



Rt Hon Lord Frost CMG
Minister of State
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Dear David

The democratic deficit under the Protocol on Ireland/Northern Ireland, and ways to enhance Northern Ireland's voice and influence

1. In the introductory report by the Sub-Committee on the Protocol on Ireland/Northern Ireland, published in July 2021, we drew attention to “the pervasive sense that the Protocol creates a democratic deficit, in that significant aspects of EU law with wide-ranging political and economic implications apply to Northern Ireland subject neither to UK Government participation in the EU institutions, nor to consent from parliamentarians either at Westminster or Stormont.” We concluded that “while there are mitigating steps that can be taken ... there is no apparent way to eliminate the democratic deficit” under the Protocol as it currently operates.
2. While we acknowledged that steps to mitigate the effect of the democratic deficit are insufficient in and of themselves, the Committee nevertheless endorsed means to maximise Northern Ireland's influence in relation to the Protocol both within the UK and with the EU, including:
 - Strengthening Northern Ireland's voice in Westminster and Whitehall, including through the work of this and other Committees, and the Common Frameworks programme;
 - Formal and informal mechanisms for dialogue and engagement between the Northern Ireland Executive and Assembly, and the EU institutions;
 - Strengthening the formal role of Northern Ireland Executive Ministers in the Withdrawal Agreement Joint Committee and other UK-EU governance bodies;
 - Using the UK-EU governance mechanisms as a means for formal and informal consultation with Northern Ireland stakeholders, and for assessing the impact of EU legislation in Northern Ireland;
 - Establishing mechanisms for the EU institutions to factor in the implications for Northern Ireland of their actions, including an early warning system to flag up Northern Ireland-related concerns;
 - The key role of the Northern Ireland Executive in maximising Northern Ireland's influence, and of its members working together to promote Northern Ireland's collective interest both to the UK and EU;

- The potential role of the intergovernmental institutions established under the Belfast/Good Friday Agreement, including the North South Ministerial Council, the British-Irish Council and the British-Irish Intergovernmental Conference, to discuss, by agreement of all parties, issues of mutual interest and concern in relation to Brexit and the Protocol; and
 - The potential role of the Irish Government in facilitating dialogue between the UK Government and the Northern Ireland Executive on the one hand, and the EU on the other.
3. We stated that we intended to “return to this issue ... [and] consider proposals to maximise Northern Ireland’s influence in more detail in the coming months.”
 4. In its formal response to the Committee’s report, the Government stated that it would “welcome any further views from the Committee regarding options for how these arrangements can be bolstered, alongside those proposals we have set out”. It is in that spirit that we write to you today, by summarising our further findings on this issue. As we stated in our introductory report, while some of us support the Protocol, others of us oppose it in principle, and our conclusions are without prejudice to those positions.
 5. In so doing, we reflect on the proposals contained in the Government’s July Command Paper on the *Northern Ireland Protocol: the way forward*, the EU’s October ‘non-paper’ on *Engagement with Northern Ireland stakeholders and authorities*, oral and written evidence provided to the Committee during the autumn, and a seminar hosted by the Committee on 3 November with key stakeholders, including Northern Ireland business and civic society representatives, academic experts, and parliamentarians from across the political spectrum from Westminster, the Northern Ireland Assembly, the Irish Oireachtas and the European Parliament.
 6. Although we acknowledge their importance and relevance, in view of the discrete and legally complex issues that they give rise to, this letter does not reflect on the Government’s broader proposals regarding governance and the jurisdiction of the CJEU in Northern Ireland, as set out in its Command Paper. We will return to these issues separately.

The underlying issue

7. We began by asking our interlocutors to define the underlying issue. Representatives of the Unionist political parties at our 3 November seminar stressed that the democratic deficit was an inherent flaw within the Protocol that could only be mitigated, not fully resolved. They said that, under the Protocol, Northern Ireland had become a rule-taker, with implications for the devolution settlement, Northern Ireland’s constitutional status and community stability. Some warned that more fundamental changes to the Protocol, or even its outright removal, were therefore required to deal with the issue.
8. Others, including Nationalist politicians, noted that Brexit itself had disturbed the delicate set of North-South and East-West inter-relationships, and stressed that the tensions that had arisen could only be resolved on the basis of a relationship of trust between the UK and the EU. The EU in turn had an obligation to adopt a more flexible

approach taking Northern Ireland's particular circumstances into account. It was only then that the potential benefits of the Protocol in terms of access to the EU Single Market could be realised.

9. Professor Peter Shirlow, Director of the University of Liverpool's Institute for Irish Studies, said that, since 1998, Northern Ireland had "created its own way of moving on and moving out of conflict. ... It is a place that is going in a certain direction, on a certain journey, and what comes along is this process where something is done to you from outside. ... What has come out of all this is the importance of the totality of the relationships. ... All those things, in many ways, have been lost in these multiple rabbit holes of technocratic laws, regulations and rules".
10. Professor Ronan McCrea, Professor of Constitutional and European Law, University College London, agreed that "there is a problem in principle" with a democratic deficit under the Protocol: "There are no MEPs from Northern Ireland. There is no Minister representing Northern Ireland on the Council, where they are making the laws.... There is a further problem as well because we have now divided goods law from services law. Ideally for an economy, goods law and services law will dovetail together. The danger for Northern Ireland is that you will have goods law made by the EU, and Westminster or Stormont ... making services law, and they might not fit together."
11. George Peretz QC, Monckton Chambers, said that the problem of a democratic deficit "was absolutely obvious in the Protocol. Indeed, the current Government managed to insert the consent provisions in 2024, because they had identified this as an issue. It seems to be a perfectly reasonable political position to say that those are good as far as they go, but that they do not go anything like far enough. Nobody can say that the problem was not obvious. It was absolutely obvious, and the current Government were well aware of it when they signed the Protocol."
12. Dr Sylvia de Mars, Senior Lecturer, and Colin Murray, Reader, Newcastle Law School, University of Newcastle, likewise noted that "the democratic deficit inherent in the application of such a large body of EU law in Northern Ireland without representation within EU institutions has been addressed within the Protocol by the Article 18 'Stormont lock', but Assembly votes on the overall operation of the Protocol are not the same as active involvement in law making."
13. **We repeat the conclusions of our introductory report that the Protocol, as a consequence of Brexit, has created a democratic deficit, in that significant aspects of EU law with wide-ranging political and economic implications apply to Northern Ireland, subject neither to UK Government participation in the EU institutions, nor to consent from parliamentarians either at Westminster or Stormont. While steps to enhance Northern Ireland's voice and influence are necessary, they are insufficient in and of themselves to resolve the democratic deficit under the Protocol as it currently operates.**
14. In that context, we now turn to the UK and EU proposals to address this issue.

The Government's proposals

15. The Government's July 2021 Command Paper stated, under the heading *Consultation and legislative processes*:

"We should also take the opportunity to ensure that in any areas where EU law is applied or replicated in Northern Ireland under a rebalanced settlement, there are more robust arrangements to ensure that, as rules are developed, they take account of their implications for Northern Ireland—and provide a stronger role for those in Northern Ireland to whom they apply (including the Northern Ireland Assembly and Executive, and wider Northern Ireland civic society and business). Of course, for as long as some legislation affecting Northern Ireland continues to be made outside the United Kingdom, the consent mechanism will need to continue to apply."

16. In the debate on the Committee's introductory report on 13 September, it was pointed out that the Government's proposals in this area were less developed than other aspects of the Command Paper. You stated in response:

"The issue of engagement of the Northern Ireland institutions in this process, is one of the most sensitive of all and I do not think it would have been right for us to set out a specific way forward in the Command Paper. The difficulty we have is the lack of democratic consent for specific measures as they come through from the EU's law-making process. At the moment those are imposed without consent. We are proposing a reordering of the governance arrangements of the Protocol so that the consent, if it exists in Northern Ireland for such measures, can be more real, meaningful and based on genuine debate. There are a number of ways of achieving that ... and that is a pre-eminently political question for people in Northern Ireland, as well as one for the UK Government. That is why we have set out the issue without proposing a specific way forward, but it is very much an issue for discussion,"

17. In its subsequent response to the Committee's July introductory report, the Government acknowledged the democratic deficit, and a "sense that arrangements are being decided by institutions and framework without a clear thread through to the people of Northern Ireland." By way of mitigation, the response drew attention to existing provisions in the Protocol and previous commitments by the Government, including:

- The provisions of Article 18 of the Protocol, on 'Democratic consent in Northern Ireland', whereby "Northern Ireland has the choice, albeit after four years, to decide whether it wished to continue having laws imposed on it by another entity."
- The Government's existing commitment that representatives of the Northern Ireland Executive be invited to be part of the UK delegation in any meetings of the Withdrawal Agreement Joint Committee or Specialised Committee on Ireland/Northern Ireland where Northern Ireland-specific matters are being discussed, and which are also being attended by the Irish Government as part of the EU delegation.
- The invitation to a representative from the Northern Ireland Executive to attend meetings of the Joint Consultative Working Group. However, the Government response acknowledged that this body "is not yet operating as effectively as it could."

18. The response did not make any specific additional proposals for addressing the democratic deficit. However, it did appear to rule some solutions out, as:
“we do not believe that providing for Northern Ireland’s representation within the structures of the EU institutions is in any sense the right way forward. Northern Ireland is part of the UK, which is not a Member State of the EU. It would not in any way be reassuring to those concerned about their identity and Northern Ireland’s place within the UK if Northern Ireland were to be pulled further into the EU’s systems and processes.”

19. We welcome your acknowledgement of the democratic deficit under the Protocol, and the problems it gives rise to. However, we regret the lack of specific proposals to address this issue in the Government’s Command Paper and subsequent statements. While we agree that engagement with Northern Ireland institutions and stakeholders is a sensitive issue, there remains a need to propose a specific way forward. Therefore, the Government should, on the basis of full consultation with the Northern Ireland Executive, together with representatives of all communities in Northern Ireland, civic society and other stakeholders, bring forward proposals to address this issue. What update can you give us on the evolution of the Government’s analysis and proposals to address the democratic deficit since its Command Paper was published? Can you specify which proposals the Government is ruling out on the basis that they would provide for “Northern Ireland’s representation within the structures of the EU institutions”?

The EU’s proposals

20. In its ‘non-paper’ on *Engagement with Northern Ireland stakeholders and authorities* published on 13 October, the European Commission acknowledged the “real interest in Northern Ireland for greater transparency and for Union measures to take account of implications for Northern Ireland.” On the basis of discussions with businesses, civic society groups and public authorities in Northern Ireland, it set out what it described as “effective and strategic solutions to enhance engagement with Northern Ireland authorities and stakeholders, within the framework of the Protocol.”

21. As with the Government Command Paper, the Commission non-paper highlighted “what already exists under the Protocol in this regard”, notably the Joint Consultative Working Group, the Withdrawal Agreement Joint Committee and the democratic consent mechanism in Article 18. It also set out six strands for further action:

- Increasing transparency: the Commission proposed a website showing EU legislation applicable to Northern Ireland, which could also include information on pending public consultations for relevant measures.
- The work of the Joint Consultative Working Group. Like the Government, the Commission acknowledged the necessity of “making it work better” as a forum for information exchange and consultation with Northern Ireland authorities. The Commission proposed structured groups with participation by experts from EU and UK/Northern Ireland authorities to discuss EU measures relevant to the Protocol, with the confidentiality requirement lifted, and the possible publication of a summary of the minutes, including explanations on specific measures.

- Fora for structured dialogue between EU institution and UK experts with Northern Ireland authorities and stakeholders, including civic society and business, experts in the EU institutions, and UK counterparts (including Northern Ireland authorities), in order to establish a “dedicated space for dialogue between Northern Ireland stakeholders and experts in certain fields (e.g. customs, sanitary and phytosanitary measures, and environment) to allow for the views of Northern Ireland stakeholders to be expressed” and for a better mutual understanding of EU rules and their impact on Northern Ireland. Such meetings could be structured around the meetings of the Ireland/Northern Ireland Specialised Committee and/or the Joint Consultative Working Group.
- Structured dialogue between Northern Ireland business and civil society stakeholders and the UK and EU co-chairs of the Withdrawal Agreement Joint Committee.
- Participation of stakeholders in meetings of the Ireland/Northern Ireland Specialised Committee, which “should be used as a platform to engage with wider Northern Ireland civic society and business”, to ensure their concerns are heard.
- Stronger links between the Northern Ireland Assembly and the EU-UK Parliamentary Partnership Assembly. The Commission suggested further engagement with the European Parliament “to see how the idea of a Northern Ireland sub-structure would work.”

22. Dr Sylvia de Mars and Colin Murray stated that “on engagement, the EU proposals are limited: they indicate that greater deliberation is possible within the Withdrawal Agreement’s structures, but do not go so far as to offer pre-legislative consultation to Northern Ireland’s representatives. This falls short of what is provided to EEA member states.”

23. The Ad-Hoc Group for North-South and East-West Cooperation noted that the EU’s proposals contained more detail than the Government’s. Nevertheless, as we set out below, they too felt that the EU should have gone further.

24. Participants at the Committee’s 3 November seminar broadly welcomed the EU’s proposals, as far as they went. However, several participants said that more significant steps were needed to maximise Northern Ireland’s voice and influence. Unionist politicians warned that a formalised relationship with the EU institutions could exacerbate political tensions by creating a perception that Northern Ireland was being drawn further into the EU (and Irish) orbit. Others stressed that the measures proposed by the EU, while potentially beneficial, were not sufficient to address the core issues of concern around a democratic deficit.

25. **We welcome the proposals in the EU’s non-paper on *Engagement with Northern Ireland stakeholders and authorities*, as far as they go. We particularly welcome the proposals for greater transparency of the Withdrawal Agreement Joint Committee, Ireland/Northern Ireland Specialised Committee and the Joint Consultative Working Group, whose work hitherto has remained opaque and largely hidden from view. We share both the Government and the EU’s analysis that these bodies can and should work**

better, and have the potential to be fora for formal and informal engagement with Northern Ireland authorities and stakeholders. What practical steps will you take to achieve this?

- 26. Greater transparency around the exchange of information on EU legislative proposals within the scope of the Protocol, both in the Joint Consultative Working Group and through a dedicated website, will also help facilitate the important work of legislative scrutiny undertaken by this Committee and our counterparts in the House of Commons and the Northern Ireland Assembly. Will you also commit to sharing with this Committee detailed information shared by the Commission with the Government about EU legislation applying to Northern Ireland, including in the Joint Consultative Working Group and through a dedicated website?**
- 27. We welcome in principle proposals for enhanced interparliamentary engagement between the Northern Ireland Assembly, UK Parliament and the European Parliament in relation to the Protocol. However, any specific proposals to formalise such engagement, for instance through a Northern Ireland sub-structure of the UK-EU Parliamentary Partnership Assembly, need to be handled sensitively, taking into account the views and concerns of all political parties represented in the Northern Ireland Assembly. We also note that the Parliamentary Partnership Assembly's remit is the operation of the Trade and Cooperation Agreement, rather than the Protocol *per se*.**
- 28. What update can you give us on the Government's dialogue with the EU on the two sides' respective proposals for maximising Northern Ireland's voice and influence? Does the Government support the EU's six strands for enhanced engagement? If so, what steps will the Government take to ensure that enhanced mechanisms for transparency, engagement and consultation are put in place and operated successfully?**
- 29. We agree with our witnesses that the EU's proposals, while a step in the right direction, are insufficient to remove the democratic deficit under the Protocol. In particular, as we set out in our introductory report, and as the Preamble to the Protocol acknowledges, all sides have an obligation to ensure that the operation of the Protocol takes into account the delicate balance between North-South and East-West relations as provided for under the Belfast/Good Friday Agreement. What further steps, in the Government's view, are necessary to address this issue?**

Proposals by Northern Ireland stakeholders and experts

- 30. Various Northern Ireland stakeholders and experts put forward their own proposals to mitigate the democratic deficit and enhance Northern Ireland's voice and influence. The Ad Hoc Group for North-South & East-West Cooperation, the Northern Ireland Business Brexit Working Group, and the Northern Ireland Civic Working Group on the Protocol shared with the Committee their joint proposal to the UK and the EU. This set out five conditions for effective civic engagement: accountability; balanced inclusivity;**

dedicated remit, rules and resources; meeting management; and access to information/expertise. It also set out five areas of outstanding need around the Protocol that civic engagement mechanisms can help address: information; evidence; consultation; representation; and transparency.

31. The joint proposal advocated the following six mechanisms for civic engagement:

- A joint UK-EU communication commitment on the Protocol;
- A joint UK-EU public information portal on the Protocol;
- An independent Rapporteur on the operation of the Protocol;
- Expert working groups under the Joint Consultative Working Group;
- A Social and Economic Committee on the Protocol; and
- A Standing Citizens' Forum on the Protocol.

32. In its written evidence to the Committee, the Ad-Hoc Group for North-South and East-West Cooperation noted that the EU's non-paper addressed some of its concerns, and touched on proposals made by the Centre for Cross Border Studies for the identification of contact points for civic society organisations with the UK-EU governance bodies, an outline schedule of meetings between them, and publication of agendas of such meetings. However, they were concerned at the lack of reference to "representation from civic society organisations in the Republic of Ireland".

33. What is your response to the six mechanisms for civic engagement set out in the joint proposal to the UK and EU by the Ad Hoc Group for North-South & East-West Cooperation, the Northern Ireland Business Brexit Working Group, and the Northern Ireland Civic Working Group on the Protocol? Do they present a basis for enhanced engagement with Northern Ireland stakeholders in relation to the operation of the Protocol?

34. Participants in the seminar hosted by the Committee on 3 November put forward a variety of proposals, some of which are also reflected in the Commission non-paper, although others go further. These included:

- Greater transparency over proposed new EU legislation within the scope of the Protocol.
- An early warning system to allow specific issues relating to Northern Ireland to be flagged up and taken into account.
- A formalised structure for Northern Ireland engagement with the EU policy-making process.
- A willingness by the EU to show flexibility in the application of EU law to Northern Ireland, where its particular circumstances need to be taken into account.
- Providing a means for the Northern Ireland Assembly to express a collective view or decision on EU legislation, for instance via pre-legislative consultation or a Legislative Consent Mechanism.
- A formal commitment by the UK Government to take account of the implications for Northern Ireland of its domestic policy proposals, in particular where they may lead to regulatory divergence between England/Great Britain and Northern Ireland.

- Enhanced engagement, including through statutory consultation and impact assessments, with business and other stakeholders about the implications of EU regulations applying to Northern Ireland.
- Enhanced engagement with civic society about the impact of the Protocol.
- Structured engagement with Northern Ireland stakeholders by the Withdrawal Agreement Joint Committee, the Ireland/Northern Ireland Specialised Committee and the Joint Consultative Working Group, and greater input into these structures by Northern Ireland Executive Ministers.
- Enhanced use of the intergovernmental mechanisms established under the Belfast/Good Friday Agreement, including the British-Irish Council, the North South Ministerial Council, and the British/Irish Intergovernmental Conference, as well as activating the proposed civic forum dimension under the Agreement, to discuss Protocol-related issues, and to ensure a balance is retained between the North-South and East-West dimensions of the Agreement.
- Providing Northern Ireland with an equivalent mechanism for engagement with the EU as provided for EEA/EFTA States.
- Formal and informal mechanisms for engagement with MEPs, for instance through observer status for MLAs on European Parliament Committees.
- A Northern Ireland sub-structure for the Parliamentary Partnership Assembly, including representatives from the Northern Ireland Assembly, the European Parliament and Westminster.

35. While there was broad support for many of these proposals, representatives of the Unionist political parties expressed concern that more formalised mechanisms, such as observer status in the European Parliament, or a greater role for the Irish Government in representing Northern Ireland's interests, would exacerbate political tensions.

36. Other witnesses to the Committee during the autumn set out their own proposals. Professor Peter Shirlow said that most people in Northern Ireland would be unaware of the role of the Specialised Committee and the Joint Consultative Working Group. He suggested that the Northern Ireland Assembly should set up a review panel, in which civic society would have a key role to play, to "take local ownership over future tensions, issues, and problematics, as well as successes" in relation to the Protocol, and to engage with the EU as appropriate.

37. Professor Ronan McCrea agreed that the EU institutions needed to be made aware of the concerns of Northern Ireland. He identified several possible solutions, including greater involvement of Northern Ireland Ministers and officials in the Withdrawal Agreement Joint Committee, and a structured dialogue with civic society. Structured dialogue with the Irish Government via the North South Ministerial Council, whereby "they undertook to ventilate the concerns relevant to Northern Ireland in the Council", was another possibility. However, he acknowledged the political sensitivity of a formal role for the Irish Government.

38. Jess Sargeant, Senior Researcher, Institute for Government, pointed out that, in a lot of areas, the UK Government is responsible for applying EU law with respect to Northern Ireland. This created a political difficulty in terms of engagement with the EU institutions,

as “the EU does not want the UK there and the UK does not necessarily want to be there either”. She said that more therefore needed to be done to carve out a particular arrangement for Northern Ireland civil servants or political representatives. She also stressed the importance of parliamentary scrutiny of EU law applying to Northern Ireland, including by this Committee and our counterparts in the House of Commons and the Northern Ireland Assembly.

39. George Peretz QC said that “it is quite hard within the structure of the Protocol to see how this can be addressed. The Commission paper talks about greater engagement, but, ultimately, Northern Ireland is not represented on the European Council and the Council of Ministers by a Member State, and Northern Ireland voters have no right to vote for Members of the European Parliament.” He also acknowledged that there were “obvious political issues” with suggestions that voters in Northern Ireland could vote for Irish MEPs, for instance, which would in any case be a “patch job to solve a real problem”.
40. Dr Sylvia de Mars told us that “the EU can and should go further. At the very least, what Norway has under the EEA should be on offer, and I am not clear to date that it is. Norway gets a very structured ability to provide input into EU legislative proposals. It is not the same as voting, and will not be, but it should be made clear that the EU is extremely willing to countenance that, because it seems like something that should be possible and should have been offered before now.” Notwithstanding the very different nature of Norway’s relationship with the EU compared to Northern Ireland’s, we note that in its strategy for cooperation with the EU in the period 2018-2021, the Norwegian Government has set out core principles for engagement with the EU.¹ We will explore the extent to which this may offer a model for engagement further in the coming months.
41. **We reiterate that proposals to mitigate the democratic deficit under the Protocol are insufficient, in and of themselves, to resolve the issue. With that caveat, we welcome the constructive proposals for enhancing Northern Ireland’s voice and influence in relation to the Protocol shared with us by Northern Ireland stakeholders and experts, and in particular those aimed to enhance transparency around the application of EU law to Northern Ireland, understanding of Northern Ireland’s particular circumstances, and engagement with Northern Ireland businesses, civic society and political institutions.**
42. **However, we acknowledge that more formalised mechanisms for engagement with the EU institutions would be politically contentious, and their effectiveness dependent on the willingness of the parties represented in the Northern Ireland Assembly, and representatives of all communities in Northern Ireland, to engage with them.**

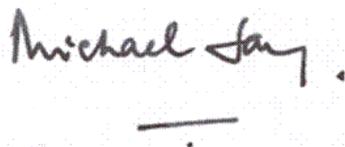
¹ https://www.regjeringen.no/en/historical-archive/solbergs-government/andre-dokumenter/ud/2018/eu_strategy/id2600561/

43. **This is all the more true of engagement with the Irish Government. In that context, while we welcome suggestions to make better use of the intergovernmental mechanisms established under the Belfast/Good Friday Agreement, the delicate balance of North-South and East-West relations provided for in the Agreement must be upheld.**
44. **What is the Government's view on the proposals outlined by our interlocutors (as outlined in paras 34-40)? Which of them do you believe are viable? Which of them are you willing to support and initiate? Would you rule any out on the grounds that that they would amount to "Northern Ireland's representation within the structures of the EU institutions"?**

Conclusion

45. **We offer these reflections to you in response to the Government's request for further views on these important issues. We would be grateful for an update on the Government's discussions with the EU on these important issues, and a response to the questions set out in this letter, by 17 January 2022.**
46. I am copying this letter to HE João Vale de Almeida, EU Ambassador to the UK; Sir William Cash MP, Chair of the House of Commons European Scrutiny Committee; Simon Hoare MP, Chair of the House of Commons Northern Ireland Affairs Committee; Sinéad McLaughlin MLA, Chair of the Northern Ireland Assembly Committee for the Executive Office; and Les Saunders and Donald Harris, Cabinet Office.

Yours sincerely,



Lord Jay of Ewelme
Chair of the Protocol on Ireland/Northern Ireland Sub-Committee