

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

4th Report of Session 2012–13

Financial Services Bill
Local Government
Finance Bill
Civil Aviation Bill

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The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session with the terms of reference “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; to report on documents and draft orders laid before Parliament under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, report on documents and draft orders laid before Parliament under or by virtue of section 7(2) of the Localism Act 2011 or under or by virtue of 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”.

Membership

The members of the Delegated Powers and Regulatory Reform Committee are:

Baroness Andrews

Lord Blackwell

Rt Hon Lord Butler of Brockwell

Lord Carlile of Berriew QC

Baroness Gardner of Parkes

Lord Haskel

Rt Hon Lord Mayhew of Twysden QC DL

Baroness O’Loan

Lord Soley

Baroness Thomas of Winchester (Chairman)

Registered Interests

Committee Members’ registered interests may be examined in the online Register of Lords’ Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the Parliamentary Archives. Interests related to this Report are in the Appendix.

Publications

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General Information

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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 the Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103 and the fax number is 020 7219 2571. The Committee’s email address is dpr@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.

Fourth Report

FINANCIAL SERVICES BILL

Introduction

1. This substantial Bill contains numerous delegated legislative powers, explained in a full and helpful memorandum from H.M. Treasury (the Treasury).¹ But many of them are well founded in precedent, and there is little which needs drawing to the attention of the House.
2. The Committee had previously considered the delegated powers in the Draft Financial Services Bill, on which this Bill is based, and we submitted a memorandum to the Joint Committee undertaking pre-legislative scrutiny on the Draft Bill.² That memorandum suggested that in a number of provisions where the Draft Bill provided for the 28 day “made affirmative” procedure in all cases, this should be confined to urgent cases, with the normal draft affirmative procedure applying in other cases (paragraphs 12 to 16 of the memorandum). This Bill implements those suggestions.
3. The powers conferred by this Bill fall broadly into two categories – those conferred on the Treasury and those conferred on the regulators.
4. Among the powers conferred on the Treasury to make orders or regulations are some Henry VIII powers (to amend primary legislation). These may be found at:

Clause 5	- new section 1J
	- new section 3B(4)
	- new section 3G(3)*
Clause 8	- new section 22A(3)
Clause 9	- new section 55C*
Clause 22	- new section 141A(2)*
Clause 25	- new section 192A(4)
	- new section 192B(6)
Clause 26	- new section 285(4)*
Clause 40	- new section 234E(3)*
	- new section 234F(4)*
	- new section 234H(4)
Clause 47*	
Clause 91(4) and (5)*	
Clause 99*	

¹<http://www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/bills-considered/>

²<http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdraftfin/236/23617.htm>

Schedule 9, para 4	- new section 204A(7)
Schedule 9, para 13	- new section 380(12)
Schedule 9, para 15	- new section 382 (15)
Schedule 9, para 17 (8)	- new section 384(13)
Schedule 17, para 55(4)	- new section 232(7)*.

5. Those provisions which had no equivalent in the draft Bill are marked with an asterisk, and we note that the number of Henry VIII powers has doubled since the Draft Bill. Among the Henry VIII powers those at clauses 22 and 40 and Schedule 17 are subject to negative procedure only. We consider the negative procedure can be justified by the explanations in the Treasury's memorandum (at paragraphs 247 to 253, 360 to 373 and 423 to 429 respectively). The remainder of the Henry VIII powers are subject to affirmative procedure.
6. The Financial Services and Markets Act 2000 (the 2000 Act) confers numerous powers on the Financial Services Authority (FSA) to make rules, give directions and issue codes, statements and guidance. There are various requirements as to consultation, procedure and publicity which must be met in relation to rules, but as we would expect the rules are not subject to any Parliamentary control.
7. Clause 5 of the Bill renames the FSA as the Financial Conduct Authority (FCA). There will also be a second regulator, the Prudential Regulation Authority (PRA). Though neither the FCA nor the PRA will actually be established by legislation, there are rules about their constitution and governance set out in new Schedule 1ZA and 1ZB respectively to the 2000 Act, inserted by Schedule 3 to the Bill. These provisions are similar in many respects to those which currently apply to the FSA.
8. The Bill gives the FCA and the PRA extensive powers to make rules, give directions and issue codes, statements and guidance. These powers do not differ significantly in principle from those which Parliament has already conferred on the FSA, nor, generally speaking, does the overall procedural framework within which those powers must be operated differ significantly from the existing framework. This framework is summarised at paragraphs 10 to 20 of the Treasury's memorandum. Annex 1 to the memorandum shows the provisions in the 2000 Act from which the powers to make rules conferred by the Bill derive and summarises the differences.
9. Though the structure of regulation for financial services under the Bill is more complex than current arrangements (because there will be two regulators rather than one), the overall approach of the Bill does not raise any novel issues about delegated powers. But there are some points that we draw to the attention of the House.

Clause 3 – Macro-prudential measures

10. Under new section 9G of the Bank of England Act 1998, inserted by clause 3 of the Bill, the Financial Policy Committee (a sub-committee of the court of directors of the Bank of England) may give a direction to the FCA or the PRA requiring them to exercise their functions so as to secure implementation of a macro-prudential measure described in the direction. The direction must be complied with (new section 9H). But it is left to the

Treasury to prescribe by order what is a “macro-prudential measure” in respect of which a direction may be given (new section 9K).

11. The reason for this power is explained at paragraph 32 of the Treasury’s memorandum. The importance of the power is recognised by the application of the draft affirmative procedure or, in urgent cases, the 28-day “made affirmative” procedure, explained at paragraph 42 of the memorandum. The Joint Committee on the Draft Bill and the House of Commons Treasury Select Committee have recommended an enhanced affirmative procedure for the non-urgent orders, based on that in the Public Bodies Act 2011. But the affirmative procedure provided for in the Bill should be a sufficient safeguard against inappropriate use of these powers.
12. There are two aspects of this power which are notable. First, the macro-prudential measure may be framed by reference to a publication issued by the FCA, the PRA, another body in the UK or an international institution, as the publication has effect from time to time. This inevitably permits an element of sub-delegation (see paragraph 37 of the Treasury’s memorandum) since the scope of the order may be determined by changes to the other publication, over which there is no Parliamentary control. Secondly, the order may exclude or modify any procedural requirement that would otherwise apply under the 2000 Act in relation to cases where the FCA or the PRA is complying with a direction.

Clause 5 – FCA’s objectives

13. There is an important power, subject to affirmative procedure, at new section 1J of the 2000 Act. The FCA has extensive rule-making powers, but this is balanced by a framework set out in some detail in the primary legislation. (This is acknowledged at paragraph 15 of the memorandum.) The new power enables the Treasury to modify that framework by re-defining certain elements of the definitions of the FCA’s objectives (explained in more detail at paragraph 69 of the memorandum). There is also a related power to alter the meaning of “consumers” for the purposes of new section 3B of the 2000 Act, which sets out regulatory principles to be applied by both the FCA and the PRA. Neither power seems excessive and there is an element of “fine tuning” about them.

Clause 9 – Permission to carry on regulated activities

14. Part 4 of the 2000 Act deals with permission to carry on regulated activities. In granting permission, the FCA must ensure that the person carrying out the regulated activity must continue to satisfy certain threshold conditions set out in Schedule 6 to the 2000 Act. The Treasury may by order subject to negative procedure vary, remove or add to any of the threshold conditions.
15. Clause 9 replaces Part 4 of the 2000 Act with a new Part 4A which contains, at new section 55C, a power similar to that currently in paragraph 9 of Schedule 6, though the new power is subject to affirmative procedure. The practical significance of the new power is that it can (indeed must – see paragraph 5 of Schedule 20 to the Bill) be used to specify what threshold conditions will apply to which regulator. The intention is that the power will be used so that there are different threshold conditions for each regulator. We do not consider this to be inappropriate.

Clause 91 – Consumer credit

16. Clause 6 of the Bill enables consumer credit to be regulated by the FCA under the 2000 Act, by bringing it within the scope of the power to make orders under section 22. Clause 91 deals with what happens when an order is made making an activity a regulated activity under the 2000 Act instead of an activity needing a licence under section 21 of the Consumer Credit Act 1974.
17. In those circumstances, clause 91(2) and (4) enable the Treasury, by order subject to affirmative procedure, in particular:
 - to transfer to the FCA functions of the Office of Fair Trading (OFT) under 1974 Act;
 - to apply specified enforcement provisions of the 2000 Act to failure to comply with a requirement of the 1974 Act; and in that connection to disapply criminal offence provisions of the 1974 Act;
 - having regard to the FCA's operational objectives, to repeal, or exclude the application of, any provision of the 1974 Act. (There are over 200 sections of that Act still in force.)

The power may be used to amend any enactment, including the Bill itself.

18. The Treasury candidly acknowledges in its memorandum that this is a significant and rather unusual power. The uses to which the power is intended to be put are fully explained at paragraphs 434 to 437 of the memorandum. In particular, the government aims to ensure that consumers do not have fewer rights and protections as a result of the transfer and that disruption to consumer credit licences holders is minimised. But there is nothing in the Bill which guarantees that position; and in particular nothing preventing a future government from exercising the powers in clause 91(4) differently from the way the present government intends. Similarly, while the Bill enables the Treasury to ensure that a transfer does not result in both a civil and a criminal penalty regime being applied to the same act or omission, this is not mandatory under the Bill (contrast section 41(b) of the Regulatory Enforcement and Sanctions Act 2008).
19. An inevitable consequence of the transfer of regulatory responsibility from the OFT to the FCA will be less Parliamentary control over the requirements that are imposed, because rules made by the FCA which are intended to replace some of the controls in the 1974 Act (or instruments made under it) are subject to no Parliamentary control. But that is simply a feature of the regime under the 2000 Act and acceptance of it is implicit if the House accepts clause 6. For any category of transferred activity, the modification or repeals in the 1974 Act that are needed can only be ascertained once an order is made under section 22 of the 2000 Act and the extent of the proposed rules by the FCA is known. So we consider that if the House accepts clause 6, there is little practical alternative to an enabling power along the lines of that in clause 91 which is subject to affirmative procedure.
20. **However, we draw to the attention of the House that this is a power of the unusual breadth and significance which is, unless limited by amendment to the Bill, capable of being used in ways that can make significant inroads into the current rights and duties of consumers and providers under current consumer credit legislation.**

LOCAL GOVERNMENT FINANCE BILL

Introduction

21. The provision in the Bill falls into two principal parts: clauses 1 to 8 and Schedules 1 to 3 introduce new arrangements for dealing with non-domestic rates, to enable local authorities to retain a proportion of the rates they have collected; and clauses 9 to 13 and Schedule 4 make provision in connection with the introduction of local schemes for reducing the council tax payable by those on low-incomes, to replace the national scheme of council tax benefit to be abolished under the Welfare Reform Act 2012. Clauses 14 and 15 provide for the publication of information about council tax, and for the supply to local authorities by HM Revenue and Customs of information for the purposes of council tax. The Department for Communities and Local Government has submitted a memorandum to the Committee to explain the delegated powers in the Bill.³

Schedule 1 – Non-domestic rating

22. Detailed provision for the new arrangements for non-domestic rates is to be found in Schedule 1 to the Bill, which inserts a new Schedule 7B into the Local Government Finance Act 1988 (“the 1988 Act”) – see clause 1(2). Clause 1(3) is concerned with Parliamentary control over regulations made under the new Schedule.
23. As is presently the case with provision about non-domestic rating in Schedule 8 to the 1988 Act, the structure and detail of the new arrangements are allocated between provision on the face of the Bill (in new Schedule 7B itself), provision in regulations, and provision in determinations by the Secretary of State that are concerned with each billing authority and which collectively form a “local government finance report” to be laid before and approved by the House of Commons. The provision to be made in regulations is quite extensive (paragraphs 6 to 9, 20, 23, 26, 30 and 35 to 39), and is in some cases substantive (for example, paragraph 8), and in others more procedural (for example, paragraph 9), in character. Most of the regulations attract the negative procedure, as is presently the case for regulations under Schedule 8 to the 1988 Act, which new Schedule 7B is to replace.
24. But in four instances the affirmative procedure is to apply (see the new subsection (9C) inserted by clause 1(3)). In each case the Secretary of State may make provision that appears to be of greater significance in the new arrangements: the payments that must be made to major precepting authorities (paragraph 8); the calculation of the levy payments (paragraph 20); the calculation of the “safety net” payments (paragraph 23); and the way in which the remaining balance on a levy account is to be distributed among relevant authorities (paragraph 28(2)). Having considered existing provision about non-domestic rating in the 1988 Act, we consider the balance in new Schedule 7B between provision in the Bill and provision in delegated legislation is about right; and that, with one exception, the level of

³<http://www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/bills-considered/>

Parliamentary control over regulations appropriate according to the relative significance of the various powers conferred.

25. Paragraph 39 enables provision in regulations requiring a billing authority to make payments to other authorities (for instance, a major precepting authority) by reference to amounts disregarded in connection with areas or hereditaments designated by regulations under paragraph 37 to 38. Although paragraphs 82 to 87 of the memorandum do not explain what kind of area or hereditament might be designated or what kind of payment liability might be imposed under paragraph 39, it is our understanding that designated areas might include an Enterprise Zone and that a hereditament might be designated in connection with a renewable energy project. Moreover, payments might be required by one billing authority to another authority where, for instance in the latter case, an energy project extended over the other authority's area. **We have concluded that the regulations made by virtue of paragraph 39 will impose a liability on a billing authority and are therefore of significance; and we accordingly recommend that the affirmative procedure should apply to them.**

Schedule 4 – Council tax reduction schemes

26. Schedule 4 inserts new Schedule 1A into the Local Government Finance Act 1992 to provide for the local schemes in England, and new Schedule 1B enables the Welsh Ministers, by regulations (subject to affirmative procedure in the National Assembly – see new section 13A(4) inserted by clause 9(1)), to require schemes to be made in Wales. Paragraph 2 of new Schedule 1A sets out the kind of provision that the schemes are to include, and paragraph 3 deals with the procedure to be followed by local authorities when preparing them. Paragraph 4 contains provision about a “default scheme” that is to apply in any area where the local authority has failed to make its own scheme.
27. Each of paragraphs 2 to 4 contains powers to make regulations. Under paragraph 2, the regulations may supplement the requirements that are set out in sub-paragraphs (2) to (7), and enable the Secretary of State to require provision equivalent to that made by regulations under social security legislation relating to CTB. But there are some quite significant powers: see, for instance, sub-paragraph (9)(b) and (c). Paragraph 93 of the memorandum explains how the government might use those powers. Provision for the default scheme under paragraph 4 is left entirely to regulations.
28. Paragraphs 95, 99 and 101 of the memorandum explain why the negative procedure is thought appropriate for the regulations under, respectively, paragraphs 2, 3 and 4 – principally because that is the procedure which currently applies to almost all regulations about CTB. We consider this is the right level of scrutiny for regulations under paragraph 3, which are procedural in character. But we do not take the same view of paragraphs 2 and 4. The change from national rules to local schemes is not an insignificant one in an area of law that the government acknowledges must secure appropriate support for vulnerable individuals, and the constraints and requirements imposed by regulations under paragraph 2 will form an important feature of the local schemes. It seems likely that some authorities may model their own schemes on the “default scheme” established by regulations under paragraph 4. **In the light of that, we recommend that**

the Bill should require the affirmative procedure for regulations under paragraphs 2 and 4 of new Schedule 1A.

CIVIL AVIATION BILL

Introduction

29. The principal purpose of this Bill is to modernise the regulatory framework for UK civil aviation by reforming the legislation governing the economic regulation of airports (Part 1 of the Bill) and the provision about the Civil Aviation Authority (“CAA”) (clauses 95 to 104). The Bill also confers certain aviation security functions on the CAA (clauses 78 to 82), and reforms the Secretary of State’s powers to regulate the provision of flight accommodation (clause 94). The Department for Transport has prepared a comprehensive and informative memorandum for the Committee, explaining the delegated powers in the Bill.⁴ Subject to one point mentioned below, there is nothing in this Bill that we draw to the House’s attention, as either an inappropriate delegation of legislative power or an inappropriate level of Parliamentary scrutiny.

Schedule 8, Paragraph 2 – Power to increase threshold

30. Paragraph 2 of Schedule 8 includes, in new section 57A, subsection (11) which enables the Secretary of State to increase by negative order the £1m threshold specified in subsection (4)(a) as the amount of annual turnover above which an airport operator is eligible for certification by the CAA as a “relevant airport operator” for purposes of Part 5 of the Airports Act 1986. Paragraph 64 of the memorandum explains that the purpose of this power (and its equivalent in paragraph 7 in relation to Northern Ireland) is to enable the amount to be increased, for example to take account of any inflation. **If it is the Government’s intention that the purpose of the power in new section 57A(11) is to enable the Secretary of State by order to increase the threshold in line with inflation, this should be specified on the face of the Bill, in which case the negative procedure is appropriate. But if the threshold is to be increased for other reasons, the affirmative procedure should apply.**

⁴<http://www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/bills-considered/>

APPENDIX 1: MEMBERS AND DECLARATION OF INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office and is available for purchase from The Stationery Office.

The following interest was declared at the meeting on the 20 June:

Financial Services Bill

Lord Butler of Brockwell, as Adviser, TT International plc (investment management)

Attendance:

The meeting on 20 June was attended by Baroness Andrews, Lord Butler of Brockwell, Baroness Gardner of Parkes, Lord Haskel, Lord Mayhew of Twysden, Baroness O'Loan, Lord Soley and Baroness Thomas of Winchester.