The European Research Group's Legal Advisory Committee Review and Assessment of the "The Windsor Framework"

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[1] For Appendix A & B see https://lawyersforbritain.org/windsor-deal-erg-legal-advisory-committee-assessment/

EXECUTIVE SUMMARY

The 'Windsor Framework' deal of 27 February 2022 has provisionally been reached between the UK and EU. The deal involves each party taking a number of steps, legal and non-legal, whose implications (assuming each step is implemented in its proposed form) can be summarised in the following manner.

1. **Sovereignty.** Northern Ireland remains subject to the power and control of EU law, the Court of Justice of the European Union (ECJ) and EU administrative organs (such as the European Commission) in respect of goods and ancillary matters. EU State aid law (below) continues to apply across the whole of the UK in respect of aid which may affect Northern Ireland.

    (a) The Windsor 'Framework' deal makes only limited legal changes to the Northern Ireland Protocol, on the basis of temporary legal powers granted in the UK-EU Withdrawal Agreement which do not permit any changes to "essential elements" of that document. Those powers themselves expire at the end of 2024.

    (b) The obligation for Northern Ireland law to follow changes to relevant EU law is unamended, subject only to the possible use of the 'Stormont brake' (below).

    (c) The rights of the people of Northern Ireland under the Acts of Union 1800 are not restored.

    (d) The hard border remains between the two different legal systems, which comprise those of (a) Great Britain, and (b) the newly created EU law regime in Northern Ireland. This constitutional anomaly is the underlying cause of the checks and controls required between these two parts of the same country, and this underlying cause has not been addressed by the Windsor deal.

    (e) There will be limited easings from the hard border customs and regulatory requirements for businesses in Great Britain selling goods into Northern Ireland, but these will not benefit businesses in Northern Ireland. They will remain fully subject to all EU laws under the NI Protocol when making goods and when selling goods to Northern Ireland consumers in competition with goods of British origin.

2. **Doubling down.** The UK provides new commitments and undertakings which reaffirm and embed the status and structures of the Withdrawal Agreement and its NI Protocol.

    (a) The Government commits to new, tougher arrangements for market surveillance and enforcement under the NI Protocol. New commitments are made by the UK on "exports" from Northern Ireland to Great Britain.

    (b) The Government commits to stopping the progress of the Northern Ireland Protocol Bill which, if enacted, would allow for the restoration of UK sovereignty in Northern Ireland.

(c) The EU sets out how EU representatives will engage directly with Northern Ireland "stakeholders", undermining the status of Northern Ireland within the United Kingdom.

(d) Commitments are made by the UK immediately to enhance enforcement over parcels moving between Great Britain and Northern Ireland, prior to the Windsor arrangements coming into force.

3. **Removal of EU law?** Claims in the UK Command Paper that the Windsor deal will lead to EU laws being "disapplied" or "removed" from Northern Ireland are not correct.

4. **Limited (and conditional) easings.** Limited easings from the full application of EU external customs duties and customs and regulatory requirements are to be made, involving reduced checks for certain goods sent within the UK across the Irish Sea which are accepted by the EU as destined solely for Northern Ireland and as not placing any risk on the EU's "single market", under a misleadingly characterised "green lane".

(a) These easings, which cover customs and certain goods standards, are highly constrained and carefully defined.

(i) They cover certain aspects of East-West trade only. E.g. full EU customs checks and duties, if payable, will still apply to business acquisitions of input goods to be processed in Northern Ireland by larger companies.

(ii) The easings will not readily be available to smaller traders.

(iii) Registration will be required by UK traders and carriers.

(iv) Some elements of the new scheme require businesses to become authorised under a newly established mechanic, managed by the UK but overseen by the EU.

(v) Some of the elements contain new, detailed application, compliance and monitoring processes, with restrictions on how the UK applies the scheme.

(vi) Declarations will still be required, as will compliance checks.

(vii) Precautionary usage of the "red lane" involving full checks is likely, and there is no reimbursement mechanism for duties where goods end up solely in Northern Ireland.

(viii) The scheme is not on a secure legal base vis-à-vis the EU, since it is vulnerable to suspension by the EU on grounds of suspected fraud, or termination by the EU on "diversion of trade" grounds.

(ix) Many of the dispensations also fall away where the EU chooses to apply "trade defence measures", including anti-dumping and countervailing (anti-subsidy) duties on an ever-expanding list of goods. The NI Protocol

allows the unilateral imposition of trade remedies measures by the EU to the territory of Northern Ireland.

(b) Future deregulatory efforts in the UK, e.g. under the Retention of EU Law Bill, will call into question whether new checks will be required, triggering a fresh negotiation. The Windsor arrangement risks incentivising the UK and its future governments to copy future EU rules, and adjustments to existing EU rules, so as to avoid the imposition of new checks across the Irish Sea. Businesses in Northern Ireland will be denied the benefits of reformed post-Brexit UK law applied in Great Britain and will be faced in their home market with competition from goods supplied by mainland businesses which comply with UK rules without themselves being able to benefit.

(c) The reverse problem is likely to become increasingly important, where goods are sold in Northern Ireland under EU single market law which do not comply with UK law. Because it is necessary to allow Northern Ireland businesses to sell EU-standards good across the Irish Sea in order to avoid shutting them out from full participation in the UK's internal market, the UK as a whole loses its ability to decide that certain goods shall not be sold on its market.

5. **Conditional adjustments to EU law in NI.** Easings for very specific areas are to be made *under EU law directly applicable in Northern Ireland*, for medicines, some retail goods (mainly foods), pets and plants.

(a) These easings are to be made under EU law rather than as adjustments to the NI Protocol, or rules to be adopted bilaterally by the UK-EU Joint Committee. Accepting that these easings are to form part of EU law has adverse consequences:

(i) Their interpretation, enforcement and validity is automatically under the jurisdiction of the ECJ rather than of the Withdrawal Agreement arbitration panel.

(ii) The UK has no legal remedy if the EU does not pass these easings into law in the form the Commission now proposes, or if the EU decides to amend or repeal them in future.

(iii) This creates an incredibly dangerous precedent of allowing the EU to make Regulations which apply only within the territory of Northern Ireland, a precedent which could be turned against the UK in future.

(b) The easings are, by their terms, conditional upon the UK providing guarantees satisfactory to the EU, and resemble internal EU law mechanisms applicable to member states which involve enforcement actions and penalties for the UK for non-compliance, as well as processes for suspension and termination.

(c) The scheme for retail goods only applies where goods are moved from an "authorised establishment" such as a supermarket distribution warehouse, on one side of the Irish Sea, to an "authorised establishment" on the other side. It does not extend to general East-to-West trade outside this limited circle of authorised

establishments and, for example, would not cover mail order supplies to end customers in Northern Ireland (important for plants). It specifically excludes from its scope goods which originate in Northern Ireland, so businesses there will not be able to compete on an equal basis with mainland businesses who use the scheme. It also covers some but not all relevant EU laws, and requires compliances with formalities, including provision of "per consignment" certificates and submission to monitoring and checking.

(d) The scheme for medicines allows the UK's Medicines and Healthcare products Regulatory Agency (MHRA) to authorise new medicines which fall within the special categories which are "centrally authorised" within the EU. However, the MHRA will remain subject to EU law when authorising new medicines in Northern Ireland which fall outside these special categories, making it difficult or impossible to change the UK's new medicines approvals regime in future without putting at risk the availability in Northern Ireland of the same medicines that are available in Great Britain. EU law relating to other aspects of medicines regulation remains applicable in Northern Ireland, subject to specific exemptions from EU anti-counterfeiting measures and a special permission to allow for the movement of medicines into Northern Ireland via regulated pharmaceutical wholesalers. These carve-outs are subject to a number of onerous restrictions and caveats: e.g. medicines must bear a non-removable "UK only" label; and the MHRA must "continuously monitor the placing into the market" in Northern Ireland of these medicinal products. The UK must also provide "written guarantees" that the placing on the market of the medicinal products does not increase the risk to public health in the EU. The EU will "continuously monitor" the application by the UK of the specific rules, and has powers to address serious or repeated infringements. There are powers of suspension and termination.

6. **VAT and excise.** Ameliorations are made for VAT and excise, largely to address the few particular areas of actual recent or immediately anticipated divergences between the EU and UK VAT and excise systems on goods since 2020. The deal provides for a new "enhanced co-ordination mechanism" on VAT and excise on goods. These arrangements amount to limited and specific relaxations in EU law applicable to VAT and excise in Northern Ireland, but they fall well short of restoring to the UK the right of an independent country to decide on its tax structures and set its tax rates as it might wish across the country. Changing tax structures or rates outside the boundary of the specific relaxations will involve negotiation with the EU and their permission.

7. **EU State aid law and its "reach-back" into the UK.** EU State aid law, by virtue of Article 10 of the NI Protocol, is applicable in Northern Ireland and across the whole of the UK if aid might affect trade under the NI Protocol. Article 10 will not be amended and the Windsor deal will use the less legally secure method of an interpretative declaration which will seek to limit (but not eliminate) the reach-back of EU State aid law across the whole UK. Therefore the Windsor deal continues to accept the reach of EU State aid law and the jurisdiction of the EU Commission and the ECJ, not just over Northern Ireland but also over the whole of the UK. By accepting the continuation of the NI Protocol's imposition of EU State aid law over Great Britain, the government has removed much of the benefit that the UK would otherwise have won from its faster, more flexible, more certain subsidy

control regime under the Subsidy Control Act 2022 which applies in Great Britain and is in conformity with the TCA.

8. **The 'Stormont brake'.** A new 'Stormont brake' is to be inserted into the NI Protocol which gives a certain number of members of the NI Assembly the ability to call for the rejection of incoming EU laws. However, this only applies to future changes to EU law and confers no right to change any part of the existing body of EU laws imposed on Northern Ireland under the NI Protocol. The 'brake' is of very narrow application in theory and is likely to be useless in practice. It is a highly conditional version of a process contained in the European Economic Area (EEA) Agreement, and allows the EU to take "remedial" countermeasures. There has only been one attempt to use the EEA version of the brake, by Norway in 2011, which was abandoned in 2013. Norway failed.

REVIEW AND ASSESSMENT

1. The questions we address and our overall answers

We have been asked to consider: first, how far (if at all) would the Windsor deal[2] restore the full sovereignty of the United Kingdom as an independent State following Brexit? Secondly, how far (if at all) would the Windsor deal restore the constitutional integrity of the Union by allowing citizens in Northern Ireland to participate equally with citizens in Great Britain, politically, in shaping the laws which apply to them, and economically, within the United Kingdom's internal market?

Sovereignty: We regret that the Windsor deal does not advance the post-Brexit sovereignty of the United Kingdom. It leaves intact the basic structure of the Northern Ireland Protocol, under which foreign laws interpreted and enforced by a foreign court will continue to apply to and within Northern Ireland, as well as for some purposes reaching back over the whole United Kingdom. The deal contains certain easings, which are subject to fulfilment by the UK of conditions to be monitored by EU Commission, of the full application of some but not all relevant EU laws[3] in closely defined circumstances. It is claimed that these easings would simplify (but not remove) customs and regulatory formalities imposed under the NI Protocol on goods moving inside the United Kingdom from Great Britain to Northern Ireland, but the deal also contains a commitment by the UK to terminate the current unilaterally extended 'grace periods' which at present shield much of the East-West trade from the full rigours of the NI Protocol.

Regrettably, for reasons we cannot understand, the UK government has accepted that the easings of the full application of EU single market laws be incorporated into Regulations to be made under EU law, instead of incorporating them, as they should have been, into a Joint Committee decision or other bilateral instrument under international law. This is a separate point from whether these easings are adequate in scope or whether they will in fact lead to friction-free movement of goods within their scope.[4] The use of EU law instruments to implement these easings has the automatic effect of extending the jurisdiction of the Court of Justice of the European Union (ECJ) to the interpretation of the boundaries of these easings and giving it jurisdiction to invalidate them under EU law, and also over any disputes which might arise as to whether the European Commission is entitled to suspend or terminate these easings if it considers the UK has not fulfilled the conditions. Nor can we see that the deal gives the UK any enforceable legal right under international law to require the EU to maintain these easing Regulations in their proposed form if the EU were to decide in future to repeal

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2 The "deal" is not a single agreement text, but instead consists of a large number of different texts which we describe below. It would result in the NI Protocol, as amended, being referred to as the "Windsor Framework" (Draft Joint Declaration on the Windsor Framework; see also Preamble 5 to the Windsor draft decision). We consider below the question of whether or not the legal framework governing Northern Ireland has been changed as implied by this new terminology.

3 See our full analysis below and in Appendix E.

4 We cannot answer the question from the available legal texts of whether or not these easings are practical for businesses to comply with in their day-to-day operations. The legal texts indicate that it will be necessary for businesses to file online paperwork to take advantage of them, and we have been given to understand from more than one source that the UK government is holding back from releasing details of exactly what information will have to be supplied until after any votes in Parliament on the Windsor deal.

or amend them under EU law. Most worryingly, this involves acceptance of the principle that the EU has power to make laws in future *which apply only extraterritorially within the territory of the United Kingdom*.

The Windsor deal also contains an important commitment by the UK government to abandon the Northern Ireland Protocol Bill. By contrast with the Windsor deal, that Bill, if passed into law, would be effective in restoring the essential sovereignty of Northern Ireland and of the United Kingdom as a whole.[5]

Constitutional integrity of the Union: The Windsor deal will not restore to citizens in Northern Ireland their equality with citizens in Great Britain in the control of the laws which apply to them. The 'Stormont brake' would apply only to future changes to EU laws and, for reasons we explain below, is of very narrow application in theory and likely to be useless in practice. More fundamentally, the Windsor deal does not confer on Northern Ireland citizens the rights enjoyed by citizens elsewhere to change or repeal the body of EU laws which are imposed upon them. This body of EU laws remains fully applicable to Northern Ireland businesses even when they are trading inside Northern Ireland or elsewhere in the UK's internal market. The easing Regulation on Retail Goods etc[6] would exempt certain goods from Great Britain sold at retail in Northern Ireland from having to comply with some (but not all) EU single market laws, but it specifically excludes from its scope goods which originate in Northern Ireland. So while the easing would benefit consumers in Northern Ireland by increasing the range of goods which they can buy from Great Britain, it subjects Northern Ireland businesses to a competitive disadvantage if they are still subject to more restrictive EU laws.

Overall, it is clear that the rights of citizens in Northern Ireland under the Acts of Union of 1800 will not be restored by the Windsor deal and that in material respects those provisions will remain subjugated by the NI Protocol; those citizens will continue to be treated differently under a treaty with a foreign power from citizens in Great Britain. Although mitigated in import-to-retail circumstances, customs duties and associated full declarations will be applicable in many instances, e.g., in business acquisitions of input goods to be processed in Northern Ireland by larger companies. Furthermore, while the easings should reduce the formalities from what they would otherwise be, they will not result in no formalities at all, as should be the case in moving goods within a single united country, nor will the easings be readily available to smaller traders.

2. The legal form of the Windsor deal

What has been called the "Windsor agreement" is not in the form of a draft international treaty text which sets out the terms which have been agreed. Indeed, there is no single text embodying what has been agreed. Instead, there is a large collection of texts issued by one or other, or sometimes both, of the parties which are of varying legal status. We will refer to

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5 The Bill has passed all stages in the House of Commons and has passed second reading and committee stage in the House of Lords. Even if (as anticipated) the Lords were to obstruct the Bill at third reading stage, from July 2023 it would be possible for the Commons to send the Bill to the Lords again in the new session and for it then to be passed into law without the assent of the Lords under the Parliament Acts.

6 See further below and in Appendix E.

the agreement as a whole with this collection of texts as "the Windsor deal". The deal amounts to a political (i.e., not legally binding) agreement to take certain actions: to take a decision within the Joint Committee established under the Withdrawal Agreement (of which the NI Protocol forms an integral part), for some interpretative declarations and declarations as to future conduct to be made, for the EU to make certain changes to its own laws, and for the UK to enhance its performance and commitments under the scheme of the NI Protocol.

The different legal statuses of the various elements of the deal complicate the analysis. The draft Joint Committee decision, which we refer to as the "Windsor draft decision", (once adopted) would have a legal effect akin to that of a treaty, since it is a formal bilateral act within the framework of the Withdrawal Agreement which would need the consent of both parties (UK and EU) to be varied. By contrast, the proposed changes to EU law (which would implement certain easings in the application of EU law under the NI Protocol) are not bilateral acts, with the consequence that their interpretation and validity fall within the jurisdiction of the ECJ. We cannot see what legal recourse the UK would have if the EU were either not to pass them into its law in the form anticipated, or if the EU were in future to decide to amend or repeal them under its own law.[7] The UK could then be reduced to pleading that the EU's intended changes were against the spirit of the political (i.e. not legally binding) aspects of the deal. The precedent set by this method of implementing the easings is very disturbing indeed, since the UK government has condoned the principle of the EU creating under its own law Regulations which do not apply within the EU's own territory and apply only within the territory of the UK, like a colonial power legislating for a colony. While the UK government welcomes these particular proposed Regulations, with this principle established, we cannot see what legal means the UK would have to prevent the EU from changing its laws to the disadvantage of Northern Ireland or the UK, for example, by implementing a ban on the importation of vaccines from the EU to Northern Ireland by amending the EU's medicines laws.[8]

3. The framework of the NI Protocol – will it change?

It is important to note that changes are to be effected to the text of the NI Protocol by way of a Joint Committee decision, using a power under Article 164(5)(d) of the Withdrawal Agreement. This allows for changes "which do not change essential elements" to be made by the Joint Committee to specified parts of the Withdrawal Agreement, including the NI Protocol, in order to address situations which were unforeseen, so long as this occurs before the end of 2024.[9] This narrow legal basis which the UK negotiators apparently accepted – as distinct from an agreed amending treaty which could make substantial changes – limits the

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7 It seems to us an avoidable negotiating error for the UK to have relied on these easings being incorporated into EU law, instead of insisting that they should be incorporated into a Joint Committee decision which would give the UK a veto on their repeal or amendment and would have brought their interpretation under the jurisdiction of the WA international arbitral panel rather than the ECJ.

8 It should be recalled that this is exactly what the EU attempted to do when COVID-19 vaccines were in short supply. On that occasion, it sought to do so by invoking Article 16 to suspend parts of the Protocol, but once the principle is accepted of the EU being able unilaterally to make changes to the law within Northern Ireland through its own legislative process, it could achieve the same result, and other results to the detriment of the UK and NI, without the need for it to invoke Article 16 with its procedures and safeguards.

9 In the Windsor Political Declaration, the changes are described as "meaningful changes to the Protocol and its operations" (page 3).

scope of the changes which can be made to the NI Protocol and would certainly rule out changes to its structure.

The actual amendments to the Protocol text proposed to be made are in three areas:[10] a new paragraph to be inserted in Article 6(2) of the NI Protocol which provides an explicit basis for the introduction of the limited easings on the movement of goods which we explain in detail below;[11] the insertion of a new paragraph 13(3a) relating to the 'Stormont brake', which we deal with below; and amendments within Annex 3 which disapply certain articles of a VAT Directive and an excise tax Directive.[12] The overwhelming bulk of the NI Protocol text will be unamended.[13]

Nor will the other parts of the Windsor deal change the existing framework of the NI Protocol.

Upon withdrawal by the UK from the EU, the EU insisted on a protective layer of EU law applying to Northern Ireland, overspilling EU boundaries and sitting on adjacent territory, in order (so it was claimed) to allow for an invisible north-south territorial border on the island of Ireland.[14] This central feature of the NI Protocol will remain in place under the Windsor deal, as will the other main elements of the NI Protocol, as follows:

- *Extraterritorial application.* The extraterritorial application of EU laws in Northern Ireland remains, save for certain specified limitations and exceptions.

- *EU executive, administrative and judicial sovereignty.* The legal mechanisms that are used to enforce, interpret and apply EU law in Northern Ireland like in a member state (including that EU laws which are applied within Northern Ireland by the NI Protocol have supremacy in the UK's (national) courts over all laws of UK origin) are not affected by the Windsor deal.

- *Severance of Northern Ireland from Great Britain.* The hard border between two different legal systems in Great Britain and Northern Ireland that is the underlying cause of the checks and controls required between these two parts of the same

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10 For ease of reference, the NI Protocol text marked up with the proposed amendments of the draft Windsor decision is published with this paper as Appendix A.

11 This new paragraph will read: "This includes specific arrangements for the movement of goods within the United Kingdom's internal market, consistent with Northern Ireland's position as part of the customs territory of the United Kingdom in accordance with this Protocol, where the goods are destined for final consumption or final use in Northern Ireland and where the necessary safeguards are in place to protect the integrity of the Union's internal market and customs union." As we have pointed out above, this wording could and should have been changed to make these specific arrangements a Joint Committee responsibility rather than leaving it to the EU to incorporate them in its own law.

12 This provides limited freedoms to the UK which allow Northern Ireland to be aligned with tax rates in GB where changes have been made since Brexit. As explained below, these changes are accompanied by restrictions which mean that the UK will not be free as a sovereign state to make whatever changes it likes to its internal tax rates in Northern Ireland.

13 Including the important Annex 2 which lists 293 EU legislative instruments relating to the single market for goods which apply "to and in the United Kingdom in respect of Northern Ireland" by virtue of Article 5(4) of the Protocol.

14 See Appendix C for the background and for a discussion of the EU's interpretation of the concept of goods being "at risk" of crossing the border as effectively requiring that there be no risk at all.

country is not addressed; the Windsor deal at best will create some circumscribed holes in that hard border.

A full background to the Windsor deal and how these elements have not been removed is set out in Appendix C.

4. Undertakings and commitments by the UK - toughening of existing arrangements

Overall, the documentation comprising the Withdrawal Agreement and its NI Protocol, which purport to override UK sovereignty by imposing foreign (EU) law in Northern Ireland, is to be treated as fully binding. As discussed above, the obligation of the UK to continue to apply EU law in Northern Ireland is unamended, as is the obligation to follow changes to EU law, subject only to the possible use of the 'Stormont brake' which we consider below. Furthermore, the existing arrangements in Northern Ireland are toughened in the following manner:

- Renewed commitments are made by the UK to the structures of the Withdrawal Agreement (which includes the NI Protocol).[15]

- In the Windsor Political Declaration of 27 February 2023, there is assertion of international obligations (*pacta sunt servanda* – i.e., that treaties must be observed), and the applicability of the Vienna Convention on the Law of Treaties 1969, stating that the Withdrawal Agreement and its Protocol fall under this Convention. This subservience by the UK to the Withdrawal Agreement is expressed despite a recent advisory opinion of the International Court of Justice which casts doubt on the effectiveness in international law of long-term encumbrances on a State's sovereignty where these were put in place before the State had emerged fully independent from a legal system in which it was a subordinate entity.[16]

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15 In the Windsor Political Declaration of the EU and UK of 27 February 2023, there is a statement (on page 1) of "continued commitment to… the Withdrawal Agreement, including its NI Protocol, and the Trade and Cooperation Agreement", which in turn contains a cross-default provision which covers defaults under the Withdrawal Agreement and NI Protocol (Inst.24. (4) on P. 391 of the TCA). Both parties also commit, in the same document "to the full implementation of the Withdrawal Agreement in all its parts" (page 4). There is a proposed new draft Joint Declaration on dialogue and goods in which the parties commit to the structures of the Withdrawal Agreement – the Joint Committee, the Specialised Committees and the Joint Consultative Working Group as envisaged in the Windsor Framework. There are new obligations of "full mutual respect" and "good faith" for these purposes, in accordance with Article 5 of the Withdrawal Agreement. In a draft Unilateral Declaration by the UK on the democratic consent mechanism, the UK notes that the joint "solutions" announced in Windsor "are intended to constitute a series of practical and sustainable measures to address, in a definitive way, deficiencies and situations unforeseen that have emerged since [these arrangements] entered into force".

16 See the advisory opinion issued by the International Court of Justice (ICJ) on the Chagos Archipelago sovereignty dispute: https://icj-cij.org/sites/default/files/case-related/169/169-20190225-ADV-01-00-EN.pdf. The Court deemed the United Kingdom's separation of the Chagos Islands from the rest of Mauritius in 1965, when both were colonial territories, to be unlawful: https://icj-cij.org/sites/default/files/case-related/169/169-20190225-ADV-01-00-EN.pdf#page=46.

- The UK government commits to stopping the process of the Northern Ireland Protocol Bill[17] and not proceeding with it, so that it will fall in the UK Parliament at the end of the Parliamentary session.

- New, tougher arrangements are to be adopted by the UK for market surveillance and enforcement under the scheme of the NI Protocol.[18]

- New commitments are made by the UK to the EU on "exports" from Northern Ireland to Great Britain.[19]

- Most disturbingly, in the context of sovereignty, and its twin companion, democracy, the UK and European Commission agree to "establish regular engagement with Northern Ireland stakeholders including citizens and businesses".[20] In a new EU document entitled "Enhanced engagement with Northern Ireland stakeholders", the EU then sets out how EU representatives will engage on an annual basis with Northern Ireland stakeholders,[21] the Commission

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17 Windsor Political Declaration, page 4. The EU states that "these arrangements, when implemented, mean that there will no longer be grounds for the existing Commission legal proceedings against the [UK] relating to the [NI Protocol]" (*ibid*).

18 A draft Recommendation of the Joint Committee on market surveillance and enforcement (available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1139435/Draft_unilateral_declarations_by_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_in_the_Withdrawal_Agreement_Joint_Committee_on_on_market_surveillance_and_enforcement.pdf) cites Articles 166(3) and 182 of the Withdrawal Agreement and Article 6(2) of the NI Protocol in recommending the prioritisation (based on risk and intelligence) of collaborative market surveillance and enforcement tools to monitor and manage the flow of goods for illegal entry into the EU (or the UK). It proposes "enhanced cooperation" arrangements to underpin those arrangements, encompassing knowledge-sharing, information exchange, work with operators and joint activity "where appropriate", between authorities in Northern Ireland and "relevant Member States" to tackle illegal activity and smuggling, ensuring goods are not placed on the market which do not meet applicable standards. There is a draft Unilateral Declaration by the UK on market surveillance and enforcement that it will build the capabilities and capacity to perform its tasks under the above arrangements, with specifics as to how it will perform this task. These will include further enhancements to retail goods procedures and arrangements for goods "moved by parcel". The UK will also maintain a strong regime for penalties, with a view to increasing those penalties to provide a further deterrent "if necessary". The UK will take "effective, dissuasive and proportionate action in relation to non-compliance", underpinned by sanctions and penalties.

19 Under a draft Unilateral Declaration on export procedures, the UK commits to applying low-impact export procedures for "exports" from Northern Ireland to Great Britain, recalling "its commitment to ensure full protection" of EU law prohibitions and restrictions on the exportation of goods to Great Britain, which is that part of the UK which is to be treated as a "third country" under these arrangements. The UK will provide "meaningful information" to the EU as regards restricted goods moving from NI to Great Britain as regards "exports, transfer, brokering and transit of dual use items, exports of cultural goods and shipments of waste". (This replaces an earlier Unilateral Declaration on export declarations of 17 December 2020.)

20 Windsor Political Declaration, page 3, point 1. Statements are made for "shared commitment to support stability and prosperity in Northern Ireland" (page 1).

21 "Every year, [the EU's European Commission] representatives will engage with Northern Ireland stakeholders on the [European] Commission Work Programme for the following year. This will highlight proposals of particular interest for Northern Ireland stakeholders enabling timely engagement with them".

will organise information sessions upon request,[22] relevant consultations including Northern Ireland stakeholders will be included on the EU's website,[23] and new EU policy initiatives will have to consider Northern Ireland stakeholders' input.[24]

- Commitments are to be made by the UK immediately to enhance enforcement over parcels moving between Great Britain and Northern Ireland, prior to the above arrangements coming into force.[25]

5. Continued application of EU customs controls and duties, and regulatory controls to goods moved into NI, with a "red lane" and procedural easings for a so-called "green lane"

The apparent reference point for the so-called "green lane" is the green lane which exists at an airport. This is a customs lane which you can walk through when you have nothing to declare. You carry your goods through without having to do paperwork, pay duties or undergo checks (other than occasional spot checks to ensure compliance). Similarly, the "green lane" for Northern Ireland is meant to be a system under which goods can be moved from Great Britain into Northern Ireland, free of formalities, checks and tariffs, where those goods are destined to be consumed or used within Northern Ireland. By contrast, goods passing through Northern Ireland on their way to the Republic of Ireland would be in the "red lane" (explained below), where they would be subject to the full panoply of customs duties, formalities and regulatory checks which are applied at an EU external border, albeit that they are applied in transit on UK territory rather than at the land border with the Republic. The Northern Ireland Protocol Bill, if enacted into law, would be capable of establishing such a green lane/red lane system, but under the sovereign control of the UK rather than under EU law and supervision.

The government claims that the Windsor deal creates a green lane of the kind found in an airport. Indeed, at its highest, it is claimed that it will remove "any sense of the border in the Irish Sea for goods staying within the UK".[26]

There are two elements to consider in assessing whether or not such a green lane will be achieved:

- customs formalities and duties, and

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22 "If requested by Northern Ireland stakeholders, the [EU's European] Commission will organise information sessions and/or workshops on new initiatives".

23 "Relevant public consultations and/or involvement of Northern Ireland stakeholders in targeted consultations for specific cases will be included on the Protocol webpage".

24 "In relevant impact assessments for new EU policy initiatives, there will now be a dedicated overview of Northern Ireland stakeholders' input. This will set out their views on the implications of the initiative for Northern Ireland and how they have been taken into account in the final proposal".

25 By a draft Unilateral Declaration by the UK on strengthening enforcement action for goods moved in parcels, the UK commits immediately to providing protection to the EU internal market by strengthening enforcement action concerning goods moved in parcels from Great Britain to NI, including by way of data sharing, enhanced customs cooperation, and collaboration on enforcement and compliance, updating the Specialised Committee on implementation in respect of the same.

26 Prime Minister's Office, 10 Downing Street and The Rt Hon Rishi Sunak MP, Press release, "Windsor Framework unveiled to fix problems of the Northern Ireland Protocol" 27 February 2023.

- regulatory checks for compliance with EU single market laws which apply in Northern Ireland under the NI Protocol.

Before coming to the specifics of how the "green lane" would operate as regards movements of goods which would fall within it, it should first be pointed out that there will continue to be many goods moving from Great Britain to Northern Ireland which will fall outside the scope of the "green lane" arrangements and will therefore be subject to the full panoply of EU external border checks, even though those goods are not going to be exported into the Republic or elsewhere in the EU. Businesses within Northern Ireland acquiring goods from Great Britain which intend to sell their products within Northern Ireland, elsewhere in the United Kingdom or to the rest of the world will continue to be damaged by these controls and duties while receiving no conceivable benefit from the NI Protocol arrangements.

6. Continued application of customs controls and duties outside the "green lane"

The general position will remain that, outside the specific accommodations, EU customs laws will apply to the movement of goods from Great Britain to Northern Ireland (this internal movement is treated as an "importation"[27]) and to importations of goods from the rest of the world. In other words, there is a customs border, within UK territory, across the Irish Sea, and the EU's rather than the UK's external customs duties will apply to imports from the rest of the world. Importantly, goods which are to be used by businesses in Northern Ireland for "commercial processing" will be subject to EU customs duties, unless the business or the type of processing falls within a specific exemption.

Under the UK and EU Trade and Cooperation Agreement (TCA), duty free trade in goods between the UK and the EU is permitted but only in a highly qualified way, which creates the needs for checks and controls. Under the so-called "Rules of Origin", goods sold in the market in Great Britain will not necessarily be counted as of UK origin, meaning that businesses in Northern Ireland which acquire goods inputs from Great Britain either need to pay EU external tariffs on those goods, or need to have evidence that those goods do satisfy Rules of Origin and so are tariff exempt. The costs of EU customs compliance on input goods due to the application of EU Rules of Origin within UK territory will put Northern Ireland businesses who acquire inputs from Great Britain at a competitive disadvantage compared with businesses in Great Britain who can acquire their input goods in the UK market without such costs.

There is a further complication with regards to UK exports to Northern Ireland concerning Tariff Rate Quotas (TRQs), which is a topic that the Windsor deal does not adequately address, except in the limited case of certain steel products (for which the deal makes special provision).[28] TRQs are quantities of goods which are permitted to enter the importing country at a lower tariff, after which point (once the specified quantity limit has been reached) a

[27] We use the word "importation" under protest since what we are talking about is in fact the movement of goods internally within one country.

[28] Proposal for a Regulation of the European Parliament and the Council amending Regulation (EU) 2020/2170 as regards the application of Union tariff rate quotas and other import quotas to certain products transferred to Northern Ireland, Brussels, 27.2.2023 COM(2023) 125 final 2023/0063(COD) (this Regulation deals with safeguard duties and related TRQs imposed by the EU against certain steel products).

higher tariff takes effect. This creates a problem where the UK applies a TRQ either unilaterally or through a Free Trade Agreement (FTA). The applied UK import tariff under the TRQ might be the same or similar to that of the EU if the EU TRQ was factored in. However, since EU TRQs do not apply in Northern Ireland, the EU's out-of-quota (higher) tariff must apply instead. For imports into Northern Ireland from Great Britain, this will invariably result in a larger tariff differential vis-à-vis the UK tariff, which is well above the three percent level which automatically triggers the "at risk of entering the EU" element of imports.

These two highly technical points have a very detrimental effect since they force Northern Ireland out of UK supply chains and deny them the benefits of the UK's external arrangements. They are discussed in more detail in Appendix D.

The "red lane"

The default will be that customs are applied at the East-West border for goods going into Northern Ireland. The "red lane" envisaged in the Windsor deal appears merely to be a relabelling and toughening up of the existing scheme, whereby goods not falling within the "green lane" are required to undergo full EU checks and customs processes. It will also presumably apply to "mixed loads", consisting partially of green lane goods along with EU-destined red lane ones, undermining the practical advantage of the green lane.

There is no clarity regarding whether there will be a reimbursement scheme for goods which were assessed as needing "red lane" assessment, on a precautionary basis, but ended up staying in Northern Ireland and which fall within the dispensations in the Windsor deal. Given the EU's history of zealously applying its rules wherever possible, this outcome seems unlikely.

Customs formalities and duties

It is often, but wrongly thought that complying with EU external customs should not be a problem on goods brought from the UK because the EU-UK TCA provides for zero tariffs on almost all goods. This is not the case. As explained above, only goods which *originate within* the UK or EU according to Rules of Origin (which are complex) qualify for zero tariffs, so EU external tariffs must be paid on many goods in free circulation in the UK market which have sufficient non-UK/EU content that they do not satisfy Rules of Origin. Even if tariffs are not payable, there is significant administrative time, work and cost in complying with customs formalities which is only partly alleviated by the government-subsidised Trader Support Service. Further, despite the TCA, EU external anti-dumping tariffs apply to some goods, which include steel. As the EU and UK's trade remedies policies diverge over time, these costs could become more burdensome, particularly during an era of increased global trade protectionism.

The NI Protocol requires EU external customs formalities (including making declarations and making goods available for customs inspection) to be complied with and customs duties to be paid on goods brought into Northern Ireland from another part of the United Kingdom, subject to an exception (inserted during the Boris Johnson renegotiation of the NI Protocol) for goods which come into Northern Ireland "by direct transport" which are not "at risk" of subsequently being moved into the EU, whether by itself or after processing to form part of

another good.[29] The exception does not apply at all to goods which are moved into Northern Ireland from Great Britain by means other than "direct transport".

Unfortunately, the notion of "at risk" is in fact applied (by the EU) in a manner which involves "no risk" (in the view of the EU) to its single market. Thus, the apparent width of the exception from compliance with EU external customs formalities and duties is severely cut down by Article 5(2) of the NI Protocol, according to which a good is treated as "at risk" unless it is proved that the good will not be subject to commercial processing in Northern Ireland, *and* that it meets criteria established by the Joint Committee. The Joint Committee can only reach decisions by consensus, i.e., both the UK and the EU have to agree, giving the EU an effective veto over the "not at risk" rules. This has enabled the EU to insist on very narrow rules, since in the absence of agreement on a set of rules, all goods would be deemed "at risk" and subject to customs controls. An extremely restrictive set of "not at risk" rules was established in Joint Committee Decision No 4/2020.[30] Under the Windsor deal, an amendment to the Protocol is made which makes clear that specific arrangements can be considered "where the goods are destined for final consumption or final use in Northern Ireland and where the necessary safeguards are in place to protect the integrity of the [EU's single] market and customs union."[31]

The starting point in the NI Protocol is a presumption that goods which are going to be commercially processed in Northern Ireland are to be subject to EU customs if they are moved into Northern Ireland from Great Britain or imported from the rest of the world.[32] "Processing" is widely defined and includes any alteration or transformation of goods or subjecting them to any process other than for preserving them or marking or labelling them.[33] The reason for the inclusion of this provision in the NI Protocol appears to stem from the EU's paranoia that businesses in Northern Ireland might be at a competitive advantage if they were able to obtain supplies of goods inputs and pay only UK external tariffs on them, which might be zero in a case where the UK had an FTA with a country and the EU did not. The Joint Committee is given a power to define exceptions where activities are deemed not to be commercial processing for this purpose,[34] but again the exercise of this power is subject to an EU veto, and it has been used in a very limited way.

If one could count on the EU to implement the Windsor deal, and in particular to conduct itself in the Joint Committee in a good faith manner, in full accordance with the EU-UK political undertakings embodied in the deal, then one might have grounds for optimism that many EU checks would be eroded, and pragmatism would sweep away the EU law scheme. However, as noted, the EU is under no international law obligation to observe the political undertakings and, thus, retains a free hand when deciding whether or not to grant "not at risk" status to

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29 Article 5(1), NI Protocol.

30 Article 3, Joint Committee Decision No 4/2020.

31 By Article 1 of the Windsor Framework, a new Article 6(2) is inserted into the NI Protocol.

32 Article 5(2)(a), NI Protocol.

33 "Processing" is defined in Article 5(2) of the NI Protocol as "any alteration of goods, any transformation of goods in any way, or any subjecting of goods to operations other than for the purpose of preserving them in good condition or for adding or affixing marks, labels, seals or any other documentation to ensure compliance with any specific requirements". So, for example, even something like painting goods would count, and such operations as cutting up bread and ham and making sandwiches fall well within the scope of "processing".

34 Article 5(2), third subparagraph, NI Protocol.

products. Those familiar with the tenets and approach of EU law and its lawyers will know that those who might think pragmatism will prevail are engaging in wishful thinking. And having thrown away the powerful negotiating card of the Northern Ireland Protocol Bill, it is hard to see what negotiating power the UK will have to persuade the EU to allow further relaxations which the EU will regard as at least potentially undermining its own interests. We believe it is unrealistic to think that the Windsor deal will usher in an era of future flexibility on the part of the EU.

7. "Green lane" customs relaxations

The Windsor deal contains a complex set of provisions for its "green lane" which, like the NI Protocol itself, are drafted in EU style and subject to EU law methods of interpretation. They address customs formalities and duties applicable to goods being taken from Great Britain into Northern Ireland in those limited circumstances in which the EU has already accepted, in the Protocol, that these may be treated as being destined solely for Northern Ireland.

Under the Windsor deal there will be various limited, and carefully restricted, instances in which the processing in Northern Ireland of a good will be considered non-commercial, with the consequence that those goods are exempted from East-West customs controls unless the good after processing is "at risk" of going on to the EU.[35] These instances would replace those set out in the existing Joint Committee Decision No 4/2020.[36] A full flavour of the narrowness of the new (albeit generally wider than before) permissions is to be gained from how they are expressed. They essentially permit circumstances in which the processing is in Northern Ireland and is "for the sole purpose of":

(a) The sale of food to an end consumer in the UK.

(b) The incorporation of processed goods into a permanent structure constructed by the importer (or one "subsequent entity") in Northern Ireland.

(c) The direct provision to the recipient of health or care services by the importer or one subsequent entity.

(d) Not for profit activities by the importer or one subsequent entity, with no subsequent sale of the processed good.

(e) The final use of animal feed on Northern Ireland premises by the importer or one subsequent entity.[37]

There is also a separate safe harbour where the good is imported for "free circulation" by importers with an annual turnover of less than £2m (up from £500k), estimated to cover 80% of firms[38] in Northern Ireland, and a declaration is provided.[39]

Accordingly, it remains the case that, for the generality of goods moved from Great Britain to Northern Ireland, unless one of the above specific exceptions applies, EU external customs

35 Article 6, Windsor draft decision.

36 Article 16, Windsor draft decision.

37 Article 6(b), Windsor draft decision.

38 We do not know what percentage of East to West trade this will represent. Larger firms with turnovers which fall outside the exemption are likely to acquire larger volumes of goods from Great Britain so we would expect the exemption to cover a lot less than 80% of the East to West trade.

39 Article 6(b), Windsor draft decision.

formalities need to be complied with and any applicable duties must be paid whenever goods are used by a Northern Ireland business in some process. It should be emphasised that goods used for processing in Northern Ireland which are not within the scope of one of the exemptions are subject to customs *regardless of whether the output goods are or are not at risk of being sent to the EU*. This imposes a very substantial compliance cost, which must be met either by the Northern Ireland business or its suppliers in Great Britain; for example, even if goods are imported from Great Britain for processing in Northern Ireland and then sent back to Great Britain in processed form.[40]

Where goods are not "considered to be subject to commercial processing", there are further narrow permissions for the movement of a set of goods into Northern Ireland, when the EU accepts they are not "at risk" of being moved into the EU.[41] These include permissions for goods carefully defined by reference to whether they attract the EU Common Customs Tariff, either at all or over a certain level; and whether they are of a non-commercial nature and are sent in a parcel by a private individual to another private individual residing in Northern Ireland. The term parcel is itself defined, by reference to weight.

There is an authorisation scheme for bringing goods into Northern Ireland by direct transport for sale to, or final use by, end consumers, which is set out in full.[42] It is supervised by the UK, but under EU oversight[43] and the overall EU legal architecture of the NI Protocol itself. This scheme contains a detailed application, compliance and monitoring process.[44] The scheme also contains various restrictions on when the UK should grant authorisations to firms, with a view to facilitating EU verification and oversight.[45] A further authorisation regime is established for carriers,[46] which contains responsibility, process, capability, systems, data, reporting, responsiveness and compliance requirements.[47] Additional requirements are also imposed.[48]

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40 This might possibly be mitigated by "inward processing relief" but claiming that relief involves compliance work and costs.

41 Article 7, Windsor draft decision.

42 Articles 9-11, Windsor draft decision.

43 Article 9(6), Windsor draft decision.

44 Including as specified under relevant EU customs legislation, referred to in Article 9(4), Windsor draft decision.

45 E.g., Article 11, Windsor draft decision.

46 Article 12, Windsor draft decision.

47 Article 13, Windsor draft decision.

48 The UK must provide monthly information to the EU, 15 days after the end of each month (and in electronic data form), on the application of customs duties provisions of the NI Protocol (Article 14, Windsor draft decision, which sets out the provisions on exchange of information on the application of Article 5(1) and (2) of the NI Protocol) and various of the above provisions of the Windsor Framework. This must comprise information on volumes and values, in aggregated form and per consignment, as well as means of transport (Article 14, Windsor draft decision). There is also an ability for the EU to audit the UK's authorisation schemes (i.e., those operating under Articles 9-12 of the Windsor draft decision). Furthermore, there is an ability for the EU to suspend various of the above provisions in instances of non-compliance or non-cooperation by the UK itself (Article 15, Windsor draft decision), whereby the arrangements under the current Joint Committee Decision No 4/2020 are reapplied. The UK can, by notification, lift the suspension and reinstate the Windsor deal arrangements (Article 15(3), Windsor draft decision). There is also a process for the switching off of provisions, on two years' notice, and the triggering of new Joint Committee discussions over a replacement set of provisions if either party considers there is a "significant diversion of trade", or fraud or illegal activities (Article

Many of these dispensations fall away where the EU chooses to apply "trade defence measures," including anti-dumping and countervailing (anti-subsidy) duties on an ever-expanding list of goods. It is noteworthy here also that the EU has not recognised the UK's subsidy control rules, outlined in the Subsidy Control Act 2022, as equivalent to EU State aid rules. Overall, the so-called "green lane" provisions are limited in scope and will result, in practice, in the continued application of EU customs formalities and duties to many goods moving from Great Britain into Northern Ireland when these will in practice never cross the border into the Republic or go elsewhere in the EU. Even within the scope of the scheme, it will impose significant compliance costs on traders, who will need to register under the scheme and make online declarations whenever they move goods into Northern Ireland, in contrast to when they supply goods to any other part of the UK. The scheme itself is not on a secure legal base vis-à-vis the EU, since it is vulnerable to suspension by the EU on grounds of suspected fraud, or termination by the EU on "diversion of trade" grounds. As mentioned above, it could also be disrupted by the unilateral imposition of trade remedies measures by the EU, which the NI Protocol allows the EU to apply to the territory of Northern Ireland.

8. The "green lane" - compliance with EU single market laws which apply in Northern Ireland under the NI Protocol, and the elusive "1,700 pages of EU law" which will be "disapplied" or "removed"

The Windsor deal would introduce a number of "specific rules"[49] which would provide as a matter of EU law for specified EU laws not to apply within the scope of the specific rule concerned. This is in effect the regulatory aspect of the "green lane" and is to be distinguished from the customs exemptions we discuss above. These easings are highly limited and revolve around the ability for processes to be implemented across the Irish Sea. [50]

15(4), Windsor draft decision). These types of provisions are not dissimilar to requirements on member states in certain contexts within the EU legal order.

While Great Britain-based companies are able to enrol in the green lane's trusted trader scheme, to do so they will need a customs representative in Northern Ireland, which may be burdensome. Northern Ireland destined goods will only require the simpler 6-digit customs code instead of the more complicated 10-digit one for red lane goods. However, some green lane products will require an 8-digit code, adding some complexity to the process.

[49] Using the terminology in the EU's draft Regulations.

[50] The UK and EU state in the Windsor Political Declaration (page 2) that there is a differentiation between goods at risk of moving into the EU single market, and goods that are destined for final consumption in Northern Ireland, with the accommodations arising in the latter context only. This declaration goes on to state that "[s]olutions have been found for the movement of food for their end consumption in Northern Ireland…. The new arrangements require effective safeguards that guarantee that goods moving from Great Britain to Northern Ireland are not moved further to the EU Single Market" (*ibid*). These safeguards are built on "three pillars: a trusted trader scheme with a robust authorisation and monitoring process; data-sharing on movements of goods allowing risk-assessments to be performed; and reinforced procedures, such as increased market surveillance, in place to guarantee that such goods will be consumed only in Northern Ireland." The measures on VAT "better reflect Northern Ireland's integral place in the UK Internal Market whilst protecting the EU from risks such as fiscal fraud or market distortion. A forward-looking coordination mechanism in the area of VAT and excise will be established to address future issues that may arise." The European Commission and the UK also commit to providing "further clarifications as regards the application of relevant State aid rules, providing certainty as to how and to whom they apply, including clarifying the conditions under which UK measures do not affect trade between Northern Ireland and the [EU] and therefore do not fall within the remit of the EU's State aid framework" (*ibid,* pages 2-3).

Outside the scope of these specific rules, businesses in Northern Ireland are obliged to comply with relevant EU laws. Goods made by a Northern Ireland business and sold on its market will remain subject to applicable EU single market rules covering their processes of production, on the standards to be satisfied when the goods are marketed and on how they are marketed (e.g., required labelling and information to be provided to consumers).

Many checks theoretically required under the NI Protocol are currently not required at all in practice because of action taken unilaterally by the UK to defer implementation on the basis of problems encountered in Northern Ireland arising from the lack of consent from the Unionist community. At a practical level, the situation which will prevail under these easings needs to be compared with the situation at present with the 'grace periods' since as part of the Windsor deal the UK is undertaking to bring these grace periods to an end.

The elusive "1,700 pages of EU law" which will be "disapplied" or "removed"

An important claim is made in the UK Command Paper that 1,700 pages of EU law have been disapplied;[51] and that this means that less than 3% of EU rules are applicable in Northern Ireland.[52] Despite questions posed to the UK government, we have been unable to verify these claims. These are important assertions. We have carefully looked for validation of them in the draft legal texts. Page-counting of itself is not a very useful exercise, but we would have welcomed some information about the make-up of this 1,700 pages of EU law – and, more importantly, identification of the legal texts by which this "disapplication" or "removal" of EU laws from Northern Ireland is to be achieved.[53] We would also have welcomed some explanation of what are said to be the "3% overall" of EU laws which the Command Paper states are still applicable in Northern Ireland. However, this has not been forthcoming.[54]

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51 The UK Command Paper, sub-paragraph (d) of the summary (emphasis added): "The agreement delivers a form of dual regulation that will work for business and consumers in Northern Ireland, based on the restoration of Northern Ireland's place in the UK internal market, and reflecting that by far the greatest portion of Northern Ireland's economic life will continue to be based on trade within the United Kingdom. As a result, **over 1,700 pages of EU law - with accompanying European Court of Justice (ECJ) jurisdiction - are disapplied,** meaning that core UK trade is based on core UK internal market rules, whether citizens and businesses are based in Belfast or Birmingham. This will ensure, for example, that the same UK food safety laws apply for retail goods moved into Northern Ireland; that VAT and excise rates apply UK-wide; and that medicines licensing will always be undertaken by the UK regulator for patients in Northern Ireland - without jeopardising access for Northern Ireland pharmaceutical firms to the EU market".

52 The UK Command Paper, paragraph 57: "[The Windsor deal] therefore narrows the range of EU rules applicable in Northern Ireland – to less than 3% overall by the EU's own calculations. The rules that do apply are there solely, and only as strictly necessary, in order to maintain the unique ability for Northern Ireland firms to sell their goods into the EU market."

53 The difficulty of validating assertions made in the UK Command Paper about the effects of the Windsor deal is greatly increased, on this as well as other issues, by the absence of normal cross-referencing and signposting to the provisions of the international texts which a normal government Paper of this kind would be expected to contain. It is most regrettable that the UK Command Paper should have been published in this condition.

54 See the written answer by Leo Docherty MP to the Parliamentary question by David Jones MP which sheds no light at all on the make-up of these "less than 3%" of EU rules, nor on the evidential basis for this claim as requested by the Question: https://questions-statements.parliament.uk/written-questions/detail/2023-03-08/161247

The Command Paper appears to be saying that "1,700 pages" of EU law will no longer apply to Northern Ireland. Regrettably, such a claim is not true. The assertion that a significant volume EU laws will be "disapplied" or "removed" from Northern Ireland is contradicted by an examination of the NI Protocol text as proposed to be amended by the draft Joint Committee decision.[55] Not a single EU law is to be deleted from the long list of EU single-market-for-goods laws in Annex 2, all of which apply "*to and in the United Kingdom in respect of Northern Ireland*" by virtue of Article 5(4) of the NI Protocol. Neither Article 5(4) nor Annex 2 are to be amended in any way. The only EU laws which will be disapplied (in part only) are certain specified parts of two VAT and Excise Directives through the amendments to be made to Annex 3 of the NI Protocol.[56]

We have been given to understand informally that the "disapplication" of EU law referred to in sub-para (d) of the Summary in the UK Command Paper is to be found in the proposals for new EU Regulations relating to Northern Ireland, which have been published by the EU Commission following the announcement of the Windsor deal. These Regulations would form part of the EU laws which apply in Northern Ireland under the NI Protocol. These proposed Regulations would provide for a number of narrowly defined and limited circumstances (referred to accurately as "special rules", in the texts of the proposed Regulations) where some (but not all) EU rules would not apply, subject to the UK complying with conditions which we describe below, breach of which can lead to these special rules being suspended or terminated.

As we have pointed out above, the general body of EU laws will continue to have full force in Northern Ireland. This is particularly important for businesses in Northern Ireland which make goods and place them on the market there. The proposed Regulations contain special rules which allow goods from Great Britain to be sold retail in Northern Ireland without needing to comply with some (but by no means all) EU rules, but ***a Northern Ireland business selling goods within Northern Ireland in competition with those goods from Great Britain will still be required to comply with the full panoply of EU rules***. The obligation of Northern Ireland businesses to comply with EU rules will not be limited to goods sold across the land border or exported to other parts the EU.

In fact, the general body of EU laws relating to the single market for goods will continue to apply pervasively across NI, and not a single one of those laws will be removed from Northern Ireland under the Windsor deal. What will be done is more akin to intricate keyhole surgery within that body of laws, under which circumscribed holes are cut, which will only be kept open if the UK jumps through the hoops of continuing to satisfy the EU Commission that it is fulfilling the conditions laid down.

The most important special rules are contained in two proposals[57] for Regulations published by the EU Commission. These formal proposals are the first step in the EU legislative system (analogous to introducing a Bill to Parliament) and they are subject to being passed, either with or without amendment, by the Council of Ministers and the European Parliament. Within the papers making up the Windsor deal, we have been unable to identify any

[55] For ease of reference, the NI Protocol text marked up with the proposed amendments of the draft Windsor decision is published with this paper as Appendix A.

[56] See Appendix A, Annex 3 as proposed to be amended.

[57] COM(2023) 124 final, 27.2.2023 on retail goods etc, and COM(2023) 122 final on medicines.

justiciable or arbitrable legal obligation on the EU to pass these Regulations in the form of the Commission proposals, or if they are passed, to maintain them in force without repeal or amendment. Even assuming that the member states are signed up to a political (i.e., legally non-binding) agreement that these Regulations should be passed into law in the form published, amendments made by the European Parliament could be a real possibility.

If passed by the EU, these Regulations will form part of the body EU law which applies within Northern Ireland under the NI Protocol. Being themselves part of EU law, their interpretation and validity will fall squarely within the jurisdiction of the ECJ under Article 12(4) of the NI Protocol. This means that the scope of these special rules or the conditions attached to their continued operation could be interpreted restrictively, against the interests of the UK, by a foreign court. Even more seriously, it is not beyond the bounds of possibility that parts of these Regulations might be ruled invalid by the ECJ, e.g., as being contrary to general principles of EU law. As far as we can see, there would be no recourse to an international arbitral panel under the Withdrawal Agreement if these Regulations were to be restrictively interpreted against the UK's interests by the ECJ or if a specific rule were to be ruled invalid as a matter of EU law. Invalidation of a specific rule would automatically lead to the general EU law which prevails under the NI Protocol filling the void.

The choice of this legal mechanism for securing the rights of a treaty party is contrary to the norms of international treaty practice. Such rights should be embodied in a legally binding international treaty or agreement. They should not be dependent on being unilaterally incorporated into the law of one treaty party, where that law and its interpretation are under the unilateral control of the courts and institutions of that treaty party. Where the law concerned extends into the territory of the other treaty party, as EU law does under the NI Protocol, that makes this arrangement even more unacceptable. In this regard the Windsor deal would materially worsen the position under the NI Protocol as it stands, through the UK conceding legal control to the EU and its institutions over the scope and existence of mitigations of EU law which are vital for the people of Northern Ireland.

We are at a loss to understand why these carve-outs are to be incorporated in draft EU legal instruments, when they could and should have been incorporated into rules adopted bilaterally by the Joint Committee. The draft amendment to Article 6(2) of the NI Protocol which authorises "specific arrangements for the movement of goods within the United Kingdom's internal market"[58] seems designed to cover carve-out arrangements of the kind included in these proposed EU Regulations. Annexing these carve-out rules to a Joint Committee decision would at least have removed them from the scope of EU law, protected them from unilateral amendment, repeal or invalidation by the EU or its institutions and would have shielded them from being bindingly interpreted by the ECJ against the UK's interests.

In our Appendix E, we discuss in more detail the draft Regulation relating to retail goods and the draft Regulation relating to Medicines. As explained there, the scheme relating to retail goods (mainly food and drink) moved from Great Britain into Northern Ireland (1) does not apply to all trade in retail goods, but only where goods are moved from an "authorised establishment" (such as a supermarket distribution warehouse) on one side of the Irish Sea

[58] See Appendix A, proposed amendment to Article 6.

to an "authorised establishment" on the other side, (2) specifically excludes from its scope goods which originate in Northern Ireland, so businesses there will not be able to compete on an equal basis with mainland businesses who use the scheme, (3) covers some but not all relevant EU laws,[59] and (4) requires compliances with formalities including provision of "per consignment" certificates and submission to monitoring and checking.

The proposed Regulation on Medicines is likewise highly restricted and conditional. As we explain in Appendix E, it allows the UK's Medicines and Healthcare products Regulatory Agency (MHRA) to authorise in Northern Ireland new medicines which fall within the special categories which are "centrally authorised"[60] within the EU. However, the MHRA will remain subject to EU law when authorising new medicines in Northern Ireland which fall outside these special categories, making it difficult or impossible to change the UK's new medicines approvals regime in future without putting at risk the availability in Northern Ireland of the same medicines that are available in Great Britain. EU law relating to other aspects of medicines regulation remains applicable in Northern Ireland, subject to specific exemptions from EU anti-counterfeiting measures and a special permission to allow movement of medicines into Northern Ireland via regulated pharmaceutical wholesalers.

The specific carve-outs are, however, accompanied by a number of restrictions and caveats.[61] Article 5 requires medicines within the carve-outs to bear a non-removable "UK only" label. Article 6 requires the UK MHRA to "continuously monitor the placing into the market" in Northern Ireland of these medicinal products. Article 8 requires the UK to provide "written guarantees" that the placing on the market of the medicinal products does not increase the risk to public health in the EU and that those medicinal products will not be moved to a Member State. Article 9 states that the EU Commission "shall continuously monitor the application by the United Kingdom of the specific rules", and, where there is evidence that the UK "does not take appropriate measures" to address serious or repeated infringements, it then lays down a procedure for the Commission to suspend all or parts of the "specific rules" – i.e., to suspend the above, limited, carve-outs from current EU law applicable to Northern Ireland, either temporarily or permanently.[62]

In addition to the abovementioned Regulations, the EU has also tweaked its existing Regulations in respect of *Ligustrum delavayanum* and *Ligustrum japonicum* plants to require that the UK certifies compliance with certain EU rules.[63]

These measures amount to an adjustment of certain highly specific areas of EU law applicable to Northern Ireland where these have given rise to immediate problems on the ground. No broader adjustment is envisaged.

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59 The EU laws affected are marked up with "RG" or "RG*" in green in our Appendix B, and amount to 62 out of the 293 single market laws made applicable to Northern Ireland by Annex 2 to the NI Protocol, together with 5 further EU laws (listed at the end of our Appendix B) which have come into force in Northern Ireland under the NI Protocol since the end of 2020.

60 I.e., authorised by the European Medicines Agency rather than authorised by Member States under the EU's Medicines Directive.

61 Articles 4(2) and 8, proposed EU Regulation on Medicines.

62 There is an "urgency procedure" for swift action: Article 11, proposed EU Regulation on Medicines.

63 C(2023)1500 final.

The fact that this is keyhole surgery rather than a disapplication of an area of EU law does not mean that the new retail goods and medicines Regulations are unimportant. It is clearly vital that the same new medicines should be available to people in Northern Ireland as in the rest of the UK, at the same time and without delays or shortages which literally could amount to matters of life and death. These specific rules seem clearly preferable to the current Heath Robinson patchwork of attempted mitigations of the malign impact of the NI Protocol on the supply of UK medicines to patients in Northern Ireland. However, the fact that the UK government in effect has to plead for limited exceptions from EU law in order to achieve this basic but vital goal graphically illustrates that the NI Protocol is profoundly flawed by placing a regulatory border between different parts of the United Kingdom, a flaw which the Windsor deal does not address.

9. Relaxations of EU law applicable in Northern Ireland for VAT and excise on goods

The NI Protocol currently provides that, so far as goods are concerned, EU VAT rules rather than UK domestic provisions are to be applicable in Northern Ireland, and the same for excise duties (such as levies on alcohol, tobacco and fuel).[64]

The Windsor deal relaxes this in certain specific ways, largely to address the few particular areas of actual recent or immediately anticipated divergences between the EU and UK VAT and excise systems on goods since 2021. The recitals prefacing the text note that these amendments should not lead to fiscal fraud risks or to any potential distortion of competition.[65]

In particular, the Windsor deal allows for VAT to apply in Northern Ireland at reduced rates below 5% in relation to goods installed in buildings, meaning that the zero UK VAT rate introduced for Great Britain in the 2022 Budget on the installation of energy saving materials such as heat pumps and solar panels can be extended to Northern Ireland. It also provides for the relaxation in Northern Ireland of certain other constraints on reduced VAT rates; that distance selling procedures for imported goods applicable to the EU since 2021 will not be required to apply to goods subject to final consumption in Northern Ireland on which UK VAT has been charged; and that a new system of EU VAT rules to deal with small businesses due to apply from 2025 will not be required to apply in Northern Ireland (although there will still be a constraint by reference to the EU VAT threshold of EUR85,000 to increasing the level of VAT registration threshold in Northern Ireland above the current £85,000).[66]

In relation to excise, under the Windsor deal EU requirements on the design of alcohol duty would no longer apply in Northern Ireland (although a floor on duty rates would remain applicable), which means that the revised alcohol duty system coming into effect in Great Britain from August 2023 could apply to the whole UK.[67]

Outside the above points dealing with specific points of actual or anticipated divergence since 2021, the Windsor deal provides for an "enhanced co-ordination mechanism" on VAT and excise on goods. This would involve the Joint Committee as a forum for discussion of the

64 Article 8 and Annex 3, NI Protocol.
65 Recital 8, Windsor draft decision.
66 Article 3(1), Windsor draft decision.
67 Article 3(2), Windsor draft decision.

effect on trade in goods in Northern Ireland of future divergences in VAT and excise rules between the UK and EU, with a view to adopting decisions and/or providing recommendations in order to address issues arising in relation to Northern Ireland and the NI Protocol while avoiding adverse impact on fiscal fraud risks and any potential distortion of competition in the EU.[68] The package of documents published together with the Windsor deal includes a draft joint declaration of the Joint Committee, stating that it intends to examine the possibility of providing for EU VAT rules governing the number and subject-matter of reduced VAT rates not to apply in the context of Northern Ireland to certain goods (other than goods installed in buildings in Northern Ireland; as discussed above, these would already be eligible for reduced rates of VAT under the Windsor deal itself), where the goods are by their nature and the conditions under which they are supplied subject to final consumption in Northern Ireland, and where making such a disapplication would not lead to fiscal fraud risks or potential distortion of competition. The draft declaration also states an intention to evaluate current arrangements for cross-border VAT refunds taking into account administrative burdens on taxpayers and tax authorities.[69]

These arrangements amount to limited and specific relaxations in EU law applicable to VAT and excise in Northern Ireland, but they fall well short of restoring to the UK the right of an independent country to decide on our tax structures and set our tax rates as we wish across our country. Changing tax structures or rates outside the boundary of the specific relaxations involve negotiation with the EU and their permission.

10. Democracy in Northern Ireland and the Stormont brake

The 'Stormont brake' is a proposed new procedure which is said to introduce an element of democratic consent for the people of Northern Ireland over the laws applicable to them, and to address the obvious point that their political representatives in the Assembly and Westminster have no say over the EU laws which are imposed upon them under the NI Protocol. The UK government claims that it allows Northern Ireland to block EU laws.[70]

Under the Protocol as it stands, if one of the many existing EU laws which the Protocol applies to Northern Ireland is amended or replaced by the EU, then that law in its amended or replaced from will automatically apply to Northern Ireland.[71] Where the EU law is a Regulation, it will apply in its amended or replaced form directly as part of the law in Northern Ireland and be enforceable in the courts, just like an Act of Parliament, without the need for any consent or action by the UK authorities or legislatures. Where the EU law is a Directive,

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68 Articles 17-21, Windsor draft decision.

69 Draft Joint Declaration of the Union and the United Kingdom in the Joint Committee Established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of XX 2023, on the VAT regime for goods not being at risk for the Union's internal market and on the VAT arrangements for cross-border refunds (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1139440/Draft_joint_declaration_by_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_and_the_European_Union_in_the_Withdrawal_Agreement_Joint_Committee_on_the_VAT_regime_for_goods_not_being_at_risk_for_the_Union_s_internal_market.pdf).

70 HC Deb 27 February 2023 vol 728 col 574: "The Stormont brake does more than just give Northern Ireland a say over new EU laws; ***it means that it can block them***."

71 This is the effect of Article 13(3) of the NI Protocol, which states that "where this Protocol makes reference to a Union act, that reference shall be read as referring to that Union act as amended or replaced."

it will create a legal duty on the UK to "transpose" the required changes into national law within Northern Ireland, which will normally be achieved by a statutory instrument.[72]

When the EU passes a *new* law (i.e., a law which is not an amendment to an existing law nor a replacement for an existing law) which falls within the scope of the NI Protocol, then a different procedure applies.[73] The EU will table the new law at the Joint Committee and invite the UK to agree to it being incorporated into the NI Protocol. If the UK refuses, then the Joint Committee must "*examine all further possibilities to maintain the good functioning of this Protocol and take any decision necessary to this effect*." If, however, no agreement can be reached either to adopt the new EU law into the NI Protocol or to adopt substitute measures which maintain the functioning of the NI Protocol to the EU's satisfaction, the EU is then entitled after giving notice "*to take appropriate remedial measures*".

This procedure is modelled on Article 102 of the European Economic Area (EEA) Agreement. That gives the European Free Trade Association (EFTA) States who belong to the EEA (i.e., Norway, Iceland and Liechtenstein) a theoretical legal right to refuse to incorporate new or changed EU laws into the Annexes to the EEA Agreement. However, the EU then has a power to suspend the part of the Annex to the EEA Agreement which would be affected by the new EU legislation.[74]

Despite the existence of this clear legal right not to agree to take on board new or changed EU laws, there is only one significant occasion when this legal right was invoked. In 2011, Norway refused to agree to the incorporation of the Third Postal Services Directive, and the Article 102 procedure was invoked by the EU. In 2013, Norway caved in to EU pressure and agreed to the incorporation of the Directive.

Under the Windsor deal, the 'Stormont brake' is to be implemented by the insertion of a new paragraph 13(3a) into Article 13 of the Protocol (as part of the amendments to be made by the draft Joint Committee decision). The text of the new 13(3a) makes it clear that the procedure in Article 13(4) applies if it is invoked. The result is that, assuming that all the hurdles to its successful exercise were overcome, the EU would then be entitled to "*to take appropriate remedial measures*". The word "retaliatory" is not used, but "remedial measures" is wider than the limited suspension power in the EEA Agreement. If the brake is invoked, the EU cannot be relied upon not to use this power in a retaliatory or vindictive manner, for example by suspending or revoking some of the specific exceptions to the application of EU laws which we discuss elsewhere.

The difficulty which would be faced by Northern Ireland if it were to operate the Stormont brake is similar to that faced by Norway when it blocked adoption of the Post Office Directive. If you are embedded in a corpus of EU laws (or in Norway's case, EEA laws which mimic EU laws) you are then very vulnerable to adverse action which might be taken by the EU if you choose to exercise your theoretical legal right to refuse to adopt changes in this body of laws

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72 Section 8C of the European Union (Withdrawal) Act 2018 confers a power on ministers to make such regulations by statutory instrument. The power in section 8C mimics the "Henry VIII" power which previously existed when the UK was a Member State in section 2(2) of the European Communities Act 1972.

73 See Article 13(4) of the NI Protocol.

74 EEA Agreement, Article 102(5).

to which you are subject. For this reason, we regard the Stormont brake as likely to be of little use in practice, even if the considerable legal hurdles to its use were to be overcome. The legal and practical constraints on the use of the Stormont brake are discussed further in Appendix F.

The UK Government acknowledges that this brake will be rarely exercised.[75] Its assertion that a difficult to use blocking mechanism accompanied by what is effectively an EU retaliation power will "close the democratic deficit" cannot in our view be accepted. Elsewhere in the UK, the people are able to vote to repeal or change the body of EU retained law through their representatives in Parliament or in a devolved legislature where relevant. The people of Northern Ireland have no such power or right as regards EU law falling within the NI Protocol. A limited veto power on changes to that body of law is not a substitute for the normal right of a voter to have existing laws changed or removed. Since the people of Northern Ireland are left in a manifestly different position from the people elsewhere it the UK, it is clear that the Stormont brake would not remedy the subjugation caused by the NI Protocol of Article VI of the Articles of Union 1800, which require that "*in all treaties with foreign powers the subjects of Ireland shall have the same privileges as British subjects*."

11. De facto drag-along for the UK on EU Law

At present, most UK trading rules are still the same as when we were EU members. However, those rules will progressively diverge over time as a result of changes in UK rules (such as allowing gene edited crops), not least if the Retained EU Law Bill is properly implemented in order to achieve the advantages of Brexit. Even if UK rules were preserved in aspic, thereby ruling out any benefits from the freedom of action offered by Brexit, UK and EU rules will continue to diverge, unless the UK allows itself to be dragged along when the EU decides to change its rules. (Several hundred replacements or amendments to EU laws which apply to Northern Ireland under the NI Protocol have been notified by the EU via the Joint Committee since the NI Protocol was adopted).

We fear that, in practice, the Windsor arrangement will incentivise the UK and its future governments to copy future EU rules (and adjustments to existing rules) so as to avoid the imposition of new checks across the Irish Sea. The potential for goods to be labelled "UK only" and still be sent into Northern Ireland even if they do not conform with an EU law is a positive, but this will still be subject to agreement with and ultimately control by the EU in allowing such goods to be imported and sold inside the scope of one of the specific rules embedded in EU law. It does not resolve the problem that businesses in Northern Ireland will be denied the benefits of reformed post-Brexit UK law and will be faced in their home market with

[75] HC Deb 27 February 2023 vol 728 col 591: "The ability to block new law is a serious mechanism and it should not be used for trivial reasons. It should be used for those new laws that have a significant and lasting impact on the everyday lives of people in Northern Ireland. ***That is the right trigger, and it is one that we are in control of deciding***."
Rt Hon Chris Heaton Harris MP, "I am a former ERG chairman, and here's why I back this agreement", (*Conservative Home*, 28 February 2023): "…so we have put in place a mechanism that will allow for the Northern Ireland Assembly to ensure the sovereignty of Northern Ireland is maintained should a law look like it might threaten that….This closes the democratic deficit, giving Northern Ireland more than a say but the ability to act."

competition from goods supplied by mainland businesses which comply with UK rules, without themselves being able to benefit.

The reverse problem is likely to become increasingly important, where goods are sold under EU single market law but which do not comply with UK law. Because it is necessary to allow Northern Ireland businesses to sell EU-standards goods across the Irish Sea in order to avoid shutting them out from full participation in the UK's internal market, the UK as a whole loses its ability which it should have as a sovereign country to decide that certain goods shall not be sold on its market.

The Windsor deal arrangements are constructed to be dynamic. A proposed Joint Declaration envisages ongoing discussion in a Specialised Committee on future UK legislation on "relevant goods", allowing the UK and EU to assess the impact of this legislation on Northern Ireland, so as to anticipate and discuss any practical difficulties.[76] It is envisaged that the Specialised Committee may convene a Special Body on Goods, which can call on expert input, as well as representation from businesses and "civic society"; and that recommendations may be made to the Joint Committee. There is a commitment from the UK and EU to use these joint bodies to address implementation issues under the obligations of the Windsor deal.[77] The UK has also announced that it will set up a new Office of the Internal Market to monitor any impacts for Northern Ireland arising from relevant future regulatory changes.[78]

12. Continued application of EU State aid law with implications for whole of UK

Article 10 of the NI Protocol applies EU State aid law, as interpreted by the ECJ, to the whole of the UK insofar as aid granted by the UK is liable to affect trade governed by the NI Protocol. This was the widest reaching intrusion into the UK's sovereignty the NI Protocol created, generating extraordinary potential effects. For example, the UK could need to notify and await the EU Commission's approval before it grants aid to a car factory in Sunderland – on the basis that the resulting cars will be placed for sale in Northern Ireland and each such car sold represents a lost opportunity for EU car manufacturers.[79]

The EU Commission has so far avoided taking such cases. That has not stopped the EU Commission (we understand) from seeking information from the UK about aid schemes or

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[76] See the draft Joint Declaration on dialogue and goods.

[77] In typical EU legalese, there is then a statement in the proposed draft Joint Declaration on dialogue and goods that dialogue in the joint bodies under the Windsor Agreement is "without prejudice to the … decision-making and respective legal orders of the [EU] and the [UK]". However, this is merely a limiting factor to ensure the arrangements do not trample on the sovereignty of Parliament. It does not cut into the overall proposition that the intention is to agree that pretty much all dialogue, agreement and resolution should take place through these joint bodies.

[78] See paragraph 52 of the UK Command Paper, which continues as follows: "[the UK] will commit that, in cases where Northern Ireland authorities (whether as an Executive or as individual departments) request that the OIM specifically investigates concerns around any future UK regulatory change, [the UK] will provide a full response to any OIM report on the concerns raised, taking into account the real-world impacts that the OIM identifies….[the UK] will ensure that appropriate authorities throughout the UK are clear as to how they should uphold their existing duties to pay special regard to the need to protect the UK internal market, as set out in section 46 of the UK Internal Market Act 2020. [The UK] will issue new guidance to underscore the need for ongoing vigilance, proper analysis of the impacts of their activities, and proactive steps to avoid new barriers to Great Britain-Northern Ireland trade and protect unfettered access to the whole UK market for Northern Ireland's firms."

[79] Because exports from anywhere in the EU to Northern Ireland are trade under the NI Protocol.

individual aid grants to put it in a position to raise objections should the political winds favour doing so. The Commission has ten years from the grant of a given aid to challenge it.

The UK has also sought to avoid highlighting the consequences of Article 10 by refusing to notify any projects in Great Britain that may engage the NI Protocol – placing the risk of non-compliance on the companies participating in such schemes. If the EU Commission was retrospectively to review an aid grant that was not notified and finds it to be incompatible with EU State aid law, it could order the aid to be recovered from the recipients. This would be extremely damaging to the companies who have proceeded in good faith on the basis that the aid did not need to be pre-notified. The UK has also refused to notify any aid schemes in Northern Ireland – limiting aid there to existing EU exemptions and therefore undermining policies such as freeports or regionally differentiated tax that may help stimulate investment in Northern Ireland – an unsustainable position over the medium term.

Article 10 of the NI Protocol was agreed before the TCA, and before the Subsidy Control Act 2022 implementing the UK's obligations under the TCA came into force. The EU now has the protection of both those regimes, which it did not have when the NI Protocol was established. As such, the Windsor deal was a perfect opportunity to normalise the subsidy control arrangements and replace Article 10 with the same arrangements that apply to the rest of the UK under the TCA – and which the EU has accepted are sufficient to create a level playing field. There was wide consensus amongst subsidy control experts, lawyers and think tanks on both remain and leave side that it would be appropriate for the UK to seek this change and for the EU to agree to it.[80] This opportunity has been comprehensively missed. The Windsor deal makes no substantive change to the position that existed before, thereby accepting the reach of EU State aid law not just over Northern Ireland, but over the whole of the UK.

By accepting the continuation of Article 10 reach over subsidy in Great Britain, the Government has removed much of the benefit that the UK would otherwise have won from its faster, more flexible, more certain subsidy control regime under the Subsidy Control Act 2022. The EU has successfully neutralised a key Brexit benefit.

We address some of the practical and legal difficulties this will create in our Appendix G.

[80] See FT article "*UK proposal to rewrite section of Brexit deal wins lawyers' backing*" available at: https://www.ft.com/content/a1acf003-cc3f-41e7-800d-6d3aebed0732; and Tony Blair Institute proposals for Article 10 reform at: https://institute.global/policy/after-brexit-making-northern-ireland-protocol-work.

APPENDIX A:
PROPOSED AMENDEDNORTHERN IRELAND PROTOCOL

With Amendments to be made by the draft Joint Committee decision

APPENDIX B:
PROVISIONS OF UNION LAW REFERRED TO IN ARTICLE 5(4) OF THE NORTHERN IRELAND PROTOCOL

This is an annotated version of Annex 2 of the Northern Ireland Protocol on which we have:

(Appendixes A&B online only)[81]

[81] Please see: https://lawyersforbritain.org/windsor-deal-erg-legal-advisory-committee-assessment/

APPENDIX C:
BACKGROUND

Upon withdrawal by the UK from the EU, the EU insisted on a protective layer of EU law applying to Northern Ireland (and various other matters), overspilling EU boundaries and sitting on adjacent territory, in order (in part) to allow for an invisible north-south territorial border on the island of Ireland. The EU claimed that the only alternatives were for it to erect border posts on the island of Ireland, north-south, or for the Republic of Ireland itself to be forced out of the EU law scheme which comprises its so-called "single market". In an extreme application of the EU's precautionary principle, the notion was that EU law would be extended, in its entirety, so far as was theoretically necessary to ensure that on no conceivable scenario would goods non-compliant with EU law and processes slip into the Republic of Ireland and thereby the EU market. This involved extending EU law right up to the sea, where *de facto* (under current technologies) the physical barrier and the time involved in transit would allow for EU law checks and avoid overlooked seepage of UK goods into the hallowed EU single market. For this is what the EU jurists clearly seek to prioritise above all interests of third parties. There was one exception: where there was literally "no risk" of UK (but not EU) compliant goods coming into Northern Ireland and then being moved on to the Republic of Ireland. This latter (extremely narrow) exception was expressed, deceptively, in the reverse, in terms of whether goods were "at risk" of moving into the Republic, and thereby the EU's single market. However, given that the scheme was drafted entirely as a matter of EU law, and subject to the oversight of the ECJ and controlled (positively or negatively) by EU administrative organs of state, the meaning of this term both in the text and in practice could be, and has been, applied in a manner involving no theoretical risk, as opposed to no practical risk, as would be the case were a pragmatic common law approach to have been adopted, or were international law norms to have been respected.

This unprecedented arrangement went beyond imperial precedents, since no attempt was made to ensure the overspilling of EU law paid any attention to the interests of the people of Northern Ireland. Laws would continue to be made solely for the EU, under the accountability procedures of the EU for the population of the EU, and would simply be extended beyond EU/Republic borders and applied directly (in part through the agency of the UK) to the people of Northern Ireland who did not benefit from or form part of those procedures. Additional complexity arises because it has been agreed, in 1998, that the people of Northern Ireland would not be subject to anything other than UK law unless they vote otherwise – under the Belfast/Good Friday Agreement. This inconvenient fact was brushed aside.

These arrangements could only be temporary, under the EU's own powers to negotiate such arrangements upon Brexit, contained in Article 50 of the Treaty on European Union. Furthermore, they are intrinsically limited by the foundational principle of international law for the self-determination of peoples. The arrangements themselves envisaged their replacement.[82] Since Brexit, in January 2020, the UK Government has been urgently seeking

[82] See Article 25 of the Political Declaration on the future EU-UK Framework, October 2019, whereby (under Article 184 of the EU-UK Withdrawal Agreement 2020) both parties agreed to use best endeavours to consider "ambitious arrangements… using all available facilitating arrangements and technologies" for ensuring "the absence of a hard border on the island of Ireland". Note this border was to be the proper north-south border, not a false border East-West. In addition, the Preambles to the Northern Ireland Protocol acknowledge the need for "possible new arrangements in accordance

to agree a replacement with the EU. This has necessitated both political engagement and also engagement with EU lawyers and the juristic tenets of the EU law scheme. The UK now claims to have resolved this longstanding problem.[83] The result is the Windsor deal.

It is important to stock-take how much of the NI Protocol will remain fully in force, and the circumstances in which it will do so, under the Windsor deal. Such a stock-take is regrettably absent from the UK Command Paper, which focusses almost entirely on what it claims will be changed under the Windsor deal rather than explaining what will remain the same. In general terms, the Windsor deal leaves the main elements of the NI Protocol in place, in the following ways.

- *Extraterritorial application.* The NI Protocol's central tenets involve applying a wide range of EU laws, internally within a part of the United Kingdom and outside the territory of the EU, as though Northern Ireland were an EU member state, but without its citizens having a vote and or being represented on the EU institutions. The NI Protocol applies to Northern Ireland the EU's laws on customs,[84] VAT and excise,[85] the whole *acquis* of the EU's laws of its single market relating to goods[86] and on the electricity market,[87] and EU laws on so-called "state aid" (i.e., subsidisation, in the broadest of senses).[88] This means that where EU and UK laws differ, businesses making and selling goods in Northern Ireland must comply with EU laws, and not with UK laws. There is no precedent for this arrangement in any of the EU's other external agreements. It is akin to the way the laws of an empire apply within a colonial territory, although in more sustained and sophisticated imperial systems there is locally accountable governance. This central feature (that Northern Ireland is an EU law territory, whilst accepting that mainland UK is not) then creates the need for checks, and other legal barriers, which prevent or disrupt the movement of goods from one part of the UK to the other when they cross the EU law boundary, erected as a result of the NI Protocol, particularly for goods passing in the East to West direction from Great Britain to Northern Ireland. It also results in the constitutional problem that people and businesses in Northern Ireland are governed by a wide range of foreign laws over which they have no democratic control, by votes of their representatives who make laws present at Westminster or in the NI Assembly.

  The Windsor deal would, if implemented, create some specific limitations and exceptions to the way EU law applies in Northern Ireland in certain circumstances with a view to easing some practical problems affecting East-West trade and the extremes of life in Northern Ireland as part of the UK. It is important to understand that the

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with the [Belfast/Good Friday] Agreement", and Article 13.8 of the Protocol allows for the replacement of the arrangements in the Protocol, in whole or in part. In addition, the UK expressly preserved its sovereign interests in section 38 of its European Union (Withdrawal Agreement) Act 2020.

83 UK Command Paper, sub-paragraph (c) of the summary: "This Windsor Framework ('the agreement') fundamentally amends the text and provisions of the original Protocol to uphold Northern Ireland's integral place in the United Kingdom, address the democratic deficit and set out a new way forward".

84 Article 5(3), NI Protocol.

85 Article 8 and Annex 3, NI Protocol.

86 Article 5(4) and Annex 2, NI Protocol.

87 Article 9 and Annex 4, NI Protocol.

88 Article 10 and Annex 5, NI Protocol.

envisaged limitations and exceptions are conditional and limited in scope. However, this does not mean that they are immaterial in practice.

- *EU executive, administrative and judicial sovereignty*. Under the NI Protocol, similar legal mechanisms are used to enforce, interpret and apply EU law in Northern Ireland as in a member state. EU laws which are applied within Northern Ireland by the NI Protocol have supremacy in the UK's (national) courts over all laws of UK origin. The UK's courts are obliged to interpret those laws in accordance with rulings of the ECJ which must be treated as binding not advisory, in a similar manner to when the UK was within the EU's Treaty-based scheme for pooled sovereignty between "member states". Thus, according to Article 12(4) of the NI Protocol, courts in Northern Ireland should make a preliminary reference to the ECJ to obtain a binding ruling in the same way as if the UK were still an EU member state. If questions of EU law are not clear from existing rulings and a case rises to the highest appellate level, the appellate court (which will normally be the Supreme Court on appeal from the Northern Ireland courts) is *obliged* to make a reference to the ECJ.[89]

  These mechanisms will not be affected by the Windsor deal. In particular, the above binding jurisdiction of the ECJ will not be affected or reduced in scope. The Commission has explicitly confirmed that "[t]here is no change to the role of the Court of Justice of the European Union. The Court of Justice remains the sole and ultimate arbiter of EU law".[90] Both the UK and the EU have politically committed to discussing possible issues within the Joint Committee and Withdrawal Agreement structures before resorting to litigation, but this does not prevent the European Commission from using the existing direct action jurisdiction of the ECJ if a dispute cannot be resolved, and this has no effect at all on the circumstances in which courts of the UK can or must make preliminary references to the ECJ.

- *Severance of Northern Ireland from Great Britain*. In consequence of the above scheme, Great Britain is regarded as a "third country" (i.e., an EU non-member state) under EU laws as they apply in Northern Ireland, with the automatic consequence that an EU hard external border arises within the United Kingdom between Great Britain and Northern Ireland. Checks and controls which then arise on the movement of goods within the UK from one part of the country to another are a secondary consequence (and a very serious one) which results from the primary cause of applying foreign laws to a part of the UK. The Windsor deal seeks to alleviate, largely as a procedural matter, some but by no means all of these checks and controls, but it does not address the underlying cause.

In fact, the broad range of EU laws which will apply to Northern Ireland under the NI Protocol will remain the same under the Windsor deal, with the exception of certain procedural easings, certain conditional adjustments to EU law on retail goods and medicines, and Articles of EU VAT and Excise Directives which will be disapplied or relaxed by the amendments to be made to Annex 3 of the NI Protocol to account for instances in

89 This is the effect of the application of the third paragraph of Article 267 of the Treaty on the Functioning of the European Union (TFEU) by Article 12(4) of the NI Protocol.

90 Commission Q&A, https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_1271

which the EU has (for now) determined that there is "no risk" (as defined by the EU) to the EU's single market. Importantly, the Windsor deal *will not involve the removal from the NI Protocol of any of the hundreds of EU single-market-for-goods laws which are listed out in Annex 2 of the NI Protocol*. Notably, there is no disapplication from Northern Ireland of the EU's Uniform Customs Code Regulation (UCC) or the other EU customs laws which are required to be applied in Northern Ireland under Article 5(3) of the NI Protocol, although exemptions will be widened for goods imported from Great Britain for consumption in Northern Ireland where there is no risk of the goods crossing into the EU.

APPENDIX D:
RULES OF ORIGIN AND TARIFF RATE QUOTAS

- *When do customs duties/tariffs apply under the NI Protocol?* The starting point is the UK and EU Trade and Cooperation Agreement (TCA), which allows for duty free trade in goods between the UK and the EU. However, this proposition is highly qualified, to the detriment of Northern Ireland under this EU scheme.

    - *What are "Rules of Origin"?* The duty exemption only applies to goods which "originate" within the EU according to so-called "Rules of Origin". This is a feature of all Free Trade Agreements (FTAs) and is designed to prevent goods which come from third countries and which have been insufficiently worked on or processed within the FTA members, in this case the UK or EU, from being allowed to by-pass the external tariff which the importing FTA member would have imposed on the goods from that third country in the absence of the FTA's preferential treatment.

    - *How these rules apply at the East-West GB-NI "border".* Goods sold in the market in Great Britain will not necessarily be counted as of UK origin under the TCA's Rules of Origin. The consequence is that businesses in Northern Ireland which acquire goods inputs from Great Britain either need to pay EU external tariffs on those goods, or need to have evidence that those goods do satisfy Rules of Origin and so are tariff exempt. This is at best administratively costly and may involve a significant monetary cost. In addition, these businesses in Northern Ireland will have to pay EU tariffs rather than UK external tariffs on goods inputs which they obtain from the rest of the world. UK tariffs will generally be lower where the UK has an FTA with a country with which the EU does not (e.g., Australia), and may be zero.

- *The detrimental consequences.* There are two highly technical but very detrimental effects of the EU-imposed scheme of the NI Protocol, since it forces Northern Ireland out of UK supply chains and denies Northern Ireland businesses the benefits of the UK's external arrangements.

    - *Northern Ireland businesses worse off than Great Britain businesses.* The costs of EU customs compliance on input goods due to the application of EU Rules of Origin within the UK territory will put Northern Ireland businesses who acquire inputs from Great Britain at a competitive disadvantage compared with Great Britain businesses who can acquire their input goods in the UK market without such costs. It is argued by the EU and some others including the Prime Minister[91] that Northern Ireland businesses are in the best of both worlds because they can export their products into the EU without having to comply with EU customs at the output stage, as a Great Britain-based business

[91] Sky News, Rishi Sunak, 28 February 2023 "Northern Ireland is in the unbelievably special position - unique position in the entire world, European continent - in having privileged access, not just to the UK home market, which is enormous... but also the European Union single market." https://news.sky.com/story/brexit-rishi-sunak-says-northern-ireland-in-unbelievably-special-position-because-of-access-to-eu-single-market-12821991

would have to do. However, that is of little or no benefit for businesses who are focussed within the UK market for their goods inputs and/or outputs (comprising more than half of all Northern Ireland exports by value in 2020).[92]

- *Worst of both worlds.* There is a further complication with regards to UK exports to Northern Ireland concerning Tariff Rate Quotas (TRQs), which is a topic that the Windsor deal does not adequately address, except in the limited case of certain steel products (for which the deal makes special provision).[93] TRQs are quantities of goods which are permitted to enter the importing country at a lower tariff, after which point (once the specified quantity limit has been reached) a higher tariff takes effect. The EU's 2020 TRQ Regulation prevents EU TRQs from applying in Northern Ireland. This creates a problem where the UK applies a TRQ either unilaterally or through an FTA. The applied UK import tariff under the TRQ might be the same or similar to that of the EU if the EU TRQ was factored in. However, since EU TRQs do not apply in Northern Ireland, the EU's out-of-quota (higher) tariff must apply instead. For imports into Northern Ireland from Great Britain, this will invariably result in a larger tariff differential vis-à-vis the UK tariff, which is well above the three percent level which automatically triggers the "at risk of entering the EU" element of imports. Since EU TRQs cannot be used in Northern Ireland (other than in the special case of steel products), the UK in-quota (normally, higher) rate is always compared to the EU's most favoured nation (MFN) rate (rather than in quota rate of a similar TRQ), exaggerating the tariff difference. For example, New Zealand sheep meat is subject to an EU and UK WTO TRQ, allowing for 114,184 tonnes and 114,205 tonnes respectively of New Zealand sheep meat to enter tariff-free. Despite technically tariff-free trade between the EU and UK under the TCA, Northern Ireland importers cannot benefit from these TRQs. The EU's full MFN tariff will apply to New Zealand sheep meat entering Northern Ireland, but New Zealand sheep meat entering Great Britain will be subject to the lower tariff applied to New Zealand sheep meat under the UK-NZ FTA, which will be even lower when the UK's TRQ is factored in. Since the difference in the two tariffs is therefore more than 3%, the meat is considered 'at risk' of entering the EU.

92 Overview of NI Trade, NISRA (18 May 2022).

93 Proposal for a Regulation of the European Parliament and the Council amending Regulation (EU) 2020/2170 as regards the application of Union tariff rate quotas and other import quotas to certain products transferred to Northern Ireland, Brussels, 27.2.2023 COM(2023) 125 final 2023/0063(COD) (this Regulation deals with safeguard duties and related TRQs imposed by the EU against certain steel products).

APPENDIX E:
SUMMARY OF PROPOSED EU REGULATIONS ON RETAIL GOODS ETC, PETS, PLANTS AND MEDICINES

(A) Specific Rules under EU Law: Retail goods etc

The first package of specific rules to consider is contained in the Commission's proposal for a Regulation entitled:

"*on specific rules relating to the entry into Northern Ireland from other parts of the United Kingdom of certain consignments of retail goods, plants for planting, seed potatoes, machinery and certain vehicles operated for agricultural or forestry purposes, as well as non-commercial movements of certain pet animals into Northern Ireland*"[94] (the " proposed Regulation on retail goods etc.")

These specific rules are of limited scope. They relate only to goods which are brought into Northern Ireland from other parts of the UK and "*where the food is consumed in Northern Ireland, the plants and seeds are used in Northern Ireland and the pets stay in Northern Ireland*".[95] These specific rules do not extend more generally, so EU laws under the Protocol would remain fully applicable to goods made within Northern Ireland and to the marketing of such goods to consumers within Northern Ireland. Within the scope of these specific rules, some but not all of the EU laws in Annex 2 of the Protocol would not apply, but the remainder would continue to apply.[96] Intriguingly, the UK Command Paper may be hinting that Annex I to this proposed Regulation on retail goods etc. accounts for 1,000 or so pages of the mysterious 1,700 pages of EU law which are allegedly removed, but the claim that these pages have actually been "removed"[97] is overstated when all of the EU rules will continue to apply throughout Northern Ireland outside the narrow ambit of these specific rules. And, even if so, the identity of the other 700 pages of EU laws which will supposedly be disapplied is a complete mystery to us. Having established the overstated nature of the claims made in the Command Paper about this "1,000 pages" when examined against the draft legal texts, we see no purpose in investigating government claims of which no details have been given of a further 700 pages of EU law being "removed" or the even less clear and indeed bizarre claim that "less than 3% of EU rules" will remain.

In order to assess which EU laws will continue to apply within the scope of these special rules, we have prepared (as Appendix B to this paper) a marked-up version of Annex 2 to the Protocol on which (1) we have numbered the EU laws it contains for ease of reference and (2) marked (with "RG" or "RG*" in green) those which are listed in Annex I of the proposed

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94 COM(2023) 124 final 2023/0062 (COD).

95 Explanatory Memorandum page 2, proposed Regulation on retail goods etc.

96 Draft Article 1(2), proposed Regulation on retail goods etc., which states that a number of provisions listed in Annex 2 do not apply "*in respect of consignments of retail goods entering into Northern Ireland from other parts of the United Kingdom for placing on the market in Northern Ireland that fall within the scope of Part 2 of this Regulation*". The second sentence of Article 1(2) is explicit that the provisions in Annex 2 other than those listed ***do continue to apply*** within the scope of the special rules.

97 Paragraph 21 of the Command Paper claims that "Overall, it will remove more than 60 EU food and drink rules in the original Protocol covering well over 1,000 pages of law".

Regulation on Retail Goods etc, as not applying within the scope of the specific rules.[98] Of the 293 items of EU legislation listed in Annex 2, some 62 are in Annex I to the proposed Regulation on retail goods etc. and therefore do not apply within the scope of the specific rules.[99]

However, this leaves some 231 items of EU legislation listed in Annex 2 which *will* continue to apply within the scope of the specific rules. Some of these can be dismissed as irrelevant since they are measures which will not apply to the types of goods or types of transactions which will take place within the scope of the specific rules. But this certainly cannot be said of all of them and there are puzzling anomalies. For example, a Regulation on geographical indications on "aromatised wine"[100] is listed in Annex I. By contrast, an EU Regulation on geographical indications on spirits[101] is not listed in Annex I. It is completely unclear to us why a trader who moves aromatised wine from Great Britain into Northern Ireland and sells it retail should be exempted from falling foul of EU geographical origin rules (which can be changed dynamically by the Commission), but a trader who moves spirits in that way – such as a supermarket stocking its shelves in Northern Ireland branches with the same range of wines and spirits as it sells in stores in Great Britain – should be at risk of infracting EU law on spirits.

We do not have either the time or resources to undertake an across-the-board review of the impact of the non-excluded EU laws on different kinds of goods in different sectors. But it is clear that traders who move into Northern Ireland and sell there a wide range of goods (such as supermarkets) will simply not be able to assume that if their goods comply with UK law when sold in Great Britain they will be safe in selling that same range of goods in Northern Ireland. Without an intricate study of this extremely complex "specific rule" Regulation and of those EU laws which it does and does not disapply from the scope of the scheme, such retailers will not be safe in selling their UK-wide range of goods within Northern Ireland.

A further difficulty which arises from this complex, rigid and tightly defined system of partial exemptions is that it cannot be amended by the UK government. Nor can we see what bargaining power the UK government would have to demand future changes to these schemes, having abandoned its intention to pass the Northern Ireland Protocol Bill into law. The UK government would be reduced to begging for favours from the EU Commission, e.g., to get the scheme extended to cover geographical indications on spirits. This is the reverse

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98 The items marked with an asterisk (*) are stated in Annex I to be relevant to public health and consumer information and under Article 6(6) of the proposed Regulation, and this allows the Commission to relax labelling requirements where it can assess that UK law requires the same information to the provided. This therefore imposes a convergence pressure on UK-wide law.

99 Annex I of the proposed Regulation on retail goods etc. also lists 5 items of EU law which are not listed in Annex 2 of the Protocol but which are replacements or amendments of items in Annex 2. These are listed at the end of Appendix B.

100 Item 264 in Appendix B: Regulation (EU) No 251/2014 of the European Parliament and of the Council of 26 February 2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and repealing Council Regulation (EEC) No 1601/91.

101 Appendix B, item 262: Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89.

of "taking back control" or restoring the sovereignty of the UK over the laws which apply to trade within the UK.

The specific rule relating to retail goods does not cover all retail goods sent from Great Britain for sale in Northern Ireland. First, it only applies to retail goods which are pre-packed in the packaging intended for the end consumer[102] and this packaging may be required to carry markings (such as "UK only").[103] This means that the specific rule will not be applicable when goods are bought in Great Britain in bulk and then repackaged for the consumer within Northern Ireland. The specific rule covers a limited range of types of goods, basically food and other products of animal or plant origin and plants (although not plants which are going to be planted).[104]

The specific rule does not cover all retail goods shipped from Great Britain to Northern Ireland. It covers them only in particular circumstances, when they form part of a "consignment" when:

> "(e) the retail goods are dispatched from listed establishments in parts of the United Kingdom other than Northern Ireland and received by listed[105] establishments in Northern Ireland";[106]

Each consignment passing between listed establishments has to be covered by a certificate. Nor does compliance with the scheme mean that there will be no checks on the goods as they pass from Great Britain to Northern Ireland: the frequency of checks will simply be reduced to a special rate of checks.

Goods which originate within Northern Ireland are specifically excluded from the scope of the scheme.[107] The restricted nature of the scheme is such that general traders in retail goods will not be able to benefit from the scheme, which appears to be narrowly focused around the needs of supermarkets and similar operations. But simply from an examination of the legal texts, we are not clear whether the scheme will bring a net benefit even to supermarkets and similar operations, bearing in mind that this scheme would be accompanied by an abandonment of the unilaterally extended "grace periods" which have been in effect since the beginning of 2021.

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102 Article 6(1), proposed Regulation on retail goods etc.

103 *Ibid*, Article 6, proposed Regulation on retail goods etc.

104 The products falling within the rule are listed in Article 3, which cross refers to complex definitions in Article 2. There are apparently bizarre anomalies within the definitions. For example, it covers "composite" products (defined in Article 2(i)) of both plant origin and *processed* products of animal origin (say, a pork pie), but why should a composite product consisting of plant origin together with *unprocessed* animal origin product be excluded?

105 According to Article 8, proposed Regulation on retail goods etc. this means listed by the UK authorities in accordance with Part 2 of Annex III of the Regulation, which requires listed establishments to be subject to risk-based and intelligence-led spot checks.

106 Article 4(e), proposed Regulation on retail goods etc.

107 Article 5(1)(b), proposed Regulation on retail goods etc. So goods made by Northern Ireland businesses and sold to retail in Northern Ireland cannot benefit, and nor would it cover goods made in Northern Ireland which are sent to Great Britain for packaging and then returned to Northern Ireland for retail sale.

The proposed Regulation on retail goods etc. also requires that the UK has given written guarantees in respect of certain matters, including that official import controls have been carried out in accordance with EU standards. The competent authorities of the UK are required to monitor the "import" of retail goods into Northern Ireland from the other parts of the UK. The member states are required to "apply effective dissuasive and proportionate sanctions" in the case of non-compliance. The Commission can suspend the provisions in the event of it finding a "systematic failure" to comply with the requirements by the UK. As we have pointed out above, the exercise of this drastic sanction would be subject only to the jurisdiction of the ECJ and the UK would not appear to have any other remedy.

Pet animals

At present, for the purposes of pet travel, the EU treats Northern Ireland as if it were within the EU. The EU has refused to recognise UK pet passports. However, an owner can take a pet to Northern Ireland from Great Britain on condition of "a microchip, a valid rabies vaccination, an animal health certificate and a tapeworm treatment."[108]

The proposed Regulation would lay down "specific rules" for the "non commercial" movement of pet dogs, cats and ferrets into Northern Ireland from other parts of the UK, where the pet will not travel on into the EU.[109] These are dependent on the UK providing a number of written guarantees, including on the onward travel of pets into the EU. This regime would require (subject to the EU accepting the UK's guarantees) a "pet travel document" for UK pets to travel to Northern Ireland, which would consist of a transponder, details of the pet (limited to a dog, cat or ferret) and the owner, and a declaration that the pet would not move onwards to the Republic of Ireland or the EU. The determination of the exact form of the required travel document and whether the requirement for guarantees has been met would reside with the Commission.

Plants for planting

Article 10 of the proposed Regulation contains specific rules covering the movement of plants for planting into Northern Ireland. It is required that they be presented for official controls at SPS Inspection Facilities on first Arrival in Northern Ireland (Article 10(1)(e)); and they are to be received by a "professional operator" in Northern Ireland who is registered under the scheme.

Concern has been expressed to us as to whether it will be possible for plants for planting to be supplied my mail order to retail customers in Northern Ireland, since apparently the UK's DEFRA has assured interested parties that this will be possible under the Windsor deal. This kind of supply will clearly not possible under the specific rules in Article 10. We are not aware of any other specific rule within the legal documents we have seen which would facilitate such a trade.

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108 UK Gov, existing rules for travel to Northern Ireland with a pet: https://www.gov.uk/taking-your-pet-abroad/travelling-to-an-eu-country-or-northern-ireland.

109 Article 12.

(B) Modification to EU Law: EU proposed measures on medicines

In addition to the proposed Regulation on retail goods etc, the EU Commission has published a proposed EU Regulation on Medicines. The Commission's Explanatory Memorandum explains clearly the history leading up to the adoption of this proposal and its intended effects.[110]

- *The normal EU law position.* There are two main EU laws relating to the regulation of human medicines, namely the EU Directive on the Community code relating to medicinal products for human use,[111] and an EU Regulation on EU procedures for the authorisation and supervision of medicinal products for human use and establishing the EU's "European Medicines Agency" (EMA).[112] Both the Directive and the Regulation are made applicable to and within Northern Ireland by Annex 2 to the NI Protocol.

  The Directive creates an EU-wide coordinated system for the authorisation of new medicines by national authorities acting within the EU-wide framework. The Regulation made the EMA responsible for the grant of EU-wide authorisations for certain classes of innovative medicines,[113] which member state national authorities are no longer permitted to grant. In addition to regulating the grant of authorisations for new types of medicines, the Directive and the Regulation, together with other EU instruments, also cover in great detail the regulation of the manufacture, testing and distribution of medicines, which is an equally vital if less glamorous area compared with authorising new medicines.

- *The Windsor deal on medicines.* As has already been pointed out, no steps will be taken under the Windsor deal to remove the Directive or the Regulation (or any of the other related EU medicines rules) from Annex 2 of the NI Protocol and therefore they will continue to form part of the law of Northern Ireland. The proposed EU Regulation on Medicines would reinforce this point by explicitly making clear in Recital (6) and Article 1(3) that "*[i]t is appropriate to clarify that the provisions listed in Annex 2 to the Protocol apply in respect of medicinal products for human use intended to be placed on the market in Northern Ireland unless specific provisions are laid down by this Regulation*".

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110 Explanatory Memorandum within the Commission's proposal at pages 1-3. In contrast to the UK government's publication, the European Commission memo clearly references the legal texts to which it refers.

111 Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use [2001] OJ L311/67.

112 Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Union procedures for the authorisation and supervision of medicinal products for human use and establishing a European Medicines Agency [2004] OJ L136/1.

113 For example, those involving recombinant DNA technology or use of monoclonal antibodies, and more recently new medicines for AIDS, cancer and viral diseases etc.

The proposed EU Regulation on Medicines contains, however, a number of new "specific rules" relating to Northern Ireland.[114] Probably the most important is Article 4, which relates to medicines of a kind which can only be authorised by the EMA and not by member states under EU law. The Article has the effect that, within Northern Ireland, authorisations of medicines of this kind granted by the UK Medicines & Healthcare products Regulatory Agency (UK MHRA) under UK law shall be recognised instead of authorisations granted by the EMA, which will no longer be recognised in Northern Ireland. The specific rule *does not extend* to new medicines authorised by the UK MHRA, which fall outside this special category: EU law (specifically Directive 2001/83/EC) continues to govern the MHRA's powers to grant authorisations for new medicines in Northern Ireland. Since it is very strongly desirable that the same new medicines be authorised in Great Britain and Northern Ireland at the same time, this constitutes an effective fetter on the UK's exercise of its sovereignty to reform its new medicines authorisation system post Brexit.

Other Articles contain specific carve-outs from EU law such as allowing "imports" of medicines from other parts of the UK by holders of a wholesale distribution licence rather than just by manufacturers,[115] and allowing medicines within Northern Ireland not to have to follow the marking requirements under the EU's Falsified Medicines Directive.

The specific carve-outs are, however, accompanied by a number of restrictions and caveats.[116] Article 5 requires medicines within the carve-outs to bear a non-removable "UK only" label. Article 6 requires the UK MHRA to "continuously monitor the placing into the market" in Northern Ireland of these medicinal products. Article 8 requires the UK to provide "written guarantees" (the nature of which is not spelled out in the proposed EU Regulation on Medicines) to the Commission:

> "that the placing on the market of the medicinal products referred to in [the proposed EU Regulation on Medicines] does not increase the risk to public health in the [EU single market] and that those medicinal products will not be moved to a Member State, including guarantees to the effect that:
>
> (a) [UK] economic operators comply with the labelling requirements laid down in Article 5;
>
> (b) effective monitoring, enforcement and controls of the specific rules laid down in [the EU Regulation on Medicines] are in place and are carried out, by means of, inter alia, inspections and audits".

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114 Article 1(1), proposed EU Regulation on Medicines. The provisions in the Protocol are expressed to apply subject to the provisions of the new Regulation: Article 3(1) – i.e., this is in essence a modification of Annex 2 of the Protocol and its EU law scheme, received into UK law in respect of Northern Ireland.

115 Article 3, proposed EU Regulation on Medicines, which also establishes certain conditions for that licence.

116 Articles 4(2) and 8, proposed EU Regulation on Medicines.

Most fundamentally, the UK MHRA is required to "continuously monitor" this process,[117] and Article 9 states that the EU Commission "shall continuously monitor the application by the United Kingdom of the specific rules", and, where there is evidence that the UK "does not take appropriate measures" to address serious or repeated infringements, it then lays down a procedure for the Commission to suspend all or parts of the "specific rules" – i.e., to suspend the above, limited, carve-outs from current EU law applicable to Northern Ireland, either temporarily or permanently.[118] In addition, the member states are required to "apply effective dissuasive and proportionate sanctions" in the case of non-compliance.[119] There is no UK governance over the EU's exercise of its powers as, of course, they arise under EU law alone. Were a dispute to arise between the UK and the European Commission, and the Commission sought to invoke the suspension procedure in Article 9 of the proposed Regulation, we consider that it is doubtful whether the international arbitration panel would have jurisdiction to annul a European Commission decision, leaving the UK with no recourse but to submit to pleading its case before the ECJ.

117 Article 6, proposed EU Regulation on Medicines.

118 There is an "urgency procedure" for swift action: Article 11, proposed EU Regulation on Medicines.

119 Article 7(2), proposed EU Regulation on Medicines.

APPENDIX F:
OPERATION OF THE STORMONT BRAKE

The Stormont brake is to be inserted into the NI Protocol by the draft Joint Committee decision,[120] so that it will become a legally binding change to the Protocol text. Unlike paragraph 13(4) (which will remain in place and continue to govern completely new EU laws which fall within the Protocol), the new paragraph 13(3a) applies where existing EU laws are amended or replaced. It does not apply all EU laws across the width of the Protocol; it is limited to those set out in Headings 1 and 7 to 47 of Annex 2[121] to the Protocol, and the EU laws which define the relief from duties on personal possessions brought into Northern Ireland by UK residents under Article 5(1).[122] It does not cover, e.g., VAT and excise, most of the EU customs code as it applies to movements of goods across the Irish Sea, the electricity market, and EU state aid law.[123]

It is envisaged that, if the Assembly is sitting, and Ministers are in place, 30 Members of the Legislative Assembly (MLA) from two parties by way of a petition of concern (which might include a vote in the Assembly),[124] could trigger a process[125] which might lead to amended or replacement EU laws not applying in Northern Ireland[126] in the following circumstances:

- The laws objected to must "significantly differ" from the laws which they replace or amend and their imposition must have a "significant impact specific to everyday life of communities in Northern Ireland in a way that is liable to persist".[127]

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120 By inserting a new sub-paragraph (3a) into Article 13 of the Protocol.

121 Annex 2 lists the single market for goods EU laws which apply to NI under Article 5(4) of the Protocol. Headings 2 to 6 (which the Stormont brake does not apply to) include measures for the protection of the financial interests of the EU and EU trade defence measures.

122 The new proposed Article 13(3a), Windsor draft decision states: "This paragraph covers Union acts referred to in the first indent of heading 1 and headings 7 to 47 of Annex 2 to this Protocol, and the third subparagraph of Article 5(1) thereof."

123 This would exclude the EU's customs code under Article 5, except for 3rd paragraph of 5 (1) relating to "residents of the United Kingdom for personal property", Annexes 3 (VAT and Excise), 4 (electricity) & 5 (State aid). Also excluded from the brake are indents 2-6 of Annex 2, which includes duties and trade remedies. These exclusions limit the areas where the brake can apply effectively to single market rules under Annex 2 which fall within headings 7 to 47.

124 It is unclear whether the 30 MLAs (of two parties) can petition as a group or whether, under Annex B of the "New Decade New Approach" agreement referenced in Annex 1 to the unilateral Declaration, a vote is required of the Assembly "in accordance with the cross community consent procedure."

125 The procedure in the Assembly is governed by Annex 1 of the Windsor draft decision that sets out the stages that need to happen before the UK notifies the Joint Committee. The following all needs to be evidenced: (i) the Assembly needs to be sitting and Ministers in place; (ii) 30 MLAs of two parties need to petition (and seek to operate the assembly in good faith); (iii) the Petition of Concern must be done via the New Decade New Approach procedure (including Annex B, which allows for a cross-community consent procedure); (iv) there must be consultation of business, civic society, the UK government and via the EU's processes; and (v) the conditions on significantly different and significant impact need to be met. Once that is done the UK must then decide if the tests are met and the explanations are sufficient.

126 Annex 1, Windsor draft decision. The unilateral declaration incudes the requirements of the Assembly and ties the UK Government to only invoking this power if the Assembly has followed these procedures.

127 The tests in the inserted para 13(3a) are: "The United Kingdom shall make the notification referred to in the first subparagraph of this paragraph only where:

- The 30 MLAs of two parties must seek discussions with the UK Government, consult business and civic society and "*make all reasonable use of applicable consultation processes provided by the European Union for [EU] acts relevant to Northern Ireland*". Once this has been done, the 30 MLAs must publish an explanation of their consultations and how the other conditions for using the brake have been met.

- The UK Government then has to agree that the conditions have been fulfilled, and subsequently notify the EU through the Joint Committee.

- In the Joint Committee, the UK and EU shall then, under Article 14(4)(b), "examine all further possibilities to maintain the good functioning of this Protocol and take any decision necessary to this effect", and if that does not lead to an agreement, the EU can "take appropriate remedial measures".[128]

- The EU can challenge whether the notification was lawful in terms of the Assembly procedure, the tests regarding significance, and whether the impact on everyday life is "liable to persist". The EU may take the matter to arbitration under Article 170 of the Withdrawal Agreement, which can lead to the UK being directed to apply the law or be subject to sanctions. If the UK were then not to apply the law following an adverse arbitration ruling, under Article 178 of the Withdrawal Agreement, the panel could authorise lump sum penalties or authorise the EU to make retaliatory suspensions of parts of the NI Protocol or other parts of the Withdrawal Agreement.

It is untrue to say that the UK determines whether the thresholds have been met for the use of the Stormont brake. In this regard the Stormont brake is notably inferior to the veto power enjoyed by the EFTA States under Article 102 of the EEA Agreement, which contains no similar preconditions or restrictions on its exercise. The determination whether the threshold has been met will ultimately come down to arbitration (although the arbitration panel would be bound to refer to the ECJ any relevant point of EU law[129]), and this could lead to a determination that the UK is in contravention of the NI Protocol. It is also worth noting that the procedure following the non-application of EU laws is largely the same as that which already exists under the NI Protocol in the case of a new law, as distinct from a replacement or amending law, with the addition of arbitration.

(a) the content or scope of the Union act as amended or replaced by the specific Union act significantly differs, in whole or in part, from the content or scope of the Union act as applicable before being amended or replaced; and
(b) the application in Northern Ireland of the Union act as amended or replaced by the specific Union act, or of the relevant part thereof as the case may be, would have a significant impact specific to everyday life of communities in Northern Ireland in a way that is liable to persist".

128 Once the notification has been made to the EU, the EU law that has been objected to is then treated as if it were a new EU law and "[w]here the notification referred to in the first subparagraph of this paragraph has been made, paragraph 4 shall apply with regard to the Union act…" If this is not possible the normal procedure will apply whereby "the Union shall be entitled, after giving notice to the United Kingdom, to take appropriate remedial measures". The EU can then insist on Arbitration under article 170 which can make binding recommendations including reapplying the EU law.

129 The question under Article.13(3a) third paragraph (a) of whether the content or scope of the EU act as amended or replaced "significantly differs" from before would involve questions of interpretation of EU law which, unless *acte claire*, would have to be referred to the ECJ for a binding interpretative ruling under Article 174 of the Withdrawal Agreement.

A further constraint is included in the draft Joint Declaration on the Stormont brake.[130] This sets out that the UK's notification of a disapplication must be made in "in good faith in accordance with Article 5".[131] Article 5 of the Withdrawal Agreement states that parties "shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement. This Article is without prejudice to the application of [EU] law pursuant to this Agreement, in particular the principle of sincere cooperation."

The draft Joint Declaration on the Stormont brake adds that "in relation to a notification under Article 13(3a) of the Windsor Framework, swift compliance with the ruling of the arbitration panel should be achieved, as set out in Recommendation [XX]/2023."[132] The draft recommendation of the Joint Committee further states that "*in order to comply with the arbitration panel ruling, and as the case may be, to the extent set out therein, the Union act applies as amended or replaced*" leading to the EU law being reapplied.

The Stormont brake is similar, but narrower in concept to the safeguarding article 16 which allows for unilateral disapplication of provisions of the Protocol if there is "serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade, the Union or the United Kingdom may unilaterally take appropriate safeguard measures." It is unclear how the new 'Stormont brake' relates to Article 16.

130 Draft Declaration on 13 3 (a): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1139426/Draft_joint_declaration_by_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_and_the_European_Union_in_the_Withdrawal_Agreement_Joint_Committee_on_Article_13_3a_.pdf

131 It is clear that, were the UK to action its own initiative to block a new law in this area, the UK would lose any case at Arbitration. The UK is required to follow the procedures and tests in good faith, as by extension are the 30 MLAs, although the UK is ultimately responsible for the operation of the Treaty. If it does not comply with the tests, the UK would be subject to an arbitration procedure and potential infraction procedures. The UK is therefore not in charge of whether a decision can be made or the thresholds met. The EU is clear that the UK will be bound by strict interpretations of both the Stormont procedures and the thresholds and the good faith provisions as ruled upon by an arbitration panel: "where an arbitration panel has ruled that the United Kingdom has failed to comply with the conditions for such notification as laid down in the third subparagraph of that paragraph, swift compliance with such an arbitration panel ruling should be achieved." Para 3.5.2, proposed Council Decision on the EU's position to be taken.

132 Draft Recommendation [XX]/2023 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1139425/Draft_Recommendation_of_the_Withdrawal_Agreement_Joint_Committee_on_Article_13_3__a_.pdf

APPENDIX G:
APPLICABILITY OF EU STATE AID LAW

The application of EU State aid law to the UK,[133] by virtue of Article 10 of the NI Protocol, is extremely significant. In addition to the loss of UK sovereignty, the practical difficulties this creates will worsen over time.

In Northern Ireland, the Government will soon have to start notifying aid projects to the Commission. Having now accepted EU law and jurisdiction in this area, it is unsustainable to continue starving Northern Ireland of public investment that engages the EU's State aid rules in order to avoid political embarrassment. The Government will have to accept the consequences of its choices. Once a notification is made, the UK cedes control over the relevant fiscal decision to a foreign power. The EU can either approve, require changes to the policy or prohibit it. Any appeal against the European Commission's decision on the proposed aid can only be heard by the ECJ.

In Great Britain, it will remain politically difficult to notify projects with beneficiaries in Great Britain to the European Commission, regardless of their indirect effect on Northern Ireland. However, failing to do so does not solve the issue or mean it is not there. It merely pushes the problem onto others and places a substantial risk on investors, which is one of the most significant costs of the approach to Article 10 of the NI Protocol in the Windsor deal. The UK courts, especially the Competition Appeal Tribunal (under section 70 of the Subsidy Control Act 2022) and the Administrative Court (TCA, by way of section 29 of the European Union (Future Relationship) Act 2020) will be asked to define the perimeter of Article 10 and the extent to which aid in Great Britain could be said to engage it. In doing so, they will take account of the joint declarations within the Windsor deal. These undoubtedly provide some constraint on the reach of Article 10, and the Windsor deal provides incremental improvements in this area. The improvements stem from the wording of the joint declaration on Article 10(1)[134] which seeks to define the key concept of a "genuine and direct link" to Northern Ireland. This phrase is not contained in Article 10 itself but emerged from an earlier unilateral declaration by the EU from 17 December 2020. The relevant paragraphs of the Windsor deal draft joint declaration are improvements on the December 2020 declaration.

Given that other parts of the text of the Protocol are to be amended by the draft Joint Committee decision, it is unclear why the text of Article 10 is to be left unamended, and the far less certain and robust route of using a declaration to "tweak" its interpretation is being used. In our view it would have been greatly preferable to have amended to text of Article 10 in order to ensure that the test is not the same as that which applies under EU State aid

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133 Article 10 is *not* limited "the UK in respect of Northern Ireland", in contrast to the Articles of the Protocol which apply EU customs, single market and tax laws.

134 Draft joint declaration by the United Kingdom of Great Britain and Northern Ireland and the European Union in the Withdrawal Agreement Joint Committee on the application of Article 10(1), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1139443/Draft_joint_declaration_by_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_and_the_European_Union_in_the_Withdrawal_Agreement_Joint_Committee_on_the_application_of_Article_10_1_.pdf.

law to the question of whether there can be an effect on trade between Member States, where a theoretical risk is enough.

The declaration will now make it arguable in Court that aid to a beneficiary in Great Britain does not engage Article 10 (and hence does not need to be notified to the European Commission) because:

(i) sales in Northern Ireland are insufficient, of themselves, to trigger Article 10;[135]

(ii) the beneficiaries' sales in Northern Ireland are too small or immaterial;[136]

(iii) the *economic effect* of the aid is not passed through the beneficiary to Northern Ireland.[137]

The declaration suggests that the ECJ test for effect on trade between member states in a State aid context is not the correct frame of reference for the test under Article 10 of effect on trade under the Protocol. This is because, under the ECJ test, sales alone are sufficient (they do not even need to be cross-border[138]) and there is no requirement to show that there is any economic effect.

However, the most obvious difficulty created is that litigation becomes more vexed. Beneficiaries and public authorities seeking to defend claims that Article 10 was breached (a claim that is made routinely because it provides a claimant with a total win on a hard-edged point of law) will need to collect expert and factual evidence on materiality and economic effects. This adds cost and difficulty to defending litigation and is likely to have a chilling effect on subsidy policy as a result.

The more major difficulty is less obvious but much larger – in fact, very large indeed. In failing to remove the "reach back" jurisdiction of Article 10 into Great Britain and merely limiting its scope, the Windsor deal has created jeopardy for investors into Great Britain. Imagine a company seeking to build a Gigafactory in Great Britain and the UK is competing for this mobile investment, including against jurisdictions in the EU. In addition to all the incremental

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135 The relevant paragraph of the joint declaration states: "For measures granted to any beneficiary that is located in Great Britain, factors relevant to materiality may include the size of the undertaking, the size of the subsidy, and the market presence of the undertaking in the relevant market in Northern Ireland. While **the mere placement of goods on the Northern Ireland market is not sufficient, on its own**, to represent a direct and genuine link engaging Article 10(1) of the Windsor Framework, measures that are granted to beneficiaries located in Northern Ireland are more likely to have material effects".

136 The relevant paragraph of the joint declaration states: "For a measure to be considered to have a genuine and direct link to Northern Ireland and thus to have an effect on the trade between Northern Ireland and the Union that is subject to the Windsor Framework, that measure needs to have real foreseeable effects on that trade. The relevant real foreseeable effects should be **material**, and not merely hypothetical or presumed".

137 The relevant paragraph of the joint declaration states: "For measures granted to any beneficiary that is located in Great Britain that have a material effect, it must be **further demonstrated that the economic benefit of the subsidy would be wholly or partially passed on to an undertaking in Northern Ireland**, or through the relevant goods placed on the market in Northern Ireland, for example through selling below market price, for there to be a direct and genuine link engaging Article 10(1) of the Windsor Framework".

138 See for example: *R (Eventech) v Parking Adjudicator* on preliminary reference to the CJEU, C-518/13 see paragraph 65

cost and risk that the TCA represents in terms of market access, subsidies offered by the UK are doubly vulnerable from the EU. First, this is so under the Foreign Subsidies Regulation (FSR), a new protectionist measure the EU has adopted to supervise the subsidisation of its trade partners. Under the FSR (which enters into force in July 2023) the EU will have the power to require the mandatory pre-notification of certain M&A transactions and public procurement processes as well as a broad *ex officio* power to investigate the award of subsidies from any non-EU member state where the EU suspects a subsidy may distort the EU single market. Second, the problem arises from the possibility of a claim (potentially years after the event) that the subsidy engages Article 10 and is unlawful for lack of prior notification, as discussed above. This is a unique risk that the UK suffers from, under the NI Protocol, that is not shared by any other jurisdiction in the world, and one that the UK Government is powerless to prevent, other than by protective notification of the project to the European Commission. While that is politically impossible under the current Government, a future Government would not be so constrained and could act to protect an investor in this scenario by filing a notification to the EU. As soon as this step is taken, the UK will delegate entirely the definition of "genuine and direct link" to Northern Ireland to the European Commission and the ECJ. Much of the advantage of an independent subsidy control policy will then disappear. The State aid position in the Windsor Framework is incrementally better than the Protocol, which is a reflection of just how poor the Protocol was. By accepting the continuation of Article 10 reach over subsidies in Great Britain, the Government has removed much of the benefit that the UK would otherwise have won from its faster, more flexible, more certain subsidy control regime under the Subsidy Control Act 2022. The EU has successfully neutralised a key Brexit benefit.

The Stormont Brake