

European Scrutiny Committee

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From: Sir William Cash MP

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Rt Hon. Michael Gove MP
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Parliamentary scrutiny of the Withdrawal Agreement Joint Committee

I wish to express the European Scrutiny Committee's concern at the Government's approach to parliamentary scrutiny of the EU/UK Withdrawal Agreement Joint Committee as set out in your [letter of 13 July 2020](#) and in a [letter of the same date](#) to the Chair of the Lords European Union Committee.

We note your commitment to making UK parliamentary scrutiny of the Joint Committee as transparent as possible but find it impossible to reconcile with your conception of how scrutiny should be conducted during the transition period. Responding to our criticism of the paucity of information contained in your [Explanatory Memorandum of 3 June 2020](#) on proposed changes to the Withdrawal Agreement, you draw a distinction between "EU proposals and UK positions", adding that "the purpose of scrutiny should not be to disclose UK positions publicly ahead of any negotiations or Withdrawal Agreement implementation discussions". The consequence is that the House is better able to scrutinise the EU's approach to the implementation of the Withdrawal Agreement and the work of the Joint Committee than it is the UK's. This surely cannot be the Government's intention.

We remind you that your own [Cabinet Office guidance](#) on parliamentary scrutiny of EU documents states explicitly that an Explanatory Memorandum ("EM") "constitutes an official Government communication to Parliament". Its purpose is to summarise the legal, policy and financial implications of an EU document and "**it must also – crucially – set out the Government's view on the proposal**" put forward by the EU.¹ The section on policy implications should, according to the same guidance, "present a clear account of the

¹ Para 1.5 of the guidance.

principal issues from a UK viewpoint, taking account of the Commission's EM, but providing the Government's own analysis and position". That analysis should also recognise that the "implications of policies may be different in Scotland, Wales and Northern Ireland to that of the UK as a whole" and should therefore consider "all implications [...] as necessary".²

The approach to scrutiny and the content of Explanatory Memoranda set out in your letters would clearly be inconsistent with our current system of parliamentary scrutiny and the means by which we hold Ministers to account. We wish to emphasise that we do not expect you to "set out the detail of UK negotiating positions" on the matters of principle already set out in the Government's [Command Paper](#)³ setting out its approach to the negotiations, but we do expect you to express a view on the reasons stated by the EU for putting forward a proposal, explain the implications for the UK, and indicate in broad terms how you intend to respond.

Instead, you say that:

The UK Government will not set out UK positions publicly in areas which are effectively negotiation issues before those negotiations have concluded.

You do not explain the basis for the distinction you draw between scrutiny of EU law during transition and "negotiation issues" or clarify what falls within the category of "negotiation issues". In any event, we do not see why the Joint Committee should be regarded as a negotiation issue, given that its role and decision-making functions are set out in the Withdrawal Agreement itself. Nor do we consider that it is feasible in practice to separate scrutiny of EU law and policy from broader issues concerning the role of the EU institutions, the application of EU law under the Withdrawal Agreement and the Protocol on Ireland/Northern Ireland, and the important decisions to be taken by the Joint Committee during and after transition. It cannot be right that Parliament is only informed of the Joint Committee's deliberations once they have concluded, without any prior sight of the analysis undertaken by the Government or opportunity to inform the UK position.

Nor, we assume, can it be your intention that Parliament is in a less privileged position than the European Parliament ("EP") in relation to the work of the Joint Committee and the Specialised Committees it oversees. The European Commission has made a clear commitment to provide the EP with "sufficient and timely information ahead and after the meetings" of these Committees, recognising that this is necessary to ensure that the EP is "in a position to

² Para 3.2.11 of the guidance.

³ CP211, *The Future Relationship with the EU: the UK's Approach to the Negotiations*, published February 2020.

exercise fully its institutional prerogatives” under the EU Treaties.⁴ We welcome the Written Ministerial Statements you have published before and after Joint Committee meetings but, as we are sure you will appreciate, the information contained in them does not provide a sufficient basis for meaningful scrutiny and we remain largely in the dark about the very important preparatory work undertaken by the Specialised Committees.

You will be aware from earlier correspondence that arrangements for parliamentary scrutiny of the Joint Committee and the Specialised Committees are a significant concern for many Select Committees.⁵ Our own scrutiny system based on the deposit of EU documents and provision of Government Explanatory Memoranda is an essential means of holding Ministers to account during the transition period, but is necessarily reactive to positions taken or proposed by the EU, not the UK. It should be complemented by other mechanisms for engaging proactively with Parliament. This is a matter of some urgency, given that we are now at the midway point of the transition period and critical decisions with the potential to affect matters of vital national interest to the United Kingdom will need to be taken in short order in the coming months.⁶

In its recent [Report](#), *Unfettered Access: Customs Arrangements in Northern Ireland after Brexit*, the Northern Ireland Affairs Committee makes clear that “effective parliamentary scrutiny of decision-making in the Joint Committee and Specialised Committees will require active facilitation by Government, because the relevant papers and records are not in the public domain”.⁷ We remain alert to the possibility that future Joint Committee Decisions may raise matters of vital national interest which merit debate on the floor of the House and expect the Government to provide a clear exposition of its own position and approach regarding the EU’s proposals when providing Explanatory Memoranda on the EU’s intended position.

We understand that the next Joint Committee meeting will take place in September. Given the concerns we have expressed, we underline the importance of hearing from you in person *before* the meeting takes place.

⁴ See the [written Declaration](#) made by the European Commission at the plenary session of the European Parliament on 16 April 2019 and Article 2(3) of [Council Decision \(EU\) 2020/135](#) of 30 January 2020 on the conclusion of 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.

⁵ See the letters dated [18 March 2020](#) and [1 May 2020](#) from the Chairs of the Committee on the Future Relationship with the EU, the European Scrutiny Committee, the Home Affairs Committee, the Northern Ireland Affairs Committee, the International Trade Committee, the Justice Committee, the Treasury Committee, the Procedure Committee and the Foreign Affairs Committee.

⁶ See [section 13A of the European Union \(Withdrawal\) Act 2018](#) as amended by [section 29 of the European Union \(Withdrawal Agreement\) Act 2020](#).

⁷ First Report of Session 2019-21, HC 161, published on 14 July. The Committee recommends the routine sharing of relevant agendas, summary minutes and minutes of the Joint Committee and the Specialised Committees with the appropriate parliamentary Select Committees and Committees of the Northern Ireland Assembly.

I am copying this letter to the Chair (Rt Hon Hilary Benn MP) and Clerk (Gordon Clarke) of the Committee on the Future Relationship with the European Union; the Chair (Rt Hon Karen Bradley MP) and Clerk (Martyn Atkins) of the Procedure Committee; the Chair (Rt Hon Yvette Cooper MP) and Clerk (Elizabeth Hunt) of the Home Affairs Committee; the Chair (Sir Robert Neill MP) and Clerk (David Weir) of the Justice Committee; the Chair (Simon Hoare MP) and Clerk (Nicholas Beech) of the Northern Ireland Affairs Committee; the Chair (Tom Tugendhat MP) and Clerk (Chris Shaw) of the Foreign Affairs Committee; the Chair (Angus MacNeill MP) and Clerk (Joanna Welham) of the International Trade Committee; the Chair (Rt Hon Mel Stride MP) and Clerk (Gosia McBride) of the Treasury Committee; the Chair (Lord Kinnoull) and Clerk (Stuart Stoner) of the European Union Committee; and Les Saunders and Donald Harris of your Department.

CHAIR