



The Scottish Parliament
Pàrlamaid na h-Alba

Published 5 December 2024
SP Paper 704
74th Report, 2024 (Session 6)

Delegated Powers and Law Reform Committee

Legislative Consent Memorandum: delegated powers relevant to Scotland in the Product Regulation and Metrology Bill



Published in Scotland by the Scottish Parliamentary Corporate Body.

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Delegated Powers and Law Reform Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1;

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meetings on 29 Octoberⁱ and 3 December 2024, the Delegated Powers and Law Reform Committee ("the Committee") considered the delegated powers that are exercisable within devolved competence in the [Product Regulation and Metrology Bill](#) ("the Bill").
2. The Committee considered the Legislative Consent Memorandum ("LCM") for the Bill in terms of the Committee's wider remit contained in Rule 6.11.1(b) of the Standing Orders which provides that the remit of the Committee includes considering and reporting on proposed powers to make subordinate legislation in particular bills "or other proposed legislation". This definition encompasses powers to make subordinate legislation in UK bills, where exercisable within devolved competence. The Committee and its predecessor Committee have considered powers conferred on UK Ministers in devolved areas in various bills over the course of sessions 5 and 6.

ⁱ Rona MacKay MSP substituted for Bill Kidd MSP at this meeting.

Overview of the Bill

3. The purpose of the Bill has been described as “to make provision about the marketing or use of products” and “units of measurement and the quantities in which goods are marketed in the United Kingdom”.
4. The Bill was introduced by the UK Government in the House of Lords on 4 September. It is currently at committee stage in the House of Lords. The first sitting was on 20 November 2024, and sittings are scheduled through to 19 December 2024. As the Bill is still progressing through the UK Parliament, it is subject to amendment. The Committee may therefore need to consider a supplementary legislative consent memorandum (LCM) in due course.
5. The Bill is relatively short, comprising of only 14 sections and 1 schedule. However, provisions of the Bill have been described by the House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC)ⁱⁱ as “skeleton legislation”, which gives broad powers to UK Ministers to legislate by statutory instrument in the areas of product regulation and metrology.
6. Metrology is reserved under Section C9 of schedule 5 to the Scotland Act 1998, headed “weights and measures”. The reservation covers units and standards of weight and measurement, and the regulation of trade so far as involving weighing, measuring and quantities. Product standards, safety and liability is also reserved to the UK Government under Section C8, which includes the subject matter of all technical standards and requirements in relation to products that had effect immediately before IP completion day in pursuance of an obligation under EU law, product safety and liability and product labelling. However, there are exceptions to this reservation as follows:

” *“Food, agricultural and horticultural produce, fish and fish products, seeds, animal feeding stuffs, fertilisers and pesticides (including anything treated as if it were a pesticide by virtue of section 16(16) of the Food and Environment Protection Act 1985). In relation to food safety, materials which come into contact with food.”*
7. The UK Government has stated that the power to make product regulations could be exercised within devolved competence, and hence it has sought legislative consent from the devolved legislatures.
8. The Scottish Government is not currently recommending that the Parliament consents to the provisions of the Bill which are within devolved competence. It states in the LCM, which it lodged on 24 September 2024, that it plans to lodge a supplementary legislative consent memorandum to inform the Parliament of the outcomes of discussions with the UK Government. The Committee will be required to consider the supplementary LCM when it is lodged.
9. The lead committee for the LCM is the Economy and Fair Work Committee.

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Delegated Powers

10. The UK Government has published a [Delegated Powers Memorandum \(“DPM”\)](#) to accompany the Bill. It explains the purpose of the power, why it considers a delegated power is appropriate, and the parliamentary procedure that has been selected.
11. As is normal for UK bills, the Scottish Government has not published a DPM. The Scottish Government’s view on the relevant clauses is set out in the LCM.
12. There are three delegated powers in the Bill. The UK and Scottish Governments agree that the power to make metrology regulations in clause 5, and the power to amend the definition of “online marketplace” in clause 10 relate to reserved matters. As such, the power that is relevant to this Committee’s remit is the power to make product regulations in Clause 1, which is supplemented by clauses 2, 3, 4, 7, 8, 9 and 11. All of those provisions are considered together below.
13. The Committee agreed to send [questions to both the UK Government](#) and [the Scottish Government](#) on the power to make product regulations in clause 1, in conjunction with the associated supplementary clauses.
14. The response [received from the UK Government is available here](#), and the [response received from the Scottish Government is available here](#).
15. Responses were requested by 11 November 2024. The response from the Scottish Government was received on 11 November 2024, and the response from the UK Government was received on 25 November 2024.

Power in question

Clause 1 – Power to make product regulations (supplemented by clauses 2, 3, 4, 7, 8, 9 and 11)

Power conferred on: Secretary of State

Power exercised by: Regulations (Statutory Instrument)

Parliamentary procedure: Affirmative procedure where the power is being exercised to create or widen the scope of a criminal offence, to create powers of entry, inspection, or search under clause 3(4)(b)(i), or to amend or repeal primary legislation insofar as permitted by clause 9 and clause 10(2). The affirmative procedure is also to be used where the power is being exercised to make provision in relation to information sharing in line with clause 7, cost recovery in line with clause 8, or emergencies in line with clause 4. Otherwise, negative procedure.

Provision

16. Clause 1 provides that the Secretary of State may make regulations which make provision, in relation to the marketing or use of products in the United Kingdom, for the purpose of:
 - reducing or mitigating risk presented by products,
 - ensuring that products operate efficiently and effectively,
 - ensuring that products designed for weight or measuring operate accurately.
17. Product is defined as a tangible item that results from a method of production and excludes products which are listed in the schedule. The products listed in the schedule include food, feeding stuff and fertiliser, plants, plant protection products, animal by-products, aircraft, medical equipment and medicines and medical devices.
18. Risk is defined as where a product could endanger the health or safety of persons, endanger the health or safety of domestic animals, endanger property (including the operability of other products) or cause or be susceptible to electromagnetic disturbance.
19. Clause 1(2) provides a power which enables the Secretary of State to make regulations which make provision, in relation to the marketing or use of products in the United Kingdom, which corresponds, or is similar, to a provision of relevant EU law for the purpose of reducing or mitigating the environmental impact of products.
20. Clause 2 provides that product regulations may make provision about requirements (“product requirements”) that must be met in relation to products marketed or used in the United Kingdom or in order for products to be marketed or used in the United Kingdom. It also provides that such regulations 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, or such a requirement is met and conditions specified in the regulations are also met.

21. Clause 3 provides that product regulations may designate one or more persons as a relevant authority for the purpose of the enforcement of the regulations. This could include monitoring compliance, investigating suspected non-compliance, securing compliance and mitigating the effect of non-compliance. Regulations may also confer power to appoint inspectors to carry out functions including conferring powers of entry, although entry to a premises used wholly or mainly as a dwelling would require a warrant issued by a sheriff, summary sheriff or a justice of the peace in Scotland. Product regulations may also make provision about sanctions, including the power to create or widen the scope of criminal offences.
22. Clause 4 provides that product regulations may make provision for the regulations to be disapplied or apply with modifications in cases of emergency.
23. Clause 7 provides that product regulations may make provision for or in connection with the disclosure of information by a relevant authority carrying out functions under product regulations to another relevant authority, the emergency services or a person specified or of a description specified in product regulations, or vice versa. Such regulations may also provide for the processing of information, however not in contravention of data protection legislation.
24. Clause 8 provides that product regulations may make provision for a relevant authority to impose fees in respect of any costs incurred by the relevant authority in carrying out functions conferred on the authority by or under such regulations.
25. Clauses 9 and 11 provide that product regulations may also make consequential, supplementary, incidental, transitional or saving provision and may amend or repeal specified primary legislation. The primary legislation specified is as follows:
 - Parts 2, 4 and 5 of the Consumer Protection Act 1987 (power to repeal only),
 - The Gun Barrel Proof Acts 1868 to 1978 (power to amend or repeal).
26. Provision is also made that any Act passed before the Act that flows from this Bill or passed later in the same session as the Act that flows from this Bill, may be amended or repealed in consequence of any amendment or repeal made as provided for above.
27. Product regulations would be subject to the negative procedure, unless the power is being exercised to create or widen the scope of a criminal offence, to create powers of entry, inspection, or search under clause 3(4)(b)(i), or to amend or repeal primary legislation insofar as permitted by clause 9 and clause 10(2), in which case the affirmative procedure applies. The affirmative procedure is also to be used where the power is being exercised to make provision in relation to information sharing in line with clause 7, cost recovery in line with clause 8, or emergencies in line with clause 4.

Committee consideration

28. At its meeting on 29 October 2024, the Committee considered that it required further information on the power in relation to both the breadth of the power, and the role that the Scottish Government and the Scottish Parliament ought to play in relation to the exercise of that power.
29. Accordingly, the Committee [asked](#) the UK Government:

- why it considers it appropriate that the principal aspects of the policy of the Bill are to be established through subordinate legislation;
 - how it envisages that this power may be used in relation to devolved matters;
 - why it considers it appropriate that the power has been conferred so that it is exercisable by the Secretary of State alone in relation to devolved matters;
 - why it considers it appropriate that when the power is exercised by the Secretary of State in relation to devolved matters, there is no requirement to obtain the consent of the Scottish Ministers, and
 - whether it intends to amend the Bill to either ensure the power is conferred solely on the Scottish Ministers in relation to devolved matters, or to require the Secretary of State when exercising the power in relation to devolved matters to obtain the consent of the Scottish Ministers.
30. The UK Government reiterated its position in its [response](#) that the use of subordinate legislation in the area of product regulation is consistent with the approach historically taken. It noted that such subordinate legislation has previously been made under section 2(2) of the European Communities Act 1972, but that the power is no longer available following the UK's withdrawal from the EU.
31. Whilst it is acknowledged that it may be appropriate for technical and detailed provision in relation to product regulation to be made by virtue of subordinate legislation, the Committee highlights that the power as currently framed does not limit its use to only making such technical and detailed provision. As such, it is conceivable that significant policy choices could be made by the UK Government through the exercise of the power.
32. Furthermore, the Committee highlights that the power in section 2(2) of the European Communities Act 1972 was used to implement obligations agreed at a European level, and those obligations would have been subject to scrutiny in the European Parliament.
33. In response to the question about how the UK government envisages the power will be used in relation to devolved matters, it responded that it considers the matters are mostly reserved, although it acknowledges that the exercise of the powers could potentially cover matters of devolved competence.
34. The UK Government emphasises in its response that it is in discussions with the Scottish Government, and that it remains committed to ensuring that views are heard and reflected as it moves forward with the legislation. It states that the UK Minister responsible for the Bill met with the Scottish Minister for Business, and that officials from both governments will continue to closely engage to work through the detail of the concerns raised. It states that it met recently with Scottish Government officials on 6 November 2024 to explore possible solutions.
35. In terms of whether the UK Government intends to amend the Bill to make provision for either a concurrent power for Scottish Ministers in relation to devolved matters or a consent mechanism where the power is exercised within devolved competence, the UK Government has stated it is happy to keep the Committee updated on further discussions. It again noted the positive and constructive engagement on the

issues to date.

36. The Committee also [wrote](#) to the Scottish Government, to ask the following:
- whether it considers it appropriate that the power to make product regulations is conferred on the Secretary of State alone, given that such regulations may make provision within devolved competence;
 - whether, in its discussions with the UK Government, it intends to seek the conferral of an equivalent power to make product regulations on the Scottish Ministers, insofar as within devolved competence;
 - given the reference to the lack of a consent mechanism in the LCM, if the Scottish Government does secure such a consent mechanism in relation to the exercise of the Secretary of State’s power, how this Parliament is to scrutinise the Scottish Ministers’ consent decisions to UK SIs made by the Secretary of State under powers conferred in devolved areas that do not fall within areas formerly within EU competence before the UK fully withdrew from the EU, and as such where the process for scrutiny by the Scottish Parliament set out in SI Protocol 2 will not apply?
37. The Scottish Government [responded](#) that it is continuing to engage with the UK Government to better understand the policy rationale behind the proposed powers, and that once that is fully understood, it will be in a position to judge whether equivalent powers would be appropriate for Scottish Ministers.
38. It also states that it agrees with the principle that the Scottish Parliament should have oversight of the use of all powers within devolved competence, including appropriate scrutiny of UK-wide statutory instruments making provision for Scotland.
39. Given the emphasis both governments have placed in their responses on the ongoing engagement between both parties on this Bill, the Committee calls on both the UK and Scottish Governments to ensure they consider the role of the Scottish Parliament as part of those discussions.
40. It highlights the conclusions of the [Constitution, Europe, External Affairs and Culture Committee Report: How Devolution is Changing Post-EU](#) (“the CEEAC Report”) in the chapter headed “Delegated Powers”ⁱⁱⁱ, and reiterates its general position in relation to regulation making powers in devolved areas.
41. **The Committee calls on both the Scottish and UK Governments, in their discussions on the potential use of the delegated powers within devolved competence, to be mindful of the importance of the Scottish Parliament having an effective scrutiny role in relation to the exercise of these powers, and to facilitate that role.**
42. **The Committee highlights that in its report, the CEEAC Committee called for a supplementary agreement between the UK and Scottish governments on the use of delegated powers by UK Ministers in devolved areas,**

ⁱⁱⁱ At paragraphs 152-197 of the CEEACC report

including:

- **“A recognition of the constitutional principle that devolved Ministers are accountable to their respective legislatures for the use of powers within devolved competence; and [that]**
- **“The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence”.**

43. **The Committee highlights, in relation to this power, its agreed position in relation to delegated powers in UK Bills exercisable in devolved areas which is, in general terms, that:**

(a) the Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence,

(b) where such powers are exercised by UK Ministers in devolved areas, there is no formal means by which the Scottish Parliament can scrutinise such regulations or be notified that they had been laid before the UK Parliament.

(c) If such powers contain a requirement for the Scottish Ministers’ consent when exercised within devolved competence, the Scottish Parliament can scrutinise the Scottish Ministers’ consent decision.

The Committee will scrutinise powers conferred on UK Ministers not subject to a requirement for Scottish Ministers’ consent and may suggest matters for the lead committee to consider.

(d) As a minimum, powers when exercised by UK Ministers in devolved areas should be subject to the process set out in the SI Protocol 2 where the power is within the scope of that protocol.

44. **The Committee draws the power to the attention of the lead committee, noting that as things stand, the power may be exercised within devolved competence by the Secretary of State only. There is no equivalent power conferred on the Scottish Ministers and as such, product regulations will not be laid in the Scottish Parliament. There is no requirement that the Secretary of State obtains the consent of Scottish Ministers before making regulations which make provision within devolved competence, nor is there a consultation requirement.**

