



Economic Crime (Transparency and Enforcement) Bill: Delegated Powers

1 March 2022



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Introduction

This briefing has been produced to inform Parliament's consideration of the Economic Crime (Transparency and Enforcement) Bill ('the Bill').¹ The Bill was introduced to the House of Commons on 1 March 2022. As indicated by the Prime Minister in his statement to the House on 24 February 2022, the measures in the Bill have been brought forward in an expedited manner in response to Russia's invasion of Ukraine.

The paper focuses exclusively on some of the delegated powers in the Bill. While these might at first glance appear to be merely technical matters, in this as in most Bills they raise important questions of constitutional, legal, and procedural principle that matter, regardless of party allegiance, views on the policy merits of the Bill, or the urgency of the situation. Parliamentarians should be clear about the level of authority they are delegating to government Ministers and be confident that they will not regret forgoing their ability to fully scrutinise future government decisions. Our suggested amendments are designed to buttress the role of Parliament in scrutinising future executive action and regulations; they need not interfere with or prevent the implementation of the intended policy.

Our analysis draws heavily on 'legislative standards' which we have derived from reports of the House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC). The DPRRC is an influential committee and provides the nearest thing to a form of 'jurisprudence' (or 'legisprudence') in the area of delegated powers.

Overview of the Bill

The Bill falls into three Parts.

Part 1 of the Bill makes provisions to set up a register of overseas entities and their beneficial owners and requires overseas entities who own land in the UK to register in certain circumstances. The purpose behind these provisions is to combat economic crime, by requiring anonymous foreign owners of UK property to reveal their real identities to ensure criminals cannot hide behind chains of shell companies. **We have identified at least 23 provisions that confer new delegated powers** (not including the powers to make commencement, transitional and saving provisions). **Of these, seven include powers that can be exercised to amend primary legislation ('Henry VIII powers').**

Part 2 of the Bill makes provisions to reform Unexplained Wealth Orders by amending the Proceeds of Crime Act 2002. In this Part there are no provisions that confer new delegated powers.

Part 3 of the Bill makes provisions about breaches of financial sanctions by amending the Policing and Crime Act 2017. In this Part there are no provisions that confer new delegated powers.

Structure of this briefing

The remainder of this briefing presents four clauses containing delegated powers that we found to be of particular concern. We have set out suggested amendments to address these concerns.

Appendix I comprises a glossary of key terms.

¹ The *Economic Crime (Transparency and Enforcement) Bill*, HC Bill 262, 2021-22 (as introduced). All references to the Bill in this briefing are to this version.

Four Clauses of Concern: Analysis and Suggested Amendments

Clause 14: Sections 12 and 13: supplementary

Overview of the clause

An overseas entity must take reasonable steps to identify any registrable beneficial owners in relation to the entity. The Bill defines an overseas entity as a legal entity that is governed by the law of a country or territory outside the UK. If it identifies any such registrable beneficial owners, the overseas entity must take steps to obtain information required by provisions in the Bill. The overseas entity must comply with these requirements before making applications or submitting updates to Companies House.

The steps that an overseas entity must take in achieving these requirements include giving an information notice to any person that it knows, or has reasonable cause to believe, is a registrable beneficial owner in relation to the entity. A person who, without reasonable excuse, fails to comply with such a notice commits an offence, which on conviction may include imprisonment or a fine (or both). Details regarding these information notices and related offences are provided in clauses 12, 13 and 15 of the Bill.

Clause 14(1) provides that the Secretary of State may by regulations make further provision about the giving of notices under section 12 or 13, including provision about the form and content of any such notices and the manner in which they must be given. The exercise of this delegated power is subject to the 'negative' parliamentary procedure (clause 14(2)).

Analysis

The DPRRC has previously highlighted that there is a strong presumption for the 'affirmative' procedure to apply to powers where their exercise creates or widens the scope of a criminal offence.² Although the offence relating to non-compliance with a notice is provided for on the face of the Bill (clause 15), the Secretary of State is to be given a wide power to make further provision about the form, content and manner in which notices must be given – notices which, if not complied with, will make a person criminally liable. While it may be reasonable for this level of detail to be contained in delegated legislation, rather than on the face of the Bill, the consequences of failing to comply with such notices may be considerable, up to and including possible imprisonment. Therefore, parliamentarians may consider it beneficial to be able actively to scrutinise and debate regulations that specify the form, content, and manner in which such notices must be given, before such regulations are made into law.

Suggested amendment

Clause 14, page 9, line 35, leave out "negative" and insert "affirmative".

² For example, House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC) (2017-19), 7th Report, HL Paper 38, para. 30; DPRRC (2019-21), 9th Report, HL Paper 42, paras. 12, 13; DPRRC (2019-21), 32nd Report, HL Paper 207, paras. 13, 14

Clause 17: Power to modify application process etc in certain cases

Overview of the clause

Clause 17(1) provides that the Secretary of State may by regulations modify the requirements for the contents of applications made by overseas entities to Companies House under clauses 4 or 9 of the Bill, or the requirements as to the material that must be delivered to Companies House under clause 7 of the Bill. These modifications are to be made in relation to overseas entities of a description specified in the regulations. Such regulations are to be made only if the Secretary of State considers that the modifications are appropriate in light of the information that is publicly available. Clause 17(4) permits such regulations to make modifications to Part 1 of the Bill that are consequential on those regulations. Clause 17(1) is therefore a ‘Henry VIII’ power. The exercise of this delegated power is subject to the ‘negative’ parliamentary procedure (clause 17(4)).

Analysis

The DPRRC has previously highlighted that there is a strong presumption for the ‘affirmative’ procedure to apply to the exercise of ‘Henry VIII powers’.³ Given this presumption, and the width of the power being sought to be able to modify application requirements specified in the Bill, parliamentarians may consider it beneficial to amend the parliamentary scrutiny procedure that is to apply to the exercise of this power.

Suggested amendment

Clause 17, page 11, line 5, leave out “negative” and insert “affirmative”.

Clause 23: Disclosure of protected information

Overview and analysis of the clause

Clause 23(1) provides that Companies House must not disclose protected date of birth information or protected residential address information about a person unless disclosure is permitted. A circumstance in which disclosure is permitted is if disclosure is to any person who has functions of a public nature and is specified for the purposes of this section by regulations made by the Secretary of State (clause 23(2)). Such regulations may specify the conditions for the disclosure of such information and provide for the charging of fees (clause 23(3)). The exercise of this delegated power is subject to the ‘negative’ parliamentary procedure (clause 23(6)).

Analysis

The DPRRC has previously highlighted that powers that can be exercised to provide for the charging of fees should be subject to the ‘affirmative’ procedure, as the exercise of such powers concerns policy issues that warrant active parliamentary scrutiny.⁴ Additionally, it is unclear why the exercise of the power in clause 23 should be subject to the ‘negative’ procedure, while the exercise of the power in clause 24, which also concerns disclosure matters, is afforded the ‘affirmative’ procedure. In the Delegated Powers Memorandum accompanying the Bill, the government invokes precedent for

³ For example, DPRRC (2017–19), 3rd Report, HL Paper 22, paras. 73, 77, 102; DPRRC (2017–19), 11th Report, HL Paper 65, para. 21; DPRRC (2017–19), 12th Report, HL Paper 73, paras. 38, 53; DPRRC (2017–19), 31st Report, HL Paper 177, para. 22; DPRRC (2017–19), 34th Report, HL Paper 194, para. 27; DPRRC (2017–19), 59th Report, HL Paper 408, paras. 8, 15; DPRRC (2019–21), 1st Report, HL Paper 3, paras. 8, 11; DPRRC (2019–21), 9th Report, HL Paper 42, paras. 12, 13

⁴ For example, DPRRC (2017–19), 3rd Report, HL Paper 22, paras. 87, 89, 90, 91(d); DPRRC (2017–19), 12th Report, HL Paper 73, paras. 43, 47, 68; DPRRC (2017–19), 24th Report, HL Paper 128, para. 4

the former clause.⁵ However, the content of each Bill needs to be considered on its own merits. Given the aforementioned standard and the inconsistency between clauses 23 and 24, it may be beneficial to amend the parliamentary scrutiny procedure that applies to the exercise of this power.

Suggested amendment

Clause 23, page 14, line 29, leave out “negative” and insert “affirmative”.

Clause 38: Financial penalties

Overview of the clause

Clause 38(1) provides that the Secretary of State may by regulations make provisions conferring power on Companies House to impose a financial penalty on a person if it is satisfied, beyond reasonable doubt, that the person has engaged in conduct amounting to an offence under Part 1 of the Bill. Such regulations may include provisions about the procedure to be followed in imposing penalties and about the size of penalties; for the imposition of interest or additional penalties for late payment; conferring rights of appeal against penalties; and about the enforcement of penalties. Such regulations may include consequential provision amending primary legislation whenever that is passed. Clause 38(1) is therefore a ‘Henry VIII’ power. The exercise of this delegated power is subject to the ‘affirmative’ parliamentary procedure (clause 38(7)).

Analysis

Where the penalty for an offence may be set by delegated legislation, the DPRRC has previously expected the maximum penalty to be included on the face of the Bill.⁶ In this case, the maximum penalty that may be imposed by virtue of this clause has not been so provided. This clause warrants having the maximum penalty specified on its face.

Suggested amendment

Clause 38, page 21, line 2, at end insert -

“(9) A penalty imposed by virtue of subsection (1) must not exceed [insert amount].”

⁵ Department for Business, Energy, and Industrial Strategy and HM Treasury, *Delegated Powers Memorandum – Economic Crime (Transparency and Enforcement) Bill*, 1 March 2022, pp. 8-9

⁶ For example, DPRRC (2019-21), 19th Report, HL Paper 109, para. 30

Appendix I: Glossary

Affirmative procedure: Parliamentary scrutiny procedure under which delegated legislation requires the active approval of the House of Commons and in most cases also the House of Lords. Under the 'draft affirmative' procedure, delegated legislation is laid before Parliament as a draft, and cannot be made into law by the Minister unless and until it has been approved by the House of Commons and in most cases also the House of Lords. Under the 'made affirmative' procedure, delegated legislation is laid before Parliament after it has been made – signed – into law by the Minister, but cannot remain law unless it is approved by the House of Commons and in most cases also the House of Lords within a statutory period – usually 28 or 40 days.

Delegated legislation: Law made by Ministers (and sometimes other authorised individuals and bodies) using delegated powers granted to them in Acts of Parliament. Statutory Instruments (SIs) are the most common form of delegated legislation. Orders and Regulations are among the categories of delegated legislation enacted in SIs. Delegated legislation is also known as secondary or subordinate legislation.

Delegated powers: A power to make delegated legislation which is conferred on Ministers (and sometimes other individuals and bodies) in an Act of Parliament.

Delegated Powers Memorandum (DPM): A document produced by the government department responsible for a Bill and published with the Bill when it is introduced to Parliament. The DPM identifies every delegated power in a Bill, its justification, and any parliamentary scrutiny procedure that is proposed for it. The DPM assists the House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC) when that Committee scrutinises and reports on the delegated powers in a Bill.

Delegated Powers and Regulatory Reform Committee (DPRRC): House of Lords Select Committee appointed to examine almost all Bills on their introduction to the House of Lords, to determine whether they contain any inappropriate delegation of power or subject those powers to an inappropriate level of scrutiny. In certain circumstances, the DPRRC may consider some Bills that start in the House of Commons before they are introduced to the Lords.

Henry VIII power: A type of delegated power. A Henry VIII power enables Ministers to amend, repeal, or otherwise alter the effect of primary legislation by delegated legislation. In a Bill, a clause that contains a Henry VIII power is a Henry VIII clause.

Negative procedure: Parliamentary scrutiny procedure under which a piece of delegated legislation or other measure does not require active parliamentary approval. Under the 'made negative' procedure, a piece of delegated legislation is laid before Parliament after it has been made – signed – into law by the Minister. If Parliament does not reject it within 40 days, it is deemed to have consented. For a 'made negative' Statutory Instrument, if either House passes a motion – known as a 'prayer' – to annul the SI within 40 days of it being laid, the government must revoke it. Under the 'draft negative' procedure, an SI is laid before Parliament as a draft, and if Parliament does not reject it within 40 days, it is deemed to have consented and the Minister can make the SI into law.

Statutory Instruments (SIs): The most common form of delegated legislation. The term 'Statutory Instrument' is given to most, but not all, forms of delegated legislation made after the Statutory Instruments Act 1946 came into force in 1948.

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