CENTRE FOR BREXIT POLICY

MUTUAL ENFORCEMENT

Antidote to the Northern Ireland Protocol

SEPTEMBER 2021

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The Centre for Brexit Policy (CBP) is a think tank backed by cross-party politicians who support the UK leaving the EU. It has been formed to propose the critical policy changes enabled by Brexit that will boost national prosperity and well-being in years to come, as well as help ensure that Britain fully 'takes back control' when it leaves the European Union.

The CBP aspires to trigger a deep and wide debate about what Brexit should mean for the UK over the next decade or two. By providing a focus for the development of post-Brexit public policy, the CBP hopes to help formulate an overarching framework for the UK that maximises the opportunities Brexit affords. This will be promoted to Government, Parliamentarians, and the public welcoming contributions from those who want to see Brexit open a new and fruitful chapter in our country's life.

The CBP has three core objectives:

- **Identify the benefits and opportunities of Brexit across the full spectrum of economic, trade, social, foreign, defence and security policy areas proposing new policies for the Government's agenda**
- **Continue to make the intellectual, evidence-based case for a 'real' Brexit and provide the Government with clear and constructive advice on how to deal with ongoing negotiation and implementation issues. A 'real' Brexit means regaining full control over our laws, borders, seas, trade, and courts.**
- **Check any attempts to dilute a real Brexit, as well as serving as a catalyst and rallying point for positive news stories that, over time, will be able to persuade and demonstrate the many substantial advantages of Brexit**

Delivery of these objectives is based on professional, substantive fact-based research by experts in their fields leading to authoritative reports, short papers, OpEds, events, and briefing meetings - both within and without Government.

The CBP is supported by a cadre of expert CBP Fellows drawn from multiple disciplines to provide additional expertise and experience in developing an agenda for policy change that will ensure the British people benefit from Brexit. Additional support is provided by a CBP Business Forum to bring a business perspective to shaping CBP's agenda, provide input to policy proposals, and deliver a pro-Brexit business voice.

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FOREWORD

THE RT HONOURABLE THE LORD TRIMBLE PC

As a former First Minister of Northern Ireland and the co-negotiator of the Belfast/Good Friday Agreement (GFA), along with the late John Hume, I am deeply concerned about the way in which the Agreement is being undermined by the Northern Ireland Protocol.

The Northern Ireland Protocol Undermines the Good Friday Agreement

The Northern Ireland Protocol not only has subverted the main safeguards within the GFA, causing civic unrest and political uncertainty, it also is damaging the NI economy - disrupting supply chains, inflating prices, and diverting trade from our main market in Great Britain.

The central pillar of the GFA was the principle of consent. For Unionists, the assurance given was that "ANY change in the status of NI could only be made with the consent of the majority of the people of NI". Those who aspired to a United Ireland knew that, if they could persuade the majority that such a constitutional change was desirable, then the UK government would not stand in their way. Furthermore, in the meantime, any controversial issues that impacted adversely on either community would have to be subjected to a cross community vote so neither community could have a policy or decision that impacted negatively on them imposed without their support.

The Northern Ireland Protocol totally destroyed this consent principle, to the detriment of the Unionist community. First of all, it represents a massive change in the constitutional status of NI. No longer will laws applicable in NI relating to agricultural practices, product standards, environmental codes, labour regulations be made by the UK parliament or even the NI Assembly. They will be made by the EU and imposed by the European Court of Justice. This monumental constitutional change has been imposed on the people of NI without seeking their consent and against the manifest opposition of every Unionist party and politician in NI. The result has been political unrest and violence and threats of further violence on our streets because the political promises of the GFA have been dismissed flippantly through the Northern Ireland Protocol.

Furthermore, the delicate consent mechanism of a cross community vote on these issues in the NI Assembly has been removed on the basis that Unionists would never vote to give their consent to them. The Biden administration is on record as saying that the primary aim of its administration is to defend and support the GFA when, in fact, defending the Northern Ireland Protocol does the exact opposite and damages community relations within NI, undermining the good work that John Hume and I achieved at great personal sacrifice.

The Northern Ireland Protocol Damages the Northern Ireland Economy

Not only has the Northern Ireland Protocol had a negative impact on community relations in NI, it is doing great damage to the NI economy. The extensive checks on trade between GB and NI (which is internal UK trade) has discouraged many firms from trading with NI, adding costs and time delays for those who do and increasing the cost of doing such business. The result has been inflationary pressures that has damaged competitiveness, loss of customers because of uncertainty and delays, empty supermarket shelves and reduced choice for consumers.

Trade with countries like Russia is now easier to undertake than trade with the rest of our own country because of the Northern Ireland Protocol. One food supplier has recently revealed that a lorry load of supplies destined for its stores in NI will have 700 pages of documentation to pass EU imposed checks for goods coming into NI from GB. It is this aspect of the Northern Ireland Protocol that has caused the economic disruption described in this Foreword. All of this economic damage is being imposed on one of the weaker economic regions of the UK.

Mutual Enforcement - A Workable Alternative to The Northern Ireland Protocol

The Northern Ireland Protocol is both damaging to community relations and the constitutional integrity of the UK. But, there is a workable alternative to it.

Mutual Enforcement respects both the integrity of the EU Single Market and the independent sovereignty of the UK voted for by the British people in the referendum in 2016. It involves both the EU and the UK mutually enforcing each other's rules, regulations, and taxes for companies exporting into each other's territory. Any company operating out of NI would be required to declare that it had met all the obligations contained in EU law when selling goods to the Republic of Ireland. Any breach of that obligation would be followed up by the authorities in the UK and breaches would carry severe penalties as an effective disincentive to break that obligation. The EU authorities would do the same for goods being exported from the RoI to NI. This avoids the needs for border checks while at the same time safeguarding the integrity of the EU internal market.

I know the leaders of the EU and US have a genuine interest in Ireland and its future and I appeal to them to consider the way in which the NIP has undermined the peace process. Accept that it is not good economically or politically for either NI or the Irish Republic. Give your support to the pursuit of the workable alternatives to the NIP, which can protect the interests of the EU and not disrupt the constitutional and economic integrity of the UK.

That is how the interests of both countries on the Island of Ireland can be served.

Lord Trimble is a former First Minister of Northern Ireland and received the Nobel Peace Prize for his work leading to the Good Friday Agreement

EXECUTIVE SUMMARY

The Northern Ireland Protocol: How We Got Here

- From the Referendum on 23rd June 2016 until the publication of the 8th December 2017 Joint UK/EU Report, the expectation of the UK and the EU was that, although the north-south border on the island of Ireland required considerable thought in establishing new arrangements, this could be achieved through normal trade measures. Notably, there had been no expectation that there would be an 'Irish Sea border'.
- However, in the course of the Brexit negotiations, the UK negotiators' definition of an unacceptable 'hard border' came to include any kind of customs infrastructure or checks or controls of any kind. This semantic journey, ushered in by pro-EU campaigners, was a wholly false narrative, given that an unquestionable premise of the Belfast/Good Friday Agreement (GFA) is in fact that Northern Ireland (NI) is a part of the UK, including its democratic structures and economy.
- Even with such a goal, the arrangements of the Northern Ireland Protocol (NIP) were unnecessary. They did not need to deprive Northern Irish citizens of their sovereign right to vote on all laws that affect them, and to benefit from free trade with their fellow citizens. The drivers of this were EU politics, and the Franco-German wish to control trade to their principal advantage, rather than logic or fairness.

The Crux of the Problem: An EU-Defined 'Hard Border'

- During the Brexit negotiations, the concern was that any visible checks would cause civil unrest, so it was agreed efforts should be made to avoid any such checks. The UK Government made clear that it would under no circumstance introduce hard (ie, visible) border checks, north-south, and that it sought to agree suitable arrangements to ensure this was so.
- However, the EU made no such commitment, insisting instead that its Single Market had to be protected either through hard border controls on the north-south border, or by arrangements unilaterally deemed acceptable by the EU for the protection of its Single Market, without reference to what might in practice be acceptable to protect the markets of both the UK and the EU, or to the people of NI.
- The EU's conceptual approach to the invisible border involved imposing EU law on NI, in what ultimately became the NIP. The EU rejected all alternative methods of securing its agreement to an invisible border. The NIP instead created a regime of new border checks within the UK, east-west across the Irish Sea, policed by the UK under EU supervision, thereby breaking NI off *de facto* from the rest of the UK.
- These arrangements did not follow the precedent of international legal conventions - ie, that historically, when states or larger constitutional units break up, existing trade relations have been allowed to continue until new arrangements were put in place. Pre-existing arrangements could remain in place so long as a third state was not adversely or disproportionately affected. This was the accepted practice under GATT (1947) and then its successor, the WTO (1995).

The Protocol's Impact on Northern Ireland Business and Society

The Protocol has a wide-ranging and devastating impact across the whole of Northern Ireland.

- **Courts and Governance**. Not only does the NIP impinge on the external trade of NI with the rest of the UK, the Republic and the rest of the EU, but it also applies a wide range of EU law inside NI itself. This is broadly speaking all EU laws (regulations and directives) relating to the Single Market in goods.
- **Political Reality**. The EU's self-serving political agenda needs to be seen in full for what it really is. The EU wishes to:
  - Subject as much of the UK as possible to EU laws for mercantilist reasons, its desire to become a regulatory superpower and the imperatives of its command and control system
  - Weaken the UK in trading terms and as a competitor, including by undermining UK sovereignty where possible
  - Avoid highlighting detrimental economic decisions of the EU as a consequence of competitive UK goods and agriproducts circulating in NI and not in the Republic of Ireland
  - Avoid creating precedents for its other borders
  - Avoid use of international law arrangements rather than arrangements under its control
  - Disguise the implications of the loss of EU member state sovereignty that has been traded away for the perceived benefits of the Single Market and EU funds
- **Legal Reality.** It is now apparent that EU motivations for the NIP are at odds with the GFA. EU negotiators have introduced the concept of an all-island economy (not included in the GFA), where there has previously been no such integrated economy and in fact there cannot be one if the GFA is respected, with NI forming part of the UK.
- **Commercial Reality.** The alleged purpose of the NIP - to 'avoid disruption to the lives and livelihoods of Northern Ireland', and ensure 'Great Britain to Northern Ireland trade flows as smoothly as possible' - is currently 'set up to fail'. Much of that failure arises not in the headline purpose of protecting the EU Customs Union, but in the detail of how it is implemented. As an example, Marks & Spencer describe its operation as a 'Kafkaesque" bureaucracy that they face throughout the entire supply chain - from ordering a product to placing it on shelves - eg, commissioning independent vets to conduct SPS checks on every product of animal origin on every truck, including on the butter in sandwiches. There are more than 100,000 checks every week.

The Command Paper: An Important Step Forward, Albeit with Unresolved Issues

- The Government has now proposed revisions to the NIP in its Command Paper of July 2021, requiring NI to have the special status which the EU had advertised, when it established the NIP, to be the best of both worlds, with goods and agriproducts produced in NI able to circulate freely in the Republic of Ireland/EU and UK. All UK goods and agriproducts from GB would circulate in NI (subject to labelling) and all Republic of Ireland/EU goods and agriproducts would circulate in NI (potentially subject to labelling). NI firms may be subject to UK subsidy control rules but with increased consultation rights for the EU, reflecting the fact that they have privileged access to the EU market (although that privilege is heavily limited - as discussed below). EU institutions - the EC and ECJ - would be removed and independent bodies would be established in accordance with international treaty practice.
- The Command Paper is important as it spells out for the first time that the NIP is not working. Significantly, it also spells out that changes need to be made to the structure of the NIP, not just some time limited delays. Critically, this is a clear departure from the UK's previous 'softly, softly' approach, and is to be welcomed.

- Although the Command Paper does represent a significant improvement on the status quo, there are key issues that remain unresolved. In particular, NI is exposed to harmful trade distortion, in breach of WTO rules, which is created *within* the EU's Single Market by the legal arrangements of the Eurozone, permitting:
  - Distortion to trade and competition through an undervalued currency. The value of the euro for Member States with a positive external trade balance is pulled lower by debt levels in the debtor Member States, but since these debts are not mutualised by the creditor Member States (including Republic of Ireland) they obtain the benefit of a depreciated currency value without the cost of debt mutualisation that would arise from normal sovereign currency arrangements;
  - Unfair monetary subsidisation through the TARGET2 mechanism, which subsidises Eurozone sellers by providing unlimited finance to Eurozone buyers. NB the current Republic of Ireland TARGET2 balance indicates that producers in the Republic of Ireland have been benefitting unduly from this mechanism, to the detriment of the North; and
  - Unfair subsidisation through artificially cheap banking, since Eurozone banks are undercapitalised, under-collateralised and illiquid, breaching international regulatory requirements.

EU state aid law fails to address these distortions and *de facto* creates an unlevel playing field for trade for the people of NI, quite contrary to the purported aims of the EU in applying EU state aid law to them.

Mutual Enforcement Resolves the Remaining Issues

- Mutual Enforcement involves each side making a reciprocal legal commitment to enforce the rules of the other with respect to trade across the north-south border. Each side maintains autonomy - but commits to the enforcement of whatever rules the other seeks to impose in respect of goods crossing (only) that border
  - Unlike a customs union or partnership, Mutual Enforcement does not - of itself - remove customs duties nor does it remove, harmonise or require mutual recognition of standards. It works by inverting the usual approach to customs enforcement.
  - The obligation to comply with the importing territory's rules and pay duties owed is placed on the exporter as a matter of law of the exporting territory. This is the critical ingredient - the border check becomes redundant.
- Mutual Enforcement would not require border checks, because any breaches could be notified to the UK authorities once they became obvious through checks at that point of sale or distribution in the EU or spot checks on exporters in the UK. Severe penalties would act as a deterrent. The EU would reciprocate in relation to trade with the UK. Importantly, the UK-EU border would be restored to the land border between NI and the Republic of Ireland, where trade is a factor of ten less than the sea bridge between Great Britain and NI.

Mutual Enforcement Needs to Be Tabled Quickly

- Finding a solution to the failed NIP is a matter of urgency. In reality, there is now only one real solution, which is to implement Mutual Enforcement. One can see that this is now the preferred option for the UK Government. Lord Frost is to be congratulated for adding a real sense of purpose and steel to his discussions with the EU.
- With the existing exemptions due to cease in September and the prospect of greater chaos if that happens, the UK Government should recognise that the Mutual Enforcement solution should be put on the table very soon. The EU could and should accept this solution because it gives the EU continuing control over goods crossing the border into the Single Market and it gives the UK the same control over goods coming from the EU.

INTRODUCTION

On June 23rd, 2016, the British people voted to leave the European Union.

Throughout the subsequent negotiations the EU used the Issue of Northern Ireland's status to put the greatest pressure they could on the UK. Perhaps the worst aspect of this was the way that they used the Belfast/Good Friday Agreement (GFA) to justify their intractable negotiating stance. The history of the last five years of the Brexit talks is well known and does not need rehearsing here.

However, after Brexit it has become all too clear that the Northern Ireland Protocol (NIP) is simply not fit for purpose. The problem lies in the fact that the NIP dilutes and diminishes the status of Northern Ireland (NI) as a constituent part of the UK. The complexity of the NIP, with its requirement that the rest of GB faces complex customs checks across the Irish Sea when sending goods to NI, apart from creating genuine shortages of UK-produced goods reaching NI's shelves, has initiated a significant diversion of trade, to the Republic of Ireland. This and other factors are, as the Nobel Peace Prize Laureate, Lord Trimble, has made clear, already putting enormous strains on the Peace Accord he negotiated and agreed.

Finding a solution to the failed NIP is a matter of urgency. In reality there is now only one real solution and that is - as this paper points out - to implement the Mutual Enforcement rules, the acceptance of which has been growing in recent months.

The purpose of this paper is to set out the record of how this failed initiative was manipulated into becoming policy, explain its pernicious impact on NI, provide support for the recent Command Paper, and show how Mutual Enforcement provides the solution and resolves the remaining issues in the Command Paper.

Specifically, this paper comprises the following chapters:

I. **THE NORTHERN IRELAND PROTOCOL: HOW WE GOT HERE**
II. **THE CRUX OF THE PROBLEM: AN EU-DEFINED 'HARD BORDER'**
III. **THE PROTOCOL'S IMPACT ON NORTHERN IRELAND BUSINESS AND SOCIETY**
IV. **THE COMMAND PAPER: AN IMPORTANT STEP FORWARD, ALBEIT WITHUNRESOLVED ISSUES**
V. **MUTUAL ENFORCEMENT RESOLVES THE REMAINING ISSUES**
VI. **MUTUAL ENFORCEMENT NEEDS TO BE TABLED QUICKLY**

TIMELINE

9 June 2016	Tony Blair claims that UK exit from the EU customs union meant a hard border or an Irish Sea border John Major is criticised after implying, at the same meeting, that Leaving the EU brings a renewed threat of violence in NI
21 June 2016	Theresa May says that Brexit would mean a customs border between NI and ROI
23 June 2016	UK votes in a UK-wide referendum that the entire UK should leave the EU
19 July 2016	Dr Alasdair McDonnell SDLP voices concern about 'passport checks', adding: 'On immigration and customs controls, there will be some changes'
25 July 2016	Theresa May says there will be no border checks on the movement of people
18 April 2017	Theresa May decides to call a general election
25 May 2017	Niall Cody (Chairman of the Board of the Irish Revenue Commissioners) tells the Irish Parliament he did not expect border infrastructure[2]
8 June 2017	General election
14 June 2017	Leo Varadkar takes over as Taoiseach from Enda Kenny
Nov 2017	EU Parliament Committee reports on option for a 'Smart Border'. Further report states that Brexit 'does not seem to involve a breach of the Belfast Agreement'
8 December 2017	Joint Report UK-EU concedes Irish Sea Border and commits to avoidance of a hard border, including any physical infrastructure or related checks and controls
7 June 2018	UK Technical Note falsely ascribes the UK's commitment to 'no border, no checks' to the Belfast Agreement
12 June 2018	Chequers White Paper 'Backstop' announced
17 Jan 2019	Simon Coveney admits that border infrastructure would have to be enforced by Ireland in the event of a No Deal
22 Jan 2019	EU says it would be obliged to enforce a customs border.
24 Jan 2019	Irish Revenue boss Niall Cody said he had no plans for checks at the border and described a non-border solution to North-South trade
29 March 2019	Meaningful Vote Three ('MV3')
3 April 2019	Cooper-Letwin Bill - seeking to prevent 'No Deal exit'
24 July 2019	Boris Johnson becomes Prime Minister
4 September 2019	Benn Bill - seeking to prevent 'No Deal'
2 October 2019	UK proposes change to NI Protocol to ensure it requires prior consent of NI Executive and Assembly and otherwise lapses
19 October 2019	New Withdrawal Agreement published, including NI Protocol without prior consent of NI Exec and Assembly, but instead requiring much later endorsement in 2024
19 October 2019	Letwin Amendment - seeking to prevent 'No Deal'
12 December 2019	Conservatives win General Election with an 80-seat majority
25 December 2020	Withdrawal Agreement with NI Protocol agreed
Easter, 2021	Civil unrest in Londonderry and Belfast
10 June 2021	Lord Trimble publishes article in The Times, saying that the NI Protocol 'subverts the GFA"
21 July 2021	Lord Frost publishes Command Paper on the NI Protocol, saying that it must be changed

2 https://www.oireachtas.ie/en/debates/debate/joint_committee_on_finance_public_expenditure_and_reform_and_taoiseach/2017-05-25/3/

I -THE NORTHERN IRELAND PROTOCOL: HOW WE GOT HERE

From the Referendum on 23rd June 2016 until the publication of the 8th December 2017 Joint UK/EU Report, the expectation of the UK and the EU was that the north-south border on the island of Ireland required considerable thought in establishing new arrangements, but that this could be achieved through normal trade measures. Notably, there had been no expectation that there would be an 'Irish Sea border'. For instance, the central planning assumption of the Irish Revenue Commissioners as late as May 2017 was for the border arrangements between the Republic and NI to remain open, with checks conducted away from the border.

Nevertheless, from an early point in the process of negotiating the new EU - UK relationship, the concept of a 'hard border' was held out by both the EU and Remain supporters in the UK as likely to result in a return of violence in NI. The definition of a hard border was stretched from one with checkpoints and armed guards to include an open travel border where goods are checked.

Eventually, in the course of the Brexit negotiations, the UK negotiators' definition of an unacceptable 'hard border' came to include any kind of customs infrastructure or checks or controls of any kind. This semantic journey, ushered in by pro-EU campaigners, was preposterously insincere and tendentious, as it sought to ensure that no kind of departure from the EU customs regime could ever feasibly happen, in spite of the absence in the Belfast/Good Friday Agreement (GFA) of any provision relating to goods, customs or any border infrastructure associated with these.

This was a wholly false narrative, given that the unquestionable premise of the GFA is in fact that NI is a part of the UK, including its democratic structures and economy.

However, even with such a goal the arrangements of the NIP were unnecessary. They did not need to deprive Northern Irish citizens of their sovereign right to vote on all laws that apply to them, and to benefit from free trade with their fellow citizens. The question therefore arises: how did we arrive at such an unsatisfactory arrangement? The answer is to be found in EU politics, and the Franco-German wish to control trade to their principal advantage, rather than logic or fairness.

THE DECEMBER 2017 JOINT REPORT

After the Brexit Referendum, the negotiations between the UK and the EU took a very wrong turn during the negotiations led by Theresa May.

One key milestone, during this period, was the 'Joint Report', negotiated between the UK and the EU between June and December 2017. This led to two important (although not legally binding) commitments.

- **Paragraph 49 stated:** *"The United Kingdom remains committed to protecting North-South* ***cooperation and to its guarantee of avoiding a hard border. Any future arrangements must be compatible with these overarching requirements.*** *The United Kingdom's intention is to* ***achieve these objectives through the overall EU-UK relationship****. Should this not be possible, the United Kingdom will propose* ***specific solutions*** *to address the unique circumstances of the island of Ireland. In the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement."* (Emphasis added)
- **The above was tempered (at DUP insistence) by paragraph 50 that amounted to an effective Unionist veto in the Assembly**: *'In the absence of agreed solutions, as set out in the previous paragraph, the United Kingdom will ensure that no new regulatory barriers develop between Northern Ireland and the rest of the United Kingdom,* ***unless, consistent with the 1998 Agreement, the Northern Ireland Executive and Assembly agree that distinct arrangements are appropriate for Northern Ireland.*** *In all circumstances, the United Kingdom will continue to ensure the same unfettered access for Northern Ireland's businesses to the whole of the United Kingdom internal market."* (Emphasis added) [3]

3 https://ec.europa.eu/info/sites/default/files/joint_report.pdf

Concession of an Irish Sea Border in December 2017

There is much controversy as to how the December 2017 text came about. Theresa May's Chief of Staff, Gavin Barwell, has said in an interview with the think tank 'UK in a Changing Europe' that the text was sprung on him by the EU team.[4] Denzil Davidson, a Number 10 Special Adviser at the same time, believed that the EU had sole responsibility for the text, as UK officials had decided not to put forward a UK text of their own.

Either way, the first draft was immediately rejected by the DUP, leading to last-minute amendments to introduce an Assembly consent mechanism to which the Unionists could commit in good faith.

Change of UK Government language, December 2017 to June 2018

In the December 2017 Joint Report, the UK Government committed itself to the Belfast Agreement and then separately committed itself to 'the avoidance of a hard border, including any physical infrastructure or related checks and controls'.

The subsequent June 2018 UK Government *Technical Note on a proposed Temporary Customs Arrangement for the whole UK* ascribed the Government's previous commitment to 'avoiding a hard border, checks and controls' directly to the Belfast Agreement. However, by suggesting that the Belfast Agreement referred to 'avoiding a hard border,' etc., the *Technical Note* was misleading. The Belfast Agreement, in fact, makes no reference to customs measures, goods, checks, or physical infrastructure. The GFA says that the British Government will 'make progress dealing with the removal of security installations', but this is clearly in the context of security against violence, rather than customs and goods. Such security arrangements, it says, should be 'consistent with the level of threat'. This is not the sort of language parties use when they have in mind an absolute prohibition. It instead reflects a realistic acknowledgement that managing even the most open borders between different jurisdictions may entail adjustments to meet changing needs and aspirations.

THE 2018 WITHDRAWAL AGREEMENT 'BACKSTOP'

The protocol attached to Theresa May's 2018 Withdrawal Agreement owed much to the 2017 Joint Report. It included a Customs Union (or a union of two customs territories) and regulatory and VAT alignment for NI. There was now, however, no consent mechanism for Unionists in NI.

While the 2018 Withdrawal Agreement would create an Irish Sea border, it was hoped by the UK Government that the EU would agree, in a future trade agreement, to lessen the friction across the Irish Sea via a 'common rule book' between the UK and EU. Furthermore, although the 2018 Withdrawal Agreement created a UK/EU Customs Union as a 'Backstop', the professed plan of the UK Government was to move to their 'Chequers' plan for a 'novel customs union'. However, given that (1) the Chequers plan was complex and not favoured by the EU, and (2) the Backstop essentially provided a plain customs union favoured by the EU, which would subsist as long as they determined, it was always unlikely that the Chequers plan of a 'novel customs union' could ever have come into being. It would have left the UK in a customs union potentially with two sets of regulations and VAT laws on either side of the Irish Sea.

4 Gavin Barwell interview with the think tank, 'UK in a Changing Europe'

UKICE: You sound as though you were surprised by the text on Northern Ireland.
GB: Yes.
UKICE: That seems to be a bit of a failure of the negotiating process?
GB: Right. **You're best, probably, talking to Olly (Robbins) on the detail about that,** but I do think he, and his team, and we at political level, do feel that text was sprung on us, yes.

FROM THE BACKSTOP TO A 'TEMPORARY' PROTOCOL

From 2016, there was clearly a belief on the part of the UK Government that even customs checks on the NI-Ireland border would be unacceptable. Unfortunately, as the words of those involved have illustrated in interviews since, the UK took a supplicant position towards the EU, even moving to accept the EU's demand of UK participation in the Customs Union and Single Market, an economic framework in which the EU would retain leverage to impose political alignment on the UK.

Boris Johnson became Prime Minister with the 2018 Withdrawal Agreement agreed with the EU but unratified in Parliament. Parliament had shown it was willing to block an UK exit from the EU unless there was a deal. The Backstop created an all-UK Customs Union and NI alignment. Thus, the Prime Minister inherited from his predecessor a weak negotiating position.

Boris Johnson did extremely well to amend and improve the inherited exit arrangements. It is of huge credit to him that he managed to gain EU agreement to remove the all-UK Customs Union, despite the EU's prior insistence that it would agree to no amendment to the text of the Agreement. The previously negotiated provision was replaced by a hybrid customs arrangement for Northern Ireland only. Johnson also laudably succeeded in removing all-UK subservience to EU law (with the crucial exception of EU State aid law that was allowed to leak into GB via Article 10), but, under pressure from an obstructive Parliament, the fall back was the NIP, which was meant to be temporary. NI legal alignment remained with a new, but imperfect consent mechanism.

On January 23rd, 2020, following the Conservative general election victory, Parliament enacted the European Union (Withdrawal Agreement) Act, approving the text of the renegotiated Agreement incorporating the Protocol.

There are strong grounds for believing that the Protocol was not envisaged by the UK to be permanent. These are founded on ample provisions of the negotiated documents, as well as international law:

- The Withdrawal Agreement and Political Declaration were themselves based on the assumption the NIP was temporary, to be superseded by 'alternative arrangements'. Article 13 (8) of the NIP contains a revised provision to supersede the Protocol in the context of the future trade talks:

  'Any subsequent agreement between the Union and the United Kingdom shall indicate the parts of this Protocol which it ***supersedes****. Once a subsequent agreement between the Union and the United Kingdom becomes applicable after the entry into force of the Withdrawal Agreement, this Protocol shall then, from the date of application of such subsequent agreement and in accordance with the provisions of that agreement setting out the effect of that agreement on this Protocol, not apply or shall cease to apply, as the case may be, in whole or in part."*

- Paragraph 35 of the Political Declaration envisages EU agreement to superseding the NIP with alternative arrangements:

  'Such facilitative arrangements and technologies will also be considered in ***alternative arrangements*** *for ensuring the absence of a hard border on the island of Ireland."*

- Article 184 of the Withdrawal Agreement sets out expectations that the Protocol will be replaced by a forthcoming trade agreement:

  'Negotiations on the future relationship. The Union and the United Kingdom shall use their ***best endeavours, in good faith*** *and in full respect of their respective legal orders, to take the necessary steps to negotiate expeditiously the agreements governing their future relationship referred to in the Political Declaration of 17 October 2019 and to conduct the relevant procedures for the ratification or conclusion of those agreements, with a view to ensuring that those agreements apply, to the extent possible, as from the end of the transition period."*

This obligation would have covered the Political Declaration, which provided in Article 4 that UK sovereignty would be recognised in future arrangements. Many Members of Parliament relied upon the provisions of Article 184 when voting in favour of the Withdrawal Agreement Bill, expecting that the provisions of the Protocol would be replaced by what became the Trade and Cooperation Agreement.

- It has been argued that the UK has a further option in international law, by virtue of the Vienna Convention on the Law of Treaties 1969 (VCLT).
  - First, under the VCLT Article 46 *'Provisions of internal law regarding competence to conclude treaties"* the UK could argue it is not bound by the WA/NIP if there is a *'manifest"* violation of '*its internal law of fundamental importance".* Arguably the Act of Union 1800 that created the United Kingdom is of fundamental importance.[5]
  - Secondly, under Article 56, if a treaty *'contains no provision regarding its termination and which does not provide for denunciation or withdrawal"* and *'it is established that the parties intended to admit the possibility of denunciation or withdrawal"* or *'a right of denunciation or withdrawal may be implied by the nature of the treaty… A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty."* [6]

In the case of the NIP and the Withdrawal Agreement generally, there is no UK right of exit (the Assembly being a devolved body) and yet the NIP was not designed or intended to be permanent. As such it could be argued that the UK has a right to leave the WA/NIP on 12 months' notice.

It should also be noted that section 38 of the Withdrawal Agreement Act declares that as a matter of common law the Parliament of the United Kingdom is sovereign and that the Act does not constitute a derogation from that principle of sovereignty.

Furthermore, commentary at the time supported this view:

- When the first NIP was proposed in 2018, the EU and UK both claimed that the NI backstop, the most contentious part of the Protocol, was 'intended' to be temporary; and
- Theresa May said that 'there are a number of references throughout the Withdrawal Agreement that indicate that this is only temporary."

A report by the Attorney General in October 2018 advised that the backstop would remain in place indefinitely unless the entire Agreement was replaced, but this did not mean the arrangement was not intended to be temporary.

When Boris Johnson negotiated the removal of the backstop in 2019, the UK Government sought a provision within the Protocol that provided for the separate treatment of NI to be temporary. This was initially proposed as a veto by the NI Executive and Assembly prior to ratification of the Protocol, in line with the requirements of the GFA.

However, owing to a weak negotiating position inherited from the previous Government, exacerbated by a pro-Remain majority in Parliament, the veto proposal was downgraded to the inverse - an endorsing vote in 2024, after years of application of the Protocol, which would lack the teeth to remove the Protocol completely, but merely initiate a renegotiation. These mechanics insufficiently reflect the temporary nature of the arrangements.

5 These provisions of the Act of Union of 1800 were held in *Allister v Secretary of State for Northern Ireland* [2021] NIQB 64 to be over-ridden by the Protocol and the 2020 Act of Parliament which implement it. However, this is only a first instance decision and the precise constitutional nature of the situation, and how it interacts with international law, have not been decided.

6 UN, The Vienna Convention on the Law of Treaties, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

II - THE CRUX OF THE PROBLEM: AN EU-DEFINED 'HARD BORDER'

During the Brexit negotiations, issues therefore arose of whether there would be visible border checks, north-south, on the island of Ireland, between NI, which is part of the UK, and the Republic of Ireland, which continues to be part of the EU. The concern was that any visible checks would cause civil unrest, so it was agreed efforts should be made to avoid any such checks arising.

The UK Government made clear it would under no circumstance introduce hard (ie, visible) border checks, north-south, and that it sought to agree suitable arrangements to ensure this was so.

EU INTRANSIGENCE

However, the EU made no such commitment. The EU instead insisted that the UK must satisfy the EU's purported need for standalone arrangements, regardless of any trade deal, which would ensure that under no circumstance would the EU see itself as needing to impose a visible border between the Republic of Ireland and NI. The EU made clear that its Single Market had to be protected either through hard border controls on the north-south border, or by arrangements unilaterally deemed acceptable by the EU for the protection of its Single Market, without reference to what might in practice be acceptable to protect the markets of both the UK and the EU, or to the people of NI.

Indeed, the EU insisted the UK agree to such arrangements before discussing a trade deal. This insistence was arguably beyond the powers conferred on the EU under Article 50 of the Treaty on European Union (TEU), a legal provision for an exiting state which was intended to allow for the EU to agree exit formalities, taking into account the framework for the future relationship of the parties.

The EU's conceptual approach to the invisible border involved imposing EU law on NI, in what ultimately became the NIP. The EU rejected all alternative methods of securing its agreement to an invisible border. Unlike a normal trade deal, the NIP sought to:

- Impose EU sovereignty over the rules for goods and agriproducts in NI,
- Require the application of EU state aid law on the whole of the UK, to restrict what the EU might regard as any adverse effects on trade across the north-south border or via other routes between NI and the EU, affecting the EU's Single Market, and disturbing what the EU claimed was its "level playing field". This was in an effort to impose a one-way (EU-facing only) level playing field on trade, on an EU conceptual basis, by placing sole reliance on EU state aid law; but this is a highly politicised, internal EU regime which remains unadjusted for the circumstances of an external EU border,
- Ensure that the application of EU state aid law would be determined by the European Commission, as an executive matter, and ultimately determined as a legal matter by the ECJ, which applies a test for state aid interference on the basis of theoretical (not practical) effects, circumventing any need to identify and isolate any real and practical adverse effects on trade across the north-south border. The result is a highly intrusive regime designed around EU political control.

The EU said that the UK's acceptance of these measures would be the only way to obviate the EU imposing border checks north-south on the island of Ireland. Meanwhile, however, the NIP instead created a regime of new border checks within the UK, east-west across the Irish Sea, policed by the UK under EU supervision, thereby breaking NI off *de facto* from the rest of the UK.

The EU was adamant that the UK accede to its own conceptual framework for addressing the NI issue, prior to any discussion of the Trade and Cooperation Agreement (TCA). The UK acceded on the basis that

it regarded the arrangements as temporary, in part as a result of the limitations contained in the Article 50 powers, but also because, under Article 184 of the Withdrawal Agreement and Article 4 of the Political Declaration, the EU committed to using best endeavours to reach a trade agreement with the UK by the end of 2020 and also to a future relationship with the UK which respected UK sovereignty.

The content of the intended trade deal was thought likely to mean that any residual issues relating to an invisible north-south border could be easily addressed.

INTERNATIONAL CONVENTIONS NOT FOLLOWED

The circumstances were unique. Historically, when states or larger constitutional units break up, existing trade relations have been allowed to continue until new arrangements were put in place.[7] Pre-existing arrangements could remain in place so long as a third state was not adversely or disproportionately affected. This was the accepted practice under GATT (1947) and then its successor, the WTO (1995). However, the EU proposed to ignore that precedent and instead to impose full WTO trading terms on the UK from the moment the notice period under Article 50 expired, threatening to cause economic disruption to the UK, unless the UK agreed to the EU's terms for the NI border and other (temporary) sovereignty encroachments then negotiated within the EU's predetermined framework for a trade deal.

In signing these arrangements, the UK did not intend to concede any points of sovereignty. In fact, matters of UK sovereignty in NI had already been settled by the GFA, which provides that NI remains part of the UK unless a majority of the people in NI vote otherwise. Furthermore, the NIP expressly states that it is without prejudice to the GFA.[8] In addition, section 38 of the European Union (Withdrawal Agreement) Act 2020 made clear that the UK Parliament retained full sovereignty over UK affairs.

Unfortunately, in the event, once the NIP was signed, the EU did not negotiate to replace it by the end of the transition period before the UK finally left the EU's legal arrangement. The EU instead only agreed to a slim trade deal in the TCA, which fell short of agreed expectations in that it did not contain much on services, did not have mutual recognition sanitary and phytosanitary ('SPS') provisions and did not have diagonal accumulation of Rules of Origin. Furthermore (and remarkably, given the EU's earlier position), it made no special provision for an invisible north-south border on the island of Ireland.

7 Dr Thomas Grant, *Brexit, Tariffs, and GATT's original intent: Why a forgotten MFN exemption merits a closer look*, Briefings for Britain, July 2019.
8 Article 1(3) of the Northern Ireland Protocol.

III - THE PROTOCOL'S IMPACT ON NORTHERN IRELAND BUSINESS AND SOCIETY

The NIP has far-reaching significance across all aspects of NI business and society.

- **The NIP applies a wide range of EU law inside NI, with important implications for NI courts and governance**
- **To appreciate the practical impact of the NIP, it is necessary to understand the political, legal, and commercial reality on the ground**

COURTS AND GOVERNANCE

Not only does the NIP impinge on the external trade of NI with the rest of the UK, the Republic and the rest of the EU, but it also applies a wide range of EU law inside NI itself. This is broadly speaking all EU laws (regulations and directives) relating to the Single Market in goods. These are listed (just the titles) over 33 pages in Annex 2 to the NIP.

These laws (and any future amendments of them which the EU may choose to make) apply within NI, but NI is also subject to the jurisdiction of the ECJ and to enforcement and binding administrative powers exercised by the EU Commission and by other EU agencies such as the European Medicines Agency. In fact, the powers exercised by the EU within NI are directly based on the powers exercised by EU law and EU institutions within member states.

In the same way as in a member state, a UK court called upon to interpret an EU law within NI may, and in the case of the Supreme Court must, refer any doubtful point of interpretation to the ECJ. EU laws are directly applicable or have direct effect within the NI legal system and are subject to the doctrine of supremacy of EU law, which means that they prevail over all laws of domestic origin, even Act of the UK Parliament. And in the event of anything which the Commission regards as backsliding, it has the power to initiate a direct action at the ECJ, bypassing the safeguards which would be in place under the bilateral arbitration clauses of the Withdrawal Agreement.

The intrusive and extensive legal powers of the ECJ and of EU institutions may be acceptable within EU member states, who appoint their own nationals to the ECJ and the Commission and participate in their governance. From the point of view of an EU member state, these are not foreign entities but are multinational institutions within which they participate. But from the point of view of the United Kingdom and NI, they are subjected to the rulings of a wholly foreign court and to the powers of wholly foreign EU institutions who have no duty to protect their interests.

In international relations, sovereign states do not submit themselves to be bound by rulings of the courts of other treaty parties. The exceptions to this principle are so rare that they stand out in history, or in infamy - for example, the 19th century treaties between the Western powers and China under which the British Supreme Court for China (with appeals to the Privy Council in London) had exclusive jurisdiction over criminal cases against British subjects in China and over civil disputes between British subjects and Chinese citizens.

The NIP is entirely exceptional in imposing these governance requirements on NI. There is nothing similar in any international treaty or in the EU's other treaties with non-member states. Even the EEA states which have agreed to follow EU Single Market rules are not subject to direct ECJ or EU Commission jurisdiction, but instead have their own court, the EFTA court, and their own mini-Commission, the EFTA Surveillance Authority, which are staffed by nationals of the EEA states rather than the EU. No trade agreements have anything comparable.

The adoption of these unprecedented arrangements by a sovereign state can only be explained by a moment of extreme weakness caused by the EU's pressure and the internal UK political pressures brought to bear by the Benn Act. However, the continuance of these arrangements is simply incompatible with the UK's status as a sovereign and independent state. It is also incompatible with the fundamental constitutional principles of the United Kingdom under the Acts of Union of 1707 and 1800, under which the citizens of all parts of the United Kingdom are entitled to be on the same footing with any foreign power,[9] and with the right to self-determination of the people of NI as reflected in the GFA. Such a repugnant treaty arrangement simply cannot be allowed to stand.

THE POLITICAL REALITY

In any discussions with the EU, the EU's self-serving agenda needs to be appreciated in full, in order to reach an outcome fair to the people of NI and respectful of international law:

- The EU wishes to subject as much of the UK as possible to EU laws for mercantilist reasons, its desire to become a regulatory superpower and because of its command and control system.[10] Hence the wish to apply state aid law to the UK, as applied by the EC and interpreted by the ECJ.
- It wishes to weaken the UK in trading terms and as a competitor, including by breaking up UK sovereignty where possible, because
  - It sees potential UK success as a threat both in terms of diversion of investment and as an example to encourage future departures from the EU of other Member States; and
  - It is fearful of a demonstration that there is a better way to run economic and political affairs, further threatening the EU's ultimate disintegration.
- In NI the situation is particularly concerning to the EU, since competitive UK goods and agriproducts circulating in NI and not the Republic of Ireland will highlight the detrimental economic decisions of the EU, potentially leading to the Republic of Ireland voting to leave the EU - a problem not of the UK's making but intrinsic to the superiority of the UK's traditional trading methods. In particular, the EU generally over-regulates and uses unnecessarily prescriptive rules on economic activity, in part in an effort to harmonise the position across member states, and in part because of its top-down, controlling, and code-based approach to lawmaking. This is at odds with the Irish common law heritage and dampens economic activity unnecessarily. What the situation suggests is that the EU is willing to blight the people of NI to reduce the extent to which its inferior methods are obvious in the Republic of Ireland.
- The EU is concerned by the precedent for its other borders, some of which also involve potential civil unrest, for instance those between Cyprus and Turkey, and Lithuania and Belarus.
- The EU feels weakened by international law arrangements rather than arrangements under its control. Its normal *modus operandi* is to seek political control through mild subsidisation (on a full recourse basis). Hence its approach to the newly joining states. However, no such subsidisation is being offered to the people of NI.
- Many of the EU member states do not understand the concept of sovereignty, having traded it away for the perceived benefits of the Single Market and EU funds - though not Germany (cf its Constitutional Court decisions). The EU arrangements then seek to disguise the position and take advantage of it, by double counting sovereignty, purporting to treat the member states as still sovereign but also wanting the EU to be treated by others as sovereign in its own right, with Ambassadors, and representatives at international meetings etc. Yet the international law position of the EU is fraught and some aspects of its arrangements are subject to challenge.[11]

9 See fn 5 above.
10 Cf *Europäische Wirtschaftsgemeinschaft*, Berlin 1942, Funk, Jecht, Woermann, Reithinger, Benning, Clodius and Hunke.
11 For example, George A Bermann, *European Union Law and International Arbitration at a Crossroads*, 42 Fordham Int Law J, 967 at 974-980.

None of these issues should now be a matter of concern to the UK or the people of NI. They result from the peculiar choices made by the EU on trade and its international arrangements. Because they operate within a self-made construct with its own internal rules supervised by the ECJ, the EU has sought to pursue the logic of that construct in resolving the NI situation, but to the detriment of the people of NI, and to the UK. It is time for fresh thinking unadulterated by the idiosyncrasies of EU policy and its willingness to override the interests of others.

THE LEGAL REALITY

It is now apparent that EU motivations for the NIP are at odds with the GFA. EU negotiators have introduced the concept (which is alien to the GFA) of an all-island economy, where there has previously been no such integrated economy and in fact there cannot be one if the GFA is respected, with NI forming part of the UK.

As a result, the EU negotiators' aspirations are at odds with the NIP's Article 16, which seeks to avoid trade diversion. Furthermore, they have ignored the interests or wishes of the Unionists. They have instead applied the NIP in a way that ignores the proviso that it is subject to the GFA, since the GFA states that NI remains part of UK sovereignty unless and until a border poll decides otherwise.

The EU have also applied the NIP in such a way as to ignore the need not to cause unrest - again in breach of Article 16 of the NIP. They have used the concept of "at risk" in the NIP in the context of SPS to require proof of "not at risk" on all kinds of products. To use the concept this way means, in effect, that all products are subject to a presumption that they are "at risk"—a presumption that does not follow from the plain text of the NIP and, as a matter of policy, is dubious as well, because it places all the costs of this arrangement on NI's market, a risk allocation that makes no sense. The EU insists on pre-empting even the remotest possibility of third-country goods skirting EU tariffs, even though the vastly larger EU market is at least as well-equipped as NI's to deal with the issue if, when, and where it arises.

Furthermore, the EU have asserted a unilateral right to determine how the NIP applies, regardless of political reality.

As applied by the EU, the arrangements have left the people of NI subject to EU laws for goods, agriproducts, and state aid, as well as European Commission executive control, and ECJ jurisdiction, over which they have no vote or input, save in retrospect every 4 years by a majority voting procedure that ignores the interests of Unionists. This is at the very least contrary to the principle set out by the European Court of Human Rights in Strasbourg under the European Convention on Human Rights in relation to the people of Gibraltar, when it decided that all Gibraltar citizens were entitled to representation in the European Parliament through an MEP, since whilst within the EU they were subject to EU-made laws.[12]

THE COMMERCIAL REALITY

A good example of the Protocol's adverse impact on NI business can be seen in the case of Marks & Spencer.

Archie Norman, Chairman of Marks & Spencer plc and a former MP, recently wrote to Lord Frost explaining the problems of the NIP caused for his company, which has a significant presence in NI. The problems identified by Mr Norman are of a pattern that has been reported by many other companies doing business in NI

Mr Norman said that the purpose of the NIP - to 'avoid disruption to the lives and livelihoods of Northern

12 Matthews v UK (App. 24833/94) (1999).

Ireland', and ensure 'Great Britain to Northern Ireland trade flows as smoothly as possible' - is currently 'set up to fail'.

Much of that failure, he said, arises not in the headline purpose of the EU Customs Union, 'but in the detail of how it is implemented". He then described the 'Kafkaesque" bureaucracy his company is facing - throughout the entire supply chain from ordering a product to placing it on shelves. It must be emphasised that this difficulty is experienced in the movement of goods from one part of the United Kingdom to another - ie, from Great Britain to NI - a state of affairs that few if any sovereign countries could be expected to tolerate.

For example, Marks & Spencer must:

- Manually input details about every individual order to comply with the EU Traces scheme;
- Commission independent vets to conduct SPS checks on every product of animal origin on every truck, including on the butter in sandwiches. There are more than 100,000 checks every week;
- Allow for 'over-zealous and bureaucratic' SPS checks, which include fifteen different types of Export Health Certificates for meat;
- Provide 48 hours' notice to APHA, the UK's Animal and Plant Health Agency, to conduct the horticultural product checks. This is described as 'unworkable in a fast-moving modern food business"; unusually, the notice required on fruit and vegetable certification is longer than the time required to harvest product from field to deliver to shelf edge;
- Ask its import agents to combine all the data required through the chain - from the line-by-line information inputted into EU Traces through to the EHCs - which creates an average of 8 documents of 720 pages per truck. That is 40,000 pages per week for goods into Ireland and - from October - that will be 120,000 pages per week.

The result of this regulatory regime is that it is ushering in the prospect of higher prices. This is despite the fact that NI households have less than half of the UK average of discretionary income and the lowest levels of financial security in the UK.

Hundreds of tonnes of food are already being wasted owing to longer delivery times for short-life food, and this could increase because of rejected deliveries.

Mr Norman said that in time companies might get used to the burden but that this will be 'at a cost to NI, customers and investors". He added that there is 'very limited remaining time for the UK Government to negotiate and implement workable arrangements".

Mr Norman suggests a series of changes to compliance and timelines that reflect the realities of supply chains and which focus enforcement checks on genuine food safety.

IV - THE COMMAND PAPER - AN IMPORTANT STEP FORWARD, ALBEIT WITH UNRESOLVED ISSUES

The British Government has tried to make the Protocol work, but the EU has applied an excessively purist interpretation of the Protocol's provisions. This is evidenced by the fact that some 20 per cent of all EU border checks take place in NI - more than in France - notwithstanding that NI accounts for an extremely small share of EU trade.

The Prime Minister and Lord Frost now rightly say that it hasn't worked.

Furthermore, the NIP, as Lord Trimble has pointed out, itself now constitutes a breach of the GFA's key guarantee that any changes to the constitutional status of NI may only be made with the prior consent of the people of NI.

The EU, for its part, refuses to countenance any amendment of the Protocol, despite the damage that is being done to societal stability in NI and the diversion of trade that is increasingly apparent.

Article 16 of the Protocol permits either party to take unilateral measures in the event that the Protocol's application leads to "serious economic, societal or environmental difficulties that are likely to persist or to diversion of trade." It was in reliance on Article 16 that the European Union sought to suspend suspended the supply of coronavirus vaccine to NI. There is, therefore, a precedent for its invocation.

It is a relief to many that the Prime Minister and Lord Frost are now clearly advocating a way out. The UK Government has proposed revisions to the NIP in its Command Paper of July 2021.[13]

THE COMMAND PAPER

The Government now proposes that NI have the special status which the EU had advertised, when it established the NIP, to be the best of both worlds, with goods and agriproducts produced in NI able to circulate freely in the Republic of Ireland/EU and UK. All UK goods and agriproducts from GB would circulate in NI (subject to labelling) and all Republic of Ireland/EU goods and agriproducts would circulate in NI (potentially subject to labelling). NI firms may be subject to UK subsidy control rules but with increased consultation rights for the EU, reflecting the fact that they have privileged access to the EU market (although that privilege is heavily limited - as discussed below). EU institutions - the EC and ECJ - would be removed and independent bodies would be established in accordance with international treaty practice.

THE COMMAND PAPER IS IMPORTANT AND SHOULD BE SUPPORTED

The launch of the Command paper on the NIP was a significant moment, as for the first time it spelt out that the Protocol was not working. Significantly, it also spells out that changes need to be made to the structure of the NI Protocol, not just some time limited delays.

Critically, this is a clear departure from the UK's previous 'softly, softly' approach, and is to be welcomed. The Protocol is destroying the political balance in the Province and making everyday life for people living in Northern Ireland increasingly difficult.

13 CP 502.

During the negotiations, the EU said the NIP was meant to protect the GFA, maintain peace and stability in NI, avoid a hard border on the island of Ireland and preserve the integrity of the EU Single Market. Yet in a powerful intervention, Nobel Peace Prize Laureate, Lord Trimble, co-architect of the GFA, said the Agreement was being destroyed by the very Protocol that the EU claimed would protect it, by making trade with the rest of the UK complicated, costly and unworkable.

As many companies have pointed out, goods freely available in the rest of the UK will no longer be available in NI. The absurdity is that three times more documentary checks now take place in NI than in Rotterdam, the major port of the EU, and over 20% of all the EU's border checks are now carried out in NI.

This has led to a significant diversion in trade - which is effectively forbidden by the Agreement itself. In fact, the Irish Foreign Minister indicated he hoped trade diversion would occur when he said that trade diversion was '….the opportunity [for the UK, including NI,] to readjust their supply chains to adapt to these new realities…' Yet the diversion that has arisen, on its own constitutes sufficient grounds to invoke Article 16 of the Agreement, allowing unilateral safeguard measures to be taken to address the situation and prevent ongoing diversion. It is ironic that when the EU decided to trigger Article 16 over vaccines without notice, contrary to the terms of the Protocol, the Irish government said little; but when the UK has pointed out the significance of the diversion of trade and its link to Article 16, the EU including Ireland blame the UK for threatening to breach an international treaty, even though unilateral response to trade diversion is expressly permitted by that treaty.

Those who say the UK agreed the NIP, and must just implement it, fail to recognise that throughout the process of negotiating the Treaty and Political Declaration, it was always seen by both sides as a temporary measure.

Furthermore, a recent poll confirmed that the rest of the UK is concerned about the impact of the NIP on NI. When asked, well over 50% agreed that the Protocol was a threat to NI peace and stability, that it was unfair that NI was treated differently and, vitally, that NI should remain a part of the UK.

If the EU persists in simply rejecting any attempt to resolve the terrible mess of the Protocol, then the UK should take unilateral action. The EU's political interests should not be put ahead of peace and stability in NI. That's why Lord Frost was right to launch the Command paper.

UNRESOLVED ISSUES

However, what is quite clear is that, whilst the Command Paper represents a welcome step forward, it doesn't solve the underlying problems of NI in full, which stem from the conceptual architecture of the NIP itself. EU-made rules would still be left to apply in NI.

This situation is volatile. It would be a disastrous mistake to attempt to solve matters iteratively, by starting from the false premises of the NIP. The opportunity should be taken to cut the Gordian knot once and for all, putting in place arrangements that are sustainable and for the benefit of the people of NI.

The Command Paper does represent a significant improvement on the status quo. One area the Command Paper gets right is the removal of Article 10 relating to EU state aid law. Having NI subject to any aspect of EU state aid law is completely unnecessary and incompatible with democratic self-determination. In particular:

- Continuing any element of EU state aid control in NI grants a foreign power and foreign courts direct veto authority over a wide range of tax and spending decisions in NI. This is self-evidently intolerable as a basic matter of democratic principle.
- The situation has evolved significantly since the Withdrawal Agreement was signed. A highly sophisticated domestic UK system of subsidy control is now being put in place - removing any need for EU state aid rules to play any role in "protecting" the Single Market.

- EU state aid law is a political instrument which operates entirely for the internal coherence of the EU Single Market - not for the benefit of the EU's trading partners, nor NI.

Perhaps even more importantly, under the current NIP, NI is exposed to the harmful trade distortion, in breach of WTO rules, which is created *within* the EU's Single Market by the legal arrangements of the Eurozone, permitting:

- Distortion to trade and competition through an undervalued currency. The value of the euro for Member States with a positive external trade balance is pulled lower by debt levels in the debtor Member States, but since these debts are not mutualised by the creditor Member States (including Republic of Ireland) they obtain the benefit of a depreciated currency value without the cost of debt mutualisation that would arise from normal sovereign currency arrangements;[14]
- Unfair monetary subsidisation through the TARGET2 mechanism, which subsidises Eurozone sellers by providing unlimited finance to Eurozone buyers. NB the current Republic of Ireland TARGET2 balance indicates that producers in the Republic of Ireland have been benefitting unduly from this mechanism, to the detriment of the North;[15] and
- Unfair subsidisation through artificially cheap banking, since Eurozone banks are undercapitalised, under-collateralised and illiquid, breaching international regulatory requirements.[16]

EU state aid law fails to address these distortions and *de facto* creates an unlevel playing field for trade for the people of NI, quite contrary to the purported aims of the EU in applying EU state aid law to them.

However, the Command Paper ultimately is still an attempt to "make the NIP work" within the confines of the unsatisfactory construct of the NIP itself. Even if implemented, it would still mean that NI applies EU laws for goods and agriproducts and may be referred to by EU officials as being part of the EU. It would still mean that the people of NI are subject to laws over which they have no vote or representation, except via majoritarian (and retrospective) consent that is inconsistent with the principles of the GFA.

Thus, under the Command Paper, the fact that EU law still applies in NI is against the interests of the people of NI and against what was agreed in the GFA.

- In para 71 of the paper, it talks about how to ensure that, in a revised agreement, rules applied in NI take into account their implications for NI, providing a stronger role for those in NI to whom they apply (including the NI Assembly and Executive, and wider NI civil society and businesses). However, these are all internal matters for the UK and should not be reflected in any treaty arrangements with the EU (which was not of course a party to the GFA and is an "interloper" in the question of protecting the people of NI, merely being interested in protecting its Single Market).
- Para 72 refers to the consent mechanism continuing to apply to the application of EU law in NI. However, this is in breach of UK sovereignty and overrides the basic international law rights of the people of NI.

The fundamental objection to the NIP is that qualifying UK sovereignty in NI involves permanent prejudice and detriment to the people of NI, since normal democratic norms are overridden for the sake of the EU's political aspirations. The UK's internal democratic arrangements cannot protect its people from political acts or trade distortions from the EU. The arrangement is fundamentally a breach of the GFA and the international law of self-determination.

Another fundamental problem of the NIP is as follows. By asserting EU legislative sovereignty for goods, agriproducts and associated economic trade, the ability of the arrangements not to cause civil unrest, trade diversion or other problems, and to operate consistently with the GFA, is dependent on:

14 David Collins, *How to Level the EU's Playing Field: Trade Remedies for a Trade Deal*, Politeia, April 2020; and David Collins, *Deploying WTO Trade Remedies to Combat the Eurozone's Unfairness*, 35 (2020) Journal of International Banking Law and Regulation, 295.

15 Barnabas Reynolds, David Blake and Robert Lyddon, *Managing Euro Risk: Saving Investors from Systemic Risk,* Politeia, February 2020.

16 See fns 14 and 15 above.

- Future legislative actions of the EU,
- The extent of any potential divergence from the UK legal system, and
- The effects of enforcing new rules on NI without any consideration being given (through democratic process) by the people of NI.

Already it is reported that over 800 EU rules have been imposed on NI,[17] for immediate implementation. The realities of the EU's legislative process are such that this system cannot in fact operate predictably or fairly for the people of NI.

It is manifest that the UK, which is responsible for the wellbeing of the people of NI, cannot have intended the NIP to operate in this way. It is evident that these arrangements are vitiated *ab initio* under Article 48 of the VCLT. They are incapable of operating in any manner which can be taken to have been intended, given the complete lack of adjustment of the EU's legislative processes to allow for the democratic interests of the people of NI, or indeed for the democratic interests of the people of the UK as a whole. This is exacerbated by the EU's unreasonable interpretation of the text of the Protocol with regard to screening products which are allegedly 'at risk' of entering the Single Market.

17 Lord Frost evidence to House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland, 14 July 2021.

V - MUTUAL ENFORCEMENT RESOLVES THE REMAINING ISSUES

The only sure way out of the conundrum is to go back to the beginning, where the original error began, and to put the border back where it should be under the GFA and international law, which is north-south, and not in the middle of the Irish Sea.

The basic error at the outset was to seek to create an invisible border by granting economic sovereignty over NI to the EU. The EU's arrangements create to some degree a new, non-international law border, east-west, which is ultimately inconsistent with UK sovereignty and must be removed. They also create a role for the ECJ and European Commission beyond the territory of the EU, over peoples who are not subject to the sovereignty or control of the EU, who do not participate in its democratic processes and who are consequently unrepresented in its councils.

This results in a permanent source of tension, particularly given the EU's activist approach to law, regulation and economic control.

THE BASIS FOR A SOLUTION

It is only by a pure reinstatement of the north-south border, thereby removing the *de-facto* east-west border, that the interests of the people of the UK, especially NI, can be respected. Only then will the people of NI be able to benefit from a removal of the EU's legal code and red tape, which has held back innovation and commercial dynamism, preventing the EU from keeping pace with many of the other economies around the world. It is only then that the UK can assist the people of NI in full with strategies like freeports, free trade agreements covering its entire territory and subsidies necessary to kickstart new development for the economy.

ALTERNATIVE SOLUTIONS

Consequently, a fundamental rethink is needed: an approach that enables Brexit to be delivered for the whole of the UK and at the same time addresses the EU concerns about the integrity of its Single Market and delivers an 'invisible north-south border'.

Two viable options have been proposed:

- **Alternative Arrangements**. The most advanced and fully developed of these proposals was formulated by *The Alternative Arrangements Commission* in July 2019, which was incorporated in UK Government Policy and formed the basis of detailed UK proposals to the EU.[18] It is a combination of cutting edge trade practices that would not require any infringements on UK sovereignty and is entirely workable given implementation time - as explained by Alternative Arrangements Commission - particularly given the relatively low volume of trade across the north-south border.

  Unfortunately, the EU was dismissive of this proposal, which ultimately led to the current unworkable East-West border in the Irish Sea.

  If the EU had welcomed these proposed Alternative Arrangements and worked constructively to implement them, both sides would have benefited and the need for the Protocol would have fallen away. In theory, such proposals could be revived today, if the EU could find the will to do so. However, recent history suggests that the EU may continue to look for excuses not to allow a sensible and minor technical evolution of the application of Common Transit Convention and Border Control Post regulations in the proposals which would eliminate the need for any border infrastructure.

18 Prosperity UK report on Alternative Arrangements: https://www.prosperity-uk.com/aacabout/

- **Mutual Enforcement**. The Centre for Brexit Policy in July 2020 advanced the solution of Mutual Enforcement of regulations by the UK and EU in respect of trade - a dual autonomy approach based on existing international trade practice.[19] This approach replaces the controversial minutiae of operational and technical procedures with a legal obligation on each side to ensure the enforcement of the other side's rules and standards. Not only does this approach avoid infrastructure at the border and endless haggling about possible gaps, but it also is likely to ensure a high level of compliance, since the relevant trader is within the jurisdiction of the government responsible for enforcing the rules. Furthermore, Mutual Enforcement not only meets the criteria the EU has demanded for NI border procedures but also preserves UK sovereignty.

Given the EU's reluctance to embrace Alternative Arrangements, this paper proposes that the UK introduce Mutual Enforcement into the current negotiations as a matter of urgency.

HOW THE MUTUAL ENFORCEMENT CONCEPT WORKS[20]

Mutual enforcement entails each side making a reciprocal legal commitment to enforcing the rules of the other with respect to trade across the border. Each side maintains autonomy - but commits to the enforcement of whatever rules the other seeks to impose in respect of goods crossing the border (See Annex A).

Unlike a customs union or partnership, Mutual Enforcement does not - of itself - remove customs duties nor does it remove, harmonise or require mutual recognition of standards. It works by inverting the usual approach to customs enforcement. Duties may be, for example, imposed for anti-dumping reasons or due to subsidies that one party claims are injuring its companies or as a result of goods failing to qualify for zero duty under rules of origin.

Normally, where there are two distinct customs territories - even between those with an FTA - customs border infrastructure is necessary, as it is the first opportunity that either side has to assert its jurisdiction - i.e., enforce its rules and collect its duties. The obligation to pay duties and ensure compliance rests with the importer - since this is the party to the transaction that is within the jurisdiction of the importing territory.

However, in a Mutual Enforcement approach, the obligation to comply with the importing territory's rules and pay duties owed is placed on the exporter as a matter of law of the exporting territory. This is the critical ingredient - the border check becomes redundant. Under Mutual Enforcement, the border is no longer the first opportunity to assert jurisdiction, because the importing territory has successfully asserted its jurisdiction beyond its border.

In essence this would mean a set of rules would be established only for those producers wishing to sell to the EU market (and *vice versa*). UK producers exporting to markets outside the EU or those who don't export at all would be not be subject to these processes. Under Mutual Enforcement for UK-EU trade across the north-south border, it would therefore become the responsibility of the EU or the UK to ensure the other side's rules were met for goods crossing the border.

This legal concept can apply to any rule that the importing state wishes to enforce at its border (except obviously those rules that themselves prescribe a particular mode of enforcement at the border). It is "legally operable" and leaves no gaps behind. In this way, it is of a different character to 'Alternative Arrangements', which is essentially a combination of legal, procedural, and technological procedures for each individual transaction.

19 The discussion below draws heavily on that paper, the mutual enforcement sections of which were largely written by James Webber, an EU lawyer and partner of Shearman & Sterling LLP.

20 The idea was originally described in a paper published by Joseph H.H. Weiler, Daniel Sarmiento and Sir Jonathan Faull on Verfassungsblog - https://verfassungsblog.de/an-offer-the-eu-and-uk-cannot-refuse/

BENEFITS OF MUTUAL ENFORCEMENT

Mutual Enforcement would not require border checks because any breaches could be notified to the UK authorities once they became obvious through checks at point of sale or distribution in the EU or spot checks on exporters in the UK. Severe penalties would act as a deterrent. The EU would reciprocate in relation to trade with the UK. Importantly, the UK-EU border would be restored to the land border between NI and the Republic of Ireland, where trade is a factor of ten less than the sea bridge between Great Britain and NI.

Given the incomplete implementation preparations of the current arrangement, the Mutual Enforcement approach as a replacement is workable and can be implemented in a similar time-scale. It delivers on the Government objective of protecting the integrity of the UK and its Single Market and taking back control. From the EU point of view, it would have both its own resources, as well as those of the UK Government, protecting its Single Market. Trade could continue to flow freely - a huge advantage to a trading bloc that has a surplus with the UK.

Mutual Enforcement also resolves the remaining issues associated with the Command Paper. It is a solution for the north-south border, meaning that EU law does not apply in NI at all, but only UK law does. As a result, there will be no need for east-west checks. And we can then do what we want in NI, including helping protect the people of NI from dumping and unfair subsidisation in the Republic and the rest of the EU.

EU law will apply to UK exporters across the north-south land border, but they would be subject to that anyway. The only difference is that enforcement will be in the UK, not in the Republic or EU.

OBJECTIONS TO MUTUAL ENFORCEMENT ARE NOT CREDIBLE

Some critics have asserted that a Mutual Enforcement arrangement would breach World Trade Organization (WTO) law, namely the Most Favoured Nation (MFN) principle of GATT Article I. This is because it would grant special treatment to products originating from one member (the UK or the EU) which are not available to other WTO members, effectively allowing goods to cross an international border without checks. But, given the historic and ongoing sensitivities in Ireland, such notional breach of MFN would almost certainly be justified by the GATT essential security exception (Article XXI).

A related challenge to Mutual Enforcement is the idea that it would mean that neither the UK nor the EU are managing their external borders properly. This appears to be predicated on the idea of "leakage" - that improperly checked goods will slip through and compromise the relevant market with sub-standard goods. A corollary to this point is that a porous border will undermine the UK (or the EU's) chances of securing Free Trade Agreements (FTAs) with other countries. Often framed in terms of a mockery of the 'Global Britain' strategy, some analysts believe that Mutual Enforcement makes the UK look unreliable as a trading partner because the other party won't know exactly what kind of market they are signing up to. But this assessment makes little sense when viewed in the context of the small volume of trade across the NI / Ireland border.

Those who oppose Mutual Enforcement tend to point to the practical difficulties of implementing it on the ground. It has been suggested that it would amount to a "smugglers' charter" because it will enable traders to bypass border controls by removing customs enforcement and replacing it with a system of fines - again the spectre of "leakage". But this critique appears to assume that UK authorities (or EU ones for that matter) would fail to enforce the rules rigorously. More importantly, there is no significant market or distribution network for non-compliant goods and therefore no real profit in it for criminals to smuggle, not when compared to more lucrative contraband such as tobacco, alcohol, fuel, drugs and migrants. This is a critically important point. The products traded under this arrangement are all sold via normal channels

through which mutual enforcement can easily function, as VAT or trading standards operate now. The zero tariff zero quota TCA means there is no tariff for smugglers to profit from evading.

Some believe that Mutual Enforcement would be unworkable because it would require businesses to become customs experts for their exports across the Irish border, which could be problematic for businesses which purchase thousands of components globally. But, while the red tape associated with assessing exports could be onerous initially, eventually businesses would learn to adapt, much as Great Britain / EU traders across the Channel have done in the first months after Brexit. Any difficulties could be mitigated by the UK and the EU providing temporary support / funding for smaller traders coping with the new scheme.[21]

GROWING SUPPORT FOR MUTUAL ENFORCEMENT

Mutual Enforcement was originally proposed over two years ago by no less a figure than former director-general at the European Commission, Sir Jonathan Faull, together with Joseph Weiler and Daniel Sarmiento, who pointed out that this approach would do away with complex border checks. Since then, it has been further developed by UK experts in trade and international/European law.

A practical plan now exists, in which the EU and the UK should together engage. Lord Frost's Command Paper sets out some of the key requirements that would pave the way for such a settlement.

Recently in July, Sir Jonathan Faull further endorsed Mutual Enforcement in a strongly supportive article in the Financial Times, in which he says, [22]

> *"The . . . approach is based on international trade practice which has proved its worth over time. State authorities have shown that they can handle the enforcement of regulatory standards of another state. Experience shows that this kind of mutual enforcement boosts confidence between trading partners and among companies by sharing knowhow, good practices and close co-operation. Dual autonomy would provide the UK and the EU with many of the benefits that the current protocol seems unable to deliver. This idea deserves attention and scrutiny, perhaps by committees of the various parliaments and assemblies involved."*

Lord Trimble, architect of the GFA, has endorsed Mutual Equivalence on numerous occasions. Last December, he authored a Centre for Brexit Policy paper, *Protecting the UK from the Northern Ireland Protocol - How Mutual Enforcement Can Solve the Northern Ireland Border Problem,*[23] in which he stated:

> *". . . the Mutual Enforcement proposal put forward by the Centre for Brexit Policy and others shows clearly how an 'invisible border' can be restored to the natural Irish land border. This would achieve immediately the objectives of both sides in the Brexit negotiations and avoid the damage caused by the NI Protocol"*

This was followed by a *Wall Street Journal* article aimed at the G7 Meeting in which he said,

> *"I have outlined a solution at the Centre for Brexit Policy called "mutual enforcement." The EU and the UK could put in a place an agreement to enforce each other's regulations. This would apply to businesses involved in trade across the border of Northern Ireland and Republic of Ireland. Firms selling into the Republic of Ireland from Northern Ireland, or vice versa, would have to declare on export that they had adhered to the regulations in the other jurisdiction. If spot checks when the goods arrive or subsequent inspections discover that the declaration was false, then the business would face stiff mandatory penalties in its home country.*
>
> *The question is: Does the political will exist to deal with the trade problem—or is the EU playing fast and*

21 See further David Collins, *Would Mutual Enforcement Work?,* Briefings for Britain, June 2021.
22 Jonathan Faull, *A dual autonomy approach would help with the Northern Ireland protocol*, Financial Times, 20 July 2021.
23 https://centreforbrexitpolicy.org.uk/publications/

loose with peace in Northern Ireland to punish the U.K. for voting for independence?" [24]

He has also expressed his views in the Foreword to this paper.

More recently, cross party political support for Mutual Enforcement has been forthcoming in Parliament. In reply to Lord Frost's Command Paper Statement in the Lords, Baroness Ludford of Clerkenwell (Liberal Democrat) admonished Lord Frost for not implementing Mutual Enforcement urgently: [25]

"The real situation is that scope continues to exist to find mutually agreed flexibilities and mitigations, within the context of the protocol, consistent with the legal regimes of both the UK and the EU. In that context, can the Minister tell me what his reaction is to the proposal from the British former senior European Commission official, Sir Jonathan Faull, in yesterday's Financial Times? The proposal is a development of proposals that he made two years ago and amounts to "mutual enforcement" or "dual autonomy", protecting the integrity of both the UK's and the EU's internal markets and based on well-tested international trade practice. The UK would introduce, as a matter of domestic law, EU rules only for goods that are exported to the EU and vice versa, and national courts could be empowered to make references to the supreme court of the other party in case of doubt about interpretation.

As Sir Jonathan says, this idea "preserves" UK regulatory autonomy, with "compliance … a legal requirement" here and not an obligation imposed by a foreign power. It avoids the complexities of the TCA's level playing field arrangements—so will the Government pick it up and run with it? After all, the EU hates it, so this Government must find it very attractive. Such a scheme would need mature and rational consideration in a climate of trust with the EU. What the Government are now doing is, sadly, the very opposite of that.

And, in the Northern Ireland Protocol Debate in the House of Commons, the Shadow Secretary for Northern Ireland, Louise Haigh, stated the following:[26]

"Of course we have studied the suggestions made by Lord Trimble, who we all thoroughly respect as a co-author of the Good Friday agreement. I would welcome the Minister's comments and remarks on the Government's strategy to propose and negotiate such an agreement [Mutual Enforcement] with the European Union. Mutual Enforcement relies on trust, and we need a veterinary agreement that respects the unique circumstances of Northern Ireland.

24 *Wall Street Journal*, 10 April 2021
25 House of Lords debate on the Command Paper, 21 July 2021
26 House of Commons debate on the Northern Ireland Protocol, 15 July 2021

VI - MUTUAL ENFORCEMENT NEEDS TO BE TABLED QUICKLY

On June 23rd, 2016, the British people voted to leave the European Union.

Throughout the subsequent negotiations the EU used the Issue of NI's status to put the greatest pressure they could on the UK. Perhaps the worst aspect of this was the way that they used the Good Friday Agreement to justify their intractable negotiating stance. The history of the last five years of the Brexit talks is well known and does not need rehearsing here. However, after Brexit it has become all too clear that the NIP is simply not fit for purpose.

The problem lies in the fact that the NIP dilutes and diminishes the status of NI as a constituent part of the UK. The complexity of the NIP, with its requirement that the rest of GB faces complex customs checks across the Irish Sea when sending goods to NI, apart from creating genuine shortages of UK-produced goods reaching NI's shelves, has initiated a significant diversion of trade, to the Republic of Ireland. This and other factors are, as the Nobel Peace Prize Laureate, Lord Trimble, has made clear, already putting enormous strains on the Peace Accord he negotiated and agreed.

Finding a solution to the failed NIP is a matter of urgency. In reality there is now only one real solution and, as this paper points out, that is to implement Mutual Enforcement. One can see that this is now the preferred option for the UK Government. Lord Frost is to be congratulated for adding a real sense of purpose and steel to his discussions with the EU, so sadly missing when others were involved previously.

What the EU needs to reflect on is a recent poll giving the lie to the idea that the rest of the UK does not care about NI. When asked, well over 50 per cent agreed that the Protocol was a threat to NI peace and stability, that it was unfair that NI was treated differently and, vitally, that NI should remain a part of the UK. [27]

The problem is that, despite Lord Frost's resolve, the EU keeps repeating the mantra that it is not prepared to revisit the failed Protocol. This is an utterly unreasonable stance. Any objective onlooker must quickly see the EU's actions as contrary to the letter and spirit of the Good Friday Agreement.

With the existing exemptions due to cease in September and the prospect of greater chaos if that happens, the UK Government should recognise that the Mutual Enforcement solution should be put on the table very soon. The EU could and should accept this solution because it gives the EU continuing control over goods crossing the border into the EU and it gives the UK the same control for goods coming from the EU.

The Command Paper was a good start. However, we are running out of time if we are to stop people in NI, although politically part of the UK, being treated as if they were second class citizens of the UK. Article 16 provides both the UK and the EU with a unilateral power to take action should the application of the Protocol give rise to 'serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade.' Yet that is happening with greater intensity as every week passes.

Article 16 is clear that, if the EU do not wish to engage with the solution, then the provisions in the Article mean we would be justified in invoking it and suspending the operation of large parts of the NIP. Giving the EU notice as per Annex 7 of the NIP is the surest way to bring the EU to the table, armed with the knowledge that the UK is determined to resolve this issue, even if the EU persists in dragging its feet.

The British people have shown they care about NI remaining a full part of the UK. Now, the UK must make it clear to that the Protocol must be replaced.

27 https://centreforbrexitpolicy.org.uk/press-releases/sausage-wars-threaten-peace-in-northern-ireland-say-british-people/

ANNEX A - MUTUAL ENFORCEMENT: FURTHER PRACTICALITIES[28]

In practical terms, how would Mutual Enforcement operate for traders who intend to be compliant with the law as contrasted to those who do not?

1. **Traders who wish to comply with the law.** If it is to be unlawful (even a criminal offence) for a trader in Ireland to export a good to NI (or *vice versa*) without complying with the latter's rules and duties, it is obviously important for that trader to have a means of complying with the law.

   This can be achieved by using the existing state structures of Ireland and NI. For example, should the export of sheep meat from the EU to the UK attract a tariff by the UK, that duty would be paid to the Irish Revenue Commissioners for the benefit of HM Revenue and Customs (HMRC). In the opposite direction, HMRC would collect all duties for the benefit of Irish customs authorities.

   A mutual enforcement approach can be readily used for regulatory compliance as well - e.g., confirming that upholstery foam meets fire standards. As a matter of the exporting territory law, the exporter would be required to check that the product complied with the importing territory rules. This could be done via the exporting territory's national regulatory authorities or classification bodies who are required - as a matter of the exporting territory's law - to confirm compliance with the importing territory's rules.

   The central control mechanisms to operate a border are the export and import declarations. Both declarations are based on the same transaction, so they could be joined in one procedure. This can lead to additional administrative efficiency. The exporting territory could apply the export procedures of its territory and in addition could apply the import procedures on behalf of the importing territory. The same basic data can be used in both declaration systems. Export customs authorities would also apply the regulations and taxation of the importing territory. There would basically be only one point where checks and inspections would take place. Duties would be collected from the exporter and paid to the importing customs authorities. Authorities would have access to the customs and regulatory declaration systems of the other territory to apply uniform procedures, or work collaboratively so as to provide data in the necessary formats. Import duties collected would be paid periodically to the other territory - or set off against duties owed in the other direction.

   Various schemes already in use could be incorporated into the agreement to help Mutual Enforcement work in a way that is least disruptive to NI-Ireland trade by lowering the administrative burden for qualifying firms to comply with the legal requirements Mutual Enforcement introduces. For example, a Trusted Trader scheme could allow qualifying companies to self-certify and account for duty on a periodic basis - rather than in advance of every movement of goods across the border. Such firms would also benefit from fewer audit checks and the scheme could permit movement for temporary storage.

   Similar exemption from duties for very small companies below the VAT threshold would essentially remove the compliance burden on those firms - although the attractiveness of such an exemption for fraud and smuggling would require tight eligibility criteria, the ability for either side to suspend the exemption in cases of suspected fraud, and police and civil law enforcement cooperation. Alternatively, umbrella services for smaller traders could be provided by those who are trusted traders at subsidised rates and with risks pooled and insured.

   It is accepted that compliance with Ireland/EU and the UK's SPS and agrifood rules using Mutual

28 See page 55 *et seq*: https://centreforbrexitpolicy.org.uk/wp-content/uploads/2020/07/REPLACING-THE-WITHDRAWAL-AGREEMENT-How-to-ensure-the-UK-takes-back-control-on-exiting-the-transition-period-12-July-20.pdf

Enforcement could present challenges. This is mainly because food safety rules are politically sensitive in the EU and the EU has chosen, where it suits the EU, to be highly prescriptive as to the method of enforcement - including on the border itself, except for instance where geographical exceptions are used so that checks take place other than at the border crossed, such as intended at Calais/Boulogne for example for seafood imports to the EU from the UK. The risk to the EU's Single Market from north-south trade in the island of Ireland is small, at least initially, because the UK's SPS and agrifood regulations start from a position of alignment, and because north south trade within the island of Ireland is small and much of it managed by regular, trusted traders. However, Mutual Enforcement could be adopted with a structured approach, to handle SPS divergence. This could envisage the following steps:

- An opportunity for the non-diverging party to determine whether to adjust its rules to follow suit
- An opportunity for the diverging side to consider whether to continue to accept the produce of the other
- Where there is divergence, the use of labelling and supply chain traceability to mark goods (both finished and ingredients) for sale in one territory or another
- Where evidence arises of produce appearing in the 'wrong' market, taking action against the importer *and* exporter pursuant to Mutual Enforcement
- Where there is persistent failure to enforce, each side to avail themselves of the rebalancing tools in the TCA

As part of this, an EU-UK border agreement could accept that veterinary, SPS checks and inspections by NI authorities to the extent necessary are fully recognized as sufficient to prove compliance with EU standards, and *vice versa*, thereby avoiding checks at the border.

2. **Traders who want to avoid compliance with the law.** A customs border post with a physical presence on the border provides the importing state with an opportunity to catch and enforce against those who wish to evade their rules. The protection is never absolute as the importing state must balance enforcement rigour against allowing legitimate trade to pass unhindered.

   A Mutual Enforcement structure removes the border post, but rather than increasing smuggling risk, it can be more efficient than a border post at detecting and deterring those traders who do not wish to comply with the law.

   - A custom border post is largely a one-shot enforcement opportunity as goods move from one side of the border (where it is lawful) to the other (where it is not). A Mutual Enforcement structure implies constant enforcement on both sides of the border. The good becomes unlawful on the exporting side of the border the moment it is exported in breach of the importing territory's rules. This approach could be expanded to catch inchoate and conspiracy offences as well. The importing territory benefits from the protection of the exporting territory's law enforcement agencies as well as its own.
   - The goods with which we are concerned are not illicit goods that are unlawful in each jurisdiction (drugs, counterfeit products, endangered species, etc.). Sheep meat or sofas that do not pay the required duty or comply with the relevant standards will be sold via normal distribution channels. Each side will know where the largest smuggling opportunities are (e.g., where the greatest differential in duties or production techniques exists). Customs enforcement can require evidence as to from where such products were supplied and proof that duty was paid. This can be assisted by recordkeeping requirements, similar to those that exist in tax matters. Such enforcement informs a prosecution on both sides of the border. The supplier of the product is therefore prosecuted as opposed to just the buyer/importer under the normal arrangements. This is a stronger enforcement mechanic than a border post offers.

Operational Legality. Legal provisions for the Mutual Enforcement approach have been drafted, which can be provided.

Compliance with the GFA. Leaving the EU is not a breach of the Belfast (Good Friday) Agreement - indeed the right to peaceful constitutional change is embedded in the GFA. The GFA does not regulate trade in goods. Nor does it require the UK and Ireland's joint membership of the European Union to sustain an open border for trade in goods.

However, the GFA does require the UK to remove "security installations" - a term that is not defined but almost certainly includes customs infrastructure - or the security presence required to protect it. This obligation is not reciprocal.

The institutional framework established by the GFA - especially the British Irish Council (BIC) and the British Irish Intergovernmental Conference under Strand Three - provide for the necessary cooperation required to make a Mutual Enforcement structure work. The BIC mandate is very broad - to

> "*promote the harmonious and mutually beneficial development of the totality of relationships among the peoples of these islands.*"

Moreover, the BIC anticipates that it can be used to discuss EU issues and comes with an obligation to

> "*exchange information, discuss, consult and use best endeavours to reach agreement on co-operation on matters of mutual interest within the competence of the relevant Administrations. Suitable issues for early discussion in the BIC could include transport links, agricultural issues, environmental issues, cultural issues, health issues, education issues and approaches to EU issues.*"

The GFA is affirmed and "*protected in all its parts*" by the Protocol, even though the Protocol is in fact inconsistent with the GFA. The GFA imposes best endeavours obligations on Ireland and the UK as described above. The use of the BIC therefore to discuss the modalities of a system such as Mutual Enforcement to remove the need for border infrastructure is not merely an option, it is an obligation on both the British and Irish State.

Compliance with WTO Rules. The EU could of course terminate the Trade and Cooperation Agreement. Were Mutual Enforcement construed to grant favourable treatment to goods entering the UK from the EU unilaterally in the event of 'no deal' (and *vice versa* in the event of reciprocity under a free trade agreement such as the TCA), the Mutual Enforcement concept as practised would not violate the Most Favoured Nation obligation of GATT Article I. This is because waiving through goods at the Irish border is defensible under the essential security provision of Article XXI of the GATT, allowing the reasonable transgression of GATT rules on the basis of safeguarding public order. The Mutual Enforcement procedure may assist in preventing any escalation of conflict associated with a full customs border and would likely be viewed as such by a GATT panel in light of recent WTO case law that demonstrates a deferential approach to Article XXI.

Dispute Process. Breaches of the Mutual Enforcement approach could be subject to the dispute settlement procedures of the TCA. The arbitration panel could be empowered to order either damages be paid or authorise tariff retaliation by the aggrieved party against the other.

Underlying Principles of Mutual Enforcement

Mutual Enforcement is underpinned by some key principles as described below:

- **The novel feature of Mutual Enforcement lies with the role of the declarant in the exporting country.** [29] Normally, the declarant in the importing country works on behalf of the importer and checks compliance with import regulations and ensures that all duties will be paid to the importing country. Under Mutual Enforcement, the role of the declarant is turned on its head - i.e., the declarant in the exporting country checks compliance of the exporter and ensures that required duties will be paid by the exporter to the relevant authority in the exporting country (e.g., HMRC in the case of the UK) on behalf of the importing country.
- **Mutual Enforcement depends on the trust that each party has in the robustness of the other's legal system.** This was cited as a fundamental defect when the original Mutual Enforcement proposal was published by Sir Jonathan Faull *et al*. The EU would never "outsource" protection of the Single Market in this way. This criticism can be dismissed as meritless. All available solutions - whether proposed by the EU or the UK - have this feature:
  - The previous backstop arrangement required the UK and EU to rely on the robustness of each other's legal system to protect the boundary of the Single Customs Territory and apply the "common rulebook";
  - The current Protocol depends on UK authorities to police the border of the Single Market at entry points to NI - and is frequently cited by EU politicians as a matter of trust.

  Under Mutual Enforcement, both customs territories would have to trust each other's enforcement of customs regulations. Thus, a Mutual Enforcement system is fundamentally *mutual*, which increases trust and interdependence relative to the current Protocol where one side is in permanent tension with the other, enforcing asymmetric rights. An important characteristic of this approach is that exporters become liable in their own jurisdiction for failing to comply with the rules of the other jurisdiction.
- **There need be no level playing field provisions of any type arising from the NI Border.** Since each side retains autonomy over its regulatory sphere, each side retains customs tools (such as anti-dumping and anti-subsidy countervailing duties) to protect their market from unfair competition. These tools do not offer either side the same comprehensive framework as within the Single Market. This is reflected in the increased trade "friction" that being outside the Single Market and customs union represents. Mutual Enforcement does not remove this friction - it provides a way for each side to effectively enforce its rules and collect duties owing beyond its border without the need for customs posts. Moreover, there is subsidy discipline in the TCA - to avoid harmful subsidy races between the parties.
- **Law enforcement cooperation will be crucial to the successful operation of the mutual enforcement system.** This can and should build on the cross-border cooperation and institutions of the GFA.

Key Mutual Enforcement Operational Considerations

There are some operational considerations important to the successful implementation of Mutual Enforcement:

- **Declarants and customs authorities would apply two legal systems**. The declarant in the exporting country makes both the export and import declaration, thereby applying two legal systems and two different customs procedures. Thus, UK customs authorities would apply EU law in relation to its exporters. The same would apply to Irish customs authorities who would apply UK law on behalf of their exporters. This is a new approach, which will require some training of a limited number of declarants, but it could make logistics more efficient and lead to administrative efficiency, as there would be only

29 Goods can be declared to customs by the trader himself or he can appoint a representative, a declarant. A declarant makes a declaration based on the available information about the transaction that is mainly found in the accompanying invoice that is normally provided by the exporter

one collective procedure for export and import. Partial sovereignty over customs procedures would be delegated to the other jurisdiction but on a mutual basis. Rights and obligations will be in balance since both sides depend on each other's operations.

- **Access to each other's customs systems is necessary, so that import regulations of all kinds are applied to all transactions under the same conditions as elsewhere in the EU.**[30] UK customs authorities can only apply all relevant customs regulations by processing them through the EU customs systems, which relate to all EU databases that use big data to determine the risk profile of a transaction and instruct the (UK) customs authorities about what checks and inspections apply to a specific transaction. The same would apply *vice versa* for the Irish customs authorities needing access to the UK customs systems, for the same reason.

Under this approach, the declarant of a NI exporter to Ireland would declare the exported goods and the systems would decide whether the transaction is in compliance with EU regulations and that the appropriate duties/tariffs, etc had been paid to HMRC (or directly to the importing EU country if such a system were to be operated). The reverse process would take place for goods exported from Ireland to NI. Periodically, HMRC and the Irish Revenue Commissioners would net out the two-way payments.

- **Declarations under a Mutual Enforcement regime will also manage import and export VAT so that the existing VIES system will be unnecessary**. Export is exempt of VAT; VAT is due only on import. This will obviate the need for the UK to participate in the existing VIES (VAT) and EMCS (Excise) systems, which are essential to prevent the interference of the ECJ on VAT matters. There is no excise levied on the export of excise goods, while excise has to be paid on import. The existing differences in VAT and excise rates will remain. Thus, arbitrage in these goods by consumers and smugglers will not change. In fact, the existing VIES (VAT) and EMCS (Excise) systems will be replaced by declarations under the Mutual Enforcement regime. The UK will introduce postponed accounting, thus simplifying any import transaction because VAT does not have to be paid to the authorities, but can be deferred administratively to the financial administrations of traders. It would be useful if the Republic of Ireland could also facilitate postponed accounting (under any border regime) to facilitate trade.
- **The Transit procedure will be needed for Irish transports passing through NI and for NI transports passing through Ireland.** For this, derogation will be needed for Transit barcodes to be scanned at the border or their replacement with more modern systems of tracing compliance, either of which can be de-risked by mutual enforcement provisions.
- **Duty-free allowances and exemptions will be needed for low value or irregular traders and individuals**. This will eliminate difficult and burdensome pre-payment of duties, and proving compliance of goods, and abuse could be covered by the provisions of mutual enforcement.

Trading Is On a Small Scale

It is important to recognise that these procedures would be operated only for goods traffic crossing the NI-Republic of Ireland land border - not for the entire UK. Therefore, the trading volume of would be very small. For example, NI sales of goods and services to Ireland were only £4.2 billion in 2018, accounting for only 6.1 per cent of total NI sales.[31]

Importantly, the trading volume across the north-south land border is many times smaller than the volume across the East-West sea border. In 2018, the total value of goods and services passing across the East-West sea border was 3.4 times greater than the value passing across the north-south land border.[32]

Moreover, the complexity of the declarant's task in dealing with north-south trade under Mutual

30 A declarant has no authority or ability to do a thorough investigation into all legal aspects of a transaction. In general, a declarant has a vocational training and has limited time to process the declaration as costs must be kept low. Based on knowledge and experience the declarant will declare the goods to his best knowledge. There are about 50 laws that are applicable to trade across the border. The outcome of the declaration depends on the algorithms and systems analysis of the data processes that check on these laws and select transactions for further investigation. Thus, the declarant makes the declaration possible, but the declarant cannot certify any declaration. It is the customs system that approves or rejects a transaction. Customs authorities are there to enforce this outcome.

31 *Northern Ireland Broad Economy Sales and Exports Statistics 2018*, NISRA, 19th December 2019

32 *Northern Ireland Broad Economy Sales and Exports Statistics: Purchases and Imports Results 2018*, NISRA, 21st May 2020

Enforcement is lower than it would be for east-west trade under the requirements of the Protocol. Thus, the procedures under Mutual Enforcement would be more manageable. For example, we estimate the total number of declarants required in NI under Mutual Enforcement would be in the order of a couple of dozen people. These declarants would work within the company of large traders and, for smaller traders, could be hired through a forwarding agent or a customs broker.

Of course, it will be necessary for the EU to agree to the Mutual Enforcement approach. We believe there are compelling reasons for the EU to do so.

However, if the EU were not to agree to the Mutual Enforcement concept, the UK could still ensure an 'invisible border' on its side of border. That might, for example, comprise the UK effectively implementing an 'Alternative Arrangements' approach on the NI side of the border. This would demonstrate the seriousness with which the UK takes its intention not to install border infrastructure.

There would then be an implied obligation for the EU to demonstrate similar intent on the Irish side of the border in order not to be the causal factor in undermining the GFA.

MUTUAL ENFORCEMENT

Antidote to the Northern Ireland Protocol

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