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European Union Committee

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Rt Hon Michael Gove MP
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17 June 2020

EM 8038/20: Proposal for an EU Council Decision establishing the position to be adopted on behalf of the European Union in the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community as regards the adoption of a decision to amend the Agreement

Dear Michael,

I write regarding the above Explanatory Memorandum, which was considered by the European Union Select Committee on 16 June 2020.

I note that draft Council Decision 8038/20, which outlined the position to be taken by the European Union ahead of the meeting of the Withdrawal Agreement Joint Committee on 12 June, was adopted by the Council as Council Decision (EU) 2020/769 of 10 June 2020. According to the Decision, in the course of the Joint Committee meeting the EU proposed amendments to:

- Annex I to the Withdrawal Agreement on Social Security Coordination;
- Part Five to the Withdrawal Agreement on Financial Provisions; and
- Annex II to the Protocol on Ireland/Northern Ireland, including the addition of six Directives and two Regulations to Annex 2 of the Protocol (which lists those EU measures that will continue to apply in Northern Ireland after the end of the transition period), along with three explanatory notes providing clarification on the scope of Regulations already listed in Annex 2 of the Protocol. Recital (5) of the Preamble to the draft Decision states that these various measures were omitted from Annex 2 of the Protocol “by oversight”.

In marked contrast to the draft Council Decision, which explains in some detail the changes to the Withdrawal Agreement sought by the EU, the UK Government has published only the following:

- The Explanatory Memorandum on the draft Council Decision, dated 3 June, which states, under the section headed ‘Policy implications’: “None. The proposal is about the adoption of an EU position.” It says nothing of the UK Government’s view on the EU’s proposals.
- Written Ministerial Statement, dated 8 June, announcing the agenda for the 12 June Joint Committee meeting. This stated that the third agenda item would be a “Decision on amendments to the Withdrawal Agreement”. No further detail was

given, either of the EU's proposals, or of any proposals brought forward by the UK Government. The WMS did, though, confirm that representatives of the Northern Ireland Executive would be invited to form part of the UK delegation.

- Another WMS, dated 15 June, summarising the outcome of the Joint Committee meeting, and stating: "The Committee adopted one Decision on correcting errors and omissions in the Withdrawal Agreement relating to financial provisions and citizens' rights."

This begs several questions of fact and substance:

1. Did the Joint Committee agree the amendments to the Withdrawal Agreement relating to social security coordination and financial provisions, in the form set out in Articles 1(1) to 1(6) of Council Decision 2020/769?
2. Were any other amendments to the Withdrawal Agreement agreed by the Joint Committee, under the heading of either citizens' rights or financial provisions?
3. Did the Joint Committee discuss the EU's proposal to add eight legislative acts to the list in Annex 2 of the Protocol? If so, what was the UK's response to the EU proposal, and what is its current status?
4. Did the UK propose any amendments to the Withdrawal Agreement in the course of the Joint Committee meeting? If so, what was the EU's response?
5. Do you agree with the Council of the EU that the eight legislative acts listed in the Decision were omitted from Annex 2 of the Protocol "by oversight"? If not, what was the reason for their omission?
6. What was the input of the Northern Ireland Executive into the development of the Government's position on the EU proposal, and into the discussions of the Joint Committee?
7. In what circumstances, if any, could you envisage the Joint Committee agreeing to the addition of further EU legislative acts to the list contained in Annex 2 of the Protocol?
8. If the UK continues to refuse the EU's request to add the eight legislative acts to the Protocol, how will the disagreement within the Joint Committee be resolved?

Turning to process, these events underline the lack of transparency and accountability in the work of the Withdrawal Agreement Joint Committee, and the weakness of current scrutiny arrangements.

In your letter to Commons committee chairs dated 24 March, and your letter to me dated 31 March, you confirmed that the Government would publish Written Ministerial Statements before and after each meeting of the Joint Committee, outlining any decisions taken. It is now clear that such Statements contain little if any information on the substance of Joint Committee meetings.

You also stated, in your letter of 24 March, that parliamentary scrutiny should focus on the work of the Joint Committee, rather than that of the Specialised Committees, since the latter was "undertaken by officials". We have little information on what discussions have taken place in the Specialised Committee on Ireland and Northern Ireland, which presumably has discussed any omissions from Annex 2 of the Protocol.

Instead we have had to rely on documentation published by the EU in order to understand something of the substance of the Joint Committee's decision, and of the wider issues that have been under consideration, including in the Specialised Committee. Do you agree with me that the contrast between the relative transparency of the EU process and the Government's refusal to share information with Parliament is most unfortunate? Would you also acknowledge that it is constitutionally inappropriate that the UK Parliament should have to rely upon EU documentation in order to understand the issues under discussion in the Joint Committee and Specialised Committees – issues that include proposals for significant legislative changes that could, from 1 January 2021, directly affect Northern Ireland?

Turning to the Explanatory Memorandum, your assertion that the draft Council Decision had no policy implications for the UK is extraordinary. The logic appears to be that the draft Decision, in and of itself, has no direct legal consequences for the UK, because only when the Joint Committee agrees to amend the Withdrawal Agreement will any changes become binding upon the UK. Yet the EU's proposal clearly required the UK Government to adopt a policy in response, and I suggest that parliamentary committees are entitled to have sight of this policy, to assess the arguments for and against EU proposals, and to consider whether the processes undertaken by Government (including consultation with Northern Ireland stakeholders and impact assessment) are adequate. Do you agree?

I note also that there is a question mark over the duration of the current arrangements for scrutiny of EU documents: once the UK exits the transition period at the end of the year it is possible (though not certain) that the requirement to deposit draft EU Council Decisions, and to provide an Explanatory Memorandum, will lapse. The Joint Committee will continue its work, but parliamentary committees, here and in the Northern Ireland Assembly, could be left in the dark about proposals with significant legislative implications for Northern Ireland. What steps are you taking to ensure that this does not happen, and that committees in Westminster and Stormont will continue to be able to scrutinise the work of the Joint Committee and the Specialised Committee on Ireland and Northern Ireland after the end of the transition period?

These questions are particularly important given Article 13(4) of the Protocol, which sets out a procedure whereby the EU will be able to propose to add new EU legislative acts that fall within the scope of the Protocol to its Annexes. In the absence of any effective parliamentary scrutiny of the work of the Joint Committee, Article 13(4) appears to confer upon the UK Government a wide power to impose new legislation upon Northern Ireland, without parliamentary scrutiny or accountability. Similar issues may also arise in respect of the continuing alignment with EU law envisaged in Article 13(3).

In our report on *The Protocol on Ireland/Northern Ireland*, published on 1 June 2020, we called on the Government to “establish a clear process to share any information it receives on planned and adopted EU law within the scope of the Protocol with the Northern Ireland Executive, Parliament, and, where relevant, the other devolved administrations”. The concerns raised in this letter underline the urgent need to introduce such a process. What steps are you taking to ensure that any proposals to add new EU laws to the Protocol are subject to appropriate consultation and parliamentary scrutiny?

Although the Council Decision has now been adopted, it remains under active scrutiny, given the importance of the issues raised. I would therefore be grateful for an answer to this letter within 10 working days.

I am copying this letter to Sir William Cash MP, Chair of the House of Commons European Scrutiny Committee.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'L Kinnoull', with a horizontal line underneath.

Lord Kinnoull
Chair of the European Union Committee