiple scenarios and it has become clear that very few of the UK's international obligations will be affected in ways that can be remedied by the clause 8 power.
4. Therefore, in line with our policy to take delegated powers only where there is a clear and present need for them, the Government has tabled amendments to remove clause 8 and the corresponding power for devolved authorities in Schedule 2, Part 2. Any measures still required to remedy or prevent breaches of our international obligations will be made in other primary legislation or under other delegated powers where that is permissible.

Removing the ability of clause 9 to amend the EU (Withdrawal) Bill

5. The Government recognises that the scope of clause 9 remains a controversial area of the Bill, particularly with regards to clause 9(2), which permits amendment of the EU (Withdrawal) Bill itself for the purposes of implementing the withdrawal agreement. Despite some precedents, this is not common and the Government only included such a measure at the time of introduction because it was seen at the time as a necessary step to provide the flexibility to respond to developments in negotiations.
6. We recognise that the debate around clause 9 has been affected by the Government's announcement that the Withdrawal Agreement and Implementation Bill will be introduced to implement the major elements of the withdrawal agreement. This is intended to give effect to the implementation period, the citizens' rights agreement, and the financial settlement, amongst other provisions. As we have endeavoured to make clear, clause 9's role must be viewed in the context of this announcement, which means it now has the residual function that it can serve as a supplementary measure to implement more technical elements of the withdrawal agreement.
7. The underlying reasons for the current wording of clause 9(2) - that is, that aspects of the EU (Withdrawal) Bill may need to be amended depending on the content on the withdrawal agreement - have not changed. However, given that we now have the option

of making any necessary changes in the Withdrawal Agreement and Implementation Bill, there is no longer the same justification for retaining clause 9(2)'s ability to amend the EU (Withdrawal) Bill itself.

8. The Government's has therefore tabled this amendment to prevent the power in clause 9 from being exercised to modify the Bill, and we hope that this addresses concerns held about the scope of the clause 9 power.

Sunsetting the power in Schedule 4 Part 1 to provide for new fees and charges

9. The Government has heard the concerns raised in Parliament about the provisions in this Bill which enable the imposition of fees and charges on the public. The Government agrees that delegated powers, particularly in this sensitive area, should be tightly defined whilst still allowing them to achieve their objective. We recognise the significance of the question over how Parliament approves fees and charges on the public.
10. These powers were already subject to a constraint amounting to a de facto sunset in the Bill as introduced, because they were only exercisable in relation to a function granted to a public authority under the powers in this Bill - which are themselves all sunset. The list of functions would therefore be closed when those powers sunset.
11. The Government however intends to establish all the new fees and charges regimes required at the same time as making the other legislative preparations for our exit from the EU under this Bill. We are therefore happy to ensure that this power falls away at the same time as the deficiencies correcting power, which we expect to be the principal vehicle for granting functions to public authorities and will, therefore, sunset the power at two years after exit day.

Sunsetting the power in clause 17(1) to make consequential provision

12. The Government has listened to the concerns raised regarding the permanent nature of the consequential power and the potential abuse of this power by future Governments. Although the power is tightly limited by its nature, in response to these concerns the Government has tabled an amendment to sunset the power to make consequential amendments at 10 years after exit.
13. The decision to sunset the power to 10 years reflects the fact that consequential amendments may continue to come to light long after our exit from the EU as the consequences of the Bill's provisions may not be apparent straight away.
14. It is unusual to sunset such powers but given the unique nature of this Bill the Government is willing to take this measure to demonstrate our commitment to restricting the powers in the Bill wherever possible whilst ensuring the statute book continues to function effectively. The Government does not intend this to set a precedent for the future.

Amendments to the scrutiny provisions attached to the power

Increased scrutiny for statutory instruments under Schedule 4

15. As set out above, the Government has heard the concerns raised in Parliament about the provisions in this Bill which enable the imposition of fees and charges on the public, and agrees that delegated powers, particularly in this sensitive area, should be subject to close scrutiny by Parliament.
16. The Bill as introduced provided that any SIs made under the powers in Schedule 4 which established a new fee or charge regime (or which sub-delegated this power) had to be subject to the affirmative procedure. In other cases, ministers held discretion to choose between the affirmative or negative procedures as appropriate.
17. The Government is committed to ensuring that there is proper scrutiny of the exercise of the powers in this Bill. The Government is therefore proposing amendments which require all SIs under Schedule 4 to be subject to the affirmative procedure unless they are adjusting fees or charges to account for inflation. The Government believes that allowing inflation related adjustments to be subject to the negative or affirmative procedure is proportionate and still allows for greater scrutiny if appropriate.

'Sifting' of statutory instruments made under the power in clause 17(1) to make consequential provision

18. The consequential power is tightly limited by its nature as a Minister of the Crown may only do what is appropriate in consequence of the provisions of the Bill, particularly the repeal of the European Communities Act 1972 (ECA) and reflecting this through the statute book. Ministers do not have the same type of discretion available when using the consequential power in comparison to when using the rest of the powers in the Bill. This reflects the fact that the consequential power is purely technical and for the purposes of 'tidying' loose ends that will arise from the Bill.
19. Given the tightly circumscribed nature of the power the Bill as introduced only provided for the negative procedure to apply to SIs made under this power.
20. However, the Government recognises the concerns raised regarding the scrutiny of this power and has tabled an amendment so that all instruments the Minister considers should be subject to the negative procedure will be sifted by the relevant new sifting committees. This ensures Parliament will have the opportunity to scrutinise the provisions made under the consequential power and recommend SIs for a debate and vote in Parliament.
21. Because the power only allowed for SIs to be made under it to be subject to the negative procedure, in order to allow ministers to accept a recommendation of the committee and propose that an SI to be made under the power is instead subject to the affirmative procedure, it has been necessary to introduce the affirmative procedure to the power and allow ministers the discretion to choose between the procedures. This of course also allows ministers to elect to adopt the affirmative procedure in the first instance if they believe it to be the more appropriate procedure for the particular instrument.

22. The Government believes that this will balance the understandable concerns of Parliament about the scrutiny of the power whilst still allowing technical and uncontroversial consequential provisions to be made under a proportionate procedure.

Explanatory statements in relation to statutory instruments made under the power in clause 17(1) to make consequential provision

23. As part of providing for greater scrutiny of the provisions made under the consequential power, the Government will also be tabling amendments requiring the Minister to make a number of statements alongside all statutory instruments made under the consequential power.
24. These will include statements explaining what the instrument does, the good reasons for the instrument and its impact (if any) upon equalities legislation. These broadly align with the types of statement required to be made alongside instruments under other powers in the Bill.
25. This reflects the Government's commitment to increasing transparency regarding its use of the consequential power, and to ensuring an appropriate level of scrutiny.

Statements in relation to declarations of urgency

26. In response to the concerns raised in the House of Lords regarding the use of the 'made affirmative' urgent procedure in the Bill, the Government has tabled an amendment requiring a statement to be made alongside any instrument that contains a declaration of urgency. This will have to explain the reasons for the Minister's opinion that it is necessary to use the made affirmative procedure.
27. 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 that where the Government is using the urgent procedure, Ministers' reasoning is clear and justified to Parliament.

Amendments to the powers for the devolved administrations

Sifting of statutory instruments made under the Schedule 2 powers by the Welsh Ministers

28. The UK Government has consulted the devolved administrations on where additional scrutiny requirements applied to UK ministers in the Bill should be extended to the corresponding powers for devolved authorities. The Welsh Government, having sought the views of the National Assembly for Wales, has requested the sifting committee procedure should apply where the Welsh Ministers lay negative instruments under their Schedule 2 powers.
29. The amendment would, therefore, apply this procedure to the Schedule 2 powers where exercised by the Welsh Ministers. This will operate in the same way as the procedure for the sifting of UK ministers' instruments in Parliament.
30. In order to make a negative instrument under the powers in Schedule 2 a Welsh Minister must have made a written statement that in their opinion this is the correct procedure and have laid the instrument and a memorandum setting out their opinion before the Assembly. They must also have received a recommendation on the appropriate

procedure from a committee of the Assembly, or the required period for the recommendation to be made must have elapsed. This is subject to the caveat that a Welsh Minister can make a declaration that reasons of urgency mean that it is necessary to make the regulations without meeting these requirements.

31. [The Scottish Government has requested that an equivalent procedure should not be applied to the Scottish Ministers' powers, but has notified the UK Government of its intention to make its own arrangements for a sifting procedure in the Scottish Parliament.]

Explanatory statements in relation to statutory instruments made under the Schedule 2 powers by the Scottish Ministers

32. In line with the aforementioned consultation, the Scottish Government, having sought the views of the Scottish Parliament, has requested that additional requirements for UK ministers to make explanatory statements when exercising powers under the Bill should also apply to the exercise of powers by the Scottish Ministers.

33. The amendment, therefore, requires the Scottish Ministers to make the following statements, corresponding to those of UK ministers:

- (a) where exercising the powers in Schedule 2, a statement of the 'good reasons' for the use of the power, and that the use is a 'reasonable course of action';
- (b) a statement of what, if any, amendments are being made to the Equality Act and that the Minister has had due regard to the first limb of the Public Sector Equalities Duty;
- (c) a statement explaining the instrument, the relevant law before exit day, the instrument's effect on retained EU law and the purpose of the instrument;
- (d) where exercising the powers in Schedule 2 to create a criminal offence, a statement of the 'good reasons' for creating a criminal offence, and of the sentence attached;
- (e) where making an instrument under the 'urgent procedure', a statement of the reasons for making the declaration of urgency; and
- (f) where amending regulations made under s2(2) of the European Communities Act 1972, a statement of the 'good reasons' for the modification, that the use is a 'reasonable course of action and explaining the instrument, the relevant law before exit day and the instrument's effect on retained EU law.

Explanatory statements in relation to statutory instruments made under the Schedule 2 powers by a UK minister acting jointly with a devolved authority

34. The Government's intention, in including the option for joint exercise of the powers in Schedule 2 by UK ministers and devolved authorities, is to allow for enhanced scrutiny where it would be appropriate. This additional scrutiny is provided by joint instruments being subject to consideration by both the UK Parliament and the relevant devolved legislature. It would not, therefore, be correct for Parliament to receive less information in

relation to the instrument than it would have received if the UK minister had been acting alone.

35. To address this, the amendment clarifies that the duties for UK ministers to provide explanatory statements when exercising the powers in the Bill also apply where they are exercising powers jointly with devolved authorities.
36. The duty will not extend to devolved authorities. The statements made by the UK minister will be available to the devolved legislatures and the relevant devolved administration can choose whether to lay this alongside the joint instrument. Where exercising powers jointly, the UK Government will work with the relevant devolved administration in drafting the statement, just as it will be working with the devolved administration in drafting the instrument.

Urgent scrutiny procedure for instruments made under the Schedule 2 powers by devolved authorities

37. The 'made affirmative' urgent procedure contained within the Bill for the scrutiny of UK ministers' statutory instruments was not applied to instruments made by devolved authorities at introduction as this is not a standard procedure in the devolved legislatures. It was considered to be inappropriate to apply this without first seeking the views of the devolved administrations.
38. Those views have been sought and each administration has confirmed that the urgent procedure should apply to the relevant devolved powers in the Bill. As a result, the amendments to the Bill ensure that this procedure will be available to devolved authorities when exercising their powers under Schedule 2.
39. The procedure will operate in the same way that it does for UK ministers. The instrument can be made by the devolved authority, without being laid before the relevant devolved legislature in draft, where accompanied by a statement that in their opinion this is necessary as a matter of urgency. The instrument must then be laid before the relevant legislature and will cease to have effect after 28 days unless approved by a vote of the legislature.
40. In line with the Scottish Government's request that requirements for explanatory statements in the Bill should apply to the Scottish Ministers, the Scottish Ministers will be under a duty to make further explanatory statements corresponding to those for UK ministers in paragraphs 25 to 26 of this memorandum.

Department for Exiting the European Union
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