

HOUSE OF LORDS

Delegated Powers and Regulatory Reform  
Committee

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1st Report of Session 2019–21

# European Union (Withdrawal Agreement) 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](#) (Chairman)

[Baroness Browning](#)

[Lord Goddard of Stockport](#)

[Lord Haselhurst](#)

[Lord Haskel](#)

[Baroness Meacher](#)

[Lord Rowlands](#)

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### *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 [hlddelegatedpowers@parliament.uk](mailto:hlddelegatedpowers@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.

# First Report

## EUROPEAN UNION (WITHDRAWAL AGREEMENT) BILL

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1. The European Union (Withdrawal Agreement) Bill is expected to be passed today by the House of Commons. Second reading in the House of Lords is scheduled for 13 January 2020, and Committee Stage during the days immediately following.
2. The Bill's central purpose is to implement the Withdrawal Agreement agreed at the European Council on 17 October 2019 between the United Kingdom and the EU.
3. Our remit requires us to report on what we regard as an inappropriate delegation of power or an inappropriate parliamentary procedure attaching to the exercise of a delegated power. We do not comment on the merits or otherwise of Brexit or of the Withdrawal Agreement. To assist us in our scrutiny of the Bill, the Department for Exiting the European Union has provided a detailed and helpful Delegated Powers Memorandum ("the Memorandum"), which engages with our known concerns from earlier Brexit legislation.
4. In a Bill consisting of 42 clauses:
  - The words "An appropriate authority may by regulations make such provision as the authority considers appropriate" occur nine times.<sup>1</sup>
  - The words "A Minister of the Crown may by regulations" occur 15 times.<sup>2</sup>
  - One paragraph of one subsection<sup>3</sup> consisting of just 10 words, easily missed in a Bill of 101 pages, allows a Minister of the Crown to make regulations implementing 85 articles of the Withdrawal Agreement.<sup>4</sup>

### The appropriateness test

5. The Government readily acknowledge the breadth of some of the Bill's delegated powers.<sup>5</sup> They refer to our concerns in relation to the drafting of the European Union (Withdrawal) Act 2018 ("the 2018 Act"). As in the 2018 Act, the drafting approach in the Bill is typically by reference to a subjective test based on the Minister's view of what is appropriate. During the passage of the 2018 Act, we argued that the test should be an objective one based on what was necessary.
6. **On this occasion we accept that the test is properly based on what is appropriate rather than on what is necessary.**
  - (a) The context of the current Bill is different from that of the 2018 Act. Government policy as set out in paragraph 1.21 of the March 2017

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1 Clauses 12, 13 and 14.

2 Clauses 3, 7-9, 11, 18, 21, 26, 39, 41 and 42.

3 Section 8B(1)(a) of the European Union (Withdrawal) Act 2018, as inserted by clause 18 of the Bill.

4 Part 3 of the Withdrawal Agreement consists of Articles 40-125, running to 119 pages in the latest edition of the Agreement (published 19 October 2019).

5 Memorandum, paras 33-40.

White Paper, *Legislating for the United Kingdom's withdrawal from the European Union*, was to preserve in UK domestic law the accumulated body of EU law without making major changes of policy through Ministerial regulations save where changes were “necessary to ensure the law continues to function properly” from exit day. Given the need to preserve in domestic law many thousands of pieces of EU law, the implications were potentially far-reaching if changes to the accumulated body of EU law depended on the Minister’s subjective view of what was appropriate rather than on the more restrictive criterion of necessity set out by the Government at paragraph 1.21 of the White Paper.

- (b) It is not clear that a “necessity” test would work for much of the Bill. The Bill provides for the Withdrawal Agreement to have direct effect in UK domestic law, but further provision may need to be made in secondary legislation to implement it or supplement it. Where it is left to the discretion of the UK to determine the precise details of how the implementation is to work, there will not be a “necessary” solution as to how that should be done. For example, Article 18(1) allows the UK to require a person who is entitled to residence rights under the Withdrawal Agreement to make an application for those residence rights and to obtain a document evidencing those rights. It is not something that the UK is required to do; it is something that the UK has the option to do.
- (c) Powers in the Bill are typically tied to the implementation of the Withdrawal Agreement. For instance, clause 14(1) allows Ministers and devolved authorities to make such provision as they consider appropriate for the purpose of implementing provisions of the Withdrawal Agreement concerning non-discrimination, equal treatment and the rights of workers. The Government rightly acknowledge that the “scope of each power is thus naturally constrained by the scope of the particular matter contained in the Agreements<sup>6</sup> that it is intended to address”.<sup>7</sup> The scope for an exorbitant exercise of the powers in this Bill is considerably less than was the case for the 2018 Act.
- (d) Although “appropriate” is a broader test than “necessary”, it does not confer unfettered discretion. Courts construe powers with reference to context and legislative intent.
- (e) It could lead to uncertainty if the test used in this Bill differed from the test used in the 2018 Act, under which hundreds of Brexit statutory instruments have already been made using the “appropriate” test.

### Henry VIII clauses

7. There is extensive use of powers given to Ministers to amend or repeal Acts of Parliament by statutory instrument (“Henry VIII clauses”). The Bill contains several types of Henry VIII clause. For example:
  - Clause 8(3) allows regulations to modify (that is, amend or repeal) just the Immigration Acts.
  - Clause 11(4) allows regulations to modify any Act of Parliament.

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6 The Withdrawal, the EEA EFTA and Swiss Agreements.

7 Memorandum, para 38.

- Clause 21 goes even further by allowing regulations to make any provision that could be made by an Act of Parliament (see paragraphs 17 to 23 below).<sup>8</sup>
8. The Bill's general approach is that regulations which amend, repeal or revoke primary legislation (or retained direct principal EU legislation) must adopt the affirmative procedure.<sup>9</sup> This accords with our normal expectations.
  9. However, clause 41 (consequential and transitional provision etc.) contains a Henry VIII power for a Minister of the Crown by regulations to repeal or amend any Act of Parliament passed from time immemorial until the end of the transitional period (the end of 2020) as part of such provision as the Minister considers appropriate in consequence of the Act. Such regulations are made pursuant to the negative procedure.<sup>10</sup>
  10. In seeking to justify this departure from the norm, the Government mention that primary legislation passed or made after December 2020 is not amendable under this provision.<sup>11</sup> This offers limited comfort, given that every Act of Parliament passed before the end of December 2020 is amendable by Ministerial regulations made under the negative procedure. The Government also seek to justify the negative procedure on the ground that consequential powers are construed strictly by the courts. This is not relevant to the question whether Parliament should be able to scrutinize the legislation under the affirmative procedure.
  11. **Where regulations under clause 41(1) modify primary legislation or retained direct principal EU legislation, the affirmative procedure should apply in accordance with established practice and be consistent with the general approach in the Bill.**<sup>12</sup>

### A sifting mechanism

12. The general approach in the Bill – that the affirmative procedure is mandatory where regulations modify primary legislation or retained direct principal EU legislation but otherwise the negative procedure prevails – contrasts starkly with the 2018 Act, where the main regulation-making power in section 8 requires the affirmative procedure for such matters as certain fee provisions, for the creation or widening of the scope of a criminal offence and for the creation of powers to make tertiary legislation.<sup>13</sup> A striking feature of the Brexit statutory instruments made under the 2018 Act is the high proportion of affirmative instruments that have been laid. Out of more than 500 instruments laid since 2018, more than 50% have been subject to the affirmative procedure.
13. The Government have not sought to justify this departure from the approach taken in the 2018 Act. Regulations that are otherwise of minor importance but amend one provision of primary legislation will trigger the affirmative procedure. By contrast, significant regulations that do not happen to amend

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8 This not only allows the amendment of primary legislation but also allows other things to be included in the regulations that would ordinarily be limited to primary legislation, such as the power to delegate legislation-making powers and the power to create criminal offences.

9 For example, Sch 4, paras 1(1)(b), 2(2), 3(1), (3), (5) and (7).

10 Sch 4, para 6.

11 Memorandum, para 328.

12 We made a similar recommendation in relation to the European Union (Withdrawal) Bill: see our 12th Report, HL Paper 73, Session 2017-19, para 38. The Government did not adopt the recommendation.

13 Sch 7, para 1(2).

either primary legislation or retained direct principal EU legislation merely trigger the negative procedure.

14. We have considered whether there would be benefit in replicating the sifting mechanism found in Schedule 7 to the 2018 Act. Under that mechanism, a sifting committee can recommend an upgrade for those regulations that do not otherwise qualify for the affirmative procedure, but which deserve to be upgraded on grounds of their significance.
15. Several provisions of the Bill illustrate how such a sifting mechanism might be useful.
  - (a) Clause 18<sup>14</sup> inserts a new section 8B into the 2018 Act, allowing Ministers to make such provision as they consider appropriate to implement Part 3 (that is, Articles 40-125) of the Withdrawal Agreement. In making those regulations, Ministers can do anything that could be done by Act of Parliament.<sup>15</sup> New section 8B(5) qualifies this to the extent that Ministers cannot (among other things) tax, make retrospective provision, create certain serious criminal offences or modify the Human Rights Act 1998. However, some things can be done under the negative procedure that could only be done under the affirmative procedure in the 2018 Act.<sup>16</sup> These include creating certain less serious criminal offences or widening the scope of any criminal offence, creating or amending a power to legislate (that is, to make tertiary legislation) and making provision relating to the fees charged by public bodies. The Government have not sought to explain why matters requiring the affirmative procedure under the 2018 Act have now been relegated to the negative procedure under this Bill. Nor have they sought to explain why the Bill makes no provision for a sifting mechanism such as that contained in the 2018 Act.
  - (b) Clause 3 inserts a new section 8A into the 2018 Act allowing Ministers to make supplementary provision in connection with the implementation period. In their Memorandum,<sup>17</sup> the Government refer to typical applications of the power in new section 8A as being to provide for glosses to certain terms and to make technical corrections. However, the power in new section 8A(1)(a) and (e) goes wider than the making of glosses and technical corrections. If the sifting mechanism applied to this new section, it would allow an upgrade to the affirmative procedure in suitable cases.
  - (c) Paragraphs 1(1) and 2(1) of Schedule 4 require the affirmative procedure for the first regulations made under various provisions contained in clauses 7-9 and 11. By contrast, subsequent sets of regulations (providing they do not include Henry VIII provisions) are subject only to the negative procedure. The Government's justification for this is that the first regulations made under these provisions are likely to be substantial and detailed, whereas any later changes are likely to be technical and minor.<sup>18</sup> Saying that later changes are likely to be technical and minor implies that there may be cases where the changes

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14 Clause 19 is the equivalent provision to clause 18 so far as the devolved authorities are concerned.

15 New section 8B(3) as inserted into the 2018 Act.

16 Sch 7, para 1(1).

17 Para 278.

18 Memorandum, paras 64-65, 79-80, 95 and 120-121.

are more than merely technical and minor. We have traditionally judged powers not on how the Government say that they will use them but on how they are capable of being used. Again, a sifting mechanism would enable a scrutiny upgrade in suitable cases.

- (d) Clause 16 provides for the powers in clauses 7, 8, 9 and 14 to implement the various Agreements to include power to make provision to supplement the effect of sections 7A and 7B<sup>19</sup> of the 2018 Act. Depending on the importance of provision made in regulations exercising these powers, a sifting mechanism to upgrade the parliamentary procedure in suitable cases would be useful.
- (e) Finally, regulations made under clause 21 relating to the Northern Ireland protocol (see paragraphs 17-23 below) might also benefit from the insights of a sifting committee, given the potential significance of such regulations.

16. **We recommend that a sifting mechanism along the lines of the one in Schedule 7 to the 2018 Act should apply to instruments laid under this Bill that do not otherwise qualify for the affirmative procedure. This would allow a sifting committee to recommend an upgrade to the affirmative procedure where regulations are significant but do not happen to modify primary legislation or retained direct principal EU legislation.**

#### Power in connection with the Ireland/Northern Ireland Protocol

- 17. Clause 21 adds a new section 8C to the 2018 Act allowing Ministers to make regulations to implement the Ireland/Northern Ireland Protocol in the Withdrawal Agreement. New section 8C(2) allows regulations to make any provision that could be made by an Act of Parliament, including modifying (that is, amending or repealing) the 2018 Act itself.
- 18. This is a significant new provision. For example, regulations could considerably add to the powers in section 8C(1) and could alter the parliamentary procedure attaching to the making of regulations under that section. This is a most potent form of Henry VIII clause, allowing regulations to modify their parent Act in addition to creating a new legal regime that would otherwise require one or more Acts of Parliament. Furthermore, clause 21 does not contain any limitation such as the one inserted by clause 18 as new section 8B(5) of the 2018 Act,<sup>20</sup> a point we develop below (see paragraphs 22 and 23).
- 19. We objected<sup>21</sup> to what was clause 9 of the European Union (Withdrawal) Bill, which allowed regulations to modify their parent Act. We said that the power was wholly unacceptable and should be removed from the Bill. The clause was subsequently removed from the Bill.

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19 Inserted by clauses 5 and 6.

20 New section 8B(5) prohibits regulations from, amongst other things, taxing, making retrospective provision, creating certain serious criminal offences or modifying, for example, the Human Rights Act 1998.

21 12th Report, HL Paper 73, Session 2017-19, para 23.

20. At paragraph 241 of the Memorandum, the Government explain why they are seeking a power to amend the 2018 Act itself:

“The power in 8C(1) is also capable of amending the EU (Withdrawal) Act 2018. This is required in order to ensure that the power can be used to explain the relationship between the snapshot of EU law that is domesticated at the end of the Implementation Period and the EU law that applies in Northern Ireland as a result of the provisions of the Protocol coming into effect (where Northern Ireland will be required to align with EU law in certain areas). For example, it may be necessary to carve out exceptions to the snapshot at the end of the Implementation Period in order to ensure that the Protocol and the domestic statute book operate effectively.”

21. **Even if the House accepts that there is a good reason for clause 21 to allow regulations to modify the 2018 Act, the power should, in our view, be limited to the minimum necessary. We therefore recommend that the Bill should spell out the purposes for which the power is to be used rather than leaving the matter at large.**

22. It was mentioned above that clause 21 allows regulations under section 8C to make any provision that could be made by an Act of Parliament, but without limiting that provision (in the way that section 8(7) of the 2018 Act currently does and new section 8B(5) would do) so that it cannot be used to:

- impose or increase taxation or fees,
- make retrospective provision,
- create a relevant criminal offence (i.e. with a penalty exceeding 2 years imprisonment),
- establish a public authority,
- amend, repeal or revoke the Human Rights Act 1998 or any subordinate legislation made under it, or
- amend or repeal the Scotland Act 1998, the Government of Wales Act 2006 or the Northern Ireland Act 1998.

23. The fact that these important limitations are missing from section 8C may suggest that the Government propose to use the powers under clause 21 to do one or more of the things on the above list. The Government have not justified the difference in approach as between sections 8 and 8B of the 2018 Act (on the one hand) and section 8C (on the other). **The House may wish therefore to seek a justification from the Minister for this difference in approach.**

## **APPENDIX 1: MEMBERS' INTERESTS**

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