

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

34th Report of Session 2017–19

Agriculture Bill

Ordered to be printed 17 October 2018 and published 17 October 2018

Published by the Authority of the House of Lords

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:

[Baroness Andrews](#)

[Lord Blencathra](#) (Chairman)

[Lord Flight](#)

[Lord Jones](#)

[Lord Lisvane](#)

[Lord Moynihan](#)

[Lord Rowlands](#)

[Lord Thomas of Gresford](#)

[Lord Thurlow](#)

[Lord Tyler](#)

Registered 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 Parliamentary Archives.

Publications

The Committee's reports are published by Order of the House in hard copy and on the internet at www.parliament.uk/hldprrcpublications.

General Information

General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at <http://www.parliament.uk/business/lords/>.

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.

Thirty Fourth Report

AGRICULTURE BILL

1. The Agriculture Bill was introduced in the House of Commons on 12 September 2018 and had its Second Reading on Wednesday 10 October. The Bill provides a legal framework for the United Kingdom to leave the Common Agricultural Policy (CAP) and establish a new system for agricultural support in this country. It is a skeleton bill, the operation of which is essentially a matter for subordinate legislation.
2. Normally we report on a bill in sufficient time to allow Members of the House of Lords to consider it before the bill's committee stage in this House. Given the significance of this Bill as part of the suite of Brexit-related bills, we have reported in time for Members of the House of Commons to consider it at committee stage in their House. We adopted the same approach in relation to the European Union (Withdrawal) Act 2018, an approach that appeared to be welcomed by MPs. In due course, we propose to report on the Agriculture Bill in the form in which it comes to this House.

The Bill's overall approach to delegated powers

3. The Bill contains only 36 clauses and yet confers 26 powers on Ministers to make law. The comparatively large number of delegated powers in an otherwise small-to- medium-sized bill is ominous. The Government say that the Agriculture Bill is a “deliberate departure from the approach under the CAP of setting out detailed legislative rules”. The Bill will “provide the legal framework required to transition out of the EU, replace the CAP and deliver a range of reforms”. It will enable government to “move away from the rigid bureaucratic constraints of the current CAP legislation”.¹
4. **We are dismayed at the Government's approach to delegated powers in the Agriculture Bill.**
 - (a) The Agriculture Bill represents a major transfer of powers from the EU to Ministers of the Crown, bypassing Parliament and the devolved legislatures in Wales and Northern Ireland.²
 - (b) Parliament will not be able to debate the merits of the new agriculture regime because the Bill does not contain even an outline of the substantive law that will replace the CAP after the United Kingdom leaves the EU. Most debate will centre on delegated powers because most of the Bill is about delegated powers. At this stage it cannot even be said that the devil is in the detail, because the Bill contains so little detail.
 - (c) The Government encourage departments to engage in clear, concise, purposeful, informative and targeted consultations before making new

1 Department for Environment, Food and Rural Affairs, [Agriculture Bill Delegated Powers Memorandum](#), paras 6 and 7.

2 Schedules 3 and 4 to the Bill set out law-making powers conferred on Ministers in the governments of Wales and Northern Ireland that are broadly similar to many of the powers in the Bill that are exercisable by the Secretary of State in England.

law. Apart from the one consultation requirement in clause 24(5),³ consultation is merely optional so far as concerns the considerable amount of subordinate legislation to be made under the Agriculture Bill.

- (d) The central purpose of the Agriculture Bill is to provide a framework that confers on Ministers extensive powers to make law in more than two dozen classes of statutory instrument. Extensive powers are conferred on Ministers with correspondingly few duties. The words “The Secretary of State may” occur 36 times in the Bill. The words “The Secretary of State must” occur three times.
 - (e) Significantly, powers are exercisable indefinitely and without sunset clauses.⁴ They include unlimited monetary penalties, the ability to create criminal offences punishable by up to two years’ imprisonment, and the conferral of enforcement functions on third parties. We are not convinced by the need for such extensive powers to be conferred on Ministers indefinitely.
 - (f) It is one thing to move away from rigid and unnecessary bureaucratic constraints. But a bill that is so short on substantive legislative changes will require extensive bureaucratic regulation to fill in the gaps. Parliamentary scrutiny of the Bill is minimised because most of the Bill concerns a framework for future regulatory changes rather than substantive legislative changes that can be debated here and now.
 - (g) In clauses 6, 9 and 11, the introduction of a test allowing Ministers to make changes to existing law that they consider will “simplify or improve” it introduces a wider test even than the heavily criticised “appropriate” test found in the European Union (Withdrawal) Act 2018. One person’s improvement is another person’s vandalism.⁵
 - (h) It is regrettable that Defra has not supplied any indicative draft statutory instruments alongside the Bill. This would have enabled Parliament to see how some of the many powers in the Bill might in due course be exercised, without committing the Government at this stage.
 - (i) The Government are committed to introducing other EU-exit bills, including a fisheries bill, an immigration bill and legislation to implement any withdrawal agreement. We would deplore such bills being skeleton bills in the fashion of the Agriculture Bill.
5. At paragraph 2 of the Explanatory Notes to the Agriculture Bill, the Government give an overview of the Bill in twelve points. All twelve points involve Ministers having the power to make law, including:
- Powers to set unlimited monetary penalties and to create criminal offences punishable by up to two years’ imprisonment
 - Powers to modify retained CAP regulations

3 Relating to new sector-specific provision in regulations made under clauses 22 and 23.

4 Clause 7 gives power for the Secretary of State to phase out direct payments during an “agricultural transition period” set, in clause 5(1), at seven years starting with 2021 and extendable. This power will make way for other financial assistance schemes under clause 1. It is a transitional provision, not a sunset clause.

5 See further para 14 below.

- Powers to intervene in exceptional market conditions
 - Powers to regulate marketing standards for agricultural products
 - Powers to control contractual dealings between producers and first purchasers
 - Powers for the Secretary of State to legislate for the UK to comply with the World Trade Organisation (WTO) Agreement on Agriculture.
6. 17 of the 26 delegated powers allow for regulations to be made by the affirmative procedure. This is a high proportion by the standards of most bills. However, the affirmative procedure offers nothing like the scrutiny given to a bill. A bill typically goes through several substantive stages in each House and can be amended. An affirmative statutory instrument is unamendable during its making and is debated once in each House. The fact that Defra proposes to make so many classes of affirmative instrument in the Agriculture Bill is an acknowledgment that the Bill covers matters of great importance to farmers, the food industry and consumers. The Bill provides an extensive framework for a wholly new agricultural regime. And yet the Bill is very short on matters of substance.
7. The Delegated Powers Memorandum says:
- “This memorandum includes examples of how the powers might be used. One of the reasons for taking delegated powers is that this Bill will be before Parliament before the terms of the UK’s withdrawal from the EU are known, and while full-scale design of future farming policy is under development in consultation with stakeholders and the sector. Any examples used in this paper are therefore illustrative of the way the powers could be used and do not represent confirmed plans at this stage.”⁶
8. We have made it clear that if a bill is wholly or mainly a skeleton bill, we will expect a full justification for the decision to adopt that structure of powers.⁷ Given the significant delegation of powers in this Bill, we did not find convincing the Government’s attempted justifications that consultation is ongoing and that there is not yet a withdrawal agreement. The Agriculture Bill could have contained more detail than it does. There could have been more statutory consultation as a pre-condition to making subordinate legislation. The subject-matter of clause 20 (marketing standards and carcass classification) is worth a bill on its own. As for the structure of the powers in the Bill being justifiable because it is being debated before the withdrawal agreement has been finalised, we disagree. The Government have committed to legislating to give effect to any withdrawal agreement. At that stage, any necessary changes to the Agriculture Bill can be made. The existence or otherwise of a withdrawal agreement is not an argument for giving Ministers so many law-making powers in a bill that offers so little substantive detail.

6 HMG has issued a policy statement and two press notices which give some information: ‘The future for food, farming and the environment’ (13 September 2018): <https://www.gov.uk/government/publications/the-future-for-food-farming-and-the-environment-policy-statement-2018> [accessed 17 October 2018]; ‘Landmark Agriculture Bill to deliver a Green Brexit’ (12 September 2018): <https://www.gov.uk/government/news/landmark-agriculture-bill-to-deliver-a-green-brexite> [accessed 17 October 2018] and ‘UK Government Agriculture Bill - Scotland myth-buster’ (13 September 2018): <https://www.gov.uk/government/news/uk-government-agriculture-bill-scotland-myth-buster> [accessed 17 October 2018].

7 See para 36 of our [Guidance for Departments](#) issued in 2014.

9. It is true that the extensive powers in this Bill largely replace directly applicable EU regulations. **But the practical effect of the Bill is that very considerable repatriated powers are momentarily returning to Parliament on exit day only to be immediately granted to Ministers of the Crown.**

Particular delegated powers

Clauses 3(2)(g), 20(4)(e) and 23(4)(d): monetary penalties

10. Clauses 3(2)(g), 20(4)(e) and 23(4)(d) confer power on the Secretary of State to make regulations about monetary penalties concerning the following:
- (a) checking, enforcing and monitoring in connection with the financial assistance provisions of the Bill (clause 3(2)(g));
 - (b) marketing standards relating to certain agricultural products (clause 20(4)(e));
 - (c) requirements on recognised organisations who benefit from certain competition law exemptions (clause 23(4)(d)).
11. These provisions relate to enforcement and allow the Secretary of State to make regulations “imposing monetary penalties”. By contrast, clause 16(4)(a), relating to the enforcement of information requirements, gives considerably more detail about the imposition of monetary penalties in regulations under that clause:
- “(a) provision for the imposition of monetary penalties for non-compliance with requirements, whether penalties—
- (i) of a specified amount, or
 - (ii) of an amount calculated in a specified manner, or
 - (iii) of an amount, not exceeding a specified maximum or a maximum calculated in a specified manner, decided by a specified person or a person of a specified description, or
 - (iv) by way of suspending, or withholding, payment of any amounts;
- (b) provision for recovery of amounts due in respect of monetary penalties, including provision for any of interest, set-off and security for payment;”.
12. **We recommend that the Minister be asked to explain why the extended treatment for monetary penalties found in clause 16 should not also apply to clauses 3(2)(g), 20(4)(e) and 23(4)(d).**

Clauses 6, 9 and 11(2): basic payment and financial support

13. Clause 6(1) allows the Secretary of State to make regulations amending or repealing legislation governing the basic payment scheme⁸ for or in connection with making changes the Secretary of State “considers will simplify or improve” the scheme so far as it operates in relation to England. Clauses 9 and 11 contain similar provisions allowing the Secretary of State to simplify or improve retained direct EU legislation relating to the financing,

8 As defined in clause 4(3).

management and monitoring of the CAP (clause 9) and support for rural development (clause 11).

14. During the passage of the European Union (Withdrawal) Act 2018, Ministers came under sustained criticism for taking powers to make law that they considered “appropriate” (rather than necessary) to correct deficiencies in retained EU law arising from the United Kingdom’s withdrawal from the EU. At least section 8(2) and (3) of that Act gives an exhaustive definition of what counts as a deficiency in retained EU law. By contrast, the “simplify or improve” test in clauses 6, 9 and 11 of the Agriculture Bill gives the Minister a much wider discretion than does the “appropriate” test in the European Union (Withdrawal) Act 2018. It allows Ministers to do what they like, providing they consider it a simplification or improvement. The Government acknowledge that the powers under clauses 6, 9 and 11 can significantly increase bureaucratic burdens providing they qualify as improvements or simplifications.⁹ Indeed, something could qualify as a simplification even if not amounting to an improvement, and *vice versa*.
15. In the context of clause 6, the Government’s expressed intention is only to make “technical changes” to the basic payment scheme. The negative procedure is justified on the ground that the amendments will “largely be minor or technical simplification measures”.¹⁰ But this restriction does not appear on the face of the Bill. The delegated powers in clauses 6, 9 and 11 allow for much more than minor or technical simplifications. The powers allow highly controversial and indubitably major “improvements”.
16. **We regard the “simplification or improvement” test in clauses 6, 9 and 11 as inappropriate. It is a highly subjective test. A clearer, more focused and proportionate test is required. If the delegated powers in clauses 6, 9 and 11 will largely be for “minor or technical” simplification measures, the Bill should say so.**

Clause 20: marketing standards

17. Clause 20 is a very significant clause, allowing the Secretary of State to make affirmative regulations concerning marketing standards in relation to a wide range of agricultural products, including milk, beef, veal, poultrymeat, eggs, fruit, vegetables, hops, wine, olive oil and live plants. We would ordinarily expect a clause of this exceptional range to be a bill in its own right.
18. Clause 20(2) states that the regulations “may cover matters such as” (implying that they may go beyond):
 - Grading into classes, weight, size, age and category
 - Presentation, labelling, packaging
 - Appearance, consistency, product characteristics, water content
 - Content, purity and identification of substances used in production
 - Types of farming and production method

⁹ Department for Environment, Food and Rural Affairs, [Agriculture Bill Delegated Powers Memorandum](#), paras 29 and 45.

¹⁰ *Ibid.*, paras 32 and 60.

- Frequency of collection, delivery, preservation, handling, temperature, storage and transport
 - Use and restrictions on use
 - The place of farming or origin
 - Conditions of disposal, holding, circulation and use of products not in conformity with the marketing standards.
19. The regulations allow Ministers to create a powerful enforcement regime against farmers, food processors and others, including:
- powers of entry, inspection, search and seizure;
 - unlimited monetary penalties;
 - criminal offences punishable by up to two years' imprisonment; and
 - the conferral of enforcement functions on third parties.¹¹
20. The current EU legislation relating to marketing standards will become retained EU law under the European Union (Withdrawal) Act 2018. Changes to such law made by regulations under section 8 of that Act are limited by the need to show that changes are appropriate to correct deficiencies in that law arising from the UK's withdrawal from the EU and by the provision that no regulations may be made under section 8 more than two years after exit day. By contrast, regulations made under clause 20 of the Agriculture Bill are subject to no such restrictions.
21. The Government have not given much indication as to how they propose to use their extensive powers under clause 20. Paragraphs 112 and 116 of the Delegated Powers Memorandum state the Government's intention not to impose an "excessive burden" on farmers or other members of the food supply chain. Paragraph 116 states that the regulations will amend overly bureaucratic EU rules. However, the Bill neither prevents excessive burdens being imposed nor requires the removal of overly bureaucratic rules.
22. **Clause 20 contains an inappropriately wide delegation of power to Ministers. The Bill should contain more detail on the relevant principles, policies and criteria underlying marketing standards in the various agricultural sectors.**¹²
- Clause 25(3)(b): fair dealing obligations of first purchasers of agricultural products*
23. Clause 25 addresses the relatively weak economic position of some primary producers compared with food processors and others in agri-food supply chains. The Secretary of State has power to make regulations imposing contractual obligations on first purchasers of agricultural products from producers.
24. Clause 25(3) allows three types of obligation to be imposed under regulations:
- (a) The obligation to contract in writing.

11 For example, clauses 20(4) and 29(5).

12 The Government may add further sectors by a Henry VIII power: Schedule 1, Part 3, para 1.

- (b) The obligation to include, or not to include, contractual terms dealing with matters specified in regulations.
 - (c) Where such terms are included: (i) obligations relating to the provision that must be made by those terms and (ii) obligations to comply with specified principles and practices as to the provision that should be made by those terms.
25. Regulations under clause 25(3)(c) must adopt the affirmative procedure; other regulations need only adopt the negative procedure.¹³ The Government justify the affirmative procedure because intrusion into the commercial relationship between third parties warrants a higher degree of parliamentary scrutiny. However, for regulations to require the parties *not to include* certain specified contractual terms is also an intrusion into the commercial relationship between third parties. **We recommend that regulations under clause 25(3)(b) should be subject to the affirmative procedure.**

Schedule 1, Part 3, paragraph 1(1)(a)

26. Part 1 of Schedule 1 lists the agricultural sectors for which marketing standards may be set (clause 20). Part 2 of Schedule 1 lists the agricultural sectors in which producers are eligible for producer organisation recognition (clauses 22–24) and the agricultural sectors in relation to which the Secretary of State may make regulations promoting fair contractual dealing by first purchasers (clause 25). Paragraph 1(1)(a) of Part 3 contains a Henry VIII power allowing the Secretary of State to add or remove an agricultural sector to or from Part 1 or 2 of Schedule 1. The power is subject only to the negative procedure.
27. We normally expect Henry VIII clauses to be subject to the affirmative procedure in the absence of compelling reasons to the contrary. Here the effect of adding new agricultural sectors to Schedule 1 is to impose significant new burdens on industry. It is not necessarily correct to say, as the Delegated Powers Memorandum does, that the power will be “exclusively of a technical nature”.¹⁴ **We recommend that regulations under paragraph 1(1)(a) of Part 3 of Schedule 1 should be subject to the affirmative procedure.**

¹³ Clause 25(8) and (9).

¹⁴ Para 207.

APPENDIX 1: MEMBERS AND DECLARATIONS OF 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.

For the business taken at the meeting on 17 October 2018, Members declared the following interests:

Baroness Andrews

Vice President, National Parks Association

Lord Lisvane

Countryside Alliance

Lord Tyler

Ambassador, The National Forest, UK

Attendance

The meeting on the 17 October 2018 was attended by Baroness Andrews, Lord Blencathra, Lord Jones, Lord Lisvane, Lord Moynihan, Lord Rowlands, Lord Thomas of Gresford and Lord Tyler.

The Chairman recused himself from the deliberation and took no part in it because of his role as Deputy Chairman of Natural England.