

Legislative Consent Memorandum

Product Regulation and Metrology Bill

Background

1. This memorandum has been lodged by Kate Forbes MSP, Deputy First Minister and Cabinet Secretary for Economy and Gaelic, in accordance with Rule 9B.3.1(a) of the Parliament's standing orders, and is supported by Richard Lochhead MSP, Minister for Business.

2. The Product Regulation and Metrology Bill ("the Bill") was introduced by the UK Government in the House of Lords on 4 September 2024. The Bill is available on the UK Parliament website via this link: <https://bills.parliament.uk/bills/3752>.

Content of the Bill

3. The Bill is primarily an enabling Bill which gives wide-ranging powers to the Secretary of State to make provisions in relation to the UK's product safety and metrology regulatory framework.

4. The high-level objectives of the Bill are to:

- Ensure that product regulations can keep pace with and respond to new technologies and address new challenges, enable recognition of new or updated EU product requirements, including CE marking, or to end recognition of EU product requirements in Great Britain where it is in the interests of UK consumers and businesses.
- Modernise product safety legislation to clarify duties for online marketplaces and to allow the UK Government to identify new actors in the supply chain and place obligations on them to protect the safety of consumers.
- Improve enforcement and compliance mechanisms to respond to and reflect the challenges of modern, digital borders and improve data sharing between regulators and market surveillance authorities.
- Ensure appropriate powers are in place to update and future-proof the metrology framework (metrology is the science of measurement).

5. Much of the UK's existing product safety framework is derived from EU law and focused on a range of specific product sectors. Such law is therefore assimilated law (the new name for retained EU law). The majority of this legislation was made before EU exit, at least in part, using powers in the European Communities Act 1972 ("the 1972 Act"), powers which were used also to regularly update that secondary legislation. The 1972 Act was repealed by EU (Withdrawal) Act 2018 ("EUWA") as part of the EU exit process. As a consequence of amendments made to the EUWA to implement the Withdrawal Agreement between the UK and EU, section 2(1) of the 1972 Act continued to apply and the powers in section 2(2) remained available

during the implementation period (IP). However, these provisions ceased to apply from IP completion day, which occurred on 31 December 2020 being the end of the implementation period entered into following the UK's exit from the EU, and can no longer be used.

6. The UK Government considers that it needs to go beyond the sectoral approach inherited from the EU to be able to adapt UK product regulations to new technologies such as Artificial Intelligence (AI), as well as to reflect the shift in both what consumers buy and how they buy it. The Bill would give the Secretary of State powers to make regulations in relation to the marketing or use of products in the UK for specified purposes. This could involve significant changes to assimilated law and lead to alignment with, or divergence from, EU law depending on the subject matter.

Provisions which require the consent of the Scottish Parliament

7. The Bill as a whole extends to Scotland. The UK Government's published view is that the clauses 1-4 and 8-11 (in part) of the Bill engage the legislative consent process in the Scottish Parliament. The Scottish Government agrees with this assessment but considers that clause 7 should also be included in this LCM. The reasons are stated below.

Clause 1

8. Clause 1(1) of the Bill enables the Secretary of State to make regulations in relation to the marketing or use of products in the UK for the purpose of:

- (a) reducing or mitigating risks presented by products;
- (b) ensuring that products operate efficiently or effectively
- (c) ensuring that products designed for weighing or measuring operate accurately.

9. Clause 1(2) gives the Secretary of State powers to make regulations, in relation to the marketing or use of products in the UK, which corresponds, or is similar, to relevant EU law for the purpose of reducing or mitigating the environmental impact of products.

10. Clause 1(3) excludes products listed in the schedule from the scope of product regulations made under clause 1(1) and (2) (see paragraph 13 below).

11. Clause 1(4) defines risk for the purposes of the Bill. A product presents a risk if under typical or reasonably foreseeable use it could endanger the health or safety of persons or domestic animals, endanger property or cause, or be susceptible to, electromagnetic disturbance.

12. Clause 1(1)(a) relates, in part, to the section C8 reservation in schedule 5 of the Scotland Act 1998, which reserves technical standards, safety and labelling of products, and product liability. However, this reservation is subject to a number of exceptions being 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) and, in relation to food safety, materials which come into contact with food. As these matters are excluded from

the C8 reservation, it is within the legislative competence of the Scottish Parliament to legislate in respect of technical standards, safety and labelling of products, and product liability in relation to them.

13. The schedule of the Bill excludes listed products from the power in clause 1(1) of the Bill. The schedule of the Bill as introduced does not exclude all of the exceptions to the C8 reservation. Therefore, the power in clause 1(1)(a) as currently drafted is within the legislative competence of the Scottish Parliament to the extent that it can be used to make regulations in relation to the exceptions to the C8 reservation that are not adequately reflected in the schedule.

14. Clause 1(1)(b) enables regulations to be made in relation to the marketing or use of products in the UK for the purpose of “ensuring that products operate efficiently or effectively”. Regulations to ensure that products operate efficiently or effectively are generally devolved. Therefore, this provision is within the legislative competence of the Scottish Parliament.

15. Regulations made under this power may be caught by the section C8 product standards, safety and liability reservation in schedule 5 of the Scotland Act 1998. This reservation reserves technical standards and requirements in relation to products that had effect immediately before IP completion day in pursuance of an EU obligation. This means that to the extent that the powers are exercised to make corresponding provision to EU law as it is amended and replaced, the exercise of the powers is likely to be reserved. However, the exercise of the powers under clause 1(1) are not limited to the amendment and replacement of EU technical requirements and standards as they stood immediately before IP completion day. Where there is no existing technical standard or obligation under EU law (as it had effect prior to IP completion day), the power in clause 1(1)(b) could be used to make regulations containing devolved provision.

16. 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. A broad definition of EU law is used in clause 1(5), which is not limited to technical standards and regulations in relation to products that existed in EU law pre-IP completion date. This means that this provision is within the legislative competence of the Scottish Parliament as regulations made under this power could be used to make devolved provision.

17. Clause 1(4) - (7) deals with matters of interpretation and is within the legislative competence of the Scottish Parliament to the extent that clause 1 is within competence.

Clauses 2 and 3

18. Clause 2 sets out the type of provision that may be made using the powers in clause 1. Clause 3 specifies the enforcement provision that may be made under clause 1. This includes designating a body as a relevant authority if it exercises functions of a public nature and creating criminal offences. These provisions relate to the exercise of powers under clause 1 and are within the legislative competence of the Scottish Parliament.

Clause 4

19. Clause 4 provides that certain provisions in product regulations made under clause 1 can be disapplied or modified in cases of an emergency. 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.

Clause 7

20. Clause 7 enables product regulations, made under clause 1, or metrology regulations, made under clause 5, to contain provision in relation to information sharing. Provisions that may be made under clause 7 include provision relating to the disclosure of information by a relevant authority carrying out functions under product regulations to specific persons, the circumstances in which information may be disclosed, the type of information which may be disclosed and the sanctions for non-compliance. The Explanatory Notes to the Bill published on introduction suggest no consent from the Scottish Parliament is required.

21. It is the Scottish Government's view that consent is required for clause 7. Due to the section B2 data protection reservation, it would not be within the legislative competence of the Scottish Parliament to make a provision which deals with general principles of data protection and management. However, it is within legislative competence to make provision which is simply concerned with disclosure of specific data for a particular purpose or in particular circumstances. Provision made under clause 7 of the Bill would be for a specific purpose being product regulations or metrology regulations. Therefore, provided the purpose of the regulations were within the devolved competence of the Scottish Parliament, it would be within competence to make information sharing provisions in relation to them. To that extent, we consider it would be within the legislative competence of the Scottish Parliament to make such provision in primary legislation setting out the power to do so.

Clauses 8 to 11

22. Clause 8(1) to (3) enables provision to be made for fees to be imposed in respect of any costs incurred by relevant authorities in carrying out functions conferred on the authority. It sets out what such provisions may cover for example, who would be liable for a charge, the circumstances in which a charge may apply, the amount of the charge including any reductions, exemptions or waivers that may apply. These provisions relate to the exercise of powers under clause 1 and are devolved to the extent that devolved provision can be made under that power.

23. Clauses 9 and 11 contain powers to make incidental and supplemental provision, including to certain primary legislation. These provisions are devolved to the extent that devolved provision can be made under clause 1.

Reasons for not seeking legislative consent

24. Section 28(8) of the Scotland Act 1998 recognises that the UK Government will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament. UK Parliament Bills require the consent of the Scottish Parliament if they

contain provisions applying to Scotland and which are for devolved purposes or if they alter the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers.

25. As described above, the Scottish Government is currently of the view that a number of the Bill's provisions relate to devolved matters by conferring powers to the Secretary of State in areas of devolved competence. The reason for doing so is unclear, except that the UK Government seeks wide-ranging powers on products to cover potential future technological, societal and legislative developments.

26. The Bill does not currently contain any consent mechanism which would prevent the Secretary of State from using the powers in devolved areas without the consent of Scottish Ministers even though this could lead to divergence from EU law on devolved matters and/or repeal Scottish legislation.

27. The Scottish Government does not therefore believe that the Bill in its current form incorporates mechanisms to recognise properly devolved responsibility for these matters. The Scottish Government is engaging with the UK Government on possible amendments to the bill to address these issues. For the moment the Scottish Government cannot recommend the Parliament consents to the bill, as reflected in our motion on legislative consent below, but the Scottish Government plans to lodge a supplementary legislative consent memorandum to inform Parliament of the outcomes of discussions with the UK Government.

Consultation

28. No public consultation was conducted specifically for the Bill. The previous UK Government conducted a public consultation on the long-term approach to product safety in 2023 but no response was ever published. The Scottish Government has been engaging with business mostly around the continued recognition of CE marking in Great Britain, which key relevant sectors in Scotland are supportive of. Conformity marking has also been the area of focus of engagement between the Scottish and UK Governments on product policy over the past few years.

Financial implications

29. It is not anticipated that the Bill will have any financial implications for the Scottish Government.

Post EU scrutiny

30. Clause 1(2) gives powers to the Secretary of State to align product regulations, made for the purpose of reducing or mitigating the environmental impact of products, with relevant EU law. Relevant EU law is defined in the Bill as Decision 768/2008/EC of the European Parliament and of the Council on a common framework for the marketing of products, or other EU law that has the purpose of harmonising the conditions for the marketing or use of products in the EU.

31. Other powers in the Bill are not specifically focused on EU law and could lead to either alignment or divergence of UK product and metrology regulations, including on

devolved product matters, depending on future decisions by the UK Government. This could include changes to assimilated law.

32. The UK Government has been largely silent on the question of the Bill's potential interaction with the Internal Market Act 2020, despite both instruments having a role in regulating domestic UK trade. In the Scottish Government's view, powers under the Bill could, potentially, see some negative effects of the IMA on devolved law be mitigated, specifically on matters where the Scottish and UK Governments had a shared ambition to align with EU law.

Conclusion

33. For the moment, it is the recommendation of the Scottish Government that the Scottish Parliament does not grant legislative consent to clauses 1-4 and 7-11 of the Product Regulation and Metrology Bill as introduced.

Draft motion on legislative consent

34. The draft motion, which will be lodged by the Deputy First Minister and Cabinet Secretary for Economy and Gaelic, is:

“That the Parliament, in relation to the Product Regulation and Metrology Bill, refuses to consent to clauses 1-4 and 7-11 being considered by the UK Parliament.”

Scottish Government
September 2024

This Legislative Consent Memorandum relates to the Product Regulation and Metrology Bill (UK legislation) and was lodged with the Scottish Parliament on 24 September 2024

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