

# European Scrutiny Committee

House of Commons London SW1A 0AA

Tel (020) 7219 3292 Email [escom@parliament.uk](mailto:escom@parliament.uk) Website [www.parliament.uk/escom](http://www.parliament.uk/escom)

From: Sir William Cash MP

16 December 2020

Rt Hon. Michael Gove MP  
Chancellor of the Duchy of Lancaster  
Cabinet Office  
70 Whitehall  
London SW1A 2AS

## **Parliamentary scrutiny of Withdrawal Agreement Joint Committee Decisions**

On 8 December, you issued a [Joint Statement](#) with the EU co-chair of the EU/UK Joint Committee announcing that you had reached an “agreement in principle on all issues, in particular with regard to the Protocol on Ireland and Northern Ireland” and that “the resulting draft texts will now be subject to respective internal procedures in the EU and in the UK” before they are formally adopted by the Joint Committee “in the coming days and before the end of the year”. Today you announced in a [Written Ministerial Statement](#) that the Joint Committee will meet on 17 December to consider and (we assume) formally adopt the Joint Committee Decisions “foreseen by the Protocol” as well as a Joint Committee Decision on correction of errors or omissions.

As you will recall from previous correspondence with this Committee, the EU’s procedures for agreeing the Joint Committee’s Decisions are subject to a formal process of scrutiny but the Government’s are not. I highlighted this “striking paradox” when I wrote to you in June, noting that “there is no system in place to ensure that Parliament is informed of the substance of the discussions to take place and decisions to be taken in the Joint Committee and carry out proper scrutiny beforehand”.<sup>1</sup> We made clear that this was an anomaly that should not continue. Despite the assurances you gave earlier in the year that the Government was ready to work with us on scrutiny of Joint Committee business “to agree an approach that meets the Committee’s expectations as far as practicable” and to appear before us to give evidence “later in the year”, this simply has not happened.<sup>2</sup>

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<sup>1</sup> [Letter dated 10 June 2020](#) to the Chancellor of the Duchy of Lancaster (Rt Hon. Michael Gove MP).

<sup>2</sup> Letter of 24 March 2020 and letter of 13 July 2020 from the Chancellor of the Duchy of Lancaster (Rt Hon. Michael Gove MP).

The lack of scrutiny is difficult to square with the policy behind [section 15C of the European Union \(Withdrawal\) Act 2018](#) (as inserted by section 35 of the EU (Withdrawal Agreement) Act 2020) which prevents the Government from agreeing to the use of a written procedure to adopt Joint Committee Decisions. As the [explanatory notes](#) accompanying the 2020 Act make clear, the purpose of this provision is to “ensure there is full ministerial accountability, including to Parliament, for all decisions made in the Joint Committee”. The [statement](#) you made to the House on 9 December on the agreement in principle reached in the Joint Committee preceded the publication of the draft Joint Committee Decisions (four in total) and accompanying Declarations. You have declined repeated invitations to appear before the European Scrutiny Committee, most recently in response to a request that you answer questions on the Decisions that you, as the Government’s representative on the EU/UK Joint Committee, are expected to agree to imminently. Instead, you have suggested an off-the-record fireside chat on a date to be determined before Christmas.<sup>3</sup>

In your [Ditchley Annual Lecture](#) on “The privilege of public service” in June, you were rightly critical of a culture in Government which led to “insulation from accountability”. Your refusal to answer questions on the public record on the Joint Committee Decisions and Declarations and your willingness to agree to their formal adoption before we have had an opportunity to consider their content and their practical implications for businesses trading in Northern Ireland undermine trust and accountability. It also frustrates our own efforts to fulfil the duty placed on us by our Standing Order to report to the House “any matters of principle, policy or law” which arise from documents deposited for scrutiny.<sup>4</sup> As you are well aware, by the time the Government formally deposits the proposed Joint Committee Decisions and submits Explanatory Memoranda, it will be too late for Parliament to influence their content, draw anomalies or concerns to the Government’s attention, or require a debate on the floor of the House under [section 13A of the European Union \(Withdrawal\) Act 2018](#).

Since we are unable to put our questions to you in person or to your alternate on the Joint Committee (Rt Hon. Penny Mordaunt MP), we ask you to respond in writing to the questions in the Annex to this letter as a matter of urgency. Please note that in preparing these questions, we have taken into account the information contained in the Government’s [Command Paper](#) (CP 346) on the Northern Ireland Protocol. We expect your response to expand on the information provided in the Command Paper.

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<sup>3</sup> [Hansard](#), 9 December 2020 col. 853

<sup>4</sup> See Standing Order [143](#).

I am copying this letter to the Prime Minister, the Rt Hon. Boris Johnson MP and to the Paymaster General, the Rt Hon. Penny Mordaunt MP. I am also sending copies to the Chair (Simon Hoare MP) and Clerk (Nick Beech) of the Northern Ireland Affairs Committee; 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. Yvette Cooper MP) and Clerk (Elizabeth Hunt) of the Home Affairs Committee); the Chair (Angus Brendan MacNeill MP) and Clerk (Joanna Welham) of the International Trade Committee; the Chair (Sir Robert Neill MP) and Clerk (David Weir) of the Justice Committee; the Chair (Mel Stride MP) and Clerk (Gosia McBride) of the Treasury Committee; the Chair (Tom Tugendhat MP) and Clerk (Chris Shaw) of the Foreign Affairs Committee); the Chair (Lord Kinnoull), Clerk (Stuart Stoner) and Principal Clerk (Chris Johnson) of the European Union Committee; and Les Saunders and Donald Harris of your Department.

**CHAIR**

## **Annex: Questions on the Joint Committee Decisions and accompanying Declarations**

### **Status of Joint Committee Decisions and Declarations**

1. What is the status of the Joint Committee Decisions in (a) international law and (b) domestic law?
2. What is the status of the unilateral declarations in (a) international law and (b) domestic law? What weight will the CJEU give to the declarations?
3. The declarations are structured as a unilateral declaration by one party of which the other party takes note. Why was this structure used rather than joint declarations? Do the declarations have a different status and effect than if they had been agreed as joint declarations?

### **Draft Decision of the Withdrawal Agreement Joint Committee on the determination of goods not at risk**

#### Authorised traders

4. Which body in the UK will be the “competent authority” responsible for the grant of authorisations under Article 5 of the draft Decision?
5. When will the new UK Trader Scheme be up and running and how soon will businesses in Northern Ireland be able to apply for authorisation?
6. What assessments has the Government carried out to ensure that (a) the information that businesses are required to submit to support an application for authorisation and to demonstrate “a high level of control” of their operations and flow of goods is routinely held by SMEs; and (b) participation in the new UK Trader Scheme is more cost-effective for businesses than paying EU tariffs (especially if they are low)?
7. Will all applications made to the new UK Trader Scheme in January and February 2021 be automatically granted provisional authorisation, or is there an element of discretion? Until provisional authorisation has been granted, will all goods imported by the applicant be considered to be “at risk” and subject to EU customs duties? If so, will the Government reimburse the duties paid once it has granted provisional authorisation?

8. How does the process for securing a provisional authorisation differ from the process for securing a permanent authorisation? Is there sufficient administrative capacity to manage both processes in the timescales envisaged in the draft Decision?
9. What estimate has the Government made of the number of businesses likely to apply to the UK Trader Scheme during (a) the first two months of operation and (b) in total?

#### Application of EU tariffs

10. Where an importer does not meet the conditions set out in Article 2 and Article 3 of the draft Decision on “at risk”, can you confirm that the goods they bring into Northern Ireland (other than from the EU) will be considered ‘at risk’ of subsequently moving into the Union for the purpose of Article 5(1) of the Protocol? And in that case, can you confirm that (EU) customs duties will be payable on goods moving from GB to NI?
11. The Government’s [Command Paper on The Northern Ireland Protocol](#) (CP 346) says that EU tariffs “will not generally be paid on internal UK trade”. Article 3(2) of the draft Decision appears to provide that *all* goods brought into Northern Ireland to which EU trade defence measures apply are to be considered as “at risk”, even if they remain in Northern Ireland. Please explain:
  - whether Northern Ireland importers will be required to pay EU (customs and retaliatory) tariffs on all goods subject to EU trade defence measures, regardless of their final destination or end-user?
  - which tariffs will apply if the EU and the UK both have trade defence measures in place on goods brought into Northern Ireland?

#### Information on the application of Article 5(1) and (2) of the Protocol on Ireland/Northern Ireland

12. Will the Government publish the information it is required to make available to the EU (under Article 8 of the draft Decision) on the application of Article 5(1) and (2) of the Protocol on Ireland/Northern Ireland? If not, why not?

## Review and termination of the UK Trader Scheme

13. Article 9 of the draft Decision would allow the EU or the UK unilaterally to terminate the UK Trader Scheme with effect from 1 August 2024 if either party considers it has resulted in “significant diversion of trade, or fraud or other illegal activities”. In the event of termination, will all goods brought into Northern Ireland (from the rest of the UK or from any non-EU country) be considered “at risk” and subject to EU customs duties from that point on?

## **Draft Decision of the Withdrawal Agreement Joint Committee on errors and omissions**

14. When we scrutinised a proposal for a Council Decision establishing the EU position on the errors and omissions to be addressed in a Joint Committee Decision, you were unable to set out the UK’s position. The Joint Committee Decision concerns EU law which will continue to apply in Northern Ireland after transition. Why was the Government not able to set out its position sooner, to allow for proper scrutiny by Parliament? What has changed in the version that is to be agreed by the Joint Committee?
15. Based on our analysis, it seems that the EU and the UK have agreed to delete two acts from Annex 2 of the Protocol on Ireland/Northern Ireland and to add only part of the Single Use Plastics Directive. Please explain the reasons for these deletions and additions.

## **Draft unilateral declarations by the United Kingdom of Great Britain and Northern Ireland and the European Union in the Withdrawal Agreement Joint Committee on export declarations**

16. With respect to customs formalities on goods moved from Northern Ireland to Great Britain, the UK will issue a unilateral declaration that the requirements under the EU Customs Code for an export customs declaration or exit summary declaration will be ‘deemed’ to be met if such information on such consignments, in terms of both content and time-limits, is submitted electronically to HMRC “by other means”. What obligations will this entail for carriers and traders when moving goods from Northern Ireland to the rest of the UK, and to what extent will the administrative burden on them be reduced compared to the situation if the EU Customs Code was applied?

**Draft unilateral declarations by the United Kingdom of Great Britain and Northern Ireland and the European Union in the Withdrawal Agreement Joint Committee on meat products, official certifications and on human and veterinary medicines**

17. These declarations refer to “grace periods” of varying lengths. What happens when each of these periods expires?

**Draft unilateral declarations by the European Union and the United Kingdom of Great Britain and Northern Ireland in the Withdrawal Agreement Joint Committee on Article 10(1) of the Protocol**

18. To what extent does the EU’s unilateral declaration on the application of EU State Aid rules under Article 10 of the Protocol assuage the Government’s concerns about the potential application of those rules to UK subsidies granted to companies outside of Northern Ireland and/or the goods sector, given that the declaration is not binding and confirms that measures which are merely “liable” to affect EU-Northern Ireland trade, rather than having an actual effect, could still be within the scope of the Protocol?

19. In the Government’s view, how does the State Aid declaration circumscribe the European Commission’s oversight of UK subsidies under the Protocol more tightly than the limits on its powers which are based on existing CJEU caselaw, and by which it would therefore have been bound in any event when exercising its powers under Article 10 of the Protocol?