

European Scrutiny Committee

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From: Sir William Cash MP

14 May 2020

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Article 8 of the Ireland/Northern Ireland Protocol: continued application of EU VAT law in Northern Ireland

As you are aware, the Ireland/Northern Ireland Protocol in the UK's Withdrawal Agreement from the EU maintains the effect of many pieces of EU legislation in Northern Ireland, for as long as the Protocol is in effect after the end of the transition period on 31 December 2020. In particular, Article 8 requires Northern Ireland to continue applying EU rules on Value Added Tax (VAT) as listed in Annex 3 to that Protocol, insofar as they 'concern goods'.

The European Scrutiny Committee has repeatedly raised concerns about implications of this arrangement.¹ In particular:

- not only does Article 8 foresee the potentially indefinite application of EU VAT legislation in part of the UK beyond our withdrawal, it also denies the Treasury and the devolved institutions in Northern Ireland any formal input over future amendments to those laws² that will nonetheless be binding under the terms of the Protocol;³

¹ See for example our predecessors' Report of [19 December 2018](#), or our Chairman's letters to the Financial Secretary to the Treasury dated 4 September 2019 and 27 March 2020.

² Article 13(3) of the Protocol states that, unless explicitly provided otherwise, "where this Protocol makes reference to a Union act, that reference shall be read as referring to that Union act as amended or replaced".

³ The Committee considers this especially problematic in light of the far-reaching reform proposals of the EU VAT Directive currently the subject of discussions in Brussels, including on rate structures and the treatment of cross-border business-to-business supplies, from which the UK Government is now excluded. See the previous European Scrutiny Committee's [Report of 28 March 2018](#) for more information.

- moreover, in light of the first meeting of the Specialised UK-EU Committee on Ireland/Northern Ireland on 30 April, it is far from clear that the Government and the EU have a shared interpretation the Government’s precise legal obligations under Article 8 and the extent to which EU VAT rules will continue to apply in Northern Ireland.⁴ The Government has not produced any detailed practical guidance on the implications of Article 8 for the sale of goods in, to and from Northern Ireland;
- the practical implementation of EU VAT rules on goods is likely to have an impact on the flow of trade between Northern Ireland and the rest of the UK, for example because the VAT-related customs procedures and controls mandated by EU law will make shipping goods between the two more difficult and costly.⁵ It also requires new or adjusted systems for use by businesses and HMRC, for example to provide specific VAT identifiers for use within the EU’s VAT Information Exchange System in relation to supplies of goods covered by the Protocol; and
- it is also not clear how the Government intends to ensure a coherent VAT system in Northern Ireland when part of that system will be determined by rules set by the EU without formal UK input, and the remainder by the UK autonomously. The unique and untested arrangement foreseen by Article 8 therefore poses the risk of significant new administrative burdens for businesses in Northern Ireland over the longer term.

By means of this letter, we are putting a number of questions to you about Article 8, and the extent to which the UK and the EU are agreed on the necessary measures to implement it. Given that the Government has consistently ruled out any extension of the transition period, meaning it is confident that the Protocol – including Article 8 – will be ready for implementation in less than eight months’ time, we expect you to be ready to reply to our questions rapidly and comprehensively. We therefore look forward to your response to our questions by the end of May.

1. The scope of Article 8 of the Protocol

⁴ In a “[technical note](#)” issued on 30 April 2020, the European Commission said: “The United Kingdom should provide details, and detailed timelines, on the implementation of Article 8, and the above-mentioned measures in particular. The Commission urges the United Kingdom to enter into technical implementation discussions with the relevant Commission services immediately”.

⁵ We recognise there are also other practical matters to be sorted that are primarily for the Government and in particular HM Revenue & Customs, such as the question of access to the EU’s VAT Information Exchange System (VIES) to monitor the sale of goods from the EU into Northern Ireland.

Firstly, while Article 8 of the Protocol only requires Northern Ireland to continue following EU VAT laws in its Annex 3 insofar as they ‘concern goods’, the legal texts of the actual EU Directives and Regulations listed in that Annex are not always neatly divided into provisions which apply to supplies of goods and services respectively.

From informal discussions between Committee staff and your officials, we understand the Government has taken the position that there are ‘reasonable grounds’ to exclude EU VAT law from being applicable in or to Northern Ireland under the Protocol if it covers both types of supply.⁶ For example, your Department told us in November 2019 - in relation to the new maximum EU-wide VAT threshold for small businesses, which will be set at €85,000 from 2025 - that this could be excluded from being applicable under Article 8 to Northern Irish firms selling goods. The reason offered was that the threshold applies to all supplies made by a business, so both goods and services. On 9 April, you wrote to us formally to reiterate that the Government does not “consider” the new threshold will apply in Northern Ireland in any form under the Protocol, but did not offer an ‘on the record’ explanation as to why. You also did not state whether the current VAT threshold, as set out in the EU VAT Directive, would apply under the Protocol, in relation to Northern Irish businesses engaged in the supply of goods.

It is not clear if the EU shares this interpretation of the scope of Article 8. Indeed, in many cases, the EU VAT rules listed in Annex 3 of the Protocol appear to apply equally to both goods and services. It is unclear why the EU would have requested (and the UK accepted) their inclusion, if it did not envisage them being applied in Northern Ireland some form.⁷ We note in this respect that the European Commission has explicitly stated that the intra-EU VAT refund process for businesses under Directive 2008/9/EC - which is listed in the Annex to the Protocol and normally applies to refunds on purchases of goods and services for business use equally - will be available to Northern Irish firms “insofar as the refund relates to VAT which they have paid on acquisitions of goods”.⁸ This suggests that the EU takes the view that, where EU VAT laws listed in the Protocol apply to goods and services equally, they “concern goods” and will therefore also apply in and to Northern Ireland with respect to any supply of goods.

⁶ For example, Treasury officials indicated as much in relation to the changes to the VAT registration threshold and the new transaction reporting obligations for Payment Services Providers, both of which apply to the supply of both goods and services.

⁷ Examples of this include Directive 2008/9/EC on the refund of value added tax and Directive 2010/24/EU on mutual assistance to recover unpaid VAT.

⁸ European Commission [Stakeholder notice](#) on VAT on trade in goods between the UK and the EU after the end of the transition period, published on 16 April 2020.

Ultimately, if there is persistent disagreement on the interpretation of the scope of the Article, there is a risk that the matter could be referred to the Arbitration Panel foreseen by the Withdrawal Agreement to issue a binding decision specifying which elements of EU VAT law fall within the Protocol.

Given the apparent lack of a shared interpretation of the precise scope of EU VAT law in Northern Ireland under Article 8, we ask you to:

- **confirm if it is indeed the Treasury’s interpretation that provisions of EU VAT law listed in Annex 3 to the Protocol, but which also apply to the supply of services in addition to the supply of goods, are outside the scope of Article 8; or, if not, what approach it has taken to determine whether EU VAT rules that apply to both types of supply will or will not be applicable under the Protocol;**
- **clarify if the Government considers that the *current* EU VAT threshold for small businesses, as set out in articles 284 to 292 of the VAT Directive, will continue to apply in Northern Ireland under the Protocol insofar as businesses involved in the supply of goods are concerned, or whether the UK will be free to vary the VAT threshold under all circumstances in Northern Ireland from the end of the transition period;**
- **explain if it agrees with the European Commission’s statement that businesses in Northern Ireland will be able to continue making use of the refund procedures provided for in Directive 2008/9/EC “insofar as the refund relates to VAT which they have paid on acquisitions of goods”;**
- **set out the current state of play in discussions with the EU on the implementation of Article 8, and in particular highlight any areas of disagreement about whether a particular element of the legislation listed in Annex 3 should or should not continue to apply in Northern Ireland; and**
- **indicate when the Government will be able to provide detailed guidance, including practical directions for businesses involved in the trade in goods within, to or from Northern Ireland, about the applicable VAT rules and systems when the transition period ends.**

2. VAT rates applicable to goods in Northern Ireland

As you will be aware, the EU VAT Directive sets mandatory minimum rates of VAT for different types of goods. However, as a Member State (and during transition) the UK had special derogations from those default rates, allowing

it to continue applying lower rates, such as zero-rating of most types of food.⁹ With respect to rates specifically, Article 8 of the Protocol states only that the UK can derogate from the minimum rates otherwise applicable in Northern Ireland by instead applying “to supplies of goods taxable in Northern Ireland [the] VAT exemptions and reduced rates that are applicable in Ireland”.

However, the Protocol does not explicitly say that Northern Ireland will continue to benefit from the UK’s specific, pre-withdrawal rate exemptions when the country as a whole is no longer considered a ‘Member State’ for the purposes of EU VAT law. Moreover, there is a pending EU proposal to fundamentally change how the VAT Directive limits the rates that can be applied to specific goods, with the aim of giving individual countries more flexibility to vary their domestic rates.¹⁰ However, the outcome of this legislative process – which has been on-going for more than two years – is uncertain. It appears theoretically possible that it could result in the elimination of the UK’s specific exemptions, insofar as they would still be applicable in Northern Ireland.

In light of the above, we ask you to confirm that the UK-specific exemptions with respect to VAT rates as set out in the VAT Directive will continue to apply in Northern Ireland under the Protocol. The Committee will follow up with you separately as necessary if it appears the discussions on the VAT Rates Directive could be problematic for Northern Ireland under the Protocol. We expect the Government to be proactive in flagging any concerns in this regard to Parliament.

3. Potential derogations from EU VAT law for Northern Ireland under Article 8

As you are aware, paragraphs 4 and 5 of Article 8 of the Protocol allow the UK-EU Joint Committee to adopt “measures for its proper application” and, “appropriate measures as necessary [...] taking into account Northern Ireland's integral place in the United Kingdom's internal market”. This implies that specific derogations from or changes to EU VAT law otherwise applicable in Northern Ireland under Article 8 are possible, subject to EU agreement.

⁹ See Article 110 of the VAT Directive. More generally, that Directive requires all EU countries to apply a standard rate of 15 per cent to all goods and services, but with two categories of derogations: a ‘positive list’ of goods and services (in Annex III to the Directive) to which any Member State could apply a reduced rate higher than 5 per cent, and a series of country-specific derogations that reflected the level of VAT charged in those Member States in January 1991.

¹⁰ See also the previous Committee’s [Report of 3 April 2018](#), and European Commission document [COM\(2018\) 20](#).

In this respect, we note that the Government in its “New Decade, New Approach” document, which led to the restoration of devolved government in Northern Ireland, said it would “aim to negotiate with the European Union additional flexibilities and sensible practical measures across all aspects of the Protocol that [...] maximise the free flow of trade”.¹¹ To our knowledge, the Treasury has not specified which “flexibilities” and “practical measures” are foreseen here in relation to VAT under the Protocol. However, in discussions with Committee staff in November 2019 your officials did refer to the possibility of derogating measures under Article 8 when explaining why the new €5,000 EU VAT threshold for small businesses may not have to be applied in Northern Ireland.

We request information from you on the detail of any Government proposals made, or planned on being made, under paragraphs 4 and 5 of Article 8 of the Protocol with a view to ensuring its “proper application” or “Northern Ireland's integral place in the United Kingdom's internal market”. We also ask you to clarify if the EU has submitted any proposals of its own under those provisions.

Concluding remarks

As noted, we expect a comprehensive reply by the end of this month, given that the Government will need to formalise the legal framework to give effect to Article 8 of the Protocol in the very near future (and the need to prepare businesses involved in trade in goods in, to or from Northern Ireland before this new arrangement is scheduled to take effect in January next year).

I am copying this letter to Simon Hoare MP, Chair of the Northern Ireland Affairs Committee and Margaret McKinnon, Clerk of that Committee; the Rt Hon Hilary Benn, Chair of the Committee on the Future Relationship with the EU and Gordon Clarke, Clerk of that Committee; to Lord Kinnoull and Christopher Johnson in the Lords; to Les Saunders at the Cabinet Office; and to Victor Peluola at your Department.

CHAIR

¹¹ Northern Ireland Office, “[New Decade, New Approach](#)” (20 January 2020), p. 48.