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The Rt Hon the Lord Judge
House of Lords
London SW1A 0PW

11th March 2019

Dear Lord Judge,

Trade Bill – Lords Report – amendment 3A

Following up on our conversation during the first day of Report on the Trade Bill on 6th March, I write to clarify the government's position on matters related to amendment 3A.

As I said during the debate, I think we agree that clause 2 should not be exercisable to create or extend criminal offences, impose fees, amend primary legislation that is not retained EU law, or create new public bodies. Our difference lies only in how that outcome might best be achieved as a legal and drafting matter.

I recognise that you have strong concerns about the issues informing your amendment, which I hope I can help to address by setting out in this letter more detail on the legal basis for the Government's position.

The rule in *Pepper v Hart*

Noting your comments on the point, I should start by confirming that I agree that it is not appropriate for Explanatory Notes to be used as a means to confine broad Ministerial powers.

I agree that the rule in *Pepper v Hart* cannot and should not be relied upon to clarify unclear drafting. *Pepper v Hart* is a judicial solution to legislative failings, and should not be used to justify those failings. The government does not seek to rely on *Pepper v Hart* in the context of clause 2 of the Trade Bill and I regret if anything I have said previously suggested otherwise.

Relying on longstanding principles of statutory construction

It is the government's understanding that the power in clause 2 could not be exercised to create or extend criminal offences, impose fees or amend primary legislation other than retained EU law (public bodies are discussed separately below). This is based on longstanding principles about the construction of powers, which tell us that there are certain things that cannot be done by secondary legislation unless expressly provided for in the enabling Act.

I refer you to section 3.7(2) of Bennion on Statutory Interpretation (7th edition):

"[i]f the legislature intends to confer certain powers – such as the ability to create offences, to impose taxes, to amend the enabling Act or other legislation, to make retrospective provision, to interfere with fundamental rights, or to permit sub-delegation – it will usually do so expressly. In the absence of express provision, a court may be reluctant to find that the legislature intended to confer such powers".

And, focusing on the creation of criminal offences, Craies on Legislation (11th edition, at paragraph 1.6.6):

"[t]here is strong presumption against the creation of offences by subordinate legislation rebuttable only by express provision or clear inference."

These presumptions reflect the constitutional status of delegated legislation, reflecting a view that Parliament cannot lightly be assumed to delegate such fundamental matters to the executive. All government Bills are drafted in light of this principle and care is taken to confer express powers to provide for such matters when they are needed,¹ and only then.

Clause 2 of the Trade Bill reflects this approach. Section 8 of the European Union (Withdrawal) Act 2018 is different, for the reasons explained below.

If Parliament were to decide that the matters listed in amendment 3A must expressly be excluded from the power in clause 2 of the Trade Bill, it would cast doubt on the many other powers it has granted over the years without express restriction.² This would result in a haphazard and unpredictable broadening of Ministerial powers across the statute book and it is for this reason that the government must resist amendment 3A.

Section 8 of EUWA

The contradiction of accepted principles of statutory construction was not a concern in the context of section 8 of the European Union (Withdrawal) Act 2018. This is because subsection (5) of section 8 provides that regulations made under that section *can make any provision that could be made by Act of Parliament*. This operates to displace the usual presumptions that a power may not to be exercised to create criminal offences, make retrospective provision, or amend primary legislation, for example, and results in a power

¹ Not least because regulations providing for such things without express power would be reported for "doubtful vires" by the JCSI. See, for example, the JCSI's 34th Report of the 97/98 Session, at paragraph 4: "*there is a persistent and strong current of precedent in legislative practice that, if the creation by delegated legislation of criminal offences is to be authorised, specific provision is included in the Act... This practice is strong evidence of an implicit principle that the creation of offences (or their authorisation) is something that Parliament reserves for itself.*" The House of Lords in *AG v Wilts United Dairies [1922] All ER Rep Ext 845* found a charge levied by the Ministry of Food on the purchase of milk to be ultra vires for lack of statutory power, per Lord Buckmaster: "*The powers so given are no doubt very extensive and very drastic, but they do not include the power of levying upon any man payment of money which the Food Controller must receive as part of a national fund and can only apply under proper sanction for national purposes. However the character of this payment may be clothed, by asking your Lordships to consider the necessity of its imposition, in the end it must remain a payment which certain classes of people were called upon to make for the purpose of exercising certain privileges, and the result is that they money so raised can only be described as a tax the levying of which can never be imposed upon subjects of this country by anything except plain and direct statutory means.*" And in the Court of Appeal, per Scrutton LJ: "*it is conceivable that Parliament may pass legislation requiring the subject to pay money to the Crown, may also delegate such powers to the Executive, but in my view the clearest words must be required before the Courts hold that such an unusual delegation has taken place*".

² Or, in the case of an exclusion for primary legislation that is not retained EU law, cast doubt on powers drafted to permit modification only of a subset of primary legislation, or only in certain circumstances. See, for example, section 54 of the Sanctions and Anti-Money Laundering Act 2018, and section 26(4) of the Climate Change Act 2008.

that is largely unrestricted. It follows from this that certain aspects had to be excluded. These are listed in subsection (7).

The government does not think it is necessary, or appropriate, to provide in clause 2 of the Trade Bill for a power as broad as that conferred by section 8 of the European Union (Withdrawal) Act 2018. The power to implement international trade agreements is, and should be, subject to the usual presumptions narrowing the exercise of powers. This very different starting point means that there is no need to replicate the exceptions in section 8(7) of the European Union (Withdrawal) Act 2018.

Public bodies

As indicated above, the government regards a power to create public bodies as a case apart from a power to modify primary legislation, create criminal offences or impose fees. This is because there is not such a clear interpretative presumption against the creation of public bodies by secondary legislation. In practice, it would be very unusual for a Bill to delegate a power to establish a public body and, for that reason, if it were the intention, a drafter would make it clear so as to avoid future challenge. In the context of clause 2 of the Trade Bill, the government does not intend to use the power in clause 2 to create public bodies.

Summary

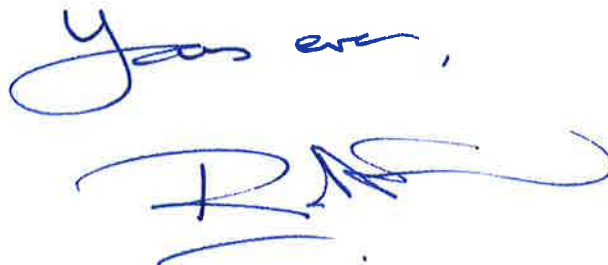
It is the government's understanding that the power in clause 2 could not be exercised to create or extend criminal offences, impose fees, amend primary legislation other than retained EU law, or create public bodies.

This understanding relies on longstanding principles of statutory construction and, in the case of criminal offences, fees and amendments to primary legislation other than EU law, on clear legislative presumptions.

It is on the basis of these principles and presumptions that I must resist amendment 3A. Its inclusion in this Bill would cast doubt on the meaning of the many other powers across the statute book that have been drafted by reference to them. Such doubt risks an unwarranted extension of executive power; something the government could not in good faith support.

I hope this letter provides you reassurance. As I indicated on the floor of the House, I will be happy to discuss this further in person, and I understand that a meeting is being arranged by officials for tomorrow afternoon. .

I have copied this letter to Lord Pannick QC, the Rt Hon the Lord Beith and the Noble Lords that took part in the debate and placed a copy in the libraries of both Houses.



Baroness Fairhead

Minister of State for Trade and Export Promotion
Department for International Trade

Cc. The Lord Pannick QC
The Rt Hon the Lord Beith
The Rt Hon the Lord Garnier QC
The Rt Hon the Lord Hope of Craighead KT
The Rt Hon Lord Mackay of Clashfern KT
The Lord Wilson of Dinton GCB