



HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

32nd Report of Session 2019–21

European Union (Future Relationship) Act 2020

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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.

Thirty Second Report

EUROPEAN UNION (FUTURE RELATIONSHIP) ACT 2020

1. The European Union (Future Relationship) Act 2020 (“the 2020 Act”) was enacted after passing all its parliamentary stages on 30 December. Its principal purpose is to make changes to domestic law necessary to implement the agreements (including the Trade and Cooperation Agreement) finalised between the United Kingdom and the European Union on 24 December.
2. Because the Bill was not published until 29 December and the delegated powers memorandum (“the Memorandum”) until 30 December,¹ we were not able to scrutinise the Bill in time for the debate on 30 December. Given the way in which the Bill was fast-tracked through Parliament, powerful pleas have been made for post-legislative scrutiny. The purpose of this report is to inform the debate in the House of Lords on the Trade and Cooperation Agreement scheduled to take place on 8 January 2021.
3. The table after paragraph 32 of the Memorandum identifies 13 delegated powers in the 2020 Act.²
 - Two powers³ concern administrative designations (rather than legislative delegations) and are not within our remit.
 - Another⁴ is a standard commencement power that, in accordance with usual practice, is not subject to any parliamentary procedure.
 - Of the remaining ten powers, seven allow for the affirmative procedure wholly or in part.
 - Although section 29 is a significant provision, it does not contain a delegation of legislative power (nor is it treated as such in the Memorandum⁵) and therefore is not within our remit.
4. **We draw to the attention of the House two sections of the Act: sections 21 and 31; and comment, in passing, on section 33.**

Section 21

5. Section 21 confers powers on the Commissioners for Her Majesty’s Revenue and Customs (HMRC) for the purposes of (a) monitoring, or controlling, the movement of goods that pose, or might pose, a risk to public health or public safety, national security, or the environment (including the health of animals or plants); (b) implementing any international obligation of the United Kingdom relating to the movement of goods.
6. Where the power at new section 166A of the Customs and Excise Management Act 1979 (CEMA), inserted by section 21 of the 2020 Act, is used to amend

1 Cabinet Office, Delegated Powers Memorandum, 30 December 2020: https://publications.parliament.uk/pa/bills/cbill/58-01/0236/20201229_EUFR_DPM.pdf.

2 Sections 6(1) and (3), 21, 22(7), 27, 31-33, 39 and 40, and Schedule 2, paragraphs 3(5), 4 and 18.

3 Sections 6(1) and paragraph 4 of Schedule 2.

4 Section 40(7).

5 We understand that the reference to clause 29 at paragraph 13(b) of the Memorandum was a typo and should have been a reference to clause 31.

or repeal primary legislation (that is, exercised as a Henry VIII power), the draft affirmative procedure applies; otherwise, the negative procedure applies. Paragraph 51 of the Memorandum justifies this on the ground that anticipated modifications to secondary legislation or retained EU law will largely consist of procedural or technical changes required to allow customs procedures relating to the movement of goods to be updated in line with new international standards.

7. **We are not convinced that it was appropriate to limit the affirmative procedure in regulations made under section 21 to those cases where the regulations amend or repeal primary legislation. The powers conferred by section 21 are potentially significant and intrusive.**

- The provisions inserted into CEMA confer a broad power to make provision for the purpose of monitoring, or controlling, the movement of goods that pose, or might pose, a risk to public health or public safety, national security or the environment.
- The powers expressly allow the regulations to include provision requiring or authorising persons or vehicles to be searched, requiring or authorising samples of goods to be taken, and requiring or authorising goods to be seized, detained or disposed.
- The powers also allow fees to be charged in respect of the exercise of functions by HMRC, the Treasury or another public body.
- The regulations may make provision for enforcement, including provision about civil sanctions. Other than the reference to civil sanctions, there is no description of what form the enforcement provisions may take and whether they include the power to create criminal offences.

8. The Memorandum relies on the fact that limitations are contained in section 166C(4) and (5) of CEMA. But section 166C(5) only deals with legislative competence and section 166C(4) limits matters at a high level — prohibiting the regulations from imposing a tax or duty or from providing for the establishment of a public authority. The fact that there was a need expressly to exclude these matters illustrates how wide-ranging and potentially significant the powers are.

9. **Given the scope and significance of the powers conferred by section 21, our view is that they ought to have been subject to the affirmative procedure in respect of all exercises of the powers and not just when primary legislation is being modified.**

Section 31

10. Section 31 contains an exceedingly wide Henry VIII power enabling a relevant national authority by regulations to implement (i) the Trade and Cooperation Agreement, (ii) the Nuclear Cooperation Agreement, (iii) the Security of Classified Information Agreement, or (iv) “any relevant agreement”. Section 31(7) defines “relevant agreement” as (a) any “future relationship agreement” (as defined in section 37(1)) which is not (i), (ii) or (iii) above; or (b) any agreement which falls within Article 2.4.4 of Chapter 2 of Title XI of Heading 1 of Part 2 of the Trade and Cooperation Agreement (competition co-operation agreement).

11. Given the Government's approach in previous Brexit Bills, the imminent end of the transition period and the potential need to amend domestic law to take account of decisions of the Partnership Council (created by the Trade and Cooperation Agreement) some power of the breadth of section 31 was perhaps to be expected. Moreover, section 31(4) limits the regulation-making power in section 31 in ways similar to section 8(7) of the European Union (Withdrawal) Act 2018 ("the 2018 Act"). For example, section 31 regulations are not allowed to impose or increase taxation or fees, to create criminal offences punishable by more than 2 years' imprisonment, to make retrospective provision or to amend human rights legislation. Otherwise, such regulations may make any provision that can be made by an Act of Parliament, including modifying the 2020 Act itself: section 31(2) says so expressly.
12. **Given the considerable breadth of the power in section 31, we are disappointed that the Government say so little in the Memorandum about the scale and significance of the changes that they expect to make using this power, or indeed about how the power in section 31 is intended to complement the highly unusual provision in section 29 — under which all existing domestic law is to have effect "with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement or the Security of Classified Information Agreement".**
13. The matters in paragraph 6(2) of Schedule 5 that trigger the affirmative procedure for regulations under section 31 are narrower than those applying for the purposes of regulations made under section 8 of the 2018 Act. In particular, paragraph 6 of Schedule 5 does not require the affirmative procedure for regulations that create or widen the scope of a criminal offence. **In our view, paragraph 6(2) of Schedule 5 to the 2020 Act should have required the affirmative procedure where regulations under section 31 create or widen the scope of a criminal offences.**
14. **Likewise, paragraph 12(2) of Schedule 5 to the 2020 Act should in our view have required the affirmative procedure where regulations under section 33 create or widen the scope of a criminal offence.**
15. **We welcome the fact that a sifting procedure has been introduced in paragraph 8 of Schedule 5, allowing the possibility of negative procedure regulations made under section 31 to be uprated to the affirmative procedure.** However, the sifting procedure will only apply for two years after the end of the transition period. Paragraph 23 of the Memorandum, recognising the significant role Parliament has played in scrutinising instruments made under the 2018 Act (in which the sifting procedure first appeared), states the Government's commitment to ensuring the appropriate scrutiny of any secondary legislation made under the delegated powers in the 2020 Act. The Memorandum does not contain a convincing explanation for the two-year limitation on the use of the sifting procedure. **Given that regulations made under section 31 may be used to implement future agreements made more than two years after the end of the transition period, in our view paragraph 8(1) of Schedule 5 should not have been limited to instruments made within the next two years.**

APPENDIX 1: MEMBERS' INTERESTS

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

For the business taken at the meeting on 6 January 2021, no interests were declared.

Attendance

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