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Sir William Cash MP
Chair of the European Scrutiny Committee
Committee Office
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Dear Bill

I am writing in response to your Committee's report on document (39583), 7400/18 and (39584), 7391/18 on the EU approval of the Global Compact on Migration (GCM).

Your Committee asked about the timelines and process around the Council Decisions. In particular you asked about the deadline for the JHA opt-in; the justification for any decision to curtail this three months period; and the basis on which the EU has already assumed that the UK will not opt in.

- My officials have confirmed that the last language versions of the proposal were published on 24 April 2018, which means that the three months deadline will be 23 July 2018. The English language versions were published in late March, on the basis of which the Commission had planned on seeking adoption of the Decisions before the April round of negotiations, scheduled for 3-5 April, to allow the EU to represent Member States during this negotiation. These Decisions could have been adopted under Qualified Majority Voting by the Council, irrespective of the UK's position.

- This would have meant that the UK would not have been allowed time to take an opt-in decision and, therefore, would not be bound by the migration-related Council Decision. During discussions at COREPER on 28 March, it became clear that Member States had concerns about the Decisions, specifically relating to the request to allow the EU to approve a document on behalf of Member States that was still being negotiated. This meant that the Decisions were not taken forward. However, the Commission has not formally withdrawn the proposal and they may return to it when the negotiations on the GCM have made further progress. Therefore, the UK still has a JHA opt-in decision to take.

- The Commission's original timetable for adoption would not have allowed the UK to undertake domestic processes to take an opt-in decision. Therefore, the

Commission had already concluded that the UK would not be able to opt in to the migration-related Council Decision.

You further sought clarification on the use of Article 16TEU as a procedural legal base for the proposed Council Decisions. Specifically, you asked about the Government's position on the use of Article 16TEU as the procedural legal base to obtain the Council's authorisation to approve a non-binding document; how far in advance such authorisation should be sought, given the possibility that the content of the document may change during negotiations; and to give an indication what options – other than Article 16TEU would be available to give the authorisation the Commission seeks.

- The Government's position is that the use of Article 16TEU could potentially be an appropriate legal base in this case and would be consistent with the judgment of the Court of Justice of the European Union in Case C-660/13 *Council v Commission*.

- The Government notes that substantive changes to the text of the Global Compact on Migration are possible. In the Government's view, it would be too early at this stage for the Council to authorise the Commission to approve a document on behalf of the Union. The intention is for the GCM to be agreed in July and launched in December, therefore, the Government considers it appropriate, if necessary, for Member States to authorise the EU to approve when there is a final or near-final version of the text, likely in late June.

- As explained above, the Government's position is that the use of Article 16TEU could potentially be an appropriate legal base in this case. Article 218(9)TFEU is not available as a procedural legal base when the Union negotiates instruments that are not legally binding.

Furthermore, your Committee noted the omission of a subsidiarity assessment in the EM and asked for an explanation of whether there are elements of the Global Compact on Migration for which the EU has acquired exclusive competence, meaning that the EU alone must act; whether all elements of the Global Compact are matters of shared competence; if competence is shared, what need or justification there is for separate EU approval of the Global Compact.

I apologise to the Committee for the omission of an assessment of the subsidiarity principle. As the Committee is aware, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States but can rather be better achieved at Union level. The Government has concluded that the GCM contains a mixture of Union and Member State competence. We understand that the Commission's intention behind this proposal was to allow the EU to speak with a single voice during negotiations in the UN, adding weight to Member States' existing co-ordination of their negotiating positions. We do not consider it necessary for there to be a legal basis for this co-ordination, and agree with other Member States that it would be inappropriate to authorise the EU to approve the GCM at this stage in negotiations, but agree that it remains helpful for EU Member States to continue to adopt a co-ordinated approach, in so far as possible, to negotiations in the UN.

I hope my response has provided you with the clarity needed in order to clear scrutiny of the Explanatory Memorandum on the potential Council Decisions authorising the Commission to approve the Global Compact for Safe, Orderly and Regular migration.

I am copying this letter to Lord Boswell of Aynho, Chair of the European Union Committee; Lynn Gardner, Clerk to your Committee; Arnold Ridout, Legal Adviser to your Committee; Tristan Stubbs, Clerk the European Union Committee; Les Saunders, the Department for Exiting the European Union; and Alex Bernal, Scrutiny Coordinator, Home Office.

Yours ever

Caroline

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