



Rt Hon Penny Mordaunt MP
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Cabinet Office 70 Whitehall London
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Sir Bill Cash MP
Chair, European Scrutiny Committee
House of Commons
London
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Our reference: MC2021/14760
Your reference: 41751

7 September 2021

Dear Sir Bill,

Thank you for your letter of 7 July. Your letter raises a number of points which I will address in turn.

On the issue you raise regarding whether the proposed Directive is within scope of the Protocol, it may be helpful to first re-state the context of the Directive and how it relates to the Protocol. As you know, Annex 4 to the Protocol sets out the legislation which continues to apply in Northern Ireland for the purposes of the Single Electricity Market (insofar as they relate to the operation of the wholesale electricity market). Directive 2008/114/EC, predecessor to the new Directive, is not included in Annex 4 and is therefore not immediately in scope of the Protocol. However, legislation (or particular articles thereof) not included in Annex 4 can be brought into scope where they are cross-referenced within Annex 4 legislation and are deemed necessary for the joint operation of the SEM.

In this case, Directive 2008/114/EC is cross-referenced in Article 4 of Regulation 1227/2011, which places an obligation on market participants to disclose inside information but allows for disclosure of sensitive information to be delayed where it relates to the protection of critical infrastructure. However, the cross-reference concerns only the definition of sensitive critical infrastructure contained in Directive 2008/114/EC. It would therefore be only this definition which might be brought within scope, not the Directive as a whole.

With regard to the determination of whether the definition of sensitive critical infrastructure should be deemed in scope, it is important to note that responsibility for implementing the Protocol with regard to the Single Electricity Market, lies with the Department for the Economy (DfE) in Northern Ireland. As you will be aware, all 'day-1' requirements for the continued operation of the SEM were met by the end of the transition period, ensuring that SEM operations could continue, but there remain some elements that still require implementation. Officials from the Department for Business, Energy and Industrial Strategy have been supporting DfE in this work and BEIS has provided its final analysis of Annex 4 legislation to DfE, indicating which provisions it determined should be considered in/out of scope of the Northern Ireland Protocol. This included the opinion that the cross-reference to Directive 2008/114/EC contained in Article 4 of Regulation 1227/2011 is not in scope of the Protocol on the grounds that it is not necessary for joint SEM operations. However, it will be for the DfE to

make the final determination when making the necessary legislative changes to the law in Northern Ireland.

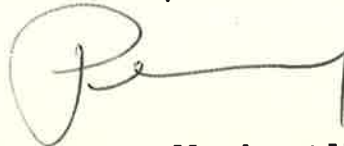
With regards to the process under Article 13(4) of the Protocol, in line with our broader approach to scrutiny, I am aware that our officials have been discussing the shape of scrutiny arrangements and I can confirm that in those discussions we are offering Explanatory Memoranda and official-level briefings ahead of each Withdrawal Agreement Joint Committee meeting. However, it is important to note that, due to negotiating confidentiality, we would be limited with what could be said publicly about any proposal.

With regards to what steps the Government is taking to identify and manage the impact of regulatory divergence between the UK and EU, the Government is being proactive in identifying new opportunities resulting from leaving the EU, including where we can regulate differently - and in more agile ways - to boost innovation, drive growth, and improve productivity in the UK economy. Any changes to our regulations will be underpinned by rigorous analysis and consultation with the relevant stakeholders, including to take account of the impact on trade with the EU and other countries.

I am copying this letter to Simon Hoare MP and Steve Habberley, Chair and Clerk of the Northern Ireland Affairs Committee; William Wragg MP and Gavin Blake, Chair and Clerk of the Public Administration and Constitutional Affairs Committee; the Earl of Kinnoull and Nick Boorer, Chair and Clerk of the European Affairs Committee in the House of Lords; and to Les Saunders and Donald Harris at Cabinet Office.

With best wishes,

Do let me know if I can help further,

A handwritten signature in black ink, appearing to read 'Penny', with a long horizontal stroke extending to the right.

**Rt Hon Penny Mordaunt MP
PAYMASTER GENERAL**