Department for Transport

Baroness Vere of Norbiton
Minister for Aviation and Local Transport

Great Minster House
33 Horseferry Road
London
SW1P 4DR

Tel: 0300 330 3000
E-Mail: baroness.vere@dft.gov.uk

Web site: www.gov.uk/dft

To: All Peers

21 October 2022

My Lords,

Seafarers' Wages Bill - Committee Stage

I thank noble Lords for their thoughtful contributions to the debate on the Seafarers' Wages Bill at Grand Committee and I look forward to further discussions on the Bill as we move to Report Stage on 26 October.

This Bill has been introduced in response to P&O Ferries disgracefully sacking, without notice or consultation, almost 800 members of their workforce, in order to replace many of them with overseas labour paid below the minimum wage. In response, the Transport Secretary introduced a 9 Point Plan, to improve seafarer welfare and working conditions by addressing issues that P&O's actions brought to light. This Bill delivers on that commitment and will ensure that employees of P&O Ferries, just as those working for all operators of services regularly using UK ports, are paid the equivalent of at least the minimum wage while they are working in UK or its territorial waters.

The purpose of the Bill is to grant pay protection to seafarers with close ties to the UK because they work on services that regularly use UK ports. We intend to achieve this by making access to UK ports conditional on operators of frequent services (those calling at a particular harbour in the UK at least 120 times a year, which equates to more than once every 72 hours on average throughout the year) evidencing that the seafarers onboard are remunerated at a rate that is equal to or exceeds the equivalent to the national minimum wage while in UK waters. If they do not provide such a declaration, harbour authorities may impose a surcharge. If the surcharge is not paid, harbour authorities may then refuse access to the port except in limited circumstances. The Bill does not extend legal entitlement to national minimum wage under national minimum wage legislation to seafarers who are otherwise not entitled to it, rather it ensures (in the course of time) that their rates of pay will be no less than an equivalent sum for the time they spend in the UK or its territorial waters.

Following the discussion at Grand Committee, we have considered concerns raised by noble Lords and the Delegated Powers and Regulatory Reform Committee (DPRRC). We have tabled an amendment to clause 3(4)(a) to remove the power to make regulations restricting the circumstances in which a harbour authority may request the operator of a service to provide a national minimum wage declaration in respect of a service. Having reflected on the points raised by noble Lords, we are satisfied that the removal of this power would not have any impact on the operability or policy intention of the Bill, but would ensure that there is no potential for the application of the Bill to be modified without proper parliamentary scrutiny.

In the rest of this letter, I will seek to elaborate on issues raised in the debate.

Territorial scope and international law

Territorial Scope

The territorial scope of the Bill is clear, and I hope the discussion we had at Grand Committee was helpful in setting this out. The Bill applies to services for the carriage of persons or goods by ship, with or without vehicles, between a place outside the UK and a place in the UK. The payment of the equivalent of national minimum wage is required for time spent in the UK and its territorial waters. This means that domestic voyages are not covered by this legislation, but seafarers working or ordinarily working in the UK, including UK internal or territorial waters if the vessel is not exercising a right to innocent passage, are already entitled to national minimum wage. This is under s1(2)(b) of the National Minimum Wage Act 1998 and Article 2 of the National Minimum Wage (Offshore Employment) Order 1999. Voyages to the Crown Dependencies are in scope of the Bill. The Crown Dependencies have their own territorial waters and so the requirements under the Bill only apply for the part of the journey in UK territorial waters as per any other international service.

I would like to clarify my answer to Lord Hendy's question on whether seafarers servicing oil and gas platforms on the continental shelf and seafarers servicing renewable installations in the Exclusive Economic Zone would be covered by the Bill or existing legislation. Under Article 2 of the National Minimum Wage (Offshore Employment) Order 1999, a worker working or ordinarily working in connection with the exploration of the sea-bed or subsoil, or the exploitation of natural resources in the UK sector of the continental shelf is treated as if they are working, or ordinarily work, in the UK. Therefore, these workers will already be entitled to the national minimum wage unless on a ship exercising the right to innocent or transit passage. Seafarers on services to offshore renewable energy installations, are not entitled to national minimum wage under existing legislation, however they are considered to already be in scope of the Bill if calling at a UK port more than 120 times a year, without the need for further amendment. I thank the noble Lord for withdrawing his amendment on this point.

International Law

The noble Baroness Scott of Needham Market asked the government what has changed since the National Minimum Wage (Offshore Employment) (Amendment) Order 2020, since the explanatory memorandum made it clear that international conventions precluded the provisions being applied to seafarers from non-UK-flagged vessels, and yet this Bill does apply to such seafarers. The reason for this difference in the application of the legislation is that we are talking about two different things. The National Minimum Wage (Offshore Employment) (Amendment) Order 2020 applies to the national minimum wage. This Bill does not alter the application of the National Minimum Wage Act 1998. It makes payment of the equivalent to the national minimum wage a condition of access to ports.

We do not consider that the Bill proposals interfere with rights and obligations under international law, including the United Nations Convention on the Law of the Sea (UNCLOS). In particular:

1. Measures that may be taken under the Bill will not interfere with the right of innocent passage, such as to breach the obligation reflected in Article 24(1) of UNCLOS (the coastal State shall not hamper the innocent passage of foreign ships aside from in specific circumstances provided for). The requirement that may be imposed by

virtue of the Bill will apply and be enforced only as a condition of entry to UK ports, in which the UK has jurisdiction over visiting ships and where, as reflected by Article 18 of UNCLOS, the right of innocent passage does not apply. Article 18 defines the meaning of passage, and this does not include stopping and anchoring (at a port or otherwise), unless this is incidental to ordinary navigation or is rendered necessary by force majeure or distress.

2. The jurisdiction of port States is well established, with the right of a State to set conditions for entry to its ports reflected explicitly in Article 25(2) of UNCLOS. Because vessels visiting a port are not then in innocent passage, and are not merely passing through the territorial sea, the associated restrictions on the exercise of jurisdiction set out in UNCLOS do not apply.
3. It is well established that port States exercise their jurisdiction in numerous spheres, including in the exercise of Port State Control, which is the inspection of foreign ships to verify compliance with international regulations, such as those relating to maritime safety and security, including with respect to ships' crews. The measures that may be taken under this Bill seek to achieve analogous ends, namely to ensure that seafarers with close ties to the UK are paid fairly by making access to UK ports conditional on vessel operators either (i) providing certificates confirming that seafarers onboard are being paid at least the equivalent to the NMW; or (ii) paying a surcharge.
4. The measures that may be taken under the Bill can be applied only to a narrow subset of vessels with a close connection to the UK, determined by clear, objective criteria. Specifically, the Bill relates to services for the carriage of persons or goods by ship, between a place outside the UK and a place in the UK, which will have entered the harbour on at least 120 occasions in the period of a year. It represents a focused and proportionate means to address a specific issue and avoids any wider impact on the diversity of shipping that makes use of the UK's ports.
5. Although the measures that may be taken under the Bill are focused on a narrow subset of vessels, they do not discriminate on the basis of nationality, i.e. the State in which a vessel is registered, and the flag under which it therefore sails. This ensures that measures taken under the Bill will comply, for example, with the UK's obligations under the 1923 Geneva Convention on the International Regime of Maritime Ports, which generally requires, under Article 2 of the annexed Statute, that Contracting States grant equality of treatment in respect of access to and use of ports, between their own vessels and those of other Contracting States.
6. The equality of treatment between vessels of different flags also means that the measures that may be taken under the Bill will comply with similar obligations arising under international trade law, including the General Agreement on Tariffs and Trade, the rules of the World Trade Organization, and other bilateral and multilateral trade treaties to which the UK is party.

Lord Hendy asked what the government will do about differing data protection laws in other countries. The Government view is that information to be requested from operators under this Bill's provisions, both in the first instance of declarations and upon further inquiry by the Maritime and Coastguard Agency (MCA) where necessary, is not likely to encompass material subject to data protection laws in any jurisdiction. I therefore consider it extremely unlikely that any operator would seek to re-Flag specifically for this purpose. But, even if there were any such likelihood, it would not be appropriate for the UK to seek to require anyone to breach the laws of another jurisdiction. That would be wrong in principle and could even carry a risk of retaliation.

Vessels in scope

Services

There were questions from noble Lords around the definition of services, as opposed to ships. The Bill is concerned with the service and not individual ships. The ship is simply a tool for carrying out a particular service. The service may be made up of one or more ships, provided that they are run by the same operator and on the same route.
The seafarers in scope of the legislation are those working on services that regularly call at UK ports, defined as services for the carriage of persons or goods by ship, with or without vehicles, calling in the UK at least 120 times a year, which roughly equates to more than once every 72 hours throughout the year.

For example, seafarers on a specific service from Dover to Calais would be covered by the legislation, whether this service were being carried out by vessel A on one day or vessel B on another. This is intentional to prevent vessel operators from avoiding the requirement, except on the densest routes, by using multiple vessels on the same route, as well as by manipulating timetables. If the Bill were premised on the definition of "ships" as opposed to "services" services may unintentionally fall out of scope if an operator has to swap out a vessel for maintenance or other operational reasons.

A service is defined in Clause 1 as being “for the carriage of persons or goods by ship, with or without vehicles, between a place outside the United Kingdom and place in the United Kingdom”. This means that if an operator is repeatedly sending ships between one place in the United Kingdom and another place outside the United Kingdom, at least 120 times a year, they are operating a service that falls within scope of the Bill. This is made clear by references to “the harbour”, rather than “a harbour” in clause 3.

Frequency

I would like to reiterate the rationale behind the frequency requirement. The scope of the Bill captures services calling at the harbour in question at least 120 times a year, which roughly equates to more than once every 72 hours throughout the year.
The rationale for the tight frequency criterion is to ensure seafarers affected by the policy are only those with close ties to the UK by virtue of them working on services that regularly call at UK ports. It covers the majority of passenger ferry (Ro-pax) and some non-passenger ferry (Ro-ro) services. Critically, it focuses the Bill fully on short sea services, clearly justifying the seafarers' connection to the UK and therefore a UK-equivalent level of pay protection. To reduce the frequency requirement to weekly services would dilute the concentration of the Bill in protecting those seafarers with the closest ties to the UK. It would then bring into scope some deep-sea container services which we do not feel can legitimately be said to have close ties to the UK.

Baroness Randerson asked me to define the term “close ties”. This phrase is not in the Bill and is not intended to have legal meaning. We use the term close ties to describe the rationale behind the frequency requirement on ships coming into scope. Those on ships calling at a UK port 120 times a year have such close ties to the UK that they ought to be afforded wage protection. It is the frequency requirement that has legal effect, not the term “close ties”.

Employment protections

Lord Hendy asked a question about Section 193 of the Trade Union and Labour Relations (Consolidation) Act 1992 and government plans to fill a perceived loophole which excludes any penalty to enforce the duty of a ship operator dismissing as redundant UK workers for redundancy to notify the authorities in the flag state of the vessel. It is disappointing that the Insolvency Service concluded that it will not commence criminal proceedings for alleged notification offences. This decision was reached after the findings of their criminal investigation were reviewed by an independent senior prosecution lawyer (in accordance with the Code for Crown Prosecutors) who concluded there was no realistic prospect of a conviction. The Government will consider whether in light of this, there is a need to amend the relevant sections of the Trade Union and Labour Relations (Consolidation) Act 1992, however this would be out of scope of this Bill. A final decision on this will, however, only be taken once the Insolvency Service's civil investigation, which remains ongoing, has concluded.

The noble Lord also asked whether government has plans to legislate for terms and conditions beyond the minimum hourly rate. As part of the 9 point plan, the Seafarers' Charter, previously referred to as a Framework, is a voluntary agreement which aims to improve long term employment and welfare conditions for seafarers. It covers a wider range of employment protections than is currently covered by this Bill. We are committed to a voluntary Seafarers' Charter because it avoids confusion, complexity and over-regulation of an industry. It is right to keep this as a voluntary agreement initially, while we monitor the impacts of the Charter. However, we are keeping the need for a legislative basis under review. We will only act legislatively where it is proven that it is appropriate to do so.

Baroness Scott asked what the government is doing to mitigate the risk that the UK is seen to be moving unilaterally on seafarer welfare issues rather than seeking improvements exclusively via multilateral channels. I would respond to this by highlighting that the UK was a key author in the development of the Maritime Labour Convention (MLC). The UK continues to be a leading voice in the International Labour Organisation (ILO) on all maritime matters, including the further development of that Convention. The MLC asks that ratifying states seek within their own legislation continuous improvement of seafarers' rights. The higher domestic standards we are looking at in this legislation are related to services that have close ties to the UK. We do not differentiate on nationality or residency for any other sector under the national minimum wage legislation nor should we for seafarers. Those working in the UK, including its waters should enjoy similar levels of protection under UK law.

Compliance and enforcement

I thank my noble Lords for the interesting discussion we had on the compliance process set out in the Bill. I would like to reiterate the point that I made in the debate; that the Government's proposed mechanism has been carefully designed as a proportionate and appropriate balance of roles between the ports, who will fulfil the administrative role of ensuring access to ports is conditional on payment of the equivalent to National Minimum Wage, and the MCA, which will be the body responsible for enforcement and prosecutions. The whole mechanism of the Bill relies on the National Minimum Wage equivalence declarations being a condition of access to ports. It is for harbour authorities to set surcharges and deny access in order to establish the condition of access connection. If the surcharge and refusal of access provisions were to be replaced with inspections and detentions only, this connection with ports would be lost. This is important, because vessels visiting a port are not in innocent passage. This means that associated restrictions

on the exercise of jurisdiction as set out in UNCLOS do not apply and the Bill's requirements will therefore only apply where the UK has jurisdiction over visiting ships and where the right of innocent passage does not apply. This would not be the case if the connection with ports is lost.

Baroness Scott raised concerns about the role of ports in the compliance process given potential perceived conflicts of interest where a port may be owned by the same company as a ferry operator. The Government is confident that there are no conflicts of interest. Harbour authorities' primary role under this Bill is to receive declarations and they will not be involved in checking the validity of those declarations. The Secretary of State will have the power to direct the harbour authority in the exercise of its powers under the Bill, which will safeguard against any potential conflict. It is not new to have a duty that is perceived to be in conflict with the harbour authority's commercial position. Harbour authorities are well versed at fulfilling their wide and varied existing statutory functions and duties independently of their commercial interests. For example, harbour authorities levy Harbour Dues and set out safety requirements that incur costs to their port users (such as towage requirements), all of which is already undertaken independently of any commercial interest they have.

Surcharges

Noble Lords raised questions about the role of ports in setting and administering the surcharge, and how the rate should be determined. The surcharge is an important mechanism to deter non-compliance, and the Government considers that it is reasonable, proportionate and essential, for reasons given above, for harbour authorities to play a role. It is important that surcharges should be relevant to the circumstances of the service in scope, and the Government's view is that harbour authorities are generally better placed than the Secretary of State to make that call given their proximity to services. Much of the detail of how the surcharge will work in practice, including how its amount is to be determined, and notification and publication requirements, will be provided for in regulations and guidance. We are in regular contact with stakeholders in the ports sector and will be consulting with them on guidance and regulations. Harbour authorities are a key element of this legislation and it is crucial that they be clear on how they should be exercising their powers.

It is envisaged that a tariff of surcharges will be set by the harbour authority based on the estimated number of seafarers onboard according to type and size of vessel, at a rate to ensure that it has the desired deterrent effect on operators who might seek to underpay workers. The detail of how this will be worked out will be set out in regulations, which will provide certainty regarding how harbour authorities set out the tariff of surcharges. We also intend to supplement the regulations with guidance to provide further assistance and detail to harbour authorities on how they should exercise this power. We will be working closely with industry to ensure that there is sufficient clarity to allow them to exercise their powers. The regulations will ensure that the criteria by which the tariff is to be set is clear enough to ensure consistent rates across harbour authorities, which will prevent any race to the bottom.

Baroness Randerson and Lord Mountevans raised questions about the surcharge and whether it is in fact a surcharge or a fine. The term surcharge is used because it is a mechanism to make the provision of declarations a condition of port access. Rather than being a punitive measure, its purpose is to make it not worthwhile for an operator to underpay their seafarers. A fine suggests a more punitive enforcement role for ports, which is not the case. The surcharge is also not to be confused with the fine to which operators and harbour authorities who commit offences under the legislation may be liable.

Refusal of access

Baroness Scott and Baroness Randerson have raised concerns about the power of harbour authorities to refuse access to ports in the event that a surcharge is not paid, and have suggested that it should be replaced by detention of vessels by the MCA. The refusal of access is one way in which we establish the provision of national minimum wage declarations as condition of access to ports. If this were replaced by a power of detention by the MCA, this connection would be lost. Moreover, this would be an inappropriate use of that power; detention of vessels is a disproportionate and inappropriate mechanism in these circumstances. Detention of ships can also carry a significant cost to the port by blocking a berth, which is not the case if they are refused access.

Baroness Randerson has expressed concerns that refusal of access is unworkable as it might result in ships mid-passage being unable to dock. This is not how the Bill will work in practice. By virtue of the high frequency requirement, all services captured are almost certain to be on short routes and access-refusal would take place before the ship has set sail from the origin port. As set out under Clause 9 of the Bill, we will set out in detail in Regulations how the harbour authority is to communicate refusal of access, which will ensure that sufficient notice is given to prevent this possibility from happening and to provide notice for users of the service to make alternative arrangements. We will be consulting closely with ports on these draft regulations. As an additional safeguard, the Secretary of State has a power to direct the harbour authority as to how or if it discharges its power to refuse access, which will ensure that access is not denied where it would cause damage by disrupting key passenger services and supply chains critical for national resilience.

Baroness Scott asked if we have had specific legal advice on compliance with OECD common principles, in relation to denial of access to harbours. I cannot reveal to the House the contents of advice given to the government under legal privilege. The government is confident that the Bill is compliant with international obligations in that the Bill measures apply to in-scope services equally and regardless of flag or nationality of the vessels performing the services.

Baroness Scott also asked about the advice from the international chamber that the Government could potentially be exceeding the powers conferred on them under the Merchant Shipping (Port State Control) Regulations 2011. The Bill is not regulating or enforcing international obligations under the Maritime Labour Convention or the Paris memorandum of understanding and therefore its compliance and enforcement measures are independent of measures contemplated in the convention and amount to ensuring compliance with a UK condition of entry to UK ports.

Powers of direction

We have also carefully reflected on the recommendation from the DPRRC to remove the powers of direction from the Secretary of State in clause 11(2). These powers of direction form an important part of the compliance mechanism under the Bill. Without the power of direction given to the Secretary of State, there will be no means of correction if the harbour authorities do not exercise their powers under the Bill, or if they exercise their powers inappropriately.

I would like to reassure noble Lords that the power is not intended to have general effect to allow the Secretary of State simultaneously to direct all harbour authorities to exercise, or not to exercise their powers under the Bill, or to exercise them in a particular way. Nor is it

intended to modify the character of the Bill itself by means of direction. The policy intention is that this power would only be used in the following circumstances:

(i) to direct a harbour authority to request a national minimum wage equivalence declaration where it appears to the Secretary of State that it is has the power to request a declaration under clause 3(1), but has not done so;
(ii) to direct a harbour authority not to request a national minimum wage equivalence declaration where doing so would disrupt key passenger services and supply chains critical for national resilience;
(iii) to direct a harbour authority to impose a surcharge where circumstances are such that it is entitled to do so under clause 7(2), but it has not done so;
(iv) to direct a harbour authority not to issue a surcharge where doing so would disrupt key passenger services and supply chains critical for national resilience;
(v) to direct a harbour authority to impose a surcharge of an amount specified in the direction instead of the amount determined by the harbour authority's tariff;
(vi) to direct a harbour authority to refuse access to a harbour where a surcharge has been imposed on an operator but they have not paid it;
(vii) to direct a harbour authority not to refuse access to a harbour, or to set conditions on the refusal of access (for example with respect to timings), where the Secretary of State considers that the refusal of access would cause damage by disrupting key passenger services and supply chains critical for national resilience.

We have carefully considered the points made by the Committee, but removing this power would significantly reduce the effectiveness of the Bill by leaving government unable to enforce the requirements of the Bill should harbour authorities not discharge their functions, or do so inappropriately, and would, for example, risk government being unable to prevent harbour authorities from refusing access to services that are critical to national resilience. It would also alter the relationship between harbour authorities and the Government, which has been subject to consultation. Therefore, any changes to this power would need to be subject to consideration of stakeholder views.

I once again thank participants for their constructive engagement on this important Bill. I look forward to further discussions at Report Stage on 26 October.

Yours faithfully,

BARONESS VERE OF NORBITON