HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

17th Report of Session 2021–22

Subsidy Control 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.

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Lord Blencathra (Chair)
Baroness Browning
Lord Goddard of Stockport
Lord Haselhurst
Lord Hendy
Lord Janvrin
Baroness Meacher
Lord Rowlands
Lord Tope

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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 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.

Seventeenth Report

SUBSIDY CONTROL BILL

1. The Subsidy Control Bill was brought from the House of Commons on 14 December 2021. The United Kingdom being no longer subject to EU state aid rules,[1] the purpose of the Bill is to regulate the giving of subsidies out of public resources. The Department for Business, Energy and Industrial Strategy has provided us with a Delegated Powers Memorandum[2] ("the Memorandum") to assist with our deliberations.

2. We normally deal with matters in order of clause numbering. **Given that clause 47 involves fundamental issues of government accountability and parliamentary scrutiny, we deal with it first.** Not only does the provision enable the Government to disapply a legislative provision—the Bill's subsidy control requirements—by a direction that can be kept secret from Parliament, but the justification for the power not being subject to any parliamentary scrutiny procedure includes, according to the Memorandum, "the potential for non-approval by Parliament"—in other words, the risk of a defeat. In our recent report, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*,[3] we said that the principles of parliamentary democracy—parliamentary sovereignty, the rule of law and the accountability of the executive to Parliament—should be at the heart of how a department approaches the delegation of legislative powers. Regrettably, the provision in clause 47 is a stark example of a breach of those principles.

Clause 47: financial stability directions

3. One of the cases when the Bill's subsidy control requirements are disapplied is where the Treasury gives a financial stability direction under clause 47(1). Clause 47(3) allows the Treasury to do this for prudential reasons, including the protection of investors or to ensure the integrity and stability of the financial system in the United Kingdom.

4. The direction involves no parliamentary procedure and does not have to be laid before Parliament after being made. Clause 46(6) states the general rule that the direction must be published in whatever manner the Treasury considers appropriate. But there is a power in clause 47(7) disapplying the general rule where the Treasury considers that publication of the direction would undermine the purpose for which it is given.

5. **Clause 47(7) means that there are circumstances in which the Treasury can keep financial stability directions secret from Parliament and the public.**

6. The power to disapply legislative requirements is a powerful tool in the hands of the Government. The Government considered making the exercise of this power subject to secondary legislation with a parliamentary procedure. They devoted pages 33 to 37 of the Memorandum to the matter. But they decided against doing so and have been extraordinarily frank in their explanation.

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1 Subject to Article 10 of the NI Protocol.
2 Business, Energy and Industrial Strategy, Delegated Powers Memorandum, 14 December 2021.
3 12th Report, Session 2021-22 (HL Paper 106).

7. The Government have offered several reasons why the power in clause 47(1) to disapply the Bill's subsidy control requirements should be exercised by a direction that is subject to no parliamentary procedure and which can be kept secret from Parliament.

8. First, market failures may require speedy intervention. But this is no reason why a direction should be used rather than regulations. In exceptional cases, regulations can come into force before they are even laid before Parliament. Only the "draft affirmative" procedure might prevent an instrument coming into force exceedingly rapidly. The Government's first argument is simply incorrect.

9. Second, "protection of information flows/secrecy". The Government acknowledge that they may need to offer covert financial support to insulate firms from contagion risks lest the news gets out and there is a collapse in confidence. As part of this they wish to be able to disapply legislative requirements that might otherwise prevent the subsidy, and to do so without telling Parliament. A delegated power subject to parliamentary scrutiny would be apt to prejudice this aim of rescuing firms that are in trouble.

10. This reasoning has inherent dangers. It is a considerable responsibility for the Government to be able to change the law in secret, in this case by disapplying the duty in clause 47(6) of the Bill to publish the direction.

11. But the third reason offered by the Government is the most striking. It is said that finality and legal certainty are required for any subsidy. The argument is that counterparties of firms needing subsidies must be assured that the subsidy measures are legally certain and sustainable lest they be reluctant to commit to further dealings with the firm that is (*ex hypothesi*) in danger of going out of business.

12. The Government say (Memorandum, paragraph 135):

> "The use of a made affirmative procedure could be relatively quickly deployed, but would raise concerns around maintaining secrecy and transactional finality. And while the relevant disapplication of subsidy control requirements would be legally effective at the time the instrument is made, where interventions are ongoing (the giving of liquidity support over many months, for example), *the potential for non-approval by Parliament in due course would create uncertainty that the subsidy will continue to be available*.[4] In relation to this and other potential Parliamentary procedures, even if that risk is relatively remote (where the aims of the authorities can be communicated clearly to Parliament), the existence of that risk could potentially affect the viability or success of the intervention."

13. **We do not recall any other occasion where the Government have argued that one reason why Parliament should not be able to scrutinise delegated legislation is because the Government might be defeated on it.**

14. **Neither have the Government cited any precedent where the ability to disapply a legislative provision (here, the Bill's subsidy control requirements) can be achieved by a direction that can be kept secret**

4 Italics added.

from Parliament. Nor does the Memorandum suggest any undertaking by the Government to inform relevant Committee Chairs, or others, on Privy Council terms as currently happens in highly confidential matters.

15. We do not suggest that highly confidential commercial transactions need to be openly broadcast. In fact, clause 47(6) would allow the Treasury to be circumspect in sensitive areas without the need for clause 47(7) to disapply the publication requirement altogether.

16. In summary, clause 47 is extraordinary for several reasons:

    (a) Parliament has no power to scrutinise and reject a Government direction suspending the application of the Bill's subsidy control requirements.

    (b) Parliament may be deliberately kept in the dark about the existence of such a direction if the Treasury elects to rely on clause 47(7).

    (c) One of the Government's reasons for having no parliamentary procedure is that the potential for non-approval by Parliament would create uncertainty that the subsidy will continue to be available. **In other words, because the Government might be defeated if the direction could be voted upon, there should be no parliamentary procedure and no vote.**

17. **We recommend that clause 47(7) should be removed from the face of the Bill.**

18. **Parliament should always be able to scrutinise secondary legislation that disapplies statutory requirements, a principle that applies to financial stability directions under clause 47(1).**

Clause 10(4): streamlined subsidy schemes

19. Clause 10 allows ministers to make "streamlined subsidy schemes", defined opaquely in clause 10(4). These demonstrate that ministers consider that all subsidies within such a scheme comply with the Bill's subsidy control principles and subsidy control requirements. In practice, it means that if a public authority keeps within the limits of the scheme, it is no longer required to consider the subsidy control principles or the subsidy control requirements when giving an individual subsidy.

20. The Memorandum (paragraph 27) says that streamlined subsidy schemes will be used by the Government to facilitate the granting of "low-risk" subsidies in the furtherance of wider Government policy objectives. However there is no such restriction on the face of the Bill. It is a statement of the Government's present intention and would not bind this Government or future Governments. Streamlined subsidy schemes will not be subject to mandatory referral to the Competition and Markets Authority ("CMA"): see clause 64(1)(a).

21. Streamlined schemes will be laid before Parliament after being made. They will not be subject either to the negative or the affirmative procedure for regulations.

22. The Government acknowledge (Memorandum, paragraph 35) that Parliament will be rightly interested in the categories of subsidies that can be given in accordance with streamlined subsidy schemes. The Government

nevertheless conclude that the economic or analytic nature of the subject matter is consistent with the making of a scheme rather than regulations.

23. We take the view that, precisely *because* Parliament will be interested in streamlined subsidy schemes (as the Government acknowledge), the matter should be included in regulations subject to a parliamentary procedure. The Government mention two precedents from the health and agricultural sectors where schemes are used rather than regulations. But the current Bill involves schemes potentially applying across all sectors.

24. **We recommend that the power to establish streamlined subsidy schemes in clause 10 should be exercised by regulations, and that the negative procedure would be appropriate.**

Clause 11(1): subsidies and schemes of interest or particular interest

25. Clause 11 allows certain definitions to be defined by affirmative regulations rather than appearing on the face of the Bill. These definitions are "subsidy, or subsidy scheme, of interest" and "subsidy, or subsidy scheme, of particular interest". These definitions are important in determining the scope of the subsidies or schemes that may or must be referred to the CMA under clauses 52 to 64 of the Bill.

26. The Memorandum offers several reasons why these definitions should appear in regulations rather than on the face of the Bill:

    (a) The intention is to set criteria that capture a relatively small number of subsidies or schemes that are more likely to have a distortive effect on competition and investment within the United Kingdom.

    (b) The criteria will need to be set at a sufficient level of detail so that it is clear whether a subsidy or scheme must be referred to the CMA.

    (c) As circumstances change, the criteria used to capture subsidies or schemes of interest or particular interest may need to be modified.

    (d) The definitions may need to be modified in the light of the findings of the CMA as to the operation of the regime and its impact on competition and investment in the United Kingdom.

27. We are not convinced by those reasons.

    (a) The Government will have to make the regulations sooner or later to make Part IV of the Bill fully operative. If the Government already have a clear idea of what they want (Memorandum, paragraph 40) they should include the definitions on the face of the Bill. If not, they should at the very least provide Parliament with indicative regulations that might be made under clause 11.

    (b) Bills are capable of including matters of detail. Not all matters of detail need to be consigned to statutory instruments, particularly key definitions required to make the Bill work.

    (c) The arguments from change in the light of experience are not arguments for excluding definitions from the Bill. They are arguments for amendments in the light of experience.

28. **The power in clause 11(1) to define in regulations certain key terms is inappropriate and we recommend that it be removed from the face of the Bill.**

29. Although we have been critical of the over-use of Henry VIII powers, we prefer to see key definitions appear on the face of the Bill—perhaps with a Henry VIII power to amend by affirmative regulations—rather than not appearing on the face of the Bill at all and always being a matter for regulations.

Clause 16(4) and (6): designation of marketable risk countries

30. Clause 16 prohibits subsidies contingent upon export performance. There is an exception for short-term export credit insurance against risks that are not "marketable risks", defined to mean risks relating to the payment obligations of public or non-public customers in "marketable risk countries". In turn this is defined to mean the United Kingdom, an EU member State and various other countries including Switzerland and the USA.

31. Clause 16(4) allows the Secretary of State to make a direction that a marketable risk country is to be treated for the purposes of clause 16 as **not** being a marketable risk country if any of the criteria in clause 16(5) apply. Any such direction is merely laid before Parliament after making and is not subject either to annulment or ratification by Parliament.

32. Clause 16(4) has the same effect as a Henry VIII power. We normally expect Henry VIII powers to be subject to the affirmative resolution procedure. Clause 16(4) is subject to neither the affirmative nor the negative procedure.

33. The Government's reasons for having no parliamentary procedure are unconvincing. They want to be able to act rapidly to allow short-term export credit finance where market factors may have rendered the list of marketable risk countries in need of amendment. But the Government can make rapid legislative changes by negative regulations or "made affirmative" regulations. The idea that the making of regulations is inconsistent with the need to move quickly is fallacious. Negative and "made affirmative" regulations can be made as quickly as can a direction.

34. Once again, the Government have conceded (Memorandum, paragraph 48) that Parliament will be rightly interested in the Secretary of State's decision in relation to a marketable risk country. Once again, though, the Government's approach envisages that Parliament's interest will not go so far as wishing to apply a parliamentary procedure beyond the mere laying of the direction after it has been made.

35. **We recommend that the power in clause 16(4) should be exercised in regulations subject to a parliamentary procedure rather than through a direction. The power clearly has legislative effect. This might be one of those exceptional cases where the negative procedure suffices.**

Clause 25(4)—meaning of deposit taker; clause 26(4)—meaning of insurance company; clause 27(3)—meaning of insurer

36. The Government have taken powers in clauses 25 to 27 to revise certain definitions to cater for developments that cannot be anticipated at the time of the enactment of the Bill (Memorandum, paragraphs 59, 68 and 77). In each case the power is subject to the affirmative procedure.

37. The problem with taking powers "just in case" changes are needed in future is that, taken to its logical conclusion, it is difficult to draw the line. Why stop at clauses 25 to 27? If legislative changes are needed in future to cater for new circumstances, the Government should return to Parliament with another Bill.

38. By way of example, the definition of "deposit-taker" in clause 25 uses a standard definition found across the statute book. If this definition were to require amendment in some future primary legislation, it would be possible for that legislation to contain the necessary consequential provision enabling the definition in clause 25 of the Subsidy Control Bill to be amended in due course. The same reasoning applies to the definitions of "insurance company" in clause 26(4) and "insurer" in clause 27(3).

39. **We recommend that the powers to amend "deposit taker", "insurance company" and "insurer" in clauses 25 to 27 are inappropriate and should be removed from the face of 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 12 January 2022 Members declared no interests.

Attendance

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