

HOUSE OF LORDS

Select Committee on the Constitution

10th Report of Session 2017–19

Taxation (Cross-border Trade) Bill

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Select Committee on the Constitution

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Committee staff

The current staff of the committee are Matt Korris (Clerk), Nadine McNally (Policy Analyst), and Lloyd Whittaker (Committee Assistant). Professor Stephen Tierney and Professor Mark Elliott are the legal advisers to the Committee.

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Taxation (Cross-border Trade) Bill

Introduction

1. The Taxation (Cross-border Trade) Bill was introduced in the House of Commons on 20 November 2017. It received its second reading on 8 January 2018, completed committee stage on 1 February, and is currently awaiting report. The Bill provides for a new customs regime which will be required to be in place by March 2019 when the UK leaves the European Union.
2. The Bill is a supply bill. It is established constitutional practice that the House of Lords does not amend supply bills. In due course it may be certified by the Speaker of the House of Commons as a money bill under the Parliament Act 1911.
3. The Constitution Committee does not ordinarily report on supply or money bills and in this report we do not comment on the financial matters provided for in this Bill. Nevertheless, the Bill raises significant and novel constitutional concerns and, given it is one of the key bills to deliver Brexit, we consider it appropriate to draw attention to these issues before the Bill completes its passage through the Commons. In doing so we build on the points made by the Delegated Powers and Regulatory Reform Committee (DPRRC) in its report on the Bill.¹

Framework legislation

4. The Bill is an example of ‘framework legislation’. It includes only limited policy detail, and instead provides the Government with broad delegated powers to implement a customs regime by secondary legislation. As the Delegated Powers and Regulatory Reform Committee observed, the Bill contains “well over 150 separate powers to make tax law for individuals and businesses”.²
5. It is not uncommon that revenue legislation takes the form of ‘framework legislation’, with secondary legislation used “to set out rules concerning administration, collection and enforcement”.³ Furthermore, Brexit may require extensive and complex change in this area of the law to be effected quickly; given that the terms of Brexit are not yet agreed, these powers may also need to be exercised flexibly as circumstances change. However, even in light of this, the discretionary powers in the Bill are overly broad and subject to limited parliamentary scrutiny.
6. The DPRRC’s report identified five thematic concerns with the delegated powers in the Bill. In this report, we address the constitutional implications of two of them.

Made affirmative procedure

7. The Bill provides for the use of the ‘made affirmative’ procedure, whereby secondary legislation can be made immediately, without parliamentary

1 Delegated Powers and Regulatory Reform Committee, *11th Report* (Session 2017–19, HL Paper 65)

2 Delegated Powers and Regulatory Reform Committee, *11th Report*, para 4

3 [Explanatory Notes to the Taxation \(Cross-border Trade\) Bill](#) [Bill 128 (2017–19)-EN], para 21

scrutiny, although it cannot remain in force unless approved by Parliament within a fixed period.⁴

8. We have previously concluded that the ‘made affirmative’ procedure may be acceptable only “in very limited circumstances” when there is sufficient justification for its use.⁵ For previous bills—such as the European Union (Withdrawal) Bill—the Government has sought to justify the procedure as necessary to deal with urgent matters; in the case of the European Union (Withdrawal) Bill, a minister using the procedure must make a declaration that the regulations are urgently required. The Government has not sought to justify the procedure in this Bill on the basis of urgency and no such requirement is placed on ministers.
9. **We are concerned that the ‘made affirmative’ procedure, which may be justified in a limited number of urgent cases, is being sought for non-urgent reasons as a convenient means of executive law-making. We agree with the DPRRC that ‘made affirmative’ instruments “should be confined to urgent cases”.**⁶

Legislating by public notice

10. The Bill provides for the making of law by “public notice”. Unlike statutory instruments, public notices need not be presented to Parliament and are not subject to any parliamentary process. The DPRRC described this as a “radical concept” and “a modern form of ruling by proclamation, without any opportunity for parliamentary scrutiny.”⁷
11. While the use of public notices is not unprecedented in revenue law, it is an extraordinary and broad power. Clause 32(9) provides that “any provision that may be made by a public notice under this Part may be made by regulations.” That anything that can be done by public notice may also be done by regulations suggests that this form of law-making could be used for significant matters, including matters affecting the legal rights of individuals. Such matters should properly be made by regulations and subject to parliamentary scrutiny. The Government stated that these notices will be used only to “make provision that is purely technical or administrative in nature”,⁸ but this is not clear on the face of the Bill.
12. The potential exercise of the power is also uncertain and subjective. For example, clause 37(5) states: “Any reference ... to a public notice is to a notice published ... in such manner as the person giving the notice considers appropriate for the purposes of that provision.” The DPRRC said “There is no definition of ‘appropriate’ and it could range from full-page adverts in the national press to obscure notices in trade journals. It might even include Facebook and Twitter.”⁹
13. **A broad and subjective power to legislate by public notice is not constitutionally acceptable. We agree with the DPRRC that a**

4 In this Bill the period is 28 days from the date the regulation is made, except where a separate commencement provision is made (in accordance with clause 52(2)), in which case the period is 60 days from the date when any of the provisions come into force.

5 Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards* (15th Report, Session 2008–09, HL Paper 116), para 139

6 Delegated Powers and Regulatory Reform Committee, *11th Report*, para 9

7 *Ibid.*, para 7

8 HM Treasury, *Taxation (Cross-border Trade) Bill Delegated Powers Note*, para 39

9 Delegated Powers and Regulatory Reform Committee, *11th Report*, para 26

“system for making determinations which are capable of affecting an individual’s legal position should ordinarily be dealt with by legislation, subject to scrutiny by Parliament.”¹⁰

10 *Ibid.*, para 27