



Public Law Project

HM Treasury
11 Downing Street
SW1A 2AB

Your Ref:

Our Ref: PUB2.3

Date: 09 October 2019

:

Also by email to private.office@hmtreasury.gsi.gov.uk;
public.enquiries@hmtreasury.gsi.gov.uk

Cc'd to
HMRC minajur.rahman1@hmrc.gov.uk
The Treasury Solicitor thetreasurysolicitor@governmentlegal.gov.uk
The Attorney General and Solicitor General
correspondence@attorneygeneral.gov.uk
The Advocate General for Scotland
enquiries@advocategeneral.gsi.gov.uk

Dear Sir/Madam,

Proposed Judicial Review of the decision to make 'The Cross-border Trade (Public Notices) (EU Exit) Regulations 2019'

1. We are writing in relation to a proposed claim for judicial review.
2. We write to you in accordance with the Judicial Review Pre-Action Protocol. For the reasons set out below, a shorter time frame for a response than the standard 14 days is appropriate. Please respond to this letter by 5pm on Monday 14 October 2019 confirming that you will carry out the steps listed below (see 'Action to be taken by you').

Proposed Claimant

3. The proposed Claimant is currently The Public Law Project (PLP). Other Claimants may join or replace PLP in this action.

Public Law Project | Casework | Consultancy | Training | Policy | Research

Address: 150 Caledonian Road, London, N1 9RD
Tel: (020) 7843 1260 Fax: (020) 7837 7048 Web: www.publiclawproject.org.uk

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The Public Law Project is a company limited by guarantee (registration number 2368562), and a registered charity (registration number 1003342)
Registered in England, registered offices as above

Proposed Defendant

4. The proposed first Defendant is Her Majesty's Treasury. If you consider a different department or Secretary of State is the appropriate Defendant, please let us know by reply.

Reference details

5. Our reference is PUB 2.3 SL

Decisions under challenge

6. The decisions to make and then lay 'The Cross-border Trade (Public Notices) (EU Exit) Regulations 2019' on 7 October 2019 under the negative resolution procedure.

Factual background

Background on PLP

7. PLP is a national legal charity founded in 1990 with the aim of improving access to public law remedies for disadvantaged individuals. Our work is for the benefit of our identified beneficiaries who are those marginalised through poverty, discrimination or disadvantage.
8. PLP's strategic priorities for 2017 – 2022 include promoting and safeguarding the Rule of Law during a period of significant constitutional change.
9. PLP takes no position on the decision to leave the European Union or as to the form which Brexit takes. Our work on Brexit has the following objectives:
 - To strengthen our democratic settlement: To see Parliament appropriately sovereign, the executive held to account, and the interests of disadvantaged groups properly and effectively represented.
 - To ensure procedural fairness to those likely to be most affected by the Brexit process.
10. Through our work in support of the first of these objectives, we have sought to inform the Rule of Law debates around the legislative process for withdrawal, and to establish mechanisms for monitoring executive decision-making pursuant to the European Union (Withdrawal) Act 2018 ('EUWA').
11. As part of our work in this area, and as a result of concerns about the ability of Parliament to provide effective scrutiny given the volume of secondary legislation that was anticipated, we established the Statutory Instrument Filtering and Tracking (SIFT) project. The goal of the SIFT project is to scrutinise the Statutory Instruments created to facilitate Brexit, to check they conform to public law standards and do not undermine fundamental rights.

12. SIFT seeks to scrutinise as many statutory instruments as possible.
13. As part of the scrutiny process we have been reviewing explanatory memoranda accompanying the statutory instruments, in particular to see whether they do record all the significant changes made by the instruments. The SIFT project has also looked at the reports of the scrutiny committees to take account of any trends in the types of errors being noted by the committees and the nature of the instruments being upgraded.
14. We publish our research findings from our SIFT project on an ongoing basis¹ and have also used our research to prepare Parliamentary briefings. Our SIFT research was the basis of PLP's intervention in the case of *R (Miller) v The Prime Minister and others* [2019] UKSC 41. Our evidence to the Supreme Court referred to PLP's research findings (such as SIs being used to implement policy changes, inadequate supporting material being provided in explanatory notes including an absence of impact assessments, and SIs being made which appear to weaken standards). The judgment (at paragraph 60) relies on points made in our evidence regarding the failure to consider the impact of prorogation on the special procedures for scrutinising delegated legislation necessary to achieve an orderly withdrawal.

The Cross-border Trade (Public Notices) (EU Exit) Regulations 2019

15. On Monday 7 October 2019 Her Majesty's Treasury laid before the House of Commons the Cross-border Trade (Public Notices) (EU Exit) Regulations 2019 ('The Regulations').
16. The Regulations were published on Gov.uk website at 8.02am on 8 October 2019. The accompanying Explanatory Memorandum states that they are subject to the negative resolution procedure (§3.5). They will come into force on Exit Day (Reg 1(2)), currently 11.00pm on 31 October 2019.
17. The Regulations provide a power for the Treasury to make, via a public notice, changes to VAT or customs and excise legislation in connection with withdrawing from the EU. This delegated power purports to authorise public notices which disapply or modify obligations imposed by or under any enactment, i.e. the Regulations purport to sub-delegate a power to amend primary legislation by public notice. The power may be exercised on the recommendation of two or more HMRC Commissioners. Regulation 4 requires monthly reports to be made by the Treasury to the House of Commons of the use of the power but there is apparently no other Parliamentary scrutiny of the power envisaged. The power conveyed by the Regulations lasts for six months from exit day, i.e. until end of April 2020 (assuming exit day remains 31 October 2019). The Explanatory Memorandum states that: "This is a temporary

¹ E.g <https://ukconstitutionallaw.org/2019/02/07/alexandra-sinclair-and-joe-tomlinson-deleting-the-administrative-state/>

arrangement and is part of the wider set of pragmatic contingency powers designed to give HMRC and the Treasury the flexibility to act quickly in an unpredictable environment after the UK's departure from the EU." (§2.3)

18. PLP is concerned by the attempted creation of broad sub-delegated Henry VIII powers, the use of the negative resolution procedure, the absence of opportunities for Parliamentary scrutiny and absence of consultation and assessment of specific impact within the Regulations and accompanying notes. On the face of it, this SI encapsulates many serious concerns about the ways in which our parliamentary procedures might be undermined or circumvented. Given current timeframes, the precedent that this SI sets for use of power by the executive and the serious and longstanding impact that precedent might have upon our democratic institutions, we consider it appropriate to write to you in this form.

Grounds of Challenge

Ground 1: Ultra Vires

19. The Regulations state that they are made in exercise of the powers conferred by section 51(1) and (3) of the Taxation (Cross-border Trade) Act 2018 ('TCTA').
20. Regulation 3 is however ultra vires s. 51 TCTA because that provision does not (either generally or in section 51(3)) include a power to sub-delegate a Henry VIII power either (a) at all or (b) in the form of a power to amend primary legislation by way of public notice. Any provision made under section 51 amending primary legislation must be made by way of regulations under section 51(3) and (5).
21. S.51 states:

*"51 Power to make provision in relation to VAT or duties of customs or excise
(1) The appropriate Minister may by regulations made by statutory instrument make such provision relating to—*

- (a) value added tax,*
- (b) any duty of customs, or*
- (c) any excise duty,*

as the appropriate Minister considers appropriate in consequence of, or otherwise in connection with, the withdrawal of the United Kingdom from the EU.

(2) No regulations may be made under this section on or after 1 April 2022.

(3) Regulations under this section—

- (a) may make any such provision as might be made by Act of Parliament, including provision amending or repealing this Act, but*
- (b) may not make provision taking effect from a date earlier than that of the making of the regulations.*

(4) In this section "the appropriate Minister" means—

(a) in any case where the provision relates to anything dealt with by any provision mentioned in section 57(2), the Secretary of State or the Treasury, and

(b) in any other case, the Treasury.

(5) A statutory instrument containing regulations under this section that amends or repeals any Act of Parliament must be laid before the House of Commons, and, unless approved by that House before the end of the period of 28 days beginning with the date on which the instrument is made, ceases to have effect at the end of that period.

(6) The fact that a statutory instrument ceases to have effect as mentioned in subsection (5) does not affect—

(a) anything previously done under the instrument, or

(b) the making of a new statutory instrument.

(7) In calculating the period for the purposes of subsection (5), no account is to be taken of any time—

(a) during which Parliament is dissolved or prorogued, or

(b) during which the House of Commons is adjourned for more than 4 days.

(8) A statutory instrument containing regulations under this section to which subsection (5) does not apply is subject to annulment in pursuance of a resolution of the House of Commons.

(9) If—

(a) a statutory instrument contains provision relating to excise duty under this section and provision relating to excise duty under another enactment, and

(b) the Parliamentary procedure applicable to a statutory instrument containing provision under the other enactment does not require House of Commons approval (within the meaning of section 48(7)),

the only Parliamentary procedure that is to apply to the instrument mentioned in paragraph (a) is that given by this section.

(10) After it is established, the appropriate Minister must consult the Trade Remedies Authority before including in regulations under this section provision relating to anything dealt with by Schedule 4 or 5.”

22. Such a power conferred on the executive to amend primary legislation by secondary legislation (with all the attenuated scrutiny that may entail) is commonly known as a ‘Henry VIII’ power. At paragraph 25 of *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39 Lord Neuberger quotes from *Craies on Legislation* (10th Edition (2015)):

“The term ‘Henry VIII power’ is commonly used to describe a delegated power under which subordinate legislation is enabled to amend primary legislation.”

23. Lord Neuberger goes on to state:

“When a court is considering the validity of a statutory instrument made under a Henry VIII power, its role in upholding Parliamentary supremacy is

particularly striking, as the statutory instrument will be purporting to vary primary legislation passed into law by Parliament.”

24. He then quotes from *McKiernon v Secretary of State for Social Security, The Times, November 1989; Court of Appeal (Civil Division) Transcript No 1017 of 1989*:

“The duty of the courts being to give effect to the will of Parliament, it is, in my judgment, legitimate to take account of the fact that a delegation to the Executive of power to modify primary legislation must be an exceptional course and that, if there is any doubt about the scope of the power conferred upon the Executive or upon whether it has been exercised, it should be resolved by a restrictive approach.”

25. But the Regulations do not themselves direct give effect to the Henry VIII power in s.51(3)(5) TCTA. Instead, they purport to delegate such power to be exercised by public notice, and with none of the safeguards the TCTA has provided (notably use of a “made affirmative” procedure requiring affirmation within 28 days if the Regulations are not to lapse).

26. Thus, Regulation 3 of the Regulations provides:

Power to make temporary provision by public notice

3.—(1) *The Treasury may give a public notice containing provision which—*
(a) relates to value added tax, any duty of customs or any excise duty(1); and
(b) is authorised by this regulation.

(2) They may do so only if, in consequence of, or otherwise in connection with, the withdrawal of the United Kingdom from the EU, they consider it appropriate in the public interest to give the notice.

(3) The power to give a public notice under this regulation is exercisable only on the recommendation of HMRC Commissioners.

(4) Provision is authorised by this regulation if it has the effect of—

(a) disapplying any obligation imposed by or under any enactment;

(b) extending the period for complying with any such obligation;

(c) extending the period during which a person is authorised or approved to do anything;

(d) suspending any power or duty of HMRC to impose a penalty or other sanction on any person;

(e) authorising HMRC to give any approvals or authorisations subject to their being subsequently satisfied that any requirements are met; or

(f) otherwise conferring a benefit of any kind on any person other than provision—

(i) reducing the amount of import duty applicable to any goods equivalent to provision that may be made under the sections referred to in section 7 of the Act; or

(ii) reducing the rate of value added tax or excise duty.

(5) Provision (“modifying provision”) is also authorised by this regulation if—

(a) it modifies the operation of any provision made by or under any enactment; and

(b) the Treasury consider the modifying provision appropriate in consequence of, or otherwise in connection with, the making of provision that has an effect specified in paragraph (4) (whether or not the provision is made by a public notice under this regulation).

(6) The modifying provision authorised by paragraph (5) includes provision imposing obligations, or penalties for failure to comply with an obligation, on any person.

(7) The period for which a public notice given under this regulation has effect must not be longer than a period of 60 days beginning with the day on which the notice is given (and none of that period may fall after the end of the period specified in regulation 1(2)).

(8) This does not affect—

(a) anything previously done under the notice;

(b) the making by that or another public notice of transitional or transitory provision or savings in connection with its ceasing to have effect; or

(c) the making of a new public notice.

27. The power conferred under Regulation 3 includes a power to amend primary or secondary legislation relating to VAT, customs and/or excise duties by a public notice.

28. Whilst the Regulations state that they are made pursuant to TCTA s.51(1) and (3) (set out above), those provisions do not authorise the sub-delegation to the Treasury or anyone else of the power to amend primary legislation. Nor do they authorise the creation of a power to amend primary legislation by way of public notice rather than by Regulations. Express words would, at the very least, be needed in the empowering Statute to permit such delegated legislation to be made in that way. We reach this conclusion for the following reasons.

29. First, such sub-delegation of Henry VIII powers is objectionable as a matter of constitutional principle, in particular the fundamental principles of Parliamentary sovereignty and Parliamentary accountability recently restated in *Miller/Cherry* [2019] UK SC at [41]-[47] since it denudes Parliament of any role in relation to the rewriting of its statutes and scrutiny over secondary legislation impacting upon Parliamentary sovereignty (see *ibid* [60]). This is particularly so when the Regulation purports to confer what is in effect a general discretionary power upon a public official to dispense with the requirements of a statute. Indeed, it

violates Article 1 of the Bill of Rights 1688 which states “*That the pretended Power of Suspending of Laws or the Execution of Laws by Regall Authority without Consent of Parlyament is illegal*” by seeking, in part, to revive a discretionary power to dispense with laws, exercisable without further Parliamentary authority or control.

30. Secondly, there is no trace of statutory authority for this dispensing power by public notice in TCTA. The TCTA does contain elsewhere specific references to the making of public notices (see, amongst numerous examples, s.13(4)), but resolutely not in relation to powers under s.51. Section 51 refers only to provisions for the making of regulations. This silence, by contrast to the sections expressly using the public notice device constitutes clear textual proof, that Parliament did not intend to confer on the Commissioners the power to amend primary legislation by public notices, but only by regulations themselves. The public notice provisions were highly controversial and were intended to be strictly applied and not extended. The Report of the Delegated Powers and Regulatory Reform Committee on the Bill described the power as “*radical*” and “*a modern form of ruling by proclamation*” concludes at §25:

“...clause 32(9) of the Bill allows anything that can be done under public notice to be done by regulations, implicitly acknowledging the importance of things done by public notice. For Ministers and others to make law by “public notice”, without any recourse to Parliament, is highly unusual and such provisions should attract strict surveillance by Parliament. The Statute of Proclamations 1539 gave proclamations the force of statute law. Although it was repealed in 1547 after the death of Henry VIII, it now enjoys a limited revival under the veil of Ministers and HMRC making law by “public notice”.”

31. The Court of Appeal in Hyde Park Residence v. Westminster City Council (2000) 80 P. & C.R. 419, CA, per Henry LJ at [29], held that:

“The Use Classes Order is secondary legislation, and the **general rule is that specific statutory rights** (such as Section 25) **are not to be cut down by subordinate legislation passed under the vires of a different Act** (see *R -v- Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275 at 290 and 293). While an Act may confer power for the amendment of another Act by delegated legislation, any such power is to be narrowly and strictly construed (see *Bennion on Statutory Interpretation* 3rd Edition pp 174–175 and *R -v- Secretary of State for Social Security ex parte Britnell* [1991] 1 WLR 198 at 204E).” [Emphasis added]

32. Even if a power to amend primary legislation can be found in the enabling legislative provisions, clear words would be needed to achieve this through the means of public notice with no Parliamentary scrutiny: See *R v. Secretary of State for the Home Department ex p Pierson* [1998] AC 539 HL per Lord Browne-Wilkinson at p. 575; *R v. Secretary of State for the Home Department ex p Simms* [2000] 2 AC 115 HL per Lord Hoffmann at p. 131.

33. Furthermore, the restrictive interpretation of s.51 is confirmed by s.51(5) (set out above) which specifically requires high levels of parliamentary scrutiny in order to amend primary legislation in this context. The requirement is for any amendment of primary legislation to be made by regulations which must be laid before the House of Commons and approved by that House within 28 days otherwise the regulations will lapse. Any provision made under s.51 amending primary legislation must be made by way of regulations themselves under s.51(3). It is clear that Parliament intended that any amendment to primary legislation should be subject to enhanced Parliamentary scrutiny, and did not intend to create a power to sub-delegate a Henry VIII power either at all or in the form of a power to amend primary legislation by public notice. Indeed, Regulation 3 circumvents those requirements for scrutiny, imposed by Parliament. The safeguard in the statute is rendered wholly nugatory and avoided by the public notice device, a point that tells conclusively against its legality.
34. Regulation 3 is therefore outside the scope of the statutory power pursuant to which it was purportedly made and *ultra vires*.

Ground 2: No power to create sub-delegated Henry VIII power by negative resolution

35. Without prejudice to the *ultra vires* challenge above, even if s.51 conferred a power to sub-delegate power to amend primary legislation (which it does not), any such sub-delegation of a Henry VIII power would have to be made by way of regulations under s.51(5) and subject to the made affirmative procedure. These regulations purport to be made under the negative procedure and are also therefore *ultra vires* for that reason.

Conclusion and way forward

36. It is accepted that withdrawal from the EU represents exceptional legislative change and challenge within the UK. Whatever the demands that Brexit poses, and whatever latitude it may require from the Courts, it cannot allow the Executive to assume or purport to confer on public officials powers to dispense with the law not been clearly and expressly granted by Parliament.
37. In order to maximise legal certainty by determining the status of these Regulations before they are relied upon we will invite the Court to grant extreme expedition to the hearing of this case; and we invite you to agree it. The point is a short one of statutory construction, assessed against well-known constitutional principles.
38. It requires no evidence. Given the evident arguability of the point, and to facilitate such speedy hearing, we also invite you to concede that the point is arguable so that a substantive hearing can be arranged as soon as possible.

Costs

39. This is a matter of significant public interest in which PLP has no private interest. In the event you intend to defend the claim we would be grateful also for your undertaking not to pursue PLP for any legal costs arising from addressing the issues raised above.
40. In the event that you are unable or unwilling to provide that undertaking generally, please provide your justification for that position, and advise whether you are at a minimum willing to undertake not to pursue your pre-permission legal costs.
41. PLP is a small charity with limited funds. The concerns raised above are matters of general public importance and the public interest requires that they are resolved. As a charity, PLP itself is little affected by the tax and customs rules covered by the Regulation. Consequently we consider PLP and/or the ultimate claimant in this case is highly likely to be awarded a Costs Capping Order. However, ancillary costs applications will require time from all parties that (given the abridged timescales) will necessarily detract from the issues of substance. Insofar as necessary, we would remind you of Lord Justice Jackson's observation: "*It must be remembered that public authorities have at the heart of their function and being the duty to act in the public interest...The facilitation of judicial review scrutiny is itself in the public interest. There is no 'unfairness' in the State absorbing the cost of this vital public law audit.*"^[1]
42. It would assist both parties in progressing this matter if clarity on costs for PLP could be provided now, and consequently we would be grateful to receive the undertaking sought.

Legal adviser dealing with this matter

43. Sara Lomri
Public Law Project
150 Caledonian Road
London
N1 9RD
020 7843 1263
s.lomri@publiclawproject.org.uk

^[1] Cited at paragraph 2.3 of Chapter 30, p. 303. <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>

Interested Parties

44. Our view is that Her Majesty's Revenue and Customs may be an Interested Party.
45. We are also sending a copy of this letter by email to The Treasury Solicitor, the Attorney General, the Solicitor General and the Advocate General for Scotland. We welcome your view as to whether you consider any of the devolved administrations should be added as Interested Parties given the issues raised.

Action to be taken by you

46. Having considered this letter, please confirm:
- a) That the Regulations will be withdrawn
 - b) You will agree that any necessary amendments to primary legislation to achieve the objectives outlined will now be made by way of regulations under s.51(5) and subject to the made affirmative procedure
 - c) In the alternative, at the very minimum, please confirm that you will withdraw the regulations and re-lay them as made affirmative under section 51(5) so that they are subject to Parliamentary scrutiny. We make clear that this request is without prejudice to our view that such Regulations would be *ultra vires* even if made under the proper procedure, and thus this may not be sufficient to avoid proceedings, but would at the very least narrow the issues and improve the prospects of Parliamentary scrutiny.

Proposed reply date

47. We will properly consider any offer of negotiation or alternative dispute resolution that you make. In any event, we ask that you respond to this letter within a curtailed time period i.e. no later than 5pm on Monday 14 October confirming whether you will carry out the action set out above. We are obliged to ask for a curtailed time period for your response as the Regulations will come into effect on Exit Day, which is currently planned for 31 October i.e. in 22 days time. In the event that you do not agree to carry out the action set out above, the matter will need to be decided by the Court and judgment given sufficiently in advance of the date the Regulations come into force to allow for lawful Regulations to be put in place. The timetable we propose for your reply gives you three full working days to respond to this letter, which is significantly longer than we have had to prepare this letter (only 1.5 working days since publication of the Regulations).
48. This letter provides notice that should you not agree to take the action required by that date, then PLP and/or other claimants bringing the action on grounds set out above (whose details will be provided to you at the earliest opportunity)

reserve the right to issue judicial review proceedings without further recourse to you.

49. In any event, please confirm receipt of this letter.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Sara Lomri', with a long horizontal flourish extending to the right.

Sara Lomri
Solicitor
Public Law Project
020 7843 1263
s.lomri@publiclawproject.org.uk