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Simon Hoare MP
Northern Ireland Affairs Committee
Committee Office
House of Commons
LONDON
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Dear Simon,

Monitoring and application of the Northern Ireland Protocol

You wrote to my predecessor on 7 June in relation to the Northern Ireland Affairs Committee's current inquiry into the Northern Ireland Protocol. My response is grouped under a number of discrete headings below with the aim not only of responding to your specific questions but also of setting a more general context for the issues explored.

Internal market and the impact of divergence

By way of general introduction, I have significant concern about the distinct possibility that firms in Great Britain will become dissuaded from engaging with the NI market when faced by regulatory barriers which can only increase if policies in England, Scotland or Wales move in a direction where NI options are constrained by the Protocol. The same concerns apply to international trade remedies including anti-dumping duties. At the same time, where new regulatory flexibilities are introduced into the GB market itself, and NI's options for response are limited, there will be potential effects on the operation and competitiveness of NI firms within that market. Although unfettered access commitments ensure qualifying NI goods can enter the GB market, their competitiveness could be undercut if GB manufacturers can develop products to looser standards. I am also concerned that the UK Internal Market (UKIM) Act does nothing to protect against commercial discrimination. Given the importance of the GB market to NI, these factors amount to potentially significant impacts on the Northern Ireland economy.

It is vital, therefore, that policy development in Great Britain incorporates robust evaluation and impact assessment of the potential divergence a policy would create between Protocol-derived NI standards and those operating in Great Britain. It remains unclear how such measures relate to the duties under Section 46 of the UKIM Act to have special regard for NI's place in the UK market. As EU laws applied by the Protocol are updated and replaced over time, and new policy initiatives are brought forward in Great Britain, divergence will impact opportunities for business to continue established trading arrangements.

In this connection I strongly favour collaborative working between UK and NI authorities to ensure that EU laws are implemented in a way that can comply with UK obligations under the Protocol while still facilitating, as far as possible, the avoidance of involuntary divergences between NI and GB law, regulatory provisions and practice.

I am in agreement with your assertion, then, that it is "important that changes, and any prospective changes, are monitored and identified as early as possible so that they can be properly communicated and assessed with any appropriate action taken". I would add that this sentiment applies not to EU Protocol legislation alone, but to legislation also that is taken forward in the UK context that may have the potential to create new divergence within the UK internal market in respect of which NI's ability to respond will be constrained by the Protocol.

My Department continues to seek clarity and engagement on the UK's and EU's future regulatory plans to ensure that the NI impacts – particularly in terms of competitiveness, investment and trade – are foreseen and understood. Identifying and acting upon risks of divergence is a vital requirement going forward, but this work can only be as good as the quality of the information flows and analysis undertaken as new policies are developed. It is essential, therefore, that we have timely and proper engagement from Whitehall on future regulatory plans, as well as on plans to monitor and influence EU law as it applies to NI under the Protocol.

Monitoring and tracking EU legislation

Your letter asked for information about the system that is under development for tracking and monitoring legislation contained within the Protocol. In broad terms, this is a proposed IT solution that will draw information from a variety of sources to identify new EU proposals and legislation linked to the Protocol, as well as prompting and recording action at the various stages of the required processes. Any such IT system will inevitably need to be supplemented by complementary systems to scrutinise the content of such legislation to assess potential impacts and also to review forthcoming EU legislation which may not necessarily be caught within the scope of the Protocol, but which may nevertheless impact upon it (and therefore on NI). While my officials are actively involved in contributing to the proposed design of the system, which is still at a relatively early stage, the project is led by the Executive Office and any questions as to detail and scope would more properly be directed there. It is important to note that this system will only give full coverage to legislation that falls within devolved competence; the UK Government is likely to be considering arrangements around reserved/excepted areas.

Responsibilities

The UK Government is responsible for the implementation of the Withdrawal Agreement. To ensure that this responsiblitiy is met, it will need an 'early warning' system that will provide an indication of forthcoming legislation which may impact on UK/NI responsibilities under the Protocol in sufficient time to enable assessments to be undertaken, representations to be made, guidance and communication to be considered, and implementing measures to be drafted and progressed through the relevant legislature.

Discussions have been ongoing between my policy officials and their colleagues primarily in BEIS (but also HSE and Defra) in relation to how best to engage on specific areas of work, but in the absence of a clear and defined approach from the UK Government centrally, there has been something of a patchwork approach. Department to department discussions, while valuable in and of themselves, cannot address the need for transparent, centrally agreed processes that operate consistently and coherently across NI and Whitehall departmental boundaries.

I am aware that there is ongoing engagement at a central level between the Executive Office and Cabinet Office which is seeking to address some of the uncertainties that have been identified. While initial guidance is starting to be forthcoming, it is by no means sufficient. My officials therefore continue to raise issues for clarification centrally and with Whitehall departments on strategic matters such as the interpretation of 'member state' responsibilities under the Protocol, the interface between the Protocol and the Trade and Cooperation Agreement (TCA) and the approach to the interpretation of and cross-referenced provisions under Article 9/Annex 4 instruments as regards the Single Electricity Market.

The UK Government's own assessment of its obligations in respect of NI under the Protocol must be clarified; but that assessment in itself, if it is not one that is agreed with the EU, will leave areas of continuing ambiguity. Only when a confident and clear assessment has been arrived at will it be possible for the UK Government to develop the kind of overarching strategic as well as subject specific guidance on these and other matters that is necessary.

In the absence of such guidance, officials have employed a best endeavours approach to progressing obligations on a case by case basis. Without greater clarity, requirements around complex legislation – often with both devolved and reserved elements – will however continue to be discharged at risk of duplication, requirements being missed or matters being progressed without consistency or coherence.

Capacity

In terms of my Department's capacity to deliver on the new requirements, there is no doubt that we face a challenge, albeit that its scale remains difficult to estimate in the climate of uncertainty described above. It is, however, clear that some policy areas in which Northern Ireland has tended to follow closely approaches adopted in Great Britain will be significantly impacted if divergence now emerges over which my Department has little to no control, and it becomes more difficult to work closely with and draw on the learning of GB officials to develop NI policy.

To take the example of health and safety law, vast amounts of policy formulation (with the necessary policy teams), technical, operational, and economic assessment, legal support, consultation and legislative drafting has historically taken place in GB, with resources and thinking shared with NI colleagues. If the new arrangements place the onus completely on Northern Ireland officials, for example, to implement EU Directives, and there is no or more limited ability to rely on the very significant resources available within HSE in GB (not to mention the direct influence HSE officials previously enjoyed in the EU institutions and with officials from other EU

Member States), current capacity will need to be considerably increased, at disproportionate expense, with existing economies of scale being lost.

Quite apart from the expertise of Whitehall officials, there remains a role for UK Government departments in continuing to advise both GB and, where there is limited devolved competence, NI businesses of changes, so that requirements are able to be understood and adaptations made by the business community across the UK. Taking a relevant example, my officials have been raising concerns over potentially significant changes to policy in Protocol affected areas through the current EU Chemicals Sustainability Strategy. Both business and Government will need to prepare for and adapt to these changes. The chemicals strategy will result in substantial changes to numerous EU regimes within scope of the Protocol, and it is vital that the UK Government, though Defra and HSE, continues to support work in this area by advising business and sharing expertise with NI officials.

A further issue of real importance for my Department is Northern Ireland's participation in the Single Electricity Market on the island of Ireland, which is dealt with by the Protocol under Article 9 and Annex 4. While there is ongoing and positive engagement between DfE and BEIS officials, a range of outstanding issues remain unresolved at a time when BEIS is winding up its dedicated team. The imminent dispersal of expertise in this area represents a risk and is an example of the kind of difficulty that can arise if Northern Ireland's position under the Protocol is not properly factored into Whitehall planning. The inability to source appropriately qualified, experienced staff has beleaguered DfE energy teams for many years and the risk to delivery of policy objectives is only heightened by these circumstances.

It should be clear from the above that I am concerned generally that access to the vast store of Whitehall expertise and invaluable linkages into the EU, upon which my officials have historically been able to rely, will be lost over time, particularly if the UK Government shifts to adopt policy which differs materially from that which will apply in Northern Ireland by virtue of the Protocol. To be clear, if new policy is pursued in areas where Northern Ireland is unable to follow, Whitehall officials will inevitably be focused on the emergent GB agenda, leaving Northern Ireland's comparatively small cadre of officials unable to benefit from the co-operation and knowledge-sharing that has been a hallmark of intra-UK relationships until now.

Intersect between reserved and devolved matters

Your letter rightly draws attention to the need for clear processes for dealing with legislation that impacts on both reserved and devolved matters. Our experience is already showing that there are challenges in handling matters which, prior to EU exit, would have presented much less difficulty.

Delivery of some Protocol requirements will require a mix of reserved and devolved domestic legislation, cutting across the responsibilities of multiple UK Government and NI departments. While to date UK departments have taken lead and co-ordinating roles where it has been appropriate to do so, there is nothing concrete to suggest that this is indicative of the handling of similar processes in the future. The absence of a clear policy lead for some of this work in Northern Ireland also illustrates the difficulties that will arise where policy matters previously led largely by Whitehall, and set within a coherent UK context at 'member state' level, will require a more

active involvement of NI officials who currently lack the depth of policy and legal knowledge and experience of Whitehall counterparts who have been used to dealing with these matters.

Assembly business

My Department does not have sufficient information at this stage to arrive at a reasoned assessment of the effect of the new arrangements on the business of the Northern Ireland Assembly. Information on which to base such an assessment will become more readily available when 'early warning' systems are in place. These should be able to facilitate the kind of forward look necessary to project impacts on Assembly business across the remits of each of the Northern Ireland departments.

Concluding remarks

In summary, from the perspective of my Department, it is essential that there are clear arrangements, at both UK and NI level, for managing the requirements of the Withdrawal Agreement, the Protocol and the Trade and Cooperation Agreement that are based on an agreed understanding of the issues, with agreed and clearly articulated roles and responsibilities, that will enable the effective discharge of UK Government responsibilities in respect of NI under the Protocol and TCA. Reflecting the UK's responsibilities, the arrangements must allow Northern Ireland to continue to access the expertise of Whitehall, and take full account of the market impacts that will result if there is unmanaged involuntary divergence.

I would be happy to meet with the Committee should you find it useful during your visit to Belfast. If you wish to arrange this please contact my office.

Yours sincerely,

PAUL FREW MLA
Minister for the Economy