HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

11th Report of Session 2016–17

Digital Economy Bill: Parts 1–4

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The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

(i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;

(ii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,

(b) section 7(2) or section 19 of the Localism Act 2011, or

(c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

(iii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) section 85 of the Northern Ireland Act 1998,

(b) section 17 of the Local Government Act 1999,

(c) section 9 of the Local Government Act 2000,

(d) section 98 of the Local Government Act 2003, or

(e) section 102 of the Local Transport Act 2008.

Membership

The members of the Delegated Powers and Regulatory Reform Committee are:

Baroness Drake
Baroness Fookes *(Chairman)*
Lord Flight
Baroness Gould of Potternewton
Lord Jones
Lord Lisvane
Lord Moynihan
Lord Thomas of Gresford
Lord Thurlow
Lord Tyler

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Publications

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Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103 and the fax number is 020 7219 2571. The Committee's email address is hldelegatedpowers@parliament.uk.

Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

Eleventh Report

DIGITAL ECONOMY BILL: PARTS 1–4

1. The Digital Economy Bill had its second reading on 13 December. It is a wide-ranging measure which includes several significant delegations of power. The Department for Culture, Media and Sport has provided a memorandum on those powers.[1] We have so far confined our consideration of the Bill to Parts 1 to 4. We will report separately on the remaining Parts of the Bill.

Clause 6—power to make consequential provision in connection with electronic communications code

2. Clause 4 replaces the electronic communications code in Schedule 2 to the Telecommunications Act 1984 with an entirely new code, set out in Schedule 1, which is to be inserted into the Communications Act 2003 as a new Schedule 3A. The code regulates the relationship between electronic communication network providers and landowners.

3. Schedule 3 makes amendments to legislation in consequence of the introduction of the new code. Clause 6 confers power on the Secretary of State to make further incidental, supplementary, consequential, transitional, transitory or saving provision by regulations. In exercising that power, the Secretary of State may amend, repeal, revoke or otherwise modify the application of "any enactment".[2] That term is defined very widely to mean:

    - primary legislation passed before the end of the Session in which this Bill is passed, including:
        - Acts of Parliament,
        - Acts of the Scottish Parliament,
        - Measures or Acts of the National Assembly for Wales, or
        - Northern Ireland legislation; and
    - subordinate legislation passed any of the above types of primary legislation.[3]

4. The negative procedure in the United Kingdom Parliament applies unless the power is used to amend, repeal or modify the application of primary legislation, in which case the affirmative procedure applies. However, *no* procedure is provided for in the Scottish Parliament, National Assembly for Wales or Northern Ireland Assembly when the power is used to amend primary legislation enacted by one of those devolved legislatures.

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1 Department for Culture, Media and Sport, *Digital Economy Bill: Delegated Powers Memorandum:* http://www.parliament.uk/documents/lords-committees/delegated-powers/Digital-Economy-Bill-DPM.pdf [accessed 22 December 2016]

2 See clause 6(2).

3 See clause 6(6).

5. Moreover there is not even a duty to consult Ministers of the relevant devolved administration before the power is exercised to amend either primary or secondary devolved legislation.

6. The memorandum justifies the power on the basis that a considerable number of pieces of legislation, including some private Acts, are affected by the redrafting of the code and its move from the Telecommunications Act 1984 to the Communications Act 2003; that they are "something of a moving target" and not suitable for amendment by Schedule 3; and that "the efficient way to deal with those further consequential amendments is by regulations made after Royal Assent".[4]

7. The memorandum is silent, however, regarding the involvement of the devolved legislatures or governments[5] where the power is used to amend, repeal or modify legislation made by any of those bodies.

8. In our recent report on the Wales Bill, we drew to the attention of the House a similar power to amend legislation made by the National Assembly for Wales or the Welsh Ministers without the need to consult them or seek their approval.[6] In their response, the Government said (among other things) that they understood our concerns in respect of a power to modify legislation made by the Assembly or the Welsh Ministers; and that the Secretary of State had written to the First Minister of Wales and to the Assembly's Presiding Officer committing to early discussions between officials well in advance of regulations being laid which affect legislation made by either the Assembly or the Welsh Ministers.[7]

9. We note also that the Scotland Act 1998 provides that "the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament",[8] and that the Wales Bill contains a corresponding provision as regards Wales.[9]

10. **It seems to be us to be inconsistent with the spirit, if not the letter, of that principle for clause 6 of this Bill to confer a power on the Secretary of State to amend legislation passed by the devolved bodies, even if the amendments are merely consequential, without being required at least to consult the Scottish, Welsh or (as the case may be) Northern Ireland Ministers.**

Clause 17(1)—power to designate age-verification regulator

11. Clause 15(1), in Part 3 of the Bill, provides that a person must not make pornographic material available on the internet on a commercial basis except in a way which secures that it is not normally accessible by persons under the age of 18.

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4 Para 48.
5 The Scottish Parliament or the Scottish Ministers, the National Assembly for Wales or the Welsh Ministers, the Northern Ireland Assembly or Northern Ireland Departments.
6 Delegated Powers and Regulatory Reform Committee, (5th Report, Session 2016–17, HL Paper 54), paras 42 to 44.
7 Delegated Powers and Regulatory Reform Committee, (10th Report, Session 2016–17, HL Paper 86), Appendix 1.
8 See section 28(8), inserted by section 2 of the Scotland Act 2016.
9 Clause 2.

12. Contravention of this prohibition will not be a criminal offence. However there is to be an "age-verification regulator" who will have the extensive investigative and enforcement powers described in clauses 19 to 23. These include provisions which enable the regulator to:

    - require the provision of information;
    - impose substantial civil penalties;
    - take steps to direct internet service providers to block access to material; and
    - publish guidance which will be highly significant to the operation of Part 3.[10]

13. The Bill does not itself specify the identity of the regulator. Instead clause 17(1) confers power on the Secretary of State by notice to designate any person, or any two or more persons jointly, as the regulator for the purposes of Part 3.

14. There are no constraints in clause 17 on whom the Secretary of State may designate as the regulator, or factors that she has to take into account in making this decision, except that she must be satisfied that the regulator will have appeal arrangements in place. Clause 18 requires the Secretary of State to lay particulars of the proposed designation before Parliament where a draft negative procedure applies.

15. The memorandum justifies this power of designation as follows:

> "Clause 17 gives the Secretary of State the power to appoint any person or persons as the age-verification regulator. It is considered necessary to retain this flexibility, first in order to ensure that the right person or persons are appointed as regulator. For example it is possible that the functions of the regulator could be shared or divided as between 'front-end' activity, by which we mean the work of issuing guidance and giving notice of contraventions, and enforcement. The role is also relatively narrow in scope compared to many regulatory roles and it may therefore be suitable to be carried out by an existing regulator or regulators in addition to their current responsibilities. The flexibility in retaining a power to designate means that it is possible to make changes should the demands of the role or the fit with other regulatory duties need to change over time. This approach is consistent with some other regulatory roles. For example the British Board of Film Classification, which creates the classification system relied on in this legislation, is designated under section 4 of the Video Recordings Act 1984 and the Claims Management Regulator is designated under section 5 of the Compensation Act 2006. As such, the Government considers that the right approach is that the Bill contain provision to designate a person, or persons, as the regulator."[11]

10 The guidance provisions are referred to in paras 24 to 51 of this report.
11 Para 104.

16. The memorandum adds:

> "On 10 October 2016 the government published letters of intent exchanged between the Department of Culture, Media and Sport and the British Board of Film Classification, who are expected to take on a regulatory role in relation to age-verification."[12]

17. A fuller version of the Government's intention is given in the Explanatory Notes accompanying the Bill:

> "… the British Board of Film Classification ("BBFC") … are expected to take on a regulatory role subject to the successful passage of the Bill and the particulars of the proposed designation being laid in both Houses of Parliament. The BBFC is expected to be the regulator for the majority of the functions of the regulator (including issuing notices to [internet service providers] to prevent access to material), but is not intended to take on the role of issuing financial penalties and enforcement notices to non-compliant websites."[13]

18. Neither the memorandum nor the Explanatory Notes indicate who will take on the enforcement powers, assuming it is not to be the British Board of Film Classification.

19. The memorandum does refer, however, to the need for "flexibility in order to ensure that the right person or persons are appointed as regulator". We do not regard this an adequate justification for conferring an untrammeled delegated power such as this. The decision as to who to appoint as regulator should be taken before, not after, a Bill is introduced so that it can be fully scrutinised by Parliament. This is especially because the regulator will have important and significant powers conferred by Part 3 which include the ability to impose substantial civil penalties. These appear to be far more extensive than the powers enjoyed by regulators under the provisions referred to in the memorandum, namely section 4 of the Video Recordings Act 1984 and section 5 of the Compensation Act 2006.

20. **In our view, the identity of the regulator or regulators should be specified on the face of the Bill. We think it inappropriate to delegate to the Secretary of State, with only a modest level of Parliamentary scrutiny, the decision on whom to designate as the regulator.**

21. We would, however, regard it as acceptable for the Secretary of State to have a power by regulations to specify a different regulator if this became necessary because, for example, the regulator named in the Bill was unable to continue performing the functions conferred on it.

Clause 17(4)—appeal arrangements

22. Under clause 17(4) as currently drafted, the Secretary of State must be satisfied before making a designation under subsection (1) that the regulator will maintain arrangements for appeals against certain types of enforcement action, for example the imposition by the regulator of a financial penalty. There is no requirement that appeals must be to an independent body, or that details of the proposed appeal arrangements should be included in the particulars laid before Parliament under clause 18. This issue is not addressed in the memorandum.

12 Para 105.
13 Para 23.

23. **We consider it inappropriate for the important question of appeals to be left to "arrangements" made by the regulator, subject only to the approval of the Secretary of State, without any type of Parliamentary scrutiny. We recommend replacing clause 17(4) with a statutory right of appeal on the face of the Bill.**

Clauses 15(3), 21(9) and 22(7)—the regulator's guidance

24. Part 3 contains three provisions which require or permit the age-verification regulator to publish guidance. *No* provision is made for Parliamentary scrutiny, even though it will have considerable significance.

Clause 15(3)—guidance on the interpretation of clause 15(1)

25. Clause 15(1) prohibits a person from making pornographic material available on the internet on a commercial basis in the United Kingdom except in a way which secures that, at any given time, it is not normally accessible by persons under the age of 18.

26. "Pornographic material" is defined in some detail (see clause 16). However there is no definition of the term "commercial basis"; and no detail is given as to what a person must do to secure that such material is not "normally" accessible to under 18s.

27. Instead, these matters are to be left to the regulator under clause 15(3) which requires it to publish guidance about—

- types of arrangements for making pornographic material available that the regulator *will treat* as complying with clause 15(1);
- circumstances in which the regulator *will treat* an internet site or other means of accessing the internet as operated or provided on a commercial basis; and
- other circumstances in which the regulator *will treat* making pornographic material available on the internet as done on a commercial basis.

28. While the clause does not impose an express duty "to have regard to" the guidance, the inclusion of the words "the regulator will treat" in subsection (3) indicates that the guidance will bind the regulator. We anticipate that it will play a key role in the interpretation of clause 15(1)–and therefore on a decision taken by the regulator about enforcement action, for example as to whether to impose a penalty under clause 20. We also expect the guidance to be highly influential on the outcome of any appeals brought under the regulator's arrangements approved under clause 17(4), particularly if such appeals are to be within the regulator's own organisation.

29. The justification for clause 15(3) given in the memorandum is that:

> "The guidance will assist persons who make pornographic material available on the internet on a commercial basis to understand what arrangements the regulator will consider sufficient for the purposes of complying with clause 15(1).
>
> Guidance on what the regulator will treat as being done on a 'commercial basis' will assist persons who make pornographic material on the internet

> in understanding the approach the regulator will take when considering whether the prohibition in subsection (1) applies in a particular case.
>
> In relation to both matters, flexibility is needed to reflect changes over time in technology and in commercial models. As such, it is considered appropriate that these matters be dealt with in guidance issued by the age-verification regulator." [14]

30. No Parliamentary procedure is specified for the guidance. The reason is given in the next paragraph of the memorandum:

> "The guidance is intended to assist stakeholders in understanding the circumstances in which the regulator will treat something as being done on 'a commercial basis' and what is considered to be a sufficient age access control. For example, a person is not required to only use the arrangements that are set out in the guidance (under clause 15(3)(a)). As such, it is considered appropriate that no Parliamentary procedure apply."[15]

31. **In our view, those paragraphs considerably understate the significance of clause 15(3). We consider it objectionable as a matter of principle that a regulator, who is to be clothed with extensive powers to impose fines and take other enforcement action, should itself be able to specify how key concepts used in clause 15(1) are to be interpreted.**

32. **We recommend that the term "commercial basis" and the circumstances in which material is to be treated as "not normally accessible" to under 18s should be spelt out on the face of the Bill although supplemented, if some flexibility is needed, with a power to give further detail in regulations to be made by the Secretary of State.**

33. **We would regard the affirmative procedure as appropriate for the first regulations to be made under such a power, and the negative procedure for subsequent regulations.**

Clause 21(9)—guidelines on financial penalties

34. Clause 20 enables the regulator to impose financial penalties on:

- a person whom the regulator determines has contravened clause 15 by (for example) making pornographic material available on the internet without sufficient safeguards to prevent access by children; or
- persons such as internet service providers who fail to provide information to the regulator in response to a notice under clause 19.

35. The regulator will have a broad discretion to determine the level of those penalties, although they may not exceed the greater of £250,000 or 5% of the relevant person's turnover (see clause 21(1) and (2)).

36. The regulator is required, however, to publish the "guidelines" it proposes to follow in deciding the amount of financial penalty, and then to have regard to them (see clause 21(5) and (9)). The guidelines will therefore be highly influential in deciding the level of penalty and, we expect, on the outcome of appeals against those decisions.

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14 Paras 97 to 99.
15 Para 100.

37. The justification for clause 21(9) given in the memorandum is that:

> "The preparation and publication of … guidelines, and making it the duty of the age-verification regulator to have regard to the guidelines, are intended to help ensure transparency and consistency in the setting of penalties. The maximum financial penalty and method for calculating it are set out in the clause, so the guidelines here relate to how the regulator will determine the fine in a particular case and flexibility to respond to circumstances will be needed here. This element of detail is considered appropriate for guidelines. This approach is entirely consistent with the elements of the Ofcom regulatory regime on which this part of the provisions is modelled (under section 392 of the Communications Act 2002 Ofcom before determining the amount of penalties imposed by them under the Communications Act 2003 or any other enactment apart from the Competition Act 1998 are obliged to issue guidance in similar terms).[16]

38. The memorandum goes on the explain why the Government think it inappropriate for there to be any Parliamentary scrutiny of the guidelines:

> "[They] do not define the key criteria of maximum fines, but rather the proposed approach in individual cases. They are guidelines the regulator must follow itself, not guidelines imposed on the regulator by another body, and are designed to ensure that it is consistent in its approach. Furthermore, the aim is for a proportionate and flexible regulatory regime given the subject matter and manner in which it is provided and accordingly it is important that this guidance can be updated to keep pace with and respond to changes in the way that pornography is made available. The approach is also consistent with the approach taken to the publication of similar guidelines with more wide-ranging effect as to penalties that it is the duty of Ofcom to publish under section 392 of the Communications Act 2003."[17]

39. There are provisions in more recent Acts about financial penalty guidance which do specify a Parliamentary procedure. We drew attention to these in our recent report on the Energy Bill[18] (the relevant paragraphs of which are reproduced in Appendix 1 to this Report). Clause 40 of that Bill conferred power on the Oil and Gas Authority (OGA) to issue guidance about the matters to which it must have regard when determining the amount of a financial penalty. It also required the First-tier Tribunal to have regard to the guidance upon an appeal against a penalty.

40. We considered it desirable for there to be a Parliamentary procedure because the guidance under the Energy Bill would be highly influential in determining the amount of a substantial financial penalty, and because the OGA was a brand new, untested organisation. In our view, this reasoning applies with even more force in relation to the guidelines under clause 21(9) of this Bill, given that the identity of the regulator is not even specified, and there is to be no statutory right of appeal against a penalty decision.

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16 Para 109.
17 Para 110.
18 Delegated Powers and Regulatory Reform Committee, (6th Report, Session 2015–16, HL Paper 31), paras 10 to 15.

41. **We therefore make similar recommendations about clause 21(9) that we made on the Energy Bill, namely that:**

- **the regulator's guidelines should be laid before Parliament;**
- **the affirmative procedure should apply to the order bringing the initial guidelines into force, and the negative procedure to an order for the commencement of revised guidelines.**

Clause 22(7)—guidance about services enabling or facilitating the making available of pornographic material or prohibited material on the internet

42. Clause 22(1) confers a power on the regulator to give a notice to a "payment-services provider" or to an "ancillary service provider" whose services may enable or facilitate another party to contravene clause 15(1) or to make "prohibited material"[19] available on the internet.

43. Recipients of notices will not be required by law to take any action in response. We assume that their purpose is to discourage "payment-services providers" or "ancillary service providers" from continuing to provide the services.

44. "Payment-services provider" is defined as a person who appears to the regulator to provide services in the course of a business which enable funds to be transferred in connection with a payment for access to online pornography.[20] It could include, for example, a credit card company.

45. "Ancillary service providers" is defined as a person (other than a payment-services provider) who appears to the regulator to—

- provide, in the course of business, services which *enable or facilitate the making available of pornographic or prohibited material by the non-complying person*; or
- advertise goods or services on an internet site operated by the non-complying person.[21]

46. Clause 22(7) enables the regulator to publish guidance about the circumstances in which the regulator *will treat* services provided in the course of business as enabling or facilitating the making available of pornographic material or prohibited material.

47. The justification for subsection (7) given in the memorandum is that:

> "Guidance about the circumstances in which the … regulator will treat services provided in the course of a business as enabling or facilitating the making available of pornographic material or prohibited material on the internet will assist stakeholders in understanding the approach taken by the … regulator as to who is an ancillary service provider. It will also assist them in understanding the status of notices they receive in accordance with that guidance. *It is hoped that the regulator will take a proportionate and flexible approach*, and accordingly, the guidance may need to be updated from time to time to reflect, for example, changes in commercial practice. The guidance is guidance about the approach the regulator itself will take. It relates only to descriptions of the types

19 "Prohibited material" is defined in clause 22(4).
20 See clause 22(5).
21 See clause 22(6).

of person (who are not themselves subject to any further regulatory outcome) it may inform about regulatory conclusions it has reached."[22]

48. There is to be *no* Parliamentary procedure associated with the guidance.[23]

49. **As with clause 15, we consider it unsatisfactory that the meaning of a key term should be delegated to guidance issued by the regulator without any form of Parliamentary scrutiny.**

50. **We therefore recommend that the circumstances in which a person is to be treated as providing a service which enables or facilitates the making available of pornographic material should be set out in clause 22, unless the Government can convince the House that it is impractical do so. In that case, the Secretary of State should have a power to deal with this in regulations, with the affirmative procedure applying to the first exercise of the power and the negative procedure to subsequent regulations.**

51. This approach would help to ensure that the regulator does take a proportionate and flexible approach, rather than merely *hoping*–as suggested in the memorandum–that it will do so. Parliament would also have the opportunity properly to scrutinise the concept of who, and who is not, to be treated as an "ancillary service provider".

22 Para 114 (emphasis added).
23 For the reasons given in the delegated powers memorandum, para 115.

APPENDIX 1: DIGITAL ECONOMY BILL: PARTS 1–4

Extract from the Delegated Powers and Regulatory Reform Committee's 6th Report of 2015–16 Session about the Energy Bill

Clause 40(2)—Amount of financial penalty

10. Chapter 5 of Part 2 of the Bill confers extensive powers on the OGA to impose civil sanctions for the purpose of enforcing compliance with various obligations, including the requirement to provide information and samples to the OGA; and clause 39 would allow the OGA to issue a financial penalty notice obliging the recipient of the notice to pay to the Authority an amount not exceeding £1 million.

11. Clause 40(2) requires the OGA:

- to issue guidance about the matters to which it will have regard when determining the amount of the financial penalty; and
- to have regard to that guidance when determining the amount of a penalty in a particular case.

The First-tier Tribunal, upon an appeal against a penalty, would also be under a duty to have regard to that guidance (see clause 47(7)).

12. We note that there is no Parliamentary procedure associated with the guidance. Indeed, there is not even a requirement to lay it before Parliament. The memorandum (paragraph 39) explains that the Bill follows the approach of section 38 of the Competition Act 1998 under which there is no Parliamentary procedure in relation to guidance issued by the Competition and Markets Authority on the exercise of its power to impose financial penalties.

13. It fails however to mention more recent examples which do not support its case! These include:

- Section 34 of the Identity Cards Act 2006 (since repealed). This provided for a code of practice about the imposition of civil penalties to be laid before Parliament in draft and brought into force by order. The affirmative procedure applied to the first order, and the negative procedure to subsequent orders.
- Section 19 of the Immigration, Asylum and Nationality Act 2006 which requires the Secretary of State to issue a code of practice about financial penalties imposed on persons who employ illegal immigrants. This must be laid in draft before Parliament and brought into force by affirmative procedure order.
- Section 55C of the Data Protection Act 1998, inserted by section 144 of the Criminal Justice and Immigration Act 2008, which requires the Information Commissioner to issue guidance about the monetary penalties he can impose for breaches of that Act. There is no Parliamentary procedure applicable to the guidance, but it does have to be laid before Parliament.
- Section 32 of the Immigration Act 2014. This requires the Secretary of State to issue a code of practice specifying factors for determining the amount of a penalty imposed on residential landlords who grant a tenancy to illegal immigrants. The code must be laid in draft before Parliament, and it comes into force in accordance with a negative procedure order.

14. We note that the guidance will be highly influential in determining the amount of what could be a substantial financial penalty imposed by the OGA—up to £1 million (with provision for this maximum to be increased to £5 million (see footnote 2)). We further note that the OGA is a brand new institution and even the memorandum refers to its "nascent enforcement framework" which is "as yet untested" (paragraph 41). In the light of this, the Committee has concluded that the guidance should be subject to some Parliamentary oversight.

15. **We therefore recommend that guidance under clause 40 should be laid in draft before Parliament, and that the affirmative procedure should apply to the order bringing the initial or any revised guidance into force.**

APPENDIX 2: MEMBERS AND DECLARATIONS OF INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office.

For the business taken at the meeting on 20 December 2016 Members declared no interests.

Attendance

The meeting on the 20 December 2016 was attended by Baroness Drake, Baroness Fookes, Baroness Gould of Potternewton, Lord Jones, Lord Lisvane, Lord Moynihan, Lord Thomas of Gresford and Lord Thurlow.