



HOUSE OF LORDS

Select Committee on the Constitution

2nd Report of Session 2024–25

Product Regulation and Metrology Bill

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Select Committee on the Constitution

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<u>Lord Beith</u>	<u>Baroness Goldie</u>
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<u>Baroness Drake (Chair)</u>	<u>Lord Strathclyde</u>
<u>Lord Falconer of Thoroton</u>	<u>Lord Thomas of Gresford</u>

Declaration of interests

See Appendix 1.

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Product Regulation and Metrology Bill

Introduction

1. The Product Regulation and Metrology Bill was introduced in the House of Lords on 4 September 2024 and second reading took place on 8 October 2024. Committee stage is scheduled to begin on 4 November 2024.
2. The Bill relates to the UK product safety, regulation and metrology framework. It deals with a miscellaneous range of matters: product safety, manufacturers' responsibilities, compliance and enforcement of standards, and the metrology framework "which governs the accuracy of weights and measures for purchased goods."¹
3. The law in this area was heavily influenced by European Union (EU) legislation during the period of UK membership of the EU. Much of this law was initially retained after Brexit and has now been assimilated within domestic law.
4. The UK's existing product safety framework focuses on a range of specific product sectors. The Government states that this regime now needs to be updated in order "to adapt to new technologies such as Artificial Intelligence, as well as to reflect the shift in both what consumers buy and how they buy it."² The Government, in the Explanatory Notes which accompany the Bill, sets out how the Bill "aims to support economic growth, provide regulatory stability and deliver more protection for consumers"³, by expanding and adapting regulation to take account of new and changing product sectors.

Delegated powers

Skeleton legislation

5. The Bill is a skeleton bill. It contains very little in the way of substantive provision, instead equipping ministers with secondary law-making powers, including extensive Henry VIII powers in clause 9 to amend both existing law and, potentially, law to be made later during the current parliamentary session. The powers contained not only in clause 9 but also in clauses 1, 2 and 3 which concern, respectively, product regulations, product requirements and enforcement of product regulations, and in clauses 5 and 6, addressing, respectively, metrology regulations and the enforcement of metrology regulations,⁴ are very broadly framed and could facilitate the making of law that goes beyond the updating of existing rules to involve the making of new policy.
6. In *The Legislative Process: The Delegation of Powers* we concluded that:

"Skeleton bills inhibit parliamentary scrutiny and we find it difficult to envisage any circumstances in which their use is acceptable. The Government must provide an exceptional justification for them ... it

1 [Explanatory Notes to the Product Regulation and Metrology Bill](#) [HL Bill 18 (2024–25)-EN], para 4

2 *Ibid.*, para 2

3 *Ibid.*, para 4

4 [Product Regulation and Metrology Bill](#), clauses 1, 2, 3, 5, 6 and 9

cannot rely on generalised assertions of the need for flexibility or future-proofing.”⁵

7. **We reiterate our view that skeleton bills inhibit parliamentary scrutiny. Primary legislation is more constitutionally appropriate, particularly where secondary powers have the potential to develop and give effect to policy innovations.**
8. The Government notes that various pieces of existing legislation, such as the Consumer Protection Act 1987 and the Weights and Measures Act 1985, are out of date.⁶ The Government therefore asserts the need to update the law as justification for the Bill’s broad delegated powers.
9. The Government also explains that much of the existing law in these areas is already secondary legislation, “made, at least in part, using powers in the European Communities Act 1972, powers which were also used to regularly update that secondary legislation.”⁷
10. However, it is important to note that the transposition of significant EU law measures into domestic law by way of secondary legislation was previously constrained by the European Communities Act 1972 section 2(2), which allowed for use of delegated powers only to implement EU law, and that invariably this law had already been subject to scrutiny by the EU law-making institutions. It is also the case that specialist parliamentary committees—in particular the House of Commons European Scrutiny Committee—performed the task of reviewing the significance of transposed EU law and its potential impact upon domestic law. The Bill will replace this limited set of secondary powers with potentially open-ended secondary powers, the exercise of which will in most cases, except for limited categories which are, under clause 11, subject to the affirmative procedure, be subject only to negative parliamentary procedure and no dedicated committee review equivalent to pre-Brexit scrutiny.
11. **We are concerned by the Government’s justification for these broad powers. In light of the UK’s withdrawal from the EU, it is now possible for Parliament to assess and influence policy development in a range of areas that were once governed by secondary legislation implementing EU law. Where potentially significant changes are to be made to law, whether assimilated former EU law or otherwise, this should be done by primary legislation, giving Parliament the opportunity to undertake detailed scrutiny.**
12. In its report on the Bill the Delegated Powers and Regulatory Reform Committee has concluded that clauses 1, 2, 3, 5, 6 and 9, are “inappropriate and should be removed from the Bill.”⁸
13. **We recognise that there may be a good case for the delegation of targeted powers to make routine or pragmatic changes to the general governance of product regulation and metrology. However, we believe that clause 9 does not meet this test. In our view, the general thrust of**

5 Constitution Committee, *The Legislative Process: The Delegation of Powers* (16th Report, Session 2017–19, HL Paper 225), para 58

6 [Explanatory Notes to the Product Regulation and Metrology Bill](#) [HL Bill 18 (2024–25)-EN], para 7

7 *Ibid.*, para 5

8 Delegated Powers and Regulatory Reform Committee, *2nd Report of Session 20214–25*, paras 36 and 44

the Bill is to avoid substantive law-making, instead conferring broad secondary powers upon the executive.

14. **We endorse the view of the Attorney General expressed at his recent Bingham Lecture on the rule of law: “[E]xcessive reliance on delegated powers, Henry VIII clauses, or skeleton legislation, upsets the proper balance between Parliament and the executive. This not only strikes at ... rule of law values ... but also at the cardinal principles of accessibility and legal certainty. In my view, the new Government offers an opportunity for a reset in the way that Government thinks about these issues. This means, in particular, a much sharper focus on whether taking delegated powers is justified in a given case, and more careful consideration of appropriate safeguards.”⁹**

Policy decisions

15. As discussed above, several powers in the Bill are widely drawn and could facilitate the making of law that goes beyond the updating of existing rules to involve the making of new policy. In its report on the Bill, the Delegated Powers and Regulatory Reform Committee captured the constitutional issue at hand:

“The concern with “skeleton legislation” is its compatibility with the established principle that the principal aspects of policy should be on the face of a bill and only its detailed implementation left to delegated legislation. As we stated in our Democracy Denied Report: “Skeleton legislation signifies an exceptional shift in power from Parliament to the executive and entails the Government, in effect, asking Parliament to pass primary legislation which is so insubstantial that it leaves the real operation of the legislation to be decided by ministers”.¹⁰

16. The General Product Safety Regulation (GPSR)—a new EU product safety legal framework due to come into force in December 2024—introduces several new measures. These measures may provide an indication of policy areas that could be developed under the delegated powers provided for by the Bill. They include, for example, reinforced product traceability requirements and reinforced market surveillance rules.¹¹ The powers in the Bill offer no such specification. The list of products made exempt from product regulations by clause 1 and the Schedule to the Bill is limited in scope.
17. **All decisions about regulation in this area call for the balancing of likely benefit against costs of various sorts. How the balance is struck is a matter of policy and can be controversial or at least require debate and scrutiny. The delegated powers in the Bill provide ministerial discretion to make significant policy decisions that should be decided by Parliament, for example, related to product safety, environmental impact, national security or regulatory alignment with the EU.**

9 Attorney General’s Office, ‘Attorney General’s 2024 Bingham Lecture on the rule of law’ (14 October 2024): <https://www.gov.uk/government/speeches/attorney-generals-2024-bingham-lecture-on-the-rule-of-law> [accessed 16 October 2024]

10 Delegated Powers and Regulatory Reform Committee, *2nd Report of Session 20214–25*, para 19

11 European Commission, ‘General Product Safety Regulation’: https://commission.europa.eu/business-economy-euro/doing-business-eu/eu-product-safety-and-labelling/product-safety/general-product-safety-regulation_en [accessed 10 October 2024]

18. *The House may wish to seek assurance that the exclusions listed in the Schedule to the Bill are sufficient to allow national security interests to be protected.*
19. Clauses 1(2) and 2(7) provide a further example of how delegated powers in the Bill could facilitate the making of new policy. Clause 1(2) enables the Secretary of State to make regulations, in relation to the marketing or use of products in the UK, which correspond, or are similar, to a provision of relevant EU law for the purpose of reducing or mitigating the environmental impact of products.¹² Environmental impact is a potentially large area, ostensibly different from product safety or product marking.
20. Clause 2(7) sets out that product regulations made by the Secretary of State may provide that a product requirement is to be treated as met if a requirement of “relevant EU law” specified in product regulations is met.¹³ This allows the Secretary of State to decide whether or not to treat the requirement of a relevant EU law as providing the test for product requirements in the UK.
21. **We draw the powers in clauses 1(2) and 2(7) to the attention of the House. These delegated powers are so broadly drawn that deciding to pursue closer (or weaker) EU alignment is left entirely to the discretion of the Government. We are of the view that such a significant policy decision should properly be scrutinised by Parliament and implemented by way of primary legislation.**

Criminal offences

22. Clauses 3(9) and (11) allow the Secretary of State, by regulations, to create, or widen the scope of, criminal offences.¹⁴ Product regulations may create a criminal offence triable summarily or on indictment and subject to a fine or imprisonment. Offences on indictment could be subject to a fine or imprisonment for a term not exceeding two years, or to both.
23. Clause 6 provides for enforcement of metrology regulations and is framed in similar terms to clause 3. Subclauses 6(9) and (11) contain equivalent powers to clause 3 in relation to the making or widening of criminal offences.¹⁵
24. We have long taken the view that delegated legislation should not be used to create new criminal offences,¹⁶ and that changes to criminal law should be made by primary legislation, and not be subject to change by ministerial decision.¹⁷ We reiterated in 2018 that:
- “In recent years the Government has sought to create criminal offences ... through delegated powers. This is constitutionally unacceptable.”¹⁸
25. **We are concerned that the powers in clauses 3(9) and (11) and 6(9) and (11) permit the creation of new criminal offences, including those which may be tried on indictment, by way of delegated powers. We reiterate our position that new criminal offences should be made by**

12 [Product Regulation and Metrology Bill](#), clause 1(2)

13 *Ibid.*, clause 2(7)

14 *Ibid.*, clauses 3(9) and (11)

15 *Ibid.*, clauses 6(9) and (11)

16 Constitution Committee, [Terrorism Bill](#) (4th Report, Session 2005–06, HL Paper 82)

17 Constitution Committee, [Deregulation Bill](#) (4th Report, Session 2014–15, HL Paper 38)

18 Constitution Committee, [The Legislative Process: The Delegation of Powers](#) (16th Report, Session 2017–19, HL Paper 225), para 50

primary legislation. Clauses 3(9) and (11) and 6(9) and (11) should be amended to remove powers to create, or widen the scope of, criminal offences by delegated legislation.

Henry VIII powers

26. Clause 9 provides for an extensive Henry VIII power.¹⁹ It allows for product regulations or metrology regulations, in consequence of any provision made by or under the Bill, to repeal, and in some cases amend, provision made in a number of statutes, including Parts 2, 4 and 5 of the Consumer Protection Act 1987, the Gun Barrel Proof Acts 1868 to 1978, section 77 and Schedule 5 to the Consumer Rights Act 2015, and the Weights and Measures Act 1985.
27. The clause also goes further than these specific provisions. Under clause 9(4), regulations under the Bill may, in consequence of any amendment or repeal made under this clause, amend or repeal provision made by or under an Act passed before this Act, or later in the same session of Parliament.²⁰
28. In *The Legislative Process: The Delegation of Powers* we said:
- “Henry VIII clauses are “a departure from constitutional principle. Departures from constitutional principle should be contemplated only where a full and clear explanation and justification is provided.” Such justification should set out the specific purpose that the Henry VIII power is designed to serve and how the power will be used. Widely drawn delegations of legislative authority cannot be justified solely by the need for speed and flexibility.”²¹
29. **We reiterate our conclusion that Henry VIII clauses—including that provided for in clause 9—are a departure from constitutional principle and that the Government should provide a full and clear explanation and justification for their inclusion. We recommend the House seeks clarification from the Government as to why the power in clause 9(4) is necessary, given that the Government, and indeed Parliament, are in a position to ensure that future draft legislation is compatible with the provisions in the Bill.**

Devolution and legislative consent

30. The Bill will extend and apply to England, Wales, Scotland and Northern Ireland. Product or consumer safety standards and units of measurement are reserved matters in relation to Scotland, Wales and Northern Ireland. However, the UK Government acknowledges that “[a]spects of the Bill may fall within devolved competence”²² and so, in line with the Sewel convention, the legislative consent of the devolved legislatures is being sought.

Use of delegated powers in areas of devolved competence

31. The Bill creates several delegated powers that enable the making of regulations in areas of devolved competence. For example, as noted, clause 1(2) allows for the making of regulations “for the purpose of reducing or mitigating

¹⁹ [Product Regulation and Metrology Bill](#), clause 9

²⁰ *Ibid.*, clause 9(4)

²¹ Constitution Committee, *The Legislative Process: The Delegation of Powers* (16th Report, Session 2017–19, HL Paper 225), para 67

²² [Explanatory Notes to the Product Regulation and Metrology Bill](#) [HL Bill 18 (2024–25)-EN], para 10

the environmental impact of products”.²³ Clause 4 provides that certain provisions in product regulations made under clause 1 can be disapplied or modified in cases of an emergency, a broad category which could potentially allow regulations in areas of devolved competence.²⁴

32. In its legislative consent memorandum the Scottish Government stated: “Clause 1 is within the competence of the Scottish Parliament. Therefore, the power in clause 4 could be used to modify devolved provision as regulations made under clause 1 may contain such provision.”²⁵ With regard to clause 1 the Welsh Government said: “It is our view that the matters of product efficiency and/or effectiveness would more likely relate to the wider sphere of economic development—which is a devolved matter and therefore within the legislative competence of the Senedd and/or other efficiencies, such as environmental efficiencies, which may also be devolved.”²⁶

33. The Sewel convention does not apply to delegated legislation, meaning that UK ministers are not required by convention to seek the consent of a devolved legislature in respect of delegated legislation that affects devolved matters. Nonetheless, in *The Governance of the Union: Consultation, Co-operation and Legislative Consent* we said:

“We reiterate our previous recommendation that formal engagement with the devolved administrations on the use of delegated powers in areas of devolved competence should be a requirement. UK Ministers should either consult devolved ministers or seek their consent, depending on the significance of the delegated power in question.”²⁷

34. **We reiterate our previous conclusion that, when exercising delegated powers in areas of devolved competence, formal engagement with the devolved administrations on the use of such powers should take place. *The House may wish to seek clarification from the Government as to the processes of consultation and consent it intends to apply in relation to the Bill’s delegated powers in the event that they are used to make regulations in areas of devolved competence; in particular, where these powers are used to alter acts of the devolved legislatures.***

The United Kingdom Internal Market Act 2020 and common frameworks

35. The United Kingdom Internal Market Act 2020 introduced the Market Access Principles to regulate, among other things, trade across the UK in goods and services. These Principles include ‘mutual recognition’ and ‘non-discrimination’ in relation to goods. They are designed to ensure alignment across the UK. We note that the Bill makes no reference to the UK Internal Market Act, despite the potential for regulations made under the Bill to encompass the use and marketing of products.

36. Furthermore, common frameworks have been developed between the UK Government and the devolved governments as a means to ensure a common

23 [Product Regulation and Metrology Bill](#), clause 1(2)

24 *Ibid.*, clause 4

25 Scottish Government, [Legislative Consent Memorandum](#), Product Regulation and Metrology Bill, September 2024, para 19

26 Welsh Government, [Legislative Consent Memorandum](#), Product Regulation and Metrology Bill, September 2024, paras 14-15

27 Constitution Committee, [Governance of the Union: Consultation, Co-operation and Legislative Consent](#), (1st Report, Session 2024–25, HL Paper 13), para 306

approach is taken in relevant policy areas. They are being developed in 32 policy areas. However, the regulation-making powers under the Bill are so broadly framed that they might permit the Government to circumvent the restrictions imposed by both the UK Internal Market Act and common frameworks, allowing it to act unilaterally in areas where significant steps have already been taken to ensure consensual decision-making and common standard-setting.

37. ***The House may wish to ask the Government to explain how, in the making of regulations under the Bill, it will continue to ensure conformity with the Market Access Principles under the UK Internal Market Act 2020, and the broader commitment within that Act to intra-UK alignment. The House may also wish to seek clarification on what steps will be taken to ensure that regulations made under the Bill are consistent with the common frameworks already agreed and with those still under discussion.***

Clauses requiring legislative consent

38. There is disagreement between the UK Government, the Scottish Government and the Welsh Government as to which clauses within the Bill require legislative consent.²⁸ In *The Governance of the Union: Consultation, Co-operation and Legislative Consent* we said:

“ ... the increased occasions on which the UK Government has legislated without consent may in part be the result of a trend since Brexit for the devolved governments to take a more expansive view of devolved competence. This has led to differences of opinion between the UK Government and the devolved government as to whether consent is required with regard to specific bills. In such circumstances, close and timely engagement between governments is required to address differences of opinion and, where possible, reach consensus.”²⁹

39. **We reiterate our previous conclusion that, in circumstances where there is disagreement between the UK Government and one or more of the devolved governments as to whether legislative consent is required, close and timely engagement between governments is necessary to address differences of opinion and, where possible, reach consensus.**

28 [Explanatory Notes to the Product Regulation and Metrology Bill](#) [HL Bill 18 (2024–25)-EN], para 75; Scottish Government, [Legislative Consent Memorandum](#), Product Regulation and Metrology Bill, September 2024, para 7; Welsh Government, [Legislative Consent Memorandum](#), Product Regulation and Metrology Bill, September 2024, para 10

29 Constitution Committee, [Governance of the Union: Consultation, Co-operation and Legislative Consent](#), (1st Report, Session 2024–25, HL Paper 13), para 229

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Baroness Drake (Chair)
 Lord Anderson of Ipswich
 Baroness Andrews
 Lord Beith
 Lord Burnett of Maldon
 Lord Falconer of Thoroton
 Baroness Finn
 Lord Foulkes of Cumnock
 Baroness Goldie
 Lord Keen of Elie
 Lord Strathclyde
 Lord Thomas of Gresford

Declarations of interest

Baroness Drake (Chair)
No interests declared
 Lord Anderson of Ipswich
No interests declared
 Baroness Andrews
No interests declared
 Lord Beith
No interests declared
 Lord Burnett of Maldon
No interests declared
 Lord Falconer of Thoroton
No interests declared
 Baroness Finn
No interests declared
 Lord Foulkes of Cumnock
No interests declared
 Baroness Goldie
No interests declared
 Lord Keen of Elie
No interests declared
 Lord Strathclyde
No interests declared
 Lord Thomas of Gresford
No interests declared

A full list of members' interests can be found in the Register of Lords' Interests: <https://members.parliament.uk/members/lords/interests/register-of-lords-interests>

Professor Stephen Tierney, University of Edinburgh, and Professor Roger Masterman, University of Durham, acted as legal advisers to the Committee. They declared no relevant interests.