HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

7th Report of Session 2017–19

European Union (Approvals) Bill

Finance Bill

Northern Ireland Budget Bill

Sanctions and Anti-Money Laundering Bill [HL]

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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:

Lord Blencathra (Chairman)
Baroness Dean of Thornton-le-Fylde
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 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.

Seventh Report

EUROPEAN UNION (APPROVALS) BILL

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

FINANCE BILL

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

NORTHERN IRELAND BUDGET BILL

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

SANCTIONS AND ANTI-MONEY LAUNDERING BILL [HL]

4. The Sanctions and Anti-Money Laundering Bill had its Second Reading on 1 November. It is concerned with two matters:

   - It confers powers on Ministers to make sanctions regulations for the purpose of implementing UN and other international obligations, as well as for other purposes concerned with the prevention of terrorism, national security and furthering the UK's foreign policy objectives.

   - It confers powers on Ministers to make regulations concerned with the detection, investigation and prevention of money laundering and terrorist financing, and implementing Standards published by the Financial Action Task Force relating to combating threats to the integrity of the international financial system.

5. The Foreign and Commonwealth Office (FCO) has provided a memorandum about the delegated powers in the Bill.[1]

6. We wish to draw to the attention of the House the delegation of powers in clauses 1, 16, 39 and 41.

Clause 1—Sanctions regulations

7. The core of Part 1 of the Bill is the power conferred on an appropriate Minister[2] to make sanctions regulations. Sanctions regulations may be made where the Minister considers that doing so is appropriate for any of the following purposes:

   a. for the purpose of complying with an obligation imposed on the UK by virtue of a UN Security Council Resolution (clause 1(1)(a));

   b. for the purpose of complying with any other obligation imposed on the UK under an international agreement (clause 1(1)(b));

1 Foreign and Commonwealth Office, *Sanctions and Anti-Money Laundering Bill [HL]: Delegated Powers Memorandum*: https://publications.parliament.uk/pa/bills/lbill/2017–2019/0069/18069-DPM.pdf

2 Defined by clause 1(7) to mean the Secretary of State or the Treasury.

c. for carrying out a purpose which the Minister considers would:

- further the prevention of terrorism (clause (1)(2)(a)),
- be in the interests of national security(clause (1)(2)(b)),
- be in the interests of international peace and security (clause (1)(2)(c)), or
- further a foreign policy objective of the UK (clause 1(2)(d)).

8. The kinds of measures which may be included in sanctions regulations are listed in clause 1(4). They are:

- financial sanctions;
- immigration sanctions;
- trade sanctions;
- aircraft sanctions;
- shipping sanctions;
- other UN sanctions.

9. The specific measures which may be included under each of these headings are set out in clauses 2 to 7 and Schedule 1. They are very wide ranging and include:

- asset freezing measures,
- measures to refuse a person leave to enter the UK or leave to remain,
- measures preventing the import or export of goods, the provision of services and the transfer of technology, and
- measures which would allow aircraft and ships to be detained or prevented from entering or leaving the UK.

It is self-evident that the measures which may be contained in sanctions regulations are liable to have a very significant, and potentially very damaging, effect on the ability of persons at whom they are aimed to conduct their lives, to manage their affairs and to carry on business. They also have the potential significantly to interfere with a person's enjoyment of their property.

10. Measures in sanctions regulations are generally aimed at designated persons and persons connected with a country prescribed in the regulations, as well as being aimed at prescribed countries themselves.

11. In each case the powers are framed so as to give Ministers a very wide discretion to determine who falls within each category. Where regulations provide for a sanctions measure to apply to a person connected with a country prescribed in the regulations, the Bill allows the Minister to determine the nature of the required connection in the regulations themselves. In the case of designated persons, designations may be made by description as well as by naming specific persons. The only limits on who may be designated are that the person is reasonably suspected of being involved in an activity specified in the regulations, and the Minister considers it appropriate to designate the

person having regard to the purpose of the sanctions regulations. The only restriction on the activities which may be specified in the regulations is that the Minister considers it appropriate to specify the activity having regard to the purpose of the regulations. The Bill also confers power on the Minister to make provision in the regulations as to what is meant by a person being "involved with" a particular activity.

12. The Bill allows sanctions regulations to include provisions which supplement the sanctions measures included in the regulations. This includes powers to require the provision of information, and to require the inspection and production of documents supported by powers of entry. Sanctions regulations are also authorised to include provision for the enforcement of sanctions. This includes the power to create criminal offences and to make provision about defences and evidentiary matters in relation to such offences. The Bill limits the maximum penalty which may be imposed for such an offence to 10 years' imprisonment.

13. Part 1 of the Bill provides certain checks and protections with respect to sanctions regulations and designations made under sanctions regulations. These include the right of persons designated under sanctions regulations to request a review of their designation and the requirement for the Minister to review certain kinds of designations every three years irrespective of whether a request for review is made. The Minister is also under a duty to carry out an annual review, where sanctions regulations are made, to determine whether the regulations are still appropriate for their purpose. There is provision for review by the courts of decisions on designations and of other decisions taken by Ministers in exercise of their functions under Part 1 of the Bill.

14. The context for the Bill's provisions is the UK's withdrawal from the European Union. The FCO explains in the memorandum that currently sanctions (including sanctions implementing UN Security Council Resolutions) are for the most part implemented through directly effective EU legislation supplemented by regulations made under section 2(2) of the European Communities Act 1972 ("the 1972 Act"). Once the 1972 Act is repealed and the UK ceases to be a member of the European Union, the UK will no longer be able to implement sanctions through the mechanisms which are available through its membership of the European Union. Although there are provisions in existing primary legislation which allow the imposition of sanctions, the powers they confer are less extensive and are generally more specific as to the circumstances in which they apply.

15. In paragraph 49 of the memorandum it is stated that the new powers are considered by the Government to be essential if the UK is to continue to comply with its obligations under international law (and in particular the UN Charter) and to take an active role with international partners in sanctions going forward. It is argued that it is not appropriate for primary legislation to contain the detail of each sanctions regime, since this would inhibit the Government's ability to implement sanctions quickly in response to global events and to satisfy its international obligations.

16. We accept that, in the light of the UK's withdrawal from the European Union, it is reasonable for Government to establish a comprehensive mechanism that will allow them to ensure that the UK is able to comply with its international obligations with respect to sanctions, particularly those obligations which arise under the UN Charter. We also accept that it is appropriate for this

mechanism to operate through the exercise of delegated powers, because of the need to react quickly in response to global events and to ensure timely compliance with the UK's international obligations; and that these powers need to be drawn widely because of the variety of circumstances in which they may need to be applied.

17. However, we are also mindful of the fact that clause 1, when read together with the other provisions of Part 1, confers exceptionally wide powers which are capable of being applied to a very wide range of persons, with a very wide discretion being given to Ministers to determine the persons against whom sanctions measures may be applied. The sanctions measures are inherently intrusive with the potential to have a significant impact on the rights of individuals.

18. **As drafted, clause 1(1) allows the Minister to make sanctions regulations where the Minister considers that doing so is "appropriate" to achieve one of the purposes listed in that clause. In the light of the width and significance of the powers, we take the view that the Minister should only have power to make sanctions regulations if doing so is considered "necessary" to achieve the purpose for which they are made.**

19. Subsection (2) of clause 1 sets out the purposes for which sanctions regulations may be made where it relates to a matter other than complying with an obligation imposed on the UK under an international agreement. The purposes are defined by reference to a list of objectives set out in paragraphs (a) to (d) of that subsection ("the listed objectives") (see paragraph 7 above).

20. In our view, there is a distinction between sanctions which are imposed for the purpose of complying with an international obligation and those imposed for a purpose falling within subsection (2), where the decision to impose sanctions, and the nature of the sanctions imposed, represents a policy choice that the UK Government is free to make or not to make without any risk of breaching international law. Also, while we consider objectives based on the prevention of terrorism (subsection (2)(a)) and the interests of national security (subsection (2)(b)) provide a reasonably clear basis for the imposition of sanctions, the same is not true of the other two objectives. In our view, the scope of the objectives concerned with international peace and security (subsection (2)(c)) and furthering a policy objective of the UK (subsection (2)(d)) is very wide, and therefore they are capable of being used to impose sanctions in a broad range of circumstances that cannot be predicted.

21. Under clause 1(2) a Minister is allowed to make sanctions regulations for a purpose if the Minister "considers" that carrying out that purpose would achieve one of the objectives listed in that subsection. In the light of the matters referred to in paragraph 17, and having regard to the width and intrusiveness of the powers conferred by clause 1, we do not believe this sets a high enough threshold for imposing sanctions which are not linked to compliance with an international obligation. **In our view, an appropriate Minister should only be allowed to make sanctions regulations for a purpose other than compliance with an international obligation, where there are compelling reasons for the Minister's belief that carrying out the purpose will achieve one of the objectives listed in clause 1(2).**

Parliamentary procedure for the scrutiny of sanctions regulations

22. Sanctions regulations are subject to different levels of Parliamentary scrutiny depending on what the regulations relate to. Where a statutory instrument contains regulations which are made for the purpose of complying with obligations imposed on the UK by virtue of a UN Security Council Resolution (referred to below as "UN regulations"), they are subject to the negative procedure.[3] In any other case a statutory instrument containing sanctions regulations is subject to the affirmative procedure.

23. The FCO explains why the negative procedure has been chosen for UN regulations in paragraph 56 of the memorandum. It notes that, where the UN Charter requires the UK to carry out binding decisions of the UN Security Council, the UK has no discretion whether to comply. The memorandum goes on to say:

> "Therefore any affirmative procedure … which would involve obtaining Parliamentary approval each time a sanctions regime was put in place, would put the UK in breach of its obligations under international law to implement UN sanctions were Parliament not to approve the regulations."

24. We are not convinced by this argument. The logic of the argument—namely, that it would be wrong for a power to be given to Parliament which would allow it to prevent the UK Government from complying with UN obligations—applies equally to the negative procedure as well as to the affirmative procedure. Further, we expect that it will not always be the case that the form of the regulations presented to Parliament will be tightly constrained by the UN Security Council Resolution they are implementing. It may be the case that the UN Security Council Resolution imposes broad requirements on States, giving a large measure of discretion to the States themselves to determine the precise form and means by which those requirements are met. If so, it must in our view be reasonable for Parliament to have the opportunity fully to scrutinise the choices that the Government make in implementing a UN obligation.

25. **Given the wide powers conferred by clause 1, their intrusive nature and the extent to which they are liable to affect individual rights, we take the view that sanctions regulations should be subject to the affirmative procedure even where they are limited to securing compliance with a UN Security Council Resolution.**

26. Under clause 45(1), the affirmative procedure applies to a statutory instrument containing non-UN regulations (that is, sanctions regulations which do not implement UN obligations) only if the instrument does not also contain any UN regulations. Therefore, a statutory instrument which contains both UN regulations and non-UN regulations will be subject to the negative procedure; in other words the lower level of scrutiny which applies to UN regulations rather than the affirmative procedure which applies to non-UN regulations. No reasons are given in the memorandum for this approach.

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3 This is subject to one exception. The draft affirmative procedure applies where UN regulations amend primary legislation.

27. **The usual approach in legislation, where a statutory instrument includes both provisions subject to the negative procedure and those subject to the affirmative procedure, is to require the higher level of parliamentary scrutiny to apply. This ensures that it is not possible to reduce the level of scrutiny given to provisions made under delegated powers by combining them with other provisions subject to a lower level of scrutiny. We take the view that the same approach should be adopted here.**

Clause 16—Criminal offences

28. As noted above, clause 16 authorises sanctions regulations to make provision for the enforcement of prohibitions and requirements contained in the regulations. This includes the power to create criminal offences with punishments of up to 10 years in prison. The issue of the creation of criminal offences is addressed in this Committee's most recent guidance for Departments (July 2014). The guidance states at paragraph 38 that "where the ingredients of a criminal offence are to be set by delegated legislation, the Committee would expect a compelling justification."

29. The FCO's reasons for allowing the creation of criminal offences by subordinate legislation are set out in paragraph 53 of the memorandum. It states that setting out the detail of criminal offences in the Bill solely by reference to the powers under which sanctions regulations will be made would risk producing the wrong results. It goes on to say that, until the prohibitions and requirements are created in the regulations, it is impossible to know who can commit an offence of breaching them, how serious such an offence is, and what is the appropriate penalty. Trying to set out the offences in primary legislation would risk producing offences and penalties that are defective or disproportionate or both. It would also run counter to the general principle that provisions creating criminal offences should be precisely drafted and clear in their effect.

30. We consider that the FCO's reasons provide a compelling case for allowing the creation of criminal offences in sanctions regulations. In our view it must be reasonable for the prohibitions and requirements imposed by sanctions regulations to be backed by criminal offences. Since the powers to impose prohibitions and requirements in sanctions regulations are so wide, it necessarily follows that the types and range of offences which may be needed in connection with a breach of those prohibitions and requirements must also be very broad. **Nevertheless, given the very wide powers and the very high penalties which are capable of being set for criminal offences under the regulations, we consider that sanctions regulations which make provision for criminal offences should be subject to the affirmative procedure even if the negative procedure would otherwise apply to the regulations.**

Clause 39—Power to amend Part 1 to authorise additional sanctions

31. Clause 39 confers a Henry VIII power. It allows the Secretary of State or the Treasury to amend Part 1 of the Bill to allow sanctions regulations to impose prohibitions or requirements which are additional to those contained in Part 1 of the Bill. Clause 39(2) makes it clear that this includes a power to amend the list of sanctions in clause 1(4) and therefore provide for additional categories of sanctions. Regulations under clause 39 are subject to the affirmative procedure.

32. Clause 39 imposes no limits on the kinds of measures which could be introduced by means of this power. The only limitation is that any additional measures must reasonably relate to a purpose for which sanctions regulations may be made. Accordingly, it would, for example, be possible to use this power to impose restrictions on a designated person's movement within the UK as a national security measure. It would appear that the power could also be used to extend the categories of person against whom the existing sanctions measures could be imposed (for example, extending asset freezing measures to persons other than designated persons and connected persons).

33. The reasons for taking the powers conferred by clause 39 are set out at paragraph 76 of the memorandum:

> "This power would allow the Secretary of State to react to changes in circumstance which may require a new kind of sanction to be imposed quickly. It is not possible to predict all the kinds of sanctions which may be useful or necessary in the future. Without this power, the Government would not be able to react quickly to new types of sanctions … and would be less able to play a leading role in the development of sanctions as a tool in international relations."

34. **This Committee has in the past taken the view that particularly compelling reasons are needed to justify Henry VIII powers which allow the amendment of the Bill itself. We do not consider that the FCO's reasons are sufficient to justify the powers conferred by clause 39, particularly having regard to the potential width of the powers and the very significant effects on individual rights that amendments made under these powers would be capable of having. The Bill already provides extensive powers to impose a wide variety of sanctions. Also, we note that this power is unnecessary for enabling additional sanctions measures to be imposed for the purposes of complying with UN obligations since clause 7 already has this effect. Accordingly, we do not consider the powers conferred by clause 39 to be appropriate.**

Clause 41—Money laundering and terrorist financing

35. Clause 41 is an enabling provision. It confers power on the Secretary of State or the Treasury to make provision for one or more of the following purposes:

- the detection, investigation or prevention of money laundering;
- the detection, investigation or prevention of terrorist financing; and
- the implementation of Standards published by the Financial Action Task Force relating to combating threats to the integrity of the international financial system.

The references to money laundering and terrorist financing in clause 41 are defined in subsection (3) of that clause. "Money laundering" is to have the same meaning as in Part 8 of the Proceeds of Crime Act 2002 and "terrorist financing" is defined to mean an act which constitutes an offence under specified statutory provisions.

36. Clause 41 confers very wide powers. Schedule 2 sets out a list of matters which may be included in regulations under clause 41. They include:

- the power to require persons to put in place prescribed controls and procedures for managing risks relating to money laundering etc. without any limit on the face of the Bill as to the persons on whom such requirements may be imposed;
- the power to confer supervisory functions on bodies, with such bodies being given investigatory powers including powers of entry, search, inspection and seizure of documents and information;
- the power to prohibit a person of a kind prescribed in the regulations from carrying on business unless registered by a supervisory body, with powers for the supervisory to suspend or cancel a registration;
- the power for supervisory bodies to take enforcement action, with power to allow the imposition of unlimited monetary penalties and the creation of criminal offences with sentences of up to two years in prison.

37. Paragraph 1 of Schedule 2 makes it clear that the matters listed in that Schedule are not exhaustive of the provision which can be made under clause 41. The wording of clause 41, in setting out the scope of the powers, is very broad. It refers to making provision for the purposes of the prevention, detection and investigation of money laundering and terrorist financing. Each of "prevention", "detection" and "investigation" are liable to cover a very wide range of matters, and have the potential to allow the grant of significant powers affecting the rights of individuals and other bodies. Also, clause 41 allows provision to be made for the purposes of implementing the Standards published by the Financial Action Task Force relating to combating threats to the integrity of the international financial system.

38. The Government's reasons for taking the powers conferred by clause 41 are set out in paragraph 86 of the memorandum:

- Measures for combating money laundering and terrorist financing have in the past been developed and formulated through the European Union, and then subsequently implemented into UK domestic law by regulations under section 2(2) of the 1972 Act. So, for example, the Fourth Money Laundering Directive (EU/849/2015) was transposed into UK law by the Money Laundering Regulations 2017. Once the UK ceases to be a member of the EU, Ministers will no longer be able to implement anti-money laundering and terrorist financing legislation using regulations under section 2(2).
- To keep the UK's legal measures up to date with changes in technology and the changing nature of threats to the integrity of the financial system, and to comply with international standards, it is necessary to enable new provision to be made in future subordinate legislation.

39. We note that the FCO gives no examples of occasions in the past when it was necessary for the Government to act quickly to make the kinds of changes referred to in the memorandum, and so justify the need for the changes to be made by subordinate rather than primary legislation. Instead the memorandum gives the impression that, because the UK currently

implements anti-money laundering and terrorist financing measures through EU legislation (and therefore without the need for primary legislation), it is appropriate for delegated powers to be conferred on Ministers once the UK is no longer a member of the EU. However, it does not necessarily follow in our view from the fact that our membership of the EU currently allows subordinate legislation to be used to give effect to anti-money laundering and counter-terrorist financing measures, that subordinate legislation will remain the appropriate vehicle in the future for delivering those measures when the UK is no longer a member of the EU.

40. **We take the view that the FCO has not provided sufficient justification for the delegation of powers by clause 41, particularly having regard to their wide scope and the significance of the powers conferred. Accordingly we consider the delegation of powers by clause 41 to be inappropriate.**

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 15 November 2017 Members declared no interests.

Attendance

The meeting on the 15 November 2017 was attended by Lord Blencathra, Baroness Dean of Thornton-le-Fylde, Lord Jones, Lord Lisvane, Lord Moynihan, Lord Rowlands, Lord Thomas of Gresford and Lord Thurlow.