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The Rt. Hon. the Lord Blencathra
Delegated Powers and Regulatory Reform Committee
Legislation Office
House of Lords
London
SW1A 0PW

19th June 2020

Dear Lord Blencathra,

I am writing in response to the Delegated Powers and Regulatory Reform Committee's fourteenth report, which was on the Corporate Insolvency and Governance Bill.

I appreciate the care the Committee have taken in scrutinising this Bill and I am grateful for their considered views and suggestions, particularly in light of the accelerated timeframe of the Bill's passage through Parliament.

I have reflected carefully on the views expressed by noble Lords as the Bill has progressed through Second Reading and Committee, as well as on the recommendations raised by the Committee. I hope this letter can go some way to alleviate the Committee's concerns.

Clause 1 to 6: moratorium

The Committee's report expressed a concern about the number of Henry VIII powers in the Bill, particularly in clause 1. Several of the powers highlighted by the Committee are essential to the operation of policy. Four of the affirmative regulation making powers we are taking in the moratorium provisions – the powers contained in sections A12(6), A18(5), A38(5) and A51(4) – are particularly important. Three of them are inter-related and deal with key definitions that are used throughout the moratorium provisions, and are vital to the effective operation and ultimately the success of a moratorium. Similarly the power in section A38(5), which deals with the circumstances in which the monitor must bring the moratorium to an end early, we view as key.

The impact that these four sections have in practice on the operation and effectiveness of the moratorium will be kept closely under review. The moratorium is a new process; in our view it is vital to retain these powers in order to ensure that we can respond quickly to lessons learned in the practical application of these new provisions and ensure the moratorium is fit for purpose.

As the moratorium is a new procedure being introduced in the context of an economic emergency, these powers are vital to allow us to respond rapidly to changing circumstances and ensure that the measures remain effective. This is

especially important in financial services, where the types of firms and contracts in use continuously evolve.

However we have listened to the concerns raised by the Committee and by noble Lords and will be amending the Bill to remove three of the Henry VIII powers in clause 1: those in new sections A10(4), A11(5) and A13(9). We will also be restricting the power in new section A6(4) so that it can only be used to add to existing requirements rather than to amend them. The same changes will be made to the corresponding powers for Northern Ireland in clause 4.

Schedule 1: Schedule ZA1

The Committee recommended that a condition should be inserted in Schedule 1: Schedule ZA1, paragraph 20 whereby the Secretary of State is required to be satisfied that significant damage would be caused to business were the power not exercised. The powers in question are essential given the wide range of companies that could benefit from the moratorium regime and the impact that may have in certain sectors. The government intends to use the power to exclude Housing Associations and Social Landlords from the moratorium provisions. Furthermore, energy firms and financial services firms are subject to more complex insolvency regimes and it may be necessary to use this power to add or remove firms in those sectors and vary the circumstances of their eligibility according to those specific requirements.

A condition that the power can only be exercised to avoid significant damage to business would be very difficult to satisfy, as the question of what is “significant damage” to business is almost impossible to define. However, we note the concerns of the Committee about the breadth of the power under paragraph 20. In light of those concerns, we will restrict the scope of that power. Paragraph 2 of Schedule ZA1 prevents companies from being eligible for a moratorium if they are or have recently been subject to a moratorium or other insolvency procedure (as set out in paragraph 2(3)). We will amend paragraph 20 so that it cannot be used to amend paragraph 2. The same change will be made to the corresponding power for Northern Ireland in Schedule 5.

Clause 12: protection of supplies of goods and services

The Committee recommended that the powers in clause 12, on supply of services, and the powers to amend the list of exclusions should be removed. Whilst we note the Committee’s concerns, we consider that removing these powers from the Bill would significantly undermine the supply of services provisions.

The purpose of excluding certain financial services firms and contracts from the termination clause provisions is to avoid affecting existing financial services legislation and the operation of special insolvency regimes for these firms. By doing so, legal certainty in the operation of financial market contracts is maintained. The same applies in other specialist sectors. Already during the Bill’s passage it has been necessary to amend new schedules 4ZZA (and 2ZAA which applies to the Northern Ireland provisions) to clarify that nothing in section 233B of the Insolvency Act 1986 (and the corresponding provision in Northern Ireland) affects the

International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015, to give clarity to the market. As the new provision beds in, it may become apparent that there is an urgent need to make further exclusions or to amend definitions.

In particular, the financial services sector is fast-changing so this power may be needed to enable the Government quickly to remove, add and amend the exclusions as new firms or types of contracts emerge. Having firms and contracts treated differently for no justifiable reason could lead to uncertainty in financial markets and have potentially severe consequences for financial stability.

The exclusions not only affect suppliers but exclude certain financial services firms from using the termination clause provisions in the event of their insolvency. In due course it may be considered that it would be of benefit to remove such entities from the exclusions. Some sectors, such as energy markets, are fast developing and exclusions (such as those relating to commodities) may need to be amended in future.

Further, if evidence shows that certain sizes or types of supplier should be excluded from the provision, the power can be used to provide for this.

Without this power, we would lose the flexibility required to provide confidence to lenders. Furthermore, the financial sector was heavily consulted on the exclusions and would have strong views if we were not able to quickly amend these in order to give clarity to financial market participants. I hope the Committee can understand our decision to retain these powers.

Clause 18 – 22: power to amend corporate insolvency and governance legislation

I have taken time to consider the points rightly raised by the Committee and by noble Lords on clause 18, the general power which enables the Secretary of State to temporarily amend corporate insolvency and governance legislation.

The Committee recommended that we introduce a restriction on the use of the power in clause 18 that the Secretary of State must consider there to be an urgent need to do so. This suggestion was supported by many noble Lords. The Committee has noted that the power is subject to restrictions, including that the power must be exercised for one of the purposes (which relate to the impact of coronavirus) mentioned in clause 19 and that regulations must be proportionate to the purposes for which they are being made. We have considered the Committee's concerns and accepted the Committee's recommendation. A condition will be added to the power so that the Secretary of State must be satisfied of the urgent need to use this power before it is exercised.

We will also further restrict the power under clause 18 by adding a limitation to the power under clause 22 to extend the expiry date for the use of the power in clause 18. As the Committee noted, the 30 April 2021 expiry date could be extended an unlimited number of times. We will amend clause 22 so that the expiry date for using the power in clause 18 cannot be extended beyond 2 years after Royal Assent.

Clause 23: consequential provision

The Committee recommended that the power in clause 23 (which enables consequential, incidental, supplementary or transitional provisions or savings to be made in connection with provision made by regulations made under clause 18) should be subject to affirmative procedure when used to amend primary legislation. Recognising the Committee's concerns, we will amend the relevant clauses so that regulations under clause 23 will be subject to the "made affirmative" procedure where they amend an Act of Parliament or an Act of the Scottish Parliament.

Schedule 14: meetings of companies etc. and clause 41: modified procedure for regulations

In their report, the Committee also highlighted that the 'made affirmative' procedure could be used so that regulations come into force as expeditiously as those subject to the negative procedure whilst ensuring that Henry VIII powers receive an appropriate level of scrutiny. In light of the Committee's recommendation, and the strong feeling demonstrated by many noble Lords, we will change the procedure for the powers in Schedule 14 to 'made affirmative', and the power in clause 41 to 'made affirmative', as is recommended by the Committee. The Committee referred to the usual period for approval by both Houses being 28 or 40 days. Owing to the present circumstances and the risks around the availability of parliamentary time, the Government's preference is for the maximum period available.

Clause 37: temporary power to extend periods for providing information

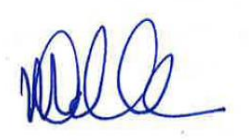
The Committee also recommended that the 'made affirmative' procedure be used for the power in clause 37. We are however concerned that this could have adverse consequences for companies and other bodies if those regulations were not debated and approved by both Houses within the required period causing them to cease to have effect. This would mean that companies who had relied on those regulations would either have to meet the relevant filing requirements very quickly in order to meet the original deadline, or if that deadline had passed, they would find themselves in breach of the relevant filing requirement. The risk of the regulations not being debated and approved within the required period is exacerbated given the current pressures on the Parliamentary timetable.

While, we understand the Committee's reasons for recommending the 'made affirmative' procedure, we believe it would create unacceptable uncertainty for companies and other bodies who may consequently be reluctant to rely on regulations made under these powers until they have been approved by both Houses. Many businesses are currently under significant pressure and these measures are designed to provide them with much needed breathing space as to their filing requirements as soon as possible. The made affirmative procedure risks significantly undermining the purpose for which this power has been included in the Bill. We have however sought to be place clear limits on the face of the Bill as to how the power will be exercised. Specifically, the power expires at end of 5 April 2021, and there are clear limits on the extent to which the relevant periods can be increased.

Clause 39: changing the duration of temporary provisions

Finally, we accept the Committee's recommendation on the need to add a condition to clause 39 – which contains the power to change the duration of the temporary provisions – to limit its use so it can only be exercised where an extension is required to deal with the effects of COVID-19.

Once again, I would like to thank the Committee for their thorough and careful scrutiny of the powers in this Bill. We have listened carefully and are taking steps as outlined above to ensure the powers in this Bill are proportionate and necessary.



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