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Lord Jay of Ewelme

Chair of the Protocol on Ireland/Northern Ireland Sub-Committee

By email: hprotocol@parliament.uk

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Article 2 of the Protocol on Ireland/Northern Ireland

Thank you for your further letter of 16 December 2021 relating to Article 2 of the Ireland/Northern Ireland Protocol, which you sent in your role as the Chair of the Protocol on Ireland/Northern Ireland Sub-Committee.

I am writing to provide answers to the questions you raised following my previous letter, and some additional information from the Northern Ireland Human Rights Commission (NIHRC) and the Equality Commission for Northern Ireland (ECNI).

I hope that my response provides some further clarity on this important commitment.

Annex A: Responses to Questions Set out in the Letter of 16 December

Responsibilities of the UK Government and the Northern Ireland Executive in upholding Article 2

1. Question: We reiterate our question as to how Article 2 interacts with the devolution settlement and how it maps onto the balance of responsibilities between the Assembly and the Executive on the one hand, and the UK Government on the other, in terms of transferred, reserved and excepted powers.

Response: I would reaffirm that the Assembly and Northern Ireland Executive have responsibility for implementing Article 2 so far as it requires the UK to maintain rights in devolved areas (for example in relation to non-discrimination in employment).

Resources for the Dedicated Mechanism

2. Question: What measures have you put in place to ensure that resourcing is sustained, particularly if the Commissions' workload increases as time goes on?

Response: Funding for the dedicated mechanism work of the Commissions is already secured until 2022/23. We will continue to meet with the Commissions regularly and will work with them to secure future funding at the appropriate time.

We are committed to ensuring the proper functioning of the dedicated mechanism and will work with colleagues in the Treasury to ensure that the Commissions are provided with funding moving forward.

Definitions

3. Question: We note your statement that questions of definitions will ultimately be a matter for the domestic courts to make decisions on, but would reiterate the Commissions' concerns that without clarification their work in communicating to stakeholders what rights they have under Article 2 will be undermined. We urge you to work with the Commissions in providing this clarification. As we asked in our original letter, can you define what a "right, safeguard or equality of opportunity" is in the context of Article 2?

Response: I must reiterate that the precise scope of Article 2, in relation to the Belfast (Good Friday) Agreement, is a matter for the domestic courts.

Issues raised with ECNI and NIHRC in relation to Article 2

4. Question: We welcome your statement that the Government is working with the Jewish community and Kosher suppliers to tackle issues over access to these products. However, you do not mention what work the Government is undertaking to work with the Muslim community in terms of their access to halal products. Could you inform us of what work is being carried out in this regard?

Response: We continue to engage with both the Jewish and the Muslim community on these important issues. On your question on the Muslim community specifically, we have been engaging with them to understand the impacts for them, noting differences in experience, and will continue to do so in order to address issues that arise.

5. Question: We understand that the Government is monitoring issues raised by the Pay Transparency Directive and in relation to the voting rights of EU citizens arriving after the end of the transition period, but you did not respond to our question of how the above issues interact with Article 2. Can you provide clarity on this point?

Response: The Government's position is that where EU citizens arrive after the end of the transition period, the rights previously available under Article 22 of The Treaty on the Functioning of the European Union (TFEU) are not within the scope of Article 2 of the Protocol.

Article 22 TFEU rights apply only to EU citizens who are resident in another Member State. The UK is no longer a Member State and so Article 22 TFEU rights are no longer applicable to it in this context.

There is also now no requirement under the Protocol for EU Member States to grant voting rights to new Northern Ireland nationals arriving in the EU. Consequently, it would be irrational if Article 2 of the Protocol required the voting rights of new EU citizen arrivals to be retained in Northern Ireland when there are no reciprocal arrangements for Northern Ireland nationals arriving in the EU.

We remain committed to ensuring all the rights scoped out in the Belfast (Good Friday) Agreement are protected and we have taken steps to ensure that both the dedicated mechanism and changes to the NI Act will ensure that the Assembly and the Executive are subject to the requirement to protect those rights in the way that they develop policy and pass legislation. The Government remains committed to ensuring that matters of pay transparency are dealt with.

We will continue to monitor this Directive and to assess how it may interact with Article 2.

Engagement with the public and key stakeholders

6. Question: We welcome the Government's indication of its intention to provide a stronger role for Northern Ireland civic society in finding agreement on outstanding areas. We note your comment that the Government has published an explainer on Article 2 on its website and that you "will continue to consider further engagement with Northern Ireland on Article 2." However, we are concerned that this does not go far enough, in particular given that the Commissions were already aware of the published explainer when they called for more public engagement. What other avenues exist for the Government to intensify its engagement with the public in relation to rights under Article 2?

Response: We continue to hold regular roundtable discussions with key voices in the voluntary community sector, for example the Society of Local Authority Chief Executives Northern Ireland (SOLACE NI), faith leaders, women's sector, academics and the Unionist/Nationalist communities in Northern Ireland. These engagements continue to provide an ongoing platform for dialogue with a broad set of stakeholders on all issues relating to the Protocol; including the upholding of rights, safeguards and equality of opportunity.

7. Question: We would be interested to understand what lessons you have learned about community sentiment and the difficulties experienced by people on the ground. We would also echo the Commissions' concerns over a lack of credence given to engagement with equality and human rights stakeholders in the Government's July Command Paper. Can you also lay out the processes for the structure and regularity of engagement with equality and human rights stakeholders?

Response: Attendees at these roundtable discussions continue to welcome the opportunity to engage directly with the Secretary of State and other Ministers, and want this to continue.

Attendees have been stressing the need for the continued use of temperate language to avoid destabilising communities in Northern Ireland. Similarly, attendees have often remarked that media reporting on the Protocol can be unhelpful in that regard, which in turn highlights the importance of continued direct engagement between the Government and civic society as a channel for clear, factual communication.

We continue to hear from attendees on the need to give attention to civil society and those living in rural and border communities impacted by the NI Protocol and avoid the pitfall of solely focusing on "tariffs and trucks". This has helped to shape our wider engagements.

Representatives of both Commissions have also attended the regular roundtable discussions held between the Secretary of State and civic stakeholders. These discussions continue to take place at regular intervals in alignment with key updates or changes in the Protocol negotiations and are structured as two-way dialogues between the Secretary of State and the attendees present.

Engagement with the Ireland/Northern Ireland Specialised Committee and the Joint Consultative Working Group

8. Question: While we welcome the news that an initial meeting between the Commissions and the UK's JCWG representatives has taken place, we would be grateful for an outline of what measures the Government is taking, working with the EU, to ensure regular, structured and formal engagement with the JCWG itself. In that context, we note that the Commissions recommend that any agreement between the UK Government and the EU on the development of "structured groups" within the JCWG includes consideration being given to establishing a group that focuses on issues relating to Article 2 of the Protocol. What consideration has been given to this recommendation by the Commissions?

Response: Our overall aim on the Protocol is to resolve the very significant issues that people and businesses in Northern Ireland are facing on a daily basis. Any solution must be underpinned by the commitments made in the Belfast (Good Friday) Agreement.

As your letter highlights, in a non-paper in October the European Commission proposed the creation of "structured groups", with the participation of experts from respective authorities to discuss aspects of EU measures that are important for the implementation of the Protocol. The Government has noted that these proposals did not go as far as our Command Paper, nor cover all the areas that we believed needed to be addressed. We are currently in a period of intensive negotiations with respect to the operation of the Protocol to seek sustainable solutions to the issues we have identified.

With regard to your request for an outline of the measures to ensure regular engagement with the Joint Consultative Working Group (JCWG) itself, the Commissions already have a formal role enshrined in the Protocol in bringing to the attention of the Ireland/Northern Ireland Specialised Committee any matter of relevance to Article 2. This already provides a means of raising issues there. We will of course, though, keep under review the right mechanisms for stakeholder engagement at all levels of the Withdrawal Agreement structures. As your letter highlights, there has been contact between the Commissions and the UK Government officials who service the UK's JCWG representatives, and we expect this to continue.

9. Question: In written evidence, the Commissions have emphasised the need for clarification of how the Ireland/Northern Ireland Specialised Committee would engage with the Commissions, and with the Northern Ireland Executive, the North South Ministerial Council, and the North-South Implementation bodies, as well as how the Specialised Committee will engage with the Commissions in their role within the dedicated mechanism framework. Can you provide clarification of how this engagement will work? Can you also clarify processes to ensure there is transparency in terms of recommendations of the Specialised Committee as regards matters raised with it by the Commissions and/or the Joint Committee of the NIHRC and the Irish Human Rights and Equality Commission (IHREC)?

Response: As noted above, we are in the process of ongoing discussions with the EU regarding the operation of the Protocol. As your letter highlights, there has been contact between the Commissions and the UK Government officials who service the joint UK-EU structures under the Protocol. In addition, the Commissions maintain regular and productive contact with officials from the Northern Ireland Office.

Article 14(c) of the Protocol states that the Ireland/Northern Ireland Specialised Committee shall "*consider any matter of relevance to Article 2 of this Protocol brought to its attention by the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland, and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland*".

If the Commissions are of the view that a matter should be considered by the Ireland/Northern Ireland Specialised Committee pursuant to Article 14(c), then that matter should be raised in the first instance with the Secretariat of the Specialised Committee, which is staffed by the same UK Government officials as above. This has not so far been the case, but if so we would anticipate engagement with the Commissions regarding how the matter would be considered, including possible attendance at the meeting. The specific approach would of course depend on the nature of the issues raised. As to transparency, both the UK and EU have established the practice of publishing post-meeting statements after the conclusion of Ireland/Northern Ireland Specialised Committee meetings. There is regular attendance by the Northern Ireland Executive at all meetings of the Specialised Committee.

Divergence in rights between Northern Ireland and Great Britain, and between Northern Ireland and Ireland

10. Question: What steps will you take, working with the Northern Ireland Executive, to address gaps or inconsistencies in equality law between Great Britain and Northern Ireland? What is your response to the Commissions' call for equality

law in Northern Ireland to be harmonised in a way that strengthens and simplifies equality rights and protection?

Response: Equality law is devolved and is a matter for the Northern Ireland Executive. Any changes to equality laws in Northern Ireland should be made in the Assembly.

The commitment in Article 2 of the Protocol, contains a series of protections against discrimination enshrined in EU law, in the form of 6 EU Directives. Those protections, which have all been transposed into the domestic legal order in Northern Ireland, are listed in Annex 1 to the Protocol. If the EU decides to amend or replace those directives to improve the minimum levels of protection available, relevant domestic law in Northern Ireland will be amended, as necessary, to reflect any substantive enhancements to those protections. This will ensure that Northern Ireland will not fall behind minimum European standards in anti-discrimination law.

11. Question: The Commissions also expressed concern about inconsistencies in equality law between Northern Ireland and Ireland, whereby laws that strengthen equality protections in the EU will be transposed into domestic law in Ireland, and “will lead to a divergence in the rights of individuals in Northern Ireland and the Republic of Ireland.” What assessment has the Government made of the potential implications of such divergence on Northern Ireland and for the Belfast/Good Friday Agreement?

Does the Government intend to keep pace with the EU on laws affecting equality and human rights outside of those listed in Annex 1 to the Protocol? If so, how might the Government do this? If not, what implications will this have for Northern Ireland, in particular in terms of divergence in rights and equality law between Northern Ireland and Ireland?

Response: The recognition and protection of rights are fundamental values of the UK. Our human rights framework offers comprehensive, well-established, and effective protections within a clear constitutional and legal system.

Guarantees of equality and rights, which recognise the unique circumstances of Northern Ireland, are a fundamental part of the Belfast (Good Friday) Agreement, to which the Government is firmly committed.

The Government’s Command Paper and the European Commission’s four ‘nonpapers’

12. Question: We are also concerned about the potential adverse impacts of issues relating to assistance dogs travelling from Great Britain to Northern Ireland

which, without an urgent solution, could also impact the rights of disabled people. We welcome continued engagement with the EU on SPS issues, but, as stated above, we are concerned that issues relating to access to Kosher and halal food have not been resolved. The Commissions told us that representatives from the Jewish community had raised concerns that the new arrangements have meant that the Jewish community has been struggling to get some types of Kosher food and if this is not addressed soon, this will “impact the viability of their historic community in Belfast.” They also told us that concerns had been raised about the “potential impact on the Muslim community in Northern Ireland on accessing halal food and ritual items should further checks on goods be introduced when the grace period ends.” What progress have the Government and the EU made towards reaching agreement on a long-term, sustainable solution to these issues?

Response: We share the concerns of the Commissions regarding the impact of the Protocol in some of the areas noted.

Under full implementation of the Protocol, owners cannot take their pets, including assistance dogs, with them when travelling between Great Britain and Northern Ireland without costly paperwork and unnecessary veterinary treatments. This is despite the UK meeting all the requisite biosecurity standards. Under standstill arrangements there are currently no routine physical or documentary checks on pet travel within the UK, but we have been clear that a more durable solution is needed so that pet dogs (including assistance dogs), cats and ferrets remaining in the UK should be able to move freely between Great Britain and Northern Ireland. This would ensure ease of movement for pets and assistance dogs, while meeting existing UK legal requirements such as microchipping for dogs.

We also share concerns that Northern Ireland’s Jewish community has struggled to obtain kosher food. It cannot be right for people in Northern Ireland to be denied vital products from the rest of the UK. That is why we have proposed a common-sense solution – goods going to the EU should go through the necessary customs and regulatory formalities and those staying in the United Kingdom should not. This means there should be no checks or documentation for goods moving from Great Britain to Northern Ireland and staying there.

Our priority is to protect peace and stability in Northern Ireland. We want a negotiated solution but if we have to use legitimate provisions including Article 16, the UK Government is willing to do that. However, there is a deal to be done, and the UK and the EU are capable of working out a solution which delivers for the people of Northern Ireland.

Consultation on the Independent Human Rights Act Review

13. Question: Finally, following the launch of the Government's consultation on proposals to reform the Human Rights Act, what assessment has the Government made of the interaction between the proposed changes to the Human Rights Act and the provisions of Article 2 of the Protocol and the Belfast/Good Friday Agreement?

Response: The UK Government is wholeheartedly committed to the Belfast (Good Friday) Agreement. This consultation is about the Government's proposals to reform the Human Rights Act 1998.

The Government's proposals for a Bill of Rights will ensure that human rights continue to be fully protected in Northern Ireland, and throughout the rest of the UK, through an improved framework that provides greater legal certainty and respects our constitutional principles. These proposals will be fully in line with our commitments under the Withdrawal Agreement, the Northern Ireland Protocol and the EU-UK Trade and Cooperation Agreement.