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& Industrial Strategy

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Dear Harriet,

Thank you for your letter of 29th September 2020, sharing the Joint Committee's concerns about the provisions of amendments number 12 and 13 at Report.

These amendments (with amendment 15) provided that regulations made under clauses 44(1) or 45(1) of the Bill, as amended in the Bill at Report, are to be treated as primary legislation for the purposes of the Human Rights Act 1998 ("HRA"). The result is that individuals will be able to challenge such regulations under the HRA and the higher courts may make declarations of incompatibility in respect of the regulations, as they can in respect of primary legislation. The substance of the amendments is now in clause 47(2)(a), clause 47(3) and the definition of "relevant domestic or international law" in clause 47(8).

The Department's ECHR memorandum of 22nd September 2020¹ sets out the analysis with regard to the statement made under section 19 HRA as to the compatibility of the provisions of the Bill with the Convention rights. The amendments do not affect that analysis. They provide, in addition to review on key judicial review principles including vires, rationality and breach of legitimate expectations, for the courts to be able to scrutinise any regulations made under clauses 44 and 45 as if they were primary legislation for the purposes of the HRA.

The effect of the amendments will be to apply the HRA so that, for example:

- a court will take into account relevant ECtHR judgments (section 2 HRA)
- a court will read and give effect to any Regulations, if it is possible to do so, in a way which is compatible with the Convention rights (section 3 HRA)
- a Minister would be expected to make a statement under section 19 of the HRA when making any Regulations, as is the practice with affirmative Regulations
- public authorities acting pursuant to powers in the Regulations will be, as is normally the case, under the duty to act compatibly with Convention rights (section 6 HRA, subject to the defences in section 6(2)) and any person wishing to challenge action taken by a public authority under the Regulations can do so in the normal way (section 7 HRA).

However any challenge to the regulations will be made in the same way as a challenge to primary legislation would be made (sections 3 and 4 HRA) and if the

¹ <https://services.parliament.uk/Bills/2019-21/unitedkingdominternalmarket/documents.html>

court finds that the regulations cannot be read compatibly with the Convention rights, then the remedy is a declaration of incompatibility (section 4 HRA).

This is considered to strike the appropriate balance between the rights of claimants and persons relying on regulations for legal certainty. State aid recipients, in particular, must be confident that if they accept State aid on the basis of an interpretation of Article 10 of the Northern Ireland Protocol, any regulations will not be struck down by reason of incompatibility with any rule of international or domestic law in a future action, and that could lead to that aid being recovered.

Yours sincerely,

A handwritten signature in blue ink, appearing to be 'Alok Sharma', consisting of a large 'A' followed by a stylized 'S'.

THE RT HON ALOK SHARMA MP
Secretary of State for Business, Energy & Industrial Strategy