

T: 0300 244 4000
E: scottish.ministers@gov.scot

To:
All Conveners,
Scottish Parliament Committees

30 April 2018

Dear Conveners

You will be aware that on the 19th March, the UK Government and European Commission announced the publication of a partially agreed version of the draft legal text on the Withdrawal Agreement. This colour-coded text showed where agreement has been reached at negotiators' level by both sides, particularly with regard to citizens' rights and the UK's financial settlement, and where areas of disagreement or divergence still exist, notably concerning the Irish border and other significant issues.

I know you are following the negotiations closely and considering how they will impact upon Scottish citizens and businesses, the work of your committees, and the Scottish Parliament. This partially agreed draft legal text is clearly an important document; it will not only set the context for the next few months of negotiations, but also define the UK's withdrawal from the EU. The Withdrawal Agreement will require domestic legislation to give it legal effect. The UK Government has announced a *Withdrawal Agreement and Implementation Bill* which will cover the contents of the Withdrawal Agreement, including issues such as an agreement on citizens' rights, any financial settlement and the details of an implementation period. We expect a significant devolved interest in this Bill and that the Scottish Government and Scottish Parliament will be appropriately engaged in developing the legislation by the UK Government.

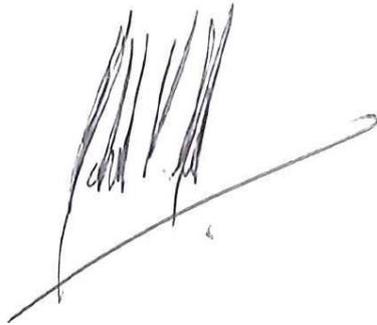
In light of the importance of this draft legal text, I enclose a summary and an overview of how the contents of the agreement align with the Scottish Government's well established positions in these negotiations. Whilst our overarching position continues to be that Scotland's interests are best served by continued EU membership, in-line with the wishes of the majority of the Scottish electorate, we do welcome the progress made in the negotiations. We know that significant work on withdrawal issues is still required, especially concerning the Irish border.

Furthermore, although the publication of this draft text of the Withdrawal Agreement was accompanied by the announcement that the UK and EU have reached an agreement *in principle* on the transition period, the EU have been clear that 'nothing is agreed until everything is agreed'. It is therefore imperative that the outstanding issues in this text are resolved to ensure a steady state transition period, where we continue to be part of the

European Single Market and EU Customs Union, to provide certainty for businesses and citizens. The provisional transition agreement the UK Government has reached with the EU also leaves a number of significant questions unanswered, particularly around the issue of access to Scottish waters and quota shares.

I hope you find this summary of use. Should you have any further questions, then please do not hesitate to contact me.

I am also copying this letter and attachment to the Presiding Officer and to Sir Paul Grice.

A handwritten signature in black ink, consisting of several vertical strokes followed by a long, sweeping horizontal line that curves upwards at the end.

MICHAEL RUSSELL

Annex – Summary of Draft Legal Text of Withdrawal Agreement

Overview

On Monday 19 March, the European Commission and UK Government announced the publication of a partially agreed version of the draft legal text on the Withdrawal Agreement. This was accompanied by the announcement that agreement has been reached in principle on the terms of a time limited transition.

The partially agreed version of the draft legal text is colour coded and indicates where full agreement has been reached at negotiators' level by both sides (colour: green), where text is agreed on the policy objective but drafting changes or clarifications are still required (colour: yellow) and where no agreement has yet been found (colour: white). The most notable areas of agreement on withdrawal issues have been on citizens' rights and the UK's financial settlement. The most notable areas where disagreement or divergence still exists are the Northern Ireland border and the governance of the Withdrawal Agreement.

This text was welcomed by the leaders of the EU27 at March European Council on 23 March.

Next Steps

Following this joint publication of the draft text, both the EU and the UK Government have reiterated their commitment to formally agreeing this treaty by October 2018, alongside a political agreement on the future relationship. The Commission remains committed to its stance that nothing is agreed until everything is agreed. Therefore the transition period is wholly dependent on completion of negotiations and agreement and ratification of legal text on the UK's withdrawal.

We have already seen negotiations continue in Brussels on aspects of the Withdrawal Agreement and discussions beginning on the future relationship.

Once agreed, the treaty on the Withdrawal Agreement will be subject to the consent of the European Parliament in line with the terms of Article 50 on the Treaty on the Functioning of the EU. The UK Government has also committed to assuring a meaningful vote for the UK Parliament on this agreement.

Overarching Scottish Government position

In line with the overwhelming majority of people in Scotland, the Scottish Government remains clear that Scotland should remain within the EU. Short of that taking place, to minimise the economic damage, we must retain our place in the European Single Market and EU Customs Union.

While we wish Brexit was not happening and that the UK as a whole was not leaving the European Union, the publication of this partially agreed draft legal text and the agreement on key areas such as citizens' rights is a welcome step forward in the negotiations.

Short of continuing EU membership, the best outcome for jobs and living standards is to retain membership of the Single Market and Customs Union – both in transition and permanently. Business and people in Scotland are demanding clarity on Brexit and with the clock ticking it is absolutely essential that a Withdrawal Agreement is legally agreed to ensure a steady-state transition period.

The alternative to this text being finally agreed is a 'no-deal' scenario. That is utterly unthinkable and threatens to be catastrophic for jobs, investment and the economy as set out in our recent analysis.

In relation to the Northern Ireland border, the Scottish Government remains absolutely committed to upholding the Good Friday Agreement in all its parts and we deplore any attempt to undermine this process. But as we have made clear previously, if it is possible for Northern Ireland to effectively remain in the Single Market or Customs Union, the case for Scotland also doing so becomes a practical necessity. Anything else would put Scotland at a huge competitive disadvantage when it comes to attracting jobs and investment.

Areas of agreement

Citizens' Rights

As the draft agreement shows, there is now agreement at negotiators' level between the UK and EU on the entirety of the Citizens' Rights part of the agreement.

The draft agreement broadly reflects the agreement on citizens' rights reached at the December European Council for the period after Brexit, in so far as it provides rights for EU citizens who were already residing in the UK (and UK nationals residing in other EU Member States) before the UK's exit. In providing for the rights of EU citizens and UK nationals, the draft agreement incorporates elements of EU law, such as the Citizenship Directive (2004/38/EC).

The draft agreement also extends to EU citizens and their families who come to the UK (and UK nationals who go to other member states) during the transition period, who will now also enjoy rights conferred the Withdrawal Agreement. This reflects a change in position from the UK Government.

The Scottish Government view continues to be that the same provisions which apply to EU citizens and their families resident in the UK before exit should extend to those who arrive during the transition. Therefore we welcome the position set out by the European Commission in the draft legal text and agreed to by the UK Government.

From the Scottish Government perspective, the concerns that we have continually raised in relation to the rights afforded by and processes associated with settled status for EU citizens and families (including vulnerable persons), remain and are not dealt with in the text. We are awaiting further information from the Home Office on settled status after the March European Council. Otherwise, we can broadly welcome the draft legal text.

Financial Settlement

The UK and EU have reached agreement on the financial settlement text of the Withdrawal Agreement. This translates the principles agreed in the December Joint Report into draft legal text, and provides further details on the timing and calculation of payments.

Agreement of the proposed implementation period until 31 December 2020 will allow continued UK participation in the 2014-2020 Multiannual Financial Framework (MFF). The UK will therefore continue to receive funding from commitments made during 2014-2020 until these programmes close, including where money is due to be spent beyond 2020. Applicable Union law also applies to these programmes until they close, though the agreed

text provides scope to agree ‘technical measures’ to ease the compliance burden around programme closure.

The draft legal text also confirms that the UK will be required to pay for liabilities entered into prior to exiting the EU, such as pensions, and that liabilities and payments will be calculated and made in Euros. There are therefore likely to be implications for conversion rate dates and hedging.

Recent UK Government estimates indicated that the final settlement will be between £35 to £39 billion. The Office of Budget Responsibility (OBR) also recently estimated that around 75% of this will be paid over the next five years, and that the UK will continue to make financial contributions to the EU until the 2060s, although payments are likely to average around £150 million per annum from 2030 onwards (primarily relating to pension payments).

The Scottish Government is clear that the electorate of Scotland did not support the proposal to exit the EU and therefore that Scotland’s public finances should not be detrimentally impacted as a result. In particular, Scotland should not bear a share of the costs, either directly or indirectly, of the withdrawal settlement.

The Scottish Government would welcome continued participation in the 2014-2020 MFF and related programmes until their closure; this would provide certainty and assurance for beneficiaries of EU funds in Scotland. However, as the OBR have noted, the impact of the financial settlement with the EU on the public finances is likely to be smaller than the indirect effects of changes in trade and migration on the economy and its capacity to generate tax receipts. Our position remains that staying in the Single Market and Customs Union is vital for Scotland’s economic and social interests. As our analysis in *Scotland’s Place in Europe: People, Jobs and Investment* shows, leaving the Single Market and Customs Union will significantly weaken our economy compared to continuing EU membership.

Transition

The jointly published text shows all aspects of the text on transition have now been agreed at negotiators’ level. This was further emphasised at the Mr Barnier - Mr Davis press conference on 19 March 2018, where they announced that agreement has been reached on the terms of a time limited transition.

The draft text provides for a transition period from the UK’s formal exit to the 31 December 2020, which subject to limited exceptions, entails a continuation of the application of all existing EU *acquis* to the UK. There is expected to be no formal institutional role for the UK during this period, with the exception of an option for the inclusion of UK representation in certain meetings and committees on a case-by-case basis, subject to specified conditions.

International Agreements

During the transition period, the general position is that representatives of the UK shall not participate in the work of any bodies set up by international agreements concluded by the Union, or by Member States acting on the Union’s behalf or by the Union and Member States acting jointly. The draft legal text, however, provides for exceptions to this where the UK is participating in its own right. In addition, the UK may be invited by the Union to join the EU delegation to international bodies (e.g. the WTO) on a case by case basis where this is considered to be necessary and in the interests of the EU, in particular for the effective implementation of those international agreements during the transition period. The UK will also be bound by the obligations stemming from international agreements concluded by the

EU, including FTAs requiring the UK to adhere to the EU Common Commercial Policy including in respect of external tariffs in relation to third countries with whom the EU has agreed FTAs without guaranteed reciprocal market access benefits from the third country concerned.

The text specifically provides that the UK may negotiate, sign and ratify international agreements entered into in an independent capacity (including in the field of trade) during the transition period provided that these do not enter into force or apply during the transition period (unless authorised to do so by the EU). While this provision should facilitate the transition to a new trade policy, the Scottish Government notes that the timeframe for negotiations would be very short.

The Scottish Government considers that a transition period should be as long as is necessary to provide certainty and stability for business and citizens. We would accept the EU27 position on the application of the EU acquis during this time and agree that it provides for the necessary certainty and on-going access to the benefits of EU membership.

Fisheries

The EU has consistently indicated that its agreement to a transition period is contingent on the UK adhering to the full *acquis communautaire* during such a period; including the Common Fisheries Policy. In relation to international negotiations on fishing opportunities during a transition period, Mr Barnier previously indicated that a mechanism would be found to ensure that the UK is “consulted”. Article 125 of the draft Withdrawal Agreement is consistent with that position.

In the draft legal text the “specific arrangements relating to fishing opportunities” section (Article 125) provides for:

- the United Kingdom to provide comments on the European Commission’s Annual Communication on fishing opportunities, the scientific advice from the relevant scientific bodies and the Commission proposals for fishing opportunities for any period falling within the transition period to be made;
- provision for the UK to attend, as part of the EU delegation, international consultations and negotiations where invited by the EU to do so and where permitted by the relevant international forum; recognising the need to allow the UK to prepare for its future membership in those fora; and
- relative stability shares for fishing opportunities being maintained.

The framework created by these clauses falls significantly short of the Scottish Government’s preferred approach to fisheries during a transitional period; namely the creation of a pragmatic mechanism to enable Scotland and the UK to be actively involved in EU decision-making on fisheries where our interests are at stake.

The precise nature of the “consultation” that will be undertaken in relation to fishing opportunities, and the ways in which the EU will act upon UK “comments”, is unspecified, creating considerable uncertainty as to the robustness of the resultant framework; and despite a request from the Scottish Government, no clarification on the form that the consultation will take has been provided by the UK Government. At the very least, there would appear to be a very significant risk that, even where consultation is undertaken in good faith, Scottish and UK fishing interests could be overridden.

In light of this, the Cabinet Secretary for the Rural Economy and Connectivity wrote to the Secretary of State for Environment, Food and Rural Affairs, Michael Gove, on 25 March to place on record the Scottish Government's objections to the impact the deal will have on Scottish fisheries. In that letter, assurances were also sought that permanent access to Scottish waters would not be used to secure other UK interests in any future deal with the EU, that international quota swapping mechanisms would remain in place, and that no negotiations with the EU in relation to fisheries would be undertaken without comprehensive input from the Scottish Government.

The Scottish Government continues to seek robust assurances on these points, and other key interests, on behalf of the Scottish fishing industry.

Justice and Home Affairs (JHA) opt-in

The Withdrawal Agreement provides for a limitation on the UK's existing opt in to measures under Title V of Part Three of the Treaty of the Functioning of the European Union (Freedom, Security and Justice) during the transition period. The UK will no longer have the automatic right to opt in to new measures and will have to be invited to co-operate by the EU.

The Scottish Government shares many joint objectives with the UK Government in fields of Justice and Home Affairs matters and specifically the areas of security, where we consider it is in our interests to maintain close cooperation with the EU. We have stressed to the UK Government the importance of considering differences in Scotland's legal system, the role and functions of the Lord Advocate and the direct links which law enforcement agencies and other justice bodies have with their EU counterparts. These must be taken into account to ensure workable arrangements for a new security treaty are put in place and when negotiating the arrangements for a transition period (until such a security treaty is agreed). The Scottish Government recognises that the role of the Court of Justice of the EU (CJEU) will continue during transition, and that the CJEU may need to continue to play a role in the future relationship as part of ensuring a robust judicial underpinning that enables the closest cooperation possible. We stand ready to play a constructive role in achieving these arrangements.

The Scottish Government supports the agreement reached that maintains the opportunity to request to extend the UK's access to any new JHA measures coming into force, although our preference would have been for the current opt-in arrangements to continue as they currently do. One of our key priorities is to ensure that our law enforcement agencies in Scotland continue to have existing access to EU databases and information sharing systems equivalent to other EU Member States so that they are not hindered in their fight against crime.

Areas where no agreement has yet been reached

Irish Border

As the jointly published draft of the text shows, there remains a number of key issues that remain outstanding on the text on Northern Ireland and comments by both Mr Barnier and Mr Davis in the press conference show that this is one of the biggest stumbling blocks to an agreement.

The jointly published text on Ireland sets out a fully developed version of the "backstop" option, which was first proposed in the December joint report. However, the specific Articles relating to this option in the draft text remain white, showing that there has not been an agreement with the UK on this option. Indeed the Prime Minister has said publically that this option could not be agreed to. In February, Mr Barnier said that given that the first two options for avoiding a hard border in the December Joint Report were only possible in the context of discussions on the future relationship the draft agreement reflected the requirement to have a backstop in case neither of the other options was agreed. These two options in the December Joint Report were for the UK to achieve the objective of continued North-South and East-West cooperation through the overall EU-UK relationship or that the United Kingdom would propose specific solutions to address the unique circumstances of the island of Ireland. Mr Barnier underlined that the protocol provides for its own extinction if an agreement under either of these options is put in place.

The protocol, as currently drafted, establishes a "Common Regulatory Area" comprising the Union and the UK in respect of Northern Ireland. This would make the island of Ireland an area without internal borders in which the free movement of goods is ensured and North-South cooperation protected.

The protocol will specify in an Annex, which is currently blank, the provisions of Union Law that will apply to Northern Ireland covering free movement of goods, agriculture and fisheries, the single electricity market, environment and state aid, and makes clear the protocol should be implemented so as to maintain the necessary conditions for continued North-South Cooperation under the Good Friday Agreement. It makes clear that the full armoury of EU powers, notably the Court of Justice of the EU and the guardian role of the European Commission, apply in relation to the rules of the Common Regulatory Area.

The Common Regulatory Area is, in essence, membership of the EU Customs Union, and of the Single Market for goods, but not services. This raises the question whether this option would be available for the UK as a whole (or failing that, for Scotland).

The establishment of a "Common Regulatory Area" is consistent with the rationale set out by the Scottish Government in Scotland's Place in Europe in December 2016, and as set out would see Northern Ireland effectively occupy the same kind of differentiated membership of the European Single Market as the Scottish Government set out for Scotland. Whilst the text is not explicit, this is likely to have a number of significant implications for Scotland, notably –

- the location of an EU/UK frontier (Irish sea) and impact on Scottish ports and transport connections
- Northern Ireland could derive a significant competitive advantage from being part of this common regulatory area (enabling differentiated access to SM, CU).
- undermine the UK Government's summary dismissal of proposals for differentiation in Scotland as unworkable

Security and Law Enforcement Cross-border Cooperation

As the jointly published draft of the text shows, there remain a number of key issues outstanding on the text relating to Justice and Law enforcement.

The jointly published text by the Commission and UK Government sets out the position reached on on-going cooperation in security, law enforcement and criminal justice proceedings for a number of key aspects. Expressly mentioned measures include: the European Arrest Warrant, European Investigation Order and European Protection Order. In

the circumstances detailed, the UK will be able to participate in cooperation arrangements during the transition period. Cooperation is contingent upon certain actions or decisions in each of these areas having been taken or made before the end of the transition period and not all JHA measures are referenced. The Scottish Government is seeking clarification on the position reached on these measures.

The position on two specific /measures/mechanisms stands apart. The text on ECRIS, the organisation and exchange of information from criminal records system, explicitly states at this point that beyond the transition period the UK's participation will be limited, i.e. replies to requests can no longer be transmitted through the ECRIS system. The UK's participation in the Joint Investigation Teams (JITs), supported by EUROPOL and EUROJUST, is also set apart and we are clarifying the position on that.

The Scottish Government's position is to ensure that the current level of co-operation can continue as this is essential in ensuring the safety and security of people. If this cannot be secured, the Scottish Government would look to keep as many of the existing measures as possible. The Scottish Government would agree to on-going compliance and keeping pace with data protection requirements in order to allow law enforcement data sharing to continue given these tools are vital in the fighting crime. We would also accept a role for the CJEU on these matters as a corollary of being able to maintain the benefits which flow from this cooperation.

The current text only envisages a limited form of cooperation after withdrawal date and will not give effect to the Scottish Government position. We understand that internal security will be negotiated as part of the wider discussions on future relationship and through that the UK Government is seeking strategic agreement on Security Treaty