



The Northern Ireland Protocol Bill: Delegated Powers

24 June 2022

Acknowledgements

This paper was produced by Dheemanth Vangimalla with assistance from Brigid Fowler and Ruth Fox.

The research for this paper was funded by The Legal Education Foundation as part of the Hansard Society's Delegated Legislation Review.

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Introduction

The Northern Ireland Protocol Bill¹ ('NIP Bill') was introduced in the House of Commons on 13 June 2022. It is scheduled for a Second Reading debate on 27 June 2022.

In this briefing, we make no comment on the Bill's legal or policy merits. None of our suggestions about ways in which the drafting of delegated powers could be improved would prevent the implementation of the Bill's intended policy.

Our conclusions are intended to buttress the role of Parliament in scrutinising future executive action and regulations arising from this Bill once it achieves Royal Assent.

Our analysis draws heavily on 'legislative standards' which we have derived from reports of the House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC). The DPRRC is an influential committee and provides the nearest thing to a form of 'jurisprudence' (or 'legisprudence') in the area of delegated powers. We have recently published a Compendium of Legislative Standards for Delegating Powers in Primary Legislation that distils standards for the delegation of powers from 101 DPRRC reports over recent sessions.² We have utilised this Compendium in producing this paper.

What is the Northern Ireland Protocol Bill?

The terms of the UK's departure from the EU are set out in an international agreement – the UK-EU Withdrawal Agreement ('Withdrawal Agreement') – and were implemented in domestic law through the European Union (Withdrawal Agreement) Act 2020. The Withdrawal Agreement includes a Protocol on Ireland/Northern Ireland ('Northern Ireland Protocol') setting out unique arrangements for Northern Ireland.

The NIP Bill is a 26-clause Bill that amends the operation of the Northern Ireland Protocol in domestic law. It does so by disapplying elements of the Northern Ireland Protocol ('excluded provision') in domestic law, in light of ongoing practical issues, as well as challenges to political stability in Northern Ireland. The NIP Bill also contains many delegated powers conferred on UK Ministers to further the policy objectives of the Bill.

Of the Bill's 26 clauses, 17 confer powers on UK Ministers.

Clauses include powers to make new domestic law in place of provisions of the Northern Ireland Protocol that are disapplied by the Bill, powers to further disapply provisions of the Northern Ireland Protocol, and powers to implement a new agreement with the EU concerning the Northern Ireland Protocol, if one were reached.

In what follows, we analyse six areas of particular concern in the NIP Bill that affect delegated powers.

¹ The *Northern Ireland Protocol Bill*, HC Bill 12, 2022-23 (as introduced) ('NIP Bill'). All references to the Bill in this briefing are to this version.

² Hansard Society (April 2022), *Compendium of Legislative Standards for Delegating Powers in Primary Legislation* (London)

Six areas of concern

1/ General matters that apply to all delegated powers in the Northern Ireland Protocol Bill

There are four features that permeate all delegated powers contained in the NIP Bill:

- (i) The NIP Bill is a ‘skeleton’ Bill. While the Bill does, on its face, disapply certain provisions of the Northern Ireland Protocol in domestic law, the implementation of new law that takes their place and the disapplication of further provisions are to be left entirely to regulations made by Ministers. Therefore, **the real operation of the Bill and the implementation of its policy objectives will be entirely at the discretion of Ministers once the Bill receives Royal Assent.**
- (ii) Clause 22 sets out the general scope and nature of all regulation-making powers contained in the Bill. Clause 22(1) states that regulations made under powers in the Bill can make any provision that can be made by an Act of Parliament. **This clause in effect enables all regulation-making powers contained in the NIP Bill to function as ‘Henry VIII powers’ – that is, powers that enable Ministers to amend, repeal, or otherwise alter the effect of Acts of Parliament by regulations.** This includes the ability to amend the NIP Bill itself after it receives Royal Assent and becomes an Act. **By virtue of Clause 22(1), Ministers will also be able to make retrospective provision and further delegate legislative powers to Ministers and others (‘legislative sub-delegation’).**
- (iii) The Bill’s Delegated Powers Memorandum³ (DPM) frequently refers to the “dual approach” that the Government has taken to the parliamentary procedure applicable to regulations made under the Bill (except for certain tax and customs regulations⁴ and regulations made under clause 26). Under this “dual approach”, regulations made under the Bill are subject to the ‘negative’ procedure, unless they amend an Act of Parliament or make retrospective provision, in which case they are subject to the ‘affirmative’ procedure. This approach does not take into consideration the fact that some regulations that do not happen to amend Acts or make retrospective provision can still be legally or politically significant, warranting active parliamentary approval.⁵
- (iv) Many of the powers sought in this Bill are very broad. The Government has provided, and will no doubt continue to provide, assurances on how they will be exercised. However, powers should be assessed on the basis not merely of how the Government says that it proposes to exercise them, but on their actual scope and how they are capable of being used by the present or any future Government. Non-binding written or oral statements by the Government are not a replacement for tighter drafting of powers on the face of the Bill.

³ Foreign, Commonwealth and Development Office, *Memorandum from the Foreign, Commonwealth and Development Office to the Delegated Powers and Regulatory Reform Committee*, 13 June 2022 (DPM)

⁴ NIP Bill, clause 24(10)

⁵ The DPRRC has previously noted how the exercise of certain powers can be potentially significant and intrusive in people’s lives, thus warranting parliamentary debate and active approval, but do not happen to amend or repeal primary legislation. Similarly, while parliamentarians can be particularly exercised about ‘Henry VIII powers’, the DPRRC has noted that not necessarily all such powers warrant the affirmative procedure. Therefore, what is in effect a ‘one size fits all’ approach when applying parliamentary scrutiny procedures to the exercise of broad powers that could be exercised in multiple ways may be problematic. A solution that has previously been adopted in such scenarios is a ‘sifting mechanism’, whereby rather than locking in the parliamentary procedure that applies to the exercise of a particular power, parliamentary committees can make recommendations on the appropriate level of parliamentary scrutiny for draft regulations, in accordance with the regulations’ legal and political importance. For example, see the *European Union (Withdrawal) Act 2018*, paragraphs 3 and 17 of Schedule 7; the *European Union (Future Relationship) Act 2020*, paragraph 8 of Schedule 5

2/ Power to make provision that a Minister considers “appropriate in connection with” other provisions (clauses 5(1), 6(1), 9(1), 12(3), 13(4), 14(4), 16(1), 17(1), 18(1) and 20(3))

Overview

Of the NIP Bill’s 26 clauses, 10 contain powers that are drafted to enable Ministers to make provision relating to subject matter that they consider “appropriate in connection with” the Northern Ireland Protocol, other parts of the Withdrawal Agreement, or one or more of the purposes of the Bill.

Subject matter that such provision could relate to includes:

- new law about the movement of goods (clauses 5(1) and 6(1));
- new law about the regulation of goods (clause 9(1));
- provision relating to subsidy control policy (clause 12(3));
- provision relating to the implementation, application, supervision and enforcement of the Northern Ireland Protocol (clause 13(4));
- provision relating to ancillary provisions in the Northern Ireland Protocol and the Withdrawal Agreement (clause 14(4));
- new law following further disapplication of the Northern Ireland Protocol or other related provision of the Withdrawal Agreement by Ministers (clause 16(1));
- new law about value added tax, excise duties and other taxes (clause 17(1));
- “conduct” in relation to any matter dealt with in the Northern Ireland Protocol (clause 18(1));
- provision relating to the requirement in domestic law for domestic courts and tribunals to follow the jurisprudence of, and refer cases to, the Court of Justice of the European Union (clause 20(3)).

Government’s justification

The Government has offered two main justifications for this choice of drafting:

- (i) “This issue was considered at length in the passage of the European Union (Withdrawal) Act 2018, the European Union (Withdrawal Agreement) Act 2020, and the European Union (Future Relationship) Act 2020. All three Acts contain delegated powers for Ministers of the Crown to make regulations subject to an appropriateness test setting out the details of legislative regimes to deliver the policy objectives of the Bill”;⁶
- (ii) “It is nevertheless the case that the majority of powers taken by the Bill are deliberately drafted, and constrained, by reference to the policy area within the Northern Ireland Protocol which they are seeking to deliver differently, where the issues have been well-documented since the Northern Ireland Protocol came into force (including in the Government’s Command Paper ‘Northern Ireland Protocol: The Way Forward’ of July 2021 and the statement made by the Foreign Secretary to the House of Commons on 17 May 2022)”.⁷

Analysis

As demonstrated in the list of related subject matter, provision that Ministers could make under the relevant clauses is broad. This breadth is compounded by drafting that sets only a subjective threshold, of ‘appropriateness’, that Ministers would have to meet to exercise the respective powers.

The undemanding nature of the threshold for using these powers contrasts with the magnitude of the threshold that the Government claims is met by the situation surrounding the Northern Ireland

⁶ DPM, para. 21

⁷ *Ibid.*, para. 22

Protocol. To claim that the Bill is compatible with international law, the Government is relying on the 'doctrine of necessity' – an international law defence.⁸ For this defence to be successful, the Government would have to demonstrate that the changes brought forward in the Bill are the only way for the UK to safeguard an essential interest against a grave and imminent peril. As a defence in international law, it is generally accepted that this is a very high threshold to meet. It is therefore surprising that a similarly high threshold is not applied to Ministers' ability to change domestic law using powers under the Bill to achieve the Bill's policy objectives.

The DPRRC has on several occasions recommended that loosely-drawn powers based on the subjective judgment of Ministers, such as an 'appropriateness' threshold, should be circumscribed in favour of a more objective threshold, such as one based on 'necessity'.⁹ There is nothing to suggest that Ministers' judgment as to what they consider 'appropriate' will be confined to technical matters or purely mechanistic changes, rather than allowing the power to be exercised to make substantial policy changes.

Such a low threshold may also be of particular concern given that all regulations made under the NIP Bill "may make any provision that could be made by an Act of Parliament"¹⁰ and may be made with minimal parliamentary oversight. Provided that the regulations do not amend primary legislation and do not include retrospective provision, they could be made subject to the 'negative procedure' and thus not require active parliamentary approval.¹¹

The Government states that the powers in the Bill are constrained by "reference to the policy area within the Northern Ireland Protocol which they are seeking to deliver differently". It is unclear how mere reference to a policy area limits a widely drafted power or has any bearing on the threshold that a Minister must meet to exercise the power. Given that they are not law, it is also unclear how the Government's Command Paper or a statement made by the Foreign Secretary to the House of Commons could constrain the exercise of these powers. Powers should be assessed on the basis not merely of how the Government says that it proposes to exercise them, but on their actual scope and how they are capable of being used by the present or any future Government.

The Government also cites three Brexit Acts as precedent for the use of the 'appropriateness' threshold in the NIP Bill. Some of the significant powers in those three Acts are indeed subject to an 'appropriateness' threshold, but such a comparison is flawed for at least three reasons.

Firstly, comparable regulation-making powers in the three cited Acts contain significantly more constraints than are found in powers in the NIP Bill. Examples of such constraints include time-limits,¹² greater restrictions¹³ on provision that could be included in regulations,¹⁴ requirements to publish draft regulations for a period of consultation prior to laying them before Parliament,¹⁵ and a 'sifting' mechanism.¹⁶ Comparable constraints are not found in the NIP Bill.

Secondly, while the DPRRC accepted that the threshold for the use of powers in the European Union (Withdrawal Agreement) Bill was properly based on what is 'appropriate', in that instance the powers

⁸ Foreign, Commonwealth and Development Office, *Northern Ireland Protocol Bill: UK government legal position*, 13 June 2022

⁹ DPRRC (2017–19), 3rd Report, HL Paper 22, paras. 21–24, 31(a), 35, 40(a); DPRRC (2017–19), 12th Report, HL Paper 73, paras. 7, 12, 19(a), 20(a); DPRRC (2017–19), 23rd Report, HL Paper 124, para. 9

¹⁰ NIP Bill, clause 22(1)

¹¹ NIP Bill, clause 23(4)

¹² For example, the *European Union (Withdrawal) Act 2018*, sections 8(8) and 23(4)

¹³ Examples of such restrictions include prohibitions against creating criminal offences, establishing public authorities, amending, repealing or revoking the Human Rights Act 1998 or any delegated legislation made under it, and amending or repealing the Scotland Act 1998, the Government of Wales Act 2006 or the Northern Ireland Act 1998.

¹⁴ For example, the *European Union (Withdrawal) Act 2018*, section 8(7); the *European Union (Future Relationship) Act 2020*, section 31(4)

¹⁵ The *European Union (Withdrawal) Act 2018*, paragraph 14 of Schedule 8

¹⁶ Whereby parliamentary committees can make recommendations on the appropriate level of parliamentary scrutiny for draft regulations, in accordance with the regulations' legal and political importance. For example, see the *European Union (Withdrawal) Act 2018*, paragraphs 3 and 17 of Schedule 7; the *European Union (Future Relationship) Act 2020*, paragraph 8 of Schedule 5

in the Bill were typically tied to the implementation of the Withdrawal Agreement. Thus, the scope of each power in that Bill was naturally constrained by the scope of the particular matter contained in the Agreement that it was intended to address.¹⁷ This is not the case in the NIP Bill. Indeed, powers in the NIP Bill are specifically permitted to make provision that is incompatible with the Northern Ireland Protocol or any other part of the Withdrawal Agreement.¹⁸

Thirdly, the subjectivity of the ‘appropriateness’ threshold in the 10 clauses in the NIP Bill is compounded by its linkage to the term ‘in connection with’. Such a term is not found in comparable powers in the three Acts which the Government relies on as precedent. Such a threshold would confer permanent powers on Ministers to make whatever legislation they considered appropriate, provided that there was at least some connection – however tenuous – with the Northern Ireland Protocol, other parts of the Withdrawal Agreement, or one or more of the purposes of this Bill. Where such a linked term has previously been included in significant powers, the DPRRC has recommended its removal.¹⁹

Conclusion

Parliamentarians may wish to consider:

- Circumscribing the ‘appropriateness’ threshold in these clauses for a more objective threshold such as one of ‘necessity’;
- Removing the term ‘in connection with’ from these clauses;
- Adopting additional constraints found in comparable regulation-making powers in the three Brexit Bills cited by the Government, such as time-limits and a ‘sifting’ mechanism.

3/ Power to “engage in conduct” relevant to the Northern Ireland Protocol (clause 18(1))

Overview

Clause 18(1) enables Ministers to “engage in conduct” relevant to the Northern Ireland Protocol if they consider it appropriate in connection with one or more of the purposes of the Bill.

What ‘conduct’ entails is not further elaborated in the Bill. However, the Bill’s Explanatory Notes state that ‘conduct’ includes sub-legislative activity, such as producing guidance.²⁰

Government’s justification

The Government has not provided a justification for seeking this power.

Analysis

The Government has not included clause 18(1) in the Bill’s Delegated Powers Memorandum. This may indicate that the Government does not consider this power to be a legislative²¹ delegation. An example provided by the Government for the ‘sub-legislative activity’ caught by this power is the production of guidance. However, ‘conduct’ in this clause is presumably not intended to be limited

¹⁷ DPRRC (2019-21), 1st Report, HL Paper 3, paras. 6(a)-6(e)

¹⁸ NIP Bill, clause 22(2)

¹⁹ DPRRC (2017-19), 3rd Report, HL Paper 22, paras. 71, 72, 74; DPRRC (2017-19), 12th Report, HL Paper 73, para. 37; DPRRC (2017-19), 24th Report, HL Paper 128, para. 7; DPRRC (2017-19), 46th Report, HL Paper 275, paras. 15, 29, 30, 32; DPRRC (2019-21), 22nd Report, HL Paper 118, paras. 17-19, 28

²⁰ House of Commons, Northern Ireland Bill, 2022-23, Explanatory Notes on the Bill as introduced, 13 June 2022 (HC Bill 12-EN)

²¹ That is, a power to make generally applicable legal requirements or legally enforceable rules that someone *must* follow.

to the production of guidance, otherwise the clause would have been drafted as such (Ministers ‘may produce guidance’ rather than ‘may engage in conduct’).

Moreover, there is nothing on the face of the Bill or in the Bill’s supporting documents to suggest that the clause is prevented from enabling the making of generally applicable legal requirements or legally-enforceable rules that someone must follow. Indeed, the former head of the Government Legal Profession, Sir Jonathan Jones QC, has described this clause as a “do whatever you like” power.²²

The nature of the activities that may count as ‘conduct’ is not clear. The Government has previously utilised ‘determinations’, ‘directions’, ‘arrangements’, ‘codes of practice’, ‘protocols’, and ‘public notices’ to set requirements that affect the legal position of individuals and organisations. The DPRRC has on numerous occasions been critical of Government acquiring what are in effect legislative powers under the guise of these various devices. The DPRRC has called such devices ‘disguised’ or ‘camouflaged’ legislation and has stated that, in the absence of cogent reasons, the imposition of legal requirements or legally enforceable rules should take place through primary legislation or delegated legislation subject to a parliamentary procedure.²³

This principle is not just a matter of form, or a pedantic point. It ensures that relevant legal provisions are drafted and treated consistently with other legislation. It also ensures that law-making does not circumvent the publication requirements that accompany, and the parliamentary scrutiny that is afforded to, primary and delegated legislation. **Exercise of the power under clause 18(1) would not be subject to any parliamentary oversight.**

While the Government may not intend to exercise this power in a legislative manner, there is no restriction to this effect on the face of the Bill. Powers must be assessed on what they will in fact allow, based on their scope, not on the Government’s intent. Moreover, the DPRRC has stated that where there may be uncertainty about whether a power amounts to a delegation of legislative power, the Government “should err on the side of caution and provide a clear explanation in the delegated powers memorandum about why the view has been taken that the power is administrative rather than legislative in character”.²⁴ No such explanation has been given for clause 18(1).

Even if the power in clause 18(1) does not amount to a delegation of legislative power, if a Minister’s ‘conduct’ – such as the production of guidance – is to be integral to the understanding or functioning of this Bill, or new law made under it, then it may be desirable for such conduct to also be subject to parliamentary scrutiny.

Conclusion

Parliamentarians may wish to consider:

- Seeking from the Government an exhaustive list of the ‘conduct’ that a Minister may engage in;
- Introducing an explicit restriction on the face of the Bill that such ‘conduct’ cannot set generally applicable legal requirements or legally enforceable rules that someone must follow;
- Subjecting the exercise of the power to a parliamentary procedure.

²² Sir Jonathan Jones QC, *The Northern Ireland Protocol Bill is one of the most extraordinary pieces of legislation I have ever seen*, (London: PoliticsHome), 15 June 2022 [accessed on 23 June 2022: <https://www.politicshome.com/thehouse/article/northern-ireland-protocol-bill-one-of-the-most-extraordinary-i-have-ever-seen>]

²³ DPRRC (2017–19), 3rd Report, HL Paper 22, paras. 93, 94; DPRRC (2017-19), 11th Report, HL Paper 65, paras. 25-27; DPRRC (2017-19), 12th Report, HL Paper 73, para. 49; DPRRC (2017-19), 31st Report, HL Paper 177, paras. 1-5, 11-13, 35(c), 36; DPRRC (2017-19), 54th Report, HL Paper 370, paras. 35, 36; DPRRC (2019-21), 17th Report, HL Paper 98, para. 4; DPRRC (2019-21), 19th Report, HL Paper 109, paras. 40- 42

²⁴ DPRRC (2021-22), *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*, HL Paper 106, para. 106

4/ Regulation-making power to implement a new agreement with the EU which amends or replaces the Northern Ireland Protocol (clause 19(1))

Overview

Clause 19(1) provides Ministers with the power to make regulations that they consider appropriate to implement any agreement made between the UK and the EU that modifies, supplements, or replaces the whole or any part of the Northern Ireland Protocol. Ministers may also make regulations that they consider appropriate to deal with matters arising from, or relating to, any such agreement.

Government's justification

The Government has provided four main reasons for seeking this power:

- (i) "The power is included in the Bill to reflect the fact that the Government's preference remains a negotiated solution with the EU";²⁵
- (ii) "[Implementing] provisions cannot be included on the face of the Bill because such an agreement with the EU has not yet been reached";²⁶
- (iii) "If such an agreement were to remedy the issues currently being faced in Northern Ireland, it may not be expedient to pass an entirely new piece of primary legislation to implement those remedies given the urgency of resolution";²⁷
- (iv) "This power does not affect Parliament's ratification process - outlined in Part 2 of the Constitutional Reform and Governance Act. It is simply about providing the means to implement what is agreed, at the appropriate time".²⁸

Analysis

As the House of Lords Constitution Committee and the DPRRC have previously stated, it is "a long-standing convention of the constitution ... that outside the exceptional case of making provision for EU law, international legal agreements that make changes to UK law are given domestic force by an Act of Parliament".²⁹

The Brexit process has seen this convention be derogated from in certain circumstances. However, regulation-making powers in such cases have contained significantly more constraints than those found in clause 19(1) of the NIP Bill. Examples of such constraints have included time-limits,³⁰ a requirement for prior enactment of a statute by Parliament approving the final terms of the agreement,³¹ greater restrictions on provision that could be included in regulations,³² and a 'sifting' mechanism.³³

Parliamentarians may therefore find it concerning that such a general power with minimal constraints has been sought in order to implement by regulations any agreement made between the UK and the EU to amend or replace the Northern Ireland Protocol. This power could be exercised regardless of the scope of the agreement, thereby obviating the need for any future Act of Parliament on the matter. If the regulations did not amend primary legislation and did not include retrospective

²⁵ DPM, 140

²⁶ *Ibid.*, 141

²⁷ *Ibid.*

²⁸ *Ibid.*, 142

²⁹ House of Lords Constitution Committee (2019–21), 5th Report, HL Paper 55, para. 4; DPRRC (2019–21), 8th Report, HL Paper 40, para. 5; DPRRC (2021–22), 2nd Report, HL Paper 13, para. 32

³⁰ For example, the *European Union (Withdrawal) Act 2018*, section 9(4) (now repealed)

³¹ For example, the *European Union (Withdrawal) Act 2018*, section 9(1) (now repealed)

³² For example, the *European Union (Withdrawal) Act 2018*, section 9(3) (now repealed); the *European Union (Future Relationship) Act 2020*, section 31(4)

³³ For example, the *European Union (Future Relationship) Act 2020*, paragraph 8 of Schedule 5

provision, they could be made subject to the 'negative procedure' and thus not require active parliamentary approval.³⁴

The Government's statement that implementing "provisions cannot be included on the face of the Bill because such an agreement with the EU has not yet been reached" is an unpersuasive argument (Government's justification (ii)). In the context of a wide power sought to implement the withdrawal agreement in the then European Union (Withdrawal) Bill, the DPRRC rejected arguments that the "nature and scale of the legislative changes required are as yet unknown" and that the "exact use of the power will of course depend on the contents of the withdrawal agreement". The DPRRC has argued that where significant and contentious policy issues are at stake and amendments are needed to primary legislation, it is for Parliament to make the changes through primary legislation rather than for Ministers to do so by regulations.³⁵

The Government argues that if an agreement were to be reached which remedies the issues currently being faced in Northern Ireland, it might not be expedient to pass an entirely new piece of primary legislation to implement those remedies given the urgency of resolution (Government's justification (iii)). This argument is also unpersuasive. As the DPRRC has previously noted, if an argument for delegating a power is the delay that would be caused by legislating for that issue by primary legislation, substantiating empirical evidence for this argument should be offered. Moreover, if circumstances were to arise in which it was necessary to act swiftly, Parliament could do so if required. Recent years have shown, in the context of Brexit and Covid-19, that Parliament is able to respond if Government seeks to introduce and pass primary legislation in as little as a day.

The Government also argues that the power does not affect Parliament's pre-ratification process under the Constitutional Reform and Governance Act 2010 (CRAG Act) (Government's justification (iv)). However, the DPRRC has taken the view that, even if the CRAG Act process were to make for adequate treaty scrutiny, its existence has no bearing on the appropriateness or otherwise of taking delegated powers to implement international agreements.³⁶ Where an agreement leaves a large measure of discretion to the signatories as to how it is implemented, Parliament must have the opportunity fully to scrutinise the choices that the Government makes in implementing the international obligation.

Finally, it is unclear why the Government's preference for a negotiated solution with the EU justifies the inclusion of this power in the Bill (Government's justification (i)). The Government also proposes to take powers to *disapply* parts of the existing agreement. In any case, the inclusion of an agreement-implementing power demonstrates little about the Government's preference for a negotiated solution with the EU, since whether and to what extent the power would be exercised would be at the Government's discretion.

Conclusion

Parliamentarians may wish to consider:

- Removing this clause; or
- Adopting additional constraints found in comparable regulation-making powers, such as time-limits and a 'sifting' mechanism.

³⁴ NIP Bill, clause 23(4)

³⁵ DPRRC (2017–19), 3rd Report, HL Paper 22, paras. 47, 49

³⁶ DPRRC (2019-21), 8th Report, HL Paper 40, para. 13

5/ Disapplication of the hybrid instrument procedure (clause 22(5))

Overview

Some regulations, though of general application, may affect a particular private interest in a manner different from the private interests of other persons or bodies of the same category or class. The hybrid instrument procedure applies to such regulations. The procedure subjects such regulations to petitioning by those whose private interests are directly and specially affected by the regulations. It is designed to empower individuals to protect their private interests where those interests may be at risk from new regulations.

Clause 22(5) is termed a 'de-hybridisation' clause. By virtue of this clause, any regulations made under this Bill that may otherwise be subject to the hybrid instrument procedure are never to be treated as being subject to that procedure.

Government's justification

The Government has not provided a justification for the inclusion of this clause.

Analysis

De-hybridisation clauses are not new. There are several examples of their inclusion in previous Bills.³⁷ The Government may well have good reasons for including another such clause in this Bill – there may be specific scenarios envisaged in the context of this Bill where it would be beneficial for the hybrid instrument procedure to be disappplied. However, in the Bill's supporting documents, the Government has addressed neither the reason(s) for including this clause nor the potential scenarios where it envisages that it might apply.

Furthermore, the DPRRC has previously stated that where a Bill contains a de-hybridisation clause, protection should be afforded under the Bill's delegated powers to interests which would otherwise be safeguarded by the hybrid instrument procedure, through provision for some other means – for example, consultation while the policy is still at a formative stage.³⁸ Such safeguards have not been included in this Bill.

Conclusion

Parliamentarians may wish to consider seeking clarification from the Government as to the reason(s) for including this clause, the potential scenarios where it envisages that this clause might apply, and any safeguards that have been or will be put in place to protect private interests that would otherwise have been protected by the hybrid instrument procedure.

6/ Devolved administrations' ability to exercise powers under this Bill (clause 22(6))

Overview

Clause 22(6) enables UK Ministers to, by regulations, make other powers under this Bill exercisable by devolved administrations to any extent. The exercise of powers under this Bill by a devolved administration can be specified to be exclusive, or concurrent or joint with a UK Minister or other devolved administration. Regulations made under clause 22(6) may also provide for the scrutiny

³⁷ For example, the *European Union (Withdrawal) Act 2018*, paragraph 36 of Schedule 7; the *European Union (Withdrawal Agreement) Act 2020*, paragraph 16 of Schedule 4; the *European Union (Future Relationship) Act 2020*, paragraph 32 of Schedule 5

³⁸ DPRRC (2017-19), 54th Report, HL Paper 370, paras. 18-21, 52-54

procedure that is to apply to regulations made by the devolved administrations by virtue of this clause.

Government's justification

The Government has provided two main reasons for seeking this power:

- (i) "The division of responsibilities in implementing the new arrangements replacing excluded elements of the Northern Ireland Protocol will depend on policy decisions yet to be taken, including as a result of consultations with stakeholders";³⁹
- (ii) "Where a matter would normally fall within the legislative competence of the devolved administrations and the passage of devolved primary legislation would not be appropriate or timely it may be appropriate to create a new devolved delegated power by exercise of this power".⁴⁰

Analysis

Under clause 22(6), UK Ministers may decide not only what powers in the Bill may be exercised by a devolved administration, but also the extent to which those powers may be exercised. UK Ministers may also decide whether the respective devolved legislature (or any legislature, for that matter) gets to scrutinise the regulations made by the devolved administration under those powers.

Bills that intend to confer powers on devolved administrations normally do so on the face of the Bill.⁴¹ The level of scrutiny applicable to the exercise of such powers is also normally specified on the face of the Bill.

The approach that has been taken in the NIP Bill is to confer on UK Ministers the power to make regulations that can further delegate legislative powers to devolved administrations. This is in effect 'legislative sub-delegation' and the power that would be exercised by the devolved administration would be a 'sub-delegated power' to make 'tertiary legislation'.

The NIP Bill does not provide for the level of scrutiny that is to apply to the exercise of these 'sub-delegated powers'. As the DPRRC has highlighted on numerous occasions, 'tertiary legislation' is still the law. Therefore, powers that permit 'legislative sub-delegation' that are drafted without provision for scrutiny of the exercise of 'sub-delegated powers' break the important link between those empowered to make law and their accountability to Parliament.

By virtue of clause 22(6), 'tertiary legislation' made by a devolved administration could be subject to no scrutiny even if it amended primary legislation or made retrospective provision. While it may be unlikely for a UK Minister to confer a 'sub-delegated power' in this way with no applicable scrutiny, powers must be assessed on their actual scope, not on the likelihood of their being exercised in a particular way.

Other than stating that "regulations under sub-delegated powers will also be subject to appropriate procedure before the relevant devolved legislature", the Government has not provided an explanation as to why 'tertiary legislation' made by virtue of clause 22(6) is not subject to the same level of scrutiny as is applicable to regulations made under the Bill.

³⁹ DPM, para. 153

⁴⁰ *Ibid.*, para. 154

⁴¹ For example, the *European Union (Withdrawal) Act 2018*, Schedule 2; the *European Union (Future Relationship) Act 2020*, Part 2 of Schedule 5

The Government justifies this power on the basis that the “division of responsibilities... will depend on policy decisions yet to be taken”. Both the DPRRC⁴² and the Cabinet Office’s Guide to Making Legislation⁴³ state that incomplete policy should not be used as a justification for seeking powers. Moreover, the Government states that instances may arise involving devolved legislative competence where “the passage of devolved primary legislation would not be appropriate, or timely”. This does not explain why it is a UK Minister that decides whether and to what extent legislative power is conferred, and not Parliament on the face of the Bill.

Conclusion

If powers are to be conferred on devolved administrations, parliamentarians may wish to consider:

- Removing this clause;
- Conferring powers on devolved administrations on the face of the Bill;
- Specifying on the face of the Bill the level of scrutiny applicable to the exercise of such powers.

⁴² DPRRC’s ‘Guidance for Departments on the role and requirements of the Committee’, November 2021, para. 19

⁴³ Cabinet Office’s ‘Guide to making legislation’, January 2022, para. 15.3

Appendix I: The Hansard Society Delegated Legislation Review

The Hansard Society has long argued that the delegated legislation system – delegated powers in Bills and the resulting Statutory Instruments – is flawed and now represents one of the most significant constitutional challenges of our time.

With the support of the Legal Education Foundation, we have therefore embarked on a Delegated Legislation Review. As part of the Review, we have been examining the delegation of powers in a range of Government Bills and drawing attention to some of the clauses of greatest concern.⁴⁴

More information about the Review can be found at:

<https://www.hansardsociety.org.uk/projects/delegated-legislation-review>

⁴⁴ For example, Hansard Society (September 2021), *The Health and Care Bill: Delegated Powers* (London); Hansard Society (October 2021), *The Nationality and Borders Bill: Delegated Powers* (London); Hansard Society (March 2022), *The Economic Crime (Transparency and Enforcement) Bill: Delegated Powers* (London)

Appendix II: The role of MPs in the scrutiny of delegated powers

The scope and design of the delegation of power sought in any Bill raise important questions for MPs that go to the heart of their role as legislators. For example:

- To what extent are MPs willing to continue accepting the troubling arrogation of power by the executive (by successive governments) at the expense of Parliament?
- What scrutiny or other safeguards do MPs think are desirable or necessary to constrain the use of delegated powers? Given the inadequacy of scrutiny procedures that apply to delegated legislation in the House of Commons, can they really remedy a delegation of legislative power otherwise deemed unacceptable?
- If Parliament accepts controversial powers in a Bill, it creates a precedent that may be used by government to justify taking similar powers in other Bills in the future. However, if Parliament has reluctantly accepted a power in exceptional circumstances - for example, during the Brexit process when there was a need to legislate at speed - are MPs content for Ministers to rely on that precedent for the establishment of new powers?
- The inclusion of 'Henry VIII powers' enabling Ministers to amend or repeal primary legislation by Statutory Instrument challenges the constitutional principle that Parliament is sovereign; that it is the sole legislative authority with the power to create, amend or repeal any law. How content are MPs for such powers to continue to be a relatively common feature of the law?
- How much discretion do MPs think should be conferred on Ministers by the legislature? Ministers may use broadly defined and ambiguously worded powers in ways that go beyond the original intention of the legislation. How content are MPs that such powers continue to be claimed by the executive, particularly when in many instances such powers will be available to Ministers in future governments of a different political stripe, possibly decades later, and may therefore be used by Ministers with radically different policy objectives from those who sought the powers in the first place?
- Do MPs think that government should be granted 'reserve' or 'holding' powers, the use of which is not fully explained or defined, simply because it is administratively convenient or because Ministers may desire freedom to act at a later date? Are MPs content that Ministerial claims of exigency and convenience should trump parliamentary scrutiny?
- When Ministers acknowledge that the relevant policy development process - particularly the consultation stage - is unfinished, should they nonetheless be granted powers to act in that area of policy?

If MPs are solicitous of the proper role and function of Parliament and their responsibilities as legislators, then the answers to these questions should inform the debate about the scope of, and safeguards applied to, each clause in a Bill that contains a proposed delegation of power. Changes which tighten the use of powers, limit the extent of discretion, incorporate scrutiny safeguards, or resist the gravitational pull of precedent, are designed to buttress the role of Parliament in scrutinising future executive action and regulations; they need not interfere with or prevent the implementation of the intended policy.

Appendix III: Glossary

Act of Parliament: Legislation that has been approved by Parliament and received Royal Assent. Acts of Parliament are primary legislation.

Affirmative procedure: Parliamentary scrutiny procedure under which delegated legislation requires the active approval of the House of Commons and in most cases also the House of Lords. Under the 'draft affirmative' procedure, delegated legislation is laid before Parliament as a draft, and cannot be made into law by the Minister unless and until it has been approved by the House of Commons and in most cases also the House of Lords. Under the 'made affirmative' procedure, delegated legislation is laid before Parliament after it has been made – signed – into law by the Minister, but cannot remain law unless it is approved by the House of Commons and in most cases also the House of Lords within a statutory period – usually 28 or 40 days.

Bill: A proposal for a new Act of Parliament, once it has been introduced to Parliament (at First Reading) and before it has received Royal Assent. A Bill goes through several stages in both Houses and can be amended. If a version of a Bill is agreed by Parliament and receives Royal Assent it becomes an Act of Parliament. A draft Bill may be published and subject to pre-legislative scrutiny by a parliamentary committee before being formally introduced to Parliament.

De-hybridisation clause: A clause in a Bill that disapplies the hybrid instrument procedure for delegated legislation made under the new powers conferred by the Bill.

Delegated legislation: Law made by Ministers (and sometimes other authorised individuals and bodies) using delegated powers granted to them in Acts of Parliament. Statutory Instruments (SIs) are the most common form of delegated legislation. Orders and Regulations are among the categories of delegated legislation enacted in SIs. Delegated legislation is also known as secondary or subordinate legislation.

Delegated power: A power to make delegated legislation which is conferred on Ministers (and sometimes other individuals and bodies) in an Act of Parliament.

Delegated Powers Memorandum (DPM): A document produced by the government department responsible for a Bill. The DPM identifies every delegated power in a Bill, its justification, and any parliamentary scrutiny procedure that is proposed for it. The DPM assists the House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC) when that Committee scrutinises and reports on the delegated powers in a Bill.

Delegated Powers and Regulatory Reform Committee (DPRRC): House of Lords Select Committee appointed to examine almost all Bills on their introduction to the House of Lords, to determine whether they contain any inappropriate delegation of power or subject those powers to an inappropriate level of scrutiny. In certain circumstances, the DPRRC may consider some Bills that start in the House of Commons before they are introduced to the Lords.

Explanatory Notes: A document that accompanies a Bill when the Bill is introduced to Parliament, setting out what the Bill does and why.

'Henry VIII power': A type of delegated power. A 'Henry VIII power' enables Ministers to amend, repeal, or otherwise alter the effect of primary legislation by delegated legislation. In a Bill, a clause that contains a 'Henry VIII power' is a 'Henry VIII clause'.

Hybrid Bill: A Bill the content of which, though of general application, would affect a particular private interest in a manner different from the private interests of other persons or bodies of the same category or class. The procedures followed in Parliament in considering Hybrid Bills

incorporate aspects of both public Bill and private Bill procedures, such as providing time for members of the public who are specially and directly affected by the Bill to submit a petition against it.

Hybrid instrument procedure: A procedure that applies in the House of Lords where an instrument subject to the affirmative procedure contains provisions which, if contained in a Bill, would render it a hybrid Bill. The instrument is subject to a petitioning procedure along the lines of that for hybrid Bills, under which those whose private interests are directly and specially affected by the instrument may petition against it.

Lay/laying/laid: Formally presenting a Statutory Instrument (SI) or other document to Parliament. When an SI is subject to a parliamentary scrutiny procedure, laying is the start of the process. Some SIs are laid before Parliament but not subject to a parliamentary procedure; in this case, they are 'laid only' SIs. The date on which an SI is laid is its 'laid date'.

Make/making/made: A Minister or other authorised individual signing a Statutory Instrument (SI) into law. The date on which this takes place is an SI's 'made date'. Once an SI has been made, it may come into force: there is no minimum or maximum period between an SI being made and it coming into force. However, there is a convention – the 21-day rule – by which, wherever possible, a Statutory Instrument which is subject to the 'made negative' procedure is laid before Parliament at least 21 calendar days before it comes into force.

Negative procedure: Parliamentary scrutiny procedure under which a piece of delegated legislation or other measure does not require active parliamentary approval. Under the 'made negative' procedure, a piece of delegated legislation is laid before Parliament after it has been made – signed – into law by the Minister. If Parliament does not reject it within 40 days, it is deemed to have consented. For a 'made negative' Statutory Instrument, if, within 40 days of the SI being laid, either House agrees a motion – known as a 'prayer' – to annul the SI, the government must revoke it. Under the 'draft negative' procedure, an SI is laid before Parliament as a draft, and if Parliament does not reject it within 40 days, it is deemed to have consented and the Minister can make the SI into law.

Parent Act/parent legislation: Legislation that grants a delegation of power to Ministers or other individuals or bodies to make delegated legislation. It may also be known as an 'enabling Act' or 'enabling legislation'.

Primary legislation: For the UK, law made by Parliament (subject to Royal Assent) and comprising Acts of Parliament. Primary legislation is not subject to judicial review.

Statutory Instruments (SIs): The most common form of delegated legislation. The term 'Statutory Instrument' is given to most, but not all, forms of delegated legislation made after the Statutory Instruments Act 1946 came into force in 1948.

Strengthened scrutiny procedure: A higher level of parliamentary scrutiny than the 'affirmative' procedure. Strengthened scrutiny is usually reserved for the exercise of significant powers that are conferred on a Minister to amend primary legislation. It involves scrutiny by a designated committee(s) and can include, among other possible required elements, statutory consultation and even a committee veto. Examples include 'enhanced affirmative' and 'super-affirmative' procedures.

Skeleton Bills: A Bill, or part of a Bill, that consists entirely of delegated powers, meaning that the real operation of the Bill, or part of the Bill, would be entirely by delegated legislation

Tertiary legislation: Acts of Parliament (primary legislation) can confer power on Ministers and others to make delegated legislation. Exceptionally, Parliament allows delegated legislation to confer

power on other people to make law. This is 'legislative sub-delegation'. Law made at this third level is tertiary legislation.

Published by the Hansard Society

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