HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

24th Report of Session 2019–21

United Kingdom Internal Market 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 (Chair)
Baroness Browning
Lord Goddard of Stockport
Lord Haselhurst
Lord Haskel
Baroness Meacher
Lord Rowlands
Lord Thurlow
Lord Tope

Registered Interests

Committee Members' registered interests may be examined in the online Register of Lords' Interests at https://www.parliament.uk/hlregister. 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. 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.

Twenty Fourth Report

UNITED KINGDOM INTERNAL MARKET BILL

1. The United Kingdom Internal Market Bill was introduced into the House of Commons on 9 September 2020. Its principal purpose is to preserve the UK internal market at the end of the transition period, which commenced upon the UK's departure from the EU on 31 January 2020. The transition period concludes at the end of 2020. Thereafter, powers previously exercisable at EU level will become exercisable by the UK Government and the devolved administrations. The Bill is designed to allow businesses to continue to trade freely across the UK, as they do now, from 2021 onwards.

2. **The Bill confers 11 separate powers on Ministers of the Crown to make law by statutory instrument.[1] Some of these powers are extraordinary; others are unprecedented.**

   - The 11 delegated powers include seven Henry VIII powers allowing Ministers to amend or repeal significant provisions of the Bill itself once it is enacted.[2]

   - When exercising any of the 11 law-making powers,[3] clause 51(2)(a) allows Ministers to amend, repeal or modify any Act of Parliament or any statutory instrument.

   - The effect of clauses 42(5), 43(3)(e) and 45 is to allow Ministers, when making regulations under clause 42 (exit procedures) or 43 (state aid) in relation to the Northern Ireland Protocol, to disregard any international or domestic law with which the regulations would otherwise be incompatible or inconsistent.

3. The Department for Business, Energy and Industrial Strategy has produced a delegated powers memorandum ("the Memorandum") to assist us with our deliberations.[4]

4. Our remit does not extend to commenting on the overall merits of the Bill. We report on inappropriate delegations of legislative power or inappropriate Parliamentary procedures attaching to delegations of legislative power. All of the Bill's provisions allowing Ministers to disregard international or domestic law are in the context of regulations made by statutory instrument, and therefore within our remit. Although we have recommended the removal of some Henry VIII powers, and the narrowing of others, it is not part of our remit to question the fundamental purpose of the Bill - which is to preserve the UK internal market at the end of the transition period.

5. We draw the attention of the House to the following delegated powers.

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1 Not including the standard commencement provision in clause 54(3).
2 Clauses 3(7), 6(5), 8(7), 10(2), 16(2), 19(7) and 41(5).
3 The clauses mentioned in footnote 2, and clauses 37(6), 38(4), 42(1) and 43(1).
4 Business, Energy and Industrial Strategy, Delegated Powers Memorandum, 8 September 2020: https://publications.parliament.uk/pa/bills/cbill/58-01/0177/UK%20Internal%20Market%20Bill%20-%20Final%20DPRRC%20Memo%2008092020.pdf

(1) Clause 3(7): relevant requirements for mutual recognition of goods

6. An important component of the Bill is the principle of mutual recognition of goods. Paragraph 11 of the Government's Explanatory Notes gives an example. If a packet of crisps made in one part of the UK meets "relevant requirements" in that part of the UK, the crisps can be sold in any other part of the UK without having to meet any other "relevant requirements" that apply to crisps made in that other part.

7. Clause 3 defines "relevant requirements" for the purpose of the mutual recognition of goods. Clause 3(4) is important and includes such things as:

- the characteristics of the goods themselves (their nature, composition, age, quality, performance etc.);
- their presentation (including packaging and labelling);
- matters connected with their production;
- matters relating to their inspection, assessment, registration, certification, approval or authorisation;
- documentation etc. accompanying the goods, and
- anything else not falling within any of the above which must or must not be done in relation to the goods before they can be sold.

8. Clause 3(7) contains a Henry VIII power for Ministers to alter the definition in clause 3(4). In the process, clause 51 allows Ministers to amend any Act of Parliament.

9. The Government offer one main reason (Memorandum, paragraph 21) why clause 3(4), if it does not deliver the objectives for the UK internal market for goods, should be amended by regulations rather than by further Act of Parliament. The reason is that the Secretary of State can act swiftly. Clause 3(7) will also allow the Secretary of State to respond to unforeseen future developments such as technological or market changes.

10. There are several reasons why we find unconvincing the argument for speed.

(a) Clause 3(4) equally affects all the administrations of the UK. If it turns out to be defective, it should be for Parliament to correct it rather than Ministers at Westminster. This is particularly so where the Secretary of State merely has an obligation to consult the other administrations rather than to obtain their consent.

(b) Even if circumstances were to arise in which it was necessary to act swiftly, it is not clear that secondary, rather than primary, legislation would be needed. The last three years have shown, in the context of Brexit and Covid-19, that Parliament is able to respond to events extremely swiftly with primary legislation.

(c) The scope of the power in clause 3(7) is not confined to cases where speed is of the essence. The Secretary of State is not required to declare that the making of regulations is required as a matter of urgency.[5]

11. **In the absence of a convincing justification for the Henry VIII power in clause 3(7), the power is inappropriate and should be removed from the Bill.**

(2) Clause 6(5): relevant requirements for non-discrimination of goods

12. The Henry VIII power in clause 6(5), allowing Ministers to re-write part of clause 6, is similar to clause 3(7) save that clause 3 concerns mutual recognition while clause 6 deals with non-discrimination. It suffers from similar defects.

(a) The Government say (Memorandum, paragraph 26) that the power in clause 6(5) is necessary to "future-proof" the operation of the non-discrimination principle. They might have said to "completely re-write" the non-discrimination principle.

(b) The Government can act without the need to introduce new primary legislation or to obtain the consent of the devolved administrations (the Minister being only under a duty to consult) even though the proper functioning of the internal market is essential to all the administrations of the UK.

(c) The Government rely on the argument that secondary legislation can be produced at speed. This ignores the facts that (i) primary legislation can be produced at speed, and (ii) the exercise of the power in clause 6(5) is not confined to cases where speed is of the essence.

(d) The Henry VIII power in clause 6(5) is said to enable the Secretary of State "to take action in response to feedback from business" (Memorandum, paragraph 26). However, it comes at the cost of allowing Ministers to override primary legislation by statutory instrument.

13. **In the absence of a convincing justification for the Henry VIII power in clause 6(5), the power is inappropriate and should be removed from the Bill.**

(3) Clauses 8(7) and 19(7): indirect discrimination in relation to goods and services

14. The Henry VIII power in clause 8(7), allowing Ministers to re-write clause 8(6), is similar to clause 3(7) and 6(5) and suffers from similar defects. Similar considerations as apply to clause 8(7) also apply to the Henry VIII power in clause 19(7), save that the latter deals with the regulation of services and the former that of goods.

15. The power given to Ministers to re-write clause 8(6) by statutory instrument is justified (Memorandum, paragraph 32) by the need to act swiftly if sudden market or other changes would mean that their inclusion would threaten the single market. Yet such changes are not a pre-requisite to the use of the

5 Cf. Schedule 7 to the European Union (Withdrawal) Act 2018 where regulations subject to the "draft affirmative" procedure may be made using the "made affirmative" procedure where the Minister declares that, by reason of urgency, it is necessary.

power in clause 8(7). Ministers can amend clause 8(6) at their leisure, where there is no such urgency and where no swift action is required.

16. The Memorandum (paragraph 33) offers a further reason for the power in clause 8(7) to amend the two "legitimate aims" in clause 8(6): that without a power to amend clause 8(6) by statutory instrument "there will be no way to change it". On the contrary, there is a simple way of amending it - by further primary legislation. What Parliament enacts, Parliament can amend.

17. **In the absence of a convincing justification for the Henry VIII powers in clauses 8(7) and 19(7), the powers are inappropriate and should be removed from the Bill.**

(4) Clause 10(2): further exclusions from market access principles

18. Part 1 of the Bill (clauses 1 to 14) contains provisions on market access to goods throughout the UK. Schedule 1 to the Bill contains provision excluding the application of the UK market access principles in certain cases (including threats to human, animal or plant health, chemicals and taxation).

19. The Henry VIII power in clause 10(2) allows Ministers to re-write Schedule 1 in part or in its entirety. The power in clause 10 suffers from the defects contained in all the other Henry VIII powers considered above. In particular, the principal justification (that it allows the Minister to act swiftly and urgently) ignores the facts that (i) Parliament can act swiftly in an emergency, and (ii) the power conferred on Ministers in clause 10 is not limited to cases where there is an urgent need to act.

20. **In the absence of a convincing justification for the Henry VIII power in clause 10(2), the power is inappropriate and should be removed from the Bill.**

(5) Clause 16(2): power to amend Schedule 2

21. Part 2 of the Bill (clauses 15 to 21) contains provisions on UK market access in relation to services. Schedule 2 contains provision excluding the application of the UK market access principles in certain cases (including financial, healthcare and legal services, and services connected with the supply of natural gas and electricity).

22. The Henry VIII power in clause 16(2) allows Ministers to re-write Schedule 2 so as to add, amend or remove services that fall within its scope. The power to add new service sectors is based on providing certainty to businesses and individuals (Memorandum, paragraph 47). Paragraph 48 adds that the process of listing services in Schedule 2 is "very detailed" and of an "administrative nature", something more appropriate to be included in a Schedule and updated in Regulations.

23. Schedule 2 is short and sets out important exclusions from Part 2 of the Bill. There is no reason why amendments to Schedule 2 should not be done by further provision made by Act of Parliament. Schedule 2 does not contain the sort of minor, technical or administrative provision that makes it appropriate to be amended, perhaps frequently, by Ministerial regulations.

24. Neither does providing certainty to business and citizens require that Schedule 2 be amended by regulations. Such certainty can be equally provided by an amendment by Act of Parliament. Amendment by Parliament

arguably provides greater certainty because regulations can be invalidated in the courts in ways that Acts of Parliament cannot be.

25. **In the absence of a convincing justification for the Henry VIII power in clause 16(2), the power is inappropriate and should be removed from the Bill.**

(6) Clause 41(5): unfettered access to UK internal market for Northern Ireland goods

26. Clause 41 is concerned with ensuring unfettered access for Northern Ireland goods to the rest of the United Kingdom, by preventing any new checks or other administrative processes being applied to "the direct movement of qualifying Northern Ireland goods from Northern Ireland to Great Britain". Clause 41(5) includes a regulation-making power that allows a Minister of the Crown to apply clause 41 to a type of movement instead of, or in addition to, a type of movement to which it already applies.

27. The Government's reason for the power in clause 41(5) is that:

> "It is necessary to include a power in the clause allowing for the amendment of what type of movement should be included, in order to provide the ability to adapt the regime if required, in conjunction with any re-exercise of the power in section 8C(6) of the European Union (Withdrawal) Act 2018, to define "qualifying Northern Ireland goods"."[6]

28. The implication appears to be that this power is only required as a consequential measure if regulations under section 8C(6) of the 2018 Act change the definition of "qualifying Northern Ireland goods". But the exercise of the power in clause 41(5) is not explicitly limited so that it can only be exercised in those circumstances. Instead the power is exercisable in any circumstances at the discretion of the Minister. This is a significant power in relation to the access of Northern Ireland goods to the rest of the United Kingdom. Arguably it should be limited so that it is only exercisable in the circumstances for which it is said to be required. The Government have given no justification for allowing the power to be exercised in circumstances other than where an amendment is being made to the definition of "qualifying Northern Ireland goods" by regulations under section 8C(6) of the 2018 Act.

29. **The power in clause 41(5) is too wide for its stated purpose and, if not narrowed in the way suggested, should be removed from the Bill.**

(7) Clauses 42(1) and 43(1): power to disapply international and domestic law in certain contexts

30. The most controversial delegated powers in this Bill are those in clauses 42 and 43 allowing Ministers to make regulations in relation to the application of:

(a) exit procedures for goods moving from Northern Ireland to Great Britain; and

(b) Article 10 (state aid) of the Northern Ireland Protocol.

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6 Memorandum, para 73.

31. Clause 42(5) (exit procedures) and clause 43(3)(e) (state aid) allow Ministers to make regulations that disregard "relevant international or domestic law". Clause 43(3)(e) allows regulations to make provision for:

> "rights, powers, liabilities, obligations, restrictions, remedies and procedures that would otherwise apply, as a result of relevant international or domestic law, not to be recognised, available, enforced, allowed or followed".

32. Under clause 45(1)(b) and (d) and (2)(a), any regulations made by Ministers under clauses 42 and 43:

> "have effect notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent".

33. "Relevant international or domestic law" is defined in the widest possible terms in clause 45(4) to include any provision of the EU withdrawal agreement, the Northern Ireland Protocol or:

> "any other legislation, convention or rule of international or domestic law whatsoever",

including

> "any order, judgment or decision of any court or tribunal, including the European Court".

34. The justifications offered by the Government for the Bill to confer such powers on Ministers are as follows.

35. In the case of regulations made under clause 42 (exit procedures), the Government wish to have no requirement to submit export or exit summary declarations for goods leaving Northern Ireland for the rest of the UK (Memorandum, paragraph 75). However, Article 5.3 of the Northern Ireland Protocol makes provision for certain legislation (including the Union Customs Code) to apply to the United Kingdom. This legislation requires export declarations and exit summary declarations. The Government wish to disapply this when they make regulations under clause 42. The Government say:

> "Any disapplication or modification is better dealt with by way of regulations as the necessary adaptations to relevant customs legislation applied by the Northern Ireland Protocol will be of a technical and detailed nature, and as such better suited for regulations."[7]

36. In the context of regulations made under clause 43 (state aid), Article 10 of (and Annex 5 to) the Northern Ireland Protocol made provision relating to the application of EU state aid law to the UK. The Government now wish to be able to change this. Therefore, clause 43 allows Ministers to make regulations that disapply or modify the effect of Article 10. In the process they can disregard any provision of international or domestic law.

37. The Government say:

> "In order to provide certainty to aid givers and recipients over the interpretation and application of Article 10, the Secretary of State

7 *Ibid.*, para 81.

considers it is necessary to take a broad power to be able to make provision in regulations in connection with Article 10, including its interpretation, and to disapply or modify that Article as it applies in domestic law. This includes making provision that is incompatible or inconsistent with any relevant international or domestic law.

The Secretary of State accepts that the taking of such a power is unusual, and recognises the risk that exercising the power in way that may be incompatible or inconsistent with Article 4 of the Withdrawal Agreement, however considers that the powers are justified by the need to provide businesses and aid givers with certainty after the end of the Transition Period."[8]

38. **The question is whether clauses 42 and 43 involve an inappropriate delegation of power in allowing Ministers to disregard any contrary provision of international or domestic law. For the following reasons, we suggest that they do.**

(a) To argue that exit procedures are technical and detailed matters best suited to regulations may be true of exit procedures in general. However, the power for regulations under clause 42 to derogate from any international or domestic law, including any decision of any court of law, cannot be characterised as merely involving detailed and technical matters. It involves matters of the highest public interest, involving questions of law, politics, diplomacy and integrity.

(b) The power to disapply Article 10 of the Northern Ireland Protocol is based on providing "certainty to aid givers and recipients over the interpretation and application of Article 10". A broad power to disapply or modify Article 10 cannot be said to provide certainty. The certainty found in the Northern Ireland Protocol is to be replaced by regulations that allow one signatory unilaterally to disregard it. Uncertainty must stem from the exorbitant nature of a power to disregard international or domestic law.

(c) The rule of law requires everyone, including Ministers, to be subject to the law. Parliament is sovereign. Ministers are not. Where Parliament authorises a Minister to make regulations in disregard of international or domestic law, it places the Minister in a difficult position. The Minister's instinct and duty is to respect and obey the law. This Bill, in allowing Ministers to make regulations that disregard international or domestic law, potentially represents an unprecedented challenge to the United Kingdom's commitment to the rule of law.

(d) The law involving judicial review of Ministers of the Crown is premised on Ministers acting lawfully or facing the prospect of court action to correct and sanction them. This Bill might place Ministers in court, given that courts have jurisdiction to review delegated legislation made by Ministers. The courts can invalidate regulations on grounds that are inapplicable to Acts of Parliament. It remains to be seen if an exercise of these extraordinary powers would survive a judicial challenge.

(e) Ministers have an overarching duty under the Ministerial Code to comply with the law and to protect the integrity of public life. A power

8 *Ibid.*, paras 94 and 95.

conferred by Parliament which allows Ministers to make delegated legislation that disregards contrary international or domestic law does not sit easily alongside a duty under the Ministerial Code to comply with the law, including international law.

(f) Parliament frequently gives Ministers the power to make regulations that amend or repeal Acts of Parliament. What is novel in this Bill is the width of the power for Ministers to disregard treaties binding in international law. Apart from any diplomatic or reputational consequences, in an action for breach of an international obligation it is unlikely to be a defence that UK domestic law purports to protect Ministers from the consequences of breach.

(g) The Withdrawal Agreement and the Northern Ireland Protocol involve binding promises freely entered into by the UK and the EU. Article 5 of the Withdrawal Agreement, headed "Good Faith", says:

> "The Union and the United Kingdom shall, in full mutual respect and good faith, assist each other in carrying out tasks which flow from this Agreement. They shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this Agreement and shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement."

Article 5 of the Withdrawal Agreement therefore requires that promises entered in good faith should be kept, rather than being unilaterally repudiated.

39. **Clauses 42(5) and 43(3)(e), which are of unprecedented width in delegating to Ministers the power to make regulations that disregard relevant international or domestic law, contain inappropriate delegations of power and should be removed from the Bill.**

APPENDIX 1: MEMBERS' INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at https://www.parliament.uk/hlregister. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 16 September 2020 Members declared no interests.

Attendance

The meeting was attended by Baroness Andrews, Lord Blencathra, Baroness Browning, Lord Haskel, Baroness Meacher, Lord Rowlands, Lord Thurlow and Lord Tope.