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Thank you for your letter of the 15 August.

As of today the UK Government has published twelve papers and four technical notes concerning the ongoing negotiations with the European Union. I acknowledge that with the exception of papers published last week officials have been provided with an advance copy or briefed on most of these papers.

However I remain disappointed that this process has not enabled the Scottish Government and Scottish Parliament's views to be taken into consideration in the development of the UK Government's positions.

In your recent letter you state that the case for a detailed discussion on the future partnership and on transition or interim arrangements grows in importance. I believe that discussion must first and foremost take place within the UK, it must involve all four nations of the UK, and engage a broad spectrum of stakeholders. That conversation should also reflect, as much as possible, the need for cross-party consensus.

That was of course the remit for the JMC(EN) which was established as the body to reach an agreed UK position and objectives for these negotiations among the four governments of the UK. It is unacceptable that instead of accepting our offer of constructive engagement the UK Government has acted in direct contradiction to the terms of reference of the Joint Ministerial Committee (EU Negotiations) and published papers setting out a position – which will be considered the UK's position – before this engagement has taken place.

While this is a concern across the board it is intolerable when the papers have covered areas of devolved competence, such as the paper on Civil Judicial Cooperation, published in August and on Science and Innovation, published today. Given the distinct Scottish jurisdiction and Scottish Government's responsibilities for funding research in accordance with the devolved settlement it is baffling that the UK Government has chosen not to seek our views.

I am seeking an assurance today that the process for producing these documents will change. Given that many of the papers set out a range of possibilities, rather than a

prescriptive solution, there is no reason why the Scottish Government's position should not be reflected. We have a legitimate interest in both the terms of withdrawal, including transition, and the overall shape of the future relationship.

I have been further alarmed to read the leaked paper on immigration and freedom of movement. Scotland has a distinct and clearly articulated position on this issue and the position set out in the leaked paper will cause immense damage to our economy and society. It cannot be right that the Scottish Government is being cut out of a decision-making process, that could result in severe detriment to our economy, our universities and our public services.

Overall I am struck by the fact that the papers you have published largely describe the many benefits of EU membership while asserting that these benefits can be retained while leaving the legal order within which they exist. The Scottish Government remains of the view that, short of EU membership, the UK's interests can best be protected by remaining in the European Single Market and EU Customs Union, and negotiating a range of additional cooperation arrangements to supplement that. It is clear that such an arrangement is the most effective mechanism to achieve the outcomes the papers aspire to.

The negotiations demand our collective effort. The Scottish Government stands ready to enter into discussions with you all these matters and the JMC (EN) and associated official level dialogue is a ready made forum for this to happen. I have set out in annex to this letter some of our initial thinking on the key papers published to date by the UK Government.

This engagement could take place in working groups or a single structure, in order to prepare the ground for a meaningful discussion at the JMC (EN). It should be complemented with stakeholder engagement across the UK, and the outcomes of that should also feed into our discussions. Due to the seriousness of the situation we will be publishing this letter and I will be copying this to the First Minister, Deputy First Minister, First Minister of Wales, Cabinet Secretary for Finance and Local Government Welsh Government, First Secretary of State, Secretary of State for Scotland and Permanent Secretary for Northern Ireland.



MICHAEL RUSSELL

Annex : Summary analysis of UK Government Papers

Science and Innovation

The UK paper on science and innovation is the most recent in the series which has been shared by the UK Government under embargo at short notice with no prior involvement of the Devolved Administrations in its development. This is particularly concerning given the UK Government's apparent support of the dual funding system and our devolved responsibilities for research and innovation.

The paper is helpfully clear about the quality and impact of the UK's science and innovation. It makes a compelling case for continued collaboration with the EU on the basis of its impact on both the UK and EU, with the UK recognised as a collaborative partner of choice, and having a level of influence on the shape of the programmes and priorities for spending.

It will be critically important that the "ambitious science and innovation agreement with the EU" reflects priorities across the whole of the UK, including in Scotland. The reference in the paper to working with the Devolved Administrations is welcome. Given the limited engagement to date, it would be helpful to understand how this will be progressed.

We have noted that the paper suggests a bespoke "ambitious" agreement that would allow the UK to continue to influence EU decision-making for programmes. We recognise that it will be very challenging to agree this with the EU in the context of the UK Government ruling out freedom of movement unilaterally and in terms of any governance arrangements and the extent of influence over the direction of future programmes. Horizon 2020 is particularly important for Scotland as we achieve "a higher level of income per capita (€55 per capita compared with a UK average of €40) than all of the other nations [in the UK]" according to Technopolis's 2016 report for the Royal Society.

The future international arrangements for cooperation on research and for the transfer of radioactive materials and technologies will affect all parts of the UK. Our preference is for membership of Euratom to continue. If this is not possible, as a result of the UK Government's negotiations on taking the UK out of the EU, then we would favour a form of associate membership of Euratom that maintains close joint arrangements on the widest range of issues, including external assurance and inspection.

It will be important that the development of both bilateral and multilateral partnerships are progressed as a genuine partnership with the Devolved Administrations.

Finally, there are other EU programmes not explicitly mentioned in the paper where we would appreciate clarity from the UK Government of its plans for future participation. These include, amongst others, Erasmus+, Euphresco and the European Environment Agency.

Civil Justice Coordination

The Scottish Government believes that Scotland and the UK would be better off continuing participation in the existing instruments of civil judicial cooperation, including the retention of key family and commercial measures. Co-operation between justice systems is absolutely vital to individuals, families and business living and operating across borders. The Scottish Government would agree with the description of the benefits of the current methods of civil judicial cooperation. Therefore, we welcome the intention of the UK Government to seek a close and comprehensive framework of civil judicial cooperation with the EU which would mirror closely the current EU system and would be a clear legal basis to support cross-

border activities. However, the paper does not provide detail as to what form of “new close and comprehensive arrangements for civil judicial cooperation” is sought – or what might be possible. It is impossible to assess the merits of any future system without knowing what it might entail.

While it may be mutually beneficial to agree to continue current civil judicial cooperation, the UK Government’s stance on the Court of Justice of the EU poses a challenge to securing such agreement. There is concern that this would constrain adequate alternative arrangements.

Although there is recognition that the UK consists of more than one legal system jurisdiction, there is no depth to this recognition and how any future, international engagement on civil judicial cooperation might take into account the UK’s status as a multi-jurisdictional state. We strongly emphasise the importance of working mutually to ensure alternative arrangements take account of Scotland’s separate justice and legal systems and bodies. The UK Government must protect and ensure the stability of Scotland as a separate legal jurisdiction, including ability to continue direct cooperation with other EU Member States.

Enforcement and Dispute Resolution

As with many of the UK Government’s papers this paper emphasises the benefits of EU membership rather than any benefits of leaving - with many questions still to be answered.

We note the paper acknowledges the precedents set by other agreements between the EU and third countries where there is mutual respect and due account taken of judgements of each jurisdiction’s courts. Taking account of Court of Justice of the EU (CJEU) jurisprudence in interpreting the relevant rules within courts in the UK will mitigate divergence between the UK and the EU.

The Scottish Government notes that both the UK Government and the EU suggest that a joint committee structure could be explored as part of the solution. The main point of difference with EU partners will therefore be the nature of any backstop to such a structure which acts as a court or final arbiter of any dispute.

If the UK Government’s priority, as suggested in this paper, is to provide legal certainty and an effective enforcement mechanism, and it also wishes to retain a great many of the benefits of EU membership, then the Scottish Government believes the answer is to stay in the European Single Market. The best practical solution under the circumstances would seem to be membership of the European Economic Area, and participation in the EFTA institutional structures and the EFTA Court would bring some advantages in presenting an available existing mechanism for the UK.

The acknowledgement that the EFTA Court model does not involve the “direct jurisdiction” of the CJEU could pave the way for such an approach in respect of the UK.

Is the UK Government able to confirm that the paper does not rule out the option of using the EFTA Court, and that there is an acceptance that the CJEU will play some role in the future agreement?

Continuity in the availability of goods for the EU and UK

We recognise that this paper responds to the EU’s own proposals published in June and welcome the identification by both UK Government and the EU that clarity on this issue is

essential – otherwise potential for chaos is clear. But the Scottish Government also recognises that for many sectors, even if agreement were reached based on the UK Government's proposals, the practical benefit would be short-lived, as commentators have been quick to point out.

We agree with the UK Government's proposed principles, especially on avoiding new burdens and complexities. However the simplest way to achieve that would be to adopt the Scottish Government's proposals, and remain in the European Single Market and EU Customs Union.

It is welcome that the UK Government's paper considers the increasingly important issue of services associated with supply of goods.

However we are concerned at the areas where UK Government and European Commission diverge in their positions, especially over the continued role (or otherwise) of the Court of Justice of the EU and of UK-based market authorisation authorities. It is not at all clear how those divergences will be resolved.

What flexibility is the UK Government prepared to offer to secure agreement?

The Scottish Government see this issue within the Withdrawal Negotiations as a litmus test for how discussions on the future partnership with the EU will go. Unless these relatively technical issues around goods already on the market can be resolved quickly and satisfactorily, there seems little hope that the wider discussions will go well.

Future customs arrangements

The Scottish Government continues to believe that Scotland and the UK would be better off remaining in the EU customs union and European single market. Any alternative arrangement needs to be seen to deliver the benefits we currently derive from membership and it is not clear that the proposed new arrangements would meet this test.

That said, we welcome the fact that the UK Government has now accepted the level of complexity which Brexit will cause necessitates an interim – or transitional – period. This period will provide some certainty for businesses in the UK and the EU and will help to ensure that businesses and others have the necessary time to implement the new arrangements and prepare for a smooth transition. A transition deal as envisaged in the paper will avoid the risks of a cliff edge Brexit in March 2019 and give more time to negotiate a new trade arrangement.

The paper contains very little that is new apart from the proposal for a transition period. There is no explanation of why the UK should leave the customs union and much of the paper is devoted to discussing how to mitigate problems that will result from leaving the customs union. There is no suggestion that any substantive work has been done to assess whether either of the two options would work in practice and in any case neither option could fully mitigate the increase in red tape and costs caused by leaving the customs union.

While the paper concentrates on customs arrangements for trade in goods little or nothing has been said about services (which accounted for 45% of UK exports in 2016). The UK Government has not so far given any proper explanation of the arrangements they are seeking to govern future trade in services with the EU, despite the fact that leaving the single market will make it harder for UK services firms to export to the EU. Nor is there any

discussion about the future of agricultural trade, where it is unclear whether the EU would be willing to include agriculture in any transitional arrangement with the UK.

Consideration of the paper raises a number of questions, including:

- How long will the interim (transition) period be and is there sufficient time to negotiate a bespoke agreement before March 2019?
- Is there any indication that the EU will agree to the proposals for a transition agreement?
- Does the UK want to remain in the customs union during the transition period? If it does, the UK will need to impose the common external tariff on trade with the rest of the world which would mean that the UK could not agree any new trade deals with non EU countries. If the UK does not remain in the customs union during this period, there will be customs procedures on UK EU trade and the costs of trade will rise.
- Will continuing to be part of a customs partnership include application of all the EU acquis in respect of the Single Market (including the jurisdiction of the Court of Justice of the EU)?
- Why would third countries negotiate a trade deal with the UK when they don't know what partnership the UK will have with the EU?
- What assessments have been done of the economic impact of the increased administrative burden the paper accepts will result from the proposed streamlined customs arrangements?
- Can the UK Government give any indication of the cost and delivery timescale of the new IT systems to facilitate this streamlining?
- What risk assessment has the UK Government done of the potential for abuse of the proposed new customs partnership?
- Is there a risk that we would end up counterbalancing – if not writing off – any benefits from new trade deals with the cost of the enforcement and tracking systems required for the new partnership arrangement?

We note that in paragraph 62 of the paper it is stated that 'Customs is a reserved matter.' While it is clear from the relevant reservations in the Scotland Act 1998 and the accompanying Notes on Sections that most of "customs" is reserved, we do not think that the simple statement is sufficient explanation of the situation nor that this should mean that the Scottish Government does not have a clear interest in these matters. For example, there are specific exceptions to the general reservation of import and export controls on food animals, animal products, plants and plant products for certain purposes.

Safeguarding Citizens' Rights

The Scottish Government published our response to the UK Government paper on 17 July. We are disappointed that it has taken the UK Government over a year since the Referendum to provide any clarity to EU citizens, and their families, about their future rights and status, and that their paper still leaves a very large number of questions unanswered. These are not abstract issues, but real questions that affect people's lives. However, we are clear that, with goodwill on all sides, these issues can be resolved.

We have called on the UK Government to immediately clarify the most important outstanding issues: the cut-off date; how rights will be protected and enforced; the scope of who will be protected (including those who have resided in the UK in the past – and UK citizens who have resided in EU countries – and Irish citizens); the rights that apply to "settled status", who qualifies, what the process involves and how much it will cost; and the rights of family members of EU citizens, especially those who come from outside the EU.

Northern Ireland and Republic of Ireland Border

The Scottish Government noted the proposals on Northern Ireland and Ireland, and in particular the UK Government's proposal of a differentiated approach to free movement of people. As committed supporters of the Good Friday Agreement, the Scottish Government strongly support the continuation of free movement of goods, services and people across the border between Northern Ireland and the Republic of Ireland, and the continuation of the Common Travel Area. This would also be consistent with the proposal in Scotland's Place in Europe for a differentiated approach to free movement of people.

Quite apart from the negative impact on the Northern Ireland peace process, the economic interests of all of the constituent nations and peoples of these islands can only be harmed by a form of Brexit that sees the UK (and NI) outside the Single Market and Customs Union, and the EU (and Ireland) on the other side of a Customs frontier / border.

We also agree with the UK Government's stated aims in regard to Irish Citizenship and EU Membership, continuation of UK and EU support for the PEACE IV programme and continuation of the North-South and East-West cooperation underpinned by the Good Friday Agreement.

There are of course other potential issues which will have to be addressed in order to prevent, for example, a route through Northern Ireland becoming a focus for human trafficking and organised crime across a range of industries and sectors, or the development of a back door between the UK and the EU for goods and services.

The easiest way to address these concerns, secure the unaltered border and protect the Good Friday Agreement and the Common Travel Area is to remain a member of the EU and that remains our preferred solution –but failing that by retaining membership of the Customs Union and full access to the Single Market. The UK Government's paper suggests instead that the best way to guarantee all of this is to move immediately to a full, flexible and imaginative new Free Trade Agreement between the UK and the EU. It remains to be seen whether a solution which meets all these needs can be negotiated with the EU, but we would be very concerned about any suggestion that Ireland / Northern Ireland concerns be used as collateral (or a bargaining chip) in the wider negotiating position on the UK objective of an FTA.

Nuclear Safeguards (Euratom)

We note that the proposals in the papers from the UK Government on this subject seek sensible agreements to preserve current arrangements for the responsibility for spent fuel sent to other countries for treatment, and for the supply of fuel for nuclear generation, following departure from the Euratom treaty framework.

Scotland needs these arrangements for effective decommissioning of Scottish sites, in particular to close out overseas contracts at Dounreay, and for smooth operation of the Scottish nuclear generation sites. Whilst we are supportive of the proposed continuity arrangements, we are concerned that they may not be achievable within a framework outside Euratom that the UK Government seeks.

The exchange and protection of personal data

We note the UK Government intends to transpose new requirements of EU law in a Data Protection Bill (repealing and replacing the Data Protection Act 1998), to be tabled in the autumn, so that at the point of exit the UK will be fully compliant with EU law as it stands. Looking beyond exit, the UK Government will need to agree a UK-EU model for exchanging and protecting personal data and understand that the favoured model is an “Adequacy” model.

The EU’s adequacy model allows the Commission to determine that a third country’s data protection framework is ‘adequate’ and therefore the free flow of data between the EEA and those third countries is permitted. However, with that come particular challenges for security and law enforcement data and intelligence sharing. There are already around 12 third country frameworks in place but these do not cover data exchanges in the security and law enforcement sectors. We note the two exceptions to that, where special arrangements for the exchange of data have been agreed in respect of PNR (Passenger Name Records) and TFTP (Terrorist Financing Tracking Programmes).

Although, the paper emphasises the impact the absence of a post-exit UK-EU model would have on business and the economy it is light on the impact that would have on our ability to share intelligence and data if we were to lose cross-border security and law enforcement measures because we fail to meet EU data protection standards. At the sharpest end of that is the potential loss of intelligence vital in the fight against terrorism and serious crime, which would leave us less secure than at present.

The Scottish Government is concerned that even if the UK Government were to put in place a new Adequacy model and agreed the model with the European Commission, there will be problems’ keeping pace as the EU continues to develop its adequacy model in the light of new technical developments and Court Of Justice Of The EU interpretations of the EU data protection framework.

Ongoing Union Judicial and Administrative Procedures

The critical thing for stakeholders in the UK, and for the Scottish Government, is that there is legal certainty at the time of exit as to their responsibilities and liabilities in respect of the jurisdiction of the Court of Justice of the EU (CJEU).

We acknowledge that the EU’s concern may be that agreeing with the UK Government’s proposals at this point may have an impact on compliance with EU law in the period leading up to the UK’s exit from the EU when it remains a member and subject to all of the obligations of membership. The UK will continue to benefit from all rights flowing from that membership up to exit day (including to bring legal proceedings itself), and so can rightly expect to be subject to the legal proceedings to which it has consented if it fails to live up to its responsibilities.

In relation to on-going infraction/compliance issues, the Scottish Government will continue to comply with its obligations under EU law.