

Lord (Tariq) Ahmad of Wimbledon
Foreign, Commonwealth and Development Office
King Charles Street
London
SW1A 2AH

13 December 2022

The Right Honourable. The Lord Judge
House of Lords
London
SW1A 0PW

Dear Igor,

We are writing in response to a question that you raised on the fourth day of the Committee Stage of the Northern Ireland Protocol Bill (NIP Bill) during which we committed to responding in writing to clarify that the individual powers within the NIP Bill are constrained by their scope and purpose. This was in relation to Clause 22 (1) providing that “*Regulations under this Act may make any provision that could be made by an Act of Parliament (including provision modifying this Act)*”. We wish to respond fully and in doing so apologise for any potential repetition of points made on the floor of the House. For the benefit of the House, we shall place a copy of this response in the Lords Library.

The effect of Clause 22 (1) on the powers in the Bill

We understand that you were asking about the effect of clause 22(1) on the scope of the powers in the Bill. As we said on the floor of the House, clause 22(1) does not make any of the powers in the Bill a ‘do anything’ power and we would like to reassure you of this by explaining further below.

Each individual clause which contains a power in the Bill sets out the detail of the power’s scope and purpose. For example, Clause 9 provides that the power in clause 9(1) may make any provision about the regulation of goods which the Minister considers appropriate in connection with the Protocol, and this may include provision which is considered appropriate in connection with a UK regulatory route being available in accordance with clause 7(2)(a) and (c), and provision amending clauses 7 and 8. As another example, clause 17 provides that the power in clause 17(1) may make any provision about VAT, excise duty, and other tax which the Treasury consider appropriate in connection with the Protocol, including provision imposing or varying the incidence of any tax, and provision to lessen, eliminate or avoid the difference between such tax in Northern Ireland and Great Britain.

Some of the provisions of clause 22 do affect the scope of the individual powers in the Bill. For example, clause 22(3) narrows the scope of the powers in the Bill to ensure that they cannot be used to create or facilitate border arrangements between Northern Ireland and Ireland which feature at the border physical infrastructure or checks and controls which did not exist before exit day.

However, Clause 22(1) does not expand the scope of the powers in the Bill but rather clarifies the *kinds* of provision which may be made under the powers, within their individual scope. It confirms that the regulations made under the powers in the Bill are capable of making any of the kinds of provisions which could be made by an Act of Parliament. This means that, for example, regulations under the Bill could make amendments to an Act of Parliament, make retrospective provision, and create a criminal offence.

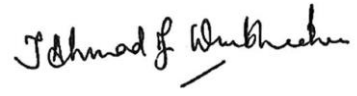
However, any of the kinds of provision which is made must still be within the scope of the particular power the provision is being made under. To provide you with an example, whilst clause 22(1) clarifies that the power in clause 9(1) (mentioned above) is capable of being exercised to make provision amending an Act of Parliament, any such amendments would still need to be in scope of the power in clause 9(1), that is the amendments would need to be about regulation of goods in connection with the Northern Ireland Protocol. This means it could not, for example, be exercised purely for the purpose of making provision about the regulation of services which had no connection with the Northern Ireland Protocol, or exercised in relation to other matters in connection with the Protocol which did not relate to the regulation of goods.

Moreover, in relation to clause 22(1), we would like to assure the Noble Lord that the Government does not take lightly the seriousness of amending legislation that Parliament has already considered and put on the statute book.

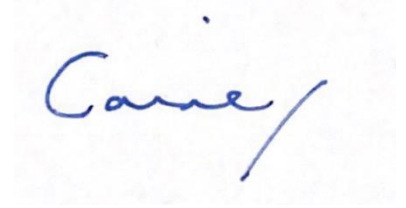
This is why the NIP Bill sets out that the use of the powers in the Bill to make provision which amends Acts of Parliament will be subject to the affirmative procedure precisely to ensure that Parliament is able to properly scrutinise and review any changes to existing legislation, even in circumstances where those changes may be consequential or exceedingly technical.

Yours sincerely,

LORD AHMAD OF WIMBLEDON

A handwritten signature in black ink that reads "Ahmad of Wimbledon". The signature is written in a cursive style with a horizontal line under the word "Wimbledon".

LORD CAINE

A handwritten signature in blue ink that reads "Caine". The signature is written in a cursive style with a horizontal line under the word "Caine".