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for Transport

From the Parliamentary  
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Sir William Cash MP  
Chairman Commons European Scrutiny Committee  
House of Commons  
14 Tothill Street  
London  
SW1H 9NB

19 January 2021

Dear Sir William,

### **Oral evidence session of 16 December 2020: The future operation of the Channel Tunnel Fixed Link**

Thank you for invitation to brief the Committee on the future operation of the Channel Tunnel and the progress of bilateral negotiations with France. I hope you and your fellow members of the Committee found the session useful. I agreed to write to the Committee with further detail on two of the questions raised during the session. Please find answers to these questions below.

#### **What will the relevance of EU Court of Justice (CJEU) case law and CJEU jurisdiction be specifically in the context of the EU's rail contingency legislation during the nine-month extension period?**

In the specific context of the nine-month EU contingency legislation applicable to the Channel Tunnel (Regulation (EU) 2020/2222)<sup>1</sup>, it is important to note that this will not have the status of retained EU law and the UK courts will therefore not adjudicate on it (see section 3(3) of the European Union (Withdrawal) Act 2018). This is because it did not apply until after the end of the Transition Period (1 January 2021) and it will therefore not be incorporated into UK domestic law. For this reason, CJEU case law will not be engaged in the UK in respect of this legislation.

While the EU contingency legislation applies to safety certificates, safety authorisations and safety certificates issued by the Intergovernmental Commission (IGC) and the Office of Rail and Road (ORR) for the Channel Tunnel, it is applicable specifically to the continued validity of those licences in EU territory, i.e. the French half of the Channel Tunnel, and therefore does not entail a role for the CJEU in UK territory.

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<sup>1</sup> <https://eur-lex.europa.eu/eli/reg/2020/2222/oj>

In the unlikely event of a dispute between one of the Channel Tunnel stakeholders and the French Government about their adherence to the requirements in the contingency legislation, this would be litigated in the French courts, which could in turn refer the case to the CJEU. Similarly, a dispute between the French Government (for example, about what the contingency legislation required of stakeholders or of the UK safety authority) and the Commission could potentially be referred to the CJEU. However, in both these cases, whilst the outcome might well have practical implications for the UK due to its potential to impact on the continuation of services through the Tunnel in the period covered by the contingency regulation, it would concern the application of EU law within EU territory, in this case the French half of the Channel Tunnel, rather than within the UK. A CJEU judgment in such a case would not 'bind' the UK in any way. Channel Tunnel stakeholders would not be able to bring a dispute relating to the EU contingency regulation before the UK courts, as the contingency regulation has not been retained in UK domestic law and applies only to the validity of safety authorisations, safety certificates and operator licences in the French half of the Channel Tunnel.

### **What will the relevance of CJEU case law be in the context of retained EU law applicable to the Channel Tunnel?**

This question is covered by the EU (Withdrawal) Act 2018 ("EUWA").

Retained EU law (as defined at section 6(7) of that Act) includes domestic legislation which gives effect to EU law for the Tunnel (such as, for example, elements of the Railways (Interoperability) Regulations 2011, which regulate rail interoperability issues, or the Railways (Accident Investigation and Reporting) Regulations) which originally transposed relevant aspects of EU law. These domestic Regulations are known, as you will know, as 'EU-derived domestic legislation'. Retained law also includes EU regulations/decisions/tertiary legislation, retained in UK domestic law by virtue of the EU (Withdrawal Act) 2018, known as 'direct EU legislation'.

Retained EU case law is also defined at section 6(7) of EUWA and means any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before the end of the Transition Period and so far, as they relate to retained EU law.

The explanatory notes to sections 5 & 6 of EUWA set out, in particular, how the former principle of supremacy of EU law will apply to retained EU law. EU retained law will be interpreted by the UK courts in a manner consistent with EU law as it was before the end of the Transition Period. Retained EU case law will be referred to by the UK courts in litigation relating to retained EU law. There is no role for the CJEU in this process and the explanatory notes to the EUWA make this clear.

The position in terms of the application of EU law and the principle of supremacy of EU law to different categories of legislation is detailed and nuanced. I note that this is also an area which has been debated and intensively scrutinised by Parliament.

Further detailed explanation of the interpretation of retained EU law is given in the explanatory notes to sections 5 & 6 of EUWA, which are available at: [www.legislation.gov.uk/ukpga/2018/16/notes/division/21/index.htm](http://www.legislation.gov.uk/ukpga/2018/16/notes/division/21/index.htm)

Lastly, I would like to reaffirm my commitment to provide the Committee with progress updates on negotiations with France regarding the Channel Tunnel as and when developments occur.

I am copying this letter to Lord Kinnoull, Chairman of the European Union Committee; and to Huw Merriman MP, Chairman of the Transport Committee; Hilary Benn MP, Chairman of the Committee on the Future Relationship with the EU; Angus Brendan MacNeil MP, Chairman of the International Trade Committee; Jessica Mulley, Clerk to your Committee; Christopher Johnson, Clerk to the Lords Committee; Indira Rao, Legal Adviser to your Committee; Les Saunders, Cabinet Office; and Margaret Browne, departmental scrutiny coordinator.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'R Maclean', with a period at the end.

**RACHEL MACLEAN**

**PARLIAMENTARY UNDER SECRETARY OF STATE FOR TRANSPORT**