

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

42nd Report of Session 2017–19

**Financial Services
(Implementation of Legislation)
Bill [HL]**

**Tenant Fees Bill: Government
Response**

**Homes (Fitness for Human
Habitation) Bill**

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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:

[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

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General Information

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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.

Forty Second Report

FINANCIAL SERVICES (IMPLEMENTATION OF LEGISLATION) BILL [HL]

1. This Bill, which had its Second Reading on 4 December, will provide the Treasury with power to implement and make changes to “in flight” files of EU financial services legislation. “In flight” files are pieces of European legislation that either have been adopted and do not yet apply or are currently in negotiation. In each case the date of application of this legislation is expected to be after 29 March 2019, the day on which the UK is expected to withdraw from the European Union, and therefore none of the pieces of legislation would constitute retained EU law by virtue of the European Union (Withdrawal) Act 2018 (“EUWA”).
2. The Treasury have provided a Delegated Powers Memorandum.¹

The ‘no deal’ premise

3. The Bill is presented both in the Explanatory Notes and in the Delegated Powers Memorandum as if the powers it is conferring will only apply in a ‘no deal’ scenario. However, there is nothing on the face of the Bill to limit the powers so that they can only be exercised where no deal is reached in relation to the UK’s withdrawal from the EU. While it may well be that in practice the powers would not be capable of being exercised in a situation where agreement has been reached, because doing so would be incompatible with the terms of the agreement, this cannot be known for certain until the withdrawal agreement has been entered into.
4. The Committee is mindful of the recent report of the Lords Economic Affairs Select Committee (the EAC) entitled *The Powers of HMRC: Treating Taxpayers Fairly*.² We acknowledge that that report concerns a subject quite different to that of the Bill. It raises, however, a point of general application about the breadth of powers conferred and their subsequent use. Referring to witnesses who included Malcolm Gammie QC and the Institute for Fiscal Studies Tax Law Reform Committee, the EAC commented that “broad, badly targeted legislation” was “unsatisfactory” because, amongst other things, it left “too much to HMRC discretion or to guidance”.³ This reaffirms a point to which the DPRRC attaches great significance and one made by the DPRRC in its report on the European Union (Withdrawal) Bill, namely that: “We judge powers not on how the Government say that they will use them but on how any Government might use them”.⁴
5. Furthermore, the assumption that the Bill will only apply in a ‘no deal’ scenario has led in our view to inconsistencies in the drafting of the Bill.

1 HM Treasury, [Financial Services \(Implementation of Legislation\) Bill \[HL\] Delegated Powers Memorandum](#)

2 Economic Affairs Committee, [The Powers of HMRC: Treating Taxpayers Fairly](#) (4th Report, Session 2017–19, HL Paper 242)

3 *Ibid.*, para 127

4 Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill](#) (12th Report, Session 2017–19, HL Paper 73), para 23

6. An important aspect of the Bill is that the powers it confers are time limited and will only be capable of being exercised until the end of a period of two years beginning with exit day. Coupled with this are the requirements on the Treasury to report on the exercise of the powers. Under clause 1(8) and (9) the Treasury must publish a first report before the end of April 2020 and a second report before the end of April 2021.
7. It is clear that the reporting periods are intended to reflect the two-year period after exit day. However, for this to work exit day would necessarily have to fall on 29 March 2019. While section 20(1) of the EUWA defines exit day as 29 March 2019 at 11pm, section 20(4) allows the time of exit day to be changed if the EU Treaties continue to apply to the UK after 29 March 2019 because a withdrawal agreement has been concluded.
8. **In our view, the provisions fixing the period when the powers under clause 1 may be exercised, and the provisions governing reporting, should be consistent. We recommend, therefore, that if specific dates are to be used in the provisions on reporting, then the period fixing when the powers may be exercised should also be based on a specified date.**

Clause 1—Power to implement EU financial services legislation

9. Clause 1(1) confers a power on the Treasury to make provision by regulations which corresponds or is similar to the EU financial services legislation referred to in clause 1(2), or which corresponds or is similar to any provision which might be made by a member State for the purposes of implementing that legislation.
10. The relevant legislation falls into the following categories:
 - EU financial services legislation which has already been adopted but which will not apply before exit day on 29 March 2019 (clause 1(2)(a) to (d) and (f));
 - Delegated acts which are adopted by the European Commission under the Prospectus Regulation, where those acts are adopted before 21 July 2019 (clause 1(2)(e));
 - EU legislation adopted as a result of the proposals for legislation listed in the Schedule to the Bill (clause 1(2)(g)).
11. The powers conferred by clause 1(1) are not limited to making provision which corresponds or is similar to the relevant EU financial services legislation. Clause 1(1)(b) also allows the Treasury to make any adjustments it considers appropriate to the relevant legislation, including (but not limited to) adjustments in connection with the withdrawal of the United Kingdom from the EU. This is therefore a broader power than that conferred by section 8 of the EUWA where the power to make modifications is limited to remedying deficiencies resulting from the UK's withdrawal from the EU.
12. Regulations under clause 1(1) are subject to the affirmative resolution procedure in respect of all exercises of the power.
13. The Treasury explain that, as a member of the EU, the UK has primarily derived its financial services legislation from the EU. Although the EUWA has the effect of bringing into domestic law EU legislation which applies

immediately before exit day, it does not have that effect for EU legislation which does not apply by that date. The purpose of the Bill is to address this gap in the legislative framework and to allow the Treasury to implement through regulations the specific pieces of EU financial services legislation identified in clause 1. It is stated that the list of EU financial services legislation in the Bill comprises “the key pieces of legislation without which there would be a risk to the reputation, global competitiveness and efficiency of the UK’s financial markets”.

14. The Treasury also explain why the powers are not limited to making provision which corresponds or is similar to that contained in the relevant EU legislation; but includes a broad power to make adjustments which is not limited to making adjustments in connection with the UK’s withdrawal from the EU. The Memorandum states:

“There will also be uncertainty as to how the negotiations around each in-flight file listed in the Schedule will conclude once the UK has exited the EU, and it is possible that the legislation might not accommodate for the specificities or interests of the UK market. A power is therefore needed to make adjustments to the legislation to fix any deficiencies and to ensure that it applies appropriately to UK markets.”⁵
15. We note that these reasons do not explain why the power is required in respect of *all* the EU legislation to which the powers relate. Instead, they are only relevant to those cases where the EU legislation is still in negotiation and therefore it is not possible to know what the final form of that legislation will be. The Memorandum does not explain why the power to make adjustments conferred by clause 1(1)(b) is required for the EU legislation referred to in clause 1(2) which has already been adopted and is already in its final form.
16. **The power to make adjustments is a very broad one with no restrictions on what the modifications may relate to or the circumstances in which they may be made. In the absence of any explanation, we consider the power to be inappropriate in so far as it relates to EU legislation that has already been adopted. We recommend that the power should in that case be limited (by analogy with section 8 of the EUWA) to a power to remedy deficiencies arising from the UK’s withdrawal from the EU.**
17. Clause 1(1) does not require the Treasury to implement the EU financial services legislation identified in clause 1(2) and the Schedule to the Bill. Instead, it confers on the Treasury a power to make provision corresponding or similar to the provisions or “any of the provisions” of the relevant EU financial services legislation. It is therefore a matter for the discretion of the Treasury as to whether a particular EU instrument is implemented. Even where the Treasury decides to implement a particular EU instrument, the Treasury has a choice as to which provisions of that legislation it implements. It is not under an obligation to implement all of its provisions. This aspect of the power is significant because the overall effect of the legislation might vary quite substantially depending on which provisions are implemented and which provisions are not.

5 HM Treasury, [Financial Services \(Implementation of Legislation\) Bill \[HL\] Delegated Powers Memorandum](#), para 11

18. The Treasury explain in the Delegated Powers Memorandum why they have adopted this approach.⁶ Again, that explanation is based on the fact that in many cases the legislation is still under negotiation and therefore it is critical that the UK has the power to choose only to implement those provisions that are necessary and beneficial for the UK.
19. We accept that there needs to be a discretion to determine whether to implement specific provisions of legislation, where that legislation is still under negotiation and not yet in its final form. However, we consider the position to be different where the legislation has already been adopted and is in its final form. In that case, it seems to us that the Treasury should have no such discretion since it should be possible for the Treasury to know now whether it is in the UK's interests for particular provisions of that legislation to be implemented. **We recommend, therefore, that specific provisions should only be identified in clause 1(2) if those provisions are necessarily going to be implemented in UK law.**

TENANT FEES BILL: GOVERNMENT RESPONSE

20. We considered this Bill in our 35th Report of this Session.⁷ The Government have now responded by way of a letter from Lord Bourne of Aberystwyth, Minister for Faith at the Ministry of Housing, Communities and Local Government, printed at Appendix 1.

HOMES (FITNESS FOR HUMAN HABITATION) BILL

21. There is nothing in this Bill which we would wish to draw to the attention of the House.

6 *Ibid.*

7 Delegated Powers and Regulatory Reform Committee, *Thirty Fifth Report* (35th Report, Session 2017–19, HL Paper 202)

APPENDIX 1: TENANT FEES BILL: GOVERNMENT RESPONSE

Letter from Lord Bourne of Aberystwyth, Minister for Faith at the Ministry of Housing, Communities and Local Government, to the Rt Hon. Lord Blencathra, Chairman of the Delegated Powers and Regulatory Reform Committee

I am writing to respond to the 35th Report of the Delegated Powers and Regulatory Reform Committee that considered the Tenant Fees Bill and which was published on 23 October 2018.

I am grateful to the Committee for their report on the delegated powers memorandum produced to support the Tenant Fees Bill and have thoroughly considered the Committee's view on submitting the statutory guidance for enforcement authorities to Parliamentary scrutiny. However, I do not intend to accept the recommendation that the enforcement guidance should be subject to the negative Parliamentary procedure.

I respectfully maintain the position that it is unnecessary to debate the contents of this guidance in Parliament since Parliament will approve the overarching enforcement principles by enacting the legislation.

The function of the guidance is to support enforcement authorities in applying that legislation consistently, whilst allowing them a measure of discretion. It will include detail inappropriate for parliamentary scrutiny such as reporting processes. It is also important to have the ability to easily update the guidance following review of the practical operation of the ban in the marketplace.

Similar guidance has not been subject to any parliamentary procedure. This includes guidance on banning orders in the private rented sector produced under the Housing and Planning Act 2016, guidance regarding capital finance under section 15 of the Local Government Finance Act 2003, guidance regarding the community infrastructure levy under section 221 of the Planning Act 2008 and guidance under section 31 of the Small Business Enterprise and Employment Act 2015 regarding the appropriateness of including a review provision in secondary legislation.

There is nothing contained in the guidance that is not already set out on the face of the Bill and therefore subject to full Parliamentary scrutiny. My officials have been working with local authorities to produce the guidance and I have attached, at Annex A,⁸ the current draft to this letter and have also shared this draft with all Members of Parliament and Peers to give them the opportunity to scrutinise and provide comment. I hope this reassures the Committee as to the contents and intent of the guidance.

The Tenant Fees Bill is due to have its Lords Report Stage on 11th December. Government is proposing a number of amendments to strengthen the protections in the Bill. A full list of these amendments is attached at Annex B⁹ but in summary the amendments are to:

8 Annex A has not been printed. See: Ministry of Housing, Communities and Local Government, draft [Statutory Guidance for Enforcement Authorities](#)

9 Annex B has not been printed. See: [Tenant Fees Bill marshalled list of amendments to be moved on report](#), [HL Bill 129-R-I]

- Lower the level of the deposit cap to 5 weeks' rent for properties where the annual rent is less than £50,000. The deposit cap will remain at 6 weeks' rent for properties where the annual rent is £50,000 or more;
- List default fees on the face of the Bill with these limited to late rent and lost key or other security device giving access to the housing;
- Introduce greater transparency around holding deposits. This is particularly to require that landlords and agents can only take one holding deposit at a time and to ensure that they give tenants reasons why they are retaining a holding deposit;
- Remove local authorities (including the Greater London Authority) and those acting on behalf of a local authority from the definition of relevant person;
- Exempt certain licences to occupy housing where advice or assistance is provided by charities or community interest companies to the licensor or licensee in connection with the grant, renewal or continuance of the license and where no rent is paid and the only consideration of granting the license is companionship or companionship and care or assistance;
- Address deficiencies in the client money protection legislation; and
- Make minor and technical amendments to address drafting issues.

None of the proposed amendments introduce any additional delegated powers but I did want to draw the Committee's attention to amendment 19 in Annex B, which amends the enabling powers contained in section 134 of the Housing and Planning Act 2016.

This amendment provides that regulations under this section may confer a discretion on the Secretary of State in connection with the approval or designation of a client money protection scheme, the conditions which must be complied with by the administrator of such a scheme, the amendment of such a scheme or the withdrawal of approval or revocation of designation of such a scheme.

These amendments are aligned with those in the Housing and Planning Act and do not give the Secretary of State any additional powers but provide clarification on those that are there. Subsection 2 of clause 134 already states:

the regulations may, in particular, make provision about:

- (a) the making of applications for approval;
- (b) conditions which must be satisfied before approval may be given or a scheme may be designated;
- (c) conditions which must be complied with by administrators of approved or designated client money protection schemes (including conditions requiring the issue of certificates for the purposes of regulations under section 133(3) and about the form of those certificates); and
- (d) the withdrawal of approval or revocation of a designation.

The detail of how these powers will be used is set out in the *Client Money Protection Schemes for Property Agents (Approval and Designation of Schemes) Regulations 2018* and the *Client Money Protection Schemes for Property Agents (Requirement to belong to a Scheme etc) Regulations* and the proposed amendments attached at Annex B.

APPENDIX 2: 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 12 December 2018, Members declared no interests.

Attendance

The meeting on the 12 December 2018 was attended by Baroness Andrews, Lord Blencathra, Lord Flight, Lord Jones, Lord Lisvane, Lord Rowlands, Lord Thomas of Gresford, Lord Thurlow and Lord Tyler.