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By email only

Your ref:
Our ref: Z2007695/EDJ/JD3

7 August 2020

Dear Mr Crosland

Response to letter before claim: 'COVID Recovery Programme'

1. This is the response of Her Majesty's Treasury to your pre-action letter of 21 July 2020, addressed to the Prime Minister, the Chancellor of the Exchequer and others. This response is sent pursuant to the Pre-action Protocol for Judicial Review.

Scope of this response

2. You propose to challenge the "*allocation of UK Government and Bank of England funds*" as part of the "*COVID Recovery Programme*", which you seek to define at paragraph 6 of your letter by reference to a non-exhaustive list of 'decisions'. These include HM Treasury's "*support for the economy or any section of it that were announced after 01 March 2020*". The scope of that element of your complaint is extremely broad and unspecific. The matters listed also include "*New projects supported by UK Export Finance*". This element of your complaint is unparticularised save for two passing references, later on in your letter, to the provision of export finance in respect of the Mozambique Liquefied Natural Gas project. As funding for that project was in contemplation prior to the COVID-19 pandemic it is not within the scope of your stated challenge. Paragraph 6 also refers to "*Any future announcements up to and including the anticipated Autumn Budget of the UK Government*". As that refers to future announcements it does not constitute a decision or decisions which can be challenged, now, by a claim for judicial review. The Government's response to COVID-19 has involved a wide and comprehensive range of actions, coordinated across departments. However, this does not constitute a single overall "COVID Recovery Programme" encompassing the matters described in your letter; this appears to be an attempt by you artificially to create a target to seek to challenge by way of judicial review.

3. This response is therefore limited to addressing your proposed challenge to the Covid Corporate Financing Facility ("CCFF"), referred to in paragraph 6(a) of your letter. This appears to be the only action or decision identified in your letter which could in principle properly be the subject of a claim for judicial review. The CCFF provides emergency liquidity support for businesses impacted by the COVID-19 pandemic. As you note in your letter, the Bank of England operates the CCFF and benefits from an indemnity from HM Treasury. HM Treasury, therefore, ultimately bears the risks associated with the CCFF. I am instructed by HM Treasury.

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4. The Government Legal Department does not act for the Bank of England, to whom your letter was also addressed. That said, whilst we do not act for the Bank, the reasons given in this letter as to why the Chancellor's decision was lawful would, in our view, apply equally to the Bank's decision to operate the facility in line with its monetary policy and financial stability objectives. We have shared a draft of this letter with the Bank of England which has confirmed that it has nothing further to add as regards the statements at Paragraphs 3, 4, 9 and 15.

Background

5. Climate Change is a threat that requires a global response. The Government remains committed to delivering the long-term changes to the UK's economic system necessary to meet the 2050 net zero target, and will harness its incoming COP and G7 presidencies to drive global climate ambition. As host of COP26, the UK is calling on all nations to come forward with more ambitious climate plans and will continue to work with all involved to increase climate ambition and deliver on the Paris Agreement.

6. Throughout the COVID-19 pandemic the Government has had to intervene in unprecedented ways to protect the economy. The Government has remained committed to meeting its climate change and wider environmental targets, including net zero by 2050 and putting tackling climate change at the heart of the economic recovery. The Summer Economic Update and Prime Minister's New Deal speech included policies that support the UK's climate targets, including reforesting Britain, making additional funding available this year to attract investment in green technologies and driving energy efficiency across the UK's buildings. These represent only one element of the Government's plans to cut emissions, building on numerous announcements made throughout 2020 including at Spring Budget. The Government will be bringing forward further plans in sectors like energy, heat and buildings in the run-up to COP26 in November 2021. Viewed in this wider context, and for the reasons given below, the Government does not accept that the absence of climate change conditionality in the CCFF is incompatible with its climate obligations.

7. I now turn to the matters which fall to be addressed under the Pre-action Protocol.

The parties

8. The details of Plan B. Earth, as set out in your pre-action letter, are noted.

9. To the extent any challenge is issued to the decision to establish the CCFF, the relevant decision-making process was as noted in paragraph 14 below.

10. It is considered that the Secretary of State for Business, Energy, and Industrial Strategy ("SSBEIS") would properly be an interested party, given his lead policy responsibility for climate change matters. This letter is also sent on behalf of the SSBEIS for whom we also act.

From and Reference Details

11. HM Treasury, care of the Government Legal Department, Planning, Infrastructure and Environmental Team, Litigation Group. Reference Z2007695/EDJ/JD3.

Details of the Matter Being Challenged

12. As set out in paragraphs 2 and 3 above.

Response to the Proposed Claim

13. At the time the decision to establish the CCFF was taken, the UK faced a large-scale public health emergency as a result of the COVID-19 pandemic. That in turn generated an economic emergency of a scale and intensity not previously known in peacetime. In response to this, the Government was required urgently to intervene in the economy as a whole in unprecedented ways, in order to avert or minimise the potentially very severe and long-term impacts of the pandemic on the lives of citizens and on the prospects for future economic health.

14. At the time the decision to establish the CCFF was taken, the UK was suffering an unprecedented economic shock, causing widespread economic disruption. Disruptions to supply chains and economic activity created cash flow challenges and increased demand for credit. The CCFF was announced by the Chancellor on 18 March 2020, following discussions between HM Treasury and the Bank of England in the immediately preceding days. It was launched for applications by the Bank of England on 23 March

2020. The scheme was created at pace and in a very short period of time in response to severe market turmoil that threatened the economic and financial stability of the UK. The scheme was necessary to keep businesses operating in the face of the global economic emergency brought on by COVID-19. At the time, the Business Secretary said "*we know that businesses are in urgent need of access to funding during these unprecedented times*" and the Chancellor said: "*We are working round the clock to do whatever it takes to protect our people and businesses. That means that we are not only taking unprecedented action but doing so at unprecedented speed, because we know that businesses and their employees need help now*".

15. The creation of the CCFF resulted from the fact that businesses of all kinds faced acute liquidity shortages. The CCFF was established as a short-term, emergency policy measure operated by the Bank of England and indemnified by the Treasury, intended to address such shortages by providing bridging support. Cash was required to pay, for example, salaries, rent and suppliers, at a time when businesses were facing severe disruption to cashflows. The purpose of the CCFF was to ensure, as far as possible through the increased supply of liquidity, that established and eligible businesses did not fall into irretrievable financial difficulty as a result of the pandemic. The CCFF offers financing on terms comparable to those prevailing in markets before the COVID-19 economic shock. The CCFF allows fundamentally strong companies to continue trading notwithstanding cashflow problems caused by COVID-19. In that respect, it does not change anything from the pre-COVID position. Rather, it merely allows activities which were part of the economy pre-COVID to continue.

16. Given the nature, purpose, scope and duration of the CCFF, it is not accepted that the absence of explicit "*climate related conditions*" in the standard scheme provisions is incompatible with the Government's climate change aspirations. This is elaborated further below. Nor is your characterisation, in your letter of 7 July, of the facility as a "*bail out of the carbon economy*" accepted as accurate: the facility is a crisis liquidity support measure based on general criteria determined so as to protect, as far as possible, eligible businesses from irretrievable financial harm as a result of the pandemic.

<u>The proposed claim would be out-of-time</u>

17. Under CPR r 54.5 a claim for judicial review must be filed promptly and in any event not later than three months after the grounds to make the claim first arose. The CCFF was announced by the Chancellor on 18 March 2020. Accordingly, any claim filed now would be significantly out-of-time and should be refused permission to apply for judicial review on that basis alone.

18. Without prejudice to that position, the proposed grounds of challenge, which concern the Climate Change Act 2008 ("CCA"), the Paris Agreement and the Human Rights Act 1998 ("HRA"), lack merit and should be refused permission to apply for judicial review on that basis also. This is for the following reasons.

<u>Proposed grounds concerning the Climate Change Act 2008</u>

19. It is not accepted that the CCFF is incompatible or inconsistent with the CCA.

20. The CCA established a legal and policy framework to manage the UK's progressive decarbonisation in the years leading up to 2050, with a system of interim targets called "carbon budgets" along with the 2050 target under section 1. In June 2019 the target under section 1 was amended, such that the UK became the first major economy to legislate for 2050 net zero greenhouse gas emissions.

21. The UK's climate change framework, while setting the overall level of ambition, leaves the Government to determine how best to balance emissions across the economy. The Clean Growth Strategy, published in October 2017, is the most recent report, under section 14 of the CCA, setting out policies and proposals for meeting carbon budgets. The Clean Growth Strategy does not, however, set out definitive routes for meeting the CCA targets. Instead it acknowledges that the Government's approach will need to evolve, for example, to reflect changes in technology.

22. Policy development with a view to meeting the CCA targets continues, as it must, and the Government will report again under section 14 of the CCA after the sixth carbon budget, covering the period 2033 to 2037, is set next year. Those policies and proposals will continue to take into account updated projections of greenhouse gas emissions.

23. The Court of Appeal's decision of 31 July 2020 in *R (Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004 makes clear that the framework of the CCA does not prescribe any particular pathway in the period to 2050, envisages various means of managing emissions, and leaves the Government free to choose how to manage increases in emissions within the overall strategy for meeting the target of net

zero emissions by 2050 (paragraph 85). The Court accepted that, while the framework sets a strategy for meeting carbon budgets and achieving the target of net zero emissions, it leaves the Government a good deal of latitude in the action it takes to attain those objectives as part of an economy-wide transition (paragraph 87).

24. Given this legal framework, that the individual measure in question here may not directly reduce greenhouse gas emissions would not render it unlawful. The provisions of the CCA have no necessary implications for a decision such as that to create the CCFF. The Government has a wide discretion as to the steps it takes across the whole economy to achieve the 2050 target. It must in any event be remembered that all the CCFF does is allow fundamentally strong companies to continue trading notwithstanding cashflow problems caused by COVID-19. The CCFF on its own would at most cause a continuation of the pre-COVID economic situation which existed immediately preceding March 2020. The CCFF will not, therefore, do anything to increase or worsen greenhouse gas emissions compared to that which existed before March 2020. The creation of the CCFF has no necessary implications for meeting the 2050 target and will not preclude the UK from meeting that target.

Proposed grounds concerning the Paris Agreement

25. The Paris Agreement is an unincorporated international treaty which, in the context of the English dualist legal system, has no direct effect in domestic law.

26. This remains the position despite the recent judgment concerning the Airports National Policy Statement ("ANPS"). In that matter, *R (Plan B. Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, the Court of Appeal declared that the Secretary of State acted unlawfully in failing to take into account the Paris Agreement when designating the ANPS. In your 7 July letter you refer to that judgment as follows:

> "The proposed approach is quite clearly unlawful. As recognised by the Court of Appeal in February of this year, it is the policy of this Government to uphold the Paris Agreement and its temperature limit, and the Government is bound to take account of its own climate policy. It would be irrational to do otherwise."

27. You make further references to this judgment in your 21 July letter at paragraphs 30 and 31. However your reliance on this judgment is misguided. The error of law found in *Plan B* arose in the context of specific *statutory* obligations placed on the Secretary of State by sections 5(8) and 10(3) of the Planning Act 2008 (see in particular paragraphs 226 to 231 and 283 of the judgment). No such statutory obligations arose here. Given this, and given the Paris Agreement has no direct legal effect as a freestanding mandatory consideration, you have failed to identify any public law error in this regard.

28. This position has been put beyond any doubt by the Court of Appeal's decision in *Packham*, in particular at paragraphs 102-103. The Court of Appeal made clear that the conclusion in *Plan B* that, in the circumstances, the Paris Agreement as an unincorporated international obligation was "*so obviously material*" that it had to be taken into account, depended on the explicit statutory requirement in section 10(3)(a) to have regard to the desirability of mitigating and adapting to climate change. The Court stated in terms that it had not decided in *Plan B* that, as an unincorporated international obligation, the Paris Agreement was automatically an "*obviously material*" consideration in any decision where climate change was an issue (paragraph 102).

29. Moreover, the decision to create the CCFF was one like the Oakervee Review in the *Packham* case, in that it was not an exercise provided for in any legislation at all, and certainly none which made climate change impacts a matter that had necessarily to be assessed as a matter of law before the decision was taken, and where there was no obligation to extend consideration of the consequences of the decision to include climate change implications (see paragraphs 93 to 94). The position in the case of the CCFF is as described by the Court of Appeal in *Packham* at paragraph 103:

> "*Plan B Earth*... was markedly different from this. In this case the decision under challenge was not taken under a statutory scheme in which the decision-making process is shaped as it is under the provisions of the Planning Act governing the designation of a national policy statement, with specific duties such as those in sections 5(8) and 10(3) – or under any statutory scheme. To make the decision at all was itself a matter of free choice for the Government, as were the decision-making parameters themselves. The Government was at liberty to select the issues on which it wished to be advised… In doing so it was not constrained by the provisions of the Climate Change Act or by any policy of its own."

30. Even if it were a mandatory consideration (which is denied) the Paris Agreement does not require the UK to meet any specific emission reduction level or to take any particular mitigation action. Under the Paris Agreement each Party determines what action it will take and communicates this to the UNFCCC. This is known as the Party's nationally determined contribution (Article 4). The Paris Agreement recognises that

the assessment of such contributions will be complex and a matter of high level policy for the national government.

Proposed grounds concerning the Human Rights Act

31. You allege that the CCFF breaches Articles 2, 8 and 14 of the European Convention on Human Rights, as incorporated into domestic law by the HRA. However, you fail to particularise how those Articles are engaged and how they are alleged to have been breached by reference to any identifiable victim or victims. The human rights arguments in your letter are based on the premise that the actions challenged have created risks. The CCFF has not created any new climate risks. It will not lead to any increase in greenhouse gas emissions. It simply helps fundamentally strong companies to continue trading notwithstanding cashflow problems caused by COVID-19. In that respect, it does not change anything from the pre-COVID position. The alleged effects of the CCFF set out in your letter are unsupported by any evidence and are not accepted.

32. As to Article 8 in particular, even if that right is engaged and interfered with (neither of which are accepted), this is a qualified right. In this regard Article 8(2) lays down the framework under which interferences can be justified by the state, including where necessary "*in a democratic society in the interests of…the economic well-being of the country*".

33. We presume that paragraph 35 of your letter refers to *State of the Netherlands v Urgenda*. That case can be distinguished given the measures the UK has taken for the mitigation of and adaptation to climate change, including through enactment of and revisions to the CCA regime.

Memorandum of Understanding

34. Your letter refers to the October 2017 'Memorandum of Understanding on resolution planning and financial crisis management' ("MoU") and implies that the "*international obligations*" referenced at paragraph 48 of the MoU include the Paris Agreement. That is a misinterpretation of the MoU. The MoU was prepared pursuant to sections 64 to 65 of the Financial Services Act 2012 which deal with financial crisis management. The MoU says that it establishes the framework for "*coordination of financial crisis management*" (paragraph 1). The MoU covers the discharge of functions relating to the stability of the UK financial system. It does not go wider to encompass climate change or any other non-financial matters. Paragraph 48 refers to international obligations in the areas addressed by the MoU, i.e. financial matters.

Parliamentary Privilege

35. Your letter quotes statements by Ministers made in Parliament, therefore forming part of parliamentary proceedings. Were such statements to be relied upon in any subsequent claim for judicial review they would amount to potential breaches of Parliamentary privilege as given effect to by Article 9 of the Bill of Rights. HM Treasury reserves its right to argue that such material would be inadmissible.

ADR Proposals

36. This matter is not considered appropriate for ADR, which in any event has not been proposed in your pre-action letter.

Response to Requests for Information and Documents

37. In your 21 July letter you seek disclosure of information and documents related to the 'Recovery Programme'. This includes a series of specific questions set out at paragraph 66. It is not possible to advise you where "*legal accountability for the Recovery Programme properly lies*" because, as has been explained above, there is no single 'Recovery Programme'. It is also not possible to answer the questions about the 'Recovery Programme' in your paragraphs 66(a) to (e) for the same reason.

38. In paragraph 65 of your letter you seek disclosure of "*all relevant correspondence, notes of meetings and other documents relating to the Government's consideration of the design and implementation of the COVID Recovery Programme*". Again, this cannot be provided because, as has been explained above, there is no single 'Recovery Programme' in the form described. In any event, the request is plainly unreasonable and unjustified. Moreover, there is no general duty of disclosure in judicial review and it is not a requirement of meeting the duty of candour, especially at the pre-action stage.

39. Under the Pre-action Protocol, defendants are not required to comply with requests for information and documents which are not proportionate or which go beyond what is properly necessary for the proposed

claimant to understand why the challenged decision has been taken or to present the proposed grounds of claim in a manner that will properly identify the issues. HM Treasury has complied in this letter with the requests made by the proposed claimant to the extent that they fall within the ambit of paragraph 13 of the Pre-action Protocol.

40. We have explained in this letter the decision-making process and the facts which are relevant to meeting the proposed grounds of challenge. Sufficient explanation of the facts relevant to the proposed grounds of challenge has been provided.

41. HM Treasury is satisfied that the information provided in this letter satisfies the duty of candour, to the extent that duty applies at the pre-action stage. We will of course keep this under review, including on receipt of any claim, if and when issued and served.

Aarhus Convention

42. It is not agreed that the proposed claim falls within the definition of an "Aarhus Convention claim" in CPR 45.41(2)(a). Your pre-action letter does not identify which of the provisions at Article 9(1), 9(2) or 9(3) of the Aarhus Convention you seek to rely on in support of your contention that this is an Aarhus Convention claim. None of these provisions appear to apply. As to Article 9(1), the claim is not for a review of a decision on an information request under Article 4. As to Article 9(2), the claim does not challenge the legality of a decision subject to Article 6, that is a decision permitting a project to proceed. As to Article 9(3), the claim does not involve any contravention of a particular provision of national law relating to the environment. In any event, HMT reserves its position in relation to seeking to vary or remove the limit on the costs recoverable by it, following provision of information on the proposed claimant's financial resources as required by the Civil Procedure Rules.

Address for Further Correspondence and Service of Court Documents

43. HM Treasury's address for service for any proceedings in this matter is:

Reference: Z2007695/EDJ/JD3.

Address: Planning, Infrastructure and Environment Team, Justice and Development Division, Litigation Group, Government Legal Department, 102 Petty France, Westminster, London, SW1H 9GL; DX 123243, Westminster 12.

Service: During the present COIVD-19 crisis, GLD accepts service of originating process by email. Please send any claim, should it be brought, to newproceedings@governmentlegal.gov.uk.

44. For the reasons set out above the proposed claim is without foundation.

Yours sincerely

For the Treasury Solicitor

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