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**CENTRE FOR BREXIT**  
POLICY

# REPLACING THE WITHDRAWAL AGREEMENT

How to ensure the UK takes back control  
on exiting the transition period

JULY 2020





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# THE CENTRE FOR BREXIT POLICY

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

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

The CBP has three core objectives:

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

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

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

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*“But if we are to be told by a foreign Power... what we shall do, and what we shall not do, we have Independence yet to seek, & have contended hitherto for very little.”*

George Washington letter to Alexander Hamilton, 8th May 1796<sup>1</sup>

<sup>1</sup> Full speech available at: <https://founders.archives.gov/documents/Washington/99-01-02-00497>

## EXECUTIVE SUMMARY

- **As the Government recognises, Sovereignty is the crux of Brexit. Chief Negotiator, David Frost, has said, it is not “some clever tactical position” but the “point of the whole project”.**
  - The bargain the UK struck when entering into the EEC/EU was, in return for shared sovereignty, it would gain other advantages. The British public voted in the 2016 Referendum and subsequently in other national elections that those advantages are no longer worth it - a rejection of the EU’s concept of “pooled sovereignty”
  - Therefore, on exiting the Transition Period (TP), it is vital that the Government ensures that no legal text interferes with the UK returning to a fully sovereign state, consistent with the *status quo ante* for whatever reasons the EU may concoct
- **As things currently stand, this is not the case.** The current situation results from a failure in the original Withdrawal Agreement (WA) - negotiated by Theresa May - to appreciate the irreconcilable position of exiting the EU, but instead signing back into EU law without any voting power over that law. Given the time and political constraints of a year ago, the new Conservative Government was surprisingly successful in eliminating the Irish Backstop and facilitating an official exit from the EU in January of this year on the basis of transition to a fully sovereign state.
  - However, although the Government sees the revised Withdrawal Agreement (WA) as only transitional until the end of the TP in December, there remain serious threats to UK sovereignty that will have crippling economic and strategic consequences for years to come if they are not dealt with now
  - Exiting the TP with these threats still in place will not return the UK to a fully sovereign state and is unacceptable
- **It is not widely understood how serious these threats are or that they can be eliminated.**
  - **The WA amounts to a ‘poison pill’, leaving the UK subjugated to the EU.** There are specific terms in the Northern Ireland Protocol (the Protocol), as well as in other parts of the WA, giving power to the EU and encroaching on UK sovereignty with regard to State aid, EU citizens’ rights, ‘divorce payment’ liabilities, future financial liabilities, EU data protection laws, EU geographical indications of origin, provisions relating to UK sovereign bases in Cyprus and Gibraltar, as well as numerous other matters
  - **Separately, in the negotiations, the EU is demanding additional sovereignty renunciations** with regard to fishing rights and demands for a ‘level playing field’
  - **The Political Declaration (PD) invites the UK to participate in various defence and industry schemes that would undercut our future independence and freedom of manoeuvre**
- **To fulfil Brexit’s sovereign promise and take back control from the EU, the UK must ensure that any agreement negotiated is ‘sovereignty compliant’ and that the UK prepares itself for the possibility that the EU ultimately will not come to such an agreement.** This requires the Government to take the following five steps:
  1. **Obtain a Government consensus that the WA/PD threats to UK sovereignty and in the negotiations at large are unacceptable**
  2. **Define a Sovereignty Compliant Agreement to replace the WA**
  3. **Replace the WA through negotiation by a new Sovereignty Compliant Agreement, explaining and justifying why the UK’s proposed agreement meets the EU’s objectives while simultaneously ensuring the UK’s future sovereignty**
  4. **Position the UK to benefit from whatever negotiation outcome is achieved**
  5. **Offer the right deal to the EU**

These steps provide a blueprint that - if implemented well - could produce an outcome of mutual benefit to both the UK and the EU.

### **STEP ONE - OBTAIN A GOVERNMENT CONSENSUS THAT WA/PD THREATS TO UK**

**SOVEREIGNTY ARE UNACCEPTABLE.** Given the raft of problems currently confronting the Government, it has understandably been difficult to gain a clear consensus on what these critical threats are to UK sovereignty, how they practically affect the UK's laws, economics, and freedom of action, and what the long-term serious consequences are to the UK if these threats are not resolved before exiting the TP. Consequently, it is vital that the Government establishes an internal consensus now that reflects the following realities:

1. **The WA in effect amounts to a 'poison pill' for the UK's future relationship with the EU, giving power to the EU and encroaching on UK sovereignty:**

- **The Northern Ireland Protocol (the Protocol) would**

- **Restrict UK competitiveness through dynamically evolving EU State aid law** that grants the European Commission executive power over significant parts of UK fiscal policy, subject to exclusive oversight of the ECJ
- **Render Northern Ireland (NI) businesses completely unprotected from EU anticompetitive behaviour** (including NI operations of UK-wide businesses)
- **Create burdensome EU customs mechanisms at an East-West Irish Sea border**
- **Impose new checks on all agri-food imports into NI**
- **Require NI to enforce EU VAT regulations**

Over time, the cumulative effect of the Protocol would, if allowed to become permanent, realign NI away from the UK's single market and towards the EU's Single Market

- **Other aspects of the WA would have similar injurious effects:**

- **EU citizens' rights** could be instilled that have 'direct effect' overriding future Acts of Parliament, coupled with European Court of Justice (ECJ) binding interpretation
- **'Divorce payment' liabilities** that are vastly greater than the zero UK obligation under international law, coupled with ECJ binding adjudication
- **Future financial liabilities** that are very large associated with the UK's membership in the European Investment Bank (EIB) and participation in other funds
- **EU data protection laws entrenched** for the long-term under the guise of EU citizens' rights
- **EU Geographical Indications of Origin entrenched** to the detriment of UK trade agreements with non-EU countries
- **Provisions relating to UK sovereign bases in Cyprus and Gibraltar, as well as other matters that encroach on UK sovereignty**

2. **Separately in the negotiations, the EU is demanding additional sovereignty renunciations with regard to:**

- **Fishing rights**, where the EU is seeking joint sovereignty
- **The 'level playing field'**, which is essentially an assertion by the EU that EU law should apply to the UK economy to ensure that it competes only in a manner deemed satisfactory to the EU

3. **The Political Declaration (PD) invites the UK to participate in various defence and industry schemes that are not in the interest of the UK and for which the UK has no legal obligation to accept**



**STEP TWO - DEFINE A SOVEREIGNTY COMPLIANT AGREEMENT.** The next step is to define a document that would nullify the above threats - achieved by employing alternative means to attain each of the outcomes the EU has requested and to which the UK has agreed in principle. These means are:

- **Use Alternative Arrangements or Mutual Enforcement to achieve an ‘invisible border’** on the Island of Ireland, which would remove any application of EU law in NI and most notably the application of the EU’s State aid regime in the UK
- **Protect EU citizens resident in the UK** (and UK citizens resident in the EU) through national legislation
- **Use independent adjudication** to police agreed outcomes
- **Transition back to UK court remedies** following one year of ECJ run off of cases
- **Exit the European Investment Bank (EIB) (and other such EU arrangements) and any attendant liabilities** as the UK will have no ongoing role in EU project financing
- **Recognise that the UK has no legal requirement to cooperate with EU defence schemes or share resources**

**STEP THREE - REPLACE THE WITHDRAWAL AGREEMENT WITH AN ACCEPTABLE AGREEMENT.**

Having defined the Government’s objective in terms of a Sovereignty Compliant Agreement, the way forward politically is to explain and justify why the WA needs to evolve into a new end of year agreement that is sovereignty compliant. The legal logic is clear, but the EU has muddied it with briefings that ignore or misrepresent crucial facts.

- **Legal Logic.** Instead of accepting the EU positioning and framing, the UK should adopt the following legal logic:
  1. **The UK as a State retains its sovereign right to withdraw from the EU, which is an international organisation**
  2. **When the UK exercised its right to leave, it participated in the WA process on the basis of an essential condition: agreement on a future permanent arrangement with the EU that enshrines UK sovereignty and secures an FTA**
  3. **The Protocol and other aspects of the WA are incompatible with the agreement intended for the end of 2020**
  4. **The EU has been acting in breach of a material term of the WA, meaning that the treaty was entered into on a false premise**
  5. **The Protocol is also in breach of the ECHR principle of the right to vote**
  6. **The UK must exercise its right to suspend and terminate the WA obligations**
  7. **The UK must subsequently pass an Act of Parliament superseding the WA, in line with Parliamentary Sovereignty under Section 38 of the Withdrawal Agreement Act 2020**

Unless a Sovereignty-Compliant Agreement is delivered, the UK must suspend or terminate the WA (through Act of Parliament). If the UK does not exercise this right and make plain the conditionality of its consent to the WA, it will, by conduct, forfeit this right and deliver renewed consent to the WA and its sovereignty-incompatible terms.

- **Legal Approach Required.** The negotiation of the entirely new UK-EU future relationship is a complex one in legal terms - and, ultimately, its success or failure will depend in large part on the legal drafting, its scope, style, methodology and overall conceptualisation. Lessons should be learned from the experience of the WA and Protocol. It is vital that UK lawyers engaged in this process are transactionally facile and able to reconceptualise the approach. They must push back on any attempts by the EU to introduce “standards” as features of the UK’s and EU’s relationship that are based on premises relevant to when the UK was within the EU but now no longer appropriate.

**STEP FOUR - BENEFIT FROM ANY OUTCOME.** If Government follows the approach described above, there are two likely outcomes:

1. **If the proposed solutions for NI and the other problems with the WA are properly crafted and executed, the EU will be under pressure to accept them.** These solutions will give them everything they have claimed they want and can ask for with any degree of conceivable legitimacy, but not at the loss of our sovereignty (upon which they have committed not to seek to encroach). This would mean that the future UK-EU relationship would be governed by the Sovereignty Compliant FTA (or an acceptable modified version) described in STEP TWO above.
2. **If the EU does not accept this argument, the EU's underlying desire to control the UK will be exposed publicly, setting the stage for breach of the WA, as well as a loss in the court of public opinion.** This would mean a default to the World Trade Organisation rules relationship with the EU.

The UK will benefit in either case.

**STEP FIVE - OFFER THE RIGHT DEAL.** As can be seen, the entire WA and Protocol are incompatible with UK sovereignty and were meant to operate merely as a stepping stone to an end of year long-term relationship between the UK and the EU. The EU has in fact breached the agreement, even as it stands, since it has been structurally unable to engage in meaningful negotiations (for what is now the majority of the intended negotiation period) towards a sovereign outcome for the UK - a point to which it had pre-committed and which is intrinsic to the set up of the WA. The UK therefore needs to suspend and terminate the arrangement.

#### **The UK should propose**

1. **A mutually beneficial long-term trade deal that respects UK sovereignty**, covering both goods and services (the EU can agree to most aspects of this by qualified majority vote - it need not go through national Parliaments). As part of this the UK may be prepared to recognise the EU's geographic indicators, so long as this is reciprocal and does not interfere with trade relations with other countries, and there is adequate consideration from the EU for this exceptional ask
2. **Suitable arrangements on security that respect the UK's sovereignty**
3. **Warm words on defence, preserving the UK's ability to act in its own interests at all times**, particularly given the unforeseeability of future needs
4. **Sovereign arrangements for EU access to UK fishing waters on the basis of reciprocity**, capable of being re-calibrated and ultimately terminated at will by the UK
5. **Making the remaining payments under the financial provisions in the now defunct WA, but subject to a cap**
6. **Alternative Arrangements or Mutual Enforcement, as set out above, for the North-South border on the Island of Ireland**

**If the EU refuses to agree a mutually beneficial future arrangement by the end of 2020, then the UK should**

1. **Treat the WA and Protocol as no longer having any legal force**
2. **Implement Alternative Arrangements for the North-South border on the Island of Ireland, indicating to the EU that the Government is prepared to negotiate Mutual Enforcement instead, if preferred, from the end of 2020**
3. **Cease to make payments to the EU under its provisions**
4. **Treat EU citizens resident in the UK unilaterally in a manner consistent with the UK's legal framework (which is one which respects fundamental human rights of its own accord in any event)**

# THE HISTORY OF SOVEREIGNTY

Professor Robert Tombs

Politics begins and ends with sovereignty: the right and duty to make the legitimate final decision. We have seen this clearly during the pandemic, as in every country people have come to depend on their own governments, whose authority rests on acknowledged sovereignty. This is as true, or even truer, in democracies: for whereas monarchs and aristocrats could dispute sovereignty and where it suited them divide up the cake amongst themselves, in a democracy there can only be one ultimate sovereign: the people. No sovereignty, no democracy.

For years we have been told that sovereignty can be 'pooled'. This has always been an illusion, if not a fraud. Who takes the final decision when sovereignty is 'pooled'? If we cannot answer that question, then it shows the fallacy. Some have argued that there have been historical examples of pooled sovereignty: usually cited is the Holy Roman Empire, which exercised a largely theoretical judicial supremacy over Germany until it was abolished in 1806. Strange that this kaleidoscope of feudal and dynastic confusion should be put forward by some as a model for 21<sup>st</sup> century Europe. And the EU? As soon as it is put to the test, as most obviously by the Covid-19 crisis, 'pooled' sovereignty proves to be no sovereignty at all; and the truly sovereign bodies (however incompetent some of them may be) at once reclaim the right to act in the interests of the peoples they embody. The German constitutional court has recently asserted this very principle.

The successors of the mini-states of the Holy Roman Empire that now form a large part of the EU - or at least some of their political theorists - might feel some nostalgia for the days when no one was quite sure where sovereignty lay, and so decisions were reached (or avoided) by long and secret diplomatic negotiations or even longer legal wrangling. But that has never been the case of the peoples of these islands. Our history has left its mark: rightly or wrongly, we want to be masters in our own house. Scottish patriots are rightly proud of the Declaration of Arbroath. The English, similarly, of Magna Carta. Medieval English monarchs, and their subjects, were very unhappy that they were vassals of the Kings of France for the territories they held across the Channel. Even if they were often stronger than their legal overlord, the humiliation of having to pay homage and accept a higher jurisdiction was something that galled. And when the French kings began to exploit their legal powers to undermine English rights, it led to conflict. In the end, it caused the Plantagenets to reject this inferior status and claim the crown of France themselves - the only way out of vassalage.

Does this have any meaning today? Although worldly wise diplomats claim that sovereignty is meaningless in our global world, the negotiations between the UK and the EU have come down to that very thing: sovereignty, the be all and end all of politics, the right to make the final decision. The dispute over fisheries shows this in the most elemental way: who owns and controls places and resources. It does not stop there, of course. Who runs the economy? Who decides the taxes? Who makes the rules? What is the status of Northern Ireland? Finally - the origin and essence of sovereignty - who lays down the law and makes the supreme judgment? Ordinary citizens sense this intuitively, for we all want a government that represents us and listens to our needs. A recent poll in 'Red Wall' constituencies - precisely those that gave such an emphatic majority to 'getting Brexit done' - shows that most people want a prompt end to the Transition Period (TP), and two-thirds of voters who switched from Labour to Conservative in 2019 believe that leaving the EU will give us back our independent sovereignty.<sup>2</sup>

On this very question, the EU negotiators have reversed their position completely since 2016. At first, the EU insisted that after Brexit the UK would be treated as a 'third country' left 'lonely on the edge of the Atlantic,' and without any special relationship ('cherry picking'). Later, when the Johnson government said that third-country status was exactly what it wanted, the EU insisted that on the contrary the UK must

2 Savanta ComRes poll for Centre for Brexit Policy, 8 June 2020

accept a special relationship because of its “economic interconnectedness and geographical proximity”.<sup>3</sup> The EU’s demands for a continued Common Fisheries Policy, a “level playing field”, a supervisory role in Northern Ireland and sole jurisdiction by the EU Court of Justice amounts to an assertion of sovereignty. This has been pointed out by Boris Johnson and David Frost, who have insisted that the EU should negotiate as between sovereign powers or no progress is possible.

So, what is going on? The EU is making demands that have no parallel in relationships between democratic (= sovereign) states. It is demanding an unequal relationship which invites indignant language about vassalage and colonial status: ‘unequal treaties’ were what Western powers forced on the Chinese Empire in the 19<sup>th</sup> century. But they at least had some excuse: Chinese law and punishment were repugnant to 19<sup>th</sup> century progressive ideas, and ultimately the Western aim was to integrate China into the international system with mutual diplomatic recognition and free economic relationships. What is the EU’s pretext today? In Barnier’s words, “geographical proximity”. This is what 19<sup>th</sup> century powers (and some even today) called ‘spheres of influence’: a large state asserts the right to exclusive privileges and even ultimate control in what it claims as areas of special interest. A limitation of sovereignty, in short. In the past, Britain claimed a ‘sphere of influence’ in Afghanistan and Nepal; Russia in Central Asia (and Putin’s Russia today in Ukraine and the Caucasus); the United States in Central America; France in North Africa. Is this not now simply archaic? Yes, of course, and insulting (as it was then), and contemptuous of democracy.

But surely modern EU leaders cannot be thinking in such an archaic way, despite Mr Verhofstadt’s revealingly neo-imperialist rhetoric? Think again. Some European politicians and diplomats have long considered the advantages of a ‘multi-speed’ Europe. The French, who do most of the EU’s thinking (especially when it serves France’s interests), have long hankered after a ‘Europe of concentric circles’: they and Germany, plus the Benelux countries, would be in the middle (and of course run the show); then there would be an outer circle of those who could not quite keep up; and then again a ring of satellites, revolving round the core: Turkey, North Africa, and - now it would seem - the United Kingdom. The satellites cannot be allowed to leave their orbit. As the Swiss are finding, efforts are also made to pull new satellites into the EU’s gravitational field.

As Michel Barnier sees it (and he is certainly not just following his own inclinations), a post-Brexit Britain must slot into this outer circle: its laws must conform to EU laws; it must be an auxiliary, not a rival; its wealth and power must continue to be harnessed to the Continent. In economic theory, this is the “gravity model” - countries necessarily trade mostly with their closest and biggest neighbours.

The European vision has now visibly faded. The Covid-19 crisis has exposed the weaknesses of every state and system, including ours, and it has hit the EU where it is most vulnerable. It has shown up the weakness of the much-vaunted solidarity between member nations, and it continues to aggravate the insoluble financial and economic problems inherent in the Eurozone. Does that mean that Britain is in a strong position in negotiating future relations with the EU? Yes, certainly, as long as we play our trump cards resolutely. But a weaker EU is not necessarily more accommodating or more equitable: perhaps the contrary. Its leading politicians realise the perils of their present situation, and hence their need to limit British freedom of action and hold Britain within their sphere of influence, not least because of their dire financial needs. Can they not see that the EU is too weak and the UK too strong for such a relationship to be sustained? It seems incredible that there are still people in Britain collaborating with these aims. Fortunately, the government gives every sign of knowing what is at stake, and of being willing to defend a sovereignty on which so many people’s future prosperity and security depends.

*Professor Tombs is Professor Emeritus of French History at the University of Cambridge*

3 Michel Barnier, news conference, 24 April 2020

# REASSERTING OUR SOVEREIGNTY: A PRACTICAL NECESSITY

Sir Bill Cash MP

The only reason why we have ever been under the laws of the European Union at all, with their accumulated and harmful effect over the last forty-eight years, is because the UK Parliament, without a referendum at the time, voluntarily agreed to enact the European Communities Act 1972 and only by a majority of eight. There is no other reason.

This 1972 Act subjected us to accepting the role of the European Court of Justice and the rule of European Community Law. Everything else flows from this including the running of our economy in a massive range of areas, including commerce, competition law and other vast swathes of activity. All this ends with the repeal of the European Communities Act 1972. The European treaties, up to and including Lisbon, have no force in law in the UK without the 1972 Act.

The supremacy of Community law over domestic law ended with our leaving the European Union under the express wording of the Withdrawal Agreement 2020 Act including Section 38. There are, however, those in the establishment and in Parliament who still hanker after some form of re-entry.

The Withdrawal Agreement Act 2020 was passed on second reading by 124 votes, following shortly after last December's General Election. This constitutional outcome reflected the will of the people in the referendum authorised by Act of Parliament. The 2019 General Election gave the Conservative Party, which endorsed the Referendum, a majority of 81. Section 38 clearly and expressly ensures that the sovereignty both of Parliament and of the electorate through its representatives in Parliament is free from EU subjugation. The UK courts must accept this.

The Transition Period under the Withdrawal Agreement does assert that until 31<sup>st</sup> December this year the UK will continue to operate as if it were still under EU jurisdiction. This will not be extended beyond 31<sup>st</sup> December 2020. We left the EU on 31<sup>st</sup> January 2020. Section 38 enables Parliament to override the Withdrawal Agreement by a later enactment without qualification. Section 38 even includes the words, *"nothing in this Act derogates from the sovereignty of the Parliament of the United Kingdom"*.

This is no less a constitutional revolution than in 1688. It gives back to the British people their self-government, freedom and their democracy accumulated over the last 400 years but temporarily interrupted in 1972 by the European Communities Act until the Withdrawal Agreement Act 2020.

To get some sense of what a massive watershed this is, it is worth looking at what we gave up voluntarily and by deception in the absorption of the United Kingdom into the EU by that fateful Act of Parliament in 1972.

Anyone looking at the archives in Kew, which are available for public inspection (never yet published) but marked "Confidential", will see the extraordinary lengths to which, at the direction of Government Ministers, the whole issue of sovereignty was camouflaged and slipped through under the radar by the Heath Government at the time. For example, in the preparation of the White Paper for July 1971 the then legal advisors to the Government made statements such as "we do not want to give future community partners the idea that we are frightened to commit ourselves to giving up our sovereignty. We need to reassure people in Parliament and in the country who get emotional about loss of sovereignty." Sovereignty, of course, is not a matter about emotions; it is about the practical application of law-making and is an essentially practical question about the rule of law, government and the running of our economy with fundamental consequences. Yet there are many examples in these confidential exchanges between senior legal and diplomatic advisors to Ministers suggesting that sovereignty was really all about "emotion". These included their use of words stating that those arguing against a loss of sovereignty were engaged in "a masquerade". There is correspondence between these advisors and Geoffrey Rippon and the Secretary of State in the preparation of this White Paper, including quoting the Law Officers (of which Sir Geoffrey Howe was Solicitor General) and Sir Con O'Neill (the most senior civil servant involved in this process) which shows how that White Paper was manipulated and engineered. He even made it clear that he did not want a European Select Committee.

The advisors say, for example, that “by far the greater part of our domestic law would be unaffected” and they say that “our courts would in certain cases need to refer matters to the European Court but otherwise the working of our courts would be unaffected.” They conveniently omit to point to the certain extension of law-making powers known as “Competences” into critical areas of government. These were anticipated and encouraged by the officials and Ministers and were matters they clearly regarded as thoroughly desirable and inevitable as time progressed.

Indeed, when the White Paper came out in July 1971 it explicitly stated at paragraph 29 that, “on a question where a government considers that vital national interests are involved, it is established that the decision should be unanimous. Like any other treaty, the treaty of Rome commits its signatories to support agreed aims but the commitment represents the voluntary undertaking of a Sovereign State to observe policies which it has helped to form. There is no question of any erosion of essential national sovereignty, what is proposed is a sharing and an enlargement of individual sovereignties in the general interest.” In Article 30 it says that, “all the countries concerned recognise that an attempt to impose a majority view in a case where one or more members considered their vital national interest to be at stake would imperil the very fabric of the community.”

However, this was not just disingenuous bureaucratic language, it was about a deliberate policy whereby the UK would be engineered and led into voluntary, induced subjugation of its Constitution and law-making through its MPs in Parliament on behalf of the British people with damaging consequences into the indefinite future. This 1972 Act of Parliament, based upon this deception, only managed to get through Parliament by a tiny majority. The confidential paper to Ministers went on to say: “it will be in British interests after entry that the Community should develop towards an effectively harmonized economic, fiscal and monetary system together with a fairly closely coordinated foreign and defence policy... it could only take place if there were a strengthening of the institutions of the Community with consequential weakening of national institutions including Parliament.” “To meet the public anxieties, masquerading as concern for ‘loss of sovereignty’, it will be important to contrast community gains with the inevitable loss of sovereignty.”

The documents continue in this vein and leave the reader in no doubt that there was every intention to massage the implications of sovereignty and to carry out the objectives by disguise and deception.

We should remember the sheer range of all the powers that were accumulated through this European Communities Act 1972, reaching into every nook and cranny of our political and domestic life, and over commercial and economic activity. The law officers are even quoted as stating that what was being pushed through was amounting, in effect, to a new body of what they described as “federal” statute law.

This was all part of a concerted agreement across the European establishment and elite driven by the European Commission and by Germany and encouraged by the United States at the time, which would undermine UK “national power”. These Government advisors sneeringly referred to this power as largely “a mere illusion”.

Indeed, the first president of the European Commission was the Euro-fanatical German Walter Hallstein. He was subsequently followed as German Vice Chancellor under Helmut Kohl by Hans Dieter Genscher who became Foreign Minister of Germany for eighteen years, retiring in 1992. Genscher was, with Helmut Kohl, the architect of Germany’s policy “at the heart of Europe”.<sup>4</sup> Boris Johnson’s book “Lend me your Ears” includes a hilarious but extremely revealing account of how John Major as Prime Minister was taken in by Kohl over this policy.

The extent of this Europe-wide policy cannot be exaggerated. That is why it so important that under the Withdrawal Agreement Act 2020, through the Referendum and now the General Election we reversed all this so that we regain our freedom and our democracy, subject to ironing out some significant matters in the negotiations such as over Northern Ireland.

4 ‘Post War Lies’ (2014) by Malte Herwig.

These archives complement the parallel determination of other Member States to achieve a continuing process of European Integration with which the British Government was collaborating. It is also important to note that this was built on the determined policies of the likes of Foster Dulles and his brother Allen Dulles and their dubious legal colleagues who in turn were engaged in following through long standing policies generated in Germany over a long period. This was recently exposed in *The Critic* in June 2020 by Adam Le Bor, which elaborated the arguments presented in my pamphlets and my book "Against a Federal Europe" in 1990 and in "From Brussels with Love"<sup>5</sup> in June 2016, before the Referendum.

The disgraceful White Paper of 1971 in itself, being the basis for the European Communities Act 1972, was a profound reason why our battle against the EU had to be fought as well as for example the infamous document in 1947 "Design for Europe". This states that "No government dependent upon a democratic vote could possibly agree in advance to the sacrifice which any adequate plan must involve. The people must be led slowly and unconsciously into the abandonment of their traditional economic defences, not asked, in advance of having received any of the benefits which will accrue to them from the plan, to make changes of which they may not at first recognise the advantages to themselves as well as to the rest of the world." This was no less than a confidence trick from the outset.

The battle over the Maastricht Treaty which Genscher described in 1992 as "the Treaty establishing political union" was the original battle to regain our practical sovereignty, self-government and our democratic freedom which has continued since the Maastricht Rebellion in the early 1990s. This has now not only been vindicated but has been one of the greatest struggles in peacetime in our entire history. It culminated in Section 38 of the 2020 Act, which constitutionally enables the UK through its express statutory wording to unilaterally break free from EU subjugation and ECJ jurisdiction.

It was significant that the Prime Minister insisted on 16<sup>th</sup> June after his Conference with European Leaders that he would have no truck with ECJ Jurisdiction, EU state aid laws, nor EU fisheries policy. His statement was entirely consistent with the White Paper published in February which made it clear that "whatever happens, the Government will not negotiate any arrangements in which the UK does not have control of its own laws and political life. That means that we will not agree to any obligations for our laws to be aligned with the EU's, or for the EU's institutions, including the Court of Justice, to have any jurisdiction in the UK". Apart from the undemocratic institutional governance of the European Union, which provides for laws to be made in the Council of Ministers by Qualified Majority vote and/or consensus, behind closed doors and without even so much as a transcript, unlike Hansard, there has never been a level playing field. In particular, the authorisation of massive state subsidies such as recently for coronavirus has emphatically favoured other countries, in particular Germany, as has been the case for coal and steel, and energy. The new German Presidency is now pressing hard for fiscal union and for new EU revenues, including a Financial Transaction Tax.

Germany took over the presidency of the Council of the European Union on 1st July - we have left in the nick of time.

*Sir Bill Cash is the MP for Stone, former Shadow Attorney General/Secretary of State for Constitutional Affairs and is Chairman of the European Scrutiny Committee*

5 Co-authored with Dr Radomir Tylecote.

# SOVEREIGNTY IN THE CONTEXT OF NORTHERN IRELAND

The Rt Hon The Lord Trimble, PC

The border between Northern Ireland and the Republic of Ireland, together with the abuse and misuse of the Good Friday Agreement (GFA), has been used as the Trojan Horse by which the EU has sought to undermine the UK's attempt to gain back sovereignty. The plan was cleverly crafted. First of all the EU insisted that talks on the future relationship could not commence until three issues were agreed. The first was the UK's contribution to the "Divorce Bill". The second was the rights of EU citizens living in the UK and UK citizens living in the EU and, finally, there was the question of the Northern Ireland (NI)/Republic of Ireland (RoI) border.

This land border was given an importance out of all proportion. In order to safeguard the integrity of the EU Single Market, goods flowing across this border would need to be monitored so that the EU could collect any tariffs due and ensure the goods were compliant with EU rules, standards and regulations. The arrangements to carry out such checks, it was argued, would mean putting a hard infrastructure along the border and this would be a contravention of the Good Friday Agreement (GFA). The consequences would be catastrophic because they would amount to tearing up an international agreement, would alienate nationalists in NI and would give terrorists targets to attack, causing the peace process to collapse and leading to a return of the terrorist campaign in NI.

Then came the clever part. The only way of avoiding such a scenario was for the UK to remain part of the EU Customs Union so that there would be no need to collect tariffs and the UK would not be able to do trade deals with other countries which involved standards different from those pertaining in the EU. Furthermore, to avoid the need for regulatory checks, the UK to some extent would continue to apply EU Single Market rules and NI would need fully to comply with them.

The Theresa May deal was rejected by the Boris Johnston administration. The new Protocol stipulates that NI must remain fully compliant with the EU single market regime for goods. This arrangement was spelt out in the Protocol, which had 78 pages of EU Regulations, interpreted at the whim of the ECJ (and in some cases under the executive authority of the European Commission). Also any future changes of law would automatically apply, with no input into the formation of the new rules either from the UK Government nor the NI Executive, since the UK would no longer be part of the EU and therefore play no part in the decision making. The UK Government would not be free to rule on huge swathes of economic and social policy in NI and there would be no democratic accountability as to how EU rule in that part of the UK was exercised. In theory, these arrangements could be dismissed by a vote in the NI Assembly, although this would be after the newly minted rules had been applied for at least 4 years and this anyway begs the question as to what would happen and what new arrangements would be required if such a vote took place, or indeed whether such a vote would then be judged as a breach of an international agreement in the absence of some replacement.

As this paper points out, the UK acquiescence to the operation of the new Protocol has significant implications for the exercise of government policy in the UK as a whole, because the EU's State Aid provisions contained in the Protocol would apply not only to NI but to any State Aid provided throughout the UK as a whole. As a result of the State aid requirements in Article 10 of the Protocol any UK business selling in NI or investing in NI will be subject to EU State Aid rules, and the application of State aid could (at the ECJ's discretion) be even wider than that. So, for example, a tax policy which makes it cheaper to a GB firm to sell goods which may be in competition with other goods made in the EU within NI could fail to be considered under EU State Aid rules and require to be notified and approved by the Commission before it can be implemented.

So the EU's interpretation of the Good Friday Agreement, its insistence on that interpretation being accepted by the UK Government, and the Government's willingness to adopt that interpretation, resulted in a Protocol which has thrown the door wide open to the EU being able to use the ECJ to stymie UK economic, fiscal, regulatory and trade policies.



The astonishing and disturbing fact is that the WA and, in particular, the Protocol completely undermine the central premise of the Good Friday Agreement. The whole purpose of the agreement was to give stability to NI by embedding in this international accord a promise that it was up to the people of NI to choose the constitutional status of the country.

It stated that the UK and Irish governments “recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland.”

The assurance to the Unionists was that the constitutional position of NI as part of the UK was guaranteed. The agreement made it clear that “[i]t is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of its people voting in a poll held for that purpose.”

The promise to nationalists was that if there was evidence that the people of NI wished to see the position changed, there would be a referendum to establish if that was the case and the referendum result would be honoured by the UK Government. The agreement stated “the Secretary of State shall exercise the power [to hold a poll] if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.”

In the meantime, recognising that in a divided society there will always be controversial and divisive issues, measures were put in place for voting when deciding those issues. The voting arrangements involved “either parallel consent, i.e. a majority of those members present and voting, including a majority of the unionist and nationalist designations present and voting; or a weighted majority (60 per cent) of members present and voting, including at least 40 per cent of each of the nationalist and unionist designations present and voting.”

The Withdrawal Agreement clearly rips the GFA apart. Since the laws governing 60 per cent of economic activity in NI will no longer be made at Westminster or by the devolved Assembly, but by an outside law-making body, the EU, and those laws will be subject to interpretation by a non-UK court, clearly the constitutional position of NI has been changed without the consent of the people of NI as required by the GFA. Furthermore, there is no way in which the people affected by those decisions will even have a say in the making or application of them.

Those who support the Withdrawal Agreement argue that, while this is true, it is a necessary consequence of the Brexit referendum result, and that NI is still part of the UK. This totally misses the point of what the Union is about. The whole purpose of having a common Crown and common Parliament was to create a common UK market. Article 6 of the Act of Union outlines the economic importance of the Union. Subjects were to be on the same footing with respect to trade and treaties with foreign powers. There were to be no prohibitions on the export of articles or manufacture between England and Ireland. Trade between the countries of the UK were to be duty free.

In other words, central to being part of the UK is access to the benefits of the UK single market and any erosion of this alters our membership of the UK - which is of immense significance to the livelihoods of the people of NI. It undermines and contradicts that central commitment of the GFA that “Northern Ireland in its entirety remains part of the UK”. Taxes will be imposed on goods coming into NI from GB. Certain GB manufactured goods will not be allowed to be traded in NI because they do not comply with EU standards. NI businesses will be required to adopt EU regulations rather than UK regulations, which will have an impact on the ability to NI manufacturers to sell their output in GB - competitively or at all. Any trade deals that the UK does with third countries may see NI excluded if aspects of those deals mean goods being included which don't conform to EU standards. And all of these implications of the Protocol undermine the ability of NI to participate in the UK single market, contrary to the Act of Union and in a way highly damaging to the NI economy, which is five times more dependent on GB for trade than it is on the EU.

The Withdrawal Agreement undermines the GFA in another way in that it removes the safeguard central to the working of the NI Assembly when it comes to voting on “key decisions”. The Withdrawal Agreement makes it clear that the NI Assembly could vote to end the arrangements in the NI Protocol but it sets aside the cross community voting arrangements so vital to the providing of “safeguards to protect the rights and interests of all sides of the community” .

These voting safeguards were removed at the insistence of the Irish government and the EU. They knew that when the Customs territory and Single Market arrangements in the Protocol came up for renewal in the NI Assembly, given their implications for the Union and the economy, they would never command the cross-community support for such a key decision. The democratic wishes of the members of the NI Assembly stood in the way of keeping in place their Trojan Horse to facilitate an assault on UK sovereignty. So, a central premise of the GFA had to be removed.

It is ironic that those who promote the application of the unmodified Protocol use the GFA as a cover for it, when in reality the Protocol and the voting mechanism to keep it in place subvert the central pillars of that agreement. Only by invoking the Good Friday Agreement has it been possible to get successive UK governments to acquiesce in the surrender of vital powers to the EU in the negotiations so far. It is important that in the final deliberations the Government steels itself to remove the unacceptable concessions made on the GFA and the damage done to the UK’s aim to take back control from Brussels in the Withdrawal Agreement. I am delighted this paper shows how that can fairly be done.

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

# INTRODUCTION

Sovereignty is the crux of Brexit and the Government recognises this. In the words of the UK's Brexit Chief Negotiator David Frost, sovereignty is not "*some clever tactical position*" but the "*point of the whole project*".<sup>6</sup>

Before joining the EEC and then the EU, the UK was a truly independent state. It would agree trading and other arrangements with other countries, and would be free to exit those arrangements. It was not subject to third party decision-making or control.

Membership of the EU, however, is underpinned by a concept of "pooled sovereignty", through which Member States give up a degree of their sovereignty in return for participation in the EU's collective institutions. The result of the 2016 Referendum was an obvious rejection of this approach. Therefore, on exiting the Transition Period (TP), it is vital that the Government ensures that no legal text interferes with the UK returning to a fully sovereign state, consistent with the *status quo ante*. The UK cannot be asked to concede on aspects of its sovereignty, whatever reasons the EU may concoct.

As things currently stand, this is not the case. The current situation results from a failure in the original Withdrawal Agreement - negotiated by Theresa May - to appreciate the irreconcilable position of exiting the EU, but instead signing back into EU law without any voting power over that law. Many aspects of that Agreement raised serious constitutional questions about the UK being bound to laws over which its voters have no control. For instance, it is unlikely the German Constitutional Court would regard such a deal, if entered into by Germany, as compatible with the basic law in Germany.<sup>7</sup> Most international law agreements contain a "vital national interests" carve-out. Currently, the UK's arrangements with the EU do not.<sup>8</sup>

Although the Government sees the revised Withdrawal Agreement (WA) as only transitional until the end of the TP in December, there remain serious threats to UK sovereignty that will have crippling economic and strategic consequences for years to come if they are not dealt with now. Exiting the TP with these threats still in place is unacceptable.

It is not widely understood how serious these threats are or that there are avenues through which they can be eliminated. These threats stem from three different sources:

1. **There are specific terms in the WA that amount to a 'poison pill'** for the UK's future relationship with the EU, giving power to the EU and encroaching on UK sovereignty, Namely:
  - **The Northern Ireland Protocol** (the Protocol), which restricts Northern Ireland industry and agriculture from sharing in the future benefits achieved by Great Britain, applies EU State aid law over all the UK, renders NI businesses unprotected from EU anticompetitive behaviour, risks creating burdensome EU customs/border mechanics at the GB-NI border, and requires NI to enforce EU VAT regulations
  - **EU citizens' rights** are instilled that have 'direct effect' overriding future Acts of Parliament, coupled with European Court of Justice (ECJ) binding interpretation
  - **'Divorce payment' liabilities** that are vastly greater than the zero UK obligation under international law coupled with ECJ binding adjudication
  - **Future financial liabilities** that are very large associated with the UK's membership in the European Investment Bank (EIB) and participation in other funds

<sup>6</sup> Full speech available at: <https://beta.spectator.co.uk/article/full-text-top-uk-brexit-negotiator-david-frost-on-his-plans-for-an-ebu-trade-deal>

<sup>7</sup> As the German Constitutional Court recently made clear, even as an EU Member State, a State's arrangements with the EU do not trump key elements of national sovereignty - see BVerfG Judgement of the Second Senate of 5 May 2020 - 2 BvR 859/17 - it is thus unattainable for a non-EU state to accept such demands. Full Judgement available at: [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505\\_2bvr085915en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html)

<sup>8</sup> NB: However, Section 29 of the European Union (Withdrawal Agreement) Act 2020 ('Parliamentary oversight') amends section 13 of the European Union (Withdrawal) Act 2018 to include a power given to the European Scrutiny Select Committee of the House of Commons and the EU Select Committee of the House of Lords to move a motion to be voted on in the Commons/Lords (the specific wording of which is to be decided by the Select Committee itself) if either select committee is of the opinion that EU legislation made during the implementation period raises a matter of vital national interest to the UK. The legal effect of such vote is not defined by the Act.

- **EU data protection laws** which are entrenched for the long-term under the guise of EU citizens' rights
  - **EU Geographical Indications of Origin** which are entrenched to the detriment of UK trade agreements with non-EU countries
  - **Provisions relating to UK sovereign bases** in Cyprus and Gibraltar, as well as other issues that encroach on UK sovereignty
2. **Separately in the negotiations, the EU is demanding additional sovereignty renunciations** with regard to:
- **Fishing rights** where the EU is seeking joint sovereignty
  - **The 'level playing field'**, which is essentially an assertion by the EU that EU law should apply to the UK economy to ensure that it competes only in a manner deemed satisfactory to the EU
3. **The Political Declaration (PD) invites the UK to participate in various defence and industry schemes that are not in the interest of the UK and for which the UK has no legal obligation**

The danger is that if a sovereignty-compliant agreement cannot be agreed, the UK will be forced to suspend and terminate (through Act of Parliament) the WA. Failure to exercise this right and make plain the conditionality of its consent to the WA, risks by conduct, forfeiting this right and delivering renewed consent to the WA and its sovereignty-incompatible terms.

Therefore, to fulfil Brexit's sovereign promise and take back control from the EU, the UK must ensure that any agreement negotiated is 'sovereignty compliant' and that the UK prepares itself for the possibility that the EU ultimately will not come to such an agreement.

**This requires the Government to take the following five steps:**

- I. **Obtain a consensus within Government that the WA/PD threats to UK sovereignty and in the negotiations at large are unacceptable**
- II. **Define a Sovereignty Compliant Agreement to replace the WA**
- III. **Replace the WA through negotiation by a new Sovereignty Compliant Agreement, explaining and justifying why the UK's proposed agreement meets the EU's objectives while simultaneously ensuring the UK's future sovereignty**
- IV. **Position the UK to benefit from whatever negotiation outcome is achieved**
- V. **Offer the right deal to the EU**

We believe these steps provide a blueprint that - if implemented well - could produce an outcome of mutual benefit to both the UK and the EU. The following chapters explain these points in depth.

# STEP ONE - OBTAIN A GOVERNMENT CONSENSUS THAT WA/PD THREATS TO UK SOVEREIGNTY ARE UNACCEPTABLE

While there is a general uneasiness that the WA falls short in many respects, the depth of understanding of what the specific issues are and their long-term effect on UK laws, economics and freedom of action varies widely, even amongst ministers. Crucially, it is important to understand that these drawbacks will not somehow vanish without them being directly addressed once we exit the TP. Sovereignty, once surrendered, is exceptionally difficult to claw back. But, that is where we are. The sovereignty concessions in the WA must be undone now as we negotiate the new trade agreement.

Given the raft of problems currently confronting the Government, it has understandably been difficult to gain a clear consensus on what these critical threats are to UK sovereignty, how they practically affect the UK's laws, economics, and freedom of action, and therefore what the long-term serious consequences are to the UK if these threats are not resolved before exiting the TP.

Consequently, it is vital that the Government establishes an internal consensus now on what are these long-term critical threats to the UK and why they matter crucially to its future. This Chapter develops this analysis of these threats that

- A. **Are contained in the legal structure of the Northern Ireland Protocol**
- B. **Are contained in the legal structures of the remainder of the WA**
- C. **Arise from the negotiations but separate from the Protocol and WA**
- D. **Stem from the PD affecting defence matters**

## A - THREATS IN THE NORTHERN IRELAND PROTOCOL

The Protocol is due to come into permanent force on 1 January 2021 unless steps are taken before then to prevent this from happening. In summary, the legal effect of the Protocol:

- Applies the single market for goods in NI; EU law will have direct effect and supremacy over UK laws (whether passed by the Westminster Parliament or the NI Assembly) and will be subject to Commission oversight and enforcement and full direct ECJ jurisdiction<sup>9</sup>
- Applies EU State aid law (dynamically aligned and subject to full Commission and ECJ jurisdiction) to the whole UK - provided the measure in question affects trade between NI and Ireland or between NI and elsewhere in the EU. The meaning of “affects trade” is to be bindingly determined by the ECJ.<sup>10</sup>
- Imposes customs and regulatory controls over the movement of goods between NI and GB<sup>11</sup>

The practical effects of the Protocol result in severe and long-lasting damage to the UK, as they:

- Prevent industry and agriculture in NI from sharing in the benefits of future improvements to laws and regulations in GB<sup>12</sup>
- Restrict UK competitiveness through dynamic application of EU State aid law over all the UK and will render NI businesses (including NI branches of UK-wide firms) unprotected from certain types of EU anticompetitive behaviour.
- Risk creating burdensome EU customs and other border mechanics on the GB-NI border, extending beyond sanitary and phytosanitary (SPS) checks
- Require NI to enforce EU VAT regulations complicating intra-UK trade.

These effects over time will promote NI’s divergence from the UK single market towards that of the EU, as well as producing dangerous political changes in that businesses and people in NI will increasingly be forced to look towards the EU for many of their laws.

The remainder of this section explains why this damage results by

- **Analysing the legal drivers in the Protocol that cause and enforce the damage**
- **Defining the resulting obligations of UK law toward EU law under ECJ oversight**
- **Summarising the practical problems resulting for the UK that lead to the damages**

At the end of this section, on pages 26-28, a case study is provided that illustrates the nature of the problems created for Great Britain (GB) by the State aid provisions in the Protocol.

### THE LEGAL DRIVERS IN THE PROTOCOL

This section analyses the legal text in the Protocol and identifies the legal source of the problems and how they are enforced legally.

9 Article 12 NI Protocol (EC)/EU Commission implementation, application, supervision and enforcement)

10 Article 10 NI Protocol (State aid)

11 Article 5 NI Protocol (Customs)

12 And force NI to follow detrimental future changes to EU laws or their interpretation which GB will be able to avoid.

## Legal Source of the Problems

**Article 4 of the WA applies to the NI Protocol as well as to all other parts of the WA.** It provides that:

- The provisions of the WA (including the Protocol) and any EU law provisions that the WA or its Protocols make applicable to the UK shall have “direct effect” if the nature of the provision satisfies the current test under EU law for direct effect. If a provision has “direct effect” it means that it can be relied upon directly in UK courts without the need for any UK legislation to transpose it into domestic law.
- Such direct effect provisions shall have primacy over all UK laws, including Acts of Parliament subsequent to the date of the WA. The WA provides that UK laws must be automatically set aside by UK courts if found to be incompatible with any directly effective provision.
- In interpreting the meaning of the WA, its Protocols, or any EU law provision that they apply to the UK, the UK courts are bound by ECJ judgments rendered up to the end of the TP and must pay “due regard” to ECJ judgments rendered after that date (note there is no provision under which the ECJ must pay due, or any, regard to UK court decisions, in contrast to normal international treaty practice under which the courts of co-signatories to a treaty will look at each other’s judgments and try to produce consistency of interpretation if possible).

**Article 5 NI Protocol applies EU laws internally within NI.** Article 5(3) of the Protocol applies EU Customs law to NI (specifically the legislation listed in Article 5(2) of the Union Customs Code)<sup>13</sup>. Article 5(4) applies a range of goods-related EU law to NI. These EU regulations and directives are listed out over 22 pages in Annex 2 (the 22 pages in the close spaced small type of the EU Official Journal are *the list of the titles of these rules*, not the rules themselves). Broadly speaking these are all the rules of the single market relating to the placing of goods on the market and the processes and procedures they must undergo before being placed on the market, and rules relating to movement of goods (such as rules on live animal exports), but also includes connected matters such as EU legislation on intellectual property (Annex 2, para 45), and an eclectic collection of additional legislation such as, for example, Council Regulation (EC) No 2182/2004 of 6 December 2004 concerning medals and tokens similar to euro coins (para 47).

**Article 10(1) of the Protocol applies “to the United Kingdom” (i.e., not just to NI, by contrast with Article 5) the EU laws on State aid in Annex 5 to the Protocol** “in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol.” The limitation on the scope of application of **Article 10(2)** therefore is not by reference to the geographical location of aid recipients, but solely by reference to whether the aid (wherever given) may “affect” trade under the Protocol. The meaning of, and extent of the EU’s jurisdiction under, this test is to be decided by the ECJ.

## ECJ Enforcement of the Protocol through Articles 5(4) and 10(1)

**There are two main mechanisms and a theoretical third mechanism (which we can discount) for interpretation and enforcement of Articles 5(4) and 10(1) of the Protocol:**

1. **The first route** is via an action in the UK courts (whether in NI or, for example, in the Administrative Court in London) brought by a commercial company (in the UK or the EU) adversely affected by a failure to implement, or a failure to implement fully and correctly any EU regulation or directive covered by Annex 2 or an ECJ judgment relating thereto, or, under Art.10(1), by a posited State aid measure. Or - subject to judicial review requirements of “standing” - such an action could be brought by a politically interested person or pressure group (cf. Gina Miller). In such an action, the UK court would have jurisdiction to stay or suspend a posited State aid measure if it had not been notified to the Commission, even if the measure were contained in a UK Act of Parliament (such as a Finance Act if it were a tax relief) of later date than the WA or the European Union (Withdrawal Agreement) Act 2020 (EU WAA).

13 Subject to certain exemptions and adaptations, the legislation applicable to NI comprises:  
a) The Union Customs Code and the provisions supplementing or implementing it adopted at Union or national level  
b) The Common Customs Tariff,  
c) The legislation setting up a Union system of reliefs from customs duty  
d) International agreement containing customs provisions, insofar as they are applicable in the Union

In such an action, UK courts would be bound by ECJ judgments handed down before the end of the TP (Article 4(4) WA) and would have to pay “due regard” to ECJ judgments after that date (Article 4(5) WA). Further, under Article 12(4) of the Protocol, the ECJ would have jurisdiction to receive and decide preliminary references from UK courts. Since Article 12(4) applies Article 267 of the Treaty on the Functioning of the European Union (TFEU) to the UK as if it were still a Member State, the UK Supreme Court *would be obliged to make a preliminary reference to Luxembourg* if a question of interpretation of Article 10(2) or of an EU regulation or directive applied to NI by Annex 2 were not already clear from the ECJ’s jurisprudence.

2. **The second route** would be via the Commission taking a so-called “direct action” against the UK before the ECJ, which is also authorised under Article 12(4) of the Protocol. Obviously, in such a direct action, the ECJ would rule on all points of law and fact.
3. **The third theoretically possible route** for such a dispute to take would be via the bilateral arbitration procedure in the WA. However, there does not seem to be any conceivable incentive for the Commission to go down this route, given that it has the more straightforward and advantageous route of a direct action in the ECJ. In theory, the UK government might try to forestall the Commission by starting a dispute under the bilateral procedure (for example, claiming a declaration that State aid rules do not apply to GB) but this would be futile. The “Ukraine” clause in the bilateral arbitration provisions in Art.174 of the WA would require the arbitrators to refer all questions of interpretation of EU law or concepts (including State aid law) to the ECJ.

**So, in conclusion, all possible routes lead to the ECJ making the final and binding determination of the EU laws to be applied to or within NI, and of the scope of Article 10(1) of the Protocol including the extent of its UK-wide effects.**

## RESULTING OBLIGATIONS OF UK LAW UNDER EU LAW AND ECJ OVERSIGHT

As explained in the previous section, the Protocol contains legal obligations for the UK to continue to be bound by EU law and ECJ jurisdiction that will persist long after the end of the TP on 31 December 2020, and in that regard is incompatible with the UK regaining sovereignty. Section 5 of the European Union Withdrawal Agreement Act (EUWAA) provides for “*general implementation of the remainder of the withdrawal agreement*”. “Remainder” here means the parts of the WA outside the scope of the TP (which is covered by the repealed 1972 Act)<sup>14</sup>. Section 5 (which technically works by inserting a new section 7A into the 2018 EU Withdrawal Act) uses wording that in substance is identical to Section 2(1) of the repealed 1972 Act to give general direct effect to the WA under UK law. Subsection 7A(3), echoing the substance of the wording in Section 2(4) of the 1972 Act, also says that “Every enactment... is to be read and have effect subject to” the directly effective provisions.

Section 5 EUWAAA, therefore, continues the *Factortame* doctrine under UK law in relation to those aspects of the WA that persist after the end of the TP. Future UK Acts of Parliament that are held by the UK courts following binding ECJ guidance to be contrary to the persisting parts of the WA will still be struck down and rendered ineffective by the courts.<sup>15</sup>

<sup>14</sup> The Act provides that the 1972 Act, like a zombie risen from the grave, shall continue to have legal effect during the transition period despite its formal repeal by section 1 of the 2008 EU Withdrawal Act.

<sup>15</sup> That is, unless a UK Act of Parliament expressly modifies or repeals the provisions of the EUWAA 2020 which, give effect and primacy in UK law to the persisting parts of the WA. The *Factortame* series of cases only dealt with the doctrine of “implied repeal”, but did not deal with express departure from EU law via a UK Act of Parliament. The SC in *R (Miller) v Secretary of State for Exiting the European Union* [2017] said: ‘legislation which alters the domestic constitutional status of EU institutions or of EU law is not constrained by the need to be consistent with EU law. In the case of such legislation, there is no question of EU law having primacy, so that such legislation will have domestic effect even if it infringes EU law (and that would be true whether or not the 1972 Act remained in force)’. The legal consequence of the judgment is that the same constitutional principle applies in the context of the WA. This is bolstered by the express ‘parliamentary sovereignty’ provision in Section 38 EUWAA and is agreed to be the position by both UK constitutional lawyers and international lawyers - International law Professor Guglielmo Verdirame QC and UK Constitutional law Professor Richard Ekins stated: ‘When international law conflicts with domestic law, the constitutional principle of the rule of law requires British courts and ministers - and other legal subjects - to follow British law’ (see: <https://ukconstitutionalaw.org/2015/11/06/richard-ekins-and-guglielmo-verdirame-the-ministerial-code-and-the-rule-of-law/>). Of course this analysis is separate from the question of whether or not the UK would incur international responsibility for undertaking such action domestically.



There are other important areas where the WA (of which the Protocol forms an “integral part”) imposing binding obligations on the UK to apply EU laws or the judgments and decisions of the ECJ and the Commission after 31 December 2020.

So, for instance, in respect of State aid across the UK going forward, unless UK law as it now stands is altered, the ECJ will be able to hand down rulings from which there can be no appeal that interpret the scope of Article 10(1) of the Protocol, which applies EU State aid law in so far as it affects trade across the north-south border and between NI and other EU member states. If the ECJ says that the State aid reporting obligation extends to the grant of aid to companies or entities in Great Britain, then its decision will be binding. It will have to be followed by UK courts, and **the EU State aid rules to the extent they are applicable within Great Britain will oust and over ride any contrary provision of a UK Act of Parliament.**

The provisions of the WA and the Protocol are unlike those of a normal international treaty, which operate at a state to state level. Instead, they are accompanied by unique obligations to implement them by mechanisms that will continue to over ride the UK’s fundamental constitutional principle of the sovereignty of Parliament, long after the UK has departed from EU membership. The UK will not demonstrably regain its sovereignty while the following mechanisms persist:

- Direct effect and internal supremacy of WA and Protocol over UK law (Art.4(1)-(2))
- Obligation to pay “due regard” to post-transition ECJ judgments (Art.4(5)), with no reciprocal obligation on EU courts to pay any regard to UK judgments
- Exclusion of resort to other methods of dispute resolution - e.g., to WTO disputes procedure or the ICJ

## TERMINATION OF THE PROTOCOL THROUGH THE MECHANICS OF THE PROTOCOL ALONE

Crucially, the Protocol stipulates two mechanisms to terminate or modify the Protocol. Under the ratified WA, the Protocol will come into substantive effect from 1 Jan 2021 once the TP ends, if

- Termination by the periodic ‘democratic consent’ mechanism in the Protocol under Article 18 NI Protocol, or
- A subsequent agreement between the UK and the EU to terminate or modify the Protocol under Article 13(8) NI Protocol.

However, the Protocol is somewhat ambiguous as to its fate in the event that the parties do not reach “subsequent agreement” or do not alter the protocol under the “democratic consent” mechanisms. Indeed, neither point is expressly stated. The EU appears to assert the indefinite application of the Protocol unless and until substituted.

However, the powers provided to the EU when negotiating the WA and the Protocol with the UK under Article 50 TEU do not provide a sufficient legal basis for the EU27, under EU law, for the establishment of permanent relations with the UK. Thus, the legal nature of the Protocol suggests that it was intended and can only apply temporarily. Furthermore, it is possible to construe the Protocol as not being intended to apply if there is no subsequent agreement at all, as it envisages adjustments to it in light of the conflation in that subsequent agreement (finally) of both trade and border processes.<sup>16</sup>

<sup>16</sup> The more general ability of the UK to walk away from the Protocol - and WA - is described in Chapter III

## SUMMARY OF PRACTICAL PROBLEMS WITH THE PROTOCOL

Application of the above UK legal obligations under the Protocol leads to six long-term and seriously injurious problems for the UK:

1. **Restriction on UK Competitiveness through Dynamically Evolving EU State aid Law.** The legal mechanics described above mean that no independent UK subsidy control policy will be possible. The EU will control State aid in the UK in a very similar way to how it does now. State aid is an exceptionally wide-ranging tool that grants the European Commission discretionary approval powers over UK corporate fiscal policy, industrial policy, energy security, infrastructure and R&D spending and many other areas. These provisions allow the European Commission to continue its involvement with UK policy design as if we had remained a member state - except without any UK political influence or participation in the Commission itself. Imagine a UK government wishes to support Nissan in Sunderland. If that support might theoretically affect trade under the Protocol - for example by enabling Nissan to compete within the NI market more effectively, thereby possibly displacing cars, which might otherwise have been imported from Germany into NI - then the Commission would be entitled to be notified of that intention and to prevent the subsidy entirely or require changes so as to protect the interests of EU competitors.

It is also worth recalling that the Commission is under no equivalent obligation to consider the effects on the UK of such subsidy granted elsewhere in the EU. Should the UK Government refuse to notify, the subsidy could be readily stopped by the Commission or a competitor via the English courts. (The obligation to notify the Commission has direct effect and is therefore enforceable directly in the UK Courts under the mechanisms described above). The UK Courts could issue an injunction preventing the subsidy proceeding until the Commission had been notified and had approved. This example is developed further in the Case Study beginning on page 26.

2. **NI Businesses (including NI operations of UK-wide businesses) are Completely Unprotected from EU Anticompetitive Behaviours.** The application of EU law in NI stops the UK protecting UK businesses in respect of their NI operations from dumping and harmful subsidisation arising from within Ireland or elsewhere in the EU, as a sovereign nation is entitled to do under WTO rules. Indeed, the application of EU law would prevent the EU honouring its commitment (in Article 4 of the Political Declaration) to recognise the UK's ability to protect its single market.

The Protocol defeats this because it would restrict the UK from charging tariffs, as the UK is entitled to do under WTO law in order to protect its Northern Ireland businesses' operations from trade dumping and unfair subsidisations from EU producers. It would also restrict the UK from protecting its GB businesses in respect of their NI operations from the same effects. The issue is that EU law, and EU State aid law, as applied under the Protocol does not see these effects as being improper - or trade distorting. The law is not set up to protect non-EU interests, but instead bakes in the unfair trade advantages enjoyed by Irish and other EU producers. Since the EU's system operates under the EU's governance and is interpreted by the ECJ, this situation will only get worse. Existing trade dumping and subsidisation could become more acute, and new forms of dumping and subsidisation could emerge.

Eurozone trading infractions of WTO law already occur and are likely to increase because of the economic effects of Covid-19 and the likely EU response to that. The UK and non-Eurozone member states have been unable to identify, let alone address these matters while operating within the EU law regime.

There are three primary causal factors for unfairness as things stand right now:

- Eurozone net exporters are accumulating unparalleled trade surpluses due to the structurally low currency value, caused by the lack of a single Eurozone sovereign backer for the zone and by the indebtedness of the southern states, for which the north avoids joint fiscal responsibility.
- The Eurozone's TARGET2 arrangements provide unlimited financing to Eurozone buyers when they make purchases from (predominantly northern) Eurozone producers, which unfairly subsidises those producers.

- EU exports into NI are subsidised by artificially cheap financing from Irish and other Eurozone banks. The cause of this cheap financing is that Irish and other Eurozone banks do not carry the cost of the financial risk inherent in the Eurozone's legal structure, which operates on the false assumption that Eurozone member state debt is risk free. This assumption is false because Eurozone states each borrow in what is essentially a foreign currency they cannot control individually and so are constantly at risk of defaulting on their debts. The result is to allow EU banks to operate with lower overheads and less well calibrated risk management systems than would be required were international standards to be properly applied.

Furthermore, the unmanaged financial risk that results from the EU's approach to member state debt seeps into the international financial system through the subsidiaries of global institutions operating from within the EU itself, since those institutions need in practice to stand behind their subsidiaries for reputational reasons, and from the fact that the financial markets are interconnected and financial firms within the EU are constantly engaged in financial dealings with financial firms outside the EU.

The net effect of this is that the EU is running a financial system that pollutes the rest of the world with financial risk - a risk that the EU leaves unmanaged. The rest of the world needs then to mitigate that risk at its own expense. Currently Eurozone risk is only addressed through the mitigating steps taken by the UK's Bank of England, which imposes top-up capital requirements on its businesses to cater for risk arising from the Eurozone.

The EU itself takes no such steps and the US does not either. UK-based firms are therefore paying a price for the Eurozone's unmanaged financial risk. And EU firms operating in the global markets by way of trading that takes place cross-border from their home state with firms in the London market, or when trading in the UK markets through their London branches, are operating at a competitive advantage by not having to meet the same top-up capital requirements as those imposed on UK-based businesses.<sup>17</sup>

The fundamental problem arises for two reasons: First, there are existing gaps in the EU level playing field rules that affect member states detrimentally today - but which will affect the UK even more acutely after Brexit. The UK needs to be free to address these outside the EU.

Second, the EU's legal system is politico-legal. To operate with any semblance of fairness it requires each jurisdiction to have political representation - applying pressure on the Commission and ultimately the Court to find appropriate and fair solutions.

The absence of NI political representation removes key checks and balances in the system. This is especially pronounced if NI is being disadvantaged by choices made by the Republic of Ireland, since NI has been seen during the Brexit process as essentially the "business" of Ireland and the EU's role to advertise benefits of EU membership by standing behind or showing solidarity with Ireland.

The arrangements, if allowed to enter into force, would mean that UK businesses operating in NI will rely on the European Commission to impose anti-dumping or anti-subsidy duties or bring relevant actions through WTO dispute settlement on their behalf, rather than the UK's own procedure via the new Trade Remedies Investigations Directorate. We cannot expect the Commission will have much appetite to take these actions for businesses that are within the UK perimeter. It has already been seen that Covid-19 has resulted in Germany granting circa 50 per cent of the total government support in the EU while accounting for only circa 22 per cent of EU GDP - massively favouring German firms in the recovery. The EU system responds to the political imperatives of its members and its most powerful members (France and Germany) most of all. It is unrealistic to expect Northern Irish interests to count in any meaningful way.

<sup>17</sup> For a full analysis of this topic, see *Managing Euro Risk: Saving Investors from Systemic Risk*, by Barnabas Reynolds, David Blake and Robert Lyddon, Politeia, February 2020.

- Burdensome EU Customs Mechanisms.** Goods going into NI from the mainland will be subject to EU mandated customs, with reclaims for goods ending up in NI - to the extent the EU is prepared to agree via the Joint Committee. This is effectively a customs border in the Irish Sea - even if reduced to online customs procedures and online infrastructure, with EU approval in the Joint Committee. The Joint Committee will also decide which goods are at risk of entering Ireland from NI and therefore subject to EU tariffs. The structure of Article 5(2) of the Protocol is that all goods are to be regarded as potentially at risk, until the Joint Committee decides otherwise. This gives the EU a veto within the Joint Committee over agreeing to rules that would be permissive regarding goods imported from GB.

As a legal matter therefore, what is deemed 'at risk' is effectively for the EU to determine, although the UK is responsible for the practical implementation. These requirements will add a significant burden to NI business, act as a disincentive to intra UK trade, and being under EU and ECJ control will demoralise the Unionist population. For example, if NI consumers are unable to access UK branches of eBay and Amazon without extra administration, it would add to the feeling they are not full participants in the UK's single market. Likewise, NI fishermen would be required to face a customs and regulatory border - effectively paying tariffs and complying with import quotas to land fish in their own home ports - unless the EU acquiesces in the Joint Committee to treat such fish as for UK consumption.

- SPS Checks.** The Protocol would impose checks on all agri-food imports into NI. While there are existing checks on live animals, these checks will now encompass all foods and will include controls imposed for economic reasons to protect EU farming interests and will not be limited to controls needed to keep animal or plant diseases out of the island of Ireland. A beef lasagne sent from a Tesco depot in Glasgow to a Tesco store in NI would now cross a new regulatory border, adding cost and potentially disrupting NI's supply chains. There could be additional problems for NI in the event that the UK concludes FTAs with third states. For example, if a future FTA between the UK and US permitted the import of hormone treated beef into NI this would breach the EU's single market SPS rules. Thus, a broader range of goods could be subject to agri-food checks between GB and NI going forward depending on the scope of the UK's future trading partners.
- The EU's VAT penalty.** Northern Ireland under the Protocol will in future be in a different VAT zone to mainland GB. This will complicate and add cost to intra-UK trade impacting NI consumers, manufacturers and traders.
- Divergence of Northern Ireland from the UK single market and towards the EU over time.** The NI Protocol would over time, if allowed to become permanent, realign Northern Ireland away from the UK's single market and towards the EU's Single Market. This is despite the EU's commitment under Paragraph 17 of the Political Declaration to respect the UK's single market.<sup>18</sup> It is unclear how any non-EU compliant mainland goods going into the Province would be treated. In general, goods could not be marketed within NI if they do not comply with the EU laws in Annex 2 of the Protocol. Uncertainty and costs would disincentivise mainland companies trading with the Province and further alienate NI from the UK's single market. This would not only be seriously detrimental to NI's economic and constitutional position in the UK but would present a political problem for the Conservative Party and its ability to rely on the unionist vote in Scotland and indeed on Northern Irish unionists if they were needed in a future Parliament.

<sup>18</sup> Political Declaration para 17 "integrity of the Union's Single Market and the Customs Union as well as the United Kingdom's": [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/840656/Political\\_Declaration\\_setting\\_out\\_the\\_framework\\_for\\_the\\_future\\_relationship\\_between\\_the\\_European\\_Union\\_and\\_the\\_United\\_Kingdom.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840656/Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom.pdf)

## CASE STUDY

### APPLICATION OF STATE AID PROVISIONS IN THE PROTOCOL TO MAINLAND UK

This case study illustrates the nature of the problems created by the State aid provisions in the Protocol - building on the example mentioned in the main text of a subsidy to Nissan Sunderland.

#### Scenario

Imagine HMG wishes to award a subsidy to Nissan Sunderland to support the development of battery electric vehicles. The subsidy results in improved vehicles being released into a competitive market where Nissan competes with EU firms. Without the subsidy the new vehicles may never have been produced, may have been produced, but in the EU rather than Sunderland, and/or might be sold for a lower price than if Nissan had had to bear the full costs of development.

The new vehicles will be sold across the UK including within NI where they will compete with vehicles made in the EU. Each Nissan that could be sold in NI is a sales opportunity lost to EU competitors (Peugeot, Volkswagen etc.). They might even be exported across the Irish land border into the Republic.

#### Legal Position under the Protocol

Is the above sufficient to “affect that trade subject to this Protocol” and require prior notification to and approval of the Commission?

**Art 10(1):** “The provisions of Union law listed in Annex 5 to this Protocol **shall apply to the United Kingdom**, including with regard to measures supporting the production of and trade in agricultural products in Northern Ireland, in respect of measures **which affect that trade between Northern Ireland and the Union which is subject to this Protocol** [emphasis added].”

The concept of “effect on trade” for State aid purposes is a Union law term of art. The Court’s judgment in *Eventech* C-518/13 provides a good illustration:

*“65... in accordance with the Court’s settled case-law, for the purpose of categorising a national measure as State aid, it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (the judgment in *Libert and Others*, C 197/11 and C 203/11, EU:C:2013:288, paragraph 76 and case-law cited).*

*66 In particular, when aid granted by a Member State **strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid** (see, to that effect, the judgment in *Libert and Others*, EU:C:2013:288, paragraph 77 and case-law cited). [emphasis added]*

*67 In that regard, it is not necessary that the beneficiary undertakings are themselves involved in intra-Community trade. Where a Member State grants aid to undertakings, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are thereby reduced (see, to that effect, the judgment in *Libert and Others*, EU:C:2013:288, paragraph 78 and case-law cited).*

68 Further, according to the Court's case-law, there is no threshold or percentage below which it may be considered that trade between Member States is not affected. The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected (the judgment in *Altmark Trans and Regie, rungspräsidium Magdeburg*, C 280/00, EU:C:2003:415, paragraph 81)."

The first question, therefore, is whether "affect that trade between Northern Ireland and the Union" in Art 10(1) is to be interpreted in the same way? The Commission before the ECJ or litigant before the UK courts may argue that the UK must have known that this provision carries its usual meaning in EU law when the Protocol was negotiated and it would undermine legal certainty to use a different test for effect on trade in an Protocol context than between member states. The Government would presumably argue that "effect on trade" should have a narrower meaning in the Protocol's context given the existence of a customs border between NI and GB meaning the situation is plainly not the same as between member states.

Either way, what is absolutely clear is that this is a question for the ECJ alone by virtue of Article 12(4), which states:

"As regards the second subparagraph of paragraph 2 of this Article, Article 5 and **Articles 7 to 10**, the institutions, bodies, offices, and agencies of the Union shall in relation to the United Kingdom and natural and legal persons residing or established in the territory of the United Kingdom have the powers conferred upon them by Union law. **In particular, the Court of Justice of the European Union (ECJ) shall have the jurisdiction provided for in the Treaties in this respect.** The second and third paragraphs of Article 267 TFEU shall apply to and in the United Kingdom in this respect." [emphasis added]

Further, Article 10(1) imports the laws at Annex 5. This is the entire EU State aid *acquis* - including the suspension obligation (the legal obligation to notify and await Commission approval before proceeding with a State aid measure) and procedural regulation (which grants the Commission its powers to collect evidence, etc.).

The combination of the Annex 5 laws plus an "effect on trade" concept that is to be interpreted by the ECJ alone means that any aid measure in the UK (wherever in the UK) that the ECJ decides may affect trade between NI and the Union is notifiable to the Commission. (this sentence not clear)

The Commission's obligation in that notification is merely to keep the UK "fully and regularly informed" per Art 10(3).

## Practical Consequences

The laws in Annex 5 include the substantive assessment guidelines for State aid measures. For the aid measure above (HMG assistance to Nissan Sunderland to support the development of battery electric vehicles) the assessment would weigh the damage to trade and competition against the benefits to the single market. How does aid given to a plant in Sunderland contribute to the single market?

Further, imagine that the Nissan project could have taken place in Sunderland or at Peugeot in France. The aid has moved the investment from France. How does that contribute to the single market? In both these scenarios Article 12(5) - which says for State aid that acts of the Commission under the Protocol shall have the same legal effects as those which they produce in the Union - could be said to help. The Commission could use this to treat the UK as being within the single market for the purposes of State aid decisions made under Article 10 of the Protocol. But, this is fraught with difficulty. For example, there will not be a regional aid classification for Sunderland

- which is a component in the Commission's assessment whether (and how much) aid the Commission can approve. The UK will have no political representation or Commissioner in Brussels to protect its interests - whereas of course France will have both.

It's even more difficult the other way around, where aid is offered by France to move the investment from Sunderland. Article 12(5) is not relevant here because it only bites on decisions adopted in accordance with Article 12(4) - the provision granting the Commission its powers over the UK. When France notifies the Commission of its aid project to move investment from Sunderland to the Peugeot plant in France, it will do so under Art 108(3) TFEU.

How then does the Commission justify declining that aid - when the negative effects are all outside the single market?

It is also worth noting that the Commission regularly approves aid that moves investment from outside the EEA to within it - even when the EU has an FTA with the country. See *JLR Slovakia*: The Commission's in-depth investigation opened in May 2017 confirmed that, when analysing in 2015 where to build the new car plant, Jaguar Land Rover considered several locations both in the European Economic Area (EEA) and in North America. Nitra in Western Slovakia was eventually selected as the preferred European location, while a city in Mexico was identified as the preferred alternative location in North America. The Commission's investigation established that without the investment aid, the project would not have been carried out in Europe but in Mexico<sup>19</sup>. Despite the fact that the EU has an FTA with Mexico (and is negotiating a new one), it used its subsidy rules to extract investment from Mexico and put it in the EU.

The Protocol puts the EU in an asymmetric and stronger position to use counter measures under the WTO's Subsidies and Countermeasures Agreement against the UK. If aid - such as in the Nissan example above - is ultimately disallowed by the Commission, the information collected from a notification provides a plausible basis to estimate the level of countervailing tariffs to apply to goods being exported from the UK to the EU to cancel out the benefit of the subsidy. The UK is not in an equivalent position in respect of the EU - as no notifications of aid in the EU are to be made to the UK.

<sup>19</sup> [https://europa2.eu/rapid/press-release\\_IP-18-6023\\_en.htm](https://europa2.eu/rapid/press-release_IP-18-6023_en.htm)

## B - THREATS IN REMAINDER OF THE WA

In summary, the threats contained in the remainder of the WA are as follows:

- **Ukraine/Moldova clause** giving ECJ jurisdiction over bilateral arbitral tribunal on issues of EU law
- **ECJ jurisdiction over the UK's financial obligations** - which are obligations the House of Lords European Union Select Committee has determined the UK does not owe under international law
- **"Long tail" jurisdiction for the ECJ** after the end of the transition period compounded by continued jurisdiction of the Commission in competition proceedings
- **Power of the ECJ and bilateral tribunal to impose financial penalties**
- **EU Citizens' Rights** - 'direct effect' over-riding future Acts of Parliament, coupled with ECJ binding interpretation<sup>20</sup>
- **'Divorce Payments' Liabilities** under the WA vastly greater than any UK obligation under international law (which is zero), coupled with uncertainty from ECJ binding adjudication of UK liabilities (no independent arbitration)<sup>21</sup>
- **Future Financial Liabilities** - financial risks associated with the UK's membership in the EIB<sup>22</sup> and participation in other EU funds<sup>23</sup>
- **EU Data Protection Laws** - i.e., General Data Protection Regulation 2016/67 (GDPR) - entrenched for the long term under guise of EU citizens' rights<sup>24</sup>
- **EU Geographical Indications of Origin** entrenched, to the detriment of UK trade agreements with non-EU countries<sup>25</sup>
- **Provisions Relating to UK Sovereign Bases** in Cyprus (which are placed into the Customs Union)<sup>26</sup>, Gibraltar, and numerous other issues which encroach on UK sovereignty

### UKRAINE/MOLDOVA CLAUSE

Now that we have formally left the EU, the ECJ has ceased to be a multi-national court in which the UK is a participating member and has become an entirely foreign court. It is contrary to international treaty practice for sovereign states to agree to be bound by the courts of the other treaty party. States will only accept to be bound by neutral and balanced means of international adjudication.

This is not only a general rule, but it is also generally true of the external agreements between the EU and non-member states. Non-member states do not as a rule agree to treaties with the EU under which they submit to binding ECJ jurisdiction. Even the customs and trade agreements between the EU and the tiny landlocked states of Andorra and San Marino contain conventional bilateral arbitration clauses.

The WA sets up a conventional balanced international arbitration panel, which for each dispute will contain five members: two nominated by each of the EU and the UK, and a neutral chairman appointed by agreement or nominated by the Secretary-General of the Court of Permanent Arbitration: Art.171(5). On the face of it that would be a suitable means for adjudicating on international treaty obligations between sovereign powers.

However, the powers of the independent panel are seriously compromised by a most remarkable provision:

20 Article 4 (citizens rights direct effect) and Article 158 WA (eight years ECJ jurisdiction citizens rights after end of TP)

21 Article 136 (post-TP contributions to EU budget), Article 138 (Union law applicable post-TP in relation to UK commitments under MFF 2014-2020) and Article 160 WA (ECJ jurisdiction concerning divorce payments)

22 Article 150 WA (EIB liabilities)

23 Article 135 (contributions to Union budget for years 2019 and 2020), Article 136 (post-TP contributions to EU budget), Article 142 (pension liabilities), Article 144 (liabilities from financial instruments), Article 147 (liabilities related to legal cases)

24 Article 71 WA (protection of personal data)

25 Article 54 WA (Intellectual property)

26 'Protocol relating to the sovereign base areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus' and the 'Protocol on Gibraltar'



## Article 174

### Disputes raising questions of Union law

1. Where a dispute submitted to arbitration in accordance with this Title raises a question of interpretation of a concept of Union law, a question of interpretation of a provision of Union law referred to in this Agreement or a question of whether the United Kingdom has complied with its obligations under Article 89(2), the arbitration panel shall not decide on any such question. **In such case, it shall request the Court of Justice of the European Union to give a ruling on the question.** The Court of Justice of the European Union shall have jurisdiction to give such a ruling, **which shall be binding on the arbitration panel.** (emphasis added)

Disputes under the WA are likely to raise questions involving EU law or concepts in many areas. Most obviously, the provisions of Part Two on the rights of EU citizens in the UK, or of UK citizens in the EU, are mainly based on EU law provisions. The effect of this clause is that such disputes will need to be referred to the court of one party, the ECJ, and the independent panel will then be bound by the ruling and have to apply it. The supposedly independent panel will simply be a post-box and rubber stamp, with the effective decision being taken by the ECJ. The reference to Art.89(2) is to a case about whether the UK has complied with a previous ECJ judgment, and in such cases as well the arbitration panel will just be a post box.

No other non-member state has agreed to being bound by rulings of the ECJ, a court made up of EU nationals only, in proceedings to which it is a party: with the exception of the former Soviet Republics of Ukraine, Moldova and Georgia. Article 174 of the WA is directly copied out from the clauses in the Association Agreements between these countries and the EU. These countries, desperate for trade deals with the EU (and in two cases when partly occupied by Russian soldiers) agreed to these humiliating and one-sided clauses.

The recently retired President of the EFTA Court, Dr Carl Baudenbacher, commented on this clause as follows:

*"This is not a real arbitration tribunal - behind it the ECJ decides everything. This is taken from the Ukraine agreement. It is absolutely unbelievable that a country like the UK, which was the first country to accept independent courts, would subject itself to this."*<sup>27</sup>

This clause requires the bilateral arbitral tribunal established under the WA to refer any questions of EU law to the ECJ and to be bound by the result. Such references are compulsory if an issue of EU law is identified, and the ECJ rather than the arbitral tribunal then becomes the effective decider of the issue.

Given that rights of EU citizens are based on EU law rights at a point in time, this clause will entitle the ECJ to continue to rule on and define the UK's obligations in respect of EU citizens for the indefinite future (for the lifetime of UK resident EU citizens and possibly for their children's lifetimes as well). It would also enable the ECJ conclusively (i.e., with the UK having no legal recourse against the decision) to deny rights to UK citizens resident in the EU.

The reason why sovereign states do not agree to such treaty arrangements is because their treaty obligations can then be defined and indeed remodelled by the organs of the other treaty party, rather than being subject only to impartial and neutral determination.

In the case of the ECJ, there is particular reason to fear there will be future judgments which purport to be merely interpreting the state of the law at the point in time when the UK leaves, but in fact unpredictably and retrospectively alter that law. For example in Case C165/16 *Toufik Lounes v Home Secretary* 14 Nov 2017 (Grand Chamber), the ECJ overturned the previous understanding of the law regarding the operation of the rules on free movement of persons in relation to dual citizens (i.e., EU citizens who also have UK citizenship), with wide ranging effects.

<sup>27</sup> Financial Times, 16 Nov 2018

This is just one example and it is simply not possible to foresee what the ECJ might or might not do over the next 50 years. The obligations of direct effect, supremacy and “due regard” (under WA Art.4) would require UK courts to follow and implement those judgments and overturn UK Acts of Parliament if necessary. Note that “due regard” is likely to be interpreted by the courts, analogously with UK courts deference to the Strasbourg Court under the Human Rights Act 1998 s.2, as effectively requiring them to follow ECJ jurisprudence - because if they fail to follow it, it will then lead to an arbitration in which the ECJ will bindingly rule on the issue under Art.174.

This clause was imposed on the former Soviet republics of Ukraine, Moldova and Georgia who were economically desperate and had a very weak negotiating position. It has not yet been accepted by any other state. Switzerland is currently resisting an EU attempt to impose such a clause on it. The EEA States (Norway, Iceland and Liechtenstein) refused to accept such arrangements under the EEA Agreement and insisted on being subject to the binding jurisdiction only of their own courts (and the advisory jurisdiction of their own EFTA Court, which has no EU nationals as judges).

A further factor in the decision of Ukraine, Moldova and Georgia to accept this clause is that they wish to join the EU eventually and have agreed to align progressively many areas of their law with EU law. Given that once they join they will need to align with ECJ decisions in any case, from their point of view this limits the down side in having to follow those decisions a bit earlier.

By contrast, there should be no post-exit dynamic alignment of the rights of EU citizens in the UK with developing EU internal free movement law. In principle, their rights should be those in Part Two of the WA based on EU laws frozen at a point in time. Insofar as their rights are defined by pre-exit ECJ jurisprudence, that jurisprudence should be interpreted by a neutral arbitral body on an objective basis. There is no case for it being subject to being re-written by the ECJ on a unilateral basis.

## ECJ JURISDICTION OVER THE UK'S FINANCIAL OBLIGATIONS

Part Five of the WA effectively converts vaguely defined “commitments” to pay into the EU budget, which are not legal obligations, into binding obligations in international law.

But, in addition, the ECJ is given jurisdiction over converting these vague obligations into a defined bill. This is contrary to all orthodox international treaty practice, according to which a neutral international body (such as the arbitral tribunal under the WA) should be entrusted with this task, not an organ of the money-receiving party.

The ECJ in common with other EU organs feels itself under stress from budget restrictions over recent years. It is implausible to think that it would not stretch its interpretations in favour of the EU collecting as much money as possible.

## “LONG TAIL” JURISDICTION FOR THE ECJ AFTER END OF TRANSITION PERIOD

The WA allows the EU Commission to commence infraction proceedings against the UK not merely during the transition, but up to 4 years after the end of the transition (Art.87). Given that the proceedings themselves may last a number of years, this raises the prospect of the UK continuing to be involved in historic litigation into the 2030s, long after we have left the transition.

This problem is compounded in competition or State aid cases where private companies are involved. This is because the relief granted in these kinds of cases may involve the unwinding of a historic position on a retrospective basis: for example, the current long running litigation challenging electricity stand-by capacity payments as unlawful State aid could eventually require repayment of sums received by operators pursuant to an order made many years in the future by the Commission or the ECJ.

It is simply unacceptable that the UK or operators in the UK market should be subject to long running EU proceedings of indefinite duration.

## POWER OF ECJ AND BILATERAL TRIBUNAL TO IMPOSE FINANCIAL PENALTIES

Such penalties are unique to the EU internal system and have no place in other international treaties; for example, the EU-Canada CETA Agreement section on disputes has no such clauses.

## EU CITIZENS' RIGHTS AND UK SOVEREIGNTY

Part Two of the WA provides for the post-Brexit rights of citizens. It applies both to EU citizens in the UK and to UK citizens in the EU. By and large (with the important exception of the data protection clauses that are considered later in this paper), the substantive rights given citizens are not contentious, bearing in mind that they are reciprocal - UK citizens will mainly enjoy the same rights in the EU as EU citizens will in the UK.<sup>28</sup>

The number of EU citizens benefiting from these rights in the UK is estimated at about 3.6 million.<sup>29</sup> By contrast, there are believed to be something over 1 million UK citizens who are resident in the 27 EU member states. Despite the disparity in the numbers who benefit from these rights, the Leave campaign was fought on the basis that Brexit would respect the rights of EU citizens already established in the UK and that controls on freedom of movement would apply only to future movement.

So, the package of rights of citizens under Part Two of the WA is not *as such* contentious, or something that the UK would wish to escape, with the exception of the data protection clauses considered below that have apparently been tacked on to "citizens' rights" as a poison pill to undermine attempts by the UK to reform its data protection laws or engage in free data exchanges with non-EU countries.

The problem arises from the mechanisms for enforcement and adjudication of those citizens' rights under the WA, which are unprecedented in international law and practice and are grotesquely one sided. The key features of these mechanisms which undermine the future sovereignty of the United Kingdom are as follows:-

1. **Supremacy over UK law and direct effect:** Article 4 of the WA applies so as to give direct effect to EU citizens' rights in the UK, and to require those rights (as adjudicated ultimately by the ECJ) to prevail over UK law *within UK courts*, including Acts of Parliament. This is a continuation of the well-known *Factortame* doctrine<sup>30</sup> which applied when the UK was an EU member, with the important difference that the UK will have no participation in the ECJ or other EU institutions. It is quite exceptional for treaties entered into by the UK to have direct effect, and unknown (apart from this example) for them to have primacy within the UK legal system over Acts of Parliament.
2. **One-sided adjudication of the rights by the ECJ:** Unlike the universal practice of international treaties under which the courts and institutions of treaty parties are on a par, citizens' rights are subject to one-sided binding adjudication by the courts of one treaty party alone, the EU. This one-sided nature of the WA is exemplified by Art.4(4) and Art.89(1) which require UK courts and institutions to treat as binding ECJ judgments handed down before the end of the transition period, and Art.4(5) which requires UK courts and institutions to "have due regard to relevant case law" of the ECJ handed down after the end of the transition period, while not containing any clause which requires the EU to pay due regard, or any regard at all, to the decisions of UK courts. It should be noted that there is nothing wrong with UK courts looking at ECJ judgments (although the practice should be reciprocal) so long as it is on a non-binding basis and seeking to achieve consistency of approach based on mutual respect. This is standard practice for the courts of countries who are parties to a treaty.

28 An important difference is that it appears that UK citizens resident in one EU country will no longer have the right (at least, no enforceable right under the WA) to change their place of residence from that EU country to another.

29 Office for National Statistics: "Population of the UK by country of birth and nationality" (2019): <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/datasets/populationoftheunitedkingdombycountryofbirthandnationality>

30 In the well-known *Factortame* case in 1990, the House of Lords disapplied a UK Act of Parliament intended to protect the British fishing industry, following the ECJ's ruling that the Act conflicted with the EC Treaty. This case made clear to all that our membership of the EC required the UK to over ride our constitutional principle of Parliamentary supremacy, and have UK courts overturn Acts if they were found to conflict with EC law (now EU law). However, the *Factortame* series of cases only dealt with the doctrine of *v* but did not deal with constitutionally salient question of the possibility of express departure from EU law via a UK Act of Parliament. The question of whether Parliament would have had to repeal the European Communities Act 1972 (ECA) in order to legislate contrary to EU law, or simply decree that such legislation was to have effect "notwithstanding" the ECA was answered by the SC in *R (Miller) v Secretary of State for Exiting the European Union* [2017]: "legislation which alters the domestic constitutional status of EU institutions or of EU law is not constrained by the need to be consistent with EU law. In the case of such legislation, there is no question of EU law having primacy, so that such legislation will have domestic effect even if it infringes EU law (and that would be true whether or not the 1972 Act remained in force)." The legal consequence of the judgment is that the same constitutional principle applies in the context of the WA.

3. **Binding direct jurisdiction by the ECJ for the next decade:** In addition to these one-sided clauses about the effects of ECJ judgments, Art.158 provides for UK courts to continue to make preliminary references to the ECJ on EU citizens' rights in cases "*commenced at first instance within 8 years from the end of the transition period.*"<sup>31</sup> This is likely to be widely used, with a possible torrent of litigation as the end of the 8-year period approaches (note that this limit applies to the date when litigation is started at first instance in the national court, given the length of time procedures take, it is likely that judgments would still be issuing from the ECJ up to 5 years after the end of the 8 years). Thus, given the length of time that cases take to wend through the courts, this means that binding ECJ judgments will continue to be handed down under this clause more than a decade hence. Although the power of UK courts to refer is not compulsory (unlike present preliminary reference procedures),<sup>32</sup> it is likely that our higher courts will effectively feel obliged as a matter of judicial practice to make such references in controversial cases, particularly where there has been post-Brexit new case law within the EU.

Especially if Art.174 WA were retained (see the Ukraine/Moldova Clause Section above), UK courts would think that there was no point in refusing a reference since the ECJ's interpretation would win anyway under that procedure. This would colour the "due regard" obligation in Art.4 of the WA and probably lead in practice to UK courts treating post-exit ECJ judgments as effectively binding. Thus, this preliminary reference procedure will lead to the UK becoming bound by decisions of a foreign court in regard to rights of EU citizens in the UK. By contrast, UK citizens in the EU will have no recourse to UK courts, and the Ukraine clause would block any effective remedy against ECJ judgments which do not properly respect their rights. The interpretation of the ECJ's pre-exit jurisprudence should be carried out by a neutral body in order to avoid the risk of the UK's rights, or the rights of UK citizens in the EU, being retrospectively re-written by a court of the other treaty party.

4. **Binding indirect ECJ jurisdiction forever:** The time-limited nature of the preliminary reference clause in Art.158 will, however, be undermined by the perpetual indirect binding jurisdiction given to the ECJ under the remarkable clause in Article 174 of the WA, which requires bilateral arbitration panels set up under the WA disputes procedure to submit questions of interpretation of EU law or "concepts" to the ECJ and then to act as a rubber stamp to give effect to the ECJ's ruling. This remarkable clause is modelled on one imposed on the desperate former Soviet republics of Ukraine, Moldova and Georgia in their agreements with the EU. It will continue to have effects literally for generations because the citizens' rights parts of the WA are based on EU law as it stands at the end of the transition period. In practice, this clause will allow the ECJ to alter the UK's treaty obligations in relation to the rights of citizens in unpredictable ways while purporting to "interpret" EU law as it stands at the end of the transition.
5. **No independent protection for UK citizens in the EU:** The corollary of the one-sided nature of the Ukraine clause is that the UK will be excluded from effective access to the bilateral arbitration mechanism to protect the rights of UK citizens within the EU. If the ECJ fails to protect those rights adequately, basing itself on provisions or concepts of EU law, then its actions or interpretation cannot be challenged because the arbitration panel would be required to send the case back to the ECJ and be bound by its decisions.

It does not seem to be widely understood how grossly these provisions, individually and collectively, depart from the near universal norms of international treaty law and practice and represent a grave and continuing threat to the sovereignty of the United Kingdom. The provisions of the Withdrawal Agreement relating to the adjudication and enforcement of citizens' rights will have unpredictable but quite possibly severe consequences for very many years to come. One has to search long and hard for precedents similar to what the Commission is demanding that the UK should subject itself to. That is, to have a privileged class of foreign nationals resident in one country enjoying rights for the rest of their lives superior to those of that country's citizens, and those rights being adjudicated upon by a foreign court whose decisions

31 This raises similar issues to Art.174 WA (Ukraine/Moldova Clause) but there are differences. Art.158 applies only to the citizenship rights parts of the WA, but Art.174 applies across the board of the WA. Art.174 is invoked in state-to-state procedures (e.g., a complaint brought against the UK by the Commission), while Art.158 permits preliminary references to be made by UK courts to the ECJ in private litigation.

32 Unlike the position under Art.267 of the TFEU where supreme courts of Member States are obliged to make references.

would override those of the first country's domestic courts and its legislature.<sup>33</sup> Further, the Ukraine clause puts the ECJ in the position of being able to retrospectively "interpret" EU law or concepts in a non-objective way to the disadvantage of the UK in a particular dispute. Given the ECJ's long and persistent track record of policy-driven "interpretation" of EU treaties and laws, it is virtually inevitable that the ECJ will amend or extend these rights (which are broadly and vaguely defined in the words of the treaty) in a policy driven way.<sup>34</sup> This will result in the effective continuation within the law of the United Kingdom of "dynamic alignment" of rights of EU citizens in the UK with developments in internal EU citizens' rights. More seriously, it will expose the UK to adverse judgments by a foreign court<sup>35</sup> which has no duty of loyalty towards the UK, but could well be animated by a desire to enlarge the rights of EU citizens at the expense of the UK as host state. The UK will simply be exposed to such injustice, with no recourse.

## DIVORCE PAYMENTS LIABILITIES

As is well known, the divorce payments stipulated in the WA are not only for amounts which are not owing under international law, but are uncapped and subject to the determination of the ECJ. Indeed, the House of Lords European Union Committee published a report in March 2017<sup>36</sup> concerning the UK's legal obligations arising under the EU Budget and related financial instruments on its withdrawal from the EU. It concluded that in the absence of a negotiated deal, there are no legal obligations binding upon the UK to make post-exit payments to the EU.<sup>37</sup>

This is because Article 50 TEU (the provision on withdrawal from the EU) stipulates that, unless agreement is reached providing otherwise, EU "Treaties shall cease to apply to the State in question" (Article 50(3) TEU). This expression is unqualified by any condition about ongoing liabilities under EU law. The meaning of these words is clear: the foundation of the whole edifice of EU law - the *acquis Communautaire* - is removed for the State in question. Given that the EU Treaties are at the pinnacle of the hierarchy of EU norms, once they cease to have effect, the legal base for every aspect of the UK's membership of the EU comes to an end. This will include all of its legal obligations under the Own Resources Decision, the Multiannual Financial Framework, and the Annual Budget. It will also include the supremacy of EU law over UK law and the jurisdiction of the ECJ over the UK. It thus follows that, under EU law, Article 50 TEU allows the UK to leave the EU without being liable for outstanding financial obligations under the EU budget, unless a deal provides otherwise.

Be that as it may, the WA includes a liability, the net cost of which the Office for Budget Responsibility has estimated at £33 billion. They state that the pensions of EU staff are likely to be the most significant liabilities for the UK, thereby underplaying the possible claims from sources such as the EU Commitments Appropriation budget and overlooking that some elements in the liability described by the WA have no end date. These are the matters that we will pass on to now.

33 The closest historical precedent are the treaties which the UK (as well as other Western powers) concluded in the 19th Century with China and other Far Eastern countries, under which British citizens were exempt from the jurisdiction of local courts and instead were subject to the jurisdiction of special extra-territorial courts ultimately controlled by the Judicial Committee of the Privy Council in London, such as the (British) Supreme Court for China in Shanghai.

34 A very important recent example of the ECJ unpredictably expanding free movement rights was Case C165/16 *Toufik Lounes v Home Secretary* 14 Nov 2017 (Grand Chamber). The ECJ overturned the previous understanding of the law regarding the operation of the rules on free movement of persons in relation to dual citizens (i.e., EU citizens who also have UK citizenship), with wide ranging effects.

35 When the UK was a Member State, the ECJ was a multinational court of which the UK was a member. It is now a wholly foreign court owing its loyalties only to the remaining Member States and to the EU itself.

36 HL Paper 125, 4 March 2017

37 This conclusion was reached taking account of the evidence provided to the inquiry by three legal experts: Professor Tridimas, Dr Sánchez-Barrueco, and Rhodri Thompson QC - see full legal advice delivered by the legal adviser to the House of Lords European Union Committee, available at: [https://publications.parliament.uk/pa/ld201617/ldselect/ldcom/125/12511.htm#\\_idTextAnchor059](https://publications.parliament.uk/pa/ld201617/ldselect/ldcom/125/12511.htm#_idTextAnchor059)

## FUTURE FINANCIAL LIABILITIES<sup>38</sup>

The WA also ensures that the UK retains liabilities and risks for many years, even if the transition period ends on 31 December 2020.

These liabilities are substantial - tens and possibly hundreds of billions of euros, with minuscule reciprocal benefit to the UK. The WA keeps the UK closely intertwined with the economics of the EU in a way that undermines the usage of the term "Withdrawal": withdrawal from influence and decision-making but not from liability.

The mechanisms creating the largest liabilities are the European Investment Bank (EIB), its subsidiary the European Investment Fund (EIF) and the portion of the EU's own budget called the Commitments Appropriation (CA). In some cases, the liability has no end date. The situation will be even worse if the transition period is extended and the UK becomes liable under the CA of the new 7-year EU budget period 2021-2027.

The situation is rendered more complicated in the WA by the length of the list of EU mechanisms, without reference to their materiality, in clauses 138-157 between pages 234 and 283. In our estimation, the amounts relating to Euratom (WA Clause 143), the European Coal and Steel Community (WA Clause 145) and the European Development Fund (WA Clause 150-3) are relatively small, but this is from experience and not because the actual figures are either in the WA itself or easy to find within the EU's published data. At least WA Clause 146 acknowledges the UK's portion of the EU's shareholding in the EIF as an EU liability to the UK, and this liability should be discharged now for reasons that will become clear below.

The gross CA amount - for calculating the UK's share - is not even stated in the WA. The UK must wait until March 2021 to receive the EU's determination of it. Our estimate is that it is €185bn<sup>39</sup> now, with headroom for an increase of €198bn<sup>40</sup> to €383bn. Thanks to a carryover provision, the EU has until 31 December 2021 to mobilise this headroom and add it to the calculation base for the UK's bill. This carryover option is not eliminated in the WA.

Clause 139 purports to limit the UK's share of the total CA bill to our normal share of the cash budget in the past, which has been around 12 per cent. There is an illusory element to this comfort in that the liabilities of the EU are guaranteed by all member states on a joint-and-several-liability basis. This is why the EU's main proposal for its Covid-19 rescue package has been rightly recognised as a watershed, since, by using the legal person of the EU as its borrowing mechanism, it mutualises the responsibility for repayment: all member states are equally liable and in full.

The illusion rests on the belief that, if there is a call on member states caused by a deficit in the CA, all member states will meet that call. The situation giving rise to the call could easily be the inability of a member state to pay their debts to an EU financial mechanism. Having failed to make the debt payment, that same member state will not be in a position to meet its share of the call triggered by its default. The shares of the solvent member states are then increased to make up for the shortfall of the defaulter(s). The UK probably would not be the only solvent member state, but its share could be expected to be nearer 25 per cent than 12 per cent (for the rationale behind this statement, see page 37 of the paper issued in June 2019 through Global Britain entitled "Why the Eurozone's Fate Makes an Immediate Brexit Vital"<sup>41</sup>).

38 We are grateful to Bob Lyddon as the author of this section

39 Our calculations point to an outstanding under previous MFFs of €79bn, with another €24bn redrawable, making €103bn prior to 2014-2020. €56bn of funds, facilities and guarantees have been established during this MFF, with two new ones in the pipeline: €16bn guarantee to the EIB for the first-loss on the €200bn EIB response to Covid-19, and an unspecified further guarantee to the EIB for the continued expansion of the non-COVID-19 activities of InvestEU. If that turned out to be €10bn, then we would have an outline figure for the end of the current MFF of €82bn, to add to the figure from previous MFFs of €103bn, making €185bn in all.

40 Moody's Investor Services has estimated that the CA for the current EU budget period, being 0.26 per cent of EU GNI, is €40bn per annum, or €280bn over the 7-year period. €82bn has already been mobilised, leaving headroom of €198bn

41 <http://www.lyddonconsulting.com/how-huge-financial-liabilities-require-a-quick-clean-brexite/>

The CA is mobilised by the creation of a fund, facility or guarantee through the passage of a specific EU legal instrument. Once such a fund, facility or guarantee has been created, member state payments against the liability may materialise only many years later. Indeed, although there is a natural run-off for certain parts of the liability, other parts can be re-drawn, repaid and re-drawn again *ad infinitum*, and some parts have no repayment date at all. Clause 138 of the WA makes clear that the UK's liability lapses only when the underlying facility, fund or guarantee lapses.

The liability for the CA is intertwined with the liabilities arising out of the EIB and EIF. The UK has a direct shareholding in the EIB, and the EIF is owned, all but a few per cent, by the EIB and EU. The riskier operations of the EIB and EIF are covered by first-loss guarantees from the CA. These operations are the EIB's loans outside the EU, the EIB's loans in the context of InvestEU (originally known as the European Fund for Strategic Investments or EFSI) and the EIF's guarantees and "equity commitments" in the context of the InvestEU.

The CA guarantees that back the EIB's normal loans outside the EU should decline as the underlying loans are repaid. EIB's typical loan pays off in equal semi-annual instalments over 15 years from the time of full drawing.

The CA guarantees that back the EIF's guarantees in the context of InvestEU should run off in line with the repayment of the loans backed by these guarantees, although there is precious little in the EIF's annual reports to say what the run-off profile is. Indeed, these annual reports do not even state the gross amount of outstanding guarantees, which have had to be extrapolated.<sup>42</sup>

However, where the EIF has made "equity commitments" in the context of the InvestEU programme, there is no release mechanism.

Further funds and facilities are "evergreen", such as the European Financial Stability Mechanism where amounts repaid can be re-drawn and which has no end date; the EFSM loan with the longest maturity currently is to Ireland and has a maturity date of 2042.<sup>43</sup>

Likewise, the Macro-Financial Assistance (MFA) facility for non-EU partner countries is not a fixed facility and can be raised via further EU legal instruments<sup>44</sup>. The MFA is being raised as part of the Covid-19 response, albeit by only €300 million above the current ceiling of €5.6 billion.<sup>45</sup>

We estimate the calculation base now for UK's CA liability to be €185 billion. There is headroom to add a further €198 billion to this base thanks to the size of the CA for the MFF 2014-2020, and this can be added at any time within the next 18 months, thanks to the carryover provision. The Covid-19 crisis creates the motivation to do this.<sup>46</sup>

Whilst the largest amounts at risk are through the CA, the UK also has direct shareholdings in the EIB and ECB.

The UK's shareholding in the EIB is 16.1 per cent<sup>47</sup>; this is €39.2 billion of subscribed capital of which €3.5 billion is paid in, and €35.7 billion of which is subscribed-but-not-called.<sup>48</sup> The proposal in clause 150 of the WA is that the UK's paid-in and callable capital should be considered as one amount, and as a liability, and should remain at the level of €39.2 billion until 10 years after the entry-into-force of the WA. It should only be amortised after that in line with the amortisation of the EIB's total book of business as it stood at the WA's entry-into-force, notwithstanding the lack of any connection of that book of business with the UK, and even if the EIB's loans into the UK have been paid off before that.

42 Annex 2 of "Managing Euro Risk" by Bob Lyddon, Barnabas Reynolds and David Blake, published in February 2020 by Politeia

43 [https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/which-eu-countries-have-received-assistance/financial-assistance-ireland\\_en](https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/which-eu-countries-have-received-assistance/financial-assistance-ireland_en) - the 30 year loan of EUR1.5 billion disbursed on 9 January 2012)

44 [https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/international-economic-relations/macro-financial-assistance-mfa-non-eu-partner-countries\\_en](https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/international-economic-relations/macro-financial-assistance-mfa-non-eu-partner-countries_en)

45 [https://ec.europa.eu/info/sites/info/files/economy-finance/mfa\\_covid-19\\_omnibus\\_proposal\\_en.pdf](https://ec.europa.eu/info/sites/info/files/economy-finance/mfa_covid-19_omnibus_proposal_en.pdf) and [https://ec.europa.eu/info/sites/info/files/economy-finance/mfa\\_covid-19\\_omnibus\\_swd\\_en.pdf](https://ec.europa.eu/info/sites/info/files/economy-finance/mfa_covid-19_omnibus_swd_en.pdf)

46 Annex A provides more details on how the CA liability has been estimated

47 Page 57 of "Managing Euro Risk" by Bob Lyddon, Barnabas Reynolds and David Blake, published in February 2020 by Politeia

48 Page 42 of Global Britain's Brexit Paper #8: "The true cost of EU membership: the total direct and contingent costs of EU membership that explains why the UK must extricate itself from EU institutions" by Bob Lyddon and Gordon Kerr, 2017

The UK's shareholding in the ECB is 13.7 per cent<sup>49</sup>; this is €1.48 billion of subscribed capital of which €56 million is paid-in, and €1.42 billion is subscribed-but-not-called. Clause 149 of the WA makes no specification on the period for repayment of the €56 million and amortization of the €1.48 billion, since it *"shall be established in accordance with Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank"*. Protocol 4 of the Treaty on the Functioning of the EU<sup>50</sup> runs from page 230 to page 250 but has no clause dealing with the situation; clause 48.3 deals with the immediate changes to the ECB's capital caused by a new country joining the EU, but there is no inverse mechanism for a country leaving, unless it can be read that the backing-out of a country will also be immediate.

These amounts are at risk in line with the risks being taken by the EIB and ECB: both are already over-trading. The EIB is over-trading through InvestEU<sup>51</sup>, and the ECB is over-trading through its Qualitative Easing<sup>52</sup>. The over-trading will be exacerbated at both InvestEU and the ECB QE as part of the EU's Covid-19 response.

The initial EU Covid-19 rescue package of €500 billion involves €300 billion of access to the European Stability Mechanism (in which the UK is not involved) and a €200 billion "permission" to the EIB to add an extra €200 billion to its InvestEU programme, on top of the "normal" expansion to that programme that was already being discussed. The €200 billion "permission" will be backed by a €16 billion first-loss guarantee from the CA, and we estimate that the "normal" expansion will benefit from a further €10 billion first-loss guarantee, both under the 2014-2020 MFF. This €26 billion of new CA guarantees is included in our estimate of €185 billion for the calculation base now.

The UK is exposed to the EIB and therefore InvestEU, both through these CA guarantees and by being a direct shareholder. InvestEU involves financings with high-risk, in which the EIB/EIF take the first - or second - loss position themselves. This increases the risks to the EIB shareholders of (i) having to meet a pay-in of their subscribed-but-not-called capital; and (ii) losing part or all of their paid-in and subscribed-but-not-called capital.

The UK's loans and investments received from the EIB/EIF have gone into rapid decline<sup>53</sup>, compared to certain other member states<sup>54</sup>. On the other hand, the overall amount of money being lent and invested by the EIB/EIF is sharply expanding, and the degree of risk within the EIB/EIF's portfolio is increasing. These factors dramatically worsen the UK's risk/reward profile out of its involvement with the EIB/EIF, and this is a good example of how poorly the WA was negotiated; the outcome is extremely unfair.

The ECB - through the Eurosystem members - is simply causing a major build-up of fixed-rate bonds into the QE portfolio, on which it takes the risks as well as the returns. The ECB is thinly capitalised and would not be able to absorb major losses, incurred by other Eurosystem members in the first instance, were these losses to be re-allocated to the ECB under the methodology between the ECB and the other Eurosystem members. In addition to the ECB creating an effective monopsony (a market with a single buyer), its over-trading raises serious issues about market liquidity.<sup>55</sup>

All of the above pertains to the UK's situation under the WA, assuming we leave on 31 December 2020 and do not sleepwalk into the new EU 2021-2027 budget cycle. The main element being earmarked against the 2021-2027 CA is the €750 billion EU Covid-19 rescue package, reduced only by the portion of it (out of a maximum of €198 billion) that can be mobilised from the current CA.

Even if the entire €198 billion could be mobilised, that would still leave €552 billion to be created in the next period, meaning the CA would have to be set at nearer €600 billion to accommodate this plan and to leave some headroom for the EIB lending outside the EU, for further expansion of InvestEU, and for the MFA.

49 Page 36 of Global Britain's paper "Why the Eurozone's Fate Makes an Immediate Brexit Vital"

50 OJ C 2016 202 FULL EN TXT downloaded on 21/6/2020 from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2016:202:TOC>

51 Annex 3 of "Managing Euro Risk" by Barnabas Reynolds, David Blake, and Bob Lyddon, published in February 2020 by Politeia

52 P50-54 of "Managing Euro Risk" by Barnabas Reynolds, David Blake, and Bob Lyddon, published in February 2020 by Politeia

53 In 2018, UK borrowers signed for €932 million of main programme loans and €24 million of InvestEU loans. This is 1.7 per cent of total loan signatures for their main programme of €55.6 billion and 0.19 per cent of the total for Invest EU of €12.4 billion. 8.3 per cent of the EIB's total loan stock at the end of 2018 was to UK borrowers, or €37.4 billion, the loan stock being shown on page 4 as €451.1 billion

54 Italy - with the same 16.1 per cent shareholding and liability to pay in more capital - has taken 11.6 per cent of EIB's loans, and Spain - with a shareholding of 9.7 per cent - 18.4 per cent. z

55 Annex 6 of "Managing Euro Risk" by Bob Lyddon, Barnabas Reynolds and David Blake, published in February 2020 by Politeia



That only becomes remotely digestible for the UK if the transition period finishes on 31 December 2020, and if the Covid-19 response is mobilised entirely against the 2021-2027 CA and not the current one, and if the UK's share will only be "around 12 per cent", and if the borrowers and account parties behind those loans and guarantees for which the UK carries a liability meet their commitments and the amounts run off. Otherwise, the UK will be contributing hugely to the EU's Covid-19 recovery and getting nothing in return, as well as paying for its own recovery. The WA was a very bad deal indeed for the UK public finances when it was signed, and Covid-19 has introduced a whole new dimension to our exposure.

## EU DATA PROTECTION LAWS

Under Article 71 of the WA, EU law on the protection of personal data applies in the UK in respect of the processing of personal data of data subjects outside the United Kingdom, provided that the personal data: (a) was processed under Union law in the United Kingdom before the end of the transition period; or (b) is processed in the United Kingdom after the end of the transition period on the basis of this Agreement. This means that GDPR is required to survive under the WA for data subjects outside the UK (i.e., elsewhere in the EU) transferred before the end of the TP in respect of EU citizens in the UK post Brexit (part b) above).

There is then a view (which we believe is shared by the Commission) that data is effectively "done" on this basis - i.e., the UK cannot get rid of GDPR under the WA as it will be too burdensome and complex to have two parallel data protection regimes in the UK.

It may be possible for the UK to introduce a different (lighter) system of data protection, while permitting companies to continue complying with GDPR if they wish. Many will do so to facilitate data transfers with the EU. Such a system would require data controllers not compliant with GDPR to ask people to confirm they are not EU citizens before providing data or accessing the services.

## GEOGRAPHICAL INDICATIONS

There is a highly damaging clause buried within the Intellectual Property provisions of the WA in Art. 54(2). This requires the UK to continue to operate the EU's system of protection of Geographical Indications (e.g., Champagne, Parma ham). Astonishingly, the final sentence of Art. 54(2) purports to require the UK to keep this system in place *"unless and until an agreement as referred to in Article 184 that supersedes this paragraph enters into force or becomes applicable."*

There is no issue of principle about the UK wanting to provide (and for UK exporters to receive in other countries) continuing protection for Geographical Indications (GIs). Articles 22-24 of the WTO's TRIPS Agreement (the Agreement on Trade-Related aspects of Intellectual Property) provide for minimum standards for protection of GIs which the UK will wish to continue to respect and to rely on when asking other countries to protect e.g., "Scotch whisky". However, the particular form of protection under EU law for GIs (or "protected designations of origin" or PDOs in EU terminology) is highly problematic. It is highly restrictive and can be used for anti-competitive purposes; for example, it allowed Parma ham producers to monopolise downstream processing activities of slicing the ham and putting it into packets after they had failed to achieve this result under trademark law.

More importantly given the UK's new global trade role, the EU's system of GI protection is highly contentious in other parts of the world, especially the USA and other New World countries, because it allows for the monopolisation of words which have become free to use over time as descriptive of a type of product rather than of the product originating in a particular country or area. The UK should be free to decide how it wishes to apply or modify its own GI laws in the light of its trade policy and other objectives, and this quite extraordinary provision in the WA which gives perpetual protection to EU origin GI's according to the EU system of protection is incompatible with that sovereignty.

## PROVISIONS RELATING TO UK SOVEREIGN BASES AND OTHER ISSUES

A Protocol to the WA relating to the Sovereign Base areas in Cyprus contains provisions that are in many respects similar to but in some respects go further than those of the Northern Ireland Protocol. Art.2 provides for the Base Areas to remain part of the EU's customs territory, while other Articles subject the Base Areas to EU VAT and other indirect tax rules and agricultural laws.

What is extraordinary is that there is no provision that explicitly allows the UK to give notice terminating this Protocol. This makes it into a permanent restriction on the UK's sovereignty.

## C - THREATS ARISING FROM NEGOTIATIONS

The threats existing as part of the negotiations are as follows:

- **Fishing Rights**, where the EU is seeking joint sovereignty over UK waters
- **The 'level playing field'**, which is essentially an assertion by the EU that EU law, including the extremely wide and discretionary EU State aid law, should apply to the UK economy to ensure it only competes in a manner deemed satisfactory to the EU from time to time

The following sections explain these threats in precise legal terms, how they will constrain the UK in future, and why these constraints are important.

### FISHING RIGHTS

Fisheries is a small economic sector in the UK, but it is at the heart of the Brexit debate. This is due to the link between fishing activity and the issue of sovereignty (reclaiming our waters), the broader cultural, social and historic value of fisheries, and its regeneration potential for the future prosperity of many coastal communities in particular across the UK.<sup>56</sup>

To deliver on the promises made to British fishermen at the time of the Referendum, the UK must regain full, sovereign control of all the waters and marine resources of its Exclusive Economic Zone (EEZ). A sovereign UK must be free to exercise control over its territorial waters within international law, irrespective of the consent or otherwise of a foreign power. If it cannot, it is not sovereign.

At the end of the TP, the UK will become an independent coastal state under international law and be fully responsible for managing fisheries in its EEZ, extending up to 200 nautical miles from shore.<sup>57</sup> This will include setting total allowable catches (TACs), distributing quotas and determining who has access to fisheries.<sup>58</sup> Thus, the UK will no longer be part of the EU Common Fisheries Policy (CFP) - the arrangement currently managing and governing EU Member States fisheries and in place in the UK up until the end of the TP.<sup>59</sup>

Crucially, the future level of access for EU vessels to UK waters and vice versa, once the TP ends, will be decided during the negotiations. The EU is seeking continued reciprocal access to fishing waters and stable quota shares for the amount of fish that can be caught. The UK argues British fishing waters should primarily be for British fishing vessels, and opportunities for EU vessels should be negotiated annually on the basis of scientific data about sustainable catch levels, not based on historic quotas (like other independent coastal states such as Norway, Iceland and the Faroe Islands).<sup>60</sup>

56 See House of Commons Library Briefing Paper Number 8442 "The Fisheries Bill 2017-19" (11 April 2019), section 1 ("The fisheries sector in the UK") p 5-12, available at: <https://commonslibrary.parliament.uk/research-briefings/cbp-8442/>

57 Article 57 of the UN Convention on the Law of the Sea (UNCLOS) states: "The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."

58 Article 61(1) UNCLOS states: "the coastal state shall determine the allowable catch of the living resources in its exclusive economic zone"

59 Article 5(1) of the current basic regulation on the CFP (Regulation 1380/2013.1) provides that "Union fishing vessels shall have equal access to waters and resources in all Union waters other than those referred to in paragraphs 2 and 3, subject to the measures adopted under Part III." A "Union fishing vessel" is defined in Article 4(1)(5) of the Regulation as "a fishing vessel flying the flag of a Member State and registered in the [European] Union"; while 'Union waters' are defined in Article 4(1)(1) as "waters under the sovereignty or jurisdiction of Member States", in other words the internal waters, territorial seas and EEZs of EU Member States. The CFP manages fisheries in Member States through measures that control how many fish can be harvested each year (quotas), and through technical Regulations on, for instance, gear types, marketing standards for fish products and autonomous tariff quotas for fish imports. Every year, the European Commission proposes a TAC for each commercial species for each area within the EU 200-mile limit. The TACs are then agreed by the Council of Ministers at the Agriculture and Fisheries Council at the end of each year. Once agreed, the TACs are divided among Member States in the form of national quotas. This is done on the basis of the "relative stability" allocation key (based on historic catches, the need to protect local populations reliant on the fishing industry and the loss of opportunities for some Member states as a result of the general extensions of 200 nautical mile limits in 1976 via UNCLOS), which grants EU countries a fixed percentage of quotas for each of the fish stocks in question. Each Member State must allocate the quotas that it receives to fishers in its country using transparent and objective criteria. The current method of allocating quotas within the UK is thus a national competence and is done on the basis of 'Fixed Quota Allocation' units held by groups of vessels or producers' organisations and based on vessels' historic landings during a fixed reference period.

60 UK Government Written Statement on EU7EU relations of 3 February 2020, Available at: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-02-03/HCWS86/>

## Fishing Rights at the End of the Transition Period as a Matter of Law

At the end of the TP, the UK will automatically become an independent coastal state. As such, the UK will automatically regain exclusive sovereign rights over all waters and resources within its EEZ under the United Nations Convention for the Law of the Sea (UNCLOS),<sup>61</sup> unless there is a roll-over of current arrangements in which the UK continues its subordination to the CFP.

There are two legal avenues through which the EU might attempt to claim it has such fishing rights in UK waters, each of which will be discussed and discarded in turn. Crucially, both of these potential access arrangements do not stem from European law but are matters of international law.

- **UNCLOS.** Once the TP ends, UK water will be governed primarily by UNCLOS. Under UNCLOS, coastal states have an obligation to set an allowable catch and to grant other states EEZ fisheries access if (and only if) they do not have the capacity to harvest the entire allowable catch (Article 62(2) UNCLOS). As Article 62 is located in Part V, there is no corresponding obligation with regard to the territorial sea. The Convention also emphasises the need to minimise economic dislocation for states whose nationals have habitually fished in the zone (Article 62(3)). As explained by Professor Barnes<sup>62</sup> when giving evidence to the House of Lords Select Committee on the European Union inquiry on “Brexit: Fisheries”<sup>63</sup>, the wording of the provision confers substantial discretion upon the coastal state. There is also no provision in UNCLOS to stop coastal states from setting an allowable catch that exactly matches its fishing capacities. Post TP, the British Government will be responsible for deciding what the total allowable catch in British waters is. In addition, the coastal state’s discretionary decision is excluded from the scope of compulsory dispute settlement under Part XV of UNCLOS (see Article 297(3)(a)) and only subject to conciliation under Annex V (see Article 297(3)(b)(ii)). Thus, the EU will have no right to fisheries access to the UK’s territorial sea and EEZ under UNCLOS once the CFP ceases to apply to the UK.<sup>64</sup> The UK can of course choose to admit foreign vessels to its waters in return for reciprocal access to the water of other states (for instance, this happens on a considerable scale with the EU and Norway) but this will be a matter for the negotiations.<sup>65</sup> Ultimately, for fish stocks that reside in the EEZs of two or more coastal states (shared stocks), UNCLOS imposes an obligation to co-operate on the sustainable management of shared stocks or stocks of associated species (Article 63 UNCLOS).<sup>66</sup>
- **Historical Fishing Rights under General International Law.** EU member states could try and claim historic fishing rights which have accrued under general international law. The arbitral tribunal in the South China Sea Arbitration described such historic fishing rights as “*any rights that a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances*”.<sup>67</sup> The tribunal also asserted that these rights require “the continuous exercise of the claimed right by the State asserting the claim and acquiescence on the part of other affected States”.<sup>68</sup> As argued by Professor Robert Churchill,<sup>69</sup> EU member states had access to the UK’s fisheries based on treaty relationships<sup>70</sup> and vice versa, and thus on the basis of consent rather than acquiescence, thereby not giving rise to historic rights. Finally, most commercial fishing in the EU is nowadays industrial rather than artisanal and few individual fishermen and vessels (as opposed to states) can claim a longstanding tradition of fishing in UK waters. Therefore, any finding on historic fishing rights might potentially also conflict with the South China Sea Arbitration tribunal’s view that “*traditional fishing rights extend to artisanal fishing that is carried out largely in keeping with the longstanding practice of the community, [...] but not to industrial fishing that departs radically from traditional*

61 UNCLOS, available at [https://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf)

62 Professor of International law (Law of the Sea and Marine Law) at the University of Hull

63 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-energy-and-environment-subcommittee/brexit-fisheries/oral/37841.html>

64 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-energy-and-environment-subcommittee/brexit-fisheries/oral/37841.html>

65 Fisheries White Paper July 2018: “*any decisions about giving access to our waters for vessels from the EU, or any other coastal states including Norway, will then be a matter for negotiation*”

66 The Fisheries White Paper ‘Sustainable fisheries for future generations’, published in July 2018, set out the Government’s intention to continue to co-operate closely with the EU and other coastal states on the sustainable management of fish stocks that cross borders.

67 PCA CaseN<sup>o</sup> 2013-19 in the matter of the South China Sea Arbitration, para 224, available at: <https://www.pccases.com/web/sendAttach/2086>

See also the ICJ in UK v Norway, available at: <https://www.icj-cij.org/files/case-related/5/005-19511218-JUD-01-00-EN.pdf>

68 PCA CaseN<sup>o</sup> 2013-19 in the matter of the South China Sea Arbitration, para. 265, available at: <https://www.pccases.com/web/sendAttach/2086>

69 Emeritus Professor of International Law at the University of Dundee who has written extensively on the Common Fisheries Policy and has appeared as a witness for the House of Lords Select Committee on the European Union inquiry on Brexit: Fisheries. See in particular: “*Possible EU Fishery rights in UK waters and possible UK fisheries rights in EU waters post-Brexit*” (2016): <http://www.sff.co.uk/wp-content/uploads/2017/03/Opinion-for-SFF-2016.pdf>

70 Via the CFP and amongst a limited amount of Member States (Belgium, Denmark, France, Germany, Ireland, Italy, the Netherlands, Poland, Portugal, Spain, Sweden) via the London Fisheries Convention 1964, a treaty the UK Government denounced on 3 July 2017.

practices”<sup>71</sup>. Thus, the EU would be unable to claim “historical fishing rights” against the UK. Whilst single Member States might attempt to make this claim<sup>72</sup>, as argued by Valentin Shatz,<sup>73</sup> even if one assumes for the sake of argument that historic fishing rights existed prior to the entry into force of UNCLOS, they would be restricted to small portions of the UK’s territorial sea and would be practically irrelevant. From a legal point of view, these States may arguably only demand that the UK take their historic fishing activity in its EEZ into account when deciding on fisheries access for third States. Shatz however concludes that there is no legal case to be made if the UK chooses to grant no access to third States at all.

Thus, without an explicit agreement to the contrary, the EU will have no legal right to fish in UK waters after 2020, nor to claim inflated quotas for resources that are predominantly in British waters. This legal position was endorsed in the UK Government Fisheries White Paper ‘Sustainable Fisheries For Future Generations’ published in July 2018.

## Threats to Fishing Sovereignty Contained In the Political Declaration

Four major threats to UK fishing rights post-TP emerge from the text of the PD that the UK Government must be wary of in the context of the negotiations, namely:

1. **Annual Fishery Agreements:** The PD states that “*within the context of the overall economic partnership*” the UK and the EU should establish a new fisheries agreement covering access to waters and quota shares whilst “*noting that the UK will be an independent coastal state.*”<sup>74</sup> The Government must not lose sight of the fact that, as the UK will no longer be bound by the CFP, it should establish an annual fisheries agreement with the EU which reflects the UK’s status as an independent coastal state under UNCLOS under the same recognition of Sovereignty as Norway, Iceland and Faroe.
2. **The Term “Non Discrimination”:** The PD states that any fishing arrangement should be based on “*non-discrimination*”. Under EU treaties, “*non-discrimination*” means that there should be no differentiation between the nationals of different member states. Since the UK is no longer a member state, this must not apply to the UK in the sense the EU may hope to contort it - that there is no discrimination between EU vessels and UK vessels in accessing one another’s waters. “*Non-discrimination*” must only mean that the UK will ensure that any annual access which the EU is granted applies equally to all EU vessels regardless of their member state.
3. **Regulatory Alignment:** The PD makes provision for the UK to be enmeshed in “*associate*” membership of EU policies,<sup>75</sup> and may “*establish specific governance arrangements*” to do so.<sup>76</sup> The PD further makes provisions that there must be a regulatory “*level playing field*”, upon which the EU is insistent.<sup>77</sup> It is vital that control over fisheries is not forfeited by these provisions seeking regulatory alignment. In that situation, the UK may not be in ‘the’ CFP, and may well be an independent coastal state in name, but future arrangements could see the UK bound to mimic EU rules in perpetuity. If ‘non-discrimination’ results in a continuation of unfettered equal access, this would be entirely inconsistent with the UK taking back control and restoring its sovereignty.
4. **The 1 July 2020 negotiation deadline:** Article 74 PD stipulates that the UK and the EU should use their “*best endeavours*” to conclude and ratify their new fisheries agreement by 1 July 2020. The EU cannot use this deadline as a legal argument to force the UK to concede on sovereignty over its waters and/or fisheries. Although reaching early agreement would be favourable as it would provide legal certainty to the UK fishing industry, the priority of the UK remains to negotiate - as an independent coastal state - sovereignty compliant annual reciprocal deals on access on the same basis as Norway, Iceland, Faroe and Greenland do with the EU, within or beyond the 1 July 2020.

71 PCA CaseNo 2013-19 in the matter of the South China Sea Arbitration, para. 798, available at: <https://www.pcacases.com/web/sendAttach/2086>

72 Denmark has reportedly built a case against the UK based on “historic fishing rights” dating back to the 1400s, which it claims it could bring before the International Court of Justice (ICJ) if negotiations fail, see: <https://www.theguardian.com/politics/2017/apr/18/denmark-to-contest-uk-efforts-to-take-back-control-of-fisheries>

73 <https://www.ejiltalk.org/brexit-and-fisheries-access-some-reflections-on-the-uks-denunciation-of-the-1964-london-fisheries-convention/>

74 PD Article 71

75 PD Article 120

76 PD Article 118

77 PD Article 21

## Threats to Fishing Sovereignty Contained In the Protocol

The Protocol also contains some hurdles the UK Government should be prepared to confront during the negotiations.

The Protocol does not extend to the territorial waters of the UK. Therefore, at the end of the TP, NI's maritime zone regulations currently governed by the CFP will be replaced by UK regulations, just as they will be throughout the UK's EEZ. Similarly, at the end of the TP, British registered fishing vessels based in NI will remain part of the UK's fishing fleet, subject to UK Fisheries Policy within the UK's fisheries zone and harvesting UK quota allocations. The Government has summarised the agreement in the Protocol as follows:

*The rules governing the single customs territory do not automatically apply in respect of fishery and aquaculture products. These products would be included when a UK-EU Fisheries Agreement has been reached that includes arrangements on access to waters and fishing opportunities. Nothing in this Protocol prescribes the content of that fisheries agreement, and the UK as a whole will not be part of the Common Fisheries Policy.<sup>78</sup>*

Fisheries are, however, explicitly mentioned in Article 5(3) NI Protocol which proposes that a Joint Committee would set out terms for certain fishery and aquaculture products landed by UK flagged vessels registered in NI would be exempt from duties.<sup>79</sup> Thus, there remain outstanding questions as to how seafood from UK fishing vessels, including those based in NI, will be treated when landed in NI fishing ports. A strict interpretation of the Protocol suggests that such seafood could be subject to tariffs. However, we are advised that this is not the intention and discussions within the UK and with the Joint Committee are ongoing to devise a solution that would resolve this anomaly so that seafood landed by UK-registered fishing vessels into their home ports in Northern Ireland would not be subject to tariffs.

The Protocol is specifically designed to avoid border checks on the island of Ireland, especially those involving trade between NI and the EU's single market. A number of questions which must therefore be answered are:

- What (if any) quantitative restrictions might be imposed by the EU side upon imports of seafood from NI into the single market? Given that there has been no mention of quantitative restrictions upon other goods, such constraints being imposed upon seafood would be an anomaly. Nevertheless, under the previous Protocol proposal, there was mention of such quantitative restrictions or a cap on the volume of seafood exported from NI into the Single Market. From the EU's perspective this was designed to avoid NI being used as a "back door" by other UK seafood producers to access the Single Market.
- What processes will be in place to verify seafood entering GB from Ireland? Some 60 per cent of seafood landed in Northern Ireland is exported to Great Britain.<sup>80</sup> The Protocol envisages continued unfettered access of produce, including seafood, from Northern Ireland to GB, west to east. However, some checks are envisaged for seafood moving from GB into Northern Ireland (east to west). This will impact upon seafood producers across GB who currently trade (for example, in pelagic species and salmon) with customers in the Republic of Ireland where their produce is processed. It also would have an impact upon Northern Ireland vessels that land their seafood into GB ports before it is sent back to Northern Ireland for processing. Similarly, a significant volume of scampi is sent to Northern Ireland from across the GB for primary processing. In this case, all of the scampi product is sent back to GB where it is finished, primarily for consumption in the UK. As with other products, where seafood is solely traded between GB, Northern Ireland and back to GB, a solution is required in which there are no additional checks. By the same token, buyers and processors based in the Republic of Ireland

78 HM Government, Explainer for the agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union, 14 November 2018 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/756376/14\\_November\\_Explainer\\_for\\_the\\_agreement\\_on\\_the\\_withdrawal\\_of\\_the\\_United\\_Kingdom\\_of\\_Great\\_Britain\\_and\\_Northern\\_Ireland\\_from\\_the\\_European\\_Union\\_\\_1\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/756376/14_November_Explainer_for_the_agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union__1_.pdf)

79 Article 5(3) NI Protocol reads: "Legislation as defined in point (2) of Article 5 of Regulation (EU) No 952/2013 shall apply to and in the United Kingdom in respect of Northern Ireland (not including the territorial waters of the United Kingdom)". However, the Joint Committee shall establish the conditions, including in quantitative terms, under which certain fishery and aquaculture products, as set out in Annex I to Regulation (EU) 1379/2013 of the European Parliament and of the Council<sup>2</sup>, brought into the customs territory of the Union defined in Article 4 of Regulation (EU) No 952/2013 by vessels flying the flag of the United Kingdom and having their port of registration in Northern Ireland are exempted from duties."

80 <https://committees.parliament.uk/writtenevidence/6929/html/>

depend upon significant volumes of seafood they process being purchased from landings made in Northern Ireland or by British fishing vessels landing directly into Irish ports.

- What processes will be in place to verify seafood entering GB from Ireland? What processes will be in place to verify seafood arriving in Europe from Ireland that has transited through GB? Whilst the Protocol is focused upon trade between Northern Ireland, Ireland and the Single Market, clarification is required where seafood travels through GB on its way to continental Europe. The vast majority of seafood landed into Northern Ireland and destined for Europe uses the GB land bridge.

Whilst UK fishermen in NI desire frictionless trade with the EU, their biggest goal remains a separation from the CFP and an end to the discrimination which this policy has wrought upon all UK fishermen based around the Irish Sea in respect of fishing quota allocations. The opportunities more than outweigh the challenges.

In its Command Paper in May 2020, the Government highlights the necessity of resolving the issues surrounding the Protocol. The key priority is ensuring that NI remains an integral part of the UK. This is a necessary condition for restoring UK sovereignty. The UK must leave the EU as one country, with all its constituent parts doing so on an equal basis. It is important, therefore, that it remains aware of the negotiating hurdles which are still to be overcome both in the Protocol and the wider Political Declaration.

## The EU Position and the Threat to UK Fishing Sovereignty

Unacceptably, the EU's negotiating mandate adopted on 25 February 2020 far exceeds what was outlined in the PD, demanding that any fisheries agreement should "uphold existing reciprocal access conditions, quota shares and traditional activity" and ensure "common technical and conservation measures."<sup>81</sup> Essentially, the EU is asking for the status quo, binding the UK to alignment with CFP rules for, potentially, very many years.

Other than the fact that this position is not backed by any credible legal rationale (as demonstrated above), the arrangement would be completely unacceptable not least because the EU's CFP has been a biological, environmental, economic and social disaster. It is beyond reform. It is a system that has forced fishermen to throw back more fish dead into the sea than they have landed. It has caused substantial degradation of the marine environment. It has destroyed much of the fishing industry, with compulsory scrapping of modern vessels. It has devastated fishing communities;

- In 1995, 9,200 British fishing vessels landed 912,000 tons of fish. At the time of the referendum in 2016, 6,191 vessels were landing 701,000 tons, representing a 23 per cent decline in landings.<sup>82</sup> Once a net exporter, UK fish imports reached 730,000 tonnes in 2016, with a combined value of over £3 billion, of which around a third came from our EU neighbours. Much of that harvest was caught in British waters, meaning that we are buying back our own fish.
- Under the EU system of "equal access to a common resource"<sup>83</sup> and "relative stability shares",<sup>84</sup> the UK provides 50 per cent of the EU's waters and 60 per cent of the catches, but receives only a 25 per cent share of the TAC limits the EU negotiates internationally on behalf of member states.
- The EU catches around 60 per cent of the fish in UK waters, worth over £700 million, whilst UK vessels take only 12 per cent (worth £100 million) of the catches in the waters of the rest of the EU. It has been shown that a sensible realignment of the TACs with British fishermen regaining their fair share would be worth an extra £1.5 billion annually to UK fisheries. In terms of the total processed value of the catch, it would provide a £6 billion boost.<sup>85</sup> These figures may be small in terms of overall GDP, but they will have a disproportionately beneficial effect on many remote, coastal communities for whom fishing is the chief source of economic activity.

81 Annex to Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement, European Council, 25 February 2020, available at <https://www.consilium.europa.eu/media/42736/st05870-ad01re03-en20.pdf>

82 E. Uberoi, UK Sea Fisheries Statistics, House of Commons Library, 5th December 2017

83 Regulation (EEC) No 2141/70 of the Council of 20th October 1970 laying down a common structural policy for the fishing industry

84 Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources

85 The robbery of UK resources, Fishing for Leave, November 2017

It is not surprising, therefore, that the decline of British fishing has come to symbolise the worst, most destructive consequences of our EU membership.

Further, the proposed mandate from the European Parliament stressed that *"the issue of free access to waters and ports is inseparable from the issue of free trade and access of UK fisheries products to the EU market"*.<sup>86</sup> However, this is a bad faith negotiating position as it suggests that the EU must have rights over another country's resources even to contemplate free trade is completely without merit. How ridiculous the EU would sound if, completely analogously, it said that 60 per cent of the grain from the UK's most fertile arable land must be ceded to the EU in exchange for a deal? How outraged would the EU be if the UK were to demand 60 per cent of the EU's North Sea oil and gas reserves or 60 per cent of EU car industry output to continue the huge goods surplus the EU runs with the UK? The EU did not demand significant fish stocks from the Grand Banks off Newfoundland as the price of a trade agreement with Canada. It should not be doing so with the UK.

Ultimately, ensuring that the UK does not fall prey to these negotiating demands and regains control over the waters and marine resources within its EEZ is an acid test of the Government's commitment to restoring UK sovereignty. The surest means of providing certainty to the fishing industry is ensuring the UK will be fully outside the disastrous CFP.

## The UK Government Position

Government ministers have given a number of assurances in the Commons that the Government will not repeat the mistakes of the 1970s and the fishing rights will not become a bargaining chip. In October 2019, the Prime Minister said: *"I can confirm that we will take back 100 per cent control of the spectacular marine wealth of this country"*<sup>87</sup> Asked in February 2020 whether he would promise to resist in all circumstances the sell-out of our fishing communities, so that we can ensure that on 1 January next year we take back control of our fishing waters and become an independent coastal state once again, the Prime Minister responded, *"I will indeed"*.<sup>88</sup>

In his statement of the 27 February, Chancellor of the Duchy of Lancaster Michael Gove confirmed that:

*"As well as concluding a full FTA, we will require a wholly separate agreement on fisheries. We will take back control of our waters as an independent coastal state, and we will not link access to our waters to access to EU markets. Our fishing waters are our sovereign resource, and we will determine other countries' access to our resources on our terms."*<sup>89</sup>

It was particularly encouraging that David Frost pointed out in his letter to Michel Barnier on 19 May that *"the EU's position that access to our waters after the end of this year should be the same as now is clearly not realistic."*<sup>90</sup>

The UK Government's position is welcome. The Government must recognise and maintain focus on the legal weakness of the EU stance - revealed by it making such outlandish demands - and ensure that the UK makes full use of the strength of its position.

Ultimately, Norway, Iceland, Faroe and Greenland, who sell large volumes of seafood to EU markets, do not tolerate the sort of conditions that the EU seeks to impose. The UK must not either. Indeed, these nations chose to forgo EU membership and accept tariffs on seafood, as they would not barter away their resources to the CFP in exchange for negating tariffs. The UK must have control of its waters, so they have something to catch in order to have something to sell. Preferential market access is academic if the EU fleet is catching the majority of UK resources.

86 Proposed mandate for negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland, European Parliament, 12th February 2020, available at [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0033\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0033_EN.html)

87 HC Deb 22nd October 2019

88 HC Deb 26th February 2020

89 HC Deb 27th February 2020

90 D. G. H. Frost letter to M. Barnier, 19th May 2020, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886168/Letter\\_to\\_Michel\\_Barnier\\_19.05.20.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886168/Letter_to_Michel_Barnier_19.05.20.pdf)



## The Way Forward

The Government must, therefore, reject the EU's unacceptable demands as having no basis in international law or any established precedent between the existing North East Atlantic coastal states.

### The Government must adhere to its position that the UK will

1. **Operate on the international normality between independent coastal states under UNCLOS**
2. **Take an independent seat on the North East Atlantic Fisheries Commission** (to which the Russian Federation, Norway, Iceland, Denmark - representing the Faroe Islands and Greenland - and the European Union are parties) and negotiate annual reciprocal deals
3. **Cease to apply the EU's "Relative Stability quota" shares at the end of the TP**
4. **Adopt TAC shares based on the principle of "Zonal Attachment"**. For clarity, Zonal Attachment is an international principle whereby a nation is allocated shares of resources based on the predominance of species in its waters. This, in essence, reflects the obvious fact that fish do not recognise national boundaries.

### The Government must ensure in negotiations, and legislate in the Fisheries Bill, that:

1. **Any future agreements on access and or quotas are always negotiated on a strictly annual basis, as is normal internationally.**
2. **Access to waters or swaps only relate to the surplus resources,<sup>91</sup> and only granted when the UK receives a reciprocal value of fishing opportunities in return.**
3. **Any fisheries agreement on limited annual access or quotas swaps is predicated on the EU recognising the UK's rightful share of resources under the international principle of Zonal Attachment.**

This is a unique opportunity to restore an industry which has been so desperately let down by our years of EU membership. By harnessing the global demand for high-quality British produce and implementing an independent fisheries management policy tailored to our own environment, the UK can build thriving coastal communities alongside a flourishing marine environment for generations to come.

## LEVEL PLAYING FIELD ISSUES

The issue of a level playing field is a controversial one, which has the potential to disrupt the negotiations on the future UK-EU relationship. The PD roughly defines the scope of these requirements. The text states that "open and fair competition" between the UK and the EU would be ensured by "robust commitments" to a "level playing field" - upholding the common high standards applicable in at the end of the transition period in the areas of **state aid, competition, social and employment standards, environment, climate change, and relevant tax matters** (fields that are at the core of the EU single market and which function within the EU via a shared institutional architecture).

The PD goes further and stipulates that "*the precise nature of commitments should be commensurate with the scope and depth of the future relationship and the economic connectedness of the Parties*", meaning that a decision would be taken during the negotiations on the future relationship as to what level of commitments matches the new partnership.

The EU is seeking to replace the shared institutional architecture of Commission and Court with legally binding commitments. These will be based on EU standards as a (although in practice largely "the") reference point, subject to strong enforcement mechanisms domestically and within the treaty governance framework. These commitments have the potential to constrain UK freedom of action and its capacity to diverge from EU rules.<sup>92</sup> As argued by Dr Lorand Bartels (Reader in International Law at Cambridge University) in a House of Lords evidence session on 27 February: "*The point is that the level playing field is essentially about ensuring that the other side raises costs to your levels. You can dress it up as values, but really it is hard-nosed economics at its best.*"

91 UNCLOS, Article 62(2)

92 HL EU Internal Market sub-committee, Uncorrected oral evidence: The level playing field and state aid, 27 February 2020, Q1

The following section will provide an analysis of the issues that emerge in each of the level playing field areas in turn: the rules on sustainable development, State aid, business competition and state-owned enterprises, taxation, labour standards and environmental protections. This will be done with reference to the PD, the European Commission draft text for an Agreement on the New Partnership with the United Kingdom<sup>93</sup> and the EU negotiations mandate adopted by the Council.<sup>94</sup>

## General Points

In the context of the level playing field, the EU has called for “non-regression” in several areas (meaning that the level of protection in those areas should not be reduced from common standards applicable within the EU and UK at the end of the transition period) and has demanded continuing alignment with EU rules in respect of State aid.

In addition, whilst the PD makes no reference to continuing UK alignment to EU rules, a reference was added in relation to the general approach to the level playing field in EU’s negotiating mandate, asking both the UK and the EU to uphold:

*“Corresponding high standards over time with Union standards as a reference point, in the areas of State aid, competition, state-owned enterprises, social and employment standards, environmental standards, climate change, relevant tax matters and other regulatory measures and practices in these areas. In so doing, the agreement should rely on appropriate and relevant Union and international standards. It should include for each of those areas adequate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement, including appropriate remedies. The Union should also have the possibility to apply autonomous, including interim, measures to react quickly to disruptions of the equal conditions of competition in relevant areas, with Union standards as a reference point.” (emphasis added)<sup>95</sup>*

The term, “Union standard as a reference point” is legally uncertain, and the EU is likely to interpret it as a form of “dynamic alignment” and parallel evolution of rules. It also creates room for manoeuvre in the negotiation - especially with respect to State aid where the EU’s opening position is most extreme. See Section IV and Annex D for our proposal on how to achieve a sovereignty compliant compromise in respect of State aid.

There is no reference to UK standards, in large part because these are all areas of EU competence and there are no or very limited distinct UK standards. Further, the EU proposes giving the joint committee powers to modify the commitments and thereby reflect evolving standards which, however, the provision itself limits to stemming from sources of EU and International law (not UK law).

A general so-called “ratchet clause” further ties the UK’s regulatory capacity as it stipulates that if either the EU or the UK go beyond the agreed level of environmental, social, labour, and climate protection, these protections are locked in and cannot be lowered again in order to boost trade and investment. This means that the British people cannot choose from time to time between more restrictive and more liberal regimes. Once a government has conceded higher standards, the UK is then stuck at that level regardless of what a future parliament may determine.

In addition, there is a cross cutting and very strong unilateral enforcement provision for the EU, which could mean that a breach of UK’s commitments to the level playing field could be punished, for instance, with the levy of tariffs on particular goods by the EU.

93 <https://www.consilium.europa.eu/media/42736/st05870-ad01re03-en20.pdf>

94 <https://www.consilium.europa.eu/media/42736/st05870-ad01re03-en20.pdf>

95 Council negotiation mandate, Para 94

Finally, the EU is insisting on a dispute resolution mechanism which will apply for the level playing field sectors, but with some exceptions.<sup>96</sup> The mechanism would involve direct ECJ jurisdiction with respect to State aid, indirect ECJ jurisdiction via a provision analogous to the Ukraine-Clause in the WA (see section B above) and direct enforcement by the European Commission.<sup>97</sup>

Prime Minister Boris Johnson has maintained that the level playing field guarantees are not needed as the country is seeking an FTA similar to those the EU has agreed with other countries, which do not involve accepting EU rules or ECJ jurisdiction, either directly or indirectly.<sup>98</sup> The Prime Minister's position is welcomed - although we set out in Section IV below a sovereignty compliant subsidy control compromise should the Government wish to move in this direction to secure an agreement.

## Sustainability

The PD makes reference to sustainability as an "overarching objective" at paragraph 18. There are no specific goals on sustainability. The EU's draft text translates this into legal obligation to "long lasting and robust commitments that prevent distortions of trade and unfair competitive advantages and ensure that their mutual trade and investment contributes to sustainable development".

This is a segue to Art LPF 1.2 the EU's "*precautionary principle*" - which entitles the EU to regulate ahead of scientific evidence emerging. The EU seeks here both to be free to justify future non-tariff barriers by reference to this and also impose tariffs or other measures against UK imports insofar as the UK does not follow suit. This approach is not present in CETA.

Since the "*precautionary principle*" has no logical or rational limit, this permits the EU to enforce its judgments on the UK or require the UK to face trade penalty. However, the obligation is drafted reciprocally. It may be that the UK in seeking to achieve "*net zero*" - at significant cost to its own competitiveness - may wish to prevent EU producers from undercutting us.

## State Aid

The PD committed the UK and EU to "uphold common high standards" and "maintain a robust and comprehensive framework for competition and state aid control that prevents undue distortion of trade and competition".

The EU have taken the most extreme possible interpretation of this at paragraph 96 of the Council's negotiating mandate that "common high standards" in fact means "the application of Union State aid rules to and in the United Kingdom". This is so obviously ludicrous that it is not worth dwelling on why it is harmful to the UK, although it has served a useful role as a "cut through" point to illustrate EU overreach and bad faith.

For a description of a subsidy control agreement that would be sovereignty compliant see Section IV below and Annex D, which contains the proposed legal drafting for such an agreement.

## State Owned Enterprises

The PD does not refer to provisions for state-owned enterprises. However, the Council directives stipulate that the envisaged partnership should include competitive neutrality provisions, to ensure that state-owned enterprises, designated monopolies and enterprises granted special rights or privileges do not distort competition or create barriers to trade and investment. Their core principle is that such enterprises are subject to competition and State aid discipline as they are in the EU. This obligation should not, however, obstruct such entities in the UK from performing the services entrusted to them. As such, the proposals match the system established under Art 106 TFEU but without the UK's participation in the political or legal institutional structure of the EU.

<sup>96</sup> It would not apply to most aspects of competition provisions (except for a provision on enforcement of domestic law on competition), good governance standards in taxation (although maintenance of anti-tax avoidance measures is covered by the dispute resolution mechanism), and the trade and sustainable development section where a panel of experts would be called upon to resolve a dispute

<sup>97</sup> EU draft agreement text Article LPFS. 2.6 and Article INST.16

<sup>98</sup> <https://www.gov.uk/government/speeches/pm-speech-in-greenwich-3-february-2020>

Whilst the policy behind these provisions is not problematic, the requirement that Union standards should be used “as a reference point” (as well as the dispute settlement role played by the ECJ) will bring with it the developed (and technically complex) case law and practice on use of Art 106 TFEU and services of general economic interest. This policy framework is not well understood in the UK. It mainly affects member states with a more recent history of state-sponsored monopolies and with higher levels of state intervention in the economy. Indeed, the UK was historically the leading voice when inside the EU encouraging the Commission to use these tools (against others) to liberalise markets and introduce competition. So while the policy objective is something the UK historically would approve of, the difficulty embedding this provision in the FTA is three fold: (i) the Commission will likely continue to enforce these rules within the EU regardless of whether the UK signs an FTA containing this provision - in other words the UK does not need to agree it in an FTA to ensure these entities remain constrained in the EU; (ii) even if these rules do not bite on the UK frequently, their complexity makes policy making for Government and local authorities more difficult - especially as previously outsourced services are brought back in-house; and (iii) the EU’s highly developed rules may conflict with either the UK’s new subsidy control policy or FTAs with other economies that have their own way to regulate these issues.

We should therefore stick to the PD and remove these provisions from the FTA.

## Taxation

The PD committed the UK and the EU to the principles of good governance in the area of taxation and to the curbing of harmful tax practices (para 77). The EU has added a supplementary requirement for non-regression on three specific aspects of tax, namely: (i) the exchange of information on income, financial accounts, cross-border tax rulings, country-by-country reports between tax administrations, beneficial ownership and potential cross-border tax planning arrangements; (ii) rules against tax avoidance practices; and (iii) and public country-by-country reporting by credit institutions and investment firms.<sup>99</sup> All of these equate to EU directives, policed by a dispute settlement mechanism that involves the European Court of Justice. Whilst it is true that taxation has remained a Member State competence<sup>100</sup> - this is being unpicked by the use of State aid to indirectly attack tax discrimination and tax rulings - such as that seen in the *Apple*, *Starbucks*, *Fiat* and *Spanish World Duty Free* cases. Moreover, the UK Government’s command paper unambiguously stated: “the Agreement could include commitments to the principles of tax good governance as reflected in international standards,” (in line with the PD) but “should not constrain tax sovereignty in any manner”<sup>101</sup>.

## Labour and Social Protection

The EU’s approach to labour and social protections law broadly reflects the position in the PD. The EU seeks to have the treaty contain non-regression clauses with regard to fundamental rights at work, occupational health and safety, fair working conditions and employment standards, information and consultation rights at company level and other areas. Thus, the Council negotiation mandate stipulates that the UK-EU Agreement must “ensure that the level of labour and social protection provided by laws, regulations and practices is not reduced below the level provided by the common standards applicable within the Union and the United Kingdom at the end of the transition period[...].” (para 101). However, the Institute of Public Policy Research (IPPR) noted that these provisions were stronger than those typically found in EU trade agreements (which usually prohibit the lowering of standards only in actions aimed at encouraging trade or investment), albeit that they were weaker than the status quo of EU membership.<sup>102</sup> As mentioned above, in addition to the non-lowering of labour standards, the EU negotiating mandate also contains provisions on upholding “common high standards, and corresponding high standards over time with Union standards as a reference point”. Further, the EU’s mandate is clear that questions relating to the interpretation of EU law, such as the EU’s employment rights directives, should be referred to the European Court of Justice.

99 EU Draft agreement, Article LPFS. 2.26

100 The major exception to this generalisation is indirect tax: primarily VAT - for which there is a substantive body of EU law establishing common rules across Member States - and, to a lesser extent, excise duties. There are no equivalent provisions with regard to other taxes, though all national legislation has to comply with the overarching provisions of the Treaty guaranteeing the free movement of goods, persons, services and capital across the Single Market and prohibiting discrimination

101 HMG, *The Future Relationship with the EU: The UK’s Approach to Negotiations*, CP211, 27 February 2020 p17

102 Marley Morris and Tom Kibasi, “The Brexit Withdrawal Agreement: A First Analysis,” IPPR, November 2018

The effect of these provisions combined is problematic and gives little space of manoeuvre to the UK to set its labour priorities and adopt or modify its labour laws. As such, the UK Government has made clear that it would not agree to commitments that go beyond those typically included in a comprehensive FTA. The UK has therefore put forward the adoption of a “non-regression” clause that is a word-for-word copy of Article 23.4 of EU Canada CETA agreement<sup>103</sup> which does not, in fact, prevent regression as the parties only “recognise that it is inappropriate” to lower standards.

## Environment, Health and Climate Change

The PD stipulates that the future agreement should include a commitment to “*maintain environmental [...] standards at the current high levels provided by the existing common standards*” (para 77) and common high standards in the area of climate change including global cooperation (para 75). The EU is proposing non-regression clauses in a number of areas of regulations, including access to environmental information, environmental impact assessment, industrial emissions, air quality, nature conservation, waste management and climate change.<sup>104</sup> The Council Directives also includes non-regression on standards related to health and product sanitary quality in the agricultural and food sector.<sup>105</sup> In addition, the directives proposes adherence to the precautionary principle (which, as mentioned above, entitles the EU to regulate ahead of scientific evidence emerging), “the polluter pays” principle and other principles at the heart of EU environmental law and therefore under the purview of ECJ jurisdiction under the current dispute settlement mechanism in the WA (See section B above). Once again, the UK’s position is to negotiate a clause similar to the one provided in the EU Canada CETA agreement<sup>106</sup> which establishes a “right to regulate” for each party whilst maintaining a commitment to multilateral environmental agreements (with no reference to EU law).

103 1. The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their labour law and standards.

2. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labour law and standards, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory.

3. A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its labour law and standards to encourage trade or investment.

104 EU Draft agreement text, Article LPFS.2.30

105 The EU also wants to include climate change regulation in the general framework for the future economic partnership, whereas the UK is seeking to negotiate a separate Agreement on Energy whereas the EU.

106 UK Government, draft CFTA, May 2020, article 28.3: “The Parties recognise the right of each Party to set its environmental priorities, to establish its levels of environmental protection, and to adopt or modify its laws and policies accordingly and in a manner consistent with the multilateral environmental agreements to which it is party and with this Agreement. Each Party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve such laws and policies and their underlying levels of protection.”

## D - THREATS TO DEFENCE IN THE PD

Through the PD, the EU has invited the UK to participate in several EU defence structures.

This is the most recent of successive EU initiatives to promote European defence integration, dating back to the Maastricht Treaty followed by continuing evolution in recent years at EU Council level. Each of these has comprised a number of projects and budgets that aggregate towards the building of a common EU defence in terms of thinking, financing, and doing.

The EU's clearly stated rationale for these structures is to further EU political integration. An incentive for such participation is the promise of financial benefits to the UK defence industry through various funding schemes. In direct contrast to this perspective, justification for participation in the UK has emphasised the financial benefits to the UK defence industry, but there has been little discussion about the implications for the UK's sovereignty or how this interacts with the EU's ongoing political integration.

In basic terms, these initiatives involve (i) building the components of an EU defence union (the fighting component) and (ii) rationalising national defence industries in order to generate a single European defence industrial capability (the supply component). Historically, the UK has done well at avoiding the first of these, as some of the key aspects have been seen as blatantly ambitious.

However, there remains a risk of signing up to a number of individual programmes and entities that then aggregate into a direct or indirect threat to NATO, or shift Whitehall's focus away from prioritising more important partners. The threat from collectivised procurement is more recent, less obvious, more pernicious, and perhaps more immediate. Annex B provides a good overview of how the incentives, rules, and interconnectedness of the many programmes create - over time - a gravitational pull of participants toward the centre of the EU defence structures.

The sections below explain

- **The basic idea proposed by the PD**
- **Why an institutionalised defence relationship would be undesirable and contrary to UK sovereignty**
- **The UK's legal right to refrain from tying itself to the frameworks envisaged in the PD**
- **Why the UK should favour a defence relationship with the EU that is a flexible and ad-hoc in approach, but above all focused on the individual member state**

### THE PD PROPOSAL

Paragraph 102 of the PD states:

The Parties agree to consider the following to the extent possible under the conditions of Union law:

- a) The United Kingdom's collaboration in relevant existing and future projects of the **European Defence Agency (EDA)** through an Administrative Arrangement;*
- b) The participation of eligible United Kingdom entities in collaborative defence projects bringing together Union entities supported by the **European Defence Fund (EDF)**;*
- c) The United Kingdom's collaboration in projects in the framework of **Permanent Structured Cooperation (PESCO)**, where invited to participate on an exceptional basis by the Council of the European Union in PESCO format.*

Simply stated, these proposals, if accepted, would largely maintain defence provisions of existing EU treaties, which otherwise would fall away when the UK exits the TP.

## THREATS CREATED BY AN INSTITUTIONALISED UK-EU DEFENCE RELATIONSHIP

The PD's defence proposal keeps the door open to imposition of EU policy and decision-making on UK defence matters that ultimately will constrain the UK's freedom of action.

They create a temptation centred on the premise of EU funding of defence industry projects. However - as with most EU funding schemes - the UK would not receive more funding than it contributes. Such funding, if desired, could be replicated by the UK Treasury at lower cost. Moreover, the supposed benefit of such funding for the UK or UK entities is made more questionable by the EU's heavy obligations with regard to project management, joint ownership and supervision.

Although participation in these structures is described in the PD as a voluntary "consideration" for the UK, entry requires the adoption of a series of administrative agreements and political obligations that would limit the UK's freedom of action in conducting an independent defence policy as long as the UK remains a participant in structures where a common EU policy has already been established.

The choice of total withdrawal from the structures technically would remain a UK sovereign decision but, over time, would become incrementally more complex and difficult as industrial, financial, political and military ties increase. In addition, the Government would be subjected to constant lobbying to remain in the schemes from industrial and other beneficiary bodies. Such growing integration is what these EU's defence structures are designed to achieve.

The following paragraphs describe in more depth how future political obligations would arise from each of these defence schemes if the UK decided to join them.

### European Defence Agency (EDA)

The EDA is an EU agency empowered by the EU treaties to administer defence aspects of the EU, acting as a military interface for EU policy and as a central operator of EU defence funding, including the EDF and PESCO. It also serves the integration of member states' planning and research.

The UK's agreement with the EDA is described in the PD as an "Administrative Arrangement". It is "administrative" because the EDA would be required to administer aspects of UK participation in EU structures. The UK's Administrative Arrangement is designed to accommodate the UK as a participant in the other defence structures of the PD - i.e., the EDF and PESCO, in which the UK has so far never participated. The Administrative Agreement consequently would require the UK to make legal and political commitments to EU defence directives, including EU oversight, as well as the EDA's objectives, rules and benchmarks.

Any significant UK engagement with the EDA is likely to require replicating the UK's previous commitment to Title V Chapter 2 TEU (dealing with EU defence and security rules and structures contained in the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP)). This is a requirement for all participants in the EDF and PESCO but carries with it an extension of UK involvement to areas beyond the defence industry and into wider EU defence policy. Essentially, by agreeing to be bound by obligations contained in EU treaties, the UK would be prolonging the legal effect of existing treaty commitments with the EU that are currently due to fall away on 31 December 2020.

## European Defence Fund (EDF)

The EDF encourages participant states to create defence capabilities jointly, with the promise of matched stimulus cash. The EDF requires adherence to the EDF's third country participation criteria, published in April 2019.<sup>107</sup> Under these criteria, the UK would adopt legal, political and financial obligations in order to allow company participation in a scheme controlled by the EU and designed to further the EU's defence interests. The UK would have to make financial contributions (the methodology for which would need to be negotiated with the EU), but the UK would be severely limited in its ability to ensure that the strategic direction of the Fund was aligned with the UK's own priorities. Unlike the ongoing EU Member States, the UK would not have voting rights over the annual Work Programme that sets out where funding will be broadly directed.

It is not clear how the UK could guarantee that the Member States and the Commission would commit to an equitable level of participation by UK companies in return for the UK's financial contribution. The suspicion is that it will be a mixture of "Buggins Turn" and Common Fisheries Policy-style bartering. Unless the payments and receipts are roughly equal, the UK would end up subsidising the defence industries of the remaining Member States, quite possibly even in areas of direct competition.

Further, as the participating state's investment does not yield a return until completion, the UK would be financially pulled towards remaining involved, not losing its investment and accepting whatever product arose as a result of UK involvement. This is exacerbated by the rules in the participation criteria stating that the EU will shoulder a larger sum of funding only at later stages of a project. EIB funding, a separate concern, appears to be increasingly tied to this.

## Permanent Structured Cooperation (PESCO)

PESCO is a political project largely intended to integrate the military capabilities of the EU member states.<sup>108</sup> There is, as a consequence, an industrial component to delivering these aims. It is the overlap from any UK engagement with the EDA that creates strategic policy risk. This overlap would commit the UK to both adherence to EU rules (consider, for example, the demand for UK defence cooperation to have to operate on a level playing field, and applying the Social Chapter) but also openly implies acceptance of the EU's defence architecture.

Participation in PESCO, in any case, means a state agrees to EU rules as enshrined in the PESCO Notification. The "more binding common commitments" contained in the PESCO Notification make clear the connection between PESCO participation and the EU's wider defence architecture, including the EDF, the Coordinated Annual Review on Defence (CARD), and Title V Chapter 2 TEU (also referred to in this document as CSDP).

## Intelligence Sharing

In addition to the formal defence structures discussed above, it is worth commenting on the area of intelligence. There has been no change to the original May text in PD103, which states that there will be only voluntary sharing of intelligence. This in itself is an uncontroversial marker, especially given that to say otherwise would involve an increase on current cooperation. But there is also no change on the May wording that "While the Parties will produce intelligence products autonomously, such intelligence exchange should contribute to a shared understanding of Europe's security environment."

It remains now to be seen whether this has generated expectations of levels of future cooperation that have not been sufficiently locked down. We might consider similarly the contradictions in the wording that "parties should exchange intelligence on a timely and voluntary basis as appropriate", contrasting a measure of obligation with the caveats that follow. There is some shuffle room in these sentences in either direction, and ministers need to ensure any attempts to open up this area into permanent EU-based

<sup>107</sup> [https://www.europarl.europa.eu/doceo/document/TA-8-2019-0430\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2019-0430_EN.html)

<sup>108</sup> 25 EU Member States (without Denmark and Malta) have committed to PESCO. The PESCO Notification document includes a series of common binding commitments relating to the integration of decision making, joint actions, joint funding and common objectives. Decisions under PESCO will be taken through QMV.



structures (generating a risk, inter alia, to Five Eyes status) are shut down.

In summary, these programmes are wholly unsuitable for a UK Government seeking to regain sovereignty, with the autonomy that brings with it, and would involve risky entanglement with the rapidly agglomerating EU defence architecture. An agreement to participate in these structures would commit the UK to much wider EU obligations.

After publication of the EDF and PESCO participation criteria, the US Government said the EU's rules were "poison pills". Senior US officials sent an official letter citing the "restrictive language" of the rules, which represented "a dramatic reversal of the last three decades' of the openness of the 'transatlantic defence sector".<sup>109</sup> The letter also indicated the possibility of reciprocal measures by the US against the EU.

The idea has been promoted in some quarters that the UK might persuade the EU to be flexible over the application of its rules if there is any significant level of formalised Common Security and Defence Policy (CSDP) cooperation. This is a fantasy.

## NO LEGAL OR OTHER REQUIREMENT TO ACCEPT THE PROPOSAL

Having formally left the EU on 31 January 2020, the UK is now considered a third country in relation to the EU and, as such, to its structures and decision-making in the context of defence and foreign policy. However, under Article 127(2) of the WA, the EU's provision on Common Foreign and Security Policy (CFSP) and CSDP continue to apply to the UK during the TP (albeit in a modified version).

If no deal on the future EU-UK relationship is reached, CFSP and CSDP treaty provisions will automatically cease to apply to the UK at the end of this year. This is because Article 50 TEU stipulates that, unless otherwise agreed, EU "Treaties shall cease to apply to the State in question" (Article 50(3) TEU), thereby removing from the UK the legal basis for all defence cooperation at EU level. Therefore, from a legal perspective, whilst the WA and the PD provide an option for the UK to enter into an institutionalised relationship in foreign affairs and defence with the EU, they impose no obligation to do so.

There is certainly no incentive to do so. The closer the UK stays to the EU's developing structures and ambitions, the greater the risk will be to NATO, to ongoing independent UK capabilities, and to the UK's privileged association with the Five Eyes intelligence community in which it is the only European participant.

Furthermore, for any arrangements that are ultimately struck, the Swiss approach, of segmenting and compartmentalising a multitude of agreements with the EU in order to avoid "suspension blackmail" in the course of any dispute, is the best approach. In itself, it mitigates the risk of institutional gravitational pull of Whitehall towards EU bodies over an extended period of time, which is critical in the context of defence, intelligence and security.

## THE UK SHOULD DECLINE THE PROPOSAL FIRMLY

The UK's stance in the current negotiations should be straightforward.

The UK should categorically refrain from administratively binding itself to the EDA, or any other institutionalised relationship envisaged by the PD, as these would represent a direct infringement to the UK's capacity to conduct itself as a sovereign state with a robust independent strategic defence industry governed by UK rules, decisions and national interest.

There is no downside to following such a policy, nor any complications in doing so. The purpose of any linkage with the EDA should simply be to identify procurement projects being discussed at an early stage that are of defence interest to the UK so that these can be transferred to the Organisation for Joint Armament Co-operation (OCCAR) to run, or to another format that might bring in defence sectors with next-generation expertise from outside the EU.

<sup>109</sup> <https://fr.reuters.com/article/worldNews/idUKKCN1SKIV7>

## STEP TWO - DEFINE A SOVEREIGNTY COMPLIANT AGREEMENT

Having obtained a consensus on the threats to the UK's sovereignty, the next step is to define a document that would nullify these threats - achieved by employing alternative means to achieve each of the outcomes the EU has requested and the UK has agreed in principle.

These are:

- **An invisible border on the Island of Ireland can be achieved by Alternative Arrangements and/or Mutual Enforcement**
- **The protection of ex-EU citizens (and ex-UK citizens in the EU) can be achieved through national legislation**
- **Agreed outcomes can be policed by independent adjudication**
- **The role of the ECJ is unnecessary after Brexit but could be allowed to be sustained for a year, transitioning back to UK court remedies after that point**
- **The UK will have no ongoing role in EU project financing, so it should leave the EIB and leave behind any liabilities for the EIB - and for any other EU arrangements**
- **The UK will have no legal requirement to cooperate with EU defence schemes or share resources**

The following sections explain these approaches and why they can nullify the risks to UK sovereignty.

### AN INVISIBLE BORDER - ALTERNATIVE ARRANGEMENTS/MUTUAL ENFORCEMENT

The Protocol reflects the EU's decision (and the UK's acquiescence) to sequence the negotiations. Since the EU was not prepared to negotiate a permanent trade relationship in parallel with the Article 50 process, it became necessary to obtain an insurance policy in the WA. This was meant to have prevented a hard border in Northern Ireland - in all circumstances - even in the event that the future trade negotiation failed.

#### Failures of the Protocol

However, the final Protocol did not achieve that. Indeed, the consent mechanism means that it can be unilaterally rejected by a simple majority of the Northern Ireland Assembly. As such, it is not a "backstop" - all-weather or otherwise.

The Protocol does not respect either the UK or the EU's legal order. For the UK, it involves conceding large areas of sovereignty over - at least - Northern Ireland and in all likelihood over important aspects of the rest of the UK. For the EU, it involves a potentially permanent arrangement under the inadequate legal basis of Article 50 TEU and ceding control over the border of the single market to the UK.

The Protocol, in order to avoid a land border with the usual customs infrastructure between Ireland and Northern Ireland, places customs checks on trade across the Irish Sea. Through the Protocol, the EU seeks to impose its full and elaborate legal and technical customs infrastructure on Great Britain (GB) to NI trade, to protect the integrity of the EU single market - despite the obvious consequences for the UK internal market.

In the recent command paper on NI, HMG proposes a set of specific measures to ensure UK sovereignty over NI focussing on minimising administrative procedures on trade between NI and GB. The result of these proposals is an incomplete and messy set of procedures that neither regains UK sovereignty nor seems likely to meet the EU's expectations for implementation either.

The government paper introduces many far-reaching exemptions of the proposed customs procedures in the Irish Sea, which leads to many "loopholes" in the external EU border. For example, issues on VAT and excise are not addressed even though they play a vital role in ensuring UK sovereignty.

The Protocol will not work and needs to be replaced by a new agreement between the UK and EU governing the trading relationship in NI. That relationship needs to solve the original problem afresh - how to ensure no "hard border" on the island of Ireland.

## Options for an 'Invisible' Northern Ireland Border

Annex C describes many of the techniques used to operate traditional customs and related border procedures. It makes the point that - given EU political will to do so - such procedures could be employed to operate an "invisible border" between Northern Ireland and Ireland. Over the past couple of years, several such proposals (generally referred to as "Alternative Arrangements") have been proposed to the EU by the UK Government and other external bodies in the UK.

Annex C also explains that an FTA between the EU and the UK would not change the fundamental need for border operations on the Island of Ireland. An FTA can include a border agreement that simplifies border procedures and facilitates implementation, but an FTA cannot make border formalities unnecessary.

**Alternative Arrangements.** The most advanced and fully developed of these proposals was formulated by The Alternative Arrangements Commission in July 2019, which was incorporated in UK Government Policy and formed the basis of detailed UK proposals to the EU.<sup>110</sup> Unfortunately, the EU was dismissive of such proposals. This ultimately led to the current situation of the proposed East-West sea border in the Irish Sea, which is unworkable for the reasons stated above.

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

**Mutual Enforcement.** Therefore, this paper proposes a completely new approach - Mutual Enforcement. This approach replaces the controversial minutia of operational and technical procedures with a legal obligation on each side to ensure enforcement of the other side's rules and standards. Not only does this approach avoid infrastructure at the border and endless haggling about possible gaps, but it also is likely to ensure a high level of compliance since the relevant trader is within the jurisdiction of the government responsible for enforcing the rules. In any case, where compliance is found lacking, the injured party will be able to claim compensation. Furthermore, Mutual Enforcement meets the criteria the EU has demanded for Northern Ireland border procedures and preserves UK sovereignty.

The remaining sub-sections of this section of the paper describe the Mutual Enforcement concept in detail.

<sup>110</sup> Prosperity UK report on Alternative Arrangements: <https://www.prosperity-uk.com/aacabout/>

## How the Mutual Enforcement Concept Works<sup>111</sup>

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

Unlike a customs union or partnership, Mutual Enforcement does not - of itself - remove customs duties nor does it remove, harmonise or require mutual recognition of standards. It works by inverting the usual approach to customs enforcement. Obviously, it would be hoped that tariff or other duties would be avoided in so far as possible by a comprehensive FTA. But duties likely will remain a feature of goods trade under an FTA. They may be, for example, imposed for anti-dumping reasons or due to subsidies that one-party claims are injuring its companies or as a result of goods failing to qualify for zero duty under rules of origin.

Normally, where there are two distinct customs territories - even between those with an FTA - customs border infrastructure is necessary as it is the first opportunity that either side has to assert their jurisdiction - i.e., enforce their rules and collect their 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.

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

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

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

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

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

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

The central control mechanisms to operate a border are the export and import declarations. Both declarations are based on the same transaction, so they could be joined in one procedure. This can lead to additional administrative efficiency. The exporting territory could apply the export procedures

<sup>111</sup> The idea was originally described in a paper published by Joseph H.H. Weiler, Daniel Sarmiento and Sir Jonathan Faull on Verfassungsblog - <https://verfassungsblog.de/an-offer-the-eu-and-uk-cannot-refuse/>

of its territory and in addition could apply the import procedures on behalf of the importing territory. The same basic data can be used in both declaration systems. Export customs authorities would also apply the regulations and taxation of the importing territory. There would basically be only one point where checks and inspections would take place. Duties would be collected from the exporter and paid to the importing customs authorities. Authorities would have access to the customs and regulatory declaration systems of the other territory to apply uniform procedures, or work collaboratively so as to provide data in the necessary formats. Import duties collected would be paid periodically to the other territory - or set off against duties owed in the other direction.

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

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

It is accepted that compliance with Ireland/EU and the UK's SPS and agrifood rules using Mutual Enforcement could present challenges. This is mainly because food safety rules are politically sensitive in the EU and the EU has chosen where it suits it to be highly prescriptive as to the method of enforcement - including on the border itself except for instances where geographical exceptions are used so that they take place other than at the border crossed, such as intended at Calais/Boulogne for example for seafood imports to the EU from the UK. The risk to the EU's single market from North-South trade in the island of Ireland is small, at least initially, because the UK's SPS and agrifood regulations start from a position of alignment, and because North-South trade within the island of Ireland is small and much of it managed by regular, trusted traders. However, a Mutual Enforcement approach could be adopted over time in the event of divergence where sufficient notice should be given to allow EU legislation as well as food producers and processors to adjust. Help can also be given to them to establish any different systems of producing or identifying goods suitable for export. As part of this, an EU-UK border agreement could accept that veterinary, SPS checks, and inspections by NI authorities to the extent necessary are fully accepted as equivalent to those in the EU, and vice versa, thereby avoiding checks at the border.

2. **Traders who want to avoid compliance with the law.** A customs border post with a physical presence on the border provides the importing state with an opportunity to catch and enforce against those who wish to evade their rules. The protection is never absolute as the importing state must balance enforcement rigour against allowing legitimate trade to pass unhindered.
  - A Mutual Enforcement structure removes the border post, but rather than increasing smuggling risk, it can be more efficient than a border post at detecting and deterring those traders who do not wish to comply with the law.
  - A custom border post is largely a one-shot enforcement opportunity as goods move from one side of the border (where it is lawful) to the other (where it is not). A Mutual Enforcement structure implies constant enforcement on both sides of the border. The good becomes unlawful on the exporting side of the border the moment it is exported in breach of the importing territory's rules. This approach could be expanded to catch inchoate and conspiracy offences as well. The importing territory benefits from the protection of the exporting territory's law enforcement agencies as well as its own.

- The goods with which we are concerned are not illicit goods that are unlawful in each jurisdiction (drugs, counterfeit products, endangered species, etc.). Sheep meat or sofas that do not pay the required duty or comply with the relevant standards will be sold via normal distribution channels. Each side will know where the largest smuggling opportunities are (e.g., where the greatest differential in duties or production techniques exists). Customs enforcement can require evidence as to from where such products were supplied and proof that duty was paid. This can be assisted by recordkeeping requirements, similar to those that exist in tax matters. Such enforcement informs a prosecution on both sides of the border. The supplier of the product is therefore prosecuted as opposed to just the buyer/importer under the normal arrangements. This is a stronger enforcement mechanic than a border post offers.

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

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

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

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

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

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

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

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

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

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

## Underlying Principles of Mutual Enforcement

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

- **The novel feature of Mutual Enforcement lies with the role of the declarant in the exporting country.**<sup>112</sup> Normally, the declarant in the importing country works on behalf of the importer and checks compliance with import regulations and ensures that all duties will be paid to the importing country. Under Mutual Enforcement, the role of the declarant is turned on its head - i.e., the declarant in the exporting country checks compliance of the exporter and ensures that required duties will be paid by the exporter to the relevant authority in the exporting country (e.g., HMRC in the case of the UK) on behalf of the importing country.
- **Mutual Enforcement depends on the trust that each party has in the robustness of the other's legal system.** This was cited as a fundamental defect when the original Mutual Enforcement proposal was published last summer by Sir Jonathan Faull et al. The EU would never "outsource" protection of the single market in this way. This criticism can be dismissed as meritless. All available solutions - whether proposed by the EU or the UK - have this feature:
  - The previous backstop arrangement required the UK and EU to rely on the robustness of each other's legal system to protect the boundary of the Single Customs Territory and apply the "common rulebook"
  - The current Protocol depends on UK authorities to police the border of the single market at entry points to Northern Ireland - and is frequently cited by EU politicians as a matter of trust
- **Under Mutual Enforcement, both customs territories would have to trust each-other's enforcement of customs regulations.** Thus, a Mutual Enforcement system is fundamentally *mutual*, which increases trust and interdependence relative to the current Protocol where one side is in permanent tension with the other enforcing asymmetric rights. An important characteristic of this approach is that exporters become liable in their own jurisdiction for failing to comply with the rules of the other jurisdiction.
- **There need be no level playing field provisions of any type arising from the NI Border.** Since each side retains autonomy over its regulatory sphere, each side retains customs tools (such as anti-dumping and anti-subsidy countervailing duties) to protect their market from unfair competition. These tools do not offer either side the same comprehensive framework as within the single market. This is reflected in the increased trade "friction" that being outside the single market and customs union represents. Mutual Enforcement does not remove this friction - it provides a way for each side to effectively enforce its rules and collect duties owing beyond its border without the need for customs posts. However, it may be advantageous for both sides to embed subsidy discipline into an FTA - to avoid harmful subsidy races between the parties, although this must be based on effects on trade and competition as described in Section A of the paper, not via accepting the application of the EU State aid rules in the UK.<sup>113</sup> Note the House of Lords EU Internal Market Sub-Committee recently endorsed this view.<sup>114</sup>
- **Law enforcement cooperation will be crucial to the successful operation of the mutual enforcement system.** This can and should build on the cross-border cooperation and institutions of the GFA.

<sup>112</sup> Goods can be declared to customs by the trader himself or he can appoint a representative, a declarant. A declarant makes a declaration based on the available information about the transaction that is mainly found in the accompanying invoice that is normally provided by the exporter

<sup>113</sup> "All Change? UK State Aid after Brexit What Law? Whose Courts?" published by Politeia on 13 February 2020 available here.

<sup>114</sup> See Letter from Baroness Donaghy to Paul Scully MP, 3 April 2020 at paragraph 44 "We endorse the statement by James Webber that "subsidy control between trading partners only really needs to catch subsidies that distort that trade, and anything that happens beneath it is really not the business of a trade agreement"

## Key Mutual Enforcement Operational Considerations

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

- **Declarants and customs authorities would apply two legal systems.** The declarant in the exporting country makes both the export and import declaration, thereby applying two legal systems and two different customs procedures. Thus, UK customs authorities would apply EU law in relation to its exporters. The same would apply to Irish customs authorities who would apply UK law on behalf of its exporters. This is a new approach, which will require some training of a limited number of declarants, but it could make logistics more efficient and lead to administrative efficiency, as there would be only one collective procedure for export and import. Partial sovereignty over customs procedures would be delegated to the other jurisdiction but on a mutual basis. Rights and obligations will be in balance since both sides depend on each other's operations.
- **Access to each other's customs systems is necessary, so that import regulations of all kinds are applied to all transactions under the same conditions as elsewhere in the EU.**<sup>115</sup> UK customs authorities can only apply all relevant customs regulations by processing them through the EU customs systems, which relate to all EU databases that use big data to determine the risk profile of a transaction and instruct the (UK) customs authorities about what checks and inspections apply to a specific transaction. The same would apply vice versa for the Irish customs authorities needing access to the UK customs systems for the same reason

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

- **Declarations under a Mutual Enforcement regime will also manage import and export VAT so that the existing VIES system will be unnecessary.** Export is exempt of VAT; VAT is due only on import. This will obviate the need for the UK to participate in the existing VIES (VAT) and EMCS (Excise) systems, which are essential to prevent the interference of the ECJ on VAT matters. There is no excise levied on the export of excise goods, while excise has to be paid on import. The existing differences in VAT and excise rates will remain. Thus, arbitration in these goods by consumers and smugglers will not change. In fact, the existing VIES (VAT) and EMCS (Excise) systems will be replaced by declarations under the Mutual Enforcement regime. The UK will introduce postponed accounting, thus simplifying any import transaction because VAT does not have to be paid to the authorities, but can be deferred administratively to the financial administrations of traders. It would be useful if Ireland could also facilitate postponed accounting on 1st January 2021 (under any border regime) to facilitate trade.
- **The Transit procedure (see Annex C) will be needed for Irish transports passing through NI and for NI transports passing through Ireland.** For this, derogation will be needed for Transit barcodes to be scanned at the border or replacement with more modern systems of tracing compliance, either of which can be de-risked by Mutual Enforcement provisions.
- **Duty-free allowances and exemptions will be needed for low value or irregular traders and individuals.** This will eliminate difficult and burdensome pre-payment of duties and proving compliance of goods, and abuse could be covered by the provisions of Mutual Enforcement.

<sup>115</sup> ". A declarant has no authority or ability to do a thorough investigation into all legal aspects of a transaction. In general, a declarant has a vocational training and has limited time to process the declaration as costs must be kept low. Based on knowledge and experience the declarant will declare the goods to his best knowledge. There are about 50 laws that are applicable to trade across the border. The outcome of the declaration depends on the algorithms and systems analysis of the data processes that check on these laws and select transactions for further investigation. Thus, the declarant makes the declaration possible, but the declarant cannot certify any declaration. It is the customs system that approves or rejects a transaction. Customs authorities are there to enforce this outcome.



## Trading Is On A Small Scale

It is important to recognise that these procedures would be operated only for goods traffic crossing the NI - Ireland land border - not for the entire UK (unlike the current proposal for an East-West sea border). Therefore, the trading volume would be very small. For example, NI sales of goods and services to Ireland were only £4.2 billion in 2018, accounting for only 6.1 per cent of total NI sales.<sup>116</sup>

Importantly, the trading volume across the North-South land border is many times smaller than the volume across the East-West sea border. In 2018, the total value of goods and services passing across the East-West sea border was 3.4 times greater than the value passing across the North-South land border.<sup>117</sup>

Moreover, the complexity of the declarant's task dealing with North-South trade under Mutual Enforcement is lower than it would be for East-West trade under the requirements of the Protocol. Thus, the procedures under Mutual Enforcement would be more manageable. For example, we estimate the total number of declarants required in NI under Mutual Enforcement would be on the order of a couple of dozen people. These declarants would work within the company of large traders and for smaller traders could be hired through a forwarding agent or a customs broker.

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

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

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

## RIGHTS OF EU CITIZENS TO BE PROTECTED BY UK NATIONAL LEGISLATION

The United Kingdom should continue to protect under its national legislation the rights of EU citizens living in the UK broadly in line with the substantive provisions of Part Two of the Withdrawal Agreement, even if the WA ceases to operate at international level. This is likely to lead to a situation where the EU and its member states continue to accord similar protection to UK citizens in the EU for reasons that are both practical and legal.

- The practical reason is that the number of EU citizens resident in the UK is several times larger than the number of UK citizens resident in the EU, so it would be contrary to the interests of the EU to curtail the rights of UK citizens in a way which might lead to retaliation on a larger scale.
- The legal reasons begin with Article 178(2)(a) of the WA, which provides that the parties are not to suspend the provisions of Part Two in a scenario where they suspend other parts of the WA because of breaches by the other party. This reflects an underlying principle that the rights of citizens (both EU and UK) under Part Two are accrued treaty rights belonging to the citizens themselves rather than being merely international law obligations owed by the treaty parties to each other.

Given the recognition of that principle in the WA, it is likely that UK citizens would be regarded as having accrued rights under EU law (and under the EU Charter of Fundamental Rights) even in the event of termination of the WA as an effective treaty at the level of State relations.

But while the UK should take care to respect the rights of EU citizens as set out in Part Two of the WA in its internal law, no attempt should be made to continue or replicate the one-sided approach in the WA of giving jurisdiction over such matters to the ECJ - and the lopsided manner in which it does so by treating the EU member states individually, making no pan-EU commitments to the UK whilst expecting the UK to make pan-UK commitments to the EU.

<sup>116</sup> Northern Ireland Broad Economy Sales and Exports Statistics 2018, NISRA, 19th December 2019

<sup>117</sup> Northern Ireland Broad Economy Sales and Exports Statistics: Purchases and Imports Results 2018, NISRA, 21st May 2020

## INDEPENDENT ADJUDICATION FOR AGREED OUTCOMES

As with any international agreement, there should be a dispute resolution provision. This should involve conventional independent adjudication, of the kind that can be seen for example in the EU-Canada FTA, with no reference to any special role for the ECJ. There is simply no justification in international treaty practice for the courts of one treaty party to have binding jurisdiction, even over matters of their own law.

Where the internal law of one treaty party is relevant to an issue before an international tribunal, it is for that tribunal to determine the content of that law on an objective basis taking account of evidence such as the texts of the relevant laws and the texts of judgments. Indeed, there should be no reference to EU law.

The “bargain” between the UK and EU in respect of their long-term relationship should be contained in a new, standalone agreement that is entirely detached from the EU legal scheme. It should reflect normal state treaty practice that provides for states to agree to certain basic trading arrangements (which are predominantly the subject-matter of this new treaty) and then keeps the parties to their words through an independent arbitration mechanism.

## TRANSITIONING BACK TO UK COURT REMEDIES

The long-tail exposure of UK and other litigants to the ECJ for legacy EU issues should be terminated. Where there are outstanding proceedings that relate to matters within the United Kingdom, the parties should be able to continue those proceedings in the appropriate replacement UK court, tribunal or administrative body. For example, pending State aid cases that are before the Commission or the General Court or ECJ and which relate to the UK should be continued to conclusion within the UK’s Competition Appeal Tribunal or higher courts so that only those UK institutions, and not EU institutions, are able to grant relief that affects UK companies and UK markets.

## EXIT FROM EIB - AND OTHER RESIDUAL LIABILITIES

The solution for the UK is much simpler than the lengthy and involved clauses 138-157 between pages 234 and 283 of the WA make it appear.

Regarding the ECB, the UK’s subscribed capital - totalling €1.48 billion (i.e. €1.5 billion) - should be cancelled, and the €56 million paid-in capital element repaid. The €1.42 billion subscribed-but-not-called capital will just be cancelled.

The UK is not a Eurozone member state and is not a participant in the ECB’s main monetary and payment operations: its QE/Asset Purchase Programme, its Long-term Refinancing Operations, the TARGET2 payment system, or its issuance of note and coin in Euro.

The ECB’s balance sheet footing on 31 December 2019 was €457 billion.<sup>118</sup> The daily average of payment traffic through TARGET2 was €1.7 trillion.<sup>119</sup> Measured against these quantums, the UK’s involvement is minuscule and the repayment of our €56 million paid-in capital will put no strain on the ECB’s resources.

The quantum associated with Euratom, the European Coal and Steel Community and the European Development Fund appear trivial and should be left out of the calculation altogether.

This leaves us with just three items:

1. The UK’s portion of the EU’s shareholding in the EIF
2. The UK’s portion of the EU’s shareholding in the EIB
3. The UK’s liability under the CA for the 2014-2020 MFF and previous ones

<sup>118</sup> ECB 2019 Annual Report Accounts section p21

<sup>119</sup> ECB 2019 Annual Report Main section p61

Taking the EIF first, the EU's shareholding in the EIF is 29.71 per cent.<sup>120</sup> The EIF's subscribed capital is €4.5 billion of which €900 million is paid-in. The EU's portion of this is a subscribed capital amount of €1.34 billion and a paid-in capital amount of €267 million.

If the UK's share of EU budget matters is 12 per cent, the UK's portion of this is subscribed capital of €161 million and paid-in capital of €32 million.

Once the UK has left the EU, the UK would have no portion, and indeed that would be to our advantage given the risks the EIF is taking now under its "normal" InvestEU expansion, and which will increase thanks to the COVID-19 response.

The UK's claim on the EIF capital should be traded away for leaving the UK's liability under Euratom, the European Coal and Steel Community and the European Development Fund out of the calculation. Ridding ourselves of risk through the EIF would be as much to our advantage as being repaid €32 million.

The situation regarding the EIB is much more serious.

Given the increasing risks the EIB is taking and the degree of its over-trading, it is important to cut our relationship with it at the end of 2020, whilst recognising that the EIB has residual loans into the UK. The solution is for the UK to buy out the EIB's UK loan portfolio and at the same time have our capital repaid, and the callable capital cancelled.

The current lengthy wording only sees the UK's paid-in capital redeemed over many years, and the subscribed-but-not-called capital reduced over the same timeframe. It refers to the supposed UK liability for other types of financial operations of the EIB, whether or not they had anything to do with the EIB's business with the UK, and whether or not they pre-dated the WA.

This is all against a background where the EIB:

- Continues to hold its current loan book into UK borrowers, the amount of which is more or less the same as our capital
- The EIB makes no new loans into the UK
- The EIB's current loans into the UK run off in equal semi-annual instalments, and any that were made in 2019 will have run off completely by 2034
- The gap between the EIB's loans into the UK and the UK's capital in the EIB will rise
- The UK will have no say in the make-up of EIB's assets, its risk management, etc
- The UK's capital will progressively support only the EIB's loans into countries other than the UK, an exacerbation of what is happening now

Instead the UK needs to sever its ties with the EIB on 31 December 2019, and this is not difficult to do.

The UK's subscribed capital in the ECB - totalling €39.2 billion - should be cancelled, with the €3.5 billion paid-in capital element being repaid. The €35.7 billion subscribed-but-not-called capital will just be cancelled.

The UK's percentage shareholding in EIB is 39.2/243.3, or 16.11 per cent. This gives us a claim on the EIB Reserves, which were €51.9 billion on 31 December 2019 including the 2019 profit.<sup>121</sup> The UK's has been a shareholder since it joined the EU and so a share of those Reserves are attributable to the UK, namely 16.11 per cent x €51.9 billion = €8.4 billion as at 1 January 2020 plus 16.11 per cent of whatever the 2020 profit turns out to be. For argument's sake the share of 2020 profit would be €0.4 billion if 2019's performance was repeated.

The UK should therefore be due €3.5 billion plus €8.4 billion plus €0.4 billion = €12.3 billion.

120 Annex 2 of "Managing Euro Risk" by Bob Lyddon, Barnabas Reynolds and David Blake, published in February 2020 by Politeia

121 EIB 2019 Financial Report p33

In order to achieve this, the UK should be willing to buy out the entirety of the EIB's loan book into the UK, which will consist of a block of 15-year loans to UK public sector entities, and a block of facilities to UK banks for them to on-lend to UK SMEs.

The EIB 2019 annual report p11 states that 8.3 per cent of its loan stock is into the UK, of a €447.5 billion total of loans disbursed shown on p4, so the UK loan book is around €37 billion equivalent.

The UK would buy this portfolio onto the books of a UK specialist bank - such as the British Business Bank - for a net present value figure to be determined by an impartial agent. The NPV will be above the nominal value because many of these loans will have been made when interest rates were higher. This premium will take care of any shortfall on the EIB's side in the redeployment of their funding, and on any financial instruments they have contracted in order to match the profile of the loans to that of the funding. The NPV will not factor in any profit margin for the EIB going forward: that margin must accrue to the UK. UK will have to raise the funds itself to make the NPV payment, but these funds will be raised at current, lower interest rates, preserving the profit margin for the UK going forward.

Borrowers would be unaffected other than via a notice to inform them that the lender had changed, and that they should make their loan payments into a different account.

The UK's claim for repayment of capital and share of reserves (including a share of the 2020 profit) of €12 billion+ would then be offset against the NPV payment for the loan book of (as a rough estimate) €40 billion to leave the UK needing to pay a net figure of €28 billion.

This completely severs our connection with the EIB, reduces their capital but also reduces the assets the capital was there to support, and compensates them for redeployment of funds taken on at higher interest rates. This is an absolutely standard way of severing such a relationship fairly.

The impact on the UK's public finances would be to increase the UK's general government gross debt - as tracked by Eurostat - only in respect of the block of facilities to UK banks for them to on-lend to UK SMEs. EIB's block of 15-year loans to UK public sector entities are (or should be) already included in the UK's general government gross debt: only the identity of the lender changes, not the identity or the liability of the borrower. The UK also obtains an asset in exchange for its payment.

Finally, we have the UK's liability under the CA.

The first step would be to require a list of outstanding amounts (i) as at 31 December 2019 (the UK's original leaving date), (ii) as of now, and (iii) a projection as of 31/12/20 given any mobilisations of the 2014-2020 ceiling that are envisaged (e.g. new first-loss guarantees to the EIB for a "normal" increase in Invest EU and for a Covid-19 response increase in Invest EU, and an allocation of the headroom under the 2014-2020 MFF for the main €750 billion borrowings of the EU for the purposes of the Covid-19 response).

Liabilities relating to Euratom, the European Coal and Steel Community and the European Development Fund will then be backed out, as well as the UK's claim to a portion of the EU's shareholding in the EIF.

The UK's bargaining position should be that the calculation as at 31/12/19 is the marker point, and that any mobilisations since then have been of no benefit to the UK and should be excluded.

Once we have that calculation, we insist that the UK's portion of it is capped at 12 per cent under any and all circumstances.

After that, the EU opens its books and the books of the mechanisms involved in the calculation so that UK delegates, reporting to Parliament, can verify the EU's calculation. The report should show the maturity dates and run-off profiles of every underlying item, and the Value-at-Risk of each one, using the EIB's Value-at-Risk methodology. The Values-at-Risk should then be totalled and multiplied by 12 per cent to reach a single buy-out amount, upon the payment of which the UK buys itself out of the liability.

The UK can then make a decision as to whether to pay the buy-out amount now and have no future liability, or to carry the liability in the long term in the hope that it does not materialise into a demand for cash.

## NO LEGAL REQUIREMENT TO COOPERATE/SHARE RESOURCES WITH EU DEFENCE SCHEMES

Chapter I explains that attachment of the UK to EU defence structures as proposed in the PD provides no material benefits to the UK and, in fact, would be harmful to the UK's defence interests by restricting its freedom of action in such matters and, over time, forcing UK compliance with EU military objectives and procedures.

This would be effected by commitments in Title V Chapter 2 TEU (which are meant to fall away when we exit the TP), accepting the EU Council's Third Country Participation Criteria if we were to participate in the European Defence Fund and the binding Common Commitments of the Notification on Permanent Structured Cooperation. Essentially, this proposal would reverse the freedom we gain from leaving the EU.

Chapter I also explains that the UK is under no legal or any other obligation to accept this PD proposal, in spite of continuing urging to do so by the EASP unit in the Foreign Office.

Therefore, it is necessary for ministers to underline their commitment that there must be no institutional framework with the EU institutions on matters of defence, security and foreign policy.

## STEP THREE - REPLACE THE WITHDRAWAL AGREEMENT WITH AN ACCEPTABLE AGREEMENT

Having defined the Government's objective in terms of a Sovereignty Compliant Agreement, the way forward politically is to explain and justify why the WA needs to evolve into a new end-of-year agreement that is sovereignty compliant to avoid the UK walking away.

The chain of logic is clear, but the EU has muddied it with briefings that ignore crucial facts:

1. The UK as a State retains its sovereign right to withdrawal from the EU, an international organisation.
2. When the UK exercised its right to leave, it participated in the WA process on the basis of an essential expectation and condition: agreement on a future permanent arrangement with the EU that enshrines UK sovereignty and secures an FTA.
3. The Protocol, ECJ jurisdiction over citizens' rights and other aspects of the WA are incompatible with the envisaged sovereign future relationship agreement and need to fall away, as envisaged.
4. By refusing to negotiate a sovereign future relationship agreement, threatening to use WTO's "most favoured nation" principle against the UK, the EU is acting in breach of a material provision of the WA (the obligation to use best endeavours and good faith to achieve a sovereign future relationship agreement by end of 2020) meaning that the UK has entered the WA on a false premise.
5. Further, the Protocol within the WA is in breach of the principle of self-determination of the people of NI and breaches their right under the ECHR to vote in elections of the legislature which makes EU laws which apply in NI.
6. The Withdrawal Agreement is based on Article 50 TEU, which pursuant to Article 50(2) concerns "arrangements for withdrawal taking account of the framework for its future relationship". Article 50 is an inadequate legal basis for a permanent relationship with the UK as a neighbouring state.
7. The Protocol does not respect the principles or governance established by the Good Friday Agreement, as Lord Trimble's introduction to this paper explains.
8. Unless the EU agrees to replace or modify the offending terms of the WA, the UK must therefore exercise its right to terminate the WA before the end of the year, as the obligations contained therein are all reciprocal and conditional upon the fulfilment of the obligation to achieve a sovereign future relationship agreement.
9. The UK will subsequently pass an Act of Parliament superseding the WA, in line with Parliamentary Sovereignty under Section 38 of the Withdrawal Agreement Act 2020.

Unless a Sovereignty-Compliant Agreement is delivered, the UK must suspend and terminate (through Act of Parliament) the WA. If the UK does not exercise this right and make plain the conditionality of its consent to the WA, it will, by conduct, forfeit this right and deliver renewed consent to the WA and its sovereignty-incompatible terms.

## THE LEGAL LOGIC

Instead of accepting the EU positioning and framing prevalent in the media discourse, the UK should adopt the legal logic summarised below:

1. **The UK as a state retains its sovereign right to withdrawal from the EU, which is an international organisation**
2. **When the UK exercised its right to leave, it participated in the WA process on the basis of an essential condition: agreement on a future permanent arrangement with the EU that enshrines UK sovereignty and secures an FTA**
3. **The Protocol and other aspects of the WA are incompatible with the agreement intended for the end of 2020**
4. **The EU has been acting in breach of a material term of the WA, meaning that the treaty was entered into a false premise**
5. **The Protocol is in breach of the ECHR principle of the right to vote**
6. **The UK must exercise its right to suspend and terminate the WA obligations**
7. **The UK must subsequently pass an Act of Parliament superseding the WA, in line with Parliamentary Sovereignty under Section 38 of the Withdrawal Agreement Act 2020**

The following sections explain each of these legal points in depth.

1. **The UK as a state retains its sovereign right to withdrawal from the EU, an international organisation**

On the basis of state sovereignty, it is contrary to the actual legal position under international law that the UK requires EU consent or agreement to leave the EU.

State sovereignty is not a principle without legal consequence. It is paramount to international law ("if States were not sovereign, no international law would be possible")<sup>122</sup> and means that each state has internal supremacy over the way Governmental functions are run and is shielded from external interference without consent. The concept was neatly summarised in the Permanent Court of Arbitration Islands of Palmas case (1928): "Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state".<sup>123</sup> Crucially, "the right of every sovereign state to conduct its affairs without outside interference"<sup>124</sup> was recognised by the ICJ, endorsed by the UN GA Resolution 2625 and has been recognised as a corollary of Article 2(1) UN Charter.

The UK as a sovereign state has a right to withdrawal from an international organisation.<sup>125</sup> This right is recognised by EU treaties themselves, as evident from the wording of Article 50 TEU: "[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements". In short, the UK's right to withdraw from the EU is licensed by international law and only limited by UK Constitutional law and thus by the UK's own discretion.

122 PCIJ ruling in Lotus (1927) para 163

123 PCA Island of Palmas case (Netherlands, USA) p 838

124 ICJ Nicaragua

125 The EU is an inter-governmental organisation comprised of sovereigns - meaning, of States that have kept their sovereignty or at least enough of it that they still are States - and therefore retain the legal right to take the decision on whether or not to be members of the organisation. This was confirmed by the German Federal Constitutional Court in the Maastricht Treaty 1992 Constitutionality Case (1993): "Because the German citizen entitled to vote exercises his right to participate in conferring democratic legitimacy on the institutions and bodies entrusted with the exercise of sovereign authority principally through the election of the German Bundestag, that parliament must also decide what is to be done about Germany's membership of the European Union, its continuance and development" (para 225)

## 2. When the UK exercised its right to leave, it participated in the WA process on the basis of an essential condition: agreement on a future permanent arrangement with the EU that enshrines UK sovereignty and secures an FTA

The WA is a temporary agreement and its binding nature is conditional upon agreement on a future permanent arrangement with the EU that enshrines UK sovereignty and secures an FTA. This is evident by the WA's legal base: Article 50(2), which explicitly distinguishes withdrawal arrangement and future relationship arrangements. Crucially, the legal basis of the WA only extends to withdrawal, not to the future relationship.

Further, the UK was still an EU member when it negotiated the WA, and thus was not in a fully sovereign position<sup>126</sup> to give or withhold consent to an agreement with a permanent legal effect. The UK at the time could only consent to a temporary framework; indeed, the intention and capacity of the UK to only bind itself temporarily is heightened by the framing of its consent as conditional to the agreement of a future permanent framework based on an FTA enshrining UK Sovereignty. The UK never consented to the permanent operation of the NI Protocol.

Thus, Article 50(2) of the Treaty on European Union provided that, after the UK served notice to exit the EU on 30<sup>th</sup> March 2017, there should be negotiations for an agreement for the withdrawal of the UK from the EU. Article 50(2) allowed the EU27 for internal EU purposes to agree their position, opposite the UK, by qualified majority voting (i.e., voting weighted according to the size of each member state of the ongoing EU, without the UK). Most importantly, the exit agreement had to take into account an agreed "framework" for the future relationship between the UK and EU, which meant that the framework had to have been agreed at the same time.

*"A member state which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament"*

In December 2016, M Barnier and the EU as a whole insisted on a two-stage negotiation, leaving the future relationship to be negotiated at a later date:

- First, there would be a Withdrawal Agreement governing three points of interest to the EU: money, citizens and EU law in Northern Ireland as the EU's chosen method of ensuring an invisible border there, along with certain other one-sided matters of interest to the EU
- Secondly, there would be a future relationship agreement, which would cover trade matters

The UK objected that it was impossible to address satisfactorily the invisible border in Northern Ireland without addressing future trade relations at the same time; but the EU refused to accept that obvious point.

The first stage of the process therefore involved negotiating a Withdrawal Agreement, effective from 31<sup>st</sup> January 2020, which recognised the UK had left the EU's intergovernmental framework, set out detailed provisions on money, citizens and Northern Ireland, amongst other matters, and provided for a transitional period of 11 months during which EU law would continue to apply in the UK, as overseen by the ECJ. In this period the parties would negotiate a future relationship deal, including for trade matters. The Withdrawal Agreement referred in turn to an agreed Political Declaration - i.e., the framework for that future relationship between the UK and EU, as envisaged in Article 50(2).

126 Something that is evident from the EU's bad faith limiting of its sovereign capacity to negotiate third country agreements (an action which had no basis in law)



Notably, the UK can only be taken to have consented to the WA on the basis of an essential condition: the commitment by the parties to achieve a future permanent arrangement with the EU that enshrines UK sovereignty and secures an FTA by the end of 2020.<sup>127</sup> Article 184 of the WA provides that the EU is to use “best endeavours” and “good faith” to achieve a future relationship agreement on those terms within that time period. Other than that, the WA contained little, if anything, of value to the UK. In fact, it involved agreeing to make payment for amounts that were not due - as determined by the House of Lords European Union Committee<sup>128</sup> - and to address ex-EU citizens in the UK whilst allowing each member state solely and individually to address ex-UK citizens in the EU itself (in a manner that was non-reciprocal to the commitments made by the UK across the entirety of the four nations of the UK). The WA also proposed methods for ensuring an invisible Irish border that were fundamentally inconsistent with UK Parliamentary and democratic sovereignty, applying EU law to the Northern Ireland economy, giving the European Commission and ECJ jurisdiction over its affairs and also giving the Commission and ECJ jurisdiction over the whole of the UK in respect of EU State aid law in so far as any trade affected the north-south border on the Island of Ireland.

So the important document for the UK was the PD. This provided for an agreed form of future sovereign relationship for the UK with the EU. Article 4 of the Political Declaration (PD) states that the EU recognises UK sovereignty, along with the integrity of the UK’s internal market and the UK’s control over its independent trade policy:<sup>129</sup>

*“The future relationship will be based on a balance of rights and obligations, taking into account the principles of each Party. This balance must ensure the autonomy of the Union’s decision making and be consistent with the Union’s principles, in particular with respect to the integrity of the Single Market and the Customs Union and the indivisibility of the four freedoms. It must also ensure the sovereignty of the United Kingdom and the protection of its internal market, while respecting the result of the 2016 referendum including with regard to the development of its independent trade policy and the ending of free movement of people between the Union and the United Kingdom.”*

### **3. The Protocol and other aspects of the WA are incompatible with the agreement intended for the end of 2020**

However, the EU’s commitment in the PD to recognise the integrity of the UK’s internal market is incompatible with any implementation of the Protocol. As explained in Section A above, the Protocol would prevent the UK from protecting its businesses in relation to their NI operations from unfair EU trade dumping or subsidisation, both of which are key attributes of UK sovereignty over its trade policy and over its internal market.

Indeed, the Protocol makes clear it is envisaged to be replaced as part of an FTA, in conformity with the EU’s commitments under the PD. Thus Article 13(8) provides:

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

Paragraph 25 of the PD also refers to other Alternative Arrangements for the north-south border and says: *“Such facilitative arrangements and technologies will also be considered in Alternative Arrangements for ensuring the absence of a hard border on the island of Ireland.”*

<sup>127</sup> There is an option for the parties to extend this period, but the UK has indicated it does not wish to do so.

<sup>128</sup> HL Paper 125, 4th March 2017.

<sup>129</sup> The same point is also made in Article 17 of the Political Declaration.

Notably and as explained in the preceding Sections, read on its own, the Protocol (as adopted) is somewhat ambiguous as to its fate in the event that the parties reach no “subsequent agreement”: it speaks of non-application or cessation of application if the parties reach a “subsequent agreement”; but it does not say what happens if they do not. However, the powers provided to the EU when negotiating the WA and the NI Protocol with the UK under Article 50 TEU do not provide a sufficient legal basis for the EU27, under EU law, for permanent relations with the UK.<sup>130</sup> Thus, when taken within its legal and political background - including the rejection of the May “all weather backstop”, its consent mechanism and its legal base (Article 50 TEU), the UK’s lack of consent to a permanent framework and the Protocol’s breach of the ECHR (see point 5 below) - it is possible to construe the Protocol as not being intended to apply if the parties are unable to reach a “subsequent agreement,” (or, at the very least, those parts of it that are incompatible with the UK’s sovereignty cease to apply). This follows from (i) the deliberate change in wording between the rejected May Protocol and the adopted Protocol<sup>131</sup> and (ii) the purpose of withdrawal - i.e., the restoration of sovereignty.

The Prime Minister, consistent with these provisions, made clear during his November 2020 election campaign that

- There would be no checks across the Irish Sea
- EU law and ECJ jurisdiction would not apply to the UK after the end of this year<sup>132</sup>

Similar comments have been made by other members of the UK Government - such as the UK’s Brexit chief negotiator David Frost.<sup>133</sup>

There are perfectly acceptable arrangements for the north-south border on the Island of Ireland which are compatible with the EU’s commitment to observe UK sovereignty, as set out in this publication. They achieve the outcome which both parties have agreed to achieve of an invisible border on the Island of Ireland, but in a way which does not encroach on UK sovereignty. The EU would not be acting in good faith were it to refuse such arrangements.

In addition, as the German Constitutional Court recently made clear, arrangements with the EU do not trump key elements of national sovereignty. There is a delegation of certain matters to the EU under the EU Treaties - and *a fortiori* under the WA - but fettered by the bounds of national sovereignty. In the UK, national, non-delegable sovereignty is to be found in the doctrine of the sovereignty of Parliament. Parliament is unable to bind itself permanently to give away control over its law-making authority or to substitute the jurisdiction of the UK’s courts for the courts of a foreign territory over its citizens. Parliament cannot be taken to have agreed to such a blind delegation to bodies it cannot validly oversee. The EU is well aware of these restrictions and of the centrality of the doctrine of the sovereignty of Parliament in the UK.

#### 4. **The EU has been acting in breach of a material term of the WA, meaning that the treaty was entered into a false premise**

The WA obliges the EU to exercise best endeavours to conclude a future relationship with a sovereign UK - i.e., a UK that is no longer part of the EU. These are legal obligations which require persistent attempts to meet and proactively to negotiate the stated outcome. Implicit (or even explicit) in this is that trade is the element of the future relationship that the parties are negotiating to define. The WA does not invite negotiations that retrench or claw back elements of the EU’s power. That is to say, the negotiations are *not* for the purpose of defining a new sub-sovereign relationship for the UK to the EU; they are for the purpose of defining a new *sovereign* relationship. And yet the EU has refused so far to negotiate a normal arm’s-length trade agreement with the UK without also trying to insist on:

130 Notably, the Theresa May Northern Ireland Protocol explicitly recognised this in Article 1(4): “the objective of the Withdrawal Agreement is not to establish a permanent relationship between the Union and the United Kingdom. The provisions of this Protocol are therefore intended to apply only temporarily, taking into account the commitments of the Parties set out in Article 2(1) [...]”

131 Article 1(4) of the Theresa May Northern Ireland Protocol stated “[...] The provisions of this Protocol shall apply unless and until they are superseded, in whole or in part, by a subsequent agreement” but this reference was deliberately kept out of the new Northern Ireland Protocol.

132 Conservative Party Manifesto 2019, <https://www.conservatives.com/our-plan/get-brex-it-done-and-unleash-britains-potential>

133 See David Frost’s 18 February 2020 speech in Brussels, available at: <https://reaction.life/david-frost-speech-in-full-britains-brex-it-position/>

- Some level of control over the UK's fishing waters (See Section C above)
- A control over UK fiscal decision making through EU State aid law,

To widen the aperture and assert that the negotiations are about matters such as jurisdiction over fishing waters (a matter of sovereignty) or fiscal policy (also a matter of sovereignty) is to ignore that the UK's withdrawal from the EU as a sovereign state is the object of the overall process. Thus, given that the EU negotiates for concessions that are not related to trade as such and not present in any of its other arm's-length trade agreements, it is not exercising best endeavours or acting in good faith in negotiating the future relationship in accordance with the provisions of the Political Declaration.

Further, the EU has threatened to use the WTO's "most favoured nation" principle as a stick to wield against the UK, threatening that unless the UK agrees to what the EU desires the UK must necessarily exit on WTO terms. This is inconsistent with state practice and the core principles of world trade, which the UK can be taken to have assumed would apply, and therefore amounts to bad faith.

- When GATT was established in 1947, an exemption was provided to prevent tariffs from entering into force between certain territories which had recently left political unions and other legal relationships, including a range of highly idiosyncratic relationships left over from the age of the European empire. These included former colonies, protectorates, and territories separating from States. The USA referred to this exemption by analogy when granting by federal statute tariff-free market access to the new States in the Pacific (after the winding down of the Strategic Trust Territory); and the GATT Working Party for the Accession of the United Arab Republic (Egypt) referred to it by analogy in order to allow Egypt to give preferential treatment to States formerly part of the Ottoman Empire. It was applied expressly between Britain and the Commonwealth countries: France, Morocco, West Berlin, etc. The UK even gave an accommodation of this nature to the E(EC) itself when it was formed.<sup>134</sup>
- Nothing quite like the EU was mentioned, because nothing quite like the EU existed or was anticipated. Exit from the EU, however, is precisely the sort of situation where the exemption has practically in all cases been applied: the UK is leaving a *sui generis* political arrangement which also contains a single market. It is consistent with the past practice of GATT/WTO to exempt the UK (and the EU) from MFN following Brexit; it would be inconsistent not to. Legal systems treat like cases alike.
- Moreover, an exemption here is consistent with the core principles of world trade. First, the WTO aims to prevent trade being used as a lever or sanction for political purposes. Leaving the EU is a right; using trade to deter the exercise of that right is not. And, second, WTO rules are about stabilising world trade relations in a framework of gradual *reduction* of tariffs, not causing surprises and shocks, and not *raising* tariffs, and certainly not between two of the world's largest economies which for 48 years have had frictionless (or near-frictionless) trade.

The WTO principle of stabilising trade in the frame of gradual tariff reduction puts the burden on any objectors to show why a WTO rule (e.g., MFN) should be interpreted to require a massive and sudden tariff increase.

In addition, and independently of the exemption that was built into GATT 1947 for states emerging from political unions, Article IX, paragraph 3, of the WTO Agreement empowers the Ministerial Conference to grant waivers from any provisions of the WTO rules. Waivers are granted where three fourths of the WTO Members decide to do so.<sup>135</sup> The UK's lawyers, diplomats, and trade negotiators should have ready to hand a full account of MFN exemptions, especially those MFN exemptions which helped stabilise trade in situations where territories were separated from long-existing States or other units and demand the same.<sup>136</sup>

<sup>134</sup> Dr Tom Grant, Brexit, Tariffs, and GATT's original intent: *Why a forgotten MFN exemption merits a closer look*, Briefings for Britain, 9th July 2019: <https://briefingsforbritain.co.uk/brexit-tariffs-and-gatts-original-intent-why-a-forgotten-mfn-exemption-merits-a-closer-look/#Introduction>

<sup>135</sup> Some 110 waivers are counted in the GATT Analytical Practice from 1947 to 1995-counting only 'original' waivers; the number of extensions of existing waivers was larger still. Since the entry into force of the WTO Agreement, waivers have continued to be granted, and some old waivers have been continued.

<sup>136</sup> Tables of exemptions are available in readily accessible WTO materials; much greater depth is needed in key cases: e.g., what did the West Germans say when they sought the West Berlin exemption? What did British GATT representatives say when the Community sought its exemption?

The EU is beneficiary today of many waivers, some for specific items of trade, some for particular countries (e.g., the countries of the Western Balkans). It was under a waiver granted in accordance with GATT 1947 Article XXV (the analogue of WTO Agreement Article IX) that the Coal and Steel Community was permitted to function, notwithstanding the incomplete (i.e., not “substantially all trade”) nature of its tariff regime.<sup>137</sup>

Ultimately, by refusing to negotiate properly to deliver a sovereign future relationship agreement, the EU has not only breached a material provision of the WA but also failed to deliver on the condition upon which the UK entered into the WA. As such, the WA has been entered into by the UK on a false premise, making UK consent defective. The UK has a right to walk away.

## 5. The Protocol is in breach of the ECHR principle of the right to vote

It is worth noting in addition that the application of EU law to NI under the protocol (see Section A above) amounts to a breach of Article 3 of Protocol 1 of the ECHR (the right of people to participate in elections to their legislature) as NI citizens will not have any voting rights in EU institutions. This was confirmed in the *Matthews* case in Strasbourg.<sup>138</sup> *Matthews* was a UK national living in Gibraltar, a dependent territory of the UK. She sought to register as a voter in respect of the elections to the European Parliament, but was refused on the grounds that the Act adopted by the EC Council of Ministers on direct elections did not include Gibraltar within the franchise for these elections. She complained under Article 3 of Protocol 1 of the ECHR under the right to participate in elections of one’s legislature. The Strasbourg Court decided that the European parliament was capable of being interpreted as a “legislature” within the article and concluded that Article 3 had been breached. The UK remained responsible for securing the rights in Article 3 of Protocol 1 in respect of Community legislation in the same way as if the restriction on the franchise had been included in national law.

This incompatibility between the ECHR and the NI Protocol further reinforces the UK’s right to terminate the WA.<sup>139</sup>

## 6. The UK must exercise its right to suspend and terminate the WA obligations

In summary, given that the UK’s participation in the WA process was conditional upon the fulfilment of the obligation to achieve a sovereign future relationship agreement, the EU’s failure to deliver on this would invalidate the basis of the UK’s participation and thereby the WA as a whole. The exact timing of this legal consequence would coincide with the moment in time when it becomes clear that the EU is not fulfilling this condition (at the latest 31<sup>st</sup> December 2020).

However, the UK can formally suspend its obligations under the WA on the basis of the EU’s breach before the end of the year, under the principle “*exceptio non adimpleti contractus*”.<sup>140</sup> The exception stipulates that a State which breaches an international law obligation may be deprived of the necessary *locus standi in judicio* (the right or capacity to bring an action or to appear in a court) for complaining of corresponding obligations on the part of other States. The exception can be invoked with no requirement of notice or of any attempt to settle the dispute by diplomatic or other means as a condition. Thus, if the UK invokes the principle, the EU will forfeit the right to invoke the WA against the UK, thereby also making the arbitration clause in the WA inoperative.

<sup>137</sup> Another example is West Germany, whose territory did not include the three western sectors of Berlin (Berlin having been severed from the other parts of Germany as a matter of international law), and that was granted an MFN waiver in order to maintain tariff-free trade with the sectors.

<sup>138</sup> *Matthews v UK* (App. 24833/94) (1999)

<sup>139</sup> Even if the matter was to be litigated and the ECJ was to agree with this position, no adequate legal remedy exists. The point is non-remediable since NI would have to have votes in Council, a Commissioner and an ECJ judge - and it would have to be satisfied with its representation on all 3 (and in the EU Parliament) in conformity with the concept of shared sovereignty. The role of the UK in relation to these NI representatives, seats and appointments would also need to be addressed to the UK’s satisfaction since NI is part of the UK and the UK deals with its external relations. The UK is unlikely to find any arrangements satisfactory given the dilutive effect of NI’s size on all of the above representations.

<sup>140</sup> “A principle that ‘is so just, so equitable, so universally recognised, that it must be applied in international relations also. In any case, it is one of these ‘general principles of law recognised by civilized nations’ which the Court applies in virtue of Article 38 of its Statute” (*Diversion of Water from the Meuse (Belgium v Netherlands)* Dissenting Opinion of Judge Anzilotti)

If the use of the exception does not lead the EU to resume executing its obligations under the Treaty, the UK can exercise its right to terminate the WA. Under Article 60(3)(b) of the Vienna Convention on the Law of Treaties, 1969, a party may repudiate a treaty where there has been a “violation of a provision essential to the accomplishment of the object or purpose of the treaty”. The WA is, in international law, a treaty. The obligation of the EU to deliver on a future relationship that respects the UK’s sovereignty is an “essential” provision, arguably the essential provision of that treaty. The agreement whereby the EU was to use “best endeavours” to achieve such an outcome is not a minor obligation. International law makes clear it is an obligation of considerable substance. Yet the EU has wasted most of the negotiating period in putting forward propositions incompatible with future UK sovereignty, and thus extraneous to the agreed purpose of the negotiations - seeking to have its cake and eat it. Without this provision, the UK would not have signed the WA as there would not have been an actionable framework for the future relationship between the UK and EU, as required by Article 50.

Given that the EU would have already lost its *locus standi* under the exception, if the UK were to repudiate the WA on the basis of the breach of a material provision, it follows that the arbitration clause within the repudiated WA cannot be relied on and is not severable.

Unless the EU and UK reach an agreement on future relations that does not perpetuate the derogations of UK sovereignty contained in the WA, termination of the WA will become the only viable approach. It is clear that the Joint Committee is not the right forum for discussions over the north-south border as it does not have the necessary legal remit to replace or renegotiate the Protocol. While the UK could work within the scope of the Joint Committee to reduce the impact of the Protocol (bringing forward proposals such as Authorised Economic Operators, *de minimis* rules, a risk based system of checks, etc.), we would be constrained by the EU veto.

It is also worth noting that even under the Protocol the EU only gains the provisions of EU law for a limited period and on a conditional basis. The Protocol provides for the possibility of 4 yearly votes by the NI Assembly as to whether the arrangements under the Protocol should continue. If the vote is no, the Protocol requires a new approach to be agreed. When it comes to a vote of the Northern Ireland Assembly, the UK should not, as a democratic matter (and consistent with the Good Friday Agreement), accept the Protocol as durable unless it receives broad (positively expressed) consent of both communities in line with the Good Friday Agreement’s principles. The Government has already committed to review the Protocol’s future in such a circumstance in its declaration of 19 October 2019.<sup>141</sup> Overall, the Protocol is at best transient, and the EU’s actions have repudiated that transient effect, along with the Withdrawal Agreement as a whole.

It is important for the UK to repudiate the WA before the end of this year, and that it passes an Act of Parliament to override the European Union (Withdrawal Agreement) Act 2020, which would otherwise continue to give effect to the WA in the UK. For the UK to proceed any other way would be to imply the WA somehow has continuing effect. Now is the time to call out the EU’s breach of its fundamental obligations to permit the smooth exit of the UK from the EU’s foundational arrangements, and to transition to a new trading and wider relationship. After the end of the year, arguing the case will be more difficult since the UK will have acquiesced in the perpetuation of the Protocol, and the EU will try to insist it “sits behind” the free trade agreement in perpetuity, as a permanent stick. After that, it can only be changed through further negotiation with the EU in what will necessarily be a one-sided arrangement.

<sup>141</sup> Unilateral UK declaration of consent 19 October 2019: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/840657/Declaration\\_by\\_Her\\_Majesty\\_s\\_Government\\_of\\_the\\_United\\_Kingdom\\_of\\_Great\\_Britain\\_and\\_Northern\\_Ireland\\_concerning\\_the\\_operation\\_of\\_the\\_Democratic\\_consent\\_in\\_Northern\\_Ireland\\_provision\\_of\\_the\\_Protocol\\_on\\_Ireland\\_Northern\\_Ireland.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840657/Declaration_by_Her_Majesty_s_Government_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_concerning_the_operation_of_the_Democratic_consent_in_Northern_Ireland_provision_of_the_Protocol_on_Ireland_Northern_Ireland.pdf)

## 7. The UK must subsequently pass an Act of Parliament superseding the WA

In order to fulfil the legal effect of the termination of the WA, the UK will need to pass an Act of Parliament to repeal the Withdrawal Agreement Act 2020 (implementing the WA entered into by the UK Government by its royal prerogative). The right of the UK Parliament to enact such legislation is founded on the fundamental UK constitutional Principle of Parliamentary Sovereignty. Section 38 of the Act expressly reinforces this right (“nothing in this Act derogates from the Sovereignty of the Parliament of the United Kingdom”).

We ultimately propose that upon terminating the WA and passing an Act of Parliament to that effect, the UK should offer to replace the Protocol with either no special legal arrangements for Northern Ireland at all or a Mutual Enforcement solution. There should be no replacements for the other aspects of the WA. No longer-term monies are owed to the EU and both parties can be trusted to honour their international law obligations to continue respecting the “acquired rights” of the citizens who continue to live in their jurisdictions. Payments could, however, still be made were the EU to agree ultimately to an acceptable future relationship agreement (including FTA).

At the end of the day, terminating the WA is in line with the UK’s sovereign right to leave the EU.

## THE LEGAL APPROACH REQUIRED

The negotiation of the entirely new UK-EU future relationship is a complex one in legal terms - and, ultimately, its success or failure will depend in large part on the legal drafting, its scope, style, methodology and overall conceptualisation. Lessons should be learned from the experience of the WA and Protocol.

In determining how to address the task, there are two main strands of thought that need separate consideration:

- Matters of trade
- Matters of sovereignty and overall architecture of the future sovereign relationship

**The first strand should be relatively easy**, in that the UK is rightly asking for provisions based on international trade agreement practice and precedent. Even though the path is well-trodden, it is hoped the UK treads it with sophistication, using seasoned trade negotiators, trade economists and the latest economic models, to ensure a satisfactory outcome.

**As for the second strand**, the UK lawyers engaged in this process will need to be transactionally experienced and able to reconceptualise the approach, pushing back on any attempts by the EU to introduce “standards” as features of the UK’s and EU’s relationship which are based on premises relevant to when the UK was within the EU but not when it is no longer so. The EU is comprised of a hugely sophisticated set of international treaty arrangements seeking to provide a framework that sits above consenting member states and to which they all agree.

UK lawyers have been very influential in developing the EU and the vast majority of UK specialists in the field genuinely like and respect the EU system. They have built their careers on understanding and explaining its intricacies to lay people. Challenging that system or even thinking outside of it is very difficult.

The EU legal system also creates its own moralities, some of which are questionable. For instance, the northern Eurozone has benefitted unduly from the set-up, particularly in that it has not so far “paid” for the arrangements from the zone from which it benefits so heavily (as explained elsewhere in this paper). Whatever the merits or demerits of the EU system, Member States have given it some form of consent.

This is no longer the case for the UK. The UK has left the EU’s architecture. As such its sovereignty is reclaimed and it is vital that it does not hand any bits of sovereignty away again on the way out.

## STEP FOUR - BENEFIT FROM ANY OUTCOME

If the Government follows the approach described in the previous chapters, there are two likely outcomes:

1. **If the proposed solutions for Northern Ireland and the other problems with the WA (described in Chapter I) are properly crafted and executed, the EU will be under pressure to accept them** - as these will give them everything they have claimed they wanted and can ask for with any degree of conceivable legitimacy, but not at the loss of our sovereignty (upon which they have committed not to seek to encroach). This would mean that the future UK-EU relationship would be governed by the “sovereignty compliant” FTA (or an acceptable modified version) described in Section II and this Section IV.
2. **If the EU does not accept this argument, the EU’s underlying desire to control us will be exposed publicly**, setting the stage for a claim for failure of best endeavours as well as a loss in the court of public opinion. This would mean a default to the World Trade Organisation rules relationship with the EU.

In either case, the UK will benefit.

### AGREEMENT WITH THE EU

An acceptable agreement guaranteeing the UK’s sovereignty will represent a win-win for both the UK and the EU and is a prize for which no effort should be spared.

This ultimate, new arrangement must be based on mutual respect and mutual recognition of regulations and/or regulatory processes, based on achievement of high-level outcomes, across all sectors. It must replace, on the basis set out in this paper, the WA and PD - if necessary through the protective steps set out in Chapter III. In Chapter II, we have set out what can be offered to the EU to achieve similar ends but through sovereignty compliant means.

On the trade front, such an agreement would not take as long as other trade agreements to negotiate. Our starting point - zero tariffs and identical rules - is where all normal free trade negotiations end up after several years. Uniquely, we already share legislation and standards that are recognised as being legally identical. So the key remaining features we need to agree on are rules of origin for goods (tailored for the future relationship between the parties) and divergence mechanisms for standards and rules - i.e., if in the future either party changes its rules, an impartial arbitration system to determine whether they remain equivalent and what to do if they are not. Managed divergence is a feature of advanced FTAs.

We are in short in a very different and unique position to do such a deal. That means that, with the right political will, we can do this bigger, full comprehensive trade deal relatively swiftly.

### Most Favoured Nation Clarification

Some have suggested that the EU will not want to offer a wide free trade deal to the UK because Most Favoured Nation (MFN) provisions in earlier EU treaties, like CETA, will require that these arrangements be offered to all the EU’s other trade partners, both past and present. This is a different point from the application of MFN as part of the general WTO rules, and relates to treaty-based MFN provisions in the FTAs the EU has struck with other states. However, even so, it is a misunderstanding of how MFN provisions work, since they require equal treatment in like circumstances only. Because of our long membership in the EU and our exceptionally close ties with the EU, the UK is in a special position vis-à-vis the EU, unlike that of any other country. MFN obligations in other EU treaties will not apply to our new EU deal, which in many respects will operate as a trade continuation agreement, rather than a wholly new FTA.

## EU Approval of the Sovereignty Compliant Agreement

On the approval process, the new Sovereignty Compliant Agreement can be with the EU itself and need not require that the individual Member States are also parties (a 'mixed competence' agreement). The ECJ Judgment on the EU-Singapore FTA deal means that if our 'Sovereignty Compliant' Agreement does not include portfolio investment and investor protection through Investor-State Dispute Settlement - which could be put into a separate deal later - then the EU alone can ratify, conclude and implement our deal. Only the Commission, Council and Parliament need to agree the FTA, and we will not need the six years or so ratification for so-called 'mixed agreements', where one national parliament can still block the deal. This will avoid the problems encountered with the EU-Canada Comprehensive Economic and Trade Agreement, which, as a "mixed competence" agreement, included individual EU Member States as parties as well as the EU itself. This entailed the need for national ratification procedures in each Member State as well as at EU level. As a result, the Wallonia regional Parliament was able to hold up the Canadian deal.

- The Japan-EU Economic Partnership Agreement omitted rules regarding the protection of investment including investor-state dispute settlement, to be negotiated later. There are still serious issues to be considered regarding the EU's Investment Court System, which it is seeking to impose in its external agreements in place of traditional bilateral international arbitration.
- The UK would need to consider whether it would be willing to adopt the EU's ICS model for investment matters going forward, or to hold out for a different system.

There is also a political choice to be made as to how to pitch this deal. Certain matters require unanimity in the EU Council under EU law. Other matters can be settled by Qualified Majority Vote (QMV) in Council. This is a different point from mixed competence agreements, mentioned above, which require national member state ratification, e.g., Wallonia (for CETA), and cannot be agreed to purely by the EU itself. Even with matters falling purely within the EU's competence, which can be achieved by a minor narrowing of what is asked for (as above), there is a choice to be made as to whether or not to pitch this as something executable by the EU through QMV and (almost certainly, given what we are likely to wish to ask for) majority vote in the EU Parliament, or whether to push for an approach that technically requires unanimity. It may be that politically the EU will be reluctant to agree anything without complete consensus anyway, but there is a significant technical difference in law whereby matters subject to QMV could be pushed through against the opposition of certain key states - and behaviours in Council are likely to be different in that context, even if there is a pretence at seeking consensus.

- In essence, goods, agriproducts and financial services matters can be agreed by QMV and majority vote in the EU Parliament. This covers a large portion of what is cross-border. We should tie goods, agriproducts and financial services together. The EU is a net exporter of goods and agriproducts and a net importer of financial services. It has limited interest in negotiating access to the UK for its financial companies since our market is pretty open anyway, but it would like to force some UK-based companies to move operations to the continent, reducing our tax base and one of our key economic advantages (and points of leverage).
- A deal covering all aspects would ultimately be in the EU's favour, but it will initially seek (as it has been) to separate off arrangements for goods and agriproducts (which it desperately wants) from financial services in the hope of reducing what we have to bargain with.



## UK Implementation of the Sovereignty Compliant Agreement

The UK will need to pass an Act of Parliament in order to implement a Sovereignty Compliant Agreement, in accordance with the dualist theory (spelled out and endorsed by the UK Supreme Court in *Miller* (2017)<sup>142</sup>).

Clear guidelines should be delivered and tailored for different sectors as required for the steps that businesses need to take to be ready for the end of the TP (businesses cannot be expected to interpret rules, UK and EU must be clear about what rules apply and how).

Fund, incentivise and stimulate an adequate supply of customs agent and other intermediaries on whom businesses will rely for any new regime. Centrally deployed Government resource (for example veterinary or other staff) that could help businesses complete any formalities without additional cost. A Funded Transport Plan should be in place to ensure goods can flow through NI ports without delays or queues. This is work that will be required for smooth functioning even if no agreement is reached.

## UK Subsidy Control Regime and Relationship with the EU FTA<sup>143</sup>

The Government has announced an intention to introduce a subsidy control regime.<sup>144</sup> This will be strongly informed by the Agreement with the EU - which will inevitably need to be reached first. The subsidy control provisions of an FTA with the EU should only bite on subsidies that appreciably distort competition between the UK and the EU. This is consistent with the findings of the House of Lords Internal Market Sub-Committee; subsidies below this threshold are not the business of a trade agreement.<sup>145</sup>

Such an Agreement should accord to the principles below. To stress test the idea we have translated these principles into suggested legal drafting in Annex D. No doubt this can be improved. The goal in doing so is to focus discussion on a detailed compromise proposal and to flush out the trade-offs and questions embedded within it.

**Definition of Subsidy.** The definition of subsidy would draw on both the EU State aid rules and the WTO SCM Agreement - the only two systems of international subsidy control in the world. This is consistent with the EU's negotiating directive which states that "*the envisaged agreement should uphold common high standards and corresponding high standards over time with Union standards as a reference point in the areas of State aid...*" [emphasis added].

The EU definition of State aid has merit as a reference point. In particular, the concepts of advantage, state resources and state immutability are all well developed, relatively stable and overlap almost completely with the WTO concept of subsidy. The legal certainty they bring would be valuable to enterprises and public administration on both sides.

The EU definition, however, also has frailties that ought not to be brought over. A series of ECJ judgments have altered the definition of "specificity" and made this concept excessively complex and unpredictable. In addition, since the governing principle of the UK/EU subsidy control arrangements is that they should only bite on measures that actually effect trade and competition, the current EU approach to effect on trade and competition within the definition of State aid cannot be used.

<sup>142</sup> R (on the application of Miller and another) v Secretary of State for Exiting the European Union. [2017] UKSC 5, p. 19, 20, para. 55-58 - In the words of Lord Oliver of Aylmerton in JH Rayner: 'Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation'.

<sup>143</sup> This proposal is based on the recent blog by James Webber for the UK State aid Law Association, available at <https://uksala.org/compromise-position-for-subsidy-control-in-a-uk-eu-fta/>

<sup>144</sup> "The UK will have its own regime of subsidy control" : Chapter 20, The Future Relationship with the EU: the UK's Approach to Negotiations, February 2020

<sup>145</sup> See Letter from Baroness Donaghy to Paul Scully MP, 3 April 2020 at paragraph 44: "We endorse the statement by James Webber that "subsidy control between trading partners only really needs to catch subsidies that distort that trade, and anything that happens beneath it is really not the business of a trade agreement"

**Specificity.** Specificity is the term used in subsidy control to separate measures that are normal public policy (corporation tax rates or decisions to build a new motorway) from subsidies. The reason it is important is that many Government policies advantage companies unequally. Does building a new motorway junction near an Amazon distribution warehouse constitute a subsidy to them? Does allowing faster amortisation of R&D capital expenses - depressing taxable profit - constitute a subsidy for research heavy companies?

The concept of “specificity” polices this line between general policy (even if not all benefit equally) from actual subsidy. Historically whether a measure was specific was measured against availability. If it was generally available then it was not specific. Recent ECJ case law - mainly in an attempt to tackle disagreeable tax measures - has tried to redefine specificity by moving away from a test of availability and considering whether the measure is an exception to a “reference framework”.<sup>146</sup> This change introduces a great deal of complexity. Broadly speaking, a measure is considered specific if it deviates from a reference framework where that deviation is not justified by the “objectives” of the reference framework. What does that mean? Are a series of tax provisions that differentiate between two taxpayers considered *together* as “the reference framework” - if so, there is no exception or deviation that could be considered a specific measure? Or do we pick out the provision that treats taxpayers in a certain situation more generously and say that is an “exception” to the reference framework? If the latter, how can we predict whether the Court or Commission will consider the exception to be justified by the objectives of the reference framework? Indeed do we even know what the objectives are? In the *Brauereri* case, Germany, the Commission and the taxpayer had three different (but arguably equally valid) views on what the “objectives” of the tax measures in question were.<sup>147</sup> It becomes excessively difficult to predict whether a measure is a subsidy or not.

Recent cases have also started to see a confusion develop between the concept of advantage and specificity.<sup>148</sup> In these cases, the existence of an advantage results in a *presumption* of specificity - effectively merging the previously separate criteria together. This is also very undesirable. Specificity is a vital and separate element in the test for State aid. To extend the analogy above, a business may get an obvious advantage from a new motorway junction or flood defences built on the seaward side of their premises. However, it is inappropriate to claw that cost back from the business concerned after the event - which is the implication of finding the advantage is *specific* and therefore State aid. The business concerned may not even have been asked. Had it known the risks, it may have preferred the extra costs of driving to the next junction or flood insurance etc.

Eventually the ECJ will have to straighten out its jurisprudence in these areas but, in the meantime, there is no reason to import the confusion into a UK/EU FTA.

Specificity should have its traditional meaning in the subsidy control provisions of the UK/EU FTA. A measure is specific if it is not generally available. The WTO SCM Agreement definition of specificity therefore is a more suitable basis for catching such measures.

**Effect on Trade and Competition.** The other area where the EU definition of State aid cannot be used in a UK/EU FTA is in relation to effect on trade and competition. While these are two separate limbs of the formal definition of State aid in the TFEU, they do not have either a separate or practical meaning. According to established ECJ case law, any aid measure in a market open to competition can affect trade and competition - regardless of whether there is any actual such effect.

Since the governing principle of the UK/EU subsidy control arrangements is that they should only bite on measures that actually affect trade and competition, such a definition is unworkable.

<sup>146</sup> The comparison of these two methods is helpfully explained by Advocate General Oe in his opinion in C-374-17 Finanzamt B v A Brauerei

<sup>147</sup> Ibid paragraph 132-134: In the Commission’s view the objective was to maximise the tax take; Germany’s view the objective was to reflect fairly the ability to pay; the taxpayer’s view the objective was to tax the change of control in land (which they said hadn’t occurred)

<sup>148</sup> Joined Cases T-755/15 and T-759/15, Luxembourg v Commission and Fiat Chrysler Finance Europe v Commission, Judgment of 24 September 2019, ECLI:EU:T:2019:670

Effect on competition and trade can be dealt with in the FTA using the following framework:

First, safe harbours should be agreed *which would not lead* to appreciable effects on competition and trade. This will include any aid below a sum, indexed each year. This sum would have to be material - say in order of €50/€75 million per measure. In addition, categories of aid should be noted as not liable to affect competition and trade, for instance competitively tendered infrastructure projects or aid for non-traded goods and services (such as toll roads, 5G rollout or railway franchises).

Second, there should also be features, which would lead to appreciable effect on competition and trade. These could track what the Commission currently calls “manifest negative effects” in its common assessment principles - such as aid explicitly to move jobs or investment from the UK to the EU or vice versa. Alternatively, aid that is demonstrably unnecessary (such as that paid to support investment where the decision to invest had been made before aid was offered).

Third, aid outside the safe harbour but not caught by manifest negative effects would be subject to an assessment regarding the effect on trade and competition. At the level of determining whether a particular measure is a subsidy / State aid, such an approach is alien to the EU since the effect on trade and competition criteria in Article 107 TFEU do not have a practical meaning.<sup>149</sup> This said, the Commission’s compatibility assessment (i.e., once aid is notified is it permissible) does look more closely at effects on competition - and the State aid modernisation process over the last decade or so has increased the use of economic analysis to assess effects.

Analytically, therefore, it is perfectly possible to assess the effects on competition and trade of a subsidy. It would require (probably) the CMA in the UK and the Commission to investigate and find a reasonable likelihood of trade and competition distortion - a similar evidence-based, forward-looking analysis as used in the merger regime. In a UK context, the Office of Fair Trading and HM Treasury produced a short readable study titled “*Guidance on how to assess the competitive effects of subsidies*” in 2007, explaining how this can be done in the context of UK Green Book assessment.<sup>150</sup> It is worth noting that - as with EU State aid currently - it is not necessary to attempt to separate the analysis of trade and competition for this purpose. The concepts are best understood and assessed together.

**Objectives of Common Interest.** Once effects on competition and trade are found, they could then be justified as a proportionate way to achieve agreed common goals - such as sustainable development or climate change. This “balancing” exercise is how the EU State aid regime works today. One potential difficulty is that the WTO SCM Agreement does not anticipate such balancing to make otherwise prohibited or actionable subsidies allowable.

This is a legitimate point, but a UK/EU FTA containing such a provision would be no more egregious than the EU’s system of State aid is today. Moreover, the UK/EU FTA only effects the subsidy arrangements between each other. It does not affect remedies available (including countermeasures) to other signatories to the WTO SCM Agreement against subsidies the UK and EU consider to be proportionate to a common interest.

In any event, the FTA could be expressed as without prejudice to the WTO SCM Agreement.

**Competent Authority.** Each side will have a competent authority capable of investigating aid to assess effects and considering whether aid is a proportionate way to achieve common objectives. That would be the Commission for the EU and, most likely, the CMA for the UK.

The competent authorities could require changes to the aid proposals - such as awarding it on a non-discriminatory basis or requiring modifications to the scheme - such as reducing its scale, preventing overcompensation or allowing clawback.

<sup>149</sup> Evidence of George Peretz QC to the House of Lords Internal Market Sub-Committee: Mr Peretz noted that “analysis of [this] effect on trade” takes place “at an astonishingly superficial level”, see Letter from Baroness Donaghy to Paul Scully MP, 3 April 2020

<sup>150</sup> Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/191490/Green\\_Book\\_supplementary\\_guidance\\_assessing\\_competition\\_effects\\_subsidies.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/191490/Green_Book_supplementary_guidance_assessing_competition_effects_subsidies.pdf)

The competent authorities would have the ability to order that aid that does create distortive effects and is not a proportionate way to achieve common objectives, shall be prohibited or recovered insofar as paid. In each case, this would be limited by the constitutional position of both competent authorities - i.e., the CMA could not contradict a clear Act of Parliament granting such aid.

**Remedies.** If either party considers a competitive effect exists that disturbs the level playing field, and which is not justified by an objective of common interest, it could take unilateral action. First, they have the right to appeal through each jurisdiction's domestic courts. The effectiveness of the system would be enhanced if private parties from each jurisdiction could also bring such claims in the domestic legal system of the UK and before the ECJ respectively.

Second, each side would be able to seek consultations - similar to the regime under the SCM Agreement.

Lastly, each side would retain unilateral tariff measures to permit proportionate retaliation. Such countermeasures are to the fullest extent possible focused on the same beneficiary or sector that received the aid complained of and should be proportionate, meaning they should not exceed the harm caused to competition by the subsidy complained of - again taking into account any objective of common interest.

The UK should be willing to submit the substance of any dispute (i.e., whether a subsidy measure is allowable under the Agreement) to binding independent dispute resolution mechanism (**DSM**). The EU is very unlikely to agree to that as it risks conflicting with the supremacy of the ECJ within the EU. For instance, Member State measure that has been approved as State aid by the Commission and upheld by the ECJ could be attacked by the DSM in the UK/EU FTA.

This difficulty can be avoided if the reference to the DSM was limited to arguments that the retaliation is disproportionate or not justified. This takes the EU's decision to find an aid measure compatible with its single market out of the DSM. Rather it would be the UK or EU's decision to impose countermeasures against the other that was before the DSM. Such countermeasures are idiosyncratic to the UK/EU FTA - they do not exist under the Treaties. As such, the DSM cannot call into question the Commission and Court's approval of a State aid measure under the TFEU.

**Northern Ireland.** Consistent with the balance of this paper, such a subsidy control proposal is intended to supersede Article 10 of the Protocol on Ireland and Northern Ireland whether pursuant to Article 13(8) of that Protocol or otherwise.

**UK Domestic Regime.** The FTA with the EU does not answer - and neither should it answer - all the design questions with respect to a domestic UK subsidy control regime. That topic is beyond the scope of this note except to say that large procedural and substantive improvements over the current State aid regime are possible and can be adopted while complying with the terms of the UK's obligations under the FTA text below.

## NO AGREEMENT

If the UK and the EU do not come to an acceptable agreement, then the UK must immediately prepare to exit the TP on 31 December under WTO rules (the Prime Minister's "Australian Option") and to take the necessary legal, economic, and strategic steps necessary to ensure the UK's sovereign power and protect the UK's commercial interests.

These steps are:

1. **Continue to offer swiftly an FTA.** The EU has already made a basic FTA offer on trade to the UK.<sup>151</sup> The UK should accept the proposal as a standstill or stopgap arrangement, whilst still signalling openness to negotiate a more comprehensive FTA. The basic FTA will be uncomplicated in its terms, quite short - but sufficient to enable the EU and the UK to maintain zero tariffs on trade between them under WTO rules and establish rules of origin arrangements. The Government should also seek (in the same document, or side-by-side) agreement covering financial services on the basis of Enhanced Equivalence (drafted so as to preserve and enhance UK competitiveness) across all financial services sectors. Such a deal could be smoothly agreed at EU level, as goods, agriproducts and financial services matters can be agreed by QMV and majority vote in the EU parliament (without the requirement of national member state ratification of the deal).<sup>152</sup> However, in accepting the EU's offer of a basic FTA, we need to make one vital proviso: that the offer is accepted by the whole of the United Kingdom, including Northern Ireland and Great Britain. Indeed, a basic deal will make Northern Ireland/Republic of Ireland arrangements easier since it will eliminate the need for tariffs in both directions on virtually all goods.
2. **Reciprocate on "mini-deals".** The EU has already legislated to mitigate against the most harmful effects of a possible no deal scenario, through so-called "mini deals", on the basis that the UK will do the same. Seventeen measures have been agreed at EU level, including: retaining basic connections for aviation and on aviation safety, for road haulage trucks, for rail operations and rail safety, for shipping, for infrastructure including telecommunications and energy. These are to ensure, for instance, that, planes will continue to fly to and from the UK to the EU, trucks will continue to pick up loads in third countries under cabotage rights, rail services will continue to run safely through the Channel Tunnel, and ships will continue to dock.<sup>153</sup> The mini-deals also cover fishing and maritime - those rules relating to the European Maritime and Fisheries Fund, the fund for the EU's maritime and fisheries policies for 2014-2020. There are social security contingency measures. There is most helpfully a visa waiver scheme for British visitors to the EU. The EU has also given authorisation for the EU to sell goods to us as a third country. Energy efficiency is protected, as is the energy market in the Island of Ireland. Euro clearing has sensibly been secured (at least temporarily). Most importantly, the agreement helping the Northern Ireland Peace Process, that is PEACE IV and its territorial cooperation programmes (both for Ireland/UK and for Ireland/Northern Ireland/Scotland), will continue. Another EU programme for students - protecting the ongoing learning mobility activities under Erasmus will be retained too. Then there are measures on the continued implementation of the EU budget. All that is needed is that the UK reciprocates - which we should do in these areas. We would also want to agree that these measures did not require formal negotiation but to start negotiating a longer-term package of such measures to ensure their continuation.

151 First on 7th March 2018, when Mr Tusk said: "I propose that we aim for a trade agreement covering all sectors and with zero tariffs on goods. Like other free trade agreements, it should address services." Then again by Chief Brexit negotiator Monsieur Barnier on 2nd August 2018 saying: "The EU has offered a Free Trade Agreement with zero tariffs and no quantitative restrictions for goods. It proposed close customs and regulatory cooperation and access to public procurement markets, to name just a few examples."

And again, by Mr Tusk tweeting on 4th October last year, "From the very beginning, the EU offer has been a Canada+++ deal. Much further reaching on trade, internal security and foreign policy cooperation. This is a true measure of respect. And this offer remains in place".

152 The EU is a net exporter of goods and agriproducts and a net importer of financial services. It has limited interest in negotiating access to the UK for its financial companies since our market is pretty open anyway, but it would like to force some UK-based companies to move operations to the continent, reducing our tax base and one of our key economic advantages (and points of leverage). A deal covering all aspects would ultimately be in the EU's favour, but it will initially seek (as it has been) to separate off arrangements for goods and agriproducts (which it desperately wants) from financial services in the hope of reducing what we have to bargain with.

153 Though some of these mini-deals are supposedly 'temporary', that is usually to allow time to implement a more permanent solution. The EU manifestly has no interest in deferring a 'cliff edge' - if it wanted to teach the UK a lesson (despite the great cost to itself) it would do so at the point of our departure.

3. **Protect vulnerable industry sectors.** Prepare measures to help sectors particularly affected by the impact of “no deal” through subsidies (as far as allowable), marketing, regional aid, R&D funds, tax, legal and regulatory adjustments (a dedicated Business Transition Fund). These plans can be announced ahead of departure. It may even be possible to offset the impact of tariff obligations. A well-targeted subsidy package, prepared in case the EU were to impose tariffs against UK agricultural products, would not increase exports, say, of British lamb to Europe; nor would it reduce imports of any EU product into the UK. The purpose of the package will be to stabilise trade relations in line with the pre-Brexit *status quo*, not to change them. The purpose thus accords with WTO principles of stability and security of trade. Any subsidy package should be accompanied by bilateral and multilateral outreach to States that might be affected by it, with a view to opening channels for the exchange of information and to rectifying any trade distortions that might inadvertently result from the subsidy. In addition to heading off problems before they happen, such outreach will establish a record demonstrating the UK’s good faith and genuine intention not to breach GATT<sup>154</sup>.
4. **Build new customs infrastructure.** Apply the full resources of Treasury, the Home Office and the Department of Transport, through HMRC, Border Force, the Police, Port and Road Authorities to establishing the policies and operational capacity for businesses to make customs declarations and transit convention procedures in full for their exports to the EU in order to make sure that just-in-time supply chains across the Channel are not disrupted. This is work that will be required for smooth functioning whether we are on WTO terms or we have a “sovereignty compliant” FTA.
5. **Guarantee EU/UK Citizens rights.** The UK made an offer under settled status plans to the large numbers of EU citizens who live and work in the UK, who make a vital and welcome contribution to our economy, our culture and our society. We have already passed the legislation to retain and improve this scheme and its practicalities and can progress it under basic deal preparations regardless. But we seek reciprocation for UK citizens in the EU. This has so far been done at member state level - several EU countries have legislated to guarantee the rights of UK citizens, subject to our reciprocal action. Logically and fairly, the matter should be dealt with by the EU as a whole, given it is purportedly our negotiating counterparty (and because the reasoning underpinning the EU’s stance is generally otherwise pan-EU), but we could settle for member state reciprocity.
6. **Address the Irish Border.** The UK should implement Alternative Arrangements on its side of the north-south border on the Island of Ireland and challenge the EU to do the same.
7. **Invoke GATT Article XXI Security Exceptions.** GATT Article XXI provides that:

*“...Nothing in [GATT] shall be construed... (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests... (iii) taken in time of war or other emergency in international relations...”*

GATT parties, including the EEC, have asserted practically unlimited discretion in identifying the circumstances that justify invocation of Article XXI. The EEC went so far on one occasion as to say that the rights exercised by a party invoking Article XXI are “inherent,” that provision being a mere reflection of them in formal terms. The EEC also said that the invocation of Article XXI rights “required neither notification, justification nor approval.” The GATT Contracting Parties by Decision of 30 November 1982 said that Contracting Parties “*should* be informed to the fullest extent possible of trade measures taken under Article XXI,” but they did not make a transmission of information obligatory.

Situations in which States have invoked Article XXI range from the serious to the trivial. The number of such situations is significant. To give one example, Ghana invoked it to support the independence of Angola from Portugal (SR.19/12, p. 196). To give another, Sweden in 1975 protected its footwear industry on Article XXI grounds. Sweden’s contemporaneous statement on the matter merits recalling:

154 GATT Article XVI is designed to deter States from granting or maintaining “any subsidy... which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory...” (emphasis added). Moreover, such a subsidy would not run afoul Article XVI. It is true that a GATT Panel in 1960 reviewing Article XVI said that “[t]he phrase ‘increased exports’... was intended to include the concept of maintaining exports at a higher level than would otherwise exist in the absence of a subsidy.” (8L/1160, adopted on 24 May 1960, 9S/188, 191, para. 10). However, this interpretation appears to have concerned the case where market forces would have brought about a lower level of exports and the exporting State contemplated a subsidy in order to counteract the market. It does not appear to have concerned the situation where a lower level of exports is brought about by the importing State imposing a tariff where none had existed before.

*“decrease in domestic production has become a critical threat to the emergency planning of Sweden’s economic defence as an integral part of the country’s security policy... Such [shoe] capacity is indispensable in order to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations...” (L/4250, p. 3).*

Article XXI (b)(iii) is not the only branch of the security exceptions. Article XXI(c) provides that the GATT shall not be construed “to prevent any contracting party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.” This provision has been invoked chiefly in connection with the enforcement of UN Security Council sanctions against countries such as Iraq. However, on a plain reading of the text, it is a much wider exception than that. An argument is to be made that Article XXI(c) addresses as well situations where States have settled a dispute in accordance with UN Charter Chapter VI (Pacific Settlement of Disputes) and where trade-related measures otherwise not in accordance with WTO rules are necessary to safeguard their dispute settlement outcome. The Good Friday Agreement might plausibly be described as a dispute settlement outcome that requires some adjustments in the application of WTO rules to safeguard its continued successful implementation post-Brexit. [NB: Dispute settlement, to accord with Chapter VI of the Charter, need not have involved UN ‘good offices’ or other UN functions in any way. Chapter VI (Article 33 thereof) is expressly open-ended as to how parties settle their disputes.] The advantage of paragraph (c) is that it does not involve invoking an “emergency”; and it ties into an international obligation: the party invoking it may say, plausibly, that the national security measure is being taken not on discretionary grounds only, but as a matter of satisfying the obligation.

8. **Re-evaluate the “Divorce Bill”**. As regards the £39 billion payment envisaged in the WA, this represents an amount which the House of Lords EU financial affairs sub-committee indicated is not owing as a matter of law. We could consider making a significantly lower payment as a measure of goodwill, once amounts have been fully assessed as properly covering matters we decide to fund within the EU on an *ex gratia* basis and once acceptable arrangements have been agreed by the EU.
9. **Continue negotiations of FTAs outside the EU**. We should continue to separately reach out across the world for trade deals: e.g., with the US, Australia, Japan, India and China, with whom the EU has not concluded free trade agreements; and across the Pacific, our Commonwealth friends, and other countries in Africa and Latin America.<sup>155</sup> Particular efforts should be invested in an FTA with the US. A full FTA with the US provides virtually the same economic benefits as completing FTAs with all non-EU countries. This is because virtually every good/service that we currently import can be sourced from the vast US market at low world market prices. Not only does this provide most of the economic benefits of free trade with the rest of the world to our economy but it insulates our economy from the negative effects of any tariffs imposed against the EU. This is because EU producers would have to absorb our tariffs in order to sell into our home market based on (lower) world market prices. A deal with the United States is also about the promise of new shared technology, electric cars and future iPhones, and financial services. It will add billions to the British economy. Whilst some are understandably worried about our standards on food and other products, we can and should maintain those. We need not compromise the safety or health of the British people. And as for our NHS, we need not accept any deal requiring us to put out to tender parts of the NHS we do not tender out already, and we need not compromise our health standards or our free-at-point-of-delivery system. EU companies already tender for contracts on an equal basis with UK companies under the EU’s public procurement rules (and UK companies have reciprocal rights in the EU during our membership). If there are aspects of the way food is produced in other countries which, whilst not putting consumers’ health at risk, raise other issues, we can consider how best to address those. We need not lower our food standards but we should maintain them by ensuring our regulations are outcome-based - NB:

<sup>155</sup> We can benefit from FTAs with these countries while helping developing countries reap the benefits of fairer access. We should make our underlying intentions clear: whilst we wish to maintain our domestic standards, we have no intention of imposing arbitrary barriers to imports from developing countries, such as to the agricultural products they want to sell us, in the name of protectionism. That would be to the economic detriment of all. To take just one example, when the EU attempted to block imports of Basmati rice from India, even Brussels admitted that this trade barrier had no basis in science, and that there was no evidence of any benefit to consumers: this was protectionism, plain and simple. Free trade is fair trade - and we know that trade liberalisation will enrich all of us.

- We should focus on the value of trade deals rolled over and not the number. We have already made progress with a number of high value trade deals, such as CETA, the Swiss Agreement, etc
- Joining the 11-nation Comprehensive and Progressive Trans Pacific Partnership (CPTPP) would preclude the need to negotiate bilateral treaties with key partners such as Canada, Japan and Australia. This should be one of our strategic priorities going forward.

## 10. Ensure remaining trade matters are addressed

- **Continued recognition of EU standards, certifications, etc.** Sections 2 and 3 of the European Union (Withdrawal) Act 2018<sup>156</sup> maintain in UK law after 31 December 2021 both existing EU-based domestic legislation and EU direct legislation (the latter is converted automatically into UK law). The general effect of this Act is that, by default, goods and services which are provided from EU member states and which are compliant with EU law and standards may continue to be lawfully imported into the UK after exit. For example, a medicine licensed by the European Medicines Agency would continue (by default) to be recognised as licensed and lawfully sellable in the UK. A large number of SIs have been made under section 8 as part of “no deal” preparations which would modify the default position, for example transferring a power to certify or license a product from an EU agency to a UK agency - additional “no deal” SI will be required.<sup>157</sup> However, while it may be necessary or appropriate to submit at least some of the necessary SIs to the affirmative vote procedure prior to 31<sup>st</sup> December, these are yes/no votes and unlike a Bill do not have the potential for wrecking amendments or, for example, amendments ruling out “no deal” exit being attached to them.
- **Tariffs.** Zero tariffs on trade between the UK and the EU can be implemented by a Treasury regulation under section 9 of the Taxation (Cross Border Trade) Act 2018. Such a regulation is an SI subject to negative resolution procedure; i.e., it can be annulled by a resolution of the House of Commons but unless and until an annulling resolution were to be passed, the tariff scheme would come into effect and stay in effect. Such a regulation could therefore be made by the Treasury to come into force on 31<sup>st</sup> December 2020 at the end of the TP. In order to have vires to make a regulation under section 9, there must be an “arrangement” between the UK and the country or territory concerned for preferential tariff rates. Therefore a political agreement with the EU would be a sufficient legal basis under UK law to keep tariffs off EU goods imports even if it were to take some time to implement a formal legal agreement.

Further, there are a number of important points to understand as background and points to keep in reserve, which are relevant to UK argumentation, approach and reasoning in case of “no agreement”.<sup>158</sup>

- **Maintain frictionless trade into the UK to protect supply chains and consumer welfare, by unilateral act if necessary, under the “Post-Union exemption” to MFN.** The GATT/WTO have always aimed to achieve lower tariffs and to prevent tariffs from being used as a political weapon. The end of political unions and similar relationships has not triggered the imposition of tariffs between the territories leaving such relationships.
- **Move for an ad hoc exemption to MFN.** This is done often. The EU does it not infrequently. It should be explored as a possibility between the UK and EU.
- **Remind any objectors that the WTO embodies a presumption against tariffs, even after an MFN waiver has lapsed.** Tariffs don’t snap instantly into place if a waiver or exemption lapses. Examples of tariff regime continuity are visible in WTO practice.
- **Prepare a targeted subsidy package to protect UK agricultural producers who would be harmed if the EU were to impose tariffs on their products.** GATT Article XVI aims to prevent subsidies that increase exports or reduce imports. That’s not what we would be doing; we would seek stability of exports as against a new tariff. Art. XVI aims to let the market, not tariff regimes, determine trade flows.

<sup>156</sup> The European Union (Withdrawal Agreement) Act 2020 postponed the coming into force of these provisions until the end of the transition period on 31 December 2020

<sup>157</sup> <https://publications.parliament.uk/pa/cm201719/cmselect/cmproced/1395/139505.htm>

<sup>158</sup> More details are set out in Appendix D.



- **Invoke GATT Article XXI Security Exceptions.** These are highly discretionary and have been used in trivial situations. Ours would not be trivial. Moreover, Article XXI does not necessarily mean an “emergency”; it also applies where necessary for fulfilling UN obligations (such as the integrity of a dispute settlement outcome like the Good Friday Agreement).
- **Prepare for dispute settlement proceedings.** This includes identifying which WTO parties might sue; what their legal claims might be; what the timelines and outcomes of a proceeding might be; and preparing our legal defences, including antecedent diplomatic steps.

Overall, a WTO based relationship with the EU would be on a par with that which the EU has with the US, and with most other countries around the world. Nothing about this course of action precludes the possibility of agreeing an FTA with the EU at a future date.

## STEP FIVE - OFFER THE RIGHT DEAL

As can be seen, the key elements of the Withdrawal Agreement including the Northern Ireland Protocol are incompatible with UK sovereignty if continued into the future and should operate merely as a stepping-stone to an end-of-year long-term relationship between the UK and the EU.

The EU has seriously breached the agreement, even as it stands, since it has been structurally unable to engage in meaningful negotiations (for what is now the majority of the intended negotiation period) towards a sovereign outcome for the UK. This is a point to which it had pre-committed and which is intrinsic to the sovereign right of a state to withdraw from an international organisation such as the EU.

The UK therefore needs to prevail on the EU to agree to remove the sovereignty-incompliant elements of the WA and the Protocol or be ready to repudiate the arrangement. The Protocol itself in any event is unclear as to its status (as explained above) if no satisfactory deal for the long-term relationship can be reached at the end of 2020.

As a result, the UK's offer should be as follows:

1. **A mutually beneficial long-term trade deal which respects UK sovereignty**, covering both goods and services (the EU can agree to most aspects of this by qualified majority vote - it need not go through national Parliaments). As part of this, the UK may be prepared to recognise the EU's geographic indicators, so long as this is reciprocal and does not interfere with trade relations with other countries, and there is adequate consideration from the EU for this exceptional ask
2. **Suitable arrangements on security that respect the UK's sovereignty**
3. **Warm words on defence, preserving the UK's ability to act in its own interests at all times**, particularly given the unforeseeability of future needs
4. **Sovereign arrangements for EU access to UK fishing waters on the basis of reciprocity**, capable of being re-calibrated and ultimately terminated at will by the UK
5. **Making the remaining payments under the financial provisions in the now defunct Withdrawal Agreement, but subject to a cap**
6. **Alternative Arrangements or Mutual Enforcement, as set out above, for the North-South border on the Island of Ireland**

If the EU refuses to agree a mutually beneficial future arrangement by the end of 2020, then the UK should

1. **Treat the Withdrawal Agreement and Protocol as no longer having any legal force**
2. **Implement Alternative Arrangements for the North-South border on the Island of Ireland, indicating to the EU that the Government is prepared to negotiate Mutual Enforcement instead, if preferred, from the end of 2020**
3. **Cease to make payments to the EU under its provisions**
4. **Treat EU citizens resident in the UK unilaterally in a manner consistent with the UK's legal framework** (which is one which respects fundamental human rights of its own accord in any event)

## ANNEX A - AMOUNT AT RISK UNDER THE COMMITMENT APPROPRIATION (CA) <sup>159</sup>

### CURRENT CA AMOUNT AT RISK UNDER PREVIOUS AND CURRENT MULTIANNUAL FINANCIAL FRAMEWORKS IS €185 BILLION

Mobilisations of the CA in Previous Multiannual Financial Frameworks Creates an Amount At Risk of €103bn

Component	Facility size	Outstanding	Redrawable	At Risk	Comments
European Financial Stability Mechanism	€60.0bn	€45.7bn	€14.3bn	€60.0bn	
EIB guarantee for loans outside the EU	€29.5bn	€21.5bn	€0.0bn	€21.5bn	
Balance of Payments Facility	€12.0bn	€2.5bn	€9.5bn	€12.0bn	
Macro-Financial Assistance (MFA) to non-EU partner countries	€5.6bn	€5.6bn <sup>160</sup>	All	€5.6bn	Evergreen facility; all repaid amounts are redrawable
Euratom	€4.0bn	€4.0bn	€0.0bn	€4.0bn	
<b>Total</b>	<b>€111.1bn</b>	<b>€79.3bn</b>	<b>€23.8bn</b>	<b>€103.1bn</b>	

Mobilisations of the CA In the Current, 2014-2020 Multiannual Financial Framework (Not All Yet Fully Drawn So Too Early To See Any Run-Off - If Any Run Off At All) Creates an Amount At Risk of €82bn - making €185bn in Total

Component	Facility size
EIB guarantee for loans outside the EU	€30.0bn
First EIB guarantee for InvestEU <sup>161</sup>	€16.0bn
Second EIB guarantee for InvestEU <sup>162</sup>	€10.0bn
Macro-Financial Assistance (MFA) to non-EU partner countries COVID-19	€0.3bn
Guarantee to the EIB for the first-loss on the €200bn EIB response to COVID-19	€16.0bn
Further guarantee to the EIB for the continued expansion of the non-COVID-19 activities of InvestEU <sup>163</sup>	€10.0bn
<b>Total</b>	<b>€82.3bn</b>

<sup>159</sup> We are grateful to Bob Lyddon who has provided this Annex

<sup>160</sup> 2018 MFA Report CELEX\_52019DC0324\_EN\_TXT page 15 shows budget allocations for 2017, 2018 and 2019 expected, but there is no statement of the total of loans outstanding and their maturities, or the total of future commitments. The amounts stated are about EUR 0.8 bn per annum of new loans. Assuming an average maturity of 7 years, the total of loans outstanding at any one time would be EUR 5.6 bn

<sup>161</sup> Contains risk on the activities of the European Investment Fund in the context of InvestEU

<sup>162</sup> Contains risk on the activities of the European Investment Fund in the context of InvestEU

<sup>163</sup> Will contain risk on the activities of the European Investment Fund in the context of InvestEU

There is also risk on the EIB and EIF outside the context of the CA.

- Firstly, on the EIB through the UK's direct shareholding in it.
- Secondly, on the EIF through the UK's shareholding in the EIB, which is in turn the majority shareholder in the EIF. The EIB's and the EU's shares in the EIF are in a limited liability company so do not at once cause a call for an extra pay-in of capital, but if the EIF made major losses, the EIB might feel it had to call up its subscribed-but-not-called capital, in which the UK participates.

The EU, in order to recapitalise the EIF should it need it, would have to create a budget item either under the cash budget or the CA - hopefully a future one, after the UK had exited.

We cannot find any information on the European Coal and Steel Community or the European Development Fund; we believe the amounts to be small relative to the overall scheme, and would not wish to guess without collateral - it does not alter the overall picture.

## POSSIBILITY OF AN EXTRA €198 BILLION BEFORE 31 DECEMBER 2020 - AND UNTIL 31 DECEMBER 2021 BECAUSE OF CARRYOVER

Moody's referred to the CA for the current MFF in their 2015 Rating Report on the European Union, on page 1 in the "Overview and Outlook": "(3) the European Commission's right to call for additional resources of on average up to around 0.26 per cent of EU Gross National Income (around €40 billion on average) each year during 2014-20 from its member states, on a joint and several basis".<sup>164</sup>

That means the ceiling for the current MFF is 7 x €40 billion = €280 billion. Since €82 billion has been or is in the process of being mobilised, the remainder - €198 billion - is available to be mobilised, and can be mobilised under the carryover provision up to one year after the supposed ending of the MFF.

## UK RISK THROUGH THE CA

MFF period	Total at risk	UK risk @12 per cent share	UK risk @25 per cent share
Up to end of 2013	€103.1bn	€12.4bn	€25.8bn
2014-2020 now	€82.3bn	€9.9bn	€20.6bn
Headroom within current MFF	€198.0bn	€23.7bn	€49.5bn
	<b>€383.4bn</b>	<b>€46.0bn</b>	<b>€95.9bn</b>

## ANNEX B - DEMYSTIFYING THE EU'S COMMON SECURITY AND DEFENCE POLICY <sup>165</sup>

The EU's Common Security and Defence Policy (CSDP) is like Tolstoy's *War and Peace*. It is a massively ambitious project, of great length, in a complicated language, that nobody wants to read.

Like any jigsaw, the more pieces you lock together, the clearer the picture.

A fundamental part of the problem is the interlocking nature of EU policies, and in particular the EU's plans for integrating its Common Foreign and Security Policies, maritime and border management policies, and defence industry aspirations. It is a jigsaw, and Whitehall is right now considering which pieces to take out of the box. Like any jigsaw though, the more pieces you lock together, the clearer the picture. Or to mix metaphors; the more fingers you poke into the pie, the stickier your hands get.

It perhaps helps best to explain this if you break CSDP into six areas. The first is particularly acronym heavy, covering areas of what might be collectively called Strategic Direction and Command. They include the Military Planning and Conduct Capability (MPCC); the Political and Security Committee (PSC); the European Union Military Staff (EUMS); the European Union Military Committee (EUMC); the Committee for Civilian Aspects of Crisis Management (CIVCOM); the Politico-Military Group (PMG); the Crisis Management and Planning Directorate (CMPD); and the Civilian Planning and Conduct Capability (CPC).

The second bracket are those features of CSDP that are associated with developing integrated policy and doctrine. These include the European Union Institute for Security Studies; the European Security and Defence College (ESDC); the Coordinated Annual Review on Defence (CARD); the European Capability Development Plan (ECDP); the collective collaborative programmes run under the rubric of PESCO (Permanent Structured Cooperation); the (supposedly-vetoed) Common Maritime Policy, with its coastal protection/surveillance elements; the Solidarity and Mutual Assistance clauses; and Defence programmes supported by offshoots of the EU's Erasmus funds.

These first two categories - policy and structures - underpin and tie together what follows.

Thirdly, there is what turns this into practice, and the operational elements. These include the EU SatCom Market; the EDA's GOVSATCOM; MARSUR; IESMA; the EDA's programmes of Exercises and training; EU Battlegroups; FRONTEX/ European Coastguard; and the MMF multinational multirole tanker fleet. There is also a range of military formations that have been established outside of the EU, but which are increasingly being identified as available to it, in effect generating a mini standing army in all but name. These proxy forces include Eurocorps, EATC, EUROMARFOR, EUROGENDFOR, and (amongst a number of other proposals) a nascent European Medical Command, with support from FINABEL.

Fourthly, there are the aspects relating to Intelligence. These include the European Union Satellite Centre; Galileo; the EU Military Staff Intelligence Directorate; the Joint EU Intelligence School; and such elements should be considered alongside the security aspects and databases associated with JHA cooperation (for example Europol).

Fifthly, there is Finance. This is where we encounter the European Defence Fund (EDF); EIB lending, such as through the Programme for the Competitiveness of enterprises and Small and Medium-sized Enterprises (COSME); European Structural and Investment Funds (ESIF); and the Connecting Europe Facility (Transport previously, possibly more in the future).

165 This Annex has been extracted from an article published in *Global Vision* written by Dr Lee Rotherham, who is a Director of think tank, The Red Cell, and Executive Director of Veterans for Britain. He was Director of Special Projects at Vote Leave.

Finally, there is the end product of the spending on Research and Procurement, increasingly orientated via the European Defence Agency (EDA). These include the Preparatory Action on Defence Research (PADR); the European Defence Research Programme (ERDP); EDIDP, on rationalising the EU's procurement sector; the institutional management role of the EDA; EDA REACH covering chemicals; the proposals arising from the EDA's Long Term Review; the EDA SME Action Plan; and so on.

Much of the latter elements are about establishing what the Commission styles "Regional clusters specialising in industrial niches". The untechnical explanation is that it is about creating a Europe-wide defence industry, with particular sectors uprooted and then concentrated in such a way that no one country is materially self-sufficient any more.

This is a blizzard of activity and it's no surprise if people get lost, or fail to spot the risk if these are aggregated. The Commission's ambition from its 2016 Action Plan has always been up front:

*"The Commission is ready to engage at an unprecedented level in defence to support Member States. It will exploit the EU instruments, including EU funding, and the full potential of the Treaties, towards building a Defence Union."*

How at risk is the UK to all this? The threat is very varied, and it's a mistake to think that we are immune because we have kept out of the more celebrated elements. At headline level, the UK has for some time now made a point of ostentatiously steering clear of the top tables. Indeed, we had been vetoing these areas for years, and only stopped when the Brexit vote happened.

Unfortunately, that was also the moment when planners failed to consider risk down the line, from whatever individual bilaterals the UK might subsequently sign up to: the working assumption seems to have been there wouldn't be any so there was no need to push for customary safeguards. By contrast, with operational elements, the UK did veto a HQ structure, but it was set up anyway under a different name.

How we end up associating with these evolving entities will be critical. It is important to remember as a starting point that much of the EU Defence infrastructure is deliberately being set up in a modular way, allowing integration to happen at variable speeds. The track record of this approach can be discerned by how far the EU has integrated since Maastricht. The process is inherently integrational and gravitational. Anyone who doubts that need simply look at a timeline on how CSDP has advanced over the years.

The declared UK policy is now one of establishing docking ports for occasional cooperation on specific tasks. But consider UK membership of the EAG. The European Air Group became of particular interest to EU planners once it developed into something larger than a bilateral with the French, and the EU doctrinally now has a stated policy of trying to draw these European structures within its orbit. UK bilateral relations with EU member states outside of NATO structures will now be permanently exposed to EU ambitions. So too will any cooperation in intelligence, where the UK is the only European state within the Five Eyes community.

With several areas from the list, the UK may sign up to a partnership agreement. The more this happens, the greater is the risk that the EEAS, the EDA or the Commission will interpret it as requiring application of EU law or policy, drafted elsewhere within the EU's corridors. It might be on some contentious work standards issue; or implying a shift away from NATO as the partner of choice; unintentionally yielding on issues of maritime territoriality or airspace management; or endorsing EU strategic priorities. The problem is that we know the EU has a track record on breaking its own treaties to push its own agenda at UK expense, from flouting Health and Safety regulation to get round the UK's Social Chapter opt out, through to using the Disaster Clause to get round the UK's opt out on bailing out the Eurozone. Those instances were deliberate and wilful, even malicious. There are plenty more far simpler cases of "policy creep".

But it's with the backdoor issues of money and industry where the risks really lie.

There are obviously the hundreds of millions that get spent in support of the EU's many military missions - peace-keeping, peace-making, counter-piracy, and capability training. But the big money will be thrown at industrial policy and building up a corporate EU defence industry, managed of course through Brussels.

Just as the EU's diplomatic arm, the EEAS, is now bigger than the diplomatic corps of almost all EU member states, the EU's budget assigned to Defence is already set to be bigger than the Defence budgets of two thirds of EU27 countries.

EU Defence procurement funding has an unambiguous set of strings attached. It is designed to make the EU27 prefer to work with other EU27 countries. It is designed to channel R&D cooperation away from non-EU states (even if they are the tech leaders) - operating through EU-managed structures, run under EU-designed principles, to EU-drafted priorities. At its heart is the European Defence Agency, the EDA, which as we have already seen is also at the centre of cooperation on tactics, training, and strategic thinking.

In the CSDP, everything is interconnected. Procurement cooperation is not - alas - just about business opportunities or value for money. It is a component of the wider move to generate an EU Defence Union. The speed over the years may look jerkier than a learner driver, but the direction of travel is set. The ambition is expressly authorised under the EU treaties, and that permission was inserted for a purpose.

The more points of contact you have with the dozens of parts of the CSDP, the more you are caught in the wider Defence Union web. The hard task for ministers is managing that risk in the national interest. There are areas where the UK needs to form a point of contact, and with it perhaps establish some mechanism, because there will be times when cooperation is needed. But at a time when the EU is designing permanent foundations for larger constructs, it needs to be as tangential a contact as possible.

The EDA cannot be that building block. It constitutes the core of the EU's common defence industry plans, in direct competition with the intergovernmental model that operates through its non-EU counterpart OCCAR. It also forms the heart of the future CSDP. It would be going too far to call the EDA the EU's Pentagon; but of all the structures and institutions the EU has at its disposal, it is the entity that those most openly pushing Defence Union are saying will develop into one.

Our ambitions and interests lie elsewhere. If the famously-neutral Swiss have been able to find a light-touch way to allow cooperation in areas of genuine common interest, not just in procurement but even for deployments, so too can we.

# ANNEX C - OVERVIEW OF HOW STANDARD CUSTOMS AND BORDER PROCEDURES OPERATE IN THE EU

## BASIC CUSTOMS PROCEDURES

The traditional view of a border is that of a place blocked by a border pole, where goods are declared on paper forms to customs authorities who decide if the goods may cross the border and what taxes have to be paid. These customs declarations contain structured information about the relevant aspects of the traded goods. This information comes mainly from the invoice that accompanies the goods. Customs declarants “translate” the business language used on the invoice to the customs language of codes and legal descriptions that is needed for customs. Customs declarants are specialists employed by forwarders and customs brokers who are hired by traders to deal with all administrative and financial customs procedures. As the goods arrive at the border, the declaration is made and presented to customs, which then can decide if they trust the information on the declaration, or if they want to verify this information, by checking the invoice and the goods. So, the verification of the declaration is done as the goods are available. Customs determines if the goods comply with all relevant laws and what taxes must be paid. The declarant acts as a kind of tax advisor and in addition, pays these duties and taxes and charges them to the trader.

The most important trade data needed by customs is information about the kind of goods, the origin of the goods and the value of the goods. Every good can be assigned to a specific tariff number. This can be a very subtle issue. For example, there can be a big duty difference between china and pottery, while the product difference it is not easy to see. Shoes can almost look the same but be made of leather or plastic. If meat is declared free of hormones, this must be determined in a laboratory.

The origin of products is decisive if the goods can make use of the benefits of a Free Trade Agreement such as lower or zero import duties. The origin of a product is determined on the basis where it is produced, not where it is shipped from. A lawnmower assembled in the UK with an American engine may still be classified in the EU as being of American origin, depending on the specific regulation. Shirts made of EU cloth, but assembled in Morocco, may be imported into the EU without the usual EU duty on textiles. Origin certificates used to be issued by customs in the country where the goods are produced. Nowadays, the producer can determine the origin of a good himself, taking all regulations into consideration, by simply stating the origin of the goods on the invoice. Still, it is the importing country that takes the final decision on the origin with the connected benefits.

The value of goods determines the amount of duty to be paid. Customs will want to check if the value on the invoice is the actual price that is being paid. For that reason, customs can also ask for more information from the administration of a trader to verify the value. So, customs also have access to any trade data, up to three years after the import.

## DIGITAL CUSTOMS PROCEDURES

Modern customs procedures are fully digitalised. Forms for customs declarations no longer exist. Declarants communicate data to customs exclusively through IT-systems. Customs computers make risk analysis based on big data to decide what goods should be scrutinised by asking for more information or even inspecting the goods. In daily practice, the result is that only about 3 per cent of all declarations are selected to provide supporting information such as the original invoice or origin information and less than 1 per cent is physically checked if the goods have the declared tariff code. All other declarations are approved by the customs IT-system without interference by any customs officer.

Risk analysis using big data is based on previous information and profiling of (trusted) traders, kinds of (fraudulent) goods or (doubtful) countries of origin, or a combination of these and other aspects. Processing of these data by customs computers is a matter of minutes or even seconds.



## INVISIBLE CUSTOMS BORDER

Both the EU and UK customs law make it possible to declare goods at the point of loading or unloading of the transport. This brings the fundamental advantage that goods can be more easily inspected, since they are readily available for a customs officer and do not have to be taken off a truck at a border facility. This requires that mobile customs officers be available to inspect the goods at the premises of the logistic service providers, the exporter or importer. Trusted traders can apply for approval of their premises for mobile inspections. The inspections can be organised based on the pre-departure and pre-arrival information of the digital declaration and thus can become an integral part of the logistic process. So, inspections do not have to take place at the (land)border, resulting in an invisible border where no customs infrastructure is needed.

All these facilities and simplifications of operation are legally available in the present EU and UK customs law. Inland physical inspections are not yet very common in the UK and Ireland as on these islands the customs inspections are traditionally based at (air)ports, and since there was no relevant land border. On the continent, the technique of checks and inspections at the point of loading and unloading are much more common.

## TRANSIT

To make this system work, in addition it is needed to control the transport from the point of departure to the point of arrival. For this the Transit system is available. Transit is an IT-system provided by the EU to traders and forwarders in the EU and bordering countries such as Switzerland, Norway and Turkey to ship goods under customs control within the EU or between the EU and that neighbouring country. The system is used more than 10 million times a year.

Goods are declared in the Transit system as they are loaded on the means of transport. The digital declaration also must mention the destination where the goods will be shipped to. The system sends this information to the customs authority where the goods will be transported to. The goods must arrive there within a reasonable time of sometimes only one day depending on the means of transport. The declarant is responsible for the correct arrival of the goods. He must provide a bank guarantee to customs authorities so that any taxes on goods that do not arrive can still be collected. If the goods do not arrive at the designated customs destination in time, the declarant will be held responsible. If so, he will do everything he can to track the transport and make sure it is properly declared at the designated customs office. Although this may seem a burdensome procedure, it has become a commodity in forwarding and transport across borders. Transit declarations are available at low cost. The Swiss use it 2.5 million times each year to make their borders transparent and prevent congestion at their frontiers.

Digital customs declarations at points of loading and unloading, in combination with Transit and mobile customs inspections can provide for an invisible border on the island of Ireland. Any transaction must be declared for export on behalf of the exporter. Only based on such a declaration can zero per cent VAT be claimed on the transaction. So, if he cannot provide an export declaration when VAT authorities inspect his administration, he will have to pay the applicable VAT rate (and a fine). This is a strong incentive to follow this trade obligation.

Transit declarations need to refer to specific previous export declarations. The Transit declaration on its turn must be followed up by an import declaration in the importing customs territory. The Transit declaration is only finalised when a reference to an import declaration is provided. In this way, an administrative chain is created that connects the export transaction in one customs territory to the import transaction in the importing territory. In daily practice, customs professionals are aware of the functioning of this system and apply it correctly. After all, that is their profession.

## AGRICULTURAL GOODS

Customs always pays special attention to foodstuffs, as the quality of these products have direct effect on the health of their citizens. For this reason, the trade and import of these goods is especially monitored by authorities. In the EU and cooperating countries, for this the TRACES (Trade Control and Expert System) system is available. TRACES works a bit like Transit in that it follows transactions of produces and traders of foodstuff in the supply chain. Food imported into and traded within the EU must comply with EU standards. Only certified traders and producers that guarantee these standards have access to the system.

Veterinary goods of animal origin and other agricultural Sanitary and Phyto-Sanitary (SPS) goods are considered high risk goods when they are imported into the EU. The UK applies the same approach. Additional health certificates and inspections are required when these goods are imported. Countries with (free trade) agreements and their certified producers can issue health certificates for foodstuff and use the Traces system. If the goods are certified, their risk profile is considerably decreased and checks and inspections are only done on a random basis. Thus, trade is considerably simplified and facilitated.

The EU requires veterinary products to be imported and declared at Border Inspection Points (BIP) located at the external border, so they cannot enter the food supply chain without strict checks and inspections. However, if there are certain geographical aspects to a border, these BIPs can be located away from the border. This requirement applies to the NI land border.

Trade across the land border on the island of Ireland consists for a large part of agricultural goods. Most transactions have a repetitive nature as farmers for example supply the same milk every day to the same dairy factory. Producers and traders can be certified according to specific standards so they can sell their goods across the border while inspections can take place at the points of loading and unloading. If necessary, specialised agricultural inspection teams can take samples and analyse them in a centralised laboratory before goods are released for further use in the supply chain.

This scenario would accommodate north-south trade almost as it is now. It would require additional but simplified customs procedures which are available within the present legal framework of the EU and the UK, and wider and deeper use of AEOs as service providers, which could be subsidised by the UK. Customs organisations would have to provide assistance to these procedures using mobile inspection teams and centralised data analysis. Traders would have to comply with customs regulations to get permissions to use these simplified procedures and have access to specialists to apply them. Repetitive traders and forwarders could incorporate these procedures in their daily operations, so they become routine. As comparison, the cost of customs formalities in Switzerland is well below 1 per cent of goods traded.

Also, in the situation where the UK and Ireland were both members of the EU, a range of formalities were in any case needed to trade across the border. Traders would have to report all transactions monthly to VAT authorities in the VAT Information Exchange System (VIES). Large companies also must provide additional statistic information. Agricultural transactions must be reported in Traces. Agricultural production standards are enforced by veterinary and health authorities. So, trade obligations across the NI land border may change but are not new, and it may be that by means of mutual enforcement, as outlined below, compliance can be enhanced and made more efficient and less contentious in cross border operations

## FREE TRADE AGREEMENT

A Free Trade Agreement between the EU and the UK can further simplify operations and facilitate trade on the island of Ireland. But basic formalities of supply of information to the administrative process would not change fundamentally. A Free Trade Agreement does not mean that trade is freed of such formalities.

Without an FTA there may be all kinds of tariffs to be paid as goods are traded. Duties may have to be paid to customs authorities and charged to traders. Agricultural products may face quota and high duties. Product requirements can make it necessary to split production processes to comply with the regulations of the importing country.

Especially trade on the island of Ireland would benefit from an FTA. There would be no duties on most products. It can be made easy to state the origin of the goods by using the REX-system. This system makes it possible for the producer to simply state the origin of his produce on the invoice without administrative customs approval. An FTA could facilitate the certification of agricultural products according to EU and UK standards by mutual agreement, thus making checks and inspections less frequent. An FTA can also stimulate customs authorities to work closely together to harmonise customs requirements and facilitate cross border permissions. Facilitation for small transactions and small traders could be agreed on. If such trade does not have any significant influence on the internal markets of the EU and the UK, exemptions of formalities and tariffs could be granted. Cooperation between customs authorities to exchange data can improve the quality of risk assessment so illegal trade can more easily be detected.

If no FTA would be reached, then the land border formalities could still be facilitated through a border agreement between the customs authorities of the UK and RoI. Simplified procedures and exemptions could apply, based on for example trusted trader permissions, small transactions or trade of companies below the VAT threshold. Such a border agreement would be in line with and use the institutional framework established by the Good Friday Agreement that facilitate the whole island economy.

# ANNEX D - DRAFT FTA TEXT ON SUBSIDY CONTROL

## Chapter [ ] Subsidy Control

### Article 1

1. Any aid granted by an authority of the Member States, the Union or the United Kingdom or otherwise through State resources in any form whatsoever which is limited to certain enterprises, distorts or threatens to distort competition in an appreciable way and which does not further an objective of common interest in accordance with this Chapter shall be actionable.<sup>166</sup>

### Article 2 Specificity

2. Certain enterprises shall mean aid that is specific to an enterprise or industry or group of enterprises or industries within the jurisdiction of the granting authority. Specificity shall be determined by reference to the general availability of a measure. Including:<sup>167</sup>
  - a. *Where the granting authority or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.*
  - b. *Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.*
  - c. *If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation*
3. A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.
4. Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

166 NTD: Enterprise is the WTO SCM term also used in the UK Enterprise Act 2002. Undertaking is the equivalent EU term.

167 NTD: The following text is lifted from Article 2 of the SCM Agreement.

## Article 3 Effect on Competition & Trade

1. *Aid within the meaning of Article 1 shall not distort competition and trade in an appreciable way where:*
  - a. Aid is below €50m per measure per 12 month period. Such threshold shall be indexed once a year to the prevailing rate of consumer price inflation in each jurisdiction or other such indexation or threshold as the Joint Committee shall determine from time to time;
  - b. Aid for infrastructure that is competitively tendered and generally available, including infrastructure that can be economically exploited;
  - c. Aid for goods or services that are not traded in a material way between the Parties; or
  - d. Aid for provision of service of general economic interest.
2. *Aid within the meaning of Article 1 above shall distort competition and trade in an appreciable way where:*
  - a. There is no market failure, equity or cohesion concern that the market cannot deliver itself;
  - b. The aid lacks incentive effect;
  - c. The aid exceeds the minimum needed to induce the additional investment or activity;
  - d. The aid is not transparent;
  - e. The aid takes place in a market in structural absolute decline provided such goods or services are traded in a material way between the Parties;
  - f. The aid causes the beneficiary to close down the same or similar activity in the jurisdiction of the other Party; or
  - g. The aid causes, against an evidenced counterfactual, an investment project to move from the jurisdiction of the other Party.
3. *Aid within the meaning of Article 1 but not within sub-section 1 or 2 of this Article shall be assessed by the competent authority for the Party concerned on the basis of economic and legal evidence for its effects on competition and trade between the UK and EU.*
4. *Such assessment may take the form of individual notification, group, scheme or block exemption.*

## Article 4 Objectives of Common Interest

1. *Aid within the meaning of Article 1 shall pursue an objective of common interest where the Joint Committee has defined such a common interest and where the aid measure achieves or contributes to that common interest with the least possible distortion to competition and trade.*

## Article 5 Competent Authorities and Courts

1. *Each of the United Kingdom and the Union shall maintain competent authorities to carry out the assessment described in Article 2 and Article 4 above.*
2. *Such competent authorities shall:*
  - a. *be independent of granting authorities within the jurisdiction of the relevant party;*
  - b. *have sufficient resources to carry out its tasks;*
  - c. *have sufficient powers of investigation to carry out its tasks, including powers to obtain evidence; and*
  - d. *to the extent possible under the constitutional limitations of each Party, be empowered to order the recovery of aid that is found to be in breach of this Chapter from the relevant beneficiary or beneficiaries plus interest at the applicable reference rate agreed by the Joint Committee from time to time.*
3. *Each Party shall maintain a system of appeal to independent courts or tribunals empowered to judicially review decisions of competent authorities.*

## Article 6 Standing

1. *Any Member State, the United Kingdom, the Union and any person, enterprise or association of enterprises whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations shall have standing to participate in the procedures of the competent authorities and courts of any other Party.*
2. *Without prejudice to Article 6(1), each Party shall offer national treatment for such rights.*

## Article 7 Actionable Subsidies

1. *Each of the Union and the United Kingdom shall be entitled to take the action described in this Article against actionable aid within the meaning of Article 1.*
2. *Should the Union or the United Kingdom consider that actionable aid has been paid or is anticipated to be paid by the other, it may complain to the competent authority of the other Party.*
3. *The competent authority shall acknowledge the complaint under this Article within 5 days and shall open proceedings under or equivalent to those foreseen under Article 108(2) TFEU within 30 days of the complaint, unless such proceedings are already in progress.*
4. *The competent authority shall adopt a decision within 12 months of the opening decision foreseen in Article 7(3) above on the basis of the information available to it at that time. Such time period to be extended by mutual agreement.*
5. *Should the Union or the United Kingdom disagree with the decision of the relevant competent authority, they may request consultations. The Joint Committee shall convene such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution in light of the decision of the competent authority.*
6. *If no mutually agreed solution has been reached within 30 days of the request for consultations, such time period to be extended by mutual agreement, the complaining party may impose countermeasures, provided that:*
  - a. *The party imposing countermeasures has utilised their right to appeal the decision of the competent authority;*
  - b. *Countermeasures are to the fullest extent possible focused on the same beneficiary or sector that received the aid complained of;*
  - c. *Countermeasures are proportionate, meaning they should not exceed the harm caused to competition and trade by the subsidy complained of taking into account any remedies imposed by the competent authority and the extent to which the measures support an objective of common interest; and*
  - d. *Countermeasures shall lapse by automatic operation of law within 14 days of the Parties announcing settlement.*

## Article 8 Subsidy Control Dispute Settlement

1. *The United Kingdom or Union may instigate the dispute settlement procedure [cross refer to the generally applicable DSM provisions] in respect of the following disputes:*
  - a. *The competent authority or courts are not complying with their obligations under this Chapter; or*
  - b. *Countermeasures imposed per Article 7 Actionable Subsidies pursuant to Article 7 are not justified or are disproportionate.*
2. *This Chapter shall be without prejudice to either Party's rights under the WTO Subsidies and Countervailing Measures Agreement.*







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