



HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

23rd Report of Session 2017–19

**European Union
(Withdrawal) Bill:
Government
Amendments**

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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 who agreed this report are:

[Lord Blencathra](#) (Chairman)

[Lord Flight](#)

[Lord Jones](#)

[Lord Lisvane](#)

[Lord Moynihan](#)

[Lord Rowlands](#)

[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 hlddelegatedpowers@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.

Twenty Third Report

EUROPEAN UNION (WITHDRAWAL) BILL: GOVERNMENT AMENDMENTS

1. We reported on this Bill in our 12th Report of this Session.¹ Of our 17 recommendations, the Government have accepted two, rejected 11 and are thinking further about four. The Government have tabled various amendments for report stage, and Lord Callanan, the Minister of State for Exiting the European Union, has written to all peers on 18 April explaining those amendments. A supplementary Delegated Powers Memorandum has been provided.² **We wish to draw the attention of the House to a number of the amendments.**

Fees—amendments 33A (clause 7) and 53A (clause 9)

2. Currently, regulations under clauses 7 and 9 may not impose or increase taxation.³ The Government have tabled amendments to clauses 7 and 9 to prevent regulations under those clauses from imposing or increasing fees. Their justification is to make a clear demarcation between clauses 7 and 9 (where fees and taxation are not allowed) and Schedule 4, where they are. Schedule 4 refers explicitly only to “charging of fees or other charges in connection with the exercise of a function”. But the Delegated Powers Memorandum says that “this could include the creation of tax-like charges, which go beyond recovering the direct cost of the provision of a service to a specific firm or individual, including to allow for potential cross-subsidisation or to cover the wider functions and running costs of a public body, or to lower regulatory costs for small or medium sized enterprises.”
3. **We remain of the view that taxation, including “tax-like” charges, should not be possible in regulations made under Schedule 4.**⁴ In correspondence, the Government have offered justifications that we found unconvincing.
 - (a) They say that Schedule 4 is designed to ensure that those using specialised services transferred from the EU to the UK pay for them. Payment for a service on no more than a full-cost recovery basis is acceptable. Going beyond this, even only as far as described in the Delegated Powers Memorandum and the Government response, is taxation, a matter for Parliament in primary legislation rather than Ministers or others in secondary or tertiary legislation. As we said in our 12th Report: “A “tax-like charge” means a tax”.
 - (b) It offers little consolation to be told that one is being taxed under Schedule 4 rather than under clause 7 or clause 9. Users of a service expect to be charged for them, not taxed.

1 Delegated Powers and Regulatory Reform Committee, (12th Report, Session 2017–19, [HL Paper 73](#))

2 Department for Exiting the European Union, European Union (Withdrawal) Bill [supplementary Delegated Powers Memorandum](#)

3 Clauses 7(7)(a) and 9(3)(a).

4 Delegated Powers and Regulatory Reform Committee, (12th Report, Session 2017–19, [HL Paper 73](#)), paragraph 45

- (c) The Government say that without this “bespoke power”, the Bank of England would be compromised. If statutory bodies need their powers to be altered, this can be done by amendment of their own statutory powers. It does not justify the creation of a new general power to tax by statutory instrument.
- (d) The Government have told us that charging regimes in statutory instruments are standard, including under the Finance Act 1973. We agree. But there is a big difference between charging for a service and taxing people for the use of a service. That difference has been enshrined in UK legislation from the outset of this country’s membership of the European Communities. Taxation in statutory instruments made under section 2 of the European Communities Act 1972 is expressly forbidden.⁵ Likewise, section 56 of the Finance Act 1973 does not allow for taxation, and was never intended to do so, lest it rendered nugatory the prohibition against taxation by statutory instrument contained in the European Communities Act 1972.

Sifting committee—amendments 70A, 70B, 77A and 77B (Schedule 7)

4. The Government have extended the House of Commons’ sifting procedure to the House of Lords. The problem is that the current sifting mechanism lacks teeth. In paragraph 58 of our 12th Report we explained the weakness of the Government’s preferred mechanism:

“The Minister can ignore with impunity any recommendation from the relevant committee. Even if the committee makes the strongest possible recommendation that the instrument be affirmative, the Minister can go ahead and use the negative procedure.”
5. This strange result is avoided by the recommendation at paragraph 58 of our 12th Report. A recommendation from a sifting committee of either House to upgrade the negative procedure to the affirmative procedure should be determinative save where the recommendation is rejected by a resolution of that House.
6. In correspondence dated 11 April, Lord Callanan said: “the ultimate arbiter of whether the Government is using delegated powers appropriately must be Parliament itself”. We agree and continue to commend our sifting mechanism to the House. Under the Bill as it stands, and under the amendment tabled by the Government, the ultimate arbiter of whether the Government are using the appropriate parliamentary procedure is the Government.
7. During committee stage and in correspondence, Lord Callanan suggested that, were effective power to be given to a committee of either House subject to an over-ride by the House in question, it might lead to a loss of the House’s confidence in the committee structure. We disagree. Committees propose; the House disposes. Where the House disagrees with one of its committees, business continues as usual. No-one would suggest that a loss of confidence in the judicial system might be occasioned merely because the Supreme Court overrules the Court of Appeal.

⁵ Paragraph 1(1)(a) of Schedule 2 to the European Communities Act 1972.

8. **We continue to believe that our sifting mechanism strikes a fair balance between the scrutiny requirements of Parliament and the business needs of Government.** It has teeth. It is by no means unprecedented.⁶ It respects the principle that Parliament is the ultimate arbiter of the correct use of its procedures. And in any event the Government say that they will usually accept the recommendations of the sifting committee.

Good reasons statements and “necessary” versus “appropriate”—amendments 83C, 83F and 83G (Schedule 7)

9. The Government have tabled amendments requiring them to demonstrate “good reasons” when making certain regulations.⁷ These amendments come in the context of the debate over the words “necessary” as opposed to “appropriate” in regulations made under clauses 7 to 9 and 17. In correspondence, the Government have suggested that there might be little practical difference between the two approaches. We disagree. “Appropriate” means suitable, proper, fitting, apt. It is much wider than necessary, which means something that is needed. We have argued for constraints reflecting the Government’s original commitment to make only those changes that are needed to make retained EU law work after exit day.
10. The Government want to maintain the “appropriateness” test and in return have offered to legislate for a requirement to state good reasons when laying certain regulations. **In our view, a “good reasons” requirement is an inadequate substitute for a test based on necessity.**
- (a) It is not even an absolute requirement to make a statement giving good reasons.⁸ If Ministers fail to make the statement, they merely have to explain why.
 - (b) The requirement to state good reasons is a very low threshold. We would always expect Ministers to have good reasons before doing anything, and certainly when making new law in secondary legislation.
 - (c) In law, if Ministers lack good reasons for doing something, they have either bad reasons or no reasons at all. In either event, their decision is liable to being quashed on judicial review. It does not advance matters for Ministers to commit to lay a document that merely confirms their belief that they are acting lawfully.
 - (d) The test for political decision-making is not simply whether there are good reasons. There may be good reasons for doing something and better reasons for not doing it.
 - (e) Under the Government’s amendments, nothing is said of what happens if the reasons fail to convince either House. It is not enough to say that the instrument could be annulled under ordinary rules. This would be the case regardless of whether or not these “good reasons” amendments are tabled.

6 Examples of legislation where the final decision on the level of scrutiny is given to Parliament include the Legislative and Regulatory Reform Act 2006, the Public Bodies Act 2011 and the Localism Act 2011. Those Acts impose longer timeframes and the super-affirmative procedure. In view of the Government’s tight timetable for Brexit, we have recommended much shorter timeframes and (like the Government) have not recommended the super-affirmative procedure. What we take from these three Acts is the principle that the ultimate arbiter of whether the Government are using delegated powers appropriately must be Parliament rather than the Government.

7 Including criminal offences and powers outside the EU (Withdrawal) Bill exercised after exit day.

8 The statement is also to include any relevant law and the effect of the amendments on EU retained law.

- (f) In correspondence, Lord Callanan has argued that clause 7 is already circumscribed by a test of “necessity”. We agree that there must be some failure of, or deficiency in, retained EU law arising from the United Kingdom’s withdrawal from the EU. But the crucial question then becomes: can Ministers do anything they regard as appropriate or can they only choose from the more limited range of options which do what is needed to make retained EU law work properly on exit day?
- (g) Lord Callanan has asked us, “necessary for what purpose”? The answer is found in clause 7, reading “is necessary” for “the Minister considers appropriate”: namely, necessary to prevent, remedy or mitigate the relevant failure or deficiency arising from the United Kingdom’s withdrawal from the EU.
- (h) Lord Callanan has given examples where Ministers might not be able to amend retained EU law under a necessity test. We said at paragraph 11 of our 12th Report that, if Ministers take the view that the concept of what is necessary needs elaboration, the Bill can do so. This is what the Government did in clause 7(2), which defines “deficiencies in retained EU law” at length. If the Government want to make it absolutely clear that they can make regulations under clause 7 to avoid legal uncertainty, prevent waste of public money, prevent the statute book from including inert material etc., they can bring forward amendments to that effect.

Statements in relation to “legislative sub-delegation” (that is, tertiary legislation)⁹—amendments 83L and 83 M (Schedule 7)

11. We have pointed out why the Government’s “good reasons” amendments are not a satisfactory substitute for a necessity test under clauses 7 to 9 and 17. We also draw attention to the Government’s response to our recommendations on tertiary legislation in our 12th Report,¹⁰ which the Government have rejected.
12. Tertiary legislation is unfamiliar to many people in Parliament not least because, from the time that the United Kingdom joined the EEC on 1 January 1973, Ministers have been expressly forbidden from making tertiary legislation when exercising powers under section 2 of the European Communities Act 1972.¹¹
13. The Government have suggested, as a compromise, that where certain regulations¹² made by a Minister confer power on other people (other than Ministers¹³) to make law, there is a requirement for the Minister to explain

9 Acts of Parliament (primary legislation) can confer power on Ministers and others to make regulations, orders, rules etc. (secondary legislation). Exceptionally, Parliament allows secondary legislation to confer power on other people to make law. Law made at this third level is tertiary legislation or “legislative sub-delegation”.

10 Delegated Powers and Regulatory Reform Committee, (12th Report, Session 2017–19, [HL Paper 73](#)), paragraphs 16 and 46

11 Paragraph 1(1)(c) of Schedule 2 to the European Communities Act 1972.

12 Made under clause 7(1), 8, 9 or Part 1 of Schedule 4.

13 No explanation is given for not imposing a similar requirement where the power to legislate is being given to Ministers. The potential significance of conferring a power to legislate is highlighted by the Government’s amendments. New paragraph 22A(6)(a) of Schedule 7 (inserted by Amendment 83L) highlights the fact that it is not limited to creating new powers to legislate, but could also be used to amend an existing power by removing procedural safeguards such as the requirement for the power to be exercised by statutory instrument.

why this is appropriate, as well as a requirement to explain the use of such tertiary legislative powers in an annual report to Parliament.

14. We have already explained the general weakness of such “good reasons/appropriate” provisions. **These Government amendments are no substitute for our recommendations on tertiary legislation:**
 - (a) **Tertiary legislation should be subject to the same parliamentary control and time-limits as are applicable to secondary legislation.**¹⁴
 - (b) **Schedule 4 should not permit fees or charges to be levied by tertiary legislation.**¹⁵
15. Parliament is proposing to confer wide powers on Ministers to make regulations under this Bill, wider powers than we have seen before in peacetime. The Bill also allows Ministers, in turn, to confer wide law-making powers on other people in tertiary legislation. We are not disputing the need for tertiary legislation. We are simply saying that, in our view, the same controls that apply to secondary legislation should also apply to tertiary legislation. Otherwise these controls can be subverted by skeletal secondary legislation where all the detail (and further law-making power) will be found in tertiary legislation.
16. The Government have mentioned in correspondence that “delegated powers granted under the powers in this Bill will be needed for the foreseeable future”. What they have not yet explained is why the delegated powers under clauses 7 to 9 remain time-limited¹⁶ whereas these time-limits can be bypassed by tertiary legislation.¹⁷
17. At paragraph 46 of our 12th Report, we recommended that the imposition of fees and charges under Schedule 4 should be done by Ministers in affirmative statutory instruments, offering the maximum scrutiny short of primary legislation, and not by tertiary legislation. The Government say that, if Ministers wish to confer power on another person to set fees and charges, they must do so by affirmative statutory instrument.¹⁸ But when the person on whom the power is conferred comes to set the fees and charges in tertiary legislation, this legislation does not have to be contained in a statutory instrument or be subject to any parliamentary procedure whatsoever. **We have not been convinced by the Government’s rebuttal and remain of the view expressed in our original report.**

14 Delegated Powers and Regulatory Reform Committee, (12th Report, Session 2017–19, [HL Paper 73](#)), paragraph 16

15 Delegated Powers and Regulatory Reform Committee, (12th Report, Session 2017–19, [HL Paper 73](#)), paragraph 46

16 Regulations under clauses 7 and 8 cannot be made two years after exit day. Regulations under clause 9 cannot be made after exit day.

17 Delegated Powers and Regulatory Reform Committee, (12th Report, Session 2017–19, [HL Paper 73](#)), paragraph 15 and 16

18 Schedule 7, paragraph 1(2)(f).

APPENDIX 1: MEMBERS INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>. The Register may also be inspected in the Parliamentary Archives.