HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

11th Report of Session 2017–19

Taxation (Cross-border Trade) Bill

Laser Misuse (Vehicles) Bill [HL]

Secure Tenancies (Victims of Domestic Abuse) Bill [HL]

Sanctions and Anti-Money Laundering Bill [HL]: Government Response

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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.

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The members of the Delegated Powers and Regulatory Reform Committee are:

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Lord Flight
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Contacts for the Delegated Powers and Regulatory Reform Committee

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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.

Eleventh Report

TAXATION (CROSS-BORDER TRADE) BILL

1. On 8 January 2018, the House of Commons gave a second reading to the Taxation (Cross-border Trade) Bill. The Bill provides for a self-contained customs regime for the United Kingdom when it leaves the European Union in March 2019.

2. The Bill confers very broad powers on the Treasury:

   (a) to determine the rates of import and export duties, and the goods they are to be levied on;

   (b) to amend existing Acts of Parliament concerning excise duties on alcohol, tobacco and hydrocarbon oil;

   (c) to make any provision that the Treasury consider appropriate in relation to VAT, customs duty or excise duty, in consequence of the United Kingdom's withdrawal from the European Union.

3. The Bill is a supply bill, which in accordance with established practice is not amended in the House of Lords. In due course it may be certified as a money bill under the Parliament Act 1911.

4. Although constitutionally the House of Commons remains supreme in financial matters, the Taxation (Cross-border Trade) Bill involves a massive transfer of power from the House of Commons to Ministers of the Crown. Ministers are given well over 150 separate powers to make tax law for individuals and businesses. These laws made by Ministers will run to thousands of pages. The Treasury's delegated powers memorandum, which sets out in detail all these law-making powers, alone runs to 174 pages.

5. The House of Lords Delegated Powers and Regulatory Reform Committee, which has no counterpart in the House of Commons, examines all bills (including supply bills) to see whether they grant inappropriate law-making powers to Ministers or other persons, and whether those powers are subject to an appropriate degree of parliamentary scrutiny.

6. 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 the House of Lords. Given the significance of this Bill and the fact that it will not be amended when it comes to the House of Lords, we wish to draw our concerns about the delegated powers in this Bill to the attention of the House of Commons and the Government.

Summary

7. In the time available, and bearing in mind that the Bill will soon complete its passage in the House of Commons, we confine our report to the most important points. We deal with them under five headings arranged thematically:

   (A) The balance between affirmative and negative instruments, with examples of powers which we consider should be subject to the more rigorous affirmative procedure.

   (B) Those Henry VIII powers which, despite enabling Ministers by delegated legislation to amend primary legislation, are subject only to the negative procedure.

   (C) The appropriateness of a sunset provision for some delegated powers, as in the European Union (Withdrawal) Bill.

   (D) The radical concept of making law by "public notice", a modern form of ruling by proclamation, without any opportunity for Parliamentary scrutiny.

   (E) The inclusion in the Bill of tertiary legislative powers, made and published without any opportunity for Parliamentary scrutiny.

(A) The balance between affirmative and negative instruments, with examples of powers which we consider should be subject to the more rigorous affirmative procedure

8. The balance in this Bill between affirmative and negative procedures is overwhelmingly in favour of the negative procedure. Furthermore, where the government use the affirmative procedure,[1] it is the "made affirmative" rather than the "draft affirmative" procedure. "Draft affirmative" regulations are laid before Parliament in draft and cannot be made unless they are debated and approved by both[2] Houses. "Made affirmative" regulations, typically used for urgent cases, are made and come into force but cannot remain in force unless debated and approved by Parliament[3] typically within a fixed period e.g. 28 days or one month of being made.

9. **We consider that the preferable approach for affirmative instruments is the one normally adopted by the Government. "Draft affirmative" instruments should be the norm. "Made affirmative" instruments should be confined to urgent cases.** This was the approach adopted by the Government in the European Union (Withdrawal) Bill.[4] It requires a Minister using the "made affirmative" procedure to make a declaration in the regulations of his opinion that, by reason of urgency, it is necessary to make the regulations without a draft of the instrument being laid before Parliament and approved. Subsequently the regulations must be debated and approved if they are to remain in force.

10. **We also consider that the following instruments made under the negative procedure should be made under an affirmative procedure.**[5]

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1 For example, clauses 32(2) and 40(2).
2 Or, in the case of money-related statutory instruments such as those under this Bill, by the House of Commons only.
3 See footnote 2.
4 Schedule 7, paragraph 4 (the numbering was amended at committee stage in the House of Commons).
5 See also the examples in paragraph 20 below.

(i) Clause 8: the customs tariff

11. Clause 8 is the foundational provision in Part 1 of the Bill that allows the Treasury to make regulations establishing and maintaining a customs tariff. The first set of regulations made under this clause must be subject to the "made affirmative" procedure.[6] The Government do not explain why the first set are singled out but not necessarily subsequent regulations. Subsequent regulations of equal importance (save where they increase import duty) are apt to be dealt with under the negative procedure. **We consider that an affirmative procedure should generally apply to clause 8.**

(ii) Clause 14: increased duty for agricultural goods

12. Clause 14 confers a wide power on the Treasury to increase duty for agricultural goods by regulations subject to the negative procedure. There is no limit on the amount of the increase which may be imposed, or the period for which it can have effect. Furthermore, the trigger points for the exercise of the power (referred to in clause 14(1)) are themselves to be determined by regulations. Elsewhere, the affirmative procedure applies to regulations that increase duty for goods: see, for example, clauses 32(2)(b) and 40(2)(b). **We consider that an affirmative procedure should likewise apply to clause 14.**

(iii) Clause 19: reliefs

13. Clause 19 allows the Treasury to make regulations providing for full or partial relief from a liability to pay import duty. Given the importance of this matter and the scope of the regulations (relief can be given in the regulations by reference to "any factor"), **we consider that these regulations should be subject to an affirmative procedure**.

(iv) Clause 22: authorised economic operators

14. Clause 22 allows HMRC Commissioners to make regulations "disapplying or simplifying" any of the law relating to import duty made by or under Part 1 of the Bill (clauses 1 to 38) in relation to "authorised economic operators", a term that will be amplified in regulations and which essentially covers operators who meet internationally recognised standards of compliance. Bearing in mind that clause 22 covers the other 31 regulation-making powers found in Part 1 of the Bill, its scope is very wide. Given the width of this power enabling HMRC to waive compliance with the law, **we consider that these regulations should be subject to an affirmative procedure.**

(v) Clause 30: general provision for the purposes of import duty

15. Clause 30(b) allows the Treasury by regulations to make "other provision generally for the purposes of import duty". This provision goes beyond the typical "supplementary" provision found in many Acts and, indeed, in clause 30(a). We note that a seemingly benign provision like clause 30(b) might take on a wholly new significance in practice,[7] yet it is only ever subject to the negative procedure. There is no apparent limit on what may be provided for under this power other than the fact that it has to be compatible with the provisions made by or under Part 1 of the Bill. This being so, **we consider that these regulations should be subject to an affirmative procedure.**

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6 Clause 32(2)(a).

7 In 1972, the government indicated during the parliamentary debates on the European Communities Bill that regulations under section 2(2) might only be expected to be made very infrequently (3 or 4 times a year). In due course, many dozens of such regulations were made every year.

(vi) Clause 39: charge to export duty

16. Clause 39 is the foundational provision in Part 2 of the Bill that allows the Treasury to make regulations establishing and maintaining a charge to tax on the export of goods from the UK. Clause 39(7) contains a particularly wide power allowing the Treasury to replicate or apply, with or without modification, any provision made by or under sections 1 to 38 of the Bill (which sections contain 30+ regulation-making powers) or indeed any other Act of Parliament relating to import duty. Although this is an extraordinarily wide power, only the first set of regulations made under clause 39 must be subject to the "made affirmative" procedure. The Government do not explain why the first set are singled out but not necessarily subsequent regulations. Subsequent regulations of equal importance (save where they increase export duty) are apt to be dealt with under the negative procedure. **We consider that an affirmative procedure should generally apply to clause 39.**

(vii) Clauses 42 & 47: EU law relating to VAT and certain excise duties

17. Clause 42(2) contains a wide power for the Treasury to amend VAT law which is retained EU law under clause 4 of the current European Union (Withdrawal) Bill.[8]

18. Clause 47 contains a similarly wide power for the Treasury to amend certain excise duties (relating to alcohol, tobacco and hydrocarbon oil) which are retained EU law under clause 3 of the European Union (Withdrawal) Bill.

19. Regulations under these powers are subject to annulment in pursuance of a resolution of the House of Commons. **Given the importance and scope of the powers in clauses 42 and 47, we do not consider that the regulations should only ever be subject to the negative procedure.**

(B) Those Henry VIII powers which, despite enabling Ministers by delegated legislation to amend primary legislation, are subject only to the negative procedure

20. This Bill contains Henry VIII powers allowing Ministers to amend Acts of Parliament and which are only subject to the negative procedure:

    (1) Regulations under clause 31 allow the UK to create a customs union with other countries. Clause 31(6)(a) allows HMRC to modify or disapply not only any Act of Parliament whenever passed but also Part 1 of the Bill itself. The customs union could potentially govern the whole range of import duty. This would then effectively allow the amendment of the whole of Part 1 of the Bill by means of negative regulations.

    (2) We have already mentioned clause 39(7) (export duty), which confers a Henry VIII power on the Treasury to replicate or apply, with or without modifications, any Act of Parliament relating to import duty.

21. We have frequently stated in our reports that Henry VIII powers require a compelling reason not to be affirmative. The Government do not satisfactorily explain why these provisions should be subject only to the negative procedure.

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8 There is a similarly wide discretion given to the Treasury in regulations made under clause 42(5).

We consider that the Henry VIII powers mentioned in paragraph 20 should be subject to an affirmative procedure.

(C) The appropriateness of a sunset provision for some delegated powers, as in the European Union (Withdrawal) Bill

22. The Government's White Paper, *Legislating for the United Kingdom's withdrawal from the European Union*,[9] acknowledged the importance of time-limiting delegated powers where powers are not needed in perpetuity. Clauses 7 to 9 of the European Union (Withdrawal) Bill contain important time-limits on the use of delegated powers. There is no corresponding time limitation in the Taxation (Cross-border Trade) Bill on the use of delegated powers, even though the Treasury's delegated powers memorandum acknowledges that the Bill has been drafted to cater for various contingencies that might never materialise, for example, if the UK leaves the EU without a negotiated agreement.[10]

23. We invite the Government to time-limit those regulation-making powers that do not need to exist in perpetuity, as they did for the European Union (Withdrawal) Bill. **We consider that candidates for a sunset clause include clauses 42 (EU law relating to VAT), 45 (general regulation making power for excise duty purposes), 47 (EU law relating to excise duty) and 51 (VAT or duties of customs or excise).**

24. By way of example, clause 51 contains a wide power which (in the words of paragraph 250 of the Treasury's delegated powers memorandum) "is necessary to ensure that the Treasury and Secretary of State have the ability to deal with the consequences of withdrawal from the EU and to maintain fully functioning and legally operable customs, VAT and excise regimes in a range of scenarios". The regulations are such as the Minister "considers appropriate in consequence of, or otherwise in connection with, the withdrawal of the United Kingdom from the EU" (clause 51(1)). But regulations under clause 51 could be made at any time in the future, including decades after our withdrawal from the EU. We consider that a sunset clause of some description would seem appropriate in this case and the other cases mentioned in paragraph 23.

(D) The radical concept of making law by "public notice", a modern form of ruling by proclamation, without any opportunity for Parliamentary scrutiny

25. The Bill relies heavily on the concept of making law by "public notice". Paragraph 39 of the Treasury's Delegated Powers Memorandum says that such notices will only make provision that is purely technical or administrative in nature. Nonetheless, clause 32(9) of the Bill allows anything that can be done under public notice to be done by regulations, implicitly acknowledging the importance of things done by public notice. **For Ministers and others to make law by "public notice", without any recourse to Parliament, is highly unusual and such provisions should attract strict surveillance by Parliament.** The Statute of Proclamations 1539 gave proclamations the force of statute law. Although it was repealed in 1547 after the death of Henry VIII, it now enjoys a limited revival under the veil of Ministers and HMRC making law by "public notice".

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9 Cm 9446, March 2017, para. 3.25 and note 13.

10 HM Treasury, Taxation (Cross-border Trade) Bill Delegated Powers Note (20th November 2017), paras. 2, 215, 219 and 223, by way of example.

26. Under clause 37(5), a public notice means something published in such manner as the person issuing it "considers appropriate". There is no definition of "appropriate" and it could range from full-page adverts in the national press to obscure notices in trade journals. It might even include Facebook and Twitter. For example, clause 24 allows HMRC by public notice to establish a system for making rulings to determine the customs code which should be applied to particular goods, and for determining the place of origin. Both of these matters are liable to impact on the amount of duty that a person has to pay. Also, rulings made in pursuance of clause 24 will presumably be capable of having legal effect (see clause 24(2)(g)) and therefore affecting a person's rights and liabilities. Large companies with advisers are less likely to be worried than small businesses and others struggling to keep abreast of laws that are made by this novel form of public notice without any involvement whatsoever of Parliament.

27. **We consider that the creation of a generally applicable system for making determinations which are capable of affecting an individual's legal position should ordinarily be dealt with by legislation, subject to scrutiny by Parliament, rather than by public notice without any such scrutiny.** It might be of importance whether the system provides for any means of review or appeal against determinations made by the HMRC in this context.

(E) The inclusion in the Bill of tertiary legislative powers, made and published without any opportunity for Parliamentary scrutiny

28. The Bill allows powers to be given to Ministers or others to make further subordinate legislation (tertiary legislation) without there necessarily being any parliamentary procedure or even any requirement for the tertiary legislation to be made by statutory instrument: see clause 51(2)(a) which allows for regulations to make any provision as might be made by Act of Parliament.

29. Furthermore, clause 32(7)(b) states that any power to make regulations under Part 1 of the Bill includes "power to make provision by reference to things set out in a notice published in accordance with the regulations". Such a notice "published in accordance with the regulations" is therefore a species of tertiary legislation, which is made and published without any parliamentary scrutiny at all. Clause 32(7)(b) increases the circumstances when legislation by public notice is possible.

30. **We consider that tertiary legislation should be subject to the same parliamentary control and time-limits applicable to secondary legislation.**

LASER MISUSE (VEHICLES) BILL [HL]

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

SECURE TENANCIES (VICTIMS OF DOMESTIC ABUSE) BILL [HL]

32. 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]: GOVERNMENT RESPONSE

33. We considered this Bill in our 7th Report of this Session.[11] The Government provided a preliminary response, printed in our 10th Report.[12] The Government have now made a full response by way of a letter from Lord Ahmad of Wimbledon, Minister of State for the Commonwealth and the UN at the Foreign and Commonwealth Office, printed at Appendix 1.

11 Delegated Powers and Regulatory Reform Committee, (7th Report, Session 2017–19, HL Paper 38)
12 Delegated Powers and Regulatory Reform Committee, (10th Report, Session 2017–19, HL Paper 58)

APPENDIX 1: SANCTIONS AND ANTI-MONEY LAUNDERING BILL [HL]: GOVERNMENT RESPONSE

Letter from Lord Ahmad of Wimbledon, Minister of State for the Commonwealth and the UN at the Foreign and Commonwealth Office, to Rt Hon. Lord Blencathra, Chairman of the Delegated Powers and Regulatory Reform Committee

I am grateful to the Committee for its careful consideration of the Sanctions and Anti-Money Laundering Bill. The Committee's report has been very helpful in informing debates on the Bill in the House. I am writing to set out the Government's response to the Committee's recommendations. As foreshadowed in my letter of 21 December 2017, I have now tabled a set of Government amendments for consideration at Report stage next week. Several of these amendments deal specifically with issues raised by the Committee. Others aim to provide additional clarity and reassurance in areas such as the procedural standards to be followed when persons are designated under sanctions regulations.

Clause 1—Sanctions Regulations

I am grateful for the Committee's acknowledgement that it is appropriate to use delegated powers to legislate for future sanctions regulations, due to the need to comply with international obligations; and that these powers 'need to be drawn widely to cater for the broad range of circumstances in which they need to be applied.

'Appropriate' and 'necessary'

> **"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."**

I note the concerns of the Committee about the breadth of the powers, particularly given the impact on the rights of individuals, and the associated recommendation that a Minister should only be able to make sanctions regulations when it is "necessary" rather than "appropriate".

I would like to emphasise that "necessary" is a high bar to meet. Some judicial commentary has reinforced the view that for something to be "necessary", the need for that thing to happen must be so pressing as to be the inevitable conclusion of all of the circumstances.

For example, courts have noted and followed the dictum of Lord Hardwicke in *Coryton v Helyar* that:

> " ... 'necessary implication' means not natural necessity, but so strong a possibility of intention that an intention contrary to that which is imputed to the testator cannot be supposed."

This suggests to me that a requirement for sanctions regulations to be "necessary" could leave the Government unable to act in a situation where the facts were uncertain and other options existed. It also suggests that we might be unable to use sanctions during the earlier stages of a crisis when there is often greater scope to change behaviour.

I do not think that such a wide-raging restriction on the Government's ability to deploy sanctions as a part of our foreign policy can possibly be right or sensible. It would limit our ability to act as part of a broader coalition, for example in parts of the world that were important to our allies but where UK interests were less directly engaged. As noted in the House of Lords EU Committee's report of 17 December on "Brexit sanctions policy", the most effective sanctions regimes are designed and applied alongside international partners.

As I said on the floor of the House, the word "appropriate" was chosen carefully to ensure that the Government has discretion to act in the field of foreign and security policy, including in the context of unpredictable, fast-moving events. Recent episodes such as the western response to Russia's actions in Ukraine underline the fact that foreign policy is an exercise in managing risks based on the Government's best assessment of the situation, using the range of tools available. There may be differing views on which tools are the most appropriate but it is for the Government to make these judgements and to be appropriately scrutinised by Parliament, and held accountable by the courts if required.

"Appropriate" in clause 1 does not give Ministers unrestricted discretion to impose whatever sanctions they may wish or like. Sanctions must not be "appropriate" *per* se, they must be "appropriate" when used for one of the specified purposes set out in the Bill. The threshold for Ministerial decisions is set firmly within the context of those purposes.

However, having listened carefully to the arguments, I am tabling a Government amendment that would introduce three additional requirements where a Minister is considering making sanctions regulations for a purpose which is not compliant with a UN obligation or other international obligation. First, the Minister would have to be satisfied that there are "good reasons" to pursue that purpose. Second, the Minister would have to be satisfied that imposition of sanctions is a "reasonable course of action" for that purpose. Third, when making regulations, the Minister would have to lay before Parliament a report explaining why these tests are met.

I hope these additional requirements will provide further reassurance. The Government will carry out an annual review of all sanctions regulations to ensure they remain appropriate in the changing political context and I have tabled a separate amendment that would require the Minister to lay a report before Parliament setting out the results of each annual review.

Distinction between different purposes

> **"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)."**

I note the Committee's distinction between the different purposes. I agree that, in relation to our international obligations, it is vital to ensure that we have flexibility to comply with our commitments. I also agree with the Committee that the scope of the objectives in clause 1(2) is wide and capable of being used to impose sanctions in a broad range of circumstances. There is a logic to that: sanctions are a foreign policy tool for use in circumstances that are inherently fluid and unpredictable.

As drafted, the purposes would allow the Government to implement sanctions regimes in UK law, when appropriate, for the full range of purposes for which we implement them now through EU law—from deterring gross human rights abuses to curbing the proliferation of nuclear and chemical weapons. Parliament will be able to scrutinise the Government's actions, and the judiciary will hold the Government to account.

I agree with the Committee's view that there should be good reasons for using sanctions when the UK acts outside UN auspices. The Government amendments I have tabled, including the three additional requirements referred to above, have been drafted with that in mind.

Parliamentary procedure for the scrutiny of sanctions regulations

> **"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."**

The Government agrees that sanctions can have a significant impact, including on individuals. That it is why there must be clear legislative authority to impose sanctions and effective safeguards on the use of those powers, including Parliamentary scrutiny. However, the Government does not agree that this requires the affirmative procedure to apply to the implementation of UN sanctions.

The UK is obliged, as a matter of international law, to put UN sanctions in place. The UN Charter requires the UK to carry out the binding decisions of the UN Security Council, including those pertaining to sanctions. Under the UN Charter, the UK has no discretion in whether to comply with sanctions imposed by the UN Security Council. It must do so and is required by the UN to implement sanctions without delay. The same applies, of course, to other countries such as Australia and Norway and that is why their legislation makes specific provision for UN sanctions to ensure they are implemented smoothly and swiftly. Under the UN Charter, the Security Council will only adopt resolutions imposing sanctions in order to maintain or restore international peace and security. As a Permanent Member of the Security Council, the UK has a key role in the formation of UN Security Council resolutions and must give its consent (or non-dissent) in all cases.

The appropriate level of Parliamentary scrutiny needs to be considered in this context. Any risk of the UK's domestic implementation of UN sanctions being overturned or delayed by Parliament would undermine our commitment as a country to comply with our obligations under international law.

While it is important that Parliament retains oversight and is ultimately able to veto measures with which it does not agree, having to go back to Parliament for express approval each time a UN measure was agreed would put the Government in an impossible position. It could ultimately call into a question the UK's status as a reliable permanent member of the UN Security Council. That is why we do not consider that an affirmative procedure is appropriate.

The Committee will be aware that Part 8 of the Policing and Crime Act 2017 contains specific powers (under the sub-heading "Avoidance of delay'') designed to bridge the sometimes lengthy gap between adoption of measures by the UN Security Council and the entry into force of the corresponding EU legal acts. We would not wish to do anything, or to be seen by our international partners to do anything, that would undo our recent efforts to improve our domestic implementation of UN sanctions.

Finally, it should be noted that the United Nations Act 1946, which is still used to implement some UN sanctions measures, provides for Orders implementing UN obligations to be laid in Parliament but requires no other Parliamentary procedure. This Bill, which applies a Parliamentary procedure to all UN-derived sanctions, strikes the right balance.

> **"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."**

I have indicated above why it is appropriate for UN regulations to be adopted via the negative procedure. This ensures there is Parliamentary oversight while sending a strong signal of commitment to uphold our international obligations.

For so-called hybrid regimes, containing both UN and non-UN sanctions, the same principle should apply. These hybrid regimes are typically based around a core of UN obligations agreed by the Security Council, coupled with non-UN measures.

An example is the North Korea sanctions regime. The UN Security Council bans the export of luxury goods to North Korea but the EU regime goes further in defining further categories of luxury goods. The two regimes are therefore closely linked.

Separating these UN and non-UN regulations into two different sets of regulations would make the sanctions regime in the UK more complicated than that of our EU partners and add to the compliance burden for individuals and businesses.

The House of Lords EU Committee's report of 17 December on "Brexit; sanctions policy'' notes the additional complications that would arise if UK sanctions diverge from those of our close allies. Although requiring separate procedures for linked UN and EU measures would not prevent us from acting in concert with international partners, it would make the process of doing so more complicated.

The concern of the Committee is that the Parliamentary scrutiny could be lowered; for non-UN measures, by combining UN and non-UN measures. With respect, my view is that combining all of the linked measures relating to a single regime—such as that of North Korea—enables Parliament to understand and properly scrutinise the totality of the sanctions measures in a particular sanctions regime. Where the UK is introducing sanctions autonomously in relation to parts of the world where the UN is not acting, the regulations will be subject to an affirmative procedure.

Clause 16—Criminal Offences

> **"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."**

I am grateful that the Committee considers that there is a compelling case for allowing the creation of criminal offences in sanctions regulations. The Committee will be aware that the prohibitions or requirements associated with any given sanctions regime cannot be determined until the regulations have been drafted.

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. The Government's proposal is that the prohibitions, requirements; and offences should all be set out in a single piece of legislation, so that it will be easy for people looking to comply with sanctions to examine that instrument and see what is, and is not, criminal behaviour.

I would like to reassure the Committee that I have noted and do understand the concerns that the Committee and others have expressed in this area. I take these issues very seriously, and the Government is considering what further assurances can be given to Parliamentarians about the use of the powers to create criminal offences. I have tabled a Government amendment designed to distinguish between the possible types of offences and the corresponding maximum penalties. I have asked officials to consider what more can be done to make clear that this Bill is essentially about enabling the Minister to apply the types of offences currently on the statute book in their appropriate context.

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

> **"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."**

The power in clause 39 would allow the Secretary of State to react to changes in circumstance which may require a new type of sanction to be imposed quickly. It is not possible to predict all the types of sanctions which may be useful or necessary in future. However, as technology advances, and those who wish to do harm find ever sophisticated ways of doing so, we need to be able to react in an agile manner.

The Government intends to continue to play a leading role in the development of sanctions as a tool in international relations. This will include acting in fast developing areas where the UN is unable or unwilling to do so. This may, at some point, require the use of new types of sanction in order to maximise the effect of such a regime and enable the UK to act in cooperation with international partners.

The House of Lords EU Committee's report of 17 December on "Brexit: sanctions policy" noted that it be desirable in future for the UK, the US and the EU to maintain a broadly similar approach to sanctions policy. The power under clause 39 would help us to do that in the event that there was a shared interest in deploying new types of sanctions. On both Iran and Russia, for example, transatlantic cooperation has resulted in sanctions that were substantively different from anything previously agreed

Regulations under this clause would be subject to the draft-affirmative resolution procedure, in line with the Committee's previous guidance, and as befitting a Henry VIII power that could create new offences.

Nevertheless, I take the concerns expressed by the Committee and others very seriously and have therefore tabled a Government amendment that would restrict the use of this power. The amendment stipulates that the Clause 39 power to create new types of sanctions may only be used where the UK is subject to a UN obligation or other international obligation, and not where the UK is acting autonomously. The amendment also makes clear that the Clause 39 power may not be used to alter the *purposes* of sanctions specified in Clause 1 or Clause 2.

Clause 41—Money laundering and terrorist financing

> **"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."**

The Government considers the use of secondary legislation to amend anti-money laundering and counter-terrorist financing ("AML/CTF") regulations is consistent with the nature of these regulations, which follow internationally agreed standards set by the Financial Action Task Force ("FATF") and impose specific obligations on firms operating within the regulated sector. The precise nature of these obligations, which is described in more detail below, is better suited to secondary legislation than primary. This follows the approach typically taken in the UK and elsewhere. It further allows the Government to respond quickly to changing circumstances, new technologies and new business practices.

An example of the need to address emerging risks can be found through the rapidly evolving policy framework at EU and international level. Most recently, amendments to the Fourth Money Laundering Directive ("4MLD") were being negotiated even before EU Member States had transposed the original Directive, demonstrating that AML/CTF requirements can evolve at a rapid pace.

These amendments will bring virtual currency exchanges and custodian wallet providers into the scope of the anti-money laundering ("AML") regime, addressing a risk of money laundering that the UK's recent National Risk Assessment of Money Laundering and Terrorist Financing ("NRA") identified as being expected to grow as virtual currencies become increasingly popular. They will also tighten the regulatory framework applied to e-money products, reflecting a changed view

of the terrorist financing risk connected with these following terrorist attacks in Paris and Brussels. Other emerging risks identified within the NRA included the significant emerging risks of money being laundered through capital markets. Although the Government will continue to publish future NRAs so as to reflect updates in our risk assessment, fully addressing such risks—as well as addressing any identified weaknesses within the existing AML regime—will likely require further legislation. This reflects the experience of both the EU and the UK in recent years.

To provide more detail on the distinction between the roles that primary and secondary legislation play within the UK's AML regime, it is the Proceeds of Crime Act 2002 ("POCA") and the Terrorism Act 2000 which establish key obligations upon the regulated sector to report details of transactions which give rise to suspicion of money laundering or terrorist financing. By contrast, the existing Money Laundering and Terrorist Financing (Information on the Payer) Regulations 2017 ("the MLRs") establish further and more detailed obligations, such as how firms should conduct due diligence upon customers; establish and maintain group-wide policies and procedures; and assess risk connected with different customers.

Please rest assured that, within this context, I have noted and carefully considered the Committee's concern about the wider power conferred through clause 41.

The Committee mentions, as one example, the power to require persons to put in place prescribed controls and procedures. The Government intends to use this power in line with the duties on "relevant persons" and payment service providers in the MLRs. In practice, this is meant to be limited to businesses whose activities are particularly likely to be used for the purposes of money laundering, terrorist financing or other activities that threaten the integrity of the international financial system. This aligns with the FATF standards and long-standing policy in this area, and I have tabled a Government amendment confirming that businesses will only be brought within the scope of AML/CTF regulation under paragraph 3 of Schedule 2 where such risks exist. So as to address points made by the Committee, the Government amendment I have tabled also makes clear that only businesses of this type can be required to carry out customer due diligence measures under paragraph 4 of that Schedule, supervised for the purposes of paragraph 7, or registered for the purposes of paragraph 9·

The Government considers there are good reasons for using secondary legislation, as opposed to primary legislation, for the purposes of AML/CTF regulation. The current definitions in the MLRs tend to involve cross-references to financial services legislation (for example, to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001). There are also financial thresholds (for instance in the definition of "high value dealer" or the *de minimis* threshold in relation to which businesses can be exempted from requirements of the MLRs) which are likely to need updating from time to time, whether to align with FATFs expectations or to reflect changes in the appropriate regulatory perimeter. There is also significant alignment (subject to specific provisions and exclusions) between "relevant persons" and the "regulated sector", as defined in Part 1 of Schedule 3A to the Terrorism Act 2000 and Part 1 of Schedule 9 to POCA. Both lists, while set out in primary legislation, can be amended via statutory instrument (see Part 3 of each Schedule)—subject to the negative procedure. This indicates Parliament's established view that subordinate legislation is suitable for defining the scope of the regulated sector as new risks emerge and new types of business need to be covered or exempted.

The Committee also notes the power to confer functions on supervisory bodies. Again, the intention is to follow the approach under the MLRs and the lists of supervisory authorities specified in Part 2 of each of the two Schedules mentioned above, which Parliament has determined can be amended by negative SI. It is important for the flexibility of the regime that supervisors, whether statutory or professional self-regulatory organisations, can be given the functions needed to monitor those businesses they supervise; and that such organisations can be added to—or removed from—the list of supervisory authorities by regulations.

The Committee mentions the requirement for certain businesses to be registered with a registering authority, currently contained in Chapter 2 of Part 6 of the MLRs. The Government anticipates that HMRC and the Financial Conduct Authority will retain their role as "registering authorities". However, provision as to which businesses should be registered with which authority is a matter that might need to be reviewed in future, along with the precise nature of the details that need to be included on relevant registers.

In terms of the creation of offences, it is important that any requirements relating to AML/CTF are subject to appropriate penalties, so as to provide a deterrent to persons who might otherwise breach such requirements. It is common in regulatory regimes for detailed requirements to be set out in secondary legislation, and for criminal sanctions to follow a breach of those requirements. Under the Financial Services and Markets Act 2000, for example, an order may prescribe what is a "regulated activity", which will be a criminal offence to carry out without permission. A similar approach is taken in the MLRs. These impose obligations, the breach of which can be penalised through either criminal or civil means. Removing the ability to criminalise breaches of future regulations of this type would undermine the UK's AML/CTF regime.

Criminal penalties cannot be created by regulations under clause 41 which would impose a sentence of more than two years' imprisonment, consistent with the existing situation and in contrast to the larger sentences that may be imposed under POCA and the Terrorism Act 2000. This will further reflect the approach that was taken under both the Money Laundering Regulations 2007 and the current MLRs. Regarding civil penalties, at present only the Financial Conduct Authority and HMRC can impose monetary fines. Taking account of the Committee's view on this issue, the Government amendment I have tabled provides that only these bodies will be able to impose civil monetary penalties for breaches of future regulations made under clause 41.

The Government amendments also provide that any future criminal offences established under clause 41 can only be established if regulations provide that such offences have either or both of: (a) a mental element necessary for their commission; and/or (b) a defence to it. This will maintain the existing policy position under the MLRs, and preserve the deterrent effect established by criminalising breaches of AML/CTF regulations. So as to further ensure the proportionate application of such offences, the Government amendments provide that a person cannot be liable to a civil monetary penalty through regulations established under clause 41 when they have already been convicted of a criminal offence (in relation to the same act/ omission) established through such regulations.

Regulations made under clause 41 will additionally be subject to the draft-affirmative procedure, unless they update the list of high-risk third countries in which case they will be subject to the made-affirmative procedure. This will provide greater Parliamentary oversight over the existing position, through which AML/CTF regulations are typically made under the negative procedure, and the list of high-risk third countries is made by the European Commission through a Delegated Act under 4MLD. It will additionally ensure that the UK's AML/CTF regime can be kept up-to-date, and capable of properly addressing identified risks.

I thank the Committee again for their thorough analysis of the Bill and constructive recommendations, which are in the finest traditions of the House. I note that some of the issues raised by the Committee were also covered in the separate report on the Bill published by the Constitution Committee. Therefore I am copying this response to the Rt Hon the Baroness Taylor of Bolton, Chair of that Committee.

10 January 2018

APPENDIX 2: MEMBERS AND DECLARATIONS OF INTEREST

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 January 2018 Members declared no interests.

Attendance

The meeting on the 17 January 2018 was attended by Lord Blencathra, Baroness Dean of Thornton-le-Fylde, Lord Jones, Lord Lisvane, Lord Moynihan, Lord Rowlands, Lord Thomas of Gresford, Lord Thurlow and Lord Tyler.