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UK Internal Market Bill

Memorandum from the Department for Business, Energy and Industrial Strategy (BEIS) to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the UK Internal Market Bill (“the Bill”). The Bill was introduced in the House of Commons on 9 September. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

The Internal Market

2. The UK is a highly integrated, yet diverse economy, reflecting the historic and complex links between England, Scotland, Wales, and Northern Ireland. These connections support businesses, workers and consumers, ensure the free flow of capital, labour, goods and services, and facilitate our everyday lives in a way that we take for granted.
3. Essential to the integration of the UK economy is shared regulation, which provides economic stability and certainty to UK citizens, facilitates frictionless trade, and creates opportunities for people to shop, work and innovate across the country. This shared UK marketplace facilitates trade and investment, allows exploration of new technologies, and drives productivity and growth while benefiting consumers. It also helps professionals move across the UK with ease so that they can provide services closer to their customers and develop business in those parts of the UK that offer the best conditions.
4. Much of the recent regulation in the UK has been shaped through membership of the European Union (EU), creating a high degree of uniformity. Following the end of the Transition Period, hundreds of powers previously exercised at EU level will flow directly to the UK Government and the devolved administrations in Edinburgh, Cardiff, and Belfast. Devolved administrations will have unprecedented regulatory freedom within new UK frameworks, allowing them to benefit from opportunities to innovate.
5. At the same time, it is crucial to guarantee the continued seamless functioning of the UK internal market and avoid the creation of regulatory barriers between the four nations of the UK. Even in areas where specific powers are not returning, the absence of EU rules could make it easier for new barriers to arise, for example if different qualifications or other regulations on professionals were to arise in new or emerging sectors of the economy. The costs that could result from these regulatory barriers could also ultimately reach consumers, increasing prices, or decreasing choice.
6. Therefore, avoiding the creation of new barriers is vital for businesses across the UK for partners overseas as the UK seeks trading relationships with other countries; and to secure the prosperity and the livelihoods of people right across the United Kingdom. This must be done in a way that respects the devolution settlement, and ensures that the devolved administrations receive powers over many more policy areas than they currently hold as part of the EU, whilst ensuring that all intra-UK trade remains frictionless.

Policy context

7. The UK Government is already engaging in a process to agree a common approach with the devolved administrations as part of its vision for the UK Internal Market. The Common Frameworks programme is the mechanism most advanced in its development to address

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regulatory coherence. Common Frameworks are designed to support the functioning of the Internal Market, the management of common resources..

8. Common Frameworks aim to protect the UK internal market by providing high levels of regulatory coherence in specific policy areas through close collaboration with devolved administrations to manage policy making. They do this by enabling officials to work together to coordinate the development of policy . However, Common Frameworks on their own cannot guarantee the integrity of the entire Internal Market. As they tend to be sector-specific, they do not address the totality of economic regulation or the cumulative effects of divergence, for example if the consequences of regulatory difference in one sector that affects other sectors. Finally, they do not fully address the question of how best to substitute the wider EU ecosystem of institutions and treaty rights had on the UK internal market.
9. There is thus a need to provide a cross-cutting complement to the Common Frameworks, that can provide the certainty needed by business, consumers, workers and the third sector in all parts of the UK.
10. In parallel, the UK left the EU on 31 January 2020 and the Withdrawal Agreement concluded with the EU entered into force, which included the Northern Ireland Protocol (“the Protocol”). The Protocol was designed as a practical solution to avoiding a hard border on the island of Ireland, whilst ensuring that the UK, including Northern Ireland, could leave the EU as a whole. It necessarily included, therefore, a number of special provisions which apply only in Northern Ireland, for as long as the Protocol is in force. The Protocol is not codified as a permanent solution; it is designed to solve a particular set of problems and it can only do this in practice as long as it has the consent of the people of Northern Ireland.
11. The free flow of goods and services within the UK Internal Market is of critical importance to Northern Ireland’s economy and people. The Government remains fully committed to safeguarding Northern Ireland’s rightful and essential place in this market as the Transition Period ends. Our approach to the implementation of the Northern Ireland Protocol, as set out in the May 2020 command paper on ‘The UK’s Approach to the Northern Ireland Protocol’, and to a wider UK internal market system, as set out in the UK Internal Market White Paper, demonstrate this commitment.
12. The Northern Ireland command paper sets out how we will implement the Protocol in a way that protects the economy of Northern Ireland and its place within the UK Internal Market. The paper sets out a four-point plan to ensure:
 - a) unfettered access for Northern Ireland’s businesses to the rest of the UK;
 - b) no tariffs on internal UK trade;
 - c) no new customs infrastructure in Northern Ireland; and
 - d) Northern Ireland benefits from UK trade deals.

As a result, the Government set out in the White Paper of 16 July 2020 our intention to establish a Market Access Commitment in legislation to preserve the UK Internal Market after the end of the Transition Period and taking into account our commitments under the Northern Ireland Protocol. This Market Access Commitment is designed to support the economy of the entire United Kingdom, avoiding unnecessary burdens and costs being placed on businesses or consumers, providing continued certainty for people and businesses to work and trade freely across the whole of the UK, and giving additional confidence to trading partners and overseas investors.

The Bill

13. Based on the White Paper and the consultation, the Government is introducing this Bill to provide the legislative underpinning for the Market Access Commitment. This

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is necessary in order to ensure UK businesses and citizens have legal certainty, especially as some powers will be held by Devolved Administrations.

14. This Bill will:

- a) Enshrine into legislation the principles of mutual recognition and non-discrimination in the trade of goods and services. The principle of mutual recognition means that goods and services from one part of the UK will be recognised across the country to ensure the devolved administrations can set their own rules and standards within their competence, but still welcome the trade of businesses anywhere in the UK. Non-discrimination ensures that there is equal opportunity for companies trading in the UK regardless of where in the UK the business is based. There will be some exclusions to these principles where certain policy areas and regulations will not be subject to mutual recognition and non-discrimination which are set out in the Bill and explained to the extent possible.
- b) Establish provisions to ensure that mutual recognition and non-discrimination provisions for goods are compatible with the unfettered access principle for as long as the Northern Ireland Protocol is in effect.
- c) Ensure there is mutual recognition of professional qualifications in the UK to allow professionals qualified in one of the four UK nations to access the same profession in a different nation without needing to requalify. The provisions of this part of the Bill will only apply in relation to changes to existing qualification and experience requirements, or new qualification or experience requirements introduced after the Bill receives Royal Assent. There will also be limited professional qualifications which are not covered by mutual recognition as set out in the Bill.
- d) Confer functions on the Competition and Markets Authority (“CMA”), acting through an Office for the Internal Market within the CMA, which will cover monitoring of the ‘health of the market’, as well as the reporting and advice on the economic impact of proposals and regulations on the UK Internal Market, including its impact on intra-UK trade, investment, and competition. To do so, the Bill will ensure the CMA has the powers to gather information to perform this function.
- e) Legislate to ensure subsidy control is a reserved matter, in order to the Government to legislate for a UK-wide subsidy control regime, if required.
- f) Provide measures which take steps to clarify specific elements of the Northern Ireland Protocol in domestic law, concerning tariffs, export procedures and state aid, to remove any ambiguity.
- g) Ensure there is a uniform approach across the UK to the application of EU State Aid law under Article 10 of the Northern Ireland Protocol.
- h) Confer a power on the UK Government to provide financial assistance. This power will cover infrastructure and economic development, culture and sport, as well as to support educational and training activities and exchanges both within the UK and internationally.

C. DELEGATED POWERS

Overview

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15. Whilst the main principles behind this Market Access Commitment are laid out in the Bill, there will also be the potential to change as sectors evolve (for example, the classification and nature of goods and services in light of technological change or new sectors evolving). There will therefore need to be powers in the Bill to enable the Secretary of State to ensure that the internal market framework can adapt in line with future developments. This future proofing will necessitate the ability to make technical and likely unforeseen issues and therefore best suited in secondary legislation.
16. There will also need to be powers to enable HM Government to adapt towards the specificities of the Northern Ireland Protocol.
17. Moreover, there will also be a need for safeguards to the UK Internal Market in case of emergencies or urgent situations, for example to take on rapid exclusions to mutual recognition and non-discrimination if there are unforeseen consequences that need rapid remedying.

Clause 3(7): Relevant requirements for mutual recognition for goods

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative resolution

Context and Purpose

18. Clause 3(4) lists the statutory requirements that are within scope of the mutual recognition principle applying to goods. These statutory requirements are “relevant requirements” for the purposes of the mutual recognition principle if they prohibit the sale of a good, or result in its sale being prohibited if not complied with, and are not excluded from being a “relevant requirement”.
19. “Relevant requirements” in this context are requirements that will not apply to the sale of a good in a part of the UK if the good complies with them in the part of the UK it was produced or imported into.
20. Clause 3(7) confers a power on the Secretary of State to amend the list of statutory requirements in clause 3(4) by adding, omitting or varying any description of requirement.

Justification for taking the power

21. This power is necessary to enable the Secretary of State to act swiftly and change the list of statutory requirements that are in scope of the mutual recognition principle if it becomes apparent that the existing list does not effectively deliver on the objectives for the UK internal market for goods, including unfettered access for goods moving from NI to the rest of the UK. In particular, it will allow the Secretary of State to respond to unforeseen future developments such as technological or market changes in a timely manner to maintain regulatory standards and the free flow of goods.
22. This power will also enable the Secretary of State to adapt the requirements that are in and out of scope of the mutual recognition principle in order to deliver on HM Government’s commitments on unfettered access for Qualifying Northern Ireland Goods. This power ensures that this can be adapted if required in the light of operating a regime that is newly required as a result of the UK’s departure from the EU. This ensures that the regime is and can remain workable and effective.

Justification for the procedure

23. The affirmative procedure is considered appropriate to ensure Parliament debates and scrutinises the regulations, given the impact that amendments to subsection (4) could have on the operation of the system.

Clause 6(5) – Relevant Requirements for Non-Discrimination of Goods

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative resolution

Context and Purpose

24. Clause 6 sets out relevant requirements for the purposes of the non-discrimination principle applying to goods. Relevant requirements in this context are requirements that apply in a part of the UK which, by virtue of clause 6, have no effect if they directly or indirectly discriminate against incoming goods.

25. Clause 6(5) confers a power on the Secretary of State to amend existing descriptions of relevant requirements, and to add or remove requirements from the list. Clause 6(5) also confers a power on the Secretary of State to amend existing descriptions of requirements that are not relevant requirements, and to add or remove requirements from that list.

Justification for taking the power

26. This power is necessary to future-proof the operation of the non-discrimination principle. By allowing the Secretary of State to modify existing descriptions of requirements that are to have no effect if they discriminate against incoming goods, or to add to or remove from the existing list of requirements, it will enable the Secretary of State to act swiftly if the change in circumstances such as technological or market changes affect the functioning of the non-discrimination principle. It will also make it possible for the Secretary of State to take action in response to feedback from business with regards to how measures affect them in practice.

27. By allowing the Secretary of State to modify existing descriptions of requirements that are not in scope of the principle, or to add to or remove from the list, it will enable the Secretary State to act swiftly.

Justification for the procedure

28. The affirmative procedure is considered appropriate to ensure Parliament debates and scrutinises the regulations, given the impact that amendments to subsections a) to d) could have on the operation of the system.

Clause 8(7) – Indirect Discrimination in relation to goods: Power to add, remove or vary an aim as a legitimate aim in sub-section (6).

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative resolution

Context and Purpose

29. Clause 8(7) provides a power for the Secretary of State to make regulations to add to, remove from or vary the list of legitimate aims set out in the sub-section. A legitimate aim is one or a combination of any of the aims set out in that sub-section. These are key public interest justifications for a relevant requirement which is indirectly discriminatory.

30. This power is intended to enable the addition to, removal from or variation of the list of legitimate aims that could justify the imposition of a relevant requirement that is indirectly discriminatory. In order to limit inappropriate derogation from the principle of non-discrimination the list of aims set out in sub-section (6) is a closed list.

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31. The power to add to, remove from or vary this list is intended to be used to (a) add any aim which is considered to justify a relevant requirement that is indirectly discriminatory; (b) remove any aim which is no longer considered to provide a justification for such a requirement; and (c) vary any aim to provide more targeted justification.

Justification for taking the power

32. This power is necessary to enable the Secretary of State to act swiftly and change the list of legitimate aims if sudden market or other changes would mean their inclusion would threaten the internal market. It will also allow the Secretary of State to act quickly to add a new grounds for introducing measures which would otherwise be considered indirect discrimination where urgent action is needed to regulate goods in part of the UK.

33. The power is appropriate because the clause relies on a closed list. Other similar lists of legitimate aims, for example in the World Trade Organization's Technical Barriers to Trade Agreement, rely on an open list of legitimate aims, which 'amongst other things' constitute a ground for indirect discrimination. This is not the case with this Bill, so without a power to amend the list, there will be no way to change it.

Justification for the procedure

34. It is proposed to use the affirmative procedure. This procedure is appropriate for the circumstances in which the power would be used by allowing for Parliament to fully scrutinise and debate the measures before the regulations are made.

Clause 10(2) - Further exclusions from market access principles

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative resolution

Context and Purpose

35. Clause 10(2) provides a power for the Secretary of State to make regulations to amend Schedule 1 which contains provisions excluding certain areas of regulation from the application of the market access principles. The exclusions set out within the schedule are areas of legislation which have either been excluded from mutual recognition or non-discrimination or the market access principles in their entirety.

36. The areas currently excluded are threats to human, animal or plant health (which includes sanitary and phytosanitary measures, including food and feed emergency legislation), chemicals, and taxation. Schedule 1 also outlines (where applicable) the necessary and justifiable evidence which is required and the steps which one nation must go through for the exclusions to be applicable.

37. The power in Clause 10(2) is intended to enable the addition to, removal from or variation of the exclusions currently contained within the schedule.

Justification for taking the power

38. This power is necessary to enable the Secretary of State to act swiftly and urgently to change the list of exclusions from the market access principles if it becomes apparent that an additional policy area needs to be excluded from either mutual recognition or non-discrimination, for example in response to emerging threats to human, animal or plant health.

39. This power would allow Secretary of State to remove excluded areas and bring them back into scope of the market access principles, should it be demonstrated that the particular exclusion is no longer required. This power is necessary to allow the Secretary of State

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to effectively manage the list of exclusions based on evidence available at that time in order to address any emerging and dangerous threats, in a timely manner, until the evidence demonstrates that they have passed and the emergency has ended.

Justification for the procedure

40. It is proposed to use the affirmative procedure. The affirmative procedure is considered appropriate to ensure Parliament debates and scrutinises amendments to Schedule 1, given the potential substantive effect such amendments may have on the scope and application of the market access principles.

Clause 12: Guidance relating to Part 1

Power conferred on: Secretary of State

Power exercised by: Statutory guidance

Parliamentary Procedure: None

Context and Purpose

41. Part 1 promotes the continued functioning of the internal market for goods in the United Kingdom by establishing the United Kingdom market access principles. These are (a) the mutual recognition principle for goods and (b) the non-discrimination principle for goods.

42. The purpose of Clause 12 is to provide the Secretary of State with a power to issue statutory guidance about the practical operation and effect of the market access principles of mutual recognition and non-discrimination, which could include guidance on enforcement, for market surveillance authorities and UK traders.

43. The principles in the Bill will require further explanation to traders and regulators to assist with the application of existing law in respect of the principles in the UKIM Bill. The concepts in the Bill will be novel to many traders and regulators. This clause therefore provides the power to issue guidance covering all aspects of both the principles of mutual recognition and non-discrimination, including proportionate enforcement of the new market access regime.

44. The UKIM Bill will not directly introduce any new enforcement bodies, powers or penalties, relying instead on enforcement provisions in existing goods regulation to ensure compliance with the requirements of the market access principles. Guidance will be needed to explain how the existing enforcement framework will work to give effect to the new market access principles, including how this affects the roles and responsibilities of regulators and what it means for traders in terms of regulatory compliance.

Justification for taking the power

45. This power is necessary to enable the Secretary of State to support traders and regulators in understanding the market access principles in the Bill. The concepts in the Bill will be novel to many traders and regulators; it will help their functioning to provide clarity via guidance.

46. As the Bill relies on enforcement provisions in existing goods regulation, guidance – which may need to be updated from time to time in line with regulatory developments – will be needed to explain how the existing enforcement framework will work to give effect to the new market access principles.

47. There is a vast range of statutory guidance, such as this, issued each year, and it is important that guidance can be updated quickly to keep pace with operational good practice and future developments as and when they arise.

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Justification for the procedure

48. Any guidance issued under Clause 12 will not be subject to any parliamentary procedure on the grounds that it would provide advice on the practical operation and effect of the market access principles of mutual recognition and non-discrimination and would be developed with input from all interested stakeholders and practitioners.
49. The guidance is explanatory and will not conflict with, or alter the scope of, the market access principles in Part 1. While a person exercising public functions may be required to have regard to the guidance when exercising those functions, the guidance will not be binding.

Clause 16 (2) – Services Overview: Power to add, amend and remove entries to a list or table set out in Schedule 2

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Made Affirmative for the first Regulation, Affirmative thereafter

Context and Purpose

50. Clause 17(1) provides for a Schedule which lists, in separate parts, the services and regulatory requirements to which the provisions of clauses 18 (mutual recognition) and 19 and 20(non-discrimination) do not apply.
51. Clause 17(2) provides that the Secretary of State must keep the Schedule under review and confers a power on the Secretary of State to remove, amend or add services in Parts 1 and 2 or regulatory requirements in Part 3 and 4 of the Schedule.
52. This power is necessary to ensure that the disapplication of services and regulatory requirements from the UK Internal Market principles of mutual recognition and non-discrimination is updated on review by the Secretary of State.
53. This will in particular ensure that services and regulatory requirements that were subject to a derogation from the mutual recognition requirements under the Provision of Services Regulations 2009 (S.I. 2009/2999) are permitted to maintain that derogation, where necessary, after the UK Internal Market Bill achieves Royal Assent, the Act comes into force, and the services in question come within scope of the Act.
54. Likewise the services and regulatory requirements that were out of scope of the Provision of Services Regulations 2009 and are listed in the Schedule can be reviewed by the Secretary of State and amended or removed.
55. The power will enable the Secretary of State to give effect to considered decisions on review on the status of the services concerned and the regulatory requirements applicable to them and to determine whether or not the UKIM principles of mutual recognition and non-discrimination should be applied or disappplied to them.

Justification for taking the power

56. New services sectors and regulations will arise, thus in order to provide regulatory certainty to business to allow them to continue operating and certainty for citizens, it is essential that these are reflected in the wider UK internal market framework and thus it may be necessary to add them to the Schedule. It may also be appropriate for certain services which are currently listed to be brought within the scope of the UK internal market as circumstances evolve.

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57. In addition, the process of listing services on this schedule is very detailed and administrative nature which is more appropriate in a Schedule and updated in Regulations.

Justification for the procedure

58. The made affirmative resolution procedure is proposed for the first use of the power to enable the Secretary of State to act as swiftly as necessary following the coming into force of the UK Internal Market Act and its impact on the services sector. It is crucial to provide businesses and regulators with certainty at the end of the Transition Period and ensure that there is no legal uncertainty to citizens and businesses about what the legal regime they will operate under on 1 January 2021.

59. Thereafter, inclusion in or exclusion from the list or table in Schedule 2 would be done through the subsequent use of the affirmative procedure which would be appropriate to enable debate and scrutiny by Parliament.

Clause 20(7) – Indirect Discrimination in the Provision of Services: Power to add, remove or vary an aim as a legitimate aim in sub-section (6).

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose

60. Clause 20(7) provides a power for the Secretary of State to make regulations to add to, remove from or vary the list of legitimate aims set out in the sub-section. A legitimate aim is one or a combination of any of the aims set out in that sub-section. These are key public interest justifications for a regulatory requirement which is indirectly discriminatory.

61. This power is intended to enable the addition to, removal from or variation of the list of legitimate aims that could justify the imposition of a regulatory requirement that is indirectly discriminatory. In order to limit inappropriate derogation from the principle of non-discrimination the list of aims set out in sub-section (6) is a closed list.

62. The power to add to, remove from or vary this list is intended to be used to (a) add any aim which is considered to justify a regulatory requirement that is indirectly discriminatory; (b) remove any aim which is no longer considered to provide a justification for such a requirement; and (c) vary any aim to provide more targeted justification. It is not envisaged that this power will be used frequently because the grounds set out in sub-section (6) should be comprehensive and settled. However, it is needed to allow for such adjustments as may be required over time.

Justification for taking the power

63. This power is necessary to enable the Secretary of State to act swiftly and change the list of legitimate aims if sudden market or other changes would mean inclusion of some of those legitimate aims would threaten the internal market. It will also allow the Secretary of State to act quickly to add a new grounds for introducing measures which would otherwise be considered indirect discrimination where urgent action is needed to regulate services in part of the UK. This is especially the case as new industries and sectors evolve, there will be a need to ensure there is regulatory certainty for businesses and protection for citizens and thus it is likely that the list of legitimate aims will need to be amended to reflect this. In particular the power to add additional legitimate aims may be necessary when accounting for new regulatory areas.

Justification for the procedure

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64. It is proposed to use the affirmative procedure. This procedure is appropriate for the circumstances in which the power would be used. It is envisaged that proposed amendments to the list of legitimate aims would be subject to advance public scrutiny via consultation which would also help elicit any contrary arguments about the action proposed to be taken.

Clause 37(6): statement of policy on enforcement of information-gathering powers

Power conferred on: Competition and Markets Authority

Power exercised by: Administrative procedure

Parliamentary Procedure: None

Context and Purpose

65. Clause 37(6) requires the Competition and Markets Authority (CMA) to prepare and publish a statement of policy in relation to the enforcement of notices given under clause 36 of the Bill (requirement to produce a specified document in a person's custody or control or to provide specified information in relation to a business which the person carries on). The statement must set out the considerations relevant to determining the nature and amount of any penalty imposed for failure to comply with a notice or obstructing steps taken under the notice. The statement may be revised and the CMA must consult on a proposed or revised statement of policy. When deciding to impose a penalty for breach of a notice the CMA must have regard to the statement of policy.

66. The power mirrors that in section 116(1) of the Enterprise Act 2002 in relation to the CMA's enforcement powers under that Act and the Competition Act 1998. The statement of policy can be expected to be modelled on that produced under the Enterprise Act.

67. This power is necessary to provide guidance to businesses, other bodies and their advisers who may hold information required by the CMA to undertake its advice, reporting, monitoring and intelligence-gathering functions in relation to the economic impact of regulation covering part of the UK on the UK internal market under the Bill.

Justification for taking the power

68. The statement of policy would address in detail matters concerning the decision to impose a penalty, the type and level of a penalty, and the applicable enforcement procedures drawing on the CMA's experience and expertise in enforcing information-gathering requirements under the competition, mergers and markets regimes, and would assist those who may be required to provide information and their advisers by explaining how the CMA's processes work and the factors relevant to the CMA's enforcement decisions. The explanation may be accompanied by examples of possible scenarios.

69. The CMA is best-placed to produce this statement as the enforcing authority. This is borne out by the power conferred on it by 116(1) of the Enterprise Act under which it has produced (and applies) a statement of policy on its approach to which the proposed statement can be expected to be modelled with appropriate adaptations.

Justification for the procedure

70. There is no Parliamentary procedure; the statement of policy will be prepared and published following consultation.

Clause 38(4): power for the Secretary of State to specify the maximum penalties for breach of information-gathering notices

Power conferred on: Secretary of State

Power exercised by: Regulations

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Parliamentary Procedure: Negative Resolution

Context and Purpose

71. Clause 38(3) provides that the penalties imposed by the Competition and Markets Authority (CMA) under clause 37 for failure, following the giving of a notice under clause 36, to produce a document or information without reasonable excuse or for obstruction of the CMA in copying documents, may not exceed such amounts as the Secretary of State may specify in regulations. Clause 38(4) sets a ceiling on the amounts of the penalties which may be so specified. Clause 38(7) sets out that before making regulations the Secretary of State must consult the CMA and such other persons as the Secretary of State considers appropriate.
72. The power mirrors that in section 111(4) of the Enterprise Act 2002 in relation to penalties imposed by the CMA for failure to comply (among other things) with a notice for the production of documents or information or for obstruction of a person in copying documents; the only distinction being that the power there is exercisable by order. The order made under section 111(4) is the Competition and Markets Authority (Penalties) Order 2014 (SI 2014/559).

Justification for taking the power

73. The power is needed to enable appropriate maximum penalties to be specified subject to the ceilings set by clause 38(6) of £30,000 for fixed amounts and £15,000 for daily rates. The system of penalties must allow for a reasonable and proportionate assessment by the CMA of proposed penalties for a wide range of persons and businesses and circumstances (having regard to the statement of policies to be produced under clause 37(5)). This will be a complex process and the potentially relevant factors (and the expected seriousness of the breach of the information-gathering requirements) may also vary depending on the particular regime which is being enforced by the CMA.
74. The ability for the Secretary of State to set maximum penalties will enable suitable limits to be set when the information-gathering power in clause 36 for the purpose of reporting, monitoring and intelligence-gathering by the CMA is not complied with. The requirement for the Secretary of State to consult the CMA and other interested parties before the regulations setting maximum penalties are made will usefully enable a range of views to be obtained on what those amounts should be in the circumstances provided for in the Bill.
75. This approach, replicating that in section 111(4) of the Enterprise Act 2002, should help to ensure that the levels of penalties which may be imposed for breach of the information-gathering power in clause 36 suitably reflect what is required to provide a necessary but not disproportionate deterrent.

Justification for the procedure

76. The negative resolution procedure is considered appropriate. This is the procedure provided by section 124(5) of the Enterprise Act 2002.

Clause 41(5) Unfettered access to UK internal market for Northern Ireland goods

Power conferred on: Minister of the Crown

Power exercised by: Regulations

Parliamentary Procedure: Affirmative resolution

Context and Purpose

77. HM Government published a Command Paper on 20 May 2020, which included political commitments in relation to unfettered access, in particular a commitment to legislate by

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1 January 2021. The commitments included no import customs declarations, no entry summary declarations and no customs checks for Northern Ireland businesses among other things (see paragraph 19 of the Command Paper).

78. Clause 41 seeks to achieve part of the commitments that were made in the command paper by restricting authorities' ability to introduce new checks, controls or processes on qualifying Northern Ireland goods ("QNIGs") moving from Northern Ireland to Great Britain. The element of movement in the clause is an essential part of the clause as it goes to the way in which unfettered access will be operationalised.
79. It provides that an authority must not exercise its functions in a way that would result in the introduction of a new check, control or administrative process, or result in an existing check, control or administrative process being used in certain ways. This applies to the direct movement of QNIGs from Northern Ireland to Great Britain.
80. The definition of QNIGs will be set out in a SI to be laid before Parliament at the end of September under the s.8C(6) European Union (Withdrawal) Act 2018.
81. The clause applies to checks, controls and administrative processes that apply to the direct movement of QNIGs, while including a power for a Minister of the Crown to amend what type of movements the clause will apply to by way of affirmative regulations.

Justification for taking the power

82. It is necessary to include a power in the clause allowing for the amendment of what type of movement should be included, in order to provide the ability to adapt the regime if required, in conjunction with any re-exercise of the power in s. 8C(6) European Union (Withdrawal) Act 2018, to define 'qualifying Northern Ireland goods'. The power is necessary to preserve the Government's future ability to redefine QNIGs as provided for in s.8C(6) of the European Union (Withdrawal) Act 2018. If, in the future, a definition of QNIGs would need to include also, for example, indirect movements, this power would allow the UK Government to make the necessary technical adaptations in respect of this clause to ensure that it aligns with any new QNIGs definition. This reflects that the regime would be a novel one arising from the UK's departure from the EU, such that it can be and remain workable throughout its period of operation.

Justification for the procedure

83. The affirmative resolution procedure is the appropriate procedure for determining the meaning of references to movement from Northern Ireland to Great Britain as it would allow for Parliament to fully scrutinise and debate the measures.

Clause 42(1): Power to disapply or modify export declarations and other exit procedures

Power conferred on: Minister of the Crown

Power exercised by: Regulations

Parliamentary Procedure: Draft affirmative and made affirmative procedure

Context and Purpose

84. Clause 42 implements part of HM Government's commitment to legislate for unfettered access. 'New Decade, New Approach' made a political commitment to bring legislation in force for 1 January 2021 to guarantee unfettered access, which was stated in the Command Paper on the UK's approach to the Northern Ireland Protocol (the 'Command Paper') to include 'no requirement to submit export or exit summary declarations for goods leaving Northern Ireland for the rest of the UK' among other things.

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85. Article 5(3) provides that Union “customs legislation” applies to and in the UK in respect of Northern Ireland, not including the territorial waters of the United Kingdom. This includes the Union Customs Code (the ‘UCC’) and its supplementary and implementing legislation. This includes requirements in relation to export declarations and exit summary declarations.
86. This power will enable a Secretary of State to make provision about the application of exit procedures (applicable by virtue of the Northern Ireland Protocol or otherwise) to goods, or a description of goods, when moving from Northern Ireland to Great Britain. These regulations may (among other things) make provision disapplying, or modifying the application of, exit procedures, stating or restating the application of exit procedures.
87. Clause 45 provides that clause 42, and any regulations made under 42(1), have effect notwithstanding any international or domestic law which may be incompatible or inconsistent with them.
88. Exit procedure is defined as a ‘procedure or other formality (including any supervision, restriction or control) applicable to goods moving from Northern Ireland (whether it is applicable before or after goods move from Northern Ireland, and whether it is applicable in Northern Ireland or elsewhere)’.

Justification for taking the power

89. As set out in the Command Paper, the UK is proceeding with discussions to disapply the requirement for export declarations for goods moving from Northern Ireland to Great Britain through the UK-EU Joint Committee.
90. As such the power allows for disapplication or modification of any ‘exit procedures’ otherwise applicable to qualifying Northern Ireland goods, including those applicable by virtue of the Northern Ireland Protocol. Any disapplication or modification is better dealt with by way of regulations as the necessary adaptations to relevant customs legislation applied by the Northern Ireland Protocol will be of a technical and detailed nature, and as such better suited for regulations.

Justification for the procedure

91. HMG published ‘New Decade, New Approach’ January 2020, which included a commitment to legislate for unfettered access by 1 January 2021. The Command Paper set out that the commitment to unfettered access includes no export or exit summary declarations among other things (see paragraph 19 of the Command Paper). The power needs to allow for regulations to be in place by 1 January 2021, if necessary. The affirmative resolution procedure is the appropriate procedure for achieving this aim.
92. The clause provides for regulations made during the “initial period”, defined as the period of six months beginning with the day on which the section comes into force, to be made under the made affirmative procedure. This reflects the need to provide businesses and citizens certainty after the end of the Transition Period.

Clause 43(1) Regulations about Article 10 of the Northern Ireland Protocol

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Made affirmative followed by affirmative

Context and Purpose

93. The United Kingdom left the European Union (“EU”) on 31 January 2020 at 11.00pm (“exit day”) following the conclusion of an agreement (“the Withdrawal Agreement”) under

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Article 50 of the Treaty on European Union (). The Withdrawal Agreement included the Protocol on Ireland/Northern Ireland (“the Protocol”).

94. Article 10(1) of the Protocol provides that the EU law on State aid listed in Annex 5 to that Protocol, will apply in the UK but only in respect of “measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol”. Such EU State Aid law will apply in domestic law under section 7A of the European Union (Withdrawal) Act 2018 (as amended).
95. Clause 45, 46, and 47 work together to deliver the Government’s following objectives:
 - a) Provide that UK public bodies apply clause 45 and regulations made under that clause, rather than EU law, when interpreting and applying Article 10 of the Protocol;
 - b) Prevent anyone other than the Secretary of State notifying aid to the European Commission (any notification must comply with the domestic law interpretation of Article 10);
 - c) Exclude the rights, powers, liabilities, obligations, restrictions, remedies and procedures which are recognised and available in domestic law, and enforced under section 7A of the European Union (Withdrawal) Act 2018 which are incompatible or inconsistent with clause 45 and regulations made under that clause, in order to preserve the domestic law interpretation of Article 10;
 - d) Prevent legal challenge being commenced against regulations made under clause 45, on the grounds that such regulations are incompatible or inconsistent with relevant international or domestic law.
96. Clause 45(1) provides that the Secretary of State may by regulations make provision in connection with Article 10 of the Northern Ireland Protocol (State aid) for the purposes of domestic law, including how it is to be interpreted, and to disapply or modify its effect.
97. Clause 45(3) provides a broad range of examples when the power in clause 45(1) may be used, including:
 - a) the circumstances when aid is to be recovered;
 - b) when rights of action arise, or do not arise, in respect of aid;
 - c) when Article 10 is or is not to apply in relation to activities outside Northern Ireland, or benefits derived from aid granted to another person;
 - d) that Article 10 is not to be interpreted in accordance with the case law of the European court, or in accordance with EU law otherwise binding on the UK, other than in accordance with the regulations;
 - e) to disapply rights, powers, liabilities, obligations, restrictions, remedies and procedures that would otherwise apply in relation to aid, as a result of relevant international or domestic law.
98. Clause 47(1) provides that clause 45, and any regulations made under clause 45(1), have effect notwithstanding any relevant international or domestic law which may be incompatible or inconsistent with them (and accordingly are not to be regarded as unlawful on the grounds of any incompatibility or inconsistency).
99. Clause 47 defines broadly the phrases international or domestic law to include any provision of the Protocol, any provision of the EU Withdrawal Agreement, any other international law (including EU law), any provision of the European Communities Act 1972, the European Union (Withdrawal) Act 2018, relevant separation law (which has the meaning given by section 7C(3) of the European Union (Withdrawal) Act 2018), and any other legislation or rule of law.
100. Clause 46(1), provides that only the Secretary of State may comply with a requirement of a provision of EU law applied to the United Kingdom by Article 10 of the Northern Ireland Protocol (State aid) to give the European Commission a notification or information relating to aid.

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101. HM Government seeks to ensure that Article 10 of the Protocol is correctly applied across the UK and done so in a uniform and consistent manner. It is recognised that public authorities to whom Article 10 applies will be bound by the EU State Aid law incorporated by that Article. In that context, regulations under clause 45(1) may make provision about the interpretation of Article 10 or go further to disapply or modify the effect of Article 10, including any relevant international or domestic law.

Justification for taking the power

102. The application of EU State Aid law to the UK in respect of particular trade between Northern Ireland and the EU under the Protocol, where the EU Commission will have sole competence, is novel and raises questions as to how laws and procedures designed to apply to and between EU Member States, will apply in this context. In order to provide certainty to aid givers and recipients over the interpretation and application of Article 10, the Secretary of State considers it is necessary to take a broad power to be able to make provision in regulations in connection with Article 10, including its interpretation, and to disapply or modify that Article as it applies in domestic law. This includes making provision that is incompatible or inconsistent with any relevant international or domestic law.

103. The Secretary of State accepts that the taking of such a power is unusual, and recognises the risk that exercising the power in way that may be incompatible or inconsistent with Article 4 of the Withdrawal Agreement, however considers that the powers are justified by the need to provide businesses and aid givers with certainty after the end of the Transition Period.

Justification for the procedure

104. It is proposed to make different provision for different periods of use: the made affirmative procedure will apply for regulations made during the first six months after the clause comes into force, thereafter the affirmative procedure will apply. These procedures are appropriate for the circumstances in which the power would be used, in light of the very clear purpose and conditions attached to the power within the Bill.

105. The use of the made affirmative is suitable for a limited period of time when the regulations may need to be brought into force quickly, or amended quickly to take into account changes in EU law once the Protocol comes into force. Thereafter, the affirmative procedure is appropriate.

**Department for Business, Energy and Industrial Strategy (BEIS)
8 September 2020**