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Sir William Cash MP
Chair, European Scrutiny Committee
House of Commons
SW1A 0AA

Sp February 2021

Des Bill,

Thank you for your letter of 16 December. Further to my comments in the House on 2 February, I look forward to appearing before your Committee next week.

As you know, the agreement in principle reached with the European Commission on the Northern Ireland Protocol, about which you asked a series of questions which I address in turn below, was formally adopted by the Withdrawal Agreement Joint Committee on 17 December, and has since been the basis on which the Protocol has been given effect, alongside the Trade and Cooperation Agreement. You will have also seen the letter I wrote to European Commission Vice-President, Maroš Šefčovič, which we have published on gov.uk, and my officials are currently working intensively with the Commission on the Protocol issues outlined in the letter.

1. What is the status of the Joint Committee Decisions in (a) international law and (b) domestic law?

As stated in Article 166(2) of the Withdrawal Agreement, decisions adopted by the Joint Committee are binding on the parties and have the same legal effect as the Withdrawal Agreement has in international law. The decisions have effect in domestic law to the extent provided for in legislation.

2. What is the status of the unilateral declarations in (a) international law and (b) domestic law? What weight will the CJEU give to the declarations?

3. The declarations are structured as a unilateral declaration by one party of which the other party takes note. Why was this structure used rather than joint declarations? Do the declarations have a different status and effect than if they had been agreed as joint declarations?

The unilateral declarations set out the understanding of the parties on certain issues relating to the implementation of the Protocol and they have legal force in relation to the interpretation of it. The format and structure of the unilateral declarations was therefore considered the most appropriate means of providing clarity on the implementation of the Protocol.

- 4. Which body in the UK will be the “competent authority” responsible for the grant of authorisations under Article 5 of the draft Decision?**
- 5. When will the new UK Trader Scheme be up and running and how soon will businesses in Northern Ireland be able to apply for authorisation?**
- 6. What assessments has the Government carried out to ensure that (a) the information that businesses are required to submit to support an application for authorisation and to demonstrate “a high level of control” of their operations and flow of goods is routinely held by SMEs; and (b) participation in the new UK Trader Scheme is more cost-effective for businesses than paying EU tariffs (especially if they are low)?**
- 7. Will all applications made to the new UK Trader Scheme in January and February 2021 be automatically granted provisional authorisation, or is there an element of discretion? Until provisional authorisation has been granted, will all goods imported by the applicant be considered to be “at risk” and subject to EU customs duties? If so, will the Government reimburse the duties paid once it has granted provisional authorisation?**
- 8. How does the process for securing a provisional authorisation differ from the process for securing a permanent authorisation? Is there sufficient administrative capacity to manage both processes in the timescales envisaged in the draft Decision?**
- 9. What estimate has the Government made of the number of businesses likely to apply to the UK Trader Scheme during (a) the first two months of operation and (b) in total?**
- 13. Article 9 of the draft Decision would allow the EU or the UK unilaterally to terminate the UK Trader Scheme with effect from 1 August 2024 if either party considers it has resulted in “significant diversion of trade, or fraud or other illegal activities”. In the event of termination, will all goods brought into Northern Ireland (from the rest of the UK or from any non-EU country) be considered ‘at risk’ and subject to EU customs duties from that point on?**

Under Article 5 of the Decision, Her Majesty’s Revenue and Customs will be the competent authority.

The UK Trader Scheme is helping ensure traders do not pay tariffs on movement of goods into Northern Ireland from Great Britain, where those goods remain in the UK’s customs territory. Traders can self-declare goods not ‘at risk’ of entering the EU so that they are not subject to EU duty. The UK Trader Scheme is optional.

Since 14 December, businesses have been able to apply for a UK Trader Scheme authorisation. Registering for the scheme is free and straight-forward, and open to traders of all sizes and over 1,500 applications have been received to date. Applications up to the end of February 2021 are eligible to receive a provisional authorisation for up to four months while the application is processed. The application must be done before traders declare goods they move into Northern Ireland not ‘at risk’.

Applications received after the end of February 2021 will be processed as normal and this can take up to a month, so traders must apply a month before they plan to declare goods not ‘at risk’. The Government’s £200 million Trader Support Service also provides free education and guidance on ‘at risk’ goods for businesses in Northern Ireland and Great Britain.

As set out in the December Command Paper, the Government will establish a reimbursement scheme for goods that attract a tariff, but which can subsequently be shown to have remained in the UK customs territory.

Regarding the termination of the UK Trader Scheme, if notice was given under Article 9, there would be a binding duty on both parties to make appropriate alternative provision by the time the termination came into effect on 1 August 2024. Importantly, these provisions would need to respect fully Northern Ireland's place in the UK's customs territory. This means both parties are bound to maintain arrangements that respect and protect Article 4 of the Protocol. Furthermore Article 3(1)(a)(i) and 3(1)(b)(i) would continue to apply even in case of termination, enabling many goods to remain 'not at risk' in all scenarios.

The UK Government will not tolerate fraudulent or abusive use of the UK Trader Scheme, and will revoke authorisations where any such cases are identified. We therefore do not envisage a scenario in which the threshold set out in Article 9 for a notice to be provided would be met.

10. Where an importer does not meet the conditions set out in Article 2 and Article 3 of the draft Decision on "at risk", can you confirm that the goods they bring into Northern Ireland (other than from the EU) will be considered 'at risk' of subsequently moving into the Union for the purpose of Article 5(1) of the Protocol? And in that case, can you confirm that (EU) customs duties will be payable on goods moving from GB to NI?

11. The Government's Command Paper on The Northern Ireland Protocol (CP 346) says that EU tariffs "will not generally be paid on internal UK trade". Article 3(2) of the draft Decision appears to provide that all goods brought into Northern Ireland to which EU trade defence measures apply are to be considered as "at risk", even if they remain in Northern Ireland. Please explain: whether Northern Ireland importers will be required to pay EU (customs and retaliatory) tariffs on all goods subject to EU trade defence measures, regardless of their final destination or end user; which tariffs will apply if the EU and the UK both have trade defence measures in place on goods brought into Northern Ireland?

We are confident that a very significant majority of internal UK trade will be able to move without being subject to tariffs. But if a good from outside the EU does not meet the conditions set out in Articles 2 and 3, it will be considered at risk and EU customs duties will be payable. We will also make full use of the provisions within the Protocol enabling tariff waivers for such movements, subject to state aid *de minimis* ceilings. The Trader Support Service will support and guide traders utilising these tariff waiver arrangements. In addition, the reimbursement scheme will apply in cases where goods remain in the UK but the UK Trader Scheme does not cover the movement. The Trade and Cooperation Agreement provides a further basis for goods to move tariff-free, where they meet relevant origin requirements.

Article 5 of the Protocol, and the associated Joint Committee Decision, provide for different circumstances in which duties are applied depending on the scale and result of the movement, and relevant tariff rates. The operation of the Joint Decision on goods subject to EU trade defence measures is set out in detail on gov.uk. Further guidance on specific cases will follow.

All revenues collected for goods at risk of entering the EU market will be held by the Exchequer. There will be no remittance of any kind to the EU budget, even for goods moving on to the

European Union.

Information on the application of Article 5(1) and (2) of the Protocol on Ireland/Northern Ireland:

12. Will the Government publish the information it is required to make available to the EU (under Article 8 of the draft Decision) on the application of Article 5(1) and (2) of the Protocol on Ireland/Northern Ireland? If not, why not?

Article 12(2) provides for the exchange of information with the EU, for the specific purpose of enabling EU officials to exercise their rights of presence under Article 12 of the Protocol. It does not provide any basis for the publication of that information as this is not necessary to enable EU officials to exercise their rights.

14. When we scrutinised a proposal for a Council Decision establishing the EU position on the errors and omissions to be addressed in a Joint Committee Decision, you were unable to set out the UK's position. The Joint Committee Decision concerns EU law which will continue to apply in Northern Ireland after transition. Why was the Government not able to set out its position sooner, to allow for proper scrutiny by Parliament? What has changed in the version that is to be agreed by the Joint Committee?

15. Based on our analysis, it seems that the EU and the UK have agreed to delete two acts from Annex 2 of the Protocol on Ireland/Northern Ireland and to add only part of the Single Use Plastics Directive. Please explain the reasons for these deletions and additions.

The UK Government has always been clear that any proposals from the EU to amend the Protocol using the mechanism established in Article 164(5)(d) of the Withdrawal Agreement would be considered in the round. This meant that these proposals had to be considered as part of the broader discussions in the Joint Committee. It is because of this that we were not able to provide details at an earlier stage.

We have also always been clear that our approach to implementing the Protocol will be pragmatic, proportionate and seek to minimise burdens for traders, while upholding the integrity and smooth functioning of the UK internal market. The amendments to the Northern Ireland Protocol we have agreed do that.

The package includes some minor changes to remove or limit provisions from the scope of the Annex. For example, we have agreed to remove Regulation 443/2009 and Regulation 510/2011 from Annex 2. This allows us to fully respect Northern Ireland's place in the UK's internal market by ensuring that Northern Ireland CO₂ emissions count towards UK rather than EU targets.

In addition, the limitation in the scope of the Single Use Plastics Directive means that only those provisions relevant to the proper functioning of the Protocol have been included, minimising the impact on Northern Ireland businesses and authorities. None of these targeted amendments occasion any significant new burdens. Further detail was set out in the explanatory memorandum submitted to Parliament on the formal Decision.

16. With respect to customs formalities on goods moved from Northern Ireland to Great

Britain, the UK will issue a unilateral declaration that the requirements under the EU Customs Code for an export customs declaration or exit summary declaration will be 'deemed' to be met if such information on such consignments, in terms of both content and time-limits, is submitted electronically to HMRC "by other means". What obligations will this entail for carriers and traders when moving goods from Northern Ireland to the rest of the UK, and to what extent will the administrative burden on them be reduced compared to the situation if the EU Customs Code was applied?

The agreement we reached with the EU confirms that the Protocol does not require export declarations on goods moved by Northern Ireland businesses from Northern Ireland to Great Britain, aside from in some limited circumstances such as for movements covered by specific international obligations. This upholds our commitment to unfettered access. The other means by which information will be provided includes the use of existing data sources such as shipping manifests. This allows for the seamless flow of goods while maintaining our capacity for effective enforcement and tackling smuggling.

17. These [unilateral] declarations [on meat products, official certifications and on human and veterinary medicines] refer to "grace periods" of varying lengths. What happens when each of these periods expires?

Regarding meat products, the agreement removed restrictions and prohibitions placed on certain types of chilled meats when moved from Great Britain to Northern Ireland from 1 January. This six month grace period avoids immediate-term disruption, providing time to take forward the right long-term solution. Further to my answer in Parliament, the UK is determined to resolve these issues and to support a wider reciprocal UK-EU resolution of general SPS matters, as well as supermarkets and their trusted suppliers and medicines.

18. To what extent does the EU's unilateral declaration on the application of EU State Aid rules under Article 10 of the Protocol assuage the Government's concerns about the potential application of those rules to UK subsidies granted to companies outside of Northern Ireland and/or the goods sector, given that the declaration is not binding and confirms that measures which are merely "liable" to affect EU-Northern Ireland trade, rather than having an actual effect, could still be within the scope of the Protocol?

19. In the Government's view, how does the State Aid declaration circumscribe the European Commission's oversight of UK subsidies under the Protocol more tightly than the limits on its powers which are based on existing CJEU case law, and by which it would therefore have been bound in any event when exercising its powers under Article 10 of the Protocol?

The state aid declaration was made by the EU in the Joint Committee and noted by the UK. As with the other unilateral declarations, it will have legal force in interpreting the Protocol, confirming that for state aid provisions to apply, there must be a genuine and direct link to Northern Ireland, that Northern Ireland's integral place in the UK internal market must be taken into account, and that the potential effects of an aid measure on trade between Northern Ireland and the EU must be real and foreseeable. This ensures the UK will be free to design its own independent subsidy regime, subject to the unique arrangements with respect to goods trade and wholesale electricity markets in Northern Ireland.

Furthermore, the Protocol sets out that agricultural and fisheries subsidies in Northern Ireland will be exempted from EU state aid rules. The Joint Committee agreement provides significant flexibility for Northern Ireland's agricultural and fishing industries, and maintains the ability to respond to any market uncertainty and disruption.

Parliamentary scrutiny

I have noted your paper on future parliamentary scrutiny arrangements with interest and officials are considering the proposals contained in it. These proposals will need to be factored into possible wider structural reform of Committees and I am aware that this is something that the Business Managers are discussing with parliamentarians.

I would like to take this opportunity to note for completeness The Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020, which was made on 9 December 2020. The practical and unique solutions contained in the Northern Ireland Protocol can sustain only for as long as they have the consent of the people of Northern Ireland. The vital importance of consent is recognised in the provision for alignment in the Protocol to be disapplied if Northern Ireland's political representatives conclude it is no longer desirable. Embedding that recognition of consent in the Protocol was intrinsic to its acceptance by this Government, and that is why we have acted swiftly to ensure that the measures to enshrine the consent arrangements in domestic law have been legislated for last year.

I trust that this response will provide you with clarity. I look forward to appearing before your Committee on 8 February.

With every good wish,

A handwritten signature in blue ink, appearing to read 'M. Gove', with a checkmark above it.

**Rt Hon Michael Gove MP
Chancellor of the Duchy of Lancaster
and Minister for the Cabinet Office**