



HOUSE OF LORDS

European Union Committee

House of Lords
London
SW1A 0PW
www.parliament.uk/hleu

The primary purpose of the House of Lords European Union Select Committee is to scrutinise EU law in draft before the Government take a position on it in the EU Council of Ministers. This scrutiny is frequently carried out through correspondence with Ministers. Such correspondence, including Ministerial replies and other materials, is published where appropriate.

This edition includes correspondence from 24 April to 31 July 2020

EU SELECT COMMITTEE

CONTENTS

Communication from the Commission to the European Parliament and the COUNCIL SHAPING the Conference on the Future of Europe (5513/20).....2

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(8038/20).....2

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT
AND THE COUNCIL SHAPING THE CONFERENCE ON THE FUTURE OF EUROPE
(5513/20)

**Letter from the Chair to Nigel Adams MP, Minister of State for Asia, Foreign and
Commonwealth Office.**

Thank you for your Explanatory Memorandum, dated 1 April 2020, on EM 5513/20: the Commission's Communication on shaping the Conference on the Future of Europe. The House of Lords European Union Select Committee considered this document at its meeting on 5 May 2020.

Although we will not participate directly in the Conference, we share your view that it may, in due course, address matters of interest to the UK. Nonetheless, given that the Conference has now been postponed and that the context has changed so fundamentally due to the Covid 19 crisis, we do not intend to pursue further questions through correspondence and have decided to clear the document from scrutiny.

5 May 2020

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 (8038/20)

**Letter from the Chair to the Rt Hon Michael Gove MP, Chancellor of the Duchy of
Lancaster and Minister for the Cabinet Office**

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?

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.

17 June 2020

Letter to the Chair from the Rt Hon Michael Gove MP, Chancellor of the Duchy of Lancaster

Thank you for your letter of 17 June asking for details on the first Decision adopted by the Withdrawal Agreement Joint Committee (WAJC) at its second meeting on 12 June.

The Decision adjusts certain dates stated in the Withdrawal Agreement, to reflect the January 2020 UK Exit date (as opposed to references to March or October 2019), and adds two Social Security Regulations omitted from the initial list in the citizens’ rights Annex. The further amendment on Article 145 on the Research Fund for Coal and Steel provides certainty for the operation of current contracts in the UK and ensures that the EU honours its existing financial commitments to the UK, in relation to this specific grant. I can confirm no other citizens’ rights- or financial provisions-related amendments were made during the second WAJC meeting. The Decision will be issued as a Command Paper on 14 July.

We did not consider or discuss the EU’s proposals on the Ireland/Northern Ireland (NI) Protocol amendments at the WAJC meeting on 12 June. Our position was that we wanted further time to scrutinise the proposals, and that they would need to be considered in the round, alongside the four negotiating tasks assigned to the WAJC within the Protocol. The list of Acts are included in an Annex to the Withdrawal Agreement, none of which were discussed during the extended negotiations phase of late 2019. If the NI Protocol Specialised Committee refers a recommendation for Decision on these or other Acts to the WAJC, we will consider the recommendation in due course. The representatives from the Northern Ireland Executive made no comment on the Decision discussion at the meeting of 12 June.

No other amendments to the Withdrawal Agreement were proposed at the WAJC meeting or have been proposed since. Either the UK or the EU can propose amendments at any time, and were the UK to propose any, we will of course keep your Committee informed. Other than the aforementioned amendments, no further changes to the Withdrawal Agreement are foreseen at this stage.

Although the Explanatory Memorandum (EM) process is not a perfect means to deal with all matters pertaining to the implementation of the Withdrawal Agreement, I remain of the view that it is the best mechanism to use during the transition period. Post-transition arrangements have not yet been agreed. I commit to providing as much information in EMs as feasible, though these will remain clear on the distinction between EU proposals and UK positions. As you know, the Transition Task Force has written to all government departments (8 June) setting out the need for high quality, prompt EM returns to Parliament, and emphasising the importance I attach to the scrutiny of EU legislation.

The Government is clear that the purpose of Parliamentary scrutiny of WAJC activity is not to disclose UK positions publicly ahead of any negotiations or Withdrawal Agreement implementation discussions. I have repeatedly stated that I shall lay Written Ministerial Statements (WMSs) both before and after WAJC meetings, and appear before your committee at appropriate times. In the case of the second WAJC meeting, WMSs were laid on 8 and 15 June, in line with this commitment. I also gave a statement to the House on 16 June outlining the key points from the WAJC, including the Decision adopted by the Committee, alongside an update on the Future Relationship (FR) negotiations. This statement was repeated by Lord True in the House of Lords.

These steps are proportionate and appropriate to enable robust Parliamentary scrutiny of WAJC activity: your Committee will in no way be 'left in the dark'. I am happy for SC and WAJC officials to meet with Committee clerks on an ad hoc basis to brief on the background of their respective areas.

Equally, I must be clear that our approach will remain firm in other areas. Whilst I am committed to approaching UK Parliamentary scrutiny of the WAJC as transparently as possible, setting out UK positions in EMs ahead of discussions with the EU is not an approach the UK Government will follow during the transition period. The amendments set out in the EM were proposals from the Commission to the Council and for which it required Council agreement in order to be able to take to the WAJC. The proposal related to the establishment of an EU position on an issue which had not yet been either discussed or agreed with the UK, and in relation to which the UK had to formulate its own view.

I understand your concern on transparency and accountability in the work of the WAJC and assure you that I will continue to attach significant importance to the scrutiny of WAJC activity. I am copying this letter to Sir William Cash, chair of the House of Commons European Scrutiny Committee; the Paymaster General, Rt Hon Penny Mordaunt MP; and Lord True.

13 July 2020

Letter from the Chair to the Rt Hon Michael Gove MP, Chancellor of the Duchy of Lancaster

Thank you for your letter dated 13 July 2020, in answer to our letter of 17 June, which was considered by the EU Select Committee at its meeting on 21 July.

We are disappointed and concerned by your response, particularly by your refusal to answer many of the legitimate questions posed in our earlier letter. We endorse the comments of the Chair of the House of Commons, Sir William Cash MP, in his letter dated 20 July, which accurately describes the implications of your approach for parliamentary scrutiny.

We also note your assertion that “your Committee will in no way be ‘left in the dark’”. Yet your letter fails to address the question to which those words related, which was about the steps the Government is taking to facilitate parliamentary scrutiny, in Westminster and Stormont, of the post-transition work of the Joint Committee and Specialised Committee. We remind you that, as stated in our previous letter, Article 13(4) of the Protocol 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, and for those proposals to be adopted by the Joint Committee. In the absence of 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 any public consultation or democratic oversight. How will you ensure that the Government is held accountable for its use of the extraordinary power contained in Article 13(4)?

So far as the EU’s current proposals to amend the Protocol are concerned, you imply that they will be considered by the Specialised Committee on the Protocol. In evidence to us on 5 May you said that “we will do everything we can to update” Parliament on the work of the Specialised Committee, so that it can “interrogate the approach that we and the EU are taking”. We also asked whether Mr Brendan Threlfall, who represents the Government on the Specialised Committee, could brief us, and you said that you saw “no impediment in my heart to such a briefing taking place”. Our clerks have since repeatedly sought Mr Threlfall’s appearance before the Committee, to no avail.

Instead, your latest letter states only that you would be “happy for SC and WAJC officials to meet with Committee clerks on an ad hoc basis to brief on the background of their respective areas”. A meeting at official level, however informative for staff, is no substitute for evidence given to a Select Committee, or even for a private briefing given to Committee members.

Given the fundamental importance of ensuring appropriate parliamentary scrutiny of the work of the bodies established under the Withdrawal Agreement, particularly in respect of Northern Ireland, we therefore restate formally our invitation to Mr Threlfall to appear before us in the first half of

September, either publicly or in private, so that we can explore the work of the Specialised Committee, particularly in respect of proposed amendments to the Protocol.

We would be grateful for a response to this letter before the House returns in September.

22 July 2020