

HOUSE OF LORDS

Select Committee on the Constitution

4th Report of Session 2023–24

**Economic Activity
of Public Bodies
(Overseas Matters)
Bill**

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Select Committee on the Constitution

The Constitution Committee is appointed by the House of Lords in each session “to examine the constitutional implications of public bills coming before the House and to keep under review the operation of the constitution and the constitutional aspects of devolution”.

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<u>Baroness Andrews</u>	<u>Lord Foulkes of Cumnock</u>
<u>Lord Beith</u>	<u>Baroness Goldie</u>
<u>Lord Burnett of Maldon</u>	<u>Lord Keen of Elie</u>
<u>Baroness Drake</u> (Chair)	<u>Lord Strathclyde</u>
<u>Lord Falconer of Thoroton</u>	<u>Lord Thomas of Gresford</u>

Declaration of interests

See Appendix 1.

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Economic Activity of Public Bodies (Overseas Matters) Bill

Introduction

1. The Economic Activity of Public Bodies (Overseas Matters) Bill was introduced in the House of Commons on 9 June 2023 and, having been carried over to the new session, was brought to the House of Lords on 11 January 2024. Second reading is scheduled for 20 February 2024.
2. The objective of the Bill is to “prevent public bodies when making decisions about procurement and investment from considering a country or territory of origin or other territorial considerations in a way that indicates political or moral disapproval of a foreign state.”¹ This policy objective was included in the Conservative Party Manifesto in 2019, which stated that the government would “ban public bodies from imposing their own direct or indirect boycotts, disinvestment or sanctions campaigns against foreign countries.”²

Freedom of expression

3. Clause 1 of the Bill provides that decision-makers making a “procurement decision” or an “investment decision” which would be subject to section 6 of the Human Rights Act 1998³ “must not have regard to a territorial consideration in a way that would cause a reasonable observer of the decision-making process to conclude that the decision was influenced by political or moral disapproval of foreign state conduct”.⁴
4. Clause 4(1)(a) prohibits decision-makers from publishing statements indicating that they intend to act in a way that contravenes the obligation set out in clause 1.⁵ Clause 4(1)(b) prohibits decision-makers from stating that they “would intend to act in such a way were it lawful to do so”.⁶
5. **The protection of free speech is a fundamental right. In our view, clauses 4(1)(a) and 4(1)(b) unduly limit freedom of speech by preventing public bodies from stating that they would or even might make a procurement or investment decision in contravention of clause 1 had it been lawful to do so. *The House may wish to consider whether clause 4 should be removed from the Bill.***
6. Clause 4 also gives rise to concerns about legal certainty. For example, it is unclear how provisions in the Bill will interact with the Higher Education (Freedom of Speech) Act 2023. Under section 1 of that Act, universities have a duty to secure “freedom of speech within the law” for staff, members,

1 [Explanatory Notes to the Economic Activity of Public Bodies \(Overseas Matters\) Bill](#), para 1

2 Conservative Party, *Conservative Party Manifesto 2019*, p 20: <https://www.conservatives.com/our-plan/conservative-party-manifesto-2019>

3 [Economic Activity of Public Bodies \(Overseas Matters\) Bill](#), clause 2(1)

4 [Economic Activity of Public Bodies \(Overseas Matters\) Bill](#), clause 1(2). The Bill exempts certain bodies and functions from this obligation—including the Security Service, the Secret Intelligence Service and the Government Communication Headquarters—and provides for exemptions for specific purposes, such as taking account of a territorial consideration so far as it relates to labour-related misconduct. [Economic Activity of Public Bodies \(Overseas Matters\) Bill](#), Schedule 1

5 [Economic Activity of Public Bodies \(Overseas Matters\) Bill](#), clause 4(1)(a)

6 [Economic Activity of Public Bodies \(Overseas Matters\) Bill](#), clause 4(1)(b)

students and visiting speakers.⁷ Given the potentially broad scope of clause 4(1)(b) of the Bill and section 1 of the Higher Education (Freedom of Speech) Act 2023, it may be difficult to balance these competing obligations in practice.

7. ***We recommend the House asks the Minister to publish more precise guidance as to how clause 4(1)(b) will be applied in practice and how the requirements in the clause will be balanced with duties under section 1 of the Higher Education (Freedom of Speech) Act 2023.***

Procedural fairness

8. Clause 8 empowers an enforcement agency⁸ to issue a compliance notice when the enforcement agency “is satisfied that a person has contravened or is likely to contravene” clauses 1 or 4. Before providing a compliance notice, the enforcement authority “must inform the person of the proposed notice and give the person an opportunity to make representations”.⁹ The enforcement agency “must also explain that failing to adhere to the notice may make the person liable to a monetary penalty”.¹⁰
9. Under clause 8(2) the enforcement agency “may give the person a written notice” setting out its reasons for being satisfied that the person has, or is likely to have, contravened clauses 1 or 4, and “the actions that it considers the person should take, or refrain from taking, in order to avoid contravening or further contravening” the provisions of clauses 1 or 4.¹¹
10. ***While clause 8 provides a public authority that has received a compliance notice with the right to make representations, these representations may be of limited effect if the public authority is unaware of the reasons behind the compliance notice. Given the impact of the Bill on free speech, we recommend that the Bill should be amended so there is a duty on an enforcement agency to provide reasons for the issuing of a compliance notice.***

Financial penalties

11. Clause 10 provides the Secretary of State with a duty to make regulations setting out the maximum financial penalty for decision-makers who fail to adhere to compliance notices.¹²
12. In its Guidance for Departments the Delegated Powers and Regulatory Reform Committee said:

“Where a bill creates a criminal offence with provision for the penalty to be set by delegated legislation, the Committee would expect, save in exceptional circumstances, the maximum penalty on conviction to

7 Higher Education (Freedom of Speech) Act 2023, [section 1](#)

8 The main enforcement agency is the Secretary of State or the Treasury, save for decisions or statements by a Minister of the Crown (for which there is no enforcement agency) or decisions or statements of a registered English higher education provider, for which the enforcement agency is the Office for Students. [Economic Activity of Public Bodies \(Overseas Matters\) Bill](#), clause 6(2), (3) and (4)

9 [Economic Activity of Public Bodies \(Overseas Matters\) Bill](#), clause 8(4)

10 [Economic Activity of Public Bodies \(Overseas Matters\) Bill](#), clause 8(3)

11 [Economic Activity of Public Bodies \(Overseas Matters\) Bill](#), clause 8(2)

12 [Economic Activity of Public Bodies \(Overseas Matters\) Bill](#), clause 10(1)

be included on the face of the bill ... where this is not the case, the memorandum should explain why not.”¹³

13. **The power in clause 10 to set a maximum financial penalty by way of regulations is unsatisfactory. There is a danger that regulations could set a high financial penalty which acts as a deterrent to freedom of expression, with public authorities erring on the side of caution to avoid being fined.**

Devolution

14. Clauses 1–4 apply to Scottish, Welsh and Northern Irish ministers, as well as devolved local authorities and bodies performing a public function in Scotland, Wales and Northern Ireland.
15. The Devolution Guidance Notes, produced by the Cabinet Office, advise that, when a bill alters the executive competences of the devolved ministers, the devolved ministers should be adequately consulted. Where the Bill has a significant effect on devolved matters, the papers accompanying the Bill before the Parliamentary Business and Legislation Committee should indicate what consultations have taken place with the relevant devolved governments.¹⁴
16. In *Respect and Co-operation: Building a Stronger Union for the 21st Century* we said:
- “The Devolution Guidance Notes require early consultation with the devolved legislatures on the devolved aspects of UK bills, to address any significant issues in good time. During Brexit, it is clear this guidance was not always followed but subsequently there is evidence that it is again being followed. We welcome this and recommend the guidance should be followed as a matter of course from now on. We believe it would be desirable for all efforts to be taken to resolve any substantive disagreements before a bill is introduced to Parliament.”¹⁵
17. Both the Scottish and Welsh governments have raised concerns that they were not specifically consulted about the Bill.¹⁶
18. **We are concerned by reports from the Scottish and Welsh governments that they were not specifically consulted about the Bill despite it altering the powers of devolved ministers. We cannot**

13 Delegated Powers and Regulatory Reform Committee, *Guidance for Departments on the role and requirements of the Committee* (December 2023), para 1: <https://committees.parliament.uk/publications/42694/documents/212126/default/>

14 Cabinet Office, *Devolution Guidance Note 8: Post-Devolution Primary Legislation affecting Northern Ireland*: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60983/post-devolution-primary-ni.pdf; Cabinet Office, *Devolution Guidance Note 10: Post-Devolution Primary Legislation affecting Scotland*: <https://assets.publishing.service.gov.uk/media/5a79c7efe5274a18ba50ec92/post-devolution-primary-scotland.pdf>; Cabinet Office, *Devolution Guidance Note: Parliamentary and Assembly Primary Legislation Affecting Wales*: https://assets.publishing.service.gov.uk/media/5ad9edd4ed915d32a3a7100a/DGN_-_Parliamentary_and_Assembly_Primary_Legislation_Affecting_Wales.pdf

15 Constitution Committee, *Respect and Co-operation: Building a Stronger Union for the 21st Century* (10th Report, Session 2021–22, HL Paper 142), para 136

16 Scottish Government, *Legislative Consent Memorandum: Economic Activity of Public Bodies (Overseas Matters) Bill* (19 July 2023), para 21: <https://www.parliament.scot/-/media/files/legislation/bills/lcms/economic-activity-of-public-bodies-overseas--matters-bill/legislative-consent-memorandum.pdf>; Welsh Government, *Legislative Consent Memorandum: Economic Activity of Public Bodies (Overseas Matters) Bill* (8 September 2023), para 7: <https://senedd.wales/media/s4ipp1xv/lcm-ld16016-e.pdf>.

conceive of a reason why consultation could not have taken place on this Bill. We recommend the Government informs the House, by way of a statement during the Bill's passage through the House, why consultation did not take place. The House should be kept informed of any ensuing consultation with the devolved administrations.

19. The Sewel convention provides that Parliament does not normally legislate on devolved matters without the consent of the devolved legislature in question.¹⁷ The Devolution Guidance Notes also state that consent is required for Bills that alter the executive competence of the devolved governments.¹⁸
20. As the Bill alters the powers of ministers of the devolved governments, it requires a legislative consent motion.¹⁹ Both the Scottish and Welsh governments have recommended that consent be withheld.²⁰
21. In *Respect and Co-operation: Building a Stronger Union for the 21st Century* we said:
- “The Sewel convention is a fundamental part of the United Kingdom’s devolution arrangements. If trust is to be maintained between the UK Government and the devolved administrations, it is essential that it be respected by all governments and legislatures.”²¹
22. We also said:
- “Where the UK Parliament legislates in devolved areas without consent it should demonstrate that the particular circumstances require it to do so. In any event, the UK Government should always demonstrate that it has taken all reasonable steps to secure consent. Other than in exceptional circumstances, the UK Government ought not to seek to legislate in devolved areas without consent.”²²
23. **We are concerned that the Bill is at risk of being enacted in the absence of legislative consent from the devolved legislatures. In our view the Bill is not so exceptional in its nature that it justifies a contravention of the Sewel convention. We recommend the House seeks further information from the Government as to whether, and if so, how it proposes to obtain legislative consent.**

17 This is the definition used in legislation: Scotland Act 1998, [section 28\(8\)](#); Government of Wales Act 2006, [section 107\(6\)](#).

18 Cabinet Office, *Devolution Guidance Note 8: Post-Devolution Primary Legislation affecting Northern Ireland*: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60983/post-devolution-primary-ni.pdf; Cabinet Office, *Devolution Guidance Note 10: Post-Devolution Primary Legislation affecting Scotland*: <https://assets.publishing.service.gov.uk/media/5a79c7efe5274a18ba50ec92/post-devolution-primary-scotland.pdf>; Cabinet Office, *Devolution Guidance Note: Parliamentary and Assembly Primary Legislation Affecting Wales*: <https://assets.publishing.service.gov.uk/media/5ad9edd4ed915d32a3a7100a/DGN - Parliamentary and Assembly Primary Legislation Affecting Wales.pdf>

19 [Explanatory Notes to the Economic Activity of Public Bodies \(Overseas Matters\) Bill](#), p 13

20 Scottish Government, *Legislative Consent Memorandum: Economic Activity of Public Bodies (Overseas Matters) Bill* (19 July 2023), para 24: <https://www.parliament.scot/-/media/files/legislation/bills/lcms/economic-activity-of-public-bodies-overseas--matters-bill/legislative-consent-memorandum.pdf>; Welsh Government, *Legislative Consent Memorandum: Economic Activity of Public Bodies (Overseas Matters) Bill* (8 September 2023), para 43: <https://senedd.wales/media/s4ipp1xv/lcm-ld16016-e.pdf>.

21 Constitution Committee, *Respect and Co-operation: Building a Stronger Union for the 21st Century* (10th Report, Session 2021–22, HL Paper 142), para 120

22 Constitution Committee, *Respect and Co-operation: Building a Stronger Union for the 21st Century* (10th Report, Session 2021–22, HL Paper 142), para 124

24. **We have previously expressed our regret at the lack of a functioning Assembly and Executive in Northern Ireland. This absence made it impossible to obtain legislative consent for bills which modified the competencies of Northern Irish ministers.**
25. The UK Government considers legislative consent is required for clauses 1–4. The Welsh Government, however, is of the view that the Sewel convention also applies to clauses 5–11, 14, 15, 16 and Schedule 2, part 1.²³
26. In *Respect and Co-operation: Building a Stronger Union for the 21st Century* we recommended:
- “At present when the Government considers consent is not required from a devolved legislature and proceed to give effect to that view, there is no parliamentary scrutiny of this determination. In future we recommend that the Government should justify its approach to the House at the beginning of a Bill’s consideration.”²⁴
27. In our report on the *Levelling-up and Regeneration Bill* we noted that “earlier consultation could help resolve any disagreement between the UK government and the Scottish and Welsh governments on whether the legislative consent process is engaged.”²⁵
28. **Differences of opinion as to the provisions for which legislative consent is required may have been avoided had earlier consultation with the devolved administrations taken place. We recommend the Government justifies to the House its view that legislative consent is required only for clauses 1–4.**
29. Clause 5 provides that, where possible, enforcement of provisions in the Bill is through judicial review.²⁶ However, where a decision or statement is not amenable to judicial review, the High Court or, in Scotland, the Court of Session is empowered to “make any order that the court thinks is appropriate by way of relief” when it is “satisfied that the decision-maker has contravened” the provisions of the Bill.²⁷ If satisfied the decision-maker “is likely to contravene” provisions of the Bill, the High Court or Court of Session may “make any order that the court thinks appropriate for the purpose of preventing such a contravention”.²⁸ It is notable that the Government does not consider legislative consent necessary for this clause, which is concerned with the judicial competence of the Court of Session—a Scottish court.
30. **It is particularly significant that the Government considers that clause 5—which empowers the Court of Session to make orders and as such is concerned with the judicial competence of a Scottish court—does not require legislative consent. Clause 5 calls into question the independence of the Scottish judiciary and, in our view, requires legislative consent. Failure to obtain consent for this clause should be justified to the House.**

23 Welsh Government, *Legislative Consent Memorandum: Economic Activity of Public Bodies (Overseas Matters) Bill* (8 September 2023), paras 26–38: <https://senedd.wales/media/s4ipp1xv/lcm-ld16016-e.pdf>

24 Constitution Committee, *Respect and Co-operation: Building a Stronger Union for the 21st Century* (10th Report, Session 2021–22, HL Paper 142), para 139

25 Constitution Committee, *Levelling-up and Regeneration Bill* (12th Report, Session 2022–23, HL Paper 140), para 18

26 *Economic Activity of Public Bodies (Overseas Matters) Bill*, clause 5(1) and (2)

27 *Economic Activity of Public Bodies (Overseas Matters) Bill*, clause 5(4)(a)

28 *Economic Activity of Public Bodies (Overseas Matters) Bill*, clause 5(4)(b)

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members of the Committee

Baroness Drake (Chair)
Lord Anderson of Ipswich
Baroness Andrews
Lord Beith
Lord Burnett of Maldon
Lord Falconer of Thoroton
Baroness Finn
Lord Foulkes of Cumnock
Baroness Goldie
Lord Keen of Elie
Lord Strathclyde
Lord Thomas of Gresford

Members who attended for the consideration of this report

Lord Hope of Craighead
Baroness Suttie

Declarations of interest

Baroness Drake (Chair)
No interests declared
Lord Anderson of Ipswich
No interests declared
Baroness Andrews
No interests declared
Lord Beith
No interests declared
Lord Burnett of Maldon
No interests declared
Lord Falconer of Thoroton
No interests declared
Baroness Finn
No interests declared
Lord Foulkes of Cumnock
No interests declared
Baroness Goldie
No interests declared
Lord Hope of Craighead
No interests declared
Lord Keen of Elie
No interests declared
Lord Strathclyde
No interests declared
Baroness Suttie
No interests declared
Lord Thomas of Gresford
No interests declared

A full list of members' interests can be found in the Register of Lords' Interests: <https://members.parliament.uk/members/lords/interests/register-of-lords-interests>

Professor Stephen Tierney, University of Edinburgh, and Professor Alison Young, University of Cambridge, acted as legal advisers to the Committee. Professor Stephen Tierney is an employee of the University of Edinburgh which is a public authority for the purposes of the Bill. Professor Alison Young is an employee of the University of Cambridge and a trustee of Robinson College. Both are 'public authorities' affected by the Bill.