

17 Kildare Street,  
Dublin 2.  
8<sup>th</sup> November 2021

Ambassador Paul Johnston,  
British Ambassador to Ireland,  
British Embassy,  
29 Merrion Rd,  
Dublin 4.

Your Excellency,

On behalf of our National Council and our many members who export to and import from the United Kingdom, I wish to register our concern that the United Kingdom is considering invoking Article 16 of the Protocol on Ireland and Northern Ireland, ostensibly on the grounds of the role of the ECJ in Northern Ireland affairs.

Since the signing of the Protocol, ISME has not heard the ECJ issue raised from a single one of our cross-border members. Nor in our contacts with other trade representatives in Northern Ireland has this issue been raised. We are of course aware that objections to the Protocol have come from some quarters in Northern Ireland, and that they have invoked the Belfast Agreement in doing so. It is noteworthy to us that these quarters are most usually associated with those who opposed the Belfast Agreement in the first place. While we do not discount that those views within Northern Ireland opposing the protocol are sincerely and strongly held, we cannot accept the contention that permitting Northern Ireland to operate within the single market amounts to a diminution of Northern Ireland's position in the United Kingdom, any more than the constitutional positions of Gibraltar, Akrotiri or Dhekelia have been threatened by the TCA.

Allowing Northern Ireland to continue within the single market is a significant concession by the EU and addresses the key desire by most parties throughout this island to avoid a border on the island. Remaining within the single market must logically require the retention of the ECJ in order to resolve intra-single market disputes that will inevitably arise, as they do today between EU member states. To suggest that Northern Ireland, as a part of the single market, would have access to some unique arbitration forum from which EU member states would be excluded is to imply the formation of an entity north of the border that would destabilise the entire single market. It would present Irish and other member-state companies with the appalling choice between acquiescing to the establishment of this new Pyongyang-on-Bann and setting up a commercial operation in Newry or surrounds; or dealing with competitors in the single market who were not subject to the enforcement mechanisms applicable to all others.

It is very difficult for us to accept the bona fides of HM Government in general and Lord Frost in particular on the issue of the ECJ as it pertains to Northern Ireland. As the former Chief Executive of the Scotch Whisky Association, Lord Frost would have been intimately familiar with cases such as that in *Commission of the European Communities v French Republic*,

advertising of alcoholic beverages [Case 152/78]<sup>1</sup> (which pre-dated the establishment of the single market) where the ECJ struck down what were blatantly discriminatory practices by France in limiting market access by Irish and Scottish distillers. Lord Frost publicly indicated his support for maintenance of the single market in this regard in early June 2016.<sup>2</sup> If Northern Ireland is to retain access to the single market, that must entail oversight of a fair and competitive market in that jurisdiction by the ECJ. We believe most Northern Ireland citizens and business owners see advantage in and accept this position.

The financial consequences of Brexit for the United Kingdom are already significant, without further exacerbating them. The OBR has estimated<sup>3</sup> the long-term GDP impact of Brexit at 4%, more than twice the (temporary) impact of the Covid-19 pandemic. Any threat by HMG to trigger Article 16 can only be done in contemplation of a more serious dispute which could ultimately undermine the Trade and Cooperation Agreement. This would of course have serious implications not just for an even greater reduction in the wealth of the United Kingdom, but for tens of thousands of businesses across the island of Ireland and Great Britain.

As your trade delegation is kind enough to keep us informed of relevant commercial updates for our membership, so obliged would we be if you were to bring the concerns of our membership to your Government.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Neil McDonnell', followed by a long horizontal line and a circular flourish.

Neil McDonnell  
Chief Executive

CC Shirley McCay, Country Director Ireland, Department for International Trade

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<sup>1</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61978CJ0152>

<sup>2</sup> <https://www.euronews.com/2016/06/10/nae-brex-it-say-scots-unwilling-to-follow-england-out-of-europe>

<sup>3</sup> <https://www.bbc.com/news/business-59070020>