



Department for International Trade

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Rt Hon. the Baroness Taylor of Bolton
Chairman of the Constitution Committee
House of Lords
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19th February 2019

Dear Baroness Taylor of Bolton,

Thank you for your letter on 11 February, in which you explain your continued concerns regarding the application of the Clause 2 power. In order to be as helpful as possible in my reply, I have tried to categorise your concerns and respond to each accordingly below.

Scope of the continuity programme

I would like to reassure you that the Government will only use the Clause 2 power to implement obligations in agreements which seek to provide continuity from those the EU has already signed. This power will not be used for future trade agreements. The Government has been clear that it seeks continuity of the existing EU trade agreements. This is a technical exercise to ensure continuity in trading relationships, and not an opportunity to change or renegotiate the terms of the agreements along the broad terms suggested in your letter.

As you are aware, we have already laid bilateral UK agreements in Parliament for Chile, the Eastern and Southern Africa (ESA) States and the Faroe Islands. Alongside these were laid parliamentary reports which describe any significant differences between these agreements and the original EU-Third country agreements. These are a good example of the scope of the programme and I hope, therefore, provide further assurance that it is limited to continuity.

Breadth of trade agreements

In your letter you highlight that trade agreements are increasingly broad. This is of course true, demonstrated through the more recent EU trade agreements such as the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA), which is known for its breadth and ambition. However, even CETA has not required the UK to impose or increase taxation or fees, create criminal offences or establish a new public authority. This demonstrates that we have no intention of making changes to your areas of concern as part of our trade agreement implementation under the continuity programme. To provide further reassurance, as we set out below, clause 2 cannot be used to make changes to these areas – as such a power must be expressly granted on the face of the Bill.

Justification for structure of power

As the Explanatory Notes to the Bill set out, the clause 2 power has been drafted in a way that means that it cannot be used to impose taxes, create new criminal offences or establish new public bodies. This follows common drafting practice. There is a well-established legal presumption that if a power is to be used for any of those purposes then a court would expect to see an express reference in the legislation creating the power. To put words on the face of the Bill that say what the clause 2 power cannot be used for would call that presumption into question. It would also create ambiguity for the interpretation of powers in other statutes which do not contain such express restrictions.

Furthermore, the power can only be used in relation to agreements that mainly relate to trade, with countries which have signed EU trade agreements by the point that the UK leaves the EU. The power cannot be used to amend primary legislation, except where that primary legislation is retained EU law. The power will also be subject to sunset after three years from exit day, which can be extended only with permission of both Houses.

I hope this provides reassurance that the Government has constrained this power as much as possible, while ensuring that it is still capable of delivering continuity in our current trading relationships.

Intended use of the power

By way of further reassurance, we only intend to use this power in relation to the implementation of non-tariff provisions of continuity trade agreements which require changes to domestic legislation. For example, we will have to implement procurement obligations in several of our agreements, including the Chile Agreement we recently signed. Without the clause 2 power we will not be able to implement fully such obligations under these agreements.

Pepper v Hart

Finally, responding to your comments on the *Pepper v Hart* 1993 case, we agree with you that *Pepper v Hart* dealt specifically with Hansard, and that courts will only turn to Hansard to resolve ambiguity in particular circumstances. However, that case does of course also make clear that the Explanatory Notes accompanying an Act are to be treated somewhat differently. Explanatory Notes are always admissible aids to the construction of the Act. This can be seen, for example, in *Westminster City Council v National Asylum Support Service* [2002] UKHL 38, where Lord Steyn made clear at paragraph 5 that there was no need for an ambiguity to be established in order for the court to consider the Explanatory Notes in their interpretation. Exceptional circumstances are not required because, in the case of *R v Montila and others* [2004] UKHL 50, at paragraph 34, "It has become common practice for their Lordships to ask to be shown Explanatory Notes when issues are raised about the meaning of words used in an enactment".

I hope that this response provides reassurance to you and the Committee.



Baroness Fairhead

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