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Lord Jay of Ewelme
Chair of the Protocol on Ireland/Northern
Ireland Sub Committee
House of Lords
London
SW1A 0AA

25 March 2022

Dear Lord Jay,

THE DEMOCRATIC DEFICIT UNDER THE NORTHERN IRELAND PROTOCOL

Thank you for your letter of 16 December regarding the democratic deficit under the Northern Ireland Protocol, originally sent to Lord Frost. Please accept my apologies for the delay in responding.

As we have made clear, particularly since the publication of our Command Paper in July, the fact that neither Northern Ireland nor the UK more broadly gets any say in the way EU legislation is imposed on Northern Ireland remains a fundamental issue of democratic accountability. The Government agrees with the Committee's assessment that the Protocol has established a democratic deficit which needs to be addressed if the Protocol is to be put on a sustainable and durable footing.

Your letter raises a number of important points which we will reflect on as we continue to advocate for the urgent need for more flexibility from the EU on our conversations. I have also set out specific responses to your points below. As a general point – and this is, in part, a consequence of the time that has passed since you wrote – I note that several of your suggestions rely on a functioning Northern Ireland Executive, as well as full Northern Ireland participation in North-South institutions. The fact that many are not possible under present circumstances shows the severe impact the Protocol is having on the Belfast (Good Friday) Agreement structures, and broader stability in Northern Ireland.

As you allude to in paragraph 6 of your letter, the imposition of EU laws in Northern Ireland is inextricably linked to the jurisdiction of the CJEU, which is the final arbiter of EU law in the EU's legal system. We have since received a letter from your Committee on this subject, to which I will respond separately.

I am grateful for your careful and considered examination of these important issues.

Yours ever,

A handwritten signature in blue ink, appearing to read 'James Cleverly', written in a cursive style.

**The Rt Hon. James Cleverly MP
Minister of State for Europe and North America**

Government response to specific questions or recommendations

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.

1. As stated previously, the Government agrees that the Protocol has created a democratic deficit, with the people and institutions of Northern Ireland having no input into many of the rules which are applied in Northern Ireland. While it was important to secure the inclusion of the vital democratic consent provisions at Article 18 of the Protocol, meaning that the continued operation of the trade elements of the Protocol is a matter for representatives elected by the people of Northern Ireland, the provisions of Article 18 do not in and of themselves address their concerns. That is why, as you have noted, we are taking forward additional discussions with the EU to provide a straightforward role for stakeholders and institutions on Northern Ireland and informing the rules that apply to them.
2. It is important to note that the imposition of EU law in Northern Ireland was not a *necessary* consequence of our departure from the EU – any more than our departure required dynamic alignment, or the 'backstop'. The imposition of EU law was a consequence of the EU's unwillingness to accept other solutions, and also a reflection of the fact that the Trade and Cooperation Agreement (TCA) had not yet been negotiated (since then, as you know, the EU has accepted lighter-touch solutions on several issues in the context of the TCA, including governance and subsidies/state aid). It is natural that these arrangements be reflected in Northern Ireland as they are in the rest of the UK.

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"?

3. While you are right to refer to the section in the July 2021 Command Paper on 'Consultation and legislative processes', it is also important to recognise that we

proposed significant substantive changes which would have reduced the democratic deficit. These might also be welcomed as solutions to the problem that the Committee acknowledges. For example, our proposal of a dual regulatory model (see paragraph 59), which would give businesses a choice of whether to manufacture in accordance with UK or EU rules – noting that goods destined for the Republic of Ireland, or elsewhere in the EU Single Market, would need to comply with EU rules. Or our proposed sanitary and phytosanitary facilitations, which would reduce the ambit of EU law in determining which agrifood goods Northern Ireland consumers can receive from the rest of the UK.

4. As you note in your letter, Lord Frost has also previously given an account of this (in a debate on the Committee's introductory report on 13 September):

“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,”

5. As noted in Lord Frost's statement of 17 December, there remains a fundamental issue of democratic accountability which has not been resolved, despite some discussions on these and related issues. Those discussions are ongoing but we need to see much more ambition from the EU to engage on the changes necessary to give Northern Ireland institutions and stakeholders a meaningful role in shaping the rules applicable in Northern Ireland.

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?

6. As the Committee has rightly identified, both the Government and the EU want to see the joint structures under the Withdrawal Agreement and the Protocol work as effectively as possible. How to achieve this in practice is subject to ongoing discussions with the EU, following which we will be able to set out further details.
7. However, the Committee will no doubt appreciate that, under the Protocol as it

stands, these bodies do not have any formal powers to be able to consider and adapt rules that apply in Northern Ireland, to take account of its unique context. Therefore, while they are fora for discussion, it is difficult to see currently how they will improve the democratic deficit problem.

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?

8. We recognise the importance of transparency about new EU legislative proposals within the scope of the Protocol in facilitating the important work of the scrutiny committees in both Houses. We would of course be happy to consider sharing information on particular legislative proposals where they are of interest to the Committee. Some information may need to be shared on a confidential basis. In any event, good relationships exist between Government officials and the Clerks of the Committees and we will continue to provide information through that channel, in light of our wider scrutiny commitments already made by Lord Frost when he wrote to you on 23 September, including an undertaking to advise your officials when the EU proposes new legislation be added to the Protocol annexes.
9. However, it is important to note that this is dependent on what is made available through the structures of the Withdrawal Agreement. As my predecessor made clear, for example, we were only able to look at the EU's proposals on human medicines after their publication in December. So progress here ties into us being able to develop those structures so that they can serve as a strong forum for dialogue and detailed consideration of the impact of legislation on Northern Ireland.
10. The EU was clear that their proposed amendments to their medicines rules were very much an exception, so we do not anticipate that the EU will routinely be making rules with a predominant focus on Northern Ireland.

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.

11. The Government agrees that any such engagement would need to be handled sensitively, in particular with reference to the European Parliament's usual

relationship with sub-national legislatures. The UK delegation to the Parliamentary Partnership Assembly will represent the views of the whole UK, including the views of Northern Ireland. The European Parliament itself has a number of other bilateral delegations to non-EU countries, and these always focus on relations with national parliaments.

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?

12. With regard to the EU's proposals, our overall assessment is similar to that of the Committee. They include some useful proposals but do not match the level of ambition represented in our Command Paper, particularly regarding the wider governance framework, and they would not have any impact on the democratic deficit if they are simply appended to the existing structures. As regards the steps the Government will take, much will depend on the outcome of discussions with the EU. We will continue to update the Committee on these issues.

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?

13. We fully agree that 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, as the Protocol itself acknowledges. As the Prime Minister noted in his foreword to the Command Paper, our proposals are about finding a new balance in the Protocol, given our concern that the delicate balance is not being respected. As recent events have shown, the continued operation of the Protocol has had major consequences for the Belfast (Good Friday) Agreement structures. There have been significant consequences for the structures under Strand 1 (as we have seen with the withdrawal of the First Minister, precluding the full operation of the Executive) and under Strand 2 (with the withdrawal of some parties from North-South institutions).

14. We want a fair, proportionate, and durable solution that works for all sides. We are clear that this requires significant changes to the Protocol. There are two unions and two single markets: both must be respected and that is the only route to a sustainable solution. Our solutions are simple and pragmatic: a green channel for goods in and out of Northern Ireland, meaning no checks or documentation for goods moving between GB and NI; control of tax and spend policy in Northern Ireland, with appropriate safeguards; ending the role of the EU Court of Justice as

the final arbiter of disputes; and goods in Northern Ireland being able to be produced to EU or UK standards, as long as they remain in the UK.

15. This should be achievable and would deliver the stability that businesses and, more importantly, communities in Northern Ireland need. But of course, the Protocol has a safeguard clause (Article 16) in it precisely because of the sensitivity of the issues at play. And that clause remains on the table if pragmatism does not prevail. We hope in our discussions with the EU to work towards a negotiated solution to sort out these very real issues for the people of Northern Ireland.

31. 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?

16. We are grateful to 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 for their thoughtful suggestions as regards civic engagement on the Protocol.
17. As you will be aware, some of the mechanisms in the groups' proposals, such as a public information portal on the Protocol, expert working groups under the Joint Consultative Working Group, increased transparency of the Withdrawal Agreement structures, and structured dialogues with stakeholders were included (or closely reflected) in the EU's non-paper titled '*Engagement with Northern Ireland stakeholders and bodies*¹', published in October, which are part of ongoing discussions between the UK and EU about the operation of the Protocol. As to the other proposals, it will be important to review the outcome of our discussions with the EU to ensure that we have the right framework of structures to receive input from a range of voices in Northern Ireland. As we noted above, any amount of engagement will not solve the democratic deficit issue if it is simply appended to the existing structures and processes. There must also be structures that enable proper consideration and adaptation of rules to the Northern Ireland context.

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.

¹ https://ec.europa.eu/info/system/files/attachment_iv_ni_participation_non-paper.pdf

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.

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"?

18. As you note, some of the proposals put forward by those who spoke to the Committee are reflected in the Commission's non-paper. Some also rightly stress the need for early engagement between the UK and EU to take account of the unique context of Northern Ireland as new rules which affect Northern Ireland are brought forward. Given the ongoing discussions with the EU on these issues, we hope the Committee will appreciate that we would like to refrain from detailed commentary on the proposals at this stage.
19. Unfortunately, even at a very high level, it is clear that some of these mechanisms do not appear to be viable under current circumstances, particularly given the EU's reluctance to share information on proposed legislation with the UK as a 'third country', and absent broader changes to the Protocol and how it applies rules in Northern Ireland.
20. We are grateful for the careful consideration that your interlocutors have brought to these issues, which will help to inform ongoing discussions with the EU. And we will of course welcome further discussions with stakeholders subsequent to our ongoing discussions with the EU.