CENTRE FOR BREXIT POLICY

MUTUAL ENFORCEMENT

The Key to Restoring Government in Stormont

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THE CENTRE FOR BREXIT POLICY 1

CONTRIBUTORS 2

EXECUTIVE SUMMARY 3

FOREWORD - The Rt Hon Sir Jeffrey Donaldson MP 7

FOREWORD - The Rt Hon David Jones MP 9

FOREWORD - The Rt Hon The Lord Trimble, PC 10

INTRODUCTION 12

I - NI PROTOCOL DOES NOT WORK AND CAN BE VOIDED 14

INTERNALLY INCONSISTENT AND CAPABLE OF BEING VOIDED UNDER INTERNATIONAL LAW 14

COMPLICATES AND FRUSTRATES TRADE 16

CANNOT RE-ESTABLISH DEVOLVED GOVERNMENT IN STORMONT 18

II - WINDSOR FRAMEWORK HAS FAILED TO GET STORMONT RUNNING AGAIN 20

EU LAW REMAINS SUPREME IN NI 21

RIGHTS OF NI PEOPLE NOT RESTORED 22

THE 'GREEN LANE' IS NOT REALLY A 'GREEN LANE' 23

PROTECTION OF STORMONT BRAKE IS DE MINIMIS AND UNLIKELY TO BE USED 24

NO WA/PROTOCOL EXIT OR REVIEW EXCEPT THROUGH HIGHLY COMPLEX LEGAL PROCESS 25

GOVERNMENT CLAIMS DO NOT MATCH REALITY 25

III - RESTORING STORMONT REQUIRES ALL PARTIES TO GET BEHIND A SOLUTION THAT CREATES AN 'INVISIBLE' NORTH-SOUTH IRISH BORDER 28

EU-DRIVEN EAST-WEST 'HARD BORDER' IS AN INTRACTABLE PROBLEM 28

EU Intransigence Undermined Available Practical Solutions 29

EU's Demands Were Non-Compliant With Agreed Basis for Negotiations 30

EU Overlooked Key Provisions Of the WTO and the GFA 31

EAST-WEST SEA BORDER INCONSISTENT WITH NI'S RIGHTFUL PLACE IN THE UK 32

RESTORING AN 'INVISIBLE' NORTH-SOUTH LAND BORDER IS ONLY WAY TO RE-ESTABLISH STORMONT 33

IV - ONLY MUTUAL ENFORCEMENT CAN PROVIDE AN 'INVISIBLE' NORTH-SOUTH LAND BORDER 34

HOW MUTUAL ENFORCEMENT SOLVES THE PROBLEM 35

MUTUAL ENFORCEMENT BENEFITS 37

OBJECTIONS TO MUTUAL ENFORCEMENT NOT CREDIBLE 38

BROAD SUPPORT FOR MUTUAL ENFORCEMENT 39

V - THE UK MUST EXERCISE ITS RIGHT TO IMPLEMENT MUTUAL ENFORCEMENT 42

ADMIT FAILURE OF THE FRAMEWORK 43

DECLARE THE WITHDRAWAL AGREEMENT AND ITS PROTOCOL VOID 45

TABLE MUTUAL ENFORCEMENT AND IMPLEMENT THE UK PORTION UNILATERALLY 45

Re-Balances Negotiation Dynamics in UK's Favour 46

Provides UK Control Over Future Outcomes 47

Existing TCA Limits Potential Trading Risks 47

More Straightforward/ Less Risky Than Framework 48

ADOPT SIX KEY RECOMMENDATIONS TO IMPLEMENT MUTUAL ENFORCEMENT SUCCESSFULLY 48

ANNEX A - HOW DID WE GET HERE? 51

THE CENTRE FOR BREXIT POLICY

The Centre for Brexit Policy (CBP) is a think tank backed by cross-party voices who support the UK leaving the EU. The CBP was 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' after leaving 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 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.

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EXECUTIVE SUMMARY

Restoring devolved government in Northern Ireland (NI), the bedrock of its peace and prosperity, requires getting the Democratic Unionist Party (DUP) back into Stormont. The way to do that is through implementing Mutual Enforcement across the North-South Irish border.

Mutual Enforcement, under which the UK and European Union take on the enforcement of each other's import and export regulations and standards, is based on existing international trade practice and endorsed in the government's July 2021 Command Paper. It protects both the UK and EU trading blocs, returns sovereignty to NI as part of the United Kingdom, and enables the return of the invisible border on the island of Ireland. It cuts through NI's Gordian knot of post-Brexit sovereignty, trade, and governance issues. It unlocks the return of the DUP to Stormont.

The NI Protocol (Protocol) is the cause of that Gordian knot. Successive governments have tried to amend it, but ultimately only added to its complexity. The latest iteration of this approach, the "Windsor Framework" (Framework), has already failed the governance test: the DUP (supported in their position by a significant number of Westminster MPs) have not returned to Stormont. And the growing clamour from NI businesses suggests that the much-hyped trading arrangements – Green and Red Lanes – are failing their first contacts with reality.

Mutual Enforcement removes all the negative consequences of the Protocol/Framework yet achieves the stated broader objectives of the Protocol. Unless all parties agree to move to such an alternative, Stormont cannot be re-opened. The UK government should set out to agree Mutual Enforcement with the EU and, with or without the EU's agreement, abandon the Protocol and Framework as soon as possible.

I. **The Protocol does not work legally, commercially, or politically and can be voided.** The problem inherent in the UK and EU's negotiations over the Protocol is profound. Both camps have spent years attempting to craft variants of a so-called 'solution', none of which has worked. The Protocol (including its current variant, the Framework) fails on every level:

   - **It is internally inconsistent and in breach of the international legal principle of the right of self-determination of peoples, meaning it can be voided under international law**
   - **It complicates and frustrates trade**
   - **It will never re-establish devolved government in Stormont**

   The Protocol, and the UK-EU Withdrawal Agreement to which it is attached, should be declared void by the UK.[1] They contain no lasting arrangements favourable to the UK and are incompatible with UK sovereignty, so are invalid under the reasoning of the Advisory Opinion of the International Court of Justice in the case of the Chagos Islands.[2]

1 See footnote 6 below.

2 International Court of Justice 2019 Advisory Opinion Regarding the Territory of Chagos, available here: https://www.icj-cij.org/public/files/case-related/169/169-20190225-01-00-EN.pdf

II. **The Framework has failed to get Stormont running again.** Having recognised that the Protocol does not work, the government announced on February 27th, 2023, that the "Windsor Framework" deal had provisionally been agreed between the UK and EU. The government's announced intent was to 'fix' the problems of the Protocol and allow Brexit to proceed as intended by the 17.4 million voters who voted to leave the EU.

III. Hard, detailed examination by multiple highly qualified analysts has shown the Prime Minister's claims, that the Framework "removes any sense of a border in the Irish Sea" and that businesses in NI will be "freed of unnecessary paperwork, checks and duties", are misleading. Not only does the Framework not provide any significant solutions to the problems of the Protocol but, in many respects, it makes the problems much worse and embeds the EU's laws and institutional control even deeper into the fabric of the UK. Under the Framework:

- **EU law remains supreme in NI**
- **The rights of the people of NI under the Acts of Union 1800 are not restored**
- **The 'Green Lane' is not really a 'Green Lane'**
- **The protection offered by the Stormont Brake is de minimis and unlikely to be used in practice**
- **The Framework does not allow for an exit from the Withdrawal Agreement or Protocol other than through a highly complex legal process**
- **Government claims do not match the reality**

The Framework has failed by a wide margin to meet the criteria established by the DUP for re-entering Stormont. This was inevitable, given that the Framework is structured to preserve the Protocol "as is". Consequently, the DUP has announced they will not re-enter the NI Assembly. As things stand, the Framework has failed in its fundamental and primary objective, to get Stormont working.

IV. **To get the DUP back to power-sharing devolved government at Stormont, all parties must get behind a solution that creates an 'invisible' North-South Irish mainland border, obviating any need for the Protocol/Framework.** In practical terms, this means moving the EU's Irish Sea trade border back to its rightful place, alongside the geographical border on the Irish mainland (as it must be, if we are to preserve the UK's sovereignty and allow ongoing development of a fully independent UK economy). This is because:

- **The EU-driven East-West 'hard border' is an intractable problem**
- **Attempts to solve this problem through the Framework prove that an East-West Irish Sea border is wholly inconsistent with NI having its rightful place in the UK, as required by the GFA**
- **Restoring an 'invisible' North-South border within the Island of Ireland - as defined by the GFA and international law - is the only sure way to re-establish the Stormont government**

All interested parties need to adopt a new approach in order to restore UK sovereignty in NI, save the GFA, and enable the people of NI to participate fully in the political life of the UK as British citizens.

V. **Only Mutual Enforcement can provide an invisible North-South border.** Mutual Enforcement, described in detail in this paper, replaces the minutiae of operational and technical procedures of other proposals with a legal obligation on each side to ensure the enforcement of the other side's rules and standards with respect to goods trade across the Irish North-South border. This approach avoids infrastructure at the border. Mutual Enforcement not only meets the criteria the EU has demanded for NI border procedures but, most critically, preserves UK sovereignty and solves the problems created by the Protocol.

VI. **The UK government must exercise its right to implement Mutual Enforcement.** Mutual Enforcement is a fair and balanced scheme, in which the EU and the UK base their arrangements on a new legal agreement, backed up by regular checks and inspections. A serious EU, interested in a deal that works for both sides, would agree to this proposal. The UK should be prepared to put its own Union first by tabling Mutual Enforcement and – if the EU fails to engage properly – unilaterally implementing it on a one-sided basis. Multiple papers have set out how Mutual Enforcement would work at an operational level and how the government should promote it. It was discussed in depth for months with the UK Brexit negotiating team. No fault was found with it.

An objective analysis shows that recent political events have narrowed the options open to the government, thereby making the path of implementing Mutual Enforcement more straightforward and less risky than the tortuous path that lies ahead if the government insists on pressing on with the requirements imposed by the EU under the Framework.

The government should take the following actions:

- **Admit that the Framework has failed politically and is already proving inoperable practically**
- **Declare the Withdrawal Agreement and its Protocol void**[3]
- **Table Mutual Enforcement and implement the UK portion unilaterally, recognising that doing so is more straightforward and less risky than attempting to implement the Framework**.
- **Adopt six key recommendations to ensure implementation success:**

Recommendation 1: Adopt a new negotiating mentality: Formulate clear objectives and work out how to achieve them, rather than adopting a "let's see what the EU offers us" approach.

Recommendation 2: Recognise political reality. Avoid the recent tendency of not only ignoring the requirements and suggestions of patriots and Unionists, but also self-deception such as believing the government can somehow 'roll over' DUP/Parliamentary opposition to its desired (EU-preferred) outcome.

Recommendation 3: Avoid repeating past legal mistakes. Recognise that the Protocol and other remaining elements of the Withdrawal Agreement were mutually intended and agreed to be only temporary; these documents contain no provisions of lasting benefit to the UK; they made clear that both the EU and the UK envisaged **a North-South border** in the future; and the Protocol itself makes clear in Article 13.8 that it is expected to be replaced.

3 See footnote 6 below.

Recommendation 4: Provide top-level political leadership in the form of a dedicated full-time Secretary of State, ideally legally trained with extensive practical negotiating experience, to set objectives, lead negotiations, and define desired outcomes.

Recommendation 5: Appoint a new, better equipped and focused team to deliver Mutual Enforcement. The team must contain the necessary political, legal, negotiating, and technical competences, including a cohort of high-end project managers able to drive through the technical and operational aspects of the invisible customs and North-South regulatory border.

Recommendation 6: Explain the UK's actions and their rationale to key constituencies by developing a comprehensive communications strategy that formulates and explains the key actions the government will take, providing a compelling rationale as to why the government finds itself compelled to give up on the Protocol/Framework approach and why it is now adopting Mutual Enforcement as its preferred solution. Successful communication of this narrative will gain support from the government's important constituencies – ie, the UK public, Parliament, the judiciary, EU institutions, and the broader court of world opinion.

FOREWORD
The Rt Hon Sir Jeffrey Donaldson MP

Leader of the Democratic Unionist Party

The decision to foist the Protocol on communities in Northern Ireland without the support of a single unionist elected representative has deeply damaged community relations and threatens both the constitutional and economic security of our Province as an integral part of the United Kingdom.

It remains the firm view of the Democratic Unionist Party that any return to fully-functioning devolved institutions at Stormont without further progress, including legislation that restores our place in the United Kingdom and its internal market, would be a retrograde step in our efforts to build a Northern Ireland where every tradition is respected and where there is economic opportunity for everyone everywhere.

Progress in building peace and stability in Northern Ireland has been painstakingly slow at times but it was achieved on the basis of consensus and with a recognition that to function effectively, the institutional arrangements require the support and participation of both unionists and nationalists. The Protocol undermines that delicately balanced consensus, including through the continued application of EU law on the manufacture of goods here which creates the potential for divergence between Great Britain and Northern Ireland.

The Belfast Agreement was sold to unionists as containing a backstop against any change in Northern Ireland's constitutional position without the advance and express consent of a majority of its people. The imposition of trade barriers between Great Britain and Northern Ireland in the absence of cross-community consent has led to the subjugation of Article 6 of the Acts of Union in respect of Northern Ireland. It denies local businesses and consumers the full orbit of economic rights those provisions confer upon, and guarantee, citizens in all parts of the United Kingdom. The ruling of the courts in favour of the Government's authority to make such a unilateral decision to restrict these rights raises existential questions regarding the adequacy of the constitutional guarantees that unionists have for twenty-five years expected to rely upon as British citizens. This cannot be ignored as part of any framework for resolving the issues and getting Northern Ireland back on track.

Economically, the corrosive impact of the Protocol has been undeniable, even with grace periods in place. In 2021 there were over a million customs declarations between GB and NI affecting over 10,000 businesses and worth £12.4bn. Meanwhile hundreds of millions of pounds in trader support has been spent by the Government on mitigating needless and prohibitive trade barriers East-West. All because the EU and non-unionist parties in Northern Ireland thought it was acceptable to impose draconian controls in the Irish Sea that were somehow unpalatable North-South. Subsequently, there has been a clear and ongoing diversion of trade from Great Britain to the Republic of Ireland. The Central Statistics Office in the Irish Republic recorded that the value of exports to Northern Ireland were around €2.5 billion in 2019 and 2020 but increased to €3.7 billion in 2021 under the Protocol arrangements.

The DUP's judgement in hitting the pause button on devolution until such a time that new arrangements command the broad support of unionists and nationalists has been vindicated. Others said there would be no re-negotiation and no change. However, our determination has proved what can be achieved. Whilst welcoming progress, we have carefully assessed the Windsor Framework and taken time to consult widely through the establishment of a panel to hear the views of stakeholders across Northern Ireland. Having received the Panel's report prior to the Local Council Elections in Northern Ireland, I concluded that the Framework does not meet our seven tests and does not go far enough in addressing some of the fundamental issues at the heart of our difficulties. Many of our concerns are reflected as part of the detailed and forensic analysis of the Windsor Framework contained in this report.

Further work is therefore required by the UK Government in the short term if we are to secure the necessary conditions for a return to the Executive. The DUP wants to see Stormont back up and running again as soon as possible and on a sound and stable foundation. The stakes are extremely high and this necessitates a willingness on all sides to engage constructively with proposals that could help end the logjam and protect our place in the Internal Market of the United Kingdom. Although the DUP has set out criteria against which we will assess any proposal, we have been clear throughout that Mutual Enforcement is a concept worthy of serious and sustained consideration in terms of delivering a longer-term solution.

The vast majority of trade from Great Britain is destined for, and remains, within Northern Ireland. There is a negligible risk to the integrity of the EU market. Indeed, it is hard to find a single reported case of goods crossing the border since 2020 which have been a threat to their Irish and EU consumers - despite many EU rules not having been applied. Even where goods are destined for the EU, it seems reasonable that each side could maintain regulatory autonomy whilst enforcing whatever rules the other seeks to impose on only those goods crossing the border. In the longer term, Mutual Enforcement would sustainably address the potential problems caused by the imposition of regulations by an entirely separate regulatory regime and respect our constitutional position as part of the UK.

Whether His Majesty's Government is willing to countenance such a proposal, or indeed bring forward plans that provide a similar level of legal certainty, remains to be seen. The objective of the DUP remains that of restoring and protecting Northern Ireland's rightful place in the UK Internal Market and to future proof this against potential divergence from the laws that regulate that internal market.

I wish to sincerely thank The Centre for Brexit Policy, including those who contributed personally to this publication in any way, for their dedicated and continued efforts to throw a spotlight on the impacts and injustice of the Northern Ireland Protocol. This work is very much appreciated.

FOREWORD
The Rt Hon David Jones MP

Deputy Chairman European Research Group

Seven years after the historic referendum of 2016, the United Kingdom has completed its departure from the European Union and recovered its independence and, with it, the ability to make its own way in the world.

Or almost. The sad truth is that the Northern Ireland Protocol of the Withdrawal Agreement prevents the UK from realising the full benefits of Brexit. Under the Protocol, Northern Ireland effectively remains part of the EU Single Market in goods, obliged to align dynamically with vast swathes of EU legislation, and subject to the jurisdiction of the Court of Justice of the European Union.

This has had the most profound impact on the UK as a whole. The British Government is in practice constrained from diverging from EU legislation, and thereby inhibited from building an economy regulated in a way that reflects the best interests of British industry and commerce.

Arguably even more worrying is the constitutional impact on Northern Ireland. The Protocol shatters the rights declared in the 1800 Act of Union. Goods passing from Great Britain to Northern Ireland have been subjected to checks supervised by EU officials. Many everyday goods enjoyed by Northern Ireland consumers have been in increasingly short supply.

Most importantly, the Protocol has undermined the principles set out in the Belfast – Good Friday Agreement, which has underpinned the peace that has prevailed, largely undisturbed, in Northern Ireland for the last 25 years.

A further consequence of the Protocol's impact on the delicate constitutional balance in Northern Ireland has been the suspension of the Assembly and Executive, with no sign of their recommencement in sight. It is essential for the stability of Northern Ireland that these institutions should be restored as quickly as possible.

The Windsor Framework, announced to much fanfare in February, is not a replacement for the Protocol, but rather an interpretive document. Checks remain on goods passing from one part of our country to another, as does the jurisdiction of the CJEU. The Northern Ireland institutions remain suspended. The Framework has not resolved the problems caused by the Protocol.

It is clear that the Protocol is not a sustainable long-term arrangement. Sooner or later – and preferably sooner - it will have to be replaced by something better.

This paper presents a workable solution to the problem. Mutual Enforcement is an elegant end effective arrangement that respects the sovereignty of the United Kingdom and restores the full place of Northern Ireland in our Union. Equally, it protects the integrity of both the EU Single Market and the UK internal market. It dispenses with the anomalous state of affairs whereby the court of one party to the Withdrawal Agreement has jurisdiction over the other.

Mutual Enforcement, in short, will normalise relations between the UK and the EU, thrown out of kilter by the Northern Ireland Protocol.

This paper is an important document that merits the closest consideration by policymakers in both Westminster and Brussels. As such, it is to be commended.

FOREWORD
The Rt Hon The Lord Trimble, PC

(Written by Lord Trimble for the CBP paper, Mutual Enforcement – Antidote to the Northern Ireland Protocol, published September 6, 2021)

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 was a former First Minister of Northern Ireland and received the Nobel Peace Prize.

INTRODUCTION

Following the celebration of the 25th anniversary of the Good Friday Agreement (GFA) – and remembering the Troubles that preceded it – what will it take to restore devolved government in Northern Ireland (NI), the bedrock of its peace and prosperity?

The answer is to get the Democratic Unionist Party (DUP) back into Stormont. And the way to do that is through implementing Mutual Enforcement, a mechanism by which the UK and the European Union take on the enforcement of each other's import and export regulations and standards.

Based on existing international trade practice, Mutual Enforcement, which was endorsed in the government's Command Paper of July 2021, protects both the EU and UK trading blocks, returns sovereignty to NI as part of the United Kingdom, and enables the return of the invisible border on the island of Ireland.[4]

It cuts through the Gordian knot of NI's post-Brexit sovereignty, trade, and governance issues. It unlocks the return of the DUP to Stormont.

The NI Protocol (Protocol) is the cause of that Gordian knot. The Protocol was presented as a way of keeping the North/South Ireland border freely open once the UK had left the EU. In practice, the Protocol was – and, after the Windsor Framework Agreement (Framework), remains – a device for creating an East/West border on the Irish Sea, diminishing trade between NI and Mainland UK, and turning NI into an appendage of the EU. It subliminally has convinced the Unionist community of NI that Westminster has abandoned them to a fate that will end with NI becoming part of a united Ireland under EU membership, regardless of their wishes. Annex A explains the chronology of events leading to the current situation.

Successive governments have tried to amend the Protocol, but have only added to its complexity. The latest iteration of this approach, Rishi Sunak's Windsor Framework, has already failed the governance test. The DUP (whose stance is supported by a significant number of Westminster MPs) has not returned to Stormont. Furthermore, given the growing clamour from NI businesses, the early signs are that the much-hyped trading arrangements – Green and Red Lanes – are failing their first contact with reality. This includes a demand that **all** GB goods be labelled "Not for EU", thus extending the costs of the Protocol to businesses that do not even trade with Northern Ireland.

The Centre for Brexit Policy (CBP) has long contended that far from being a one-off event, Brexit marked a return to Britain's historical natural order of foreign policy, namely, a perpetual state of negotiation with the world as a fully sovereign nation. In this sense, the Framework is just the latest stage in a continuing negotiation with the EU. Indeed, the Framework's own provisions lay out terms for a second phase of such evolution. Mutual Enforcement must be at the top of this agenda.

Mutual Enforcement removes all the negative consequences of the Protocol/Framework yet achieves the stated objectives of the Protocol. Unless all parties agree to move to such an approach, Stormont cannot reopen and the democratic institutions set up by the GFA will have failed. The British government should therefore set out to agree a new Mutual Enforcement-based arrangement with the EU (and to abandon the Protocol/Framework) as soon as possible.

4 The government's Command Paper is available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1008451/CCS207_CCS0721914902-005_Northern_Ireland_Protocol_Web_Accessible__1_.pdf

The purpose of this paper is to explain why Mutual Enforcement is the key to getting the DUP back to Stormont and how it can be implemented.

The following five chapters explain our conclusions in depth – ie,

I. **The Protocol does not work legally, commercially, or politically and can be voided**

II. **The Framework has failed to get Stormont running again**

III. **To get the DUP back to power-sharing devolved government at Stormont, all parties must get behind a solution that creates an 'invisible' North-South Irish mainland border, obviating any need for the Protocol/Framework**

IV. **Only Mutual Enforcement can provide an invisible North-South border**

V. **The UK government must exercise its right to implement Mutual Enforcement**

Some readers may query why Chapters I and II of this paper delve into the historical problems of the Protocol and the Framework. The answer is, that in order to understand the proper basis for 'cutting the Gordian Knot', it is vital to understand the flawed underpinnings of the Protocol, why they provide the basis for disposing of it, and to appreciate that the Framework does not provide a solution, but in fact exacerbates the problem.

I - NI PROTOCOL DOES NOT WORK AND CAN BE VOIDED

The Protocol and its current variant – the Framework – fails on every level:

- **It is internally inconsistent and in breach of the international legal principle of the right of self-determination of peoples, meaning it can be voided under international law**
- **It complicates and frustrates trade**
- **It cannot re-establish devolved government in Stormont**

INTERNALLY INCONSISTENT AND CAPABLE OF BEING VOIDED UNDER INTERNATIONAL LAW

As implemented, the Protocol is internally inconsistent. It purports to uphold the GFA whilst its terms and implementation do the opposite, by imposing EU law on the people of NI for vital matters of day-to-day life.

Moreover, it is in breach of international law. The Protocol, even as currently operated in partial form, breaches the entitlements of the Unionist community arising under the GFA. It is implemented in a manner that breaches the international law principle of the self-determination of peoples – the inhabitants of NI and the whole UK. The NI Assembly has no say in the forming of EU law; nor does the UK Parliament.

In these circumstances, suspicions abound. Is this a deliberate attempt by EU mercantilists to ensure the UK cleaves close to the EU *acquis*, preventing the UK benefiting from the Brexit-enabled ability of competing in open markets? Or is it an attempt by the EU to be in a position where it can constantly wield a stick to influence the actions of an independent UK by dialling up or down the unacceptable checks across the Irish Sea?

Crucially, the Protocol is in breach of international law as there are, at least, two well founded, important self-determination cases, the first regarding the UK and the EU, that provide grounds for voiding the Protocol.

These are (1) the decision in Matthews v UK (1999) with regard to the rights of people in Gibraltar to be represented in the formulation of EU law and (2) the 2019 Advisory Opinion by the International Court of Justice regarding the separation of the territory of Chagos from the then UK colony of Mauritius.

1. **The situation in NI contravenes hard law applied by the European Court of Human Rights in its decision in Matthews v UK (1999). This case held that the people of Gibraltar had an inalienable right to be represented in the formulation of EU law because, at the time, Gibraltar was part of the EU.** Thus, the argument that the UK agreed to the Protocol arrangement and must therefore live with it is untenable. An agreement to do something that is illegitimate – ie, to impose EU law on the people of NI without any proper representation in the EU bodies that make that law, is not a lawful agreement. The EU insisted on the arrangement and did so without assessing what is compliant with the European Convention on Human Rights (ECHR), nor what is democratically acceptable (objectively and subjectively) to both communities in NI. It is clear that it is unacceptable to the Unionist community on both an objective and a subjective basis, and therefore it fails to be executable at its very first hurdle.

These questions are legally important. In law, one cannot agree to 'take hemlock' – ie, no contract is valid in law if it has an illegal basis or is illegally implemented. The illegality here arises from overriding the ECHR rights of the people of NI. Under no version of the Protocol will they have any say in the laws applicable to them – except *ex-post-facto* every four years in a manner incompatible with the governance arrangements of the GFA.

Furthermore, the legality of the Protocol is premised on a proper application of its very first clauses, which state that it is:

> *"without prejudice to the provisions of the [Belfast/Good Friday] Agreement in respect of the constitutional status of Northern Ireland and the principle of consent, which provides that any change in that status can only be made with the consent of a majority of its people."*

This consent does not exist and has not been forthcoming; so the very agreement itself breaches this provision even before one gets to the fact that the arrangements themselves do not provide for ongoing consent through proper representation in EU law-making bodies. This point cannot be remedied: such representation would be impossible under the EU's own constitutional arrangements. The people of NI fall outside the EU and do not have a voice within the EU – ie, directly or indirectly through elected representatives (or their appointees or nominees) battling for the NI (and UK) position in the EU Council, EU Parliament and EU Commission.

Nor do the people have a judge reflecting their viewpoint on the Court of Justice of the European Union (ECJ). They are not citizens of an EU member state and do not form part of one. So the entire Protocol operates without taking the democratic rights of the people of NI into account in any way that could be described as valid. Their representatives are at Westminster and also at the devolved body of the Assembly, whose arrangements are ignored and trampled upon by the Protocol.

2. **The 2019 advisory opinion of the International Court of Justice shows it is in fact possible to void the entire Withdrawal Agreement and the Protocol and start again.**[5] In our view, this should be done straight away, since there is nothing to be gained from trying to make the Withdrawal Agreement and Protocol documents work.[6] Neither document contains anything of lasting benefit to the UK – which rather proves the fact that they were entered into under duress. The entire legal architecture of the Protocol is at odds with the interests of the Unionist community.

   This Advisory Opinion related to a complaint by Mauritius against the UK about the British Indian Ocean Territory, the overseas possession of the UK that contains the Chagos. The crux of the complaint was that separation of that territory from the then UK colony of Mauritius in 1965 was a violation of the self-determination of Mauritius.

   Although it was true that the separation had been agreed by the UK's and Mauritius' leaders in talks at Lancaster House, the International Court of Justice concluded that Mauritius in 1965 had been in no position to give effective consent to such an encumbrance on its sovereignty. According to the Court, the continuation of UK jurisdiction in the Chagos "was not based on the free and genuine expression of the will of the people concerned." The issues in NI under the Protocol pivot on the same international law principle, the right of self-determination. If this principle were applied consistently, then it would be clear that the many concessions on NI that the UK made to the EU before the UK's full exit from the EU rest on dubious ground.

5 International Court of Justice 2019 Advisory Opinion Regarding the Territory of Chagos, available here: https://www.icj-cij.org/public/files/case-related/169/169-20190225-01-00-EN.pdf

6 In relation to the Withdrawal Agreement, the position adopted in this paper is that Part 2 of the Withdrawal Agreement (on the rights of EU citizens settled in the UK and vice versa) should continue to be given effect in UK law. This should be done to protect the rights conferred on EU citizens in the UK. This is consistent with the approach under the Withdrawal Agreement given that Part 2 has a special status which prevents it from being suspended by either party in the event of breach by the other party of other provisions of the Agreement. Therefore, the Withdrawal Agreement should be ceased as an international agreement and the provisions of Part 2 should be retained and available under UK law.

The position of the UK under the Protocol is reversed from that in Chagos. Under the Protocol, another sovereign power continues its jurisdiction within NI (which is part of the UK). The EU's highest court continues to be the final decision-maker for crucial matters pertaining to NI, and the EU continues to make and enforce rules that apply in NI. This is a very serious constraint on self-determination.

The parallel to Mauritius is even closer when one considers the circumstances in which the EU and the UK adopted the Protocol under which the constraint was imposed. The UK was then negotiating the terms of its exit from the EU, much as Mauritius had been negotiating the terms of its exit from the UK.

The EU is not a trade pact between sovereign equals. It is a political union with ambitions for full statehood, and the states that comprise it do not enjoy the freedom of action in all fields that fully sovereign states outside the EU Treaties enjoy.

EU states are not colonies of the EU, as Mauritius was a colony of the UK in 1965. Nevertheless, it is not possible to ignore both political reality and the legal constraints of the pre-Brexit period in order to maintain that the UK was in a position to have given any more valid consent to the EU's continued jurisdiction over NI than it had been for Mauritius to consent to the UK's over the Chagos. The recent decision of the UK to enter into negotiations with Mauritius about the future of the Chagos at least implicitly accepts that the International Court of Justice was right about self-determination.

Both of the decisions above show that there is only one legitimate path, which is that reflected in the GFA. The UK must re-visit the Protocol (and the Withdrawal Agreement) and resolve all outstanding issues within the territory of the UK, including NI, in favour of the democratic bodies of Westminster and the NI Assembly. This will involve treating the Withdrawal Agreement and its Protocol as void and replacing them either with unilateral measures or a properly negotiated outcome.

COMPLICATES AND FRUSTRATES TRADE

The Protocol fails to deliver on the most basic level. The EU's marketing spin for the Protocol was that NI would benefit economically by being in both the EU and UK single markets, and NI was billed as 'having the best of both worlds'. This was an undeliverable claim.

In fact, NI is not "in" the Single Market. In the EU's own words, it has "a unique access" to the Single Market. It is, however, in the UK's internal market, but implementation of the Protocol does not allow NI to enjoy full participation in the UK's internal market on an equal footing with businesses and citizens in the rest of the UK. It is simply not possible at once to be in two different legal regimes – which create two different single markets – because when laws clash, only one set of laws can be followed. That is why Article 6 of the Acts of Union 1800, which stated there would be and could be no barriers to trade between GB and NI, was disapplied when the Protocol came into law.[7]

Importantly, the technical Red and Green Lane solution to trade crossing the Irish Sea does not solve the problem. The Red Lane is simply the imposition of full EU official control and regulation on movements including those that are wholly within the UK, whilst the "Green Lane" creates such a compliance overload that many "eligible" traders will consider the bureaucratic controls at the start, middle and end of the process to be more burdensome than going through the Red Lane. This 'solution' does not restore equality and freedom of trade between NI and mainland UK, as required by the Acts of Union. Those Acts were reflected in the GFA. The Protocol overrode them.

7 *Re Allister and Ors.* [2021] NIQB 64 (see paras 110, 114)

Consequently, placing NI under EU Single Market rules for goods has had deleterious legal, physical, and commercial consequences. The Acts of Union have been undermined, border control posts to carry out checks on goods have been erected at ports in NI, and even those lorries not checked at the border have to carry up to 700 pages of paperwork to move from GB to NI. These requirements have had a high commercial impact.

For example, haulage companies in NI have seen an 8 per cent reduction in loads brought in from GB to NI. Several large hauliers record that they have had no new business from firms wishing to send goods to NI. Transport costs have increased by 14 per cent, purely as a result of the additional logistics costs arising from the Protocol's bureaucracy. And this is with the UK partially subsidising traders through its Trader Support Scheme (see below), which is a subsidy that will fall away at some point.

As a consequence, many GB companies are abandoning the NI market, which in many cases makes up a small proportion of their trade. It seems they have decided that the 2-3 per cent of their business in NI is replaceable by some additional marketing spend on business in GB.

The result is an increase in NI purchases from the Republic of Ireland. This increase and the decline of purchases from mainland UK constitute trade diversion, something expressly prohibited under the Protocol. In fact, under Article 16 of the Protocol, trade diversion is one of the grounds for suspending relevant parts of the agreement, and for countervailing steps to be taken – actions that have not been taken. As evidenced by the very existence of Article 16, trade diversion was not envisaged by the Protocol. Such diversion necessarily restricts consumer choice and results in more expensive and possibly inferior products, to the detriment of the people of NI.[8]

As a partial counterbalance, the UK government covers some of the additional costs of GB-NI trade caused by the Protocol through the Trader Support Scheme. Currently, £500 million annually is being spent on helping firms work their way through the mass of bureaucracy imposed on their firms by the Protocol. The question for many firms is how long this support will continue and at what stage they will have to start shouldering this burden. The question for the British taxpayer is: why on earth is the UK paying such exorbitant sums merely to allow for trade within its own internal market?

It is unlikely that government support can continue for long. As laws diverge between GB and NI because of Brexit freedom from new EU regulations, and with trading regulations shifting all the time, more and more trade (at least through the Red Lane) will become subject to border checks. Mainland companies will be required continually to update their knowledge base, organisation, and paperwork. Given that 300 areas of law, including taxation, are covered by the Protocol, its potentially crippling administrative burden cannot be overestimated.

Furthermore, whilst the government currently covers the cost of the border posts and the monitoring of trade into NI, the EU ultimately expects those costs to be passed on to the carriers who bring goods across the border. The EU Border Controls Regulations accept that the system of official controls and their monitoring is "by its nature complex and resource demanding" and "competent authorities should collect fees and charges to cover the costs".[9] The result will be EU charges imposed on GB goods coming into NI to pay for the EU-imposed border posts. This will place further costs and demands on trading into NI that do not occur on trade within GB nor on trade between NI and the Republic of Ireland.

8 Irish ministers have stated openly that Article 16 is the remedy for the frustration and additional costs caused by Protocol trade barriers; yet no such remedy has been invoked. Applying it would involve the permanent removal of most of the Protocol, which the government has not been willing to do. So Article 16 is an inadequate remedy. It also involves relying on the Protocol when, as explained in this paper, that document is fundamentally objectionable and should be treated as void.

9 See Regulation (EU) 2017/625, including Arts 79 and 80.

A further consequence of EU laws diverging from those in the UK will be an increase in the number of GB goods that cannot be sold in NI. Some divergences might at first sight seem innocuous but could nevertheless have major commercial effects. It has been announced that the EU is seeking to alter the fruit composition requirements in jams and preserves, with a certain knock-on for GB producers who supply NI consumers.[10] This kind of EU regulatory trade attack at UK producers of popular agrifoods is likely to worsen as the EU flexes the muscles the government so foolishly granted it in the Framework.

In the long term, even if the UK does not change any of its inherited EU laws, the EU will add new regulations and diverge radically, as the "Breakfast Directive" proposal shows. Nearly 700 new EU laws affecting NI have been made since the Protocol became operative, all of which will result in divergence between NI and GB. Dynamic alignment in NI requires NI to implement all these new directives and regulations both for imports from GB and for goods made in NI, even where those goods are not destined for the EU. Thus, ever more areas of trade within the UK's internal market will be affected, curbing innovation, limiting choice, increasing prices and reducing quality for consumers. This in turn will create major challenges to underlying systems and reinforce ongoing legal conflict. Going to NI from Great Britain will feel more and more like entering a different country.

The intellectual incoherence of all this is that the solutions for the East-West border are reminiscent of technical arrangements for 'Alternative Arrangements' that the EU previously dismissed as "magical thinking". They also require the development of new IT systems and border infrastructure that do not currently exist.

Article 16 is not the solution. It would need to be exercised permanently to override most of the Protocol, which is not its intended usage. The Protocol is fundamentally flawed for the above reasons. Most of its substance is permanently at odds with the GFA, which (ironically) the Protocol separately says it seeks to uphold. The Protocol is brought down by its own inconsistencies.

CANNOT RE-ESTABLISH DEVOLVED GOVERNMENT IN STORMONT

Perhaps most importantly of all, the Protocol does not enable the re-establishment of devolved government in NI. If the central pillars of consent and cross-community support on which the GFA rests are to be protected, then the Protocol will never work in NI, legally or politically.

> *The Assembly and the cross-border bodies require cross-community support and that is not forthcoming at present because no Unionist representatives elected to the Assembly support the Protocol: by participating in the Assembly and its Executive they would be required by law to implement the Protocol. For this reason, the Assembly will not be formed, and so the institutions of the GFA cannot function. The Protocol and the GFA cannot work together. This is a political fact.*

There are only two ways the matter can be addressed: either by fundamentally changing the terms of the GFA and the election processes in NI or, as this paper proposes, through the abandonment of the Protocol and the adoption of Mutual Enforcement. Most would agree that the former risks a deeply retrograde and potentially bloody step back into the past.

10 See https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2023)201&lang=en. And see https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2366. The EU is extending these changes to more products, including cider, which are very popular in the UK.

The Protocol also affects UK-wide political decisions, since the State aid and VAT provisions in the Protocol limit the ability of the government at Westminster to pursue its own industrial and fiscal policies. Any and all VAT changes cannot apply across the whole of the UK; EU VAT is required to be imposed on UK goods sold in NI, with a few specific new derogations. Worse, any support for businesses that **might** sell goods in NI **–** even if based in GB **–** could be deemed by the EU Commission and the ECJ to involve unfair competition with EU firms. Such overreach and interference in the UK's affairs cannot be sustained politically by the UK Government.

The Protocol's 'solutions' fail to address the fundamental issue of UK (NI and Great Britain) sovereignty. Indeed, the Protocol is incompatible with both UK sovereignty and with the GFA. It leaves Republic of Ireland/EU law, EU executive authority and ECJ jurisdiction in place in NI while denying the UK exercise of sovereignty over its sovereign territory (again in breach of the Protocol's stated objectives).

As such, the Protocol is (understandably) offensive to the Unionist community in NI. Lord Trimble made clear, before he died, in two forewords written for CBP, that the Protocol is irredeemably incompatible with the GFA.[11] No amount of tinkering with the terms of the Protocol is capable of making it compatible with that Agreement.

If this sovereignty and identity issue is not addressed to the satisfaction of the Unionists, there is no prospect of power-sharing being restored in NI. The DUP is united behind this position and has gained in popularity in doing so, supported by a wide range of Westminster MPs.

11 "Correcting the Damage Caused by the Northern Ireland Protocol: How Mutual Enforcement Can Solve the Northern Ireland Border Problem" Centre for Brexit Policy (February 2021) available here: https://centreforbrexitpolicy.org.uk/wp-content/uploads/2021/02/Correcting-the-Damage-Caused-by-the-Northern-Ireland-Protocol-5-Feb-21.pdf see also "Mutual Enforcement: Antidote to the Northern Ireland Protocol" Centre for Brexit Policy (September 2021) available here: https://centreforbrexitpolicy.org.uk/wp-content/uploads/2021/09/Mutual-Enforcement-Antidote-to-the-NI-Protocol.pdf

II - WINDSOR FRAMEWORK HAS FAILED TO GET STORMONT RUNNING AGAIN

Having recognised that the Protocol does not work, the government announced on February 27th, 2023, that the "Windsor Framework" deal had been agreed provisionally between the UK and EU. The government's announced intent was to 'fix' the problems of the Protocol and allow Brexit to proceed as intended by the 17.4 million voters who voted to leave the EU.

Prime Minister Sunak stated, when announcing the Framework alongside the President of the EU, Ursula Von der Leyen, that the Framework "removes any sense of a border in the Irish Sea" and that businesses in NI will be "freed of unnecessary paperwork, checks and duties". Unfortunately, hard, detailed examination by multiple, highly qualified analysts has shown the Prime Minister's words to be misleading. Not only does the Framework not provide any significant solutions to the problems of the Protocol but, in many respects, it makes the problems much worse and embeds the EU's laws and institutional control even deeper into the fabric of the UK.

The Framework has failed by a wide margin to meet the criteria established by the DUP for re-entering Stormont; consequently, they have announced they will not do so. Therefore, the Framework has failed in its core objective, to get Stormont working.

The detailed findings of the Legal Advisory Committee Review and Assessment of the "The Windsor Framework"[12] commissioned by the ERG – popularly known as the 'Star Chamber' – sets out the reasons why the Framework has failed to achieve any of the government's objectives.

The following sections of this chapter explain the principal conclusions of the Star Chamber, which were:[13]

- **EU law remains supreme in NI**
- **The rights of the people of NI under the Acts of Union 1800 are not restored**
- **The 'Green Lane' is not really a 'Green Lane'**
- **The protection offered by the Stormont Brake is de minimis and unlikely to be used in practice**
- **The Framework does not allow for an exit from the Withdrawal Agreement or Protocol other than through a highly complex legal process**
- **Government claims do not match the reality**

The concluding section of this chapter contains a table comparing the claims for the Framework made by the government with the facts. This comparison shows that the Framework – in many ways – is a retrograde step relative to the previous (and the current) situation of grace periods under the Protocol. It is hardly a surprise that the Framework has failed to get Stormont working.

12 The full report can be found at: https://lawyersforbritain.org/windsor-deal-erg-legal-advisory-committee-assessment/

13 These conclusions are based on the detailed summary of the Star Chamber's report reflected in the ERG press release of 21 March 2023.

EU LAW REMAINS SUPREME IN NI

The Framework fails to achieve the government's objective of removing the application of EU law from NI for the four reasons listed below:

1. **No EU laws will be "disapplied" or "removed" from NI, contrary to claims in the accompanying UK Command Paper.** NI will remain subject to the power and control of EU law, the ECJ and the European Commission on EU single market laws that govern the manufacture and sale of goods in NI; and EU customs formalities and duties will still apply to goods sent to NI from Great Britain, unless one of the limited exemptions applies.

   The deal makes only limited legal changes to the NI Protocol, on the basis of temporary legal powers under the UK-EU Withdrawal Agreement, which do not permit any changes to "essential elements". Claims that this amounts to a new legal framework or structure are incorrect. At most, there has been 'keyhole' surgery within the scope of these laws.

2. **There are only limited easements within the existing Protocol structure from the Irish Sea border customs and regulatory requirements for businesses in Great Britain selling goods into NI.** Two different legal systems, (a) UK law in Great Britain, and (b) EU law in NI, are the underlying cause of a border in the Irish Sea, with checks and controls required between those two parts of the same country. This underlying legal anomaly is not addressed by the Framework.

   Instead, there will be limited easements from the Irish Sea border customs and regulatory requirements for businesses in GB selling goods into NI. The reduced regulatory burden is intended to benefit certain goods sent within the UK across the Irish Sea that are accepted by the EU as destined solely for NI and as not presenting any risk to the EU's "Single Market", but the processes imposed on traders in order to benefit from these "easements" in effect greatly increase the regulatory burden and controls from those currently in operation.

   These easements will not benefit businesses in NI, which will remain fully subject to all EU laws under the Protocol both when making goods and when selling goods to NI consumers in competition with goods of British origin. A manufacturer in NI must produce goods *only* to EU standards and be monitored by the EU under the EU's regulatory regime, even where the goods are destined solely for the UK's internal market. This means the NI manufacturer is treated like a third country supplier in the UK's own internal market.

   Moreover, EU laws for goods encompass not only requirements for the specification of the good itself, but also apply to how the good is made and whether any matter of public policy gives rise to an advantage over other such goods produced in the Single Market (eg, through the EU's State aid law).

   Easements for very specific areas are to be made *under EU law directly applicable in NI*, for medicines, some retail goods (mainly foods), pets and plants. Allowing this to be done within EU law (rather than in a bilateral instrument) has adverse consequences:

   - Their interpretation, enforcement and validity are automatically under the jurisdiction of the ECJ
   - The UK has no legal remedy if the EU decides to amend or repeal them in future
   - This creates the incredibly dangerous precedent of allowing the EU to make and enforce under EU law EU Regulations that apply not only within the territory of NI but within GB (eg, the labelling requirements and trusted GB trader scheme). This sets a precedent that could be turned against the UK in future and which creates an immediate conflict with the philosophy of UK internal market legislation

3. **Future changes in VAT and excise remain under EU control.** Derogations are made from EU rules on VAT and excise that will allow changes to UK VAT and alcohol duties that have been made (or shortly to be made) since Brexit in GB to be replicated in NI. But there is no overall removal of VAT and excise from EU control and the deal provides for a new "enhanced co-ordination mechanism" on VAT and excise. Changing tax structures or rates outside the boundary of the specific relaxations will involve negotiation with the EU and their permission. The Protocol therefore imposes EU taxation without representation not just in NI but on the whole of the UK, in flagrant abuse of the principle of democratic consent.

4. **The EU remains in complete control of State aid law in NI and its "reach-back" into the UK has not been eliminated.** EU State aid law, by virtue of Article 10 of the Protocol, is applicable in NI and *across the whole of the UK* if aid might affect trade under the NI Protocol. *Article 10 will not be amended*, leaving the EU still in complete control of State aid within NI. The Framework will use a declaration (less legally secure than amending the treaty text) that seeks to limit (but not eliminate) the reach-back of EU State aid law across the whole UK, putting recipients of aid within Great Britain at risk of Commission proceedings requiring the aid to be repaid for 10 years after it is granted.

RIGHTS OF NI PEOPLE NOT RESTORED

The Framework does not restore the rights of people in NI that have been unlawfully taken away by the Protocol:

1. **NI citizens remain under the control of EU laws, courts, and administrative entities.** Unlike GB, NI will remain subject to the power and control of EU law, the ECJ, and EU administrative organs (such as the European Commission). NI citizens will have no ability to vote to change or remove the body of EU laws that apply to them under the Protocol, unlike citizens in GB who have the power to change or remove retained EU law.

   The Framework without consent creates two avenues for political and legal separation between NI and GB. The first is the application of new or revised EU laws that apply to NI but not GB. Since the Protocol came into force, there have been 670 new EU laws to which NI must adhere, indicating the extent of the divergence that will occur. The Stormont Brake - even if it were to be applied – could never deal with this volume of legislation.

   The second route to separation from the UK occurs when the UK government decides to replace inherited EU laws with new domestic legislation. Where this clashes with EU law applicable in NI, it cannot also apply to NI. This is likely to be a huge source of divergence in agriculture, biotech, and manufacturing. Furthermore, this could have huge social and economic consequences by generating divergent lifestyles and standards of living either side of the Irish Sea. The EU's hope, of course, is that the UK will curb its lawful sovereign ambitions in order to avoid NI becoming isolated in an EU legal ghetto.

   Using the Protocol as an underhand way of keeping the UK aligned with the EU was always the objective for Brussels. It should be clearly understood that avoiding a visible border in Ireland was the means to this ultimate goal, not that dynamic alignment with EU law is a prerequisite to avoiding a hard border in Ireland.

2. **Customs duties and restrictions remain on goods moved from GB to NI.** Customs duties between GB and NI will remain unless a specific exemption applies. Larger businesses in NI will have to pay EU tariffs on goods inputs from GB if they do not satisfy rules of origin under the TCA. Burdensome administrative requirements will apply to goods even within the scope of the specific easements and, outside those easements, the full panoply of EU external border rules will apply to goods moved from GB.

THE 'GREEN LANE' IS NOT REALLY A 'GREEN LANE'

As outlined above in this chapter, *EU Law Remains Supreme in NI*, limited (and conditional) relief from the full application of EU external customs duties and customs and regulatory requirements is to be made in an attempt to facilitate trade across the Irish Sea.

However, these easements, which cover customs and certain goods standards, are highly constrained, carefully defined, and in many cases impose new costs and burdens on traders:

- They cover certain aspects of East-West trade only. For example, full EU customs checks and duties, if payable, will still apply to business acquisitions of input goods to be processed in NI by larger companies
- They will not be readily available to smaller traders
- Registration and approval for GB traders and carriers will be required, extending EU law outside NI into the rest of the UK
- Some elements of the new scheme require businesses to become authorised under a newly established mechanism, managed by the UK but overseen by the EU
- Some of the elements contain new, detailed application, compliance and monitoring processes, with restrictions on how the UK applies the scheme
- Declarations will still be required, as will compliance checks
- Precautionary usage of the "Red Lane" involving full checks is likely, and there is no reimbursement mechanism for duties where goods end up solely in NI
- The scheme is not on a secure legal base vis-à-vis the EU, since it is vulnerable to suspension by the EU on grounds of suspected fraud, or termination by the EU on "diversion of trade" grounds
- In addition, the movement of mail order parcels between GB and NI, currently covered by the grace period, will become subject to stringent new EU rules requiring the personal information of senders and addressees to be collected and passed to the EU

These complex new rules certainly do not resemble a "Green Lane" where no declarations or checks are required and anyone is free to walk through.

Sanitary and Phytosanitary (SPS) goods, under the draft EU SPS regulation,[14] will have to be supplied by a trusted trader, specifically labelled, checked on entry into NI, sealed and certified, and monitored to their final retail destination, which must be an approved NI retailer. This is far more onerous than anything envisaged under the Protocol, or indeed for internal market trade anywhere in the world. Moreover, the EU SPS regulation mandates the building of new border infrastructure, in the form of Border Inspection Posts (BIPs).

The extremely bureaucratic regime devised by the EU in the Framework for the sale of GB goods within NI (unique labelling requirements, trusted trader scheme, physical check at border posts, sealed consignments monitored to the point of sale, follow-up audit) seems expressly designed to frustrate trade within the UK's internal market – in clear breach of the Protocol's aims. Let's not forget, these are not "at risk" goods. These are basic retail foodstuffs which have been – and should be – freely available to be enjoyed by consumers in NI, and which will be subject to so much bureaucracy that it will not be worthwhile for the trade to continue. These draconian new rules create a hard border within the UK itself.

Furthermore, construction of the BIPs to monitor GB-NI trade is likely to lead to unrest, at the very least. Far from solving the problems with the Protocol, the Framework, if implemented according to the EU's demands, will lead to a host of new and worsening problems and increase political tensions within NI, thus undoing much of the progress achieved under the GFA.

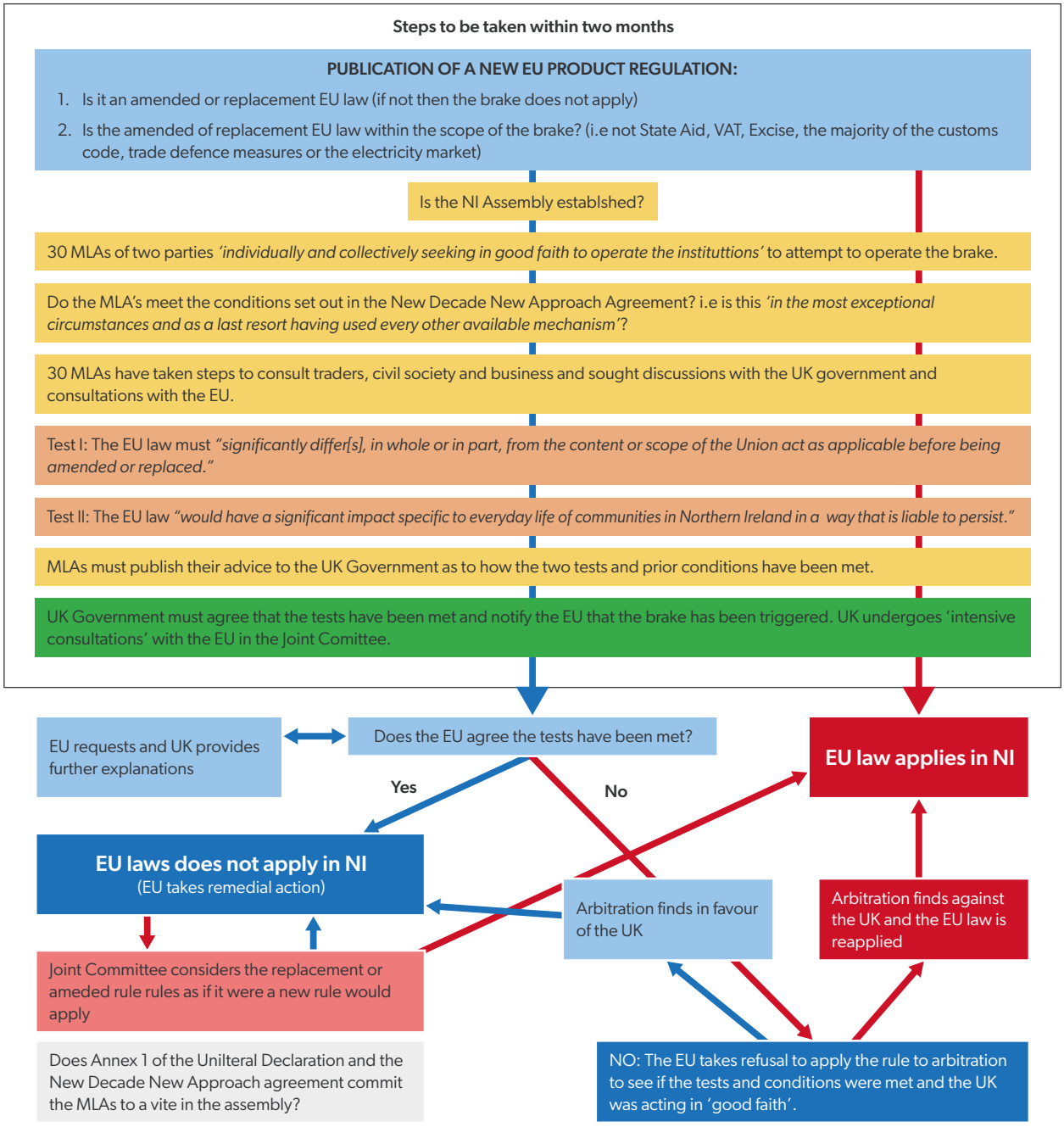
14 Proposal for a Regulation of the European Parliament and of the Council on specific rules relating to the entry into Northern Ireland from other parts of the United Kingdom of certain consignments or retail goods, plants for planting, seed potatoes, machinery and certain vehicles operated for agricultural and forestry purposes, as well as non-commercial movements of certain pet animals into Northern Ireland (2023/062), full text available here: https://commission.europa.eu/system/files/2023-02/COM_2023_124_final_EN_0.pdf

PROTECTION OF STORMONT BRAKE IS DE MINIMIS AND UNLIKELY TO BE USED

The government points to a feature of the Framework that it says ameliorates the situation. A new 'Stormont Brake' has been inserted into the Protocol, which gives a certain number of members of the NI Assembly the ability to call for the rejection of incoming EU laws. However, this applies only to future changes to EU law and confers no right to change any part of the existing body of EU laws imposed on NI under the Protocol.

Moreover, the 'brake' is of very narrow application in theory and is likely to be ineffective in practice. It is a highly restricted version of a process contained in the European Economic Area (EEA) Agreement and does not cover laws on EU trade defence measures, State aid, VAT, excise, most of the Customs Code, nor the Electricity Market. Furthermore, the 'brake' allows the EU to take "remedial" countermeasures. There has been only one attempt to use the EEA version of the brake, by Norway in 2011, which was abandoned in 2013. Norway failed.

The flow chart below illustrates the bureaucratic complexity and likely negative outcomes offered by the Brake:



NO WA/PROTOCOL EXIT OR REVIEW EXCEPT THROUGH HIGHLY COMPLEX LEGAL PROCESS

Under the Framework, the UK makes new commitments and undertakings that reaffirm and embed the status and structures of the Withdrawal Agreement and its NI Protocol.

- The government commits to new, tougher arrangements for market surveillance and enforcement under the Protocol. New commitments are made by the UK on "exports" from NI to GB.
- The government commits to stopping the progress of the NI Protocol Bill, which, if enacted, would allow for the restoration of UK sovereignty in NI
- The EU sets out how EU representatives will engage directly with NI "stakeholders", undermining the status of NI within the United Kingdom

Furthermore, the Protocol contains no viable exit or review clause. The "democratic consent" mechanism, which allows for renegotiation on an Assembly vote in 2024, is not cross-community as it should be under the GFA. Even if invoked, the Protocol remains in place and governs any replacement arrangement.

The combined effects of the above lead to an unfortunate but inevitable conclusion: **the Framework will incentivise current and future British governments to copy future new and amended EU rules so as to avoid the imposition of new checks across the Irish Sea.** Changes to the "Breakfast Directive" will be the first test. Thus, businesses in NI will be denied the benefits of reformed post-Brexit UK law applied in GB and will be faced in their home market with competition from goods supplied by GB-based businesses that comply with more competitive UK rules.

GOVERNMENT CLAIMS DO NOT MATCH REALITY

The table below summarises the claims made by the government for the Framework versus the practical reality.

- **Of the 14 claims made by the government and listed in the left column, only one might be justified** – ie, the EU's 'generosity' in allowing GB pets to travel to NI if they are microchipped and have an accompanying travel document and declaration stating that the pet will not go to the Republic of Ireland. Note that this, of course, pertains to pets travelling from one part of the UK to another.
- **The government's remaining 13 claims are misleading or, less generously, untrue.**

THE GOVERNMENT'S CLAIMS	ANALYSIS
Is this legally binding on both sides? *"It does what many said could not be done., legally binding changes to the protocol treaty itself."*	The NI Protocol remains intact, supplemented by some additional arrangements. The UK cannot hold the EU to many of its commitments, which will be enacted under new EU law and be governed by the ECJ.
Has it removed EU laws? *"over 1,700 pages of EU law – with accompanying European Court of Justice (ECJ) jurisdiction – are disapplied," (CP 806)*	As described in this Chapter II (in *EU Law Remains Supreme in NI*), there is no evidence that 1,700 pages of EU law have been disapplied. Not a single EU single market law has been removed from NI.

THE GOVERNMENT'S CLAIMS	ANALYSIS
The Stormont Brake: *"It gives us control over dynamic alignment, through the Stormont brake, beyond what the [NI Protocol] Bill promised."* *"these arrangements provide for the appropriate sovereignty in NI for the Stormont Assembly to have that say. It is more than a say; it is an ability for the Assembly to block new EU goods laws as they come down the pipe if Assembly Members are not happy with them."* *"It is for us to make the determination whether the threshold has been met."*	As described in this Chapter II (in *Stormont Brake's Protection is De Minimis and Unlikely to be Used*): The 'brake' is of very narrow application in theory and is likely to be ineffective in practice. It covers a limited range of EU laws applicable to NI. The UK cannot determine whether the thresholds have been met. If the tests are not met, then adjudicators could find against the UK and reapply the law.
Medicines: *"it provides dual regulation for medicines. The UK's regulator will approve all drugs for the whole UK market, including NI, with no role for the European Medicines Agency. That fully protects the supply of medicines from Great Britain into NI"*	The UK MHRA will remain subject to EU law when authorising new medicines in NI that fall outside these special categories. The concession could be removed by EU legislation or withdrawn under the legislation if the UK is judged to have contravened its terms.
UK alignment with EU rules? *"we have also committed to a range of other things to ensure that we protect against trade and regulatory divergence, including dialogue with businesses in NI and also with the European Union."* *"there are opportunities to do things differently across the UK to drive growth and prosperity,"* *"What that refers to very specifically is the work of the Office for the Internal Market, which we have strengthened as a result of the agreement and provided some extra detail about what we do in the Command Paper."*	In practice, the Framework will incentivise the UK and its future governments to copy future EU rules (and adjustments to existing rules). The UK will have to engage in an on-running system of negotiations via the Joint Committee or see the Irish Sea border harden and fall foul of its own legislation to ensure there is no further hardening of the Irish Sea Border. It has agreed to create a Special Body on Goods and a Committee that allows the EU to scrutinise new UK legislation, with no right to be consulted on new EU regulations. This will ensure dynamic alignment with EU law.
Pets *"A pet owner travelling from Great Britain to NI just needs to make sure that their pet is microchipped and then they will simply need to tick a box when booking their travel."*	The EU has allowed GB pets to travel to NI if they are microchipped and have an accompanying travel document and declaration stating the pet will not go to the Republic of Ireland.
Green Lane *"Within the green lane, burdensome customs bureaucracy will be scrapped and replaced with data sharing of ordinary, existing commercial information. Routine checks and tests will also be scrapped. The only checks will be those required to stop smugglers and criminals. Our new green lane will be open to a broad, comprehensive range of businesses across the UK."*	As described in this Chapter II (in *'Green Lane' is Not Really a 'Green Lane'*), full customs formalities will remain for many NI businesses importing goods from Great Britain and complex Tariff Rate Quotas and Rules of Origin will complicate NI firms' supply chains. The 'Green Lane' is only available for a limited range of goods and involves burdensome pre-registration and administration. One-way data sharing of data relevant to EU state aid law is strategically dangerous.
NI's place in the UK *"I can say with conviction that it does address the issues that were raised, and that it does secure NI's place in the Union and safeguard sovereignty."*	The Articles of Union of 1800 have not been restored. There are serious questions regarding UK sovereignty in NI and Great Britain.
Is the Protocol Permanent? *"it is a significant development that the Vienna convention on the law of treaties is in the political declaration"*	As described in this Chapter II (in *No WA/Protocol Exit or Review Other Than Through Highly Complex Legal Process*), the NI Protocol contains no viable exit or review clause.
Plants *"That is why today's agreement will lift the ban on shrubs, plants and trees going to NI"*	The agreement only applies only to "professional operators", is subject to "the rules for their entry into the Union laid down in Regulations (EU) 2016/2031 and (EU) 2017/625", and only applies to a handful of trees and shrub species that need to be accompanied by plant health certificates.

Another perspective on the government's claim that the Framework essentially replaces the Protocol is to consider the tiny degree to which the Framework has dictated changes in the text of the Protocol. Because the Protocol remains in force as an instrument of the Withdrawal Agreement, the only way onerous aspects of the Protocol can be nullified or modified is by scrapping it or radically amending its text.

Analysis by the Star Chamber shows that the substantive law changes are de minimis. As a rough and ready proxy for any assessment, the following points are revealing:

- **Only 4 amendments have been made to the Protocol**
- **These amendments affect only 6 pages (partially) of the 55 pages of the Protocol** (including appendices, etc)
- **Out of 21,788 words in the Protocol, the amended passages account for only 1,416 words** (6.5 per cent)

It is obvious that any significant change to the Protocol would be evidenced by much greater change in the text.

III - RESTORING STORMONT REQUIRES ALL PARTIES TO GET BEHIND A SOLUTION THAT CREATES AN 'INVISIBLE' NORTH-SOUTH IRISH BORDER

Chapter I has made it clear that the Protocol does not and cannot work. Chapter II explains that the government's intended 'fix' for the Protocol – the Framework – makes the overall situation (constitutionally) worse and introduces long-term controls by the EU over the UK. Most importantly, the government has failed to achieve its primary objective to get Stormont working again.

The only way to solve this problem is to go back to the beginning and start again. In practical terms, this means that the EU's Irish Sea trade border must be restored to its rightful place, alongside the geographical border on the Irish mainland.

The following three sections explain the basis for this conclusion and how interested parties need to change their approach in order to restore UK sovereignty in NI, save the GFA, and enable the people of NI to participate fully in the political life of the UK as British citizens.

- **An EU-driven East-West 'hard border' is an intractable problem**
- **Attempts to solve this problem through the Framework prove that an East-West Irish Sea border cannot be consistent with NI having its rightful place in the UK, as required by the GFA**
- **Restoring an 'invisible' North-South border within the Island of Ireland – as defined by the GFA and international law – is the only sure way to re-establish the Stormont government**

EU-DRIVEN EAST-WEST 'HARD BORDER' IS AN INTRACTABLE PROBLEM

The Protocol and its myriad problems arose from fundamental analytical, legal, and negotiating errors by both UK and EU officials. Stepping back from the detail, they must have believed that a structure involving the application of EU law in NI could be made compatible with the GFA and acceptable to Unionists. It should have been obvious at the time, and it is certainly obvious now, that they were completely wrong.

The EU drove this result in three ways:

- **The EU's intransigence prevented available practical solutions from being considered**
- **The EU's negotiating demands did not conform to the agreed basis for negotiating the UK's exit but were accepted by the UK**
- **The EU overlooked key provisions of the WTO and the GFA**

Of course, if UK officials and negotiators had not acquiesced in these matters, the result could have been different. This issue is addressed in Chapter V.

EU Intransigence Undermined Available Practical Solutions

During the Brexit negotiations, the question arose of whether there would be visible North-South border checks 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 on that border would cause civil unrest.

It was agreed that efforts should be made to avoid any such checks. The GFA was cited in support of this proposal, although nothing in the GFA moves the Irish border to the Irish Sea nor removes the fiscal, currency, geographic, legal and political border between NI and the Republic.

The British government made clear it would not introduce hard (ie, visible) North-South border checks and sought to agree arrangements to ensure this would be so. It is a matter of record, following the Referendum result, that officials from both the UK's HMRC and Irish Revenue Commissioners saw no difficulty operating an 'invisible border'. In fact, work in HMRC had started on developing the IT systems in coordination with the Irish.

Chancellor Philip Hammond stopped this work in the spring of 2018 when Theresa May made the decision to submit to the EU's proposed "backstop" solution (involving the application of EU law in NI), instead of ensuring British sovereignty in all parts of the UK. The Chequers Paper of July 2018 set out the framework for what became the Protocol and took the option of an invisible North-South border completely off the table.

Notably, the EU never committed to an invisible North-South border and tabled demands that made such an arrangement impossible to implement:

- **The EU insisted that the UK must satisfy its purported need for *permanent* standalone arrangements, despite the two parties having already agreed to work toward a trade deal that would largely eliminate trade issues at the border** (see below)**.** Such arrangements would have to ensure that under no circumstance would the EU itself need to impose a visible border and border checks between the Republic of Ireland and NI. Unfortunately, the UK's acceptance of this flawed approach meant that the UK tacitly accepted the responsibility of solving the EU's border concerns, rather than insisting that the EU deal with these concerns itself.
- **The EU made clear that its Single Market had to be protected through either: (1) hard border controls on the North-South border or (2) by arrangements deemed acceptable unilaterally by the EU for the protection of its Single Market**. The EU claimed the first option would lead to civil disturbance from the Nationalist community in NI. Their own proposed arrangements were formulated 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. For example, the EU asserted that one such solution would be for it to rip the Republic of Ireland out of its Single Market.
- **The requirements in the GFA for cross-community support and the principle of consent have never featured in the EU's thinking.** Indeed, the need to avoid supposed unrest if a visible border were introduced is of much less concern to the EU than "protecting the Single Market". But fundamentally, the issue on the Irish border is simply one of customs controls. Why do EU VAT, excise, state aid law and goods manufacturing regulations have to be imposed in NI in order to stop smuggling on the Irish border, which could easily be detected through intelligence operations?

- **Furthermore, the EU insisted that the UK agree to its demands before any discussion of a trade deal or before any detailed negotiation of future arrangements between the UK and EU.** This insistence was arguably beyond the powers conferred on the EU under Article 50 of the Treaty on European Union (TEU), a legal provision that is intended to allow the EU to agree exit formalities, taking into account the framework for the future relationship of the parties, which at that stage was unknown. In any event, Article 50 did not allow for *permanent* arrangements to be created, which is a key point to remember.

EU's Demands Were Non-Compliant With Agreed Basis for Negotiations

The EU's conceptual approach to the invisible border involved imposing EU law on NI, in what ultimately became the Protocol. The EU rejected all alternative methods of securing an agreement to an invisible border, even though such methods were extensively worked out (by the UK) and based on the very best of existing trade practices and processes from around the world.

EU negotiators achieved their desired outcome largely by ignoring the normal framework for such negotiations. Extraordinarily, UK negotiators acquiesced. For example,

1. **As mentioned above, the EU was adamant that the UK must accede to the EU's conceptual framework, prior to any discussion of the TCA.** The UK acceded, on the already agreed[15] basis that:
   - It regarded the arrangements as temporary, in part, as a result of the limitations contained in the Article 50 powers
   - Under Article 184 of the Withdrawal Agreement and Article 4 of the accompanying 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 that respected UK sovereignty
   - Article 25 of the Political Declaration envisaged the parties working towards arrangements for an invisible North-South border on the island of Ireland

   All of the above adds up to an agreement of temporary nature. However, such an interpretation is justiciable only at the end of the ECJ legal road, a court that is renowned widely for making decisions - not on the basis of the wording on the page but instead - on the basis of what it sees as in the EU's own interests – applying its so-called "purposive" method of interpretation.

2. **The EU weaponised Remainers in Parliament to force through the UK Withdrawal (No. 2) Act 2019, which made it impossible for the UK to leave the EU "without a deal", and then subsequently demanded the UK's acceptance of measures that were entirely alien to any normal withdrawal treaty**, asserting that this was all the EU would agree in order to allow the UK to leave the EU. These demands included:
   - **Imposing EU sovereignty over the rules for goods and agriproducts in NI**
   - **Requiring 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, that might affect the EU's Single Market or disturb what the EU claimed was its "level playing field"

15 Which they had said would be an unacceptable outcome.

- **Ensuring that the application of EU State aid law would be determined by the European Commission, as an executive matter, and ultimately applied as a legal matter by the ECJ**. All UK aid caught by these State aid provisions, as interpreted from time to time by the ECJ, is required to be notified to the European Commission for approval, rejection or adjustment. Non-notification does not circumvent the problem: it merely means that businesses receiving such aid are at risk from an action for up to 10 years subsequently to repay the aid.

And so, the Protocol that followed automatically created the need for a regime of new East-West border checks across the Irish Sea within the UK, policed by the UK under EU supervision. This broke NI off *de facto* from the rest of the UK and has created all the problems detailed in Chapter I. The result of all of the above is a highly intrusive regime designed to ensure the EU's political control over the UK's commercial and trade policy.

When the Withdrawal Agreement and Protocol were published, legal commentators – taking into account the content of the intended trade deal – presumed this to mean that any residual issues relating to an invisible North-South border could be easily addressed within a fairly short time frame. However, this did not happen, and Article 184 of the Withdrawal Agreement and Article 25 of the Political Declaration were not honoured.

EU Overlooked Key Provisions Of the WTO and the GFA

The section above refers to problems with regard to the negotiating procedures themselves. However, there were larger issues with the international legal framework within which the negotiations were conducted – specifically key provisions of the WTO and the GFA:

1. **The EU overlooked the WTO precedent that allows WTO members to continue with existing arrangements when they separate from another state or constitutional unit until new arrangements are put in place**. Historically, when states or larger constitutional units break up, existing trade relations have been allowed, by the WTO members, to continue until new arrangements were put in place. Pre-existing arrangements could be continued so long as a third state was not adversely or disproportionately affected. This was not only the accepted practice under GATT (1947), but it remains so under its successor arrangements comprising the WTO (1995).[16]

   However, after Brexit, the EU proposed to ignore that precedent and instead impose full WTO trading terms on the UK from the moment the notice period under Article 50 expired. This would involve applying the WTO's Most Favoured Nation (MFN) principle, which threatened to cause economic disruption by applying the same trading terms to the UK as the EU had with arm's length countries – an outcome not envisaged by Article 50 at all. This fallacious idea was perpetuated by the May Government's refusal to plan and make preparations for a 'no-deal' Brexit. This conjured threat would be lifted only if 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.

   It should be remembered that the May government and the civil service were complicit in the creation of the original Protocol (first known as the "backstop"). Keeping the entire UK as well as NI in the EU's Single Market and Customs Union gave the EU full control over the British economy, with the UK having absolutely no say. Presumably the idea was to make the exit terms so unpalatable that Parliament would reject the Withdrawal Agreement and Brexit could be stopped.

16 Dr T Grant, "Brexit, Tariffs, and GATT's original intent: Why a forgotten MFN exemption merits a closer look" Briefings for Britain (July 2019), available here: https://www.briefingsforbritain.co.uk/brexit-tariffs-and-gatts-original-intent-why-a-forgotten-mfn-exemption-merits-a-closer-look/

The Framework has extended this very unwelcome and fundamentally undemocratic principle by allowing the EU to create new regulations governing trade that takes place solely within the UK's borders. The motives behind this usurpation of sovereign power are open to question.

2. **The EU ran roughshod over the GFA stipulation that NI remains part of the UK unless a majority of the people in NI vote otherwise.** The Protocol has always claimed to protect UK sovereignty, the principle of consent in NI, and NI's place in the UK's internal market. Matters of UK sovereignty in NI were settled by the 1998 GFA, which provides that NI remains part of the UK unless a majority of the people in NI vote otherwise. The Protocol (*Art 1.1*) expressly states that it is *"without prejudice to the provisions of the 1998 Agreement in respect of the constitutional status of NI and the principle of consent, which provides that any change in that status can only be made with the consent of a majority of its people."* Furthermore, section 38 of the European Union (Withdrawal Agreement) Act 2020 makes clear that the UK Parliament retains full sovereignty over UK affairs.

   And yet we now have a Protocol/Framework that can be operated only if the British government surrenders its sovereign right to govern NI and the UK and reneges on its commitments in the GFA.

Perhaps Whitehall was naïve enough to believe that Article 25 of the Political Declaration, which foresaw agreement on an invisible border in Ireland, meant that the Protocol would become temporary, like the Gibraltar Protocol. In the event, once the Withdrawal Agreement/Protocol was signed, the EU refused to contemplate reopening the question, in breach of its commitments. In doing so it brushed aside elements of its commitments in paragraph 4 of the UK-EU Political Declaration 2020 to put in place longer-term arrangements for the relationship between the UK and EU that respect UK sovereignty.

The EU agreed only to a slim goods trade deal in the TCA that fell short of expectations in that it did not contain much on services, did not have mutual recognition of SPS provisions, and did not have diagonal accumulation of Rules of Origin. Furthermore (and remarkably, given the EU's earlier alleged concerns), it made no special provision for an invisible North-South border on the island of Ireland.

EAST-WEST SEA BORDER INCONSISTENT WITH NI'S RIGHTFUL PLACE IN THE UK

As Chapters I and II have demonstrated, the Protocol does not and cannot work to give the people of NI their rightful place in the UK, including participating in the UK's own market. It cannot work in its original form, nor in any future renegotiated form. It is a political sledgehammer to crack a small technical nut (customs controls on the Irish border) and has created far more serious problems than the minor one it is supposedly designed to solve.

- **The root of the problem is that the Protocol has created a new East-West border in the Irish Sea** under non-international law, which is wholly inconsistent with UK sovereignty and the UK's territorial integrity
- **The Protocol also creates a role for the ECJ and European Commission beyond the territory of the EU,** over peoples who are not bound by the EU Treaties, who do not participate in the EU's law-making processes, and who have no democratic representation in its councils and administrative bodies
- **The application of EU law in NI is unacceptable, unworkable and illegitimate, since it breaches the GFA,** iteration by iteration as new EU laws are applied in NI, even while purporting to recognise the GFA's supremacy

The Protocol and the Framework effectively prevent the UK from significant deregulation, since that would flag the ever-increasing difference in lifestyles and standards of living on either side of the Irish Sea. State aid has not been provided in new categories in NI to avoid revealing that this needs to be notified to the European Commission. Already, desired changes in VAT have been shelved, because they can be implemented only for mainland GB, and not for NI.

The Framework only ratifies those minor changes made so far or currently envisaged. It does not permit UK autonomy on tax policy. A country that cannot set its own tax law is not sovereign. All of this allows adverse political interests more credibly to assert that Brexit has not worked. The very existence of the Framework shows that Brexit is far from being "done".

Given the EU's activist approach to law and economic control and its highly prescriptive regulatory approach, the problems described above create a permanent source of legal conflict and political tension as the EU 'project' continues to be rolled out and rules are added to or modified.

RESTORING AN 'INVISIBLE' NORTH-SOUTH LAND BORDER IS ONLY WAY TO RE-ESTABLISH STORMONT

In order to resolve the situation and re-establish a Stormont government, 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 both parties' concerns about the integrity of their markets.

This requires reviewing what the Protocol was originally intended to achieve: an invisible North-South border for trade on the island of Ireland and, also, to protect equally the UK's and EU's markets, the UK's sovereignty, and NI's indivisible membership of the UK.

The only sure way to achieve this is to put the trade border back where it should be. It is only by removing the de-facto hard East-West border that the stated aims of the Protocol and all parts of the GFA can be respected. UK law can then, at a stroke, apply in NI.

More specifically, a viable solution must take into account the following:

- **Recognition that the threat to the EU Single Market from NI trade across the North-South border is minimal**
- **Acceptance that the interests of the UK and Unionists need to be respected in full and take precedence over the interests of the EU, a foreign organisation that has no sovereign, financial or moral right to impose its will in NI**
- **Accept the operation of an 'invisible border' between NI and the Republic of Ireland, which would obviate the need for the Protocol and the application of any EU law in NI**

These points are addressed in the next Chapter.

IV - ONLY MUTUAL ENFORCEMENT CAN PROVIDE AN 'INVISIBLE' NORTH-SOUTH LAND BORDER

Chapter III explained that in order to get the DUP back to the NI Assembly and to get Stormont working again, all parties must get behind a solution based on the legally recognised international North-South Irish border. This completely removes the need for the Protocol and the Framework and thereby ends their increasing irremediable financial, societal and political problems - and consequent costs.

There have been many ideas proposed for establishing an 'invisible' North-South border on the Irish mainland. Since July 2019, two viable approaches have been developed and proposed. These are:

- **Alternative Arrangements**. The first of these proposals, formulated by The Alternative Arrangements Commission in July 2019,[17] was incorporated in UK government Policy and formed the basis for detailed UK proposals to the EU. It involved a combination of cutting-edge trade practices and latest technologies. As explained by the Alternative Arrangements Commission, these arrangements would not involve infringements of UK sovereignty. They were entirely operable given adequate implementation time, particularly taking into account the relatively low volume of trade across the North-South border.

  Unfortunately, the EU was dismissive of these ideas and did not engage with them, instead insisting on the current unworkable East-West border in the Irish Sea. If the EU had welcomed the Alternative Arrangements proposals and worked constructively to refine and implement them in a manner satisfactory to both parties, each side would have benefited and the need for the Protocol would have fallen away.

  Potentially, such proposals could be revived today with political will from the EU. However, history suggests that the EU will continue to look for theoretical gaps in the solution and technical excuses for not engaging with the ideas. For instance, the EU is unlikely to allow the necessary sensible and minor (technical) evolution of the application of Common Transit Convention and Border Control Post regulations, which would eliminate the need for any border infrastructure.

- **Mutual Enforcement**. A team of experts working with the Centre for Brexit Policy in July 2020 advanced the solution of Mutual Enforcement – a dual autonomy approach. Mutual Enforcement of regulations by the UK and EU in respect of trade was originally proposed in a paper co-authored by Sir Jonathan Faull, the former Director-General of the 'Task Force for Strategic Issues Related to the UK Referendum', and two others (see *Broad Support for Mutual Enforcement* in Chapter IV). The concept has been further operationalised in two additional CBP documents.[18]

  Mutual Enforcement replaces the minutiae of operational and technical procedures in Alternative Arrangements with a legal obligation on each side to ensure the enforcement of the other side's rules and standards with respect to exports across the Irish North-South border. This approach avoids infrastructure at the border[19] and results in a high level of compliance, since both the exporting and importing parties are subject to the same rules and are within the jurisdiction of a government responsible for enforcing the rules. This is unlike usual border enforcement measures that apply only to importers within the jurisdiction of the state seeking to protect or manage its borders. Mutual Enforcement not only meets the criteria the EU has demanded for NI border procedures but – most critically - preserves UK sovereignty and upholds the institutions of the GFA.

17 The full report can be found at: http://uniserve.co.uk/wp-content/uploads/2019/10/Alternative-Arrangements-for-the-Irish-Border.pdf

18 "Correcting the Damage Caused by the Northern Ireland Protocol: How Mutual Enforcement Can Solve the Northern Ireland Border Problem" Centre for Brexit Policy (February 2021) available here: https://centreforbrexitpolicy.org.uk/wp-content/uploads/2021/02/Correcting-the-Damage-Caused-by-the-Northern-Ireland-Protocol-5-Feb-21.pdf see also "Mutual Enforcement: Antidote to the Northern Ireland Protocol" Centre for Brexit Policy (September 2021) available here: https://centreforbrexitpolicy.org.uk/wp-content/uploads/2021/09/Mutual-Enforcement-Antidote-to-the-NI-Protocol.pdf

19 Except with respect to SPS measures, which are discussed below

Why Mutual Enforcement is the best option for restoring the invisible North-South trade border on the Irish mainland is explained in the following sections of this chapter:

- **How Mutual Enforcement solves the problems of the Protocol**
- **The benefits provided by a Mutual Enforcement solution**
- **Why common objections to Mutual Enforcement are not credible**
- **The broad political support behind Mutual Enforcement**

HOW MUTUAL ENFORCEMENT SOLVES THE PROBLEM

Mutual Enforcement entails each side making a reciprocal legal commitment to the other to enforce the rules of the other with respect to trade across the border. Each side maintains its regulatory autonomy, but commits to the enforcement of whatever rules the other seeks to impose in respect of goods crossing the border, including the collection of any applicable tariffs from importers.

Unlike a customs union or partnership, Mutual Enforcement does not – of itself – remove customs duties, nor does it remove, harmonise or require the 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. The TCA between the UK and the EU already has an agreed mechanism for identifying and addressing such distortions.

Normally, where there are two distinct customs territories – even between those with an FTA – customs border infrastructure is necessary, as the arrival of goods in the importing country provides the first opportunity that either side has to assert its jurisdiction - ie, to enforce its rules (such as rules of origin under an FTA) 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, Mutual Enforcement places the obligation to comply with the importing territory's rules and pay duties 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 (through the actions of the exporting territory) beyond its border. This already happens to a certain extent with customs pre-declarations, where goods are cleared for entry into an importing country even before they leave their country of export, but under Mutual Enforcement the technique would be extended.

In essence, this means that a set of rules would be established applicable only to those businesses wishing to sell to the EU across the North-South border on the island of Ireland (and vice versa). UK (GB and NI) firms exporting to EU across other borders or to markets outside the EU, or those who don't export at all, would not be subject to these procedures. 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 and duties paid for goods crossing the border. There would be no need for EU goods regulations and standards for NI goods, nor for paperwork or physical checks on goods travelling solely within the UK's internal market, between GB and NI.

Mutual Enforcement can accommodate the collection of customs duties. While the detailed procedures are beyond the scope of this paper, a possible approach is the creation of a system whereby an order of goods from the UK to the Republic of Ireland triggers a UK export declaration and an EU import declaration such that:

1. EU customs duties, if owed, are put on the goods invoice and paid by the importer to the exporter
2. The exporter then remits the duty to the EU, either through HMRC or directly to Irish customs
3. The exporter then attaches to the goods a sticker or barcode evidencing the fact that the necessary duties have been paid, with a similar approach taken on a bill of lading carried by the haulier
4. The barcode is scanned at the departure port. Alternatively, the Dover/Calais model could be emulated whereby goods are cleared electronically at some juncture during the transit, and a Pre-Boarding Notification would be lodged by the Irish importer
5. Upon arrival in NI, there would be no checks to the goods. Upon arrival in the Republic, there would be no checks on goods at the border
6. It would be open to the EU to require an Irish importer to acknowledge receipt of the goods, possibly by uploading an electronic receipt/scanning the original barcode to Irish customs to sit alongside the import declaration and PBN
7. Active monitoring of declarations and analysis to spot any trade diversion would lead to intelligence-led operations to force compliance. The digital customs and logistics systems required for Mutual Enforcement are already in existence and could be deployed easily

To ensure compliance with the regime, a penalty would apply to those parties who fail to follow the procedure. The penalty would apply both to exporters and hauliers, therefore incentivising all parties involved in the carriage of goods to ensure that appropriate EU customs duties are paid. The same would be required in the Republic for its importers. It should be noted that an analogous system would in any event be required for the Red and Green Lane approach prescribed by the Framework.

The legal concept underlying Mutual Enforcement can apply to any rule that the importing state wishes to enforce at its border (except, obviously, those rules that themselves result in a particular mode of enforcement at the border such as with respect to SPS rules). 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 mechanisms for each individual transaction.

There is an adaptation to Mutual Enforcement that must be made in relation to SPS controls. Mutual Enforcement does not work well with existing EU SPS rules because these require agrifoods to enter the EU via a BIP. Therefore, in relation to SPS, Mutual Enforcement cannot avoid all border infrastructure. This issue is not without solutions, however:

1. The EU could (and arguably should, given that almost identical rules apply in the UK and the EU) negotiate an SPS equivalence agreement with the UK, as it has done for countries as far away as New Zealand and Canada.
2. Potentially, the UK could agree to align itself dynamically to EU SPS rules (or, obviously, vice versa) but it would be politically inept to offer this option. This is of course the EU's preferred option, since it thereby would retain control over an important area of the UK's economy. However, EU SPS standards are likely to be a barrier in negotiating FTAs with the United States and other third countries, as well as accession to the CPTPP, and the UK should not allow the EU to dictate its trade policy. Pressure on the EU should be brought to bear by strict monitoring of EU agrifoods imported into the UK (including the imposition of new standards) rather than agreeing to terms inferior to those agreed by the EU with other far less significant trade partners.

3. Alternatively, the UK could continue to accept Irish beef and dairy exports to the UK on the same basis as currently. If there is future divergence, the Irish party would agree to match the new UK standard. This of course leaves open the question of UK (and particularly NI) agrifoods exported to the Republic, either for processing and return to the UK or for resale. It would be prudent to leave the EU to be the party who, if it fails to negotiate SPS equivalence in good faith, forces such trade to stop presumably in order to score a political point against the UK. Such action by the EU would risk stoking the very kind of unrest and political tension in the Republic that it claims to want to avoid.

4. The UK should certainly not agree to any complex and outdated special labelling requirements for any products sold either in NI or in the Republic remembering that, if the EU does not agree equivalence, the UK has tools at its disposal to make the UK market much less profitable for EU agrifood exporters - who to date have had a very easy ride post-Brexit. All goods produced in the UK currently are labelled as being produced in the UK. If such goods are not legally saleable in the EU, then the label 'Product of the UK' is quite sufficient to prevent resale in the EU. Any EU trader who imports such a product will be committing an offence under EU law. It cannot be a legal obligation on the British government to monitor such importers or prosecute EU retailers - least of all by imposing special and costly labelling requirements on UK producers that no other third country producers must implement.

The issue of SPS controls is far from an insurmountable barrier to the delivery of Mutual Enforcement. The issue merely lends further weight to the recommendation, made in Chapter V, under *Implement Mutual Enforcement Successfully*, that a team of experts be appointed in order to successfully deliver Mutual Enforcement.

MUTUAL ENFORCEMENT BENEFITS

Mutual Enforcement would not require border checks, because any potential breaches or actual breaches in goods exported to the EU across the North-South border would be notified to the UK authorities once they became obvious, either through spot checks on exporters in the UK or through checks at point of sale or distribution in the EU. Severe penalties would act as a deterrent. The EU would reciprocate in relation to Irish exports to the UK. Importantly, restoring the UK-EU trade border to the land border between NI and the Republic of Ireland would massively reduce compliance and administration costs, since trade there is a factor of ten less than the Irish Sea border between GB and NI.

Given that the current Framework arrangements have yet to be implemented (or even fully legislated), Mutual Enforcement is a workable replacement that can go live in a similar timescale. Trade could continue to flow freely, which is a huge advantage to a trading bloc that has a surplus with the UK. This is even more important to Ireland, which had exports of EUR 17 billion to the UK in 2022.

Mutual Enforcement resolves the important issues:

- No hard border is needed, either North-South or East-West; each party would remit the duties collected to the other party
- EU law would not apply in NI at all, only UK law
- There would be no East-West checks or customs duties on GB goods remaining in NI
- The UK would enforce EU law and collect EU customs duties on all UK (GB and NI) exports to the Republic

- The Republic/EU would enforce UK law and collect UK customs duties on all Republic/EU exports entering the UK across the Irish border
- There would be no need for checks North-South on the Irish border
- EU law and customs duties would apply to UK exports crossing the North-South land border, with liability for breaches arising only from the moment non-conforming goods, or goods where the applicable tariff has not been paid, cross that border. Such goods would, of course, be subject to that liability under EU law only at that stage anyway. The simple difference is that enforcement would in almost all circumstances be in the UK, not in the Republic or the EU. The point on liability serves as a backstop. The procedures would be designed to ensure that no such liability would arise. However, the applicability of the rules on liability would demonstrate that the true trade border had been moved back to its rightful place.
- Mutual Enforcement is a logical and practical solution for protecting the EU's Single Market, avoiding a hard border on the island of Ireland, and restoring NI to its rightful place within the United Kingdom. The authors of this paper recognise the need to assist the EU in this regard. The EU has shown the necessary good faith in other arrangements, such as those existing with New Zealand for veterinary products. Replicating New Zealand's and other dispensations could also be part of the UK-EU arrangements. This would of course work in both directions across the border, thereby helping resolve SPS issues.
- Of course, mutual recognition of SPS standards would solve the whole issue of agrifoods, plants and livestock. But, as long as the EU sees non-recognition as a useful pressure tactic in its dealings with the UK, a sensible good faith agreement between parties that have the same welfare standards is unlikely to be forthcoming.
- Where there is political will and a desire to promote trade and mutual prosperity, anything is possible. The region of Flanders in Belgium, for example, recognising the importance of its trade with the UK, announced on 6 June 2023 a new digital system, Gateway2Britain, to make trade between Antwerp-Bruges and Britain "as frictionless as possible". This involves the creation of software that allows traders "to fill out just one dataset online, which is then automatically shared with all the relevant supply chain and logistics partners."

OBJECTIONS TO MUTUAL ENFORCEMENT NOT CREDIBLE

Some critics have asserted that a Mutual Enforcement arrangement would breach WTO law, namely the Most Favoured Nation (MFN) principle of GATT Article I. This is alleged because it would grant special treatment to products originating from one member (the UK or the EU) that 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 a notional breach of MFN would be completely justified using the GATT essential security exception (Article XXI).[20] It is also arguably justified by the customary international law doctrine of necessity which enables states to take reasonable actions in times of crisis, as the conflict in NI would undoubtedly be, which might otherwise be unlawful.

20 D Collins, "Would Mutual Enforcement Work?" Briefings for Brexit (13 June 2021) available here: www.briefingsforbritain.co.uk/would-mutual-enforcement-work

A related challenge to Mutual Enforcement is the claim 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 with other countries. This has already been disproved by the trade agreements the UK has signed under the current open Irish land border. Mutual Enforcement will actually strengthen controls on goods crossing from GB/NI to the EU. And trade rules could be enforced strictly, given the small volume of trade across the NI/Republic of Ireland border and the procedures that both sides would be legally obliged to implement.

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 might enable traders to bypass border controls. But this critique appears to assume that UK and EU authorities would fail to enforce customs and other 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 Mutual Enforcement would all be sold using functioning administrative channels such as VAT, digital customs processes, and trading standards that already operate today. Finally, the zero-tariff quota TCA means there is, as a general rule, 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 that purchase thousands of components globally. But the amount of work involved pales into insignificance by comparison with the excessive burdens placed on the much larger trade between GB and NI under the Framework.

BROAD SUPPORT FOR MUTUAL ENFORCEMENT

Mutual Enforcement was originally proposed in August 2019 by the former Director-General at the European Commission, Sir Jonathan Faull, together with Joseph Weiler and Daniel Sarmiento, who said that this approach would do away with complex border checks.[21]

In July 2021, Sir Jonathan further endorsed Mutual Enforcement in a strongly supportive article in the *Financial Times*, in which he said:

> *"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."*

Since then, it has been further developed by legal experts in UK trade law, international/EU law, and international customs/trade procedures, alongside the Centre for Brexit Policy.

21 J.H.H. Weiler, D Sarmiento and J Faull, "An offer the EU and UK cannot refuse" Verfassungsblog (22 August 2019) available here: https://verfassungsblog.de/an-offer-the-eu-and-uk-cannot-refuse/

Crucially, Mutual Enforcement has been endorsed by the DUP as the key to their return to Stormont, since no hard border is needed and it allows the reinstatement of the border on the island of Ireland, EU law would not apply in NI at all, but only UK law, and there would be no need for East-West checks between NI and the rest of the UK. The Rt Hon Sir Jeffrey Donaldson MP, Leader of the DUP said:

> *"Mutual Enforcement is the key to establishing mutual peace and prosperity for NI, the UK, and our friends in the EU. It overcomes the essential political truth that the NI Protocol and the GFA cannot work together and allows Stormont to get back to work."*

It is also supported within Westminster. The Rt Hon Mark Francois MP, Chairman of the European Research Group, said:

> *"Mutual Enforcement is the only solution to the repeated failures of the NI Protocol and its bastard children to get Stormont back to work, allow frictionless trade within our own United Kingdom borders, and the right to make and judge our own laws."*

Lord Trimble, architect of the GFA, endorsed Mutual Enforcement on numerous occasions,[22] 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 June 2021 G7 Meeting in which Lord Trimble 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 NI and Republic of Ireland. Firms selling into the Republic of Ireland from NI, 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 loose with peace in NI to punish the U.K. for voting for independence?"*

Former EU Brexit negotiator, Michel Barnier, in an October 22nd, 2018 meeting with Lord Trimble and other UK politicians also thought it was a interesting basis for moving forward - until Mrs May ceded the regulation of goods in NI to the EU, with consequential EU legal sovereignty in that area. As Lord Trimble later reported:[23]

> *"Meanwhile, I have been working to seek a manageable alternative. A couple of years ago I had a meeting with Michel Barnier in which mutual enforcement of trade rules by the UK and the EU was discussed. This plan, if the EU engaged, would ensure the UK single market and the EU single market were protected and 90 per cent of businesses which don't sell outside Northern Ireland would have no more need to engage in costly and disruptive checks."*

22 "Mutual Enforcement: Antidote to the Northern Ireland Protocol" (Centre for Brexit Policy, September 2021) p. 28, available here: https://centreforbrexitpolicy.org.uk/wp-content/uploads/2021/09/Mutual-Enforcement-Antidote-to-the-NI-Protocol.pdf

23 *The Times*,10 June 2021. Article by Lord Trimble, "*EU intransigence threatens the Good Friday Agreement*"

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:

> *"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.

In the NI Protocol Debate in the House of Commons on July 15th, 2021, the Shadow Secretary for NI, Louise Haigh MP, stated:

> *"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 NI."*

The economies of the British islands, like the people of these islands, are so integrated that a solution must be found to protect movements to and from NI and GB. Mutual Enforcement may be deemed imperfect by challengers, but it provides a much more stable economic and political platform and recovers the damage that 29 months of internal UK trade barriers have done.

V - THE UK MUST EXERCISE ITS RIGHT TO IMPLEMENT MUTUAL ENFORCEMENT

Mutual Enforcement is a fair and balanced scheme, in which the EU and the UK base their arrangements on a new legal agreement founded on trust, backed up by regular checks and inspections. A serious EU, interested in a deal that works for both sides, would agree with this proposal. If the EU were to try to cling onto the Protocol, the conclusion must be that it never had an intention of seeking such a balanced arrangement, presumably as it tends to see Brexit as a threat to the grand project of Political Union and its international competitiveness. That is why the UK should be prepared to put its own Union first and show that the UK is – in the event of a lack of engagement and cooperation from the EU – prepared to implement its side of Mutual Enforcement on its own.

The existing UK-EU relationship can be transformed by tabling Mutual Enforcement and – if the EU fails to engage fully – implementing it on a one-sided basis. Multiple papers (mentioned in *Broad Support for Mutual Enforcement*, in Chapter IV) have set out how Mutual Enforcement would work at an operational level and how the government should promote it. The topic has been discussed in depth for months with the UK Brexit negotiating team. No fault has been found with it. It enjoys broad support.

However, the government has never tabled it in its negotiations with the EU despite Mutual Enforcement being mentioned as a solution in the government's Command Paper of July 2021[24]. Instead, the government has focused on EU proposals that ostensibly patch up issues arising from the badly flawed Protocol, but ultimately introduce far more complexities and costs for GB-NI trade. This approach fails to take into consideration the strategic fault line running through the Protocol, which is that it reduces part of the UK to second-class status. By contrast, Mutual Enforcement reinstates NI as an integral part of the UK's internal market whilst protecting both the EU's Single Market and the UK's internal market.

The government has failed to achieve its primary objective of restoring power-sharing at Stormont and has deeply divided its Party. Considering abstentions, it did not achieve a majority in the vote on the Stormont Brake Statutory Instrument. Recent local elections in NI have demonstrated that the Unionists' principled opposition against the Protocol/Framework has been rewarded by NI voters.

Furthermore, objective analysis shows that recent political events have narrowed the options open to government. This has made the path for implementing Mutual Enforcement more straightforward and less risky; certainly better than the tortuous path that lies ahead if the government insists on pressing on with the new requirements imposed by the EU under the Framework.

Therefore, the government should take the following actions:

- **Admit that the Framework has failed politically and is already proving inoperable practically**
- **Declare the Withdrawal Agreement and its Protocol void[25]**
- **Table Mutual Enforcement and implement the UK portion unilaterally, recognising that, in the current political environment, doing so is more straightforward and less risky than attempting to implement the Framework**
- **Adopt six key recommendations to ensure implementation success**

24 The government's Command Paper is available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1008451/CCS207_CCS0721914902-005_Northern_Ireland_Protocol_Web_Accessible__1_.pdf

25 See footnote 6 above.

ADMIT FAILURE OF THE FRAMEWORK

More than three months have passed since the government announced the Framework, an agreement that was worked on for months by technical experts on the UK negotiating team. Following the announcement, UK officials were silent on the detail as statutory instruments were rushed through Parliament, with scant respect for scrutiny.

Questions and challenges by hauliers and customs experts have been ignored, and considerable pressure is building in supply chains with specific regard to the misnamed 'Green Lane' requirements. It appears that the UK negotiators opted to adopt a range of procedures that simply are not reasonably practical, despite more than two years of warnings from the food industry.

The Framework is an inadequate solution and has failed to achieve its fundamental objectives of 'fixing' the problems of the Protocol and restoring government in Stormont. What should the government do now?

1. **Accept that the Framework has created a political impasse.** The government's haste in pushing through the Framework without consultation or scrutiny was, ostensibly, due to the need to restore power-sharing democratic government to NI in time for the 25th anniversary of the GFA. The government must now accept that it has failed to achieve this primary objective. There is instead widespread anger within NI that the GFA has been fundamentally undermined by the imposition of new EU law within NI without democratic consent.

   The DUP and the TUV have already made clear their lack of support for the Framework/Protocol and that they will not be re-joining Stormont. As more people become aware of the Framework's many drawbacks, opposition in various forms is growing. There is growing militancy and MI5 has increased their assessment of the risk of a terrorist attack. This is the very last thing the government should expect if the Framework actually respected and supported the GFA.

2. **Stop ignoring the growing awareness among people at large, business owners, and politicians in NI of the government's misleading claims for the Framework.** In particular, it is already becoming evident to GB businesses that the Framework will complicate their trade within the UK's internal market, potentially leading to them pulling out of NI markets, which makes NI trade with GB harder and costlier, not easier. This is a far cry from the government's claim that it is restoring frictionless trade within the UK internal market.
   - The Irish Sea border is to be reinforced with tens of millions of pounds worth of new border posts at ports of entry into NI
   - Every lorry bringing goods into NI will be required to have paperwork checks, even if the goods are staying in NI (10 per cent will also have physical checks)
   - Goods coming into NI without a definite final destination at the time of entry will be subject to full EU border checks and required to pay EU customs duties, even if they subsequently remain in the UK or are exported to a third country as a component in a finished product. The EU duties will not be reimbursed
   - GB companies will still find trading with NI more expensive than selling goods in the rest of the UK
   - Some GB manufactured goods will not be able to be sold in NI because EU laws applying to that part of the UK exclude them
   - The UK government still needs to consider EU State aid rules, including if it wishes to support NI businesses, new technologies and other businesses in GB, and innovation across the country as a whole

Additionally, the release of the Target Border Operating Model compounds the difficulties of the Framework that attempts to place a Third Country Customs and SPS border within the UK's regional and local supply chains. By failing to make any provisions for EU goods entering NI or the Republic of Ireland, the government has created a myriad of mutually exacerbating problems that will cause the situation to unravel as UK border controls are implemented; most notably for goods entering GB though the port of Cairnryan from NI sea ports.

As in 2021, when the government attempted to spin "solutions" to the Protocol, the logistical realities of the Framework will prevail and its cracks will create crashes in the supply chain. Should food traders continue to deem the Green Lane to be unworkable and switch to the Red Lane, then NI seaports, and the regional trade that passes through them, will be subject to a greater number of controls than any other seaport in Europe. This obvious outcome will cause an unprecedented diversion of trade and costs, therefore undermining another key intention of the Protocol.

3. **Recognise that the Framework has cut NI adrift, potentially breaking up the Union.** It needs to be recognised that the entire Framework is based on a false premise (that the only way to avoid a hard border in Ireland is to keep NI subject to EU law) and that it doubles down on the legal architecture of the Protocol, which creates an illegal border across the Irish Sea between two parts of the United Kingdom. This core element of the Protocol is the cause of the unrest and, unless it is removed, that unrest will only get worse.

4. **Acknowledge the Framework's future negative impact on Great Britain.** It must also be recognised that, by creating the East-West border, there will be social dislocation in NI, splitting UK society.

5. **Understand the self-interested and damaging effects of the EU's "State aid" law and unilateral reporting of trade flow data.** The application of EU State aid law to GB in respect of NI will cause unpredictable frictions as the EU asserts its jurisdiction and (importantly) will discourage foreign investment in GB, since the UK is not (quite rightly) notifying potential aid to the European Commission and cannot guarantee that any aid granted will not be subsequently ruled unlawful by the ECJ at any stage for the next 10 years.

   Moreover, the information-sharing arrangements arising from the Framework, whereby the UK provides to the EU (unilaterally, not reciprocally) information on trade across the Irish Sea within the UK, is both flawed and dangerous. The European Commission seeks out and uses such data within the Single Market to identify what it regards as market distortions, which it then can control through the highly political tool of EU State aid law.

   The EU will be able to use data provided to it to evidence breaches of EU state aid law in respect of NI and force the UK government to adjust a range of measures such as subsidies, tax breaks, regulation or any other measures deemed by the EU to cause trade distortions. The data may also be used by the EU in the context of the TCA. The provision of data unilaterally is extremely ill-advised and an encroachment on UK sovereignty.

DECLARE THE WITHDRAWAL AGREEMENT AND ITS PROTOCOL VOID

As explained in *Internally Inconsistent and Capable of Being Voided Under International Law* in Chapter I, the Withdrawal Agreement and Protocol cannot be seen as binding under international law and the UK government has the right and ability to declare them void.[26]

First, the necessity arises because the UK attempted to negotiate these documents with the EU when the EU still had sovereignty over the UK. The EU's Treaties prevailed over UK law, and were of an overriding nature. The result is that these documents were not entered into on a sovereign-to-sovereign basis, which is the premise for valid international law arrangements. This premise is merely an instance of the international law doctrine of the self-determination of peoples.

Second, the EU has continued to apply its law making to NI, despite the UK having left the EU and without the EU having any democratic checks and balances applicable to the people of NI (which is a point the EU is incapable of solving under its own Treaties). Even if the Withdrawal Agreement and Protocol had temporary validity under Article 50 to allow for a smooth transition of the UK out of the EU, they cannot do so any longer. There is a continual flow of EU legislation emerging from Brussels in breach of the above principles.

There is no alternative, therefore, to treating the Withdrawal Agreement and Protocol documents as void. The EU (Withdrawal Agreement) Act 2020 seeks to apply the Withdrawal Agreement, including its Northern Ireland and other Protocols, directly in UK law: in section 7A that it inserted into the 2018 Withdrawal Act, in section 21 *et seq*, and more generally.

The UK government is entitled to declare the Withdrawal Agreement as no longer effective under international law, and to ask Parliament to give effect under UK domestic law to the international position by passing legislation that repeals section 7A and provides for replacement rules and transitional provisions.

It is a point of fundamental necessity that the Withdrawal Agreement be voided; otherwise the dispute settlement provisions of the Withdrawal Agreement would survive and the arguments surrounding the validity of the Protocol would be scrutinised by (conflicted) EU institutions, which would involve conceding on the very point at issue. The dispute settlement provisions do not reflect normal international law principles of treaties between sovereign equals, since they give the court of one party (the EU) binding jurisdiction over the other party (the UK) without mutual powers for UK courts.

TABLE MUTUAL ENFORCEMENT AND IMPLEMENT THE UK PORTION UNILATERALLY

Voiding the Withdrawal Agreement and Protocol presents the opportunity for an invisible border on the island of Ireland. As already discussed, the only solutions to achieve an invisible border are Alternative Arrangements, which the EU has roundly (albeit improperly) rejected, and Mutual Enforcement.

The EU's rejection of Alternative Arrangements hinges on the fact that theoretical gaps were identified where goods could potentially slip through the net. It is not possible to make such arguments in respect of Mutual Enforcement, since this solution involves what is effectively a UK government guarantee. The only objection of the EU could be that the EU does not trust the UK, but if Mutual Enforcement were underpinned by a binding international legal agreement, and/or its processes were baked into UK legislation (as envisaged on the unilateral approach discussed below), this objection falls away.

26 See footnote 6 above.

Following the voiding of the Withdrawal Agreement and the Protocol, the UK should take the following steps:

1. **Table a draft Annex to the TCA that provides for Mutual Enforcement, with obligations flowing from the UK to the Republic, and *vice versa*, on a mirrored basis.**
2. **In the meantime – pending EU agreement to a reasonable proposed text – the UK must introduce procedures unilaterally for an invisible North-South border under UK sovereign control following the Mutual Enforcement concept.** The EU's agreement cannot be relied upon, and the UK should implement, unilaterally, one half of Mutual Enforcement North-to-South, and Alternative Arrangements for South-to-North trade. The arrangements should be calibrated to be no better than the worst outcome (in practical terms) achieved by the UK in respect of the border since the Referendum. This should serve to incentivise the EU to enter into a proper Mutual Enforcement arrangement expeditiously and on reasonable terms.
3. **Do not hesitate to employ the many tools at government's disposal to bring the EU to the negotiating table.** This should include the imposition of full SPS checks on all EU foodstuffs and agri-goods entering the UK (which have been waived since Brexit). Such checks should be equal to the number and intensity of checks that the EU is demanding on GB SPS goods sent to NI. Why should EU producers benefit from easements that the EU expects the British government to deny to its own producers? For every excessive requirement and demand made by the EU, there should be a reciprocal new requirement from the UK. At some point EU producers will start demanding some common sense from Brussels before their businesses suffer irreversible damage.

The government's confidence should be bolstered by recognising that, not only is Mutual Enforcement the right solution, but recent events have also made its negotiation and implementation necessary. Tabling Mutual Enforcement and implementing the UK portion unilaterally

- **Re-balances in the UK's favour the dynamics of the lopsided negotiation with the EU**
- **Gives the UK control over future outcomes**
- **Limits potential trading risks due to the existence of the TCA (and WTO rules)**
- **Is more straightforward than previous approaches and less risky than continuing with the failed Framework**

Re-Balances Negotiation Dynamics in UK's Favour

Tabling Mutual Enforcement and implementing the UK's portion unilaterally shifts the dynamics of negotiations with the EU in the UK's favour. Doing so

- Refutes the EU's long-standing claim that the UK has no viable proposal for an 'invisible' border on the Irish mainland
- Forces the EU to choose between either cooperating to develop a viable Irish mainland border solution or otherwise revealing they have no serious intention of ever finding a solution
- Places the onus upon the EU to devise solutions for how they will deal with their side of the border, rather than expecting the UK to do this for them – a ploy the EU has successfully used throughout the Brexit negotiations (with the UK negotiators' acquiescence)

Provides UK Control Over Future Outcomes

The UK should table Mutual Enforcement on the basis that the EU will work jointly with the UK in good faith to craft a Mutual Enforcement-based solution. This is the preferred outcome.

However, the UK cannot wait for EU cooperation, and must implement Mutual Enforcement unilaterally on its side of the Irish land border and challenge the EU to propose what it will do on its side. The EU would then be forced to choose whether to:

- Trust the UK's inspection regime and let UK-certified goods enter into the Republic of Ireland with no further inspection
- Erect inspection posts on its side of the border, which would, of course, be a violation of everything the EU has claimed it stands for
- Pull the Republic of Ireland out of the Single Market, in contravention of the EU's own Treaties and to the detriment of its relationship with the Republic
- Negotiate a chapter of the TCA that provides for Mutual Enforcement on a mutually agreeable basis

The EU's potential option of playing 'hardball' and imposing a blanket EU ban on UK-exported goods – or enacting onerous inspection regimes – would not be viable under WTO rules nor under the TCA, both of which mandate that trade barriers be no more restrictive than necessary; nor would such an approach be viable in the court of world opinion. More critically, it would cripple parts of EU industry and create shortages and misery for its consumers.

Furthermore, from a UK perspective, the volume of goods flowing across the Irish land border is so small (only about 10 per cent of the value of goods flowing across the Irish Sea border) that any disruption created by the EU would be manageable. Irish exports could still reach GB by other routes that do not go through NI. Importantly, any such trade disruption would be much less concerning than the disruption NI has been forced to experience recently under the Protocol and – even more importantly – far less disruptive than future trading conditions under the Framework once grace periods are terminated and the full effects of the misnamed Red and Green Lanes start to kick in.

Existing TCA Limits Potential Trading Risks

There is now an FTA between the UK and the EU (the TCA) that did not exist when the Protocol was devised. **All** UK manufacturers now have 'access' to the Single Market under the TCA. Furthermore, all UK manufacturers would have had 'access' to the Single Market in any case under WTO rules, even without the TCA. The existence of the TCA and the WTO rules mitigate any risk of harm which implementing Mutual Enforcement could cause to trade.

It is often forgotten that any UK manufacturer, whether based in NI or GB, must ensure compliance with EU standards for goods exported to the EU. Every manufacturer makes their own commercial decision as to whether the cost and hassle of tailoring goods for a given export market is justified by the volume of goods to be sold. For example, Jaguar Land Rover now sells vehicles of differing specifications domestically, as compared to the US or to China. If the manufacturer decides not to export, they are not under any obligation to modify their product.

Under existing TCA rules, a NI manufacturer should not be treated differently. The same would apply under WTO rules. So the risk to NI manufacturers – in the event of a future negotiation failure – should not be of great concern.

In contrast, under the rules of the Framework as explained in *EU Law Remains Supreme in NI,* in Chapter II, a manufacturer in NI is *required* to produce goods to EU standards and will be subject to the EU's regulatory regime and public policy, such as EU state aid law, which is partisan and political, and overlooks matters such as Eurozone dumping instead focusing on matters that the EU deems relevant to its own version of a level playing field).

The application of wide-ranging goods regulations in NI under the Framework is irrelevant to the establishment of an invisible border; rather, it is simply a means for regulatory colonialism. The position should merely be the same as for any third country exporter based in, for example, Canada. If businesses wish to sell to the EU, their product itself – and only the product – needs to meet EU standards from the moment it enters the EU's Single Market.

More Straightforward/ Less Risky Than Framework

Moving the border from the Irish Sea to the Irish mainland obviates any need for the Protocol (and the Framework), thereby simplifying the negotiating situation dramatically. Once the Protocol/Framework is removed, a complex negotiation task (which will continue far into the future) is eliminated – one in which the EU has enjoyed an advantage from the beginning over the UK's ill-equipped and far too conciliatory negotiators.

The issue becomes simply one of agreeing the practicalities of a straightforward inspection regime within each country's own borders, as contrasted to the complicated treaties, protocols, and regulations required by the Protocol/Framework. Agreeing the practical operation of Mutual Enforcement is much simpler than what has just been agreed with the Framework.

ADOPT SIX KEY RECOMMENDATIONS TO IMPLEMENT MUTUAL ENFORCEMENT SUCCESSFULLY

If the UK is to implement Mutual Enforcement successfully, it must avoid past mistakes, provide top-level political leadership to the implementation team, and exploit all available leverage.

Specifically, we make six key recommendations:

Recommendation 1: Adopt a new negotiating mentality. The stance any negotiator adopts when entering negotiations is always of utmost importance to the outcome. However, the British approach to date appears to have been, "let's see what the EU offers us", rather than first formulating a clear objective of what needs to be achieved, and then working out how to achieve that objective.

Recommendation 2: Recognise political reality. The government must avoid continuing its recent tendency of not only ignoring the requirements and suggestions of those with a patriotic interest in ensuring the country's success (which includes the Unionists) but deceiving itself by believing it can somehow 'roll over' DUP/Parliamentary opposition to its desired (EU-preferred) outcome. The importance of an arrangement that commands Unionist (and, therefore, cross-community) support in NI cannot be overstated. The restoration of power sharing depends upon it. Any attempt to implement an agreement without Unionist consent will have consequences for the government within the Conservative Party – a division the Prime Minister should want to avoid. Already, the reliance on the Labour Party in getting the Stormont Vote Statutory Instrument through the House without DUP and Conservative backbench support has damaged the Prime Minister and the government.

Any deal that leaves the sovereignty of the UK government in its own territory still compromised and surrendered is not going to work. Persisting in it would be foolish. Trying to force acquiescence would be reckless, especially when the workable and acceptable Mutual Enforcement alternative is available.

Recommendation 3: Avoid repeating past legal mistakes. Since the creation of the Withdrawal Agreement, the UK has allowed the EU to develop a false narrative that the Protocol is permanent. It is not. It is vital to understand that the Protocol and other remaining elements of the Withdrawal Agreement were intended to be temporary only, since the EU's powers to conclude this agreement under Article 50 of the Treaty on European Union do not allow for anything more than that. This was recognised in the Political Declaration, which set out the terms for the future relationship between the UK and EU and envisaged the following:

> *. . . facilitative arrangements and technologies will also be considered in alternative arrangements for ensuring the absence of a hard border on the island of Ireland.*[27]

Most importantly, this document made clear that **both the EU and the UK envisaged a North-South border in the future**, not an East-West border. And the Protocol itself makes clear in Article 13.8 that it is expected to be replaced.

Recommendation 4: Provide top-level political leadership. A dedicated full-time Secretary of State is required to get Mutual Enforcement implemented. Ideally, this person needs to have been legally trained, with extensive practical experience in high-level negotiations. The task of leading the negotiations, setting the objectives and setting the bar for the outcomes lies with Ministers. This task should never again be delegated to officials or those without high end negotiating abilities, allowing them to define their own success whilst constantly lowering the bar so that they can hop over it.

Recommendation 5: Appoint a new, better equipped and focused team to deliver Mutual Enforcement:

- **A critical and fundamental problem undermining the UK's negotiations has been a lack of capability in the civil service to effect the fundamental shift required in short order after the Referendum decision.** This has been particularly true with international trade negotiations, when for 50 years the UK delegated that function to the EU. Consequently, there was never adequate new thinking evidenced when determining how to conceive and then deliver sovereignty-compliant solutions. Instead, undue reliance was (perhaps still now) placed upon EU legal norms, with extraordinary deference to reasoning that reflects only the interests of our negotiating counterparty.

  Overall, it does not appear that the UK's negotiating team had either the capability or motivation to identify and advise on the full range of possible options or to provide properly analysed political choices, let alone implement those options properly. The negotiating team appeared simply to acquiesce in the EU's self-reinforcing method of drafting and negotiation. It agreed to a conceptual negotiation architecture that trampled on UK sovereign interests, in varying degrees, leading to an inevitable impasse.

  The team failed to engage sufficiently with the drafting of legal text to create its own UK-oriented solutions and remove the problems that arose from the EU's preferred text. Not retaining control of the drafting is a basic negotiating error with inevitable consequences. Unfortunately, reports from officials who were engaged with this at the time indicates there was very little pushback against EU legal text: a greater concern of UK officials was how initiatives proposed by the EU would fit with UK IT systems. There was insufficient intellectual rigour, negotiating ability and agency on the part of the UK's negotiating team, which has shown through in the results.

27 Paragraph 25, Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, October 2019.

The shortcomings of the negotiation process have included numerous other fundamental mistakes, including failing to:

- Understand the full implications of EU State aid law, and the role of the ECJ in that context
- Identify accurately the economic consequences of "no deal" with the EU
- Identify leverage over the EU in negotiations, including over the Eurozone, to ensure a favourable outcome for the UK
- Understand or identify the economic and other societal benefits of moving back entirely to the common law system
- Identify how to deliver control of our borders under the common law

- **To deliver Mutual Enforcement, a new team must be appointed that includes the necessary political, legal, negotiating, and technical competences.** The government should form a small team of the very best, adept at pulling together the law in the context of the required political decisions, constructing arguments around text and outcomes in a politico-legal context and putting those across in an unanswerable way. This team will need to be experienced in high-end negotiations and in drafting and revising legal text; and must have an understanding of the differences in legal method between member states and the EU, on the one hand, and our own approach on the other**.** This will require the involvement of experts in European law from the private sector.

  Sir Con O'Neill said he had not understood the implications of what are now the EU's legal arrangements when negotiating our entry to the European Community.[28] The significance of this failing – which persisted and was still evident, probably even worse, in our negotiating teams on exit – cannot be overstated. No member of the team should be unaware of, or not have facility with, the implications of this point.

  The team will also need a cohort of high-end project managers and logistics and IT experts able to drive through the technical and operational aspects of the invisible customs and North-South regulatory border. Because Mutual Enforcement is novel, the team will need to be able to override any reluctance of those experienced in current processes to engage with and optimise the necessary changes. Perhaps they could talk to the consultants who have helped Flanders develop its Gateway2Britain frictionless trade system.

  The team needs to be driven by politico-legal analysis, with people who understand the approach, methodology and drafting proffered by the EU, and can explain when and why it is wrong. It should be subject to sophisticated political oversight backed by rigorous policy analysis.

Recommendation 6: Explain the UK's actions and their rationale to key constituencies. In parallel with establishing the required delivery platform and new implementation team, the government needs to develop a comprehensive communications strategy that

- Formulates and explains the key legislative and other actions the government will implement, as well as the likely potential outcomes and the position the government will take in each case
- Provides a compelling rationale as to why the government has given up on the Protocol/Framework approach and is now adopting Mutual Enforcement as its preferred solution
- Incorporates a wide-ranging communications programme to explain what the government is doing and why that will gain support from the government's important constituencies – ie, the UK public, Parliament, the judiciary, EU institutions, and the broader court of world opinion.

28 M Charlton, *The Price of Victory* British Broadcasting Corporation (1983)

ANNEX A
How Did We Get Here?

Following the 2016 Brexit Referendum vote, many Europhile politicians claimed they did not know what the outcome actually meant. Despite the Vote Leave campaign's clearly stated objective of "taking back control", they claimed that sovereignty was a malleable, nebulous concept and, consequently, they needed to consider further how the UK should reframe its relations with the EU.

The EU responded by offering several options, all but one of which involved allowing sovereignty to remain with the institution the UK had just decided to leave. Alternatively, we were offered an arm's length trade relationship with the EU based on a basic free trade agreement.

Many in the political establishment appeared to be terrified both of an arm's length free trade agreement with the EU and of a so-called "no-deal Brexit", where trade with the EU continued under WTO rules. It was asserted that the former would never happen, even though that is precisely what was eventually agreed and is now being operated.

This combination of alarmism, negativity, and refusal to accept that the UK should enjoy all the rights of an independent, sovereign democracy, enabled Theresa May's administration to propose that the whole of the UK should remain in the Customs Union and elements of the Single Market through the so-called NI "backstop", *without any protections in terms of governance rights arising from the EU Treaties themselves (to which the UK would no longer be a party).* It would have turned the whole of the UK into an EU colony, as the EU negotiators proudly boasted. Such a step would have involved conceding sovereignty for no return. [29]

Mrs May's negotiating team accepted the false proposition from the EU that the only way to ensure an invisible North-South border on the island of Ireland was to impose EU law on NI, under a so-called "backstop", despite the obvious objection that this created a far more significant East-West border within the UK itself. They sought to solve the East-West border issue by applying this arrangement to the whole of the UK (so that the Customs Union and Single Market rules continued to prevail across the whole of the country, as if we had never left the EU). This meant that the UK would have been unable to vary its tariffs with third countries from those prevailing in the EU. Fortunately, Parliament eventually threw out the "backstop".

The Fixed Term Parliaments Act frustrated the efforts of democratic forces in the Commons. Many leading Remainer voices were able to stay *in situ*, without fear of a General Election, organising rebellions (within the Conservative Party) that had the effect of thwarting the Referendum decision. It essentially obliged the government (absent vital political steps and a mastery of the reasoning set out in this paper) to agree a Withdrawal Agreement containing the NI Protocol – albeit a Protocol with (potentially) very slightly more wriggle room than the old backstop.[30]

The idea, of course, was that once a free trade agreement had been reached with the EU, then many of the issues in the Protocol would fall away and it could be rewritten to become something more light touch. But the advocates of May's colonial backstop have not gone away. Indeed, they now have much more influence over policy in the current government. The Protocol is once again a vehicle for the continuation of EU law, EU bureaucracy and EU control over the UK's internal affairs.

29 This proposition would have been difficult, if not impossible, to moot in a country with a written constitution, which defines its sovereign territory and the obligations of the executive and legislature in respect of that territory. Our unwritten constitutional arrangements rely instead on common observance of basic standards of a similar nature, but the prevailing political situation meant that such standards were overlooked by some.

30 Most were only removed, finally, with Boris Johnson's electoral victory in November 2019. The Fixed Term Parliaments Act has now been repealed, which will prevent such a situation from arising again in the House of Commons.

Unfortunately, the Remainer obstruction problem also persists in the House of Lords in an entrenched and profound way. The government's feeble approach has resulted in the NI Protocol Bill being frozen in the House of Lords at the EU's request, EU demands on trade data sharing being met, and the removal of powers from the Stormont Executive so that DEFRA can now go about building extensive and expensive BIPs in NI at the behest of the EU. As discussed in *'Green Lane' is Not Really a 'Green Lane'*, in Chapter II, the draft EU SPS regulation[31], which mandates the building of the BIPs and imposes a host of other trade measures which are far more onerous than anything envisaged under the Protocol, properly construed, or indeed for internal market trade anywhere in the world.

31 Proposal for a Regulation of the European Parliament and of the Council on specific rules relating to the entry into Northern Ireland from other parts of the United Kingdom of certain consignments or retail goods, plants for planting, seed potatoes, machinery and certain vehicles operated for agricultural and forestry purposes, as well as non-commercial movements of certain pet animals into Northern Ireland (2023/062), full text available here: https://commission.europa.eu/system/files/2023-02/COM_2023_124_final_EN_0.pdf

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