The Draft Withdrawal Agreement

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Executive Summary:

The following two notes are the first in a series covering the legal aspects of the Draft Withdrawal Agreement:

Note 1. Supremacy of the EU law will continue past the transition period

This paper makes the following points:

- The Withdrawal Agreement (WA) itself and the EU treaties and EU law which it applies to the UK will have direct effect in the UK and automatic supremacy over UK law, including over Acts of Parliament (Article 4 (1) - (2) of the WA). This direct effect and supremacy will apply across the board up to the end of the Transition Period, to EU Citizens' Rights as long as EU citizens with acquired rights are alive, and indefinitely to the 'backstop' Protocol provisions.

- The Attorney-General Geoffrey Cox in his letter of 15 July 2018 to MPs stated that under the Chequers White Paper the system of ECJ supremacy would be "completely different" from that of EU membership – it would be a system where the UK was bound in international law but not domestically. The WA however perpetuates the EU membership model, with direct references from UK courts to the ECJ for binding rulings during the transition period on all matters, on EU citizens' rights for about 10 years after the transition period, and for Northern Ireland single market rules indefinitely.

- Binding ECJ rulings via a 'Moldovan' arbitration procedure. Even where direct ECJ references from UK courts do not apply, under Article 174 WA where there is a dispute as to questions of EU law the ECJ shall rule, and these rulings will be binding on the arbitration panel.

- Obligations for the UK to continue to follow ECJ Judgments. The UK will be bound by all ECJ judgments delivered up to the end of the transition, and by judgments on citizens' rights and on the customs and single market rules which apply to Northern Ireland after that. Even where ECJ judgments have ceased to be binding, UK courts will still be required to have "due regard" them – in practice meaning UK Courts will follow ECJ caselaw across the board after exit day.

- The UK could be liable for financial penalties awarded in cases brought to the ECJ for up to 4 years after the end of the transition period. (Article 87)

- The ECJ will be given jurisdiction over the Financial settlement. (Article 160)

Note 2. The Northern Ireland Protocol is neither a "backstop" nor temporary

This paper makes the following points:

- No unilateral exit clause. The Protocol can only be prevented from coming into force if the EU agrees with the UK to replace it before the end of the transition period with a trade agreement. If the Protocol comes into force, the UK cannot exit from it without a "joint" decision (meaning the EU has a veto) in the 'joint committee' (article 20 of the Protocol). This absence of a clause allowing withdrawal on notice is unprecedented in trade treaties including the EU's own trade agreements with non-member countries. Under international law, future governments and Parliaments would be locked in and bound by the treaty concluded by this government.

- Because of this lock-in, the Protocol would not operate just as a "backstop". In negotiations on the future trade treaty, the EU would have no incentive to offer the UK terms which are any better than the Protocol – since if the UK fails to agree to the EU's demands the Protocol automatically comes into effect and lasts indefinitely, giving the EU tariff free access for its £95bn trade surplus in goods and keeping up the EU's external tariff wall around the UK market as a barrier against competing goods from non-EU countries.

- It will require the whole UK to remain in a Customs Union at the end of the transition unless there is agreement between the UK and the EU to the contrary.

- It will require Northern Ireland (unlike Great Britain) to be subject to a large number of EU single market regulations and directives, and customs and tax rules.

- Under the backstop the UK would have to follow the EU's external trade policy and import tariffs. It would not be possible for the UK to implement trade agreements with non-EU countries

- The Protocol includes 'level playing field' measures in areas such as state aid, environment and employment rights. Since these are locked into the Protocol, the EU is certain to insist on the same or more stringent restrictions in any replacement trade agreement.

Note 3. The “backstop” Protocol and the threat to the Union

This paper makes the following points:

- While the Protocol requires the whole of the UK to stay inside a customs union Northern Ireland will also have to apply all the rules of the single market relating to the placing of goods on the market and the processes and procedures they must undergo before being placed on the market, and rules relating to movement of goods (such as rules on live animal exports), but also includes connected matters such as EU legislation on intellectual property.

- The Protocol will oblige the UK to prevent the importation into Northern Ireland of goods from Great Britain that do not comply with EU law, although not vice versa. This will entail a requirement to operate checks on goods which cross the Irish Sea from East to West.

- Barriers between GB and Northern Ireland would be damaging for Northern Ireland as its trade with Great Britain is two and a half times bigger than its trade with the Republic of Ireland.

- Creating barriers within the UK is would be contrary to Article VI of the 1800 Articles of Union. The UK internal market is also recognised in the legislation which established the current Northern Ireland Assembly, the Northern Ireland Act 1998.

Note 1: European Court Jurisdiction and Supremacy of EU Law over UK Law

Supremacy of EU law will continue past the transition period

One of the most vexed problems of EU membership has been the way in which it has required us to over-ride our constitutional principle of Parliamentary supremacy, and have the courts overturn Acts if they are found to conflict with EU law. In the well-known *Factortame* case in 1990, the House of Lords disapplied an Act of Parliament intended to protect the British fishing industry applying an interpretation of EU law by the ECJ.

It was thought that after Brexit we would no longer see Acts of Parliament overturned in our courts based on EU treaties or rules, particularly as many rules are vague and open to elastic interpretation in the hands of the ECJ. On 15 July 2018 shortly after the Chequers meeting, the Attorney-General Geoffrey Cox sent a letter to colleagues in the House of Commons which stated that:

> "The framework outlined in the White Paper would be fundamentally different from the current framework in that the UK's adherence to the "common rule book" would be achieved by a normal international agreement, which would impose a standard international law obligation on the UK Government to ensure observance of its terms. **This is completely different to membership of the European Union. We will be taking back control of our laws.**
>
> The provisions of that treaty and the common rules to which they related could not become law in the UK, other than by an enactment or other legislative measure of the UK parliament or government. The agreement would not require the UK to give EU legislation direct effect in its national law, so that rules made by the law-making institutions of the EU would no longer have automatic effect in UK law. Thus, the power of the EU institutions to make laws for the United Kingdom will cease."

This position seems to have been completely abandoned in the draft WA. Art.4 will require the UK to maintain in our law the principles of direct effect and supremacy across the board of matters covered by the WA, subject only to specific exceptions. Art.4(1)-(2) says:-

> Art.4(1): 1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.

> Accordingly, legal or natural persons shall in particular be able to **rely directly on the provisions contained or referred to in this Agreement** which meet the conditions for direct effect under Union law.
>
> 2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities **to disapply inconsistent or incompatible domestic provisions**, through domestic primary legislation. (emphasis added)

In order to comply with Art.4(2), the UK will have to pass primary legislation which replicates the effect of section 2(4) of the to-be-repealed on exit European Communities Act 1972.

It is important to understand that this is not limited just to Part Four of the WA on the transition period. During the transition period, the supremacy of EU law and the full enforcement machinery by the Commission and the ECJ will apply across the board in the same way as if we were still a Member State, the difference being that we will no longer have any representation in the ECJ or in other EU institutions.

The supremacy of the WA and of EU laws which it applies to the UK will continue past the end of the transition period in the following main areas:

(1) The whole of EU citizens' rights in Part Two, for as long as any EU citizens are alive who acquire rights before the end of the transition period;

(1) In Northern Ireland, under the NI Protocol, all EU customs rules and tariff rules and a large number of EU single market laws which are listed over 67 pages in Annex 5 to the NI Protocol;

(1) As regards the whole UK, the provisions of the NI Protocol itself including the obligation to maintain UK external tariffs in line with EU tariffs and to comply with the customs rules and obligations in the NI Protocol and in its Annex 2.

Jurisdiction of the ECJ in and over the UK will continue

At her press conference on 15 November 2015, the Prime Minister made the following assertions about what the draft WA would bring:

> "Full control of our laws, by ending the jurisdiction of the European Court of Justice in the United Kingdom."
>
> and
>
> "The jurisdiction of the ECJ - over."

These assertions appear to be at variance from objective reality as demonstrated by the words of the draft WA. That will continue the jurisdiction of the ECJ in and over the UK in a number of ways.

First, the direct jurisdiction of the ECJ as it is now exercised will continue on all matters throughout the transition period. That consists of preliminary references whereby all UK courts may, and the Supreme Court must, send issues of EU law for decision by the ECJ and are bound by the ruling; and of so called "direct actions", where the Commission brings a claim against the UK for infraction of a treaty or EU law rule. Art.87 of the WA allows the Commission to bring such direct actions against the UK not only during the transition period, but up to 4 years after the end of the transition period. These may involve claims for money or financial penalties which the UK would be obliged to pay if ordered by the ECJ.

The direct jurisdiction of the ECJ and the enforcement powers of the Commission will also continue under the NI Protocol. Art.14(4) of that Protocol specifies that the ECJ's jurisdiction shall continue in relation to Arts.8 to 12 of the Protocol. These lay down the single market, tax and state aid rules that are applicable in Northern Ireland. Art.15(3) of the Protocol also states that in relation to these matters, ECJ rulings made after then of the transition period are binding.

The direct preliminary reference procedure will also continue in relation to citizens' rights (Art.158) in cases which are commenced at first instance up to 8 years after the end of the transition period, i.e. 2028 or later if the transition is extended.

The ECJ will be given jurisdiction to rule on post Brexit financial liabilities under Art.160.

But there are two further ways in which the ECJ's jurisdiction will continue to prevail in the UK, one by making binding rulings in a special international procedure, and secondly via continued deference of UK courts to its case law.

Binding ECJ rulings via the Moldova arbitration procedure

When we leave the EU, the ECJ will cease to be a multi-national court in which the UK is a participating member and will become an entirely foreign court. It is contrary to international treaty practice for sovereign states to agree to be bound by the courts of the other treaty party, but will only accept neutral and balanced means of international adjudication.

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

bilateral arbitration clauses.

The draft WA sets up a conventional balanced international arbitration panel which for each dispute will contain 5 members: 2 nominated by each of the EU and the UK, and a neutral chairman appointed by agreement or nominated by the Secretary-General of the Court of Permanent Arbitration: Art.171(5). On the face of it that would a suitable means for adjudicating on international treaty obligations between sovereign powers.

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

Article 174
Disputes raising questions of Union law

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

Disputes under the WA are likely to raise questions about whether or not the UK has correctly mirrored EU rules which the UK is meant to apply. The effect of this clause is that such disputes will need to be referred to the court of one party, the ECJ, and the independent panel will then be bound by the ruling and have to apply it. The supposedly independent panel will simply be a post-box and rubber stamp, with the effective decision being taken by the ECJ. The reference to Art.89(2) is to a case about whether the UK has complied with a previous ECJ judgment, and in such cases as well the arbitration panel will just be a post box.

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

The recently retired President of the EFTA Court, Dr Carl Baudenbacher, said (Financial Times, 16 Nov 2018) commented on this clause as follows:

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

Obligations of UK courts to continue to follow ECJ judgments

In addition to the methods by which the ECJ will continue to exercise jurisdiction over the UK via direct actions, preliminary rulings on references from UK courts, and rulings via the supposedly 'independent' arbitration procedure, the draft WA gives continuing special status to ECJ judgments, laws and legal principles.

Art.4(3)-(5) lay down the general principles which apply across the board under the WA:

> 3. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law.
>
> 4. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period.
>
> 5. In the interpretation and application of this Agreement, the United Kingdom's judicial and administrative authorities shall have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period.

This makes the ECJ's case law binding in judgments delivered up to the end of the transition period - and judgments delivered by then will continue to be binding afterwards. With regard to judgments delivered after that date, the obligation on UK courts will be to "*have due regard*".
It is quite common under international treaties for the courts of one treaty party to pay due regard to the court decisions of the other treaty party when interpreting their mutual treaty obligations, in order to seek consistency of interpretation. But this practice is mutual and goes in both directions. Under the WA, there is no corresponding obligation for the ECJ to pay "due regard" - or any regard at all - to decisions of UK courts. There is merely a provision for engaging in "dialogue" (Art.163).

This unbalanced provision - contrary to all international treaty practice - places UK courts in an inferior and potentially servile position vis a vis the ECJ. UK courts will normally be expected to follow ECJ post-transition judgments. In theory they will be entitled to depart from them.

However, the willingness of UK courts to depart from post-transition ECJ judgments is likely to be tempered by the existence of the Moldova-style arbitration mechanism. UK courts will reason that if they do depart from an ECJ judgment, then the matter will lead to a dispute under the Moldova arbitration procedure in which the case will be referred to the ECJ which will inevitably uphold its previous judgment.

This means that although post-transition ECJ judgments will be theoretically not quite binding, the occasions on which UK courts will be willing to depart from them in practice are likely to rare in the extreme. So in general within the scope of matters covered by the WA, UK courts will continue in the future to follow ECJ judgments. Since Art.4 as discussed above requires that the UK legislate to give direct effect to the provisions of the WA and that they should be supreme over UK domestic law, this will lead to courts continuing to overturn Acts of Parliament on the basis of ECJ judgments very much as now - except that the ECJ will then be an entirely foreign court with no UK judge.

There is one very important area where post-transition ECJ judgments are explicitly made binding. This is in the NI Protocol, Art.15(3), which over-rides Arts.4(4)-(5) of the main WA and makes post-transition ECJ judgments binding when the provisions of the NI Protocol are being applied. This notably includes a vast range of single market measures listed in Annex 5 of the Protocol which are to apply to and within Northern Ireland.

Note 2: The Northern Ireland Protocol: it is neither a "backstop" nor temporary

What is this Protocol?

Within the draft WA, 175 pages consists of a Protocol whose formal title is "Protocol on Ireland/Northern Ireland", together with 10 detailed Annexes which form part of it. Informally it is called the Northern Irish "backstop" protocol. Neither its formal nor its informal title really describes it. It should be called "the whole UK permanent lock-in protocol with extra lock-in for Northern Ireland."

Most of its provisions do not come into force until the end of the transition period. However at that point and in the absence of an agreement between the UK and the EU to the contrary, it will come into force and will require the whole of the UK to stay in a customs union with the EU - a customs union in which the UK has no vote on the tariffs to be charged or on who to do or not to do trade deals with, but will be obliged to follow the EU's tariffs at all times. Further, it obliges the UK not to deviate from EU rules on a wide range of so-called "level playing field" areas of policy, including environment, workplace rights, state aids and competition law.

Secondly, it will require Northern Ireland (unlike Great Britain) to be subject to a large number of EU single market regulations and directives, and customs and tax rules.

Finally - and this is the most important point - the UK has no right under the treaty to either to prevent the Protocol coming into effect or, once it is in force, to leave it, unless the EU agrees. In this regard, the Protocol is unique amongst trade agreements, which invariably contain clauses allowing each party the right to withdraw on notice.

Is it just a "backstop" which will never come into effect?

The government argue that the Protocol is just a "backstop" which they intend not to come into effect, and if it does come into effect it will only be temporary.

It is true that the Protocol will not come into effect if before the end of the transition period in December 2020 the UK and the EU have agreed a wider trade deal which, among other things, deals with the Irish border issue to the satisfaction of the EU.

But it is utterly naive to argue that the terms of this "backstop" do not matter because it is likely to be replaced with something else. The Protocol will have a profound effect even if it never comes into force. Its very existence will mean that the EU will have no reason to offer a trade agreement with better terms than the Protocol. The Protocol will be the baseline for the terms which the EU will offer in a trade agreement.

The Protocol includes the obligation for the whole UK slavishly to apply EU-dictated tariffs to imports from outside the EU, and to follow the EU's external trade policy. This keeps the UK a captive market for EU goods exports, so the EU will be able to carry on selling their huge £95bn a year surplus of goods into the UK market, at above world prices protected by the EU tariff wall against third country competition. It will also kill stone dead any ability of the UK to conclude our own trade agreements with non-EU countries.

In addition, the Protocol includes the so-called "level playing field" measures on the environment, state aids, workplace rights and other areas which are designed to suppress the competitiveness of UK industry. It is obvious to a 5-year old child, but not apparently to our Prime Minister, that by conceding all these rights to the EU in the so-called backstop, we ensure that we will get the same terms or worse in any future trade agreement. That the EU believes it can use these concessions as the benchmark for the future relationship, and intends to use them in this way, has been confirmed in the leaked diplomatic note from Sabine Weyand. As reported in The Times on 14 Nov 2018:

> Sabine Weyand, the deputy to Michel Barnier, Europe's chief negotiator, told European ambassadors that this concession would be used as the basis of the future relationship with the EU. She also said that Britain "would have to swallow a link between access to products and fisheries in future agreements", in a leaked note of the meeting on Friday.
>
> "We should be in the best negotiation position for the future relationship. This requires the customs union as the basis of the future relationship," Ms Weyand said. "They must align their rules but the EU will retain all the controls. They apply the same rules. UK wants a lot more from future relationship, so EU retains its leverage."

What is said in that note is clearly right. The EU can sit solid in the future trade negotiations, refusing to agree to any terms which are better for the UK than the Protocol, knowing that if there is no deal the UK will be forced into the Protocol and have to submit to its terms anyway. Then the EU can keep the UK bottled up inside the Protocol as long as it wants, because it gives the UK no legal right to withdraw from it.

So the Protocol gives to the EU both the right and the incentive to force the UK to comply with its terms. So the only way the UK could escape the Protocol is by agreeing to the same terms (or worse) in a trade agreement. So the terms in the Protocol will bind the UK, whether formally as part of the Protocol if it comes into force, or as terms of the replacement trade agreement which the UK will be forced to include as a result of the binding commitments it has made in the Protocol.

Is the Protocol temporary?

The Protocol contains wording in Art.1(4) that it is “intended to apply temporarily”. But this is just comfort wording included for window-dressing that will have no legal effect. This is because the Articles which govern how the Protocol can be replaced or reviewed give the EU a complete right of veto on the UK leaving the Protocol. This right is not subject to any effective judicial or arbitral challenge .

Remarkably, the government has capitulated on any attempt to secure an independent mechanism permitting the UK to leave the Protocol, let alone the unconditional right to leave after a period of time which it originally asked for.

Art.2 of the Protocol provides for it to be replaced by a subsequent agreement. However, the EU is under no legal obligation to conclude a subsequent agreement, so the UK cannot leave the Protocol under this clause without the EU's consent. And that consent, as I have explained, could only be obtained by submitting to the same terms or worse in the replacement agreement with the EU.

Art.20 sets out a "review" process whereby the Protocol can "in whole or in part" be made no longer to apply. This requires the UK to give reasons saying why it should no longer apply because the Protocol "*is no longer necessary to achieve the objectives set out in Article 1(3)*” of the Protocol. Those objectives are:

> "... to address the unique circumstances on the island of Ireland, maintain the necessary conditions for continued North-South cooperation, avoid a hard border and protect the 1998 Agreement in all its dimensions."

Having given its reasons why the Protocol is no longer necessary, the UK could then theoretically be released from it under Art.20, but only by a “joint decision” of the UK and the EU within the Joint Committee. This wording, “joint decision”, means that *both the UK and the EU must agree in order for the UK to be released from the Protocol*. The words “joint decision” do not mean that somehow there is a friendly discussion in which a consensus view is reached. These words give to the EU a complete and unqualified right to veto the UK’s exit from the Protocol.

Art.20 refers to Art.5 of the Withdrawal Agreement, which requires the parties to act in "good faith". The government may argue that the EU are obliged to participate in this review in "good faith" and that this provides some kind of protection for the UK. This is not so for the following reason.

The criteria in Art.1(3) of the Protocol quoted above are broad, vague and involve questions of political judgement as well operational judgements about e.g. the effectiveness or otherwise of alternative customs arrangements. The EU would be able to justify any refusal to release the UK from the Protocol by a

myriad of potential arguments, such that it would be impossible to challenge the refusal as based on bad faith. In practice, such a refusal could not be challenged by judicial or arbitral processes and the UK would be stuck in the Protocol as long as the EU wanted to keep us there.

The government apparently argues that the UK can escape from the Protocol because of a “best endeavours” clause in Art.184 of the draft WA. This reads:

ARTICLE 184
Negotiations on the future relationship

> The Union and the United Kingdom shall use their best endeavours, in good faith and in full respect of their respective legal orders, to take the necessary steps to negotiate expeditiously the agreements governing their future relationship referred to in the political declaration of [DD/MM/2018] and to conduct the relevant procedures for the ratification or conclusion of those agreements, with a view to ensuring that those agreements apply, to the extent possible, as from the end of the transition period.

“Best endeavours” clauses sometimes appear in commercial agreements - such as for example an obligation by a distributor to use “best endeavours” to sell a manufacturer’s products. Even in that kind of context they are notoriously difficult to litigate, because a court is faced with measuring the efforts of a party against a yardstick which is not clear: how good is “best”?

But in this treaty clause the “best endeavours” clause is effectively meaningless and certainly non-justiciable. This is because it is an obligation to use best endeavours to agree. Legal obligations on parties to agree with each other are recognised as being unenforceable because if two parties fail to agree with each other it is generally impossible to pin the blame on one or the other.

The political declaration referred to is extremely short, weak and vague. Rather than actually spelling out the future relationship even as a “framework”, it has vague paragraphs which could encompass different kinds of post-Brexit trade relationships between the EU and UK, notably in customs matters. This means that without provably acting in bad faith or failing to use their best endeavours, the EU could propose terms which are unacceptable to the UK and also string out the negotiations for a number of years.

As explained in the section below on the customs union clauses, the EU would have a strong incentive to keep the Protocol in place for as long as possible or indeed for ever, since it guarantees the exclusion of competing goods from non-EU countries from the UK domestic market, and contains “level playing field” clauses designed to suppress the competitiveness of UK industries.

Can future Parliaments be bound for ever by this Protocol?

At present, the so-called “backstop” is just a joint statement by negotiators in the December 2017 Joint Report, and is not legally binding. By contrast, if this draft agreement is ratified, the UK will be obliged under international law to comply with the Protocol.

Some people believe that the doctrine of Parliamentary supremacy - under which one Parliament cannot bind its successor - would give a future government or Parliament the ability to leave the Protocol regardless of what it says. This is a dangerous confusion.

The doctrine that one Parliament cannot bind its successor is part of the UK’s internal law. It forms no part of the international law of treaties. Quite the contrary - it is firmly established in international law that if a State enters into a treaty, then that State continues to be bound by it, regardless of changes of legislators, governments or even revolutions which totally replace the State’s internal constitutional order.

So there should be no doubt that if this treaty is concluded and ratified, the United Kingdom will be bound to comply with it under international law, regardless of the wishes of a future government or Parliament. For the UK in future just to breach a treaty would have the gravest consequences, since as a trading nation we rely on other states honouring their treaties with us.

I think that the incredulity in some quarters about it being possible for a treaty like this to bind in a country indefinitely is because trade treaties never do bind their participants indefinitely. In practice they all routinely contain termination clauses giving each party the right to withdraw on notice - commonly one year. This is only common sense. All sorts of conditions may change over time and countries do not want to be bound without their consent into trade relationships which become inappropriate or burdensome over time.

Therefore this Protocol in locking in the UK without a right to leave is quite unique and unprecedented. I am not aware of any trade agreement between the EU and a non-Member state which does not contain a right for that state to withdraw from the agreement. Even the humiliating and degrading Association Agreement between the EU and Moldova which I discuss in my note on ECJ jurisdiction contains in Art.460 a normal each-party termination clause on 6 months notice.

The Customs Union clauses

The Protocol provides for a customs union which will cover the whole UK. There are certain differences in the way in which it works in Northern Ireland which I will cover in a separate note on the parts of the Protocol which are specific to Northern Ireland.

The scheme is very similar to that of the EU-Turkey Customs Union agreement, save that the Turkish agreement excludes agricultural products but the UK-EU customs union under the Protocol would include them. I have written in detail about the terms of the EU-Turkey customs union and how it entails a loss of sovereignty over internal laws as well as external trade relations at: https://lawyersforbritain.org/staying-in-the-eu-customs-union-after-exit

The main point is that this is not a customs union between equal parties, under which they collectively decide what external tariffs they should charge and which countries the should do trade deals with. Instead, this customs union would create an entirely marsupial relationship between the EU and the UK, under which the UK will be required slavishly to follow EU tariffs and trade policy. (The difference is that marsupials care for their young in their pouches, but we would be in the EU's pouch when we have every reason to fear that they would not care for us at all.)

The nature of the relationship is made clear by Art.3(4) of Annex 2 of the Protocol:

> "4. The United Kingdom shall be informed of any decision taken by the Union to amend the Common Customs Tariff, to suspend or reintroduce duties and any decision concerning quotas, tariff-rate quotas or duty suspensions in sufficient time for it to align itself with that decision. If necessary, consultations may be held in the Joint Committee."

Thus, the UK will have a mere consultation right with no decision making power whatever, and a duty to comply with whatever the EU decides.

The basic problem with the EU's Common Customs Tariff is that it is still based on the EEC's customs union which was designed and built before we joined the EEC in 1973. The tariffs were set in order to protect Continental producer interests, notably French farmers, German car makers, and Italian clothing and footwear manufacturers. Those were - and still are - the areas where the EU's external tariffs are very high. The high food tariffs were and continue to be very damaging to us as a net food importing nation. Our consumers pay 100% of the elevated prices for food inside the EU's tariff walls, but only part of the benefit goes to British farmers. The rest of the benefit of the higher prices goes to farmers in other EU countries.

The nature of the EU's Common External Tariff (CET) has two effects. One is that it is damaging for the UK - particularly UK consumers - because it forces us to pay well over the odds for types of products which we do not produce, or in which we have comparatively little domestic production.

Secondly, it creates a massive incentive for the EU to keep up these tariff barriers against third country imports of goods which the EU sells into the UK market. This means that if the EU are given the legal right under this Protocol to force the UK to operate the CET indefinitely, they are going to exercise that

right. Once they have this in the bag, why on earth should they agree to change the relationship with the UK to one of a Free Trade Agreement which would give the UK the right to set its own external tariffs.

Average EU tariff by product type (%)	
Animal products	15.7
Dairy products	35.4
Fruit, vegetables and plants	10.5
Coffee, tea	6.1
Cereals and preparations	12.8
Oilseeds, fats and oils	5.6
Sugars and confectionery	23.6
Beverages and tobacco	19.6
Cotton	0.0
Other agricultural products	3.6
Fish and fish products	12.0
Minerals and metals	2.0
Petroleum	2.5
Chemicals	4.5
Wood, paper etc	0.9
Textiles	6.5
Clothing	11.5
Leather, footwear etc	4.1
Non-electrical machinery	1.9
Electrical machinery	2.8
Transport equipment	4.3
Other manufactures	2.6
Source: WTO World Tariff Profiles 2017, p82	

This customs union arrangement would kill stone dead the chances of the UK following an independent trade policy after Brexit. We would not be able to offer tariff concessions to free trade partners, so they would have no incentive to offer us concessions on say services which we would want to export to them. Further, it will render the theoretical right to negotiate third country trade agreements during the transition period totally meaningless. Since we will be unable to tell prospective free trade partners when we will be free to implement such an agreement, or indeed whether we will ever be free to do so at all, they will have no interest in spending time and effort on serious negotiations with us.

The subordinate relationship also applies to so-called trade remedies, where the EU takes action to impose anti-dumping or countervailing duties under WTO rules on non-EU countries. The EU will take these actions in to protect its own interests, regardless of any negative impacts on UK consumers, and the UK will be obliged to comply with those measures by imposing higher tariffs even where this is contrary to the UK's interests. Under Art.4(3) of Annex 2, it will have merely the right to be consulted.

Where dumping affects UK industries, the UK will have no right to take anti-dumping action to protect its own interests. It would be dependent on the EU to take action. If UK industries but no EU industries are affected, why should we expect the EU to do that?

It is quite extraordinary for one of the leading trading nations of the world to be a total rule taker on its trade policy in this way. This one-sided customs union arrangement would destroy the ability of the UK to take advantage of the freedom brought by Brexit to forge a new independent trade policy and shackle us permanently to being a dependency of the EU.

Note 3. The “backstop” Protocol and the threat to the Union

Differences in treatment between Northern Ireland and Great Britain

My previous briefing on the NI Protocol explained why it is not really just a “backstop” because the EU will have no reason to offer terms in a replacement trade deal which are better for the UK than the Protocol. Therefore it is very likely either that it will come into effect, or that the EU will insist on the terms in it (or even worse terms) being transposed into any replacement trade deal.

The Protocol requires the whole of the UK to stay inside a customs union with the EU and also to follow “level playing field” rules on the environment, state aids, workplace rights and other matters which are designed to prevent UK industries becoming more competitive.

But in respect of Northern Ireland it goes further. Many of the provisions in the Protocol apply to Northern Ireland but not to the rest of the UK. I will examine the implications of this different treatment for Northern Ireland for the operation of the internal market of the United Kingdom and for the constitutional relationship between Northern Ireland and the other parts of the United Kingdom.

EU single market rules

The first and most obvious difference is that the Protocol applies a huge range of EU single market regulations and directives to Northern Ireland which are listed out over 68 pages in Annex 5 (the 68 pages are *the list of the titles of these rules*, not the rules themselves). These rules are applied to Northern Ireland (but not Great Britain) by Arts.6(2) and 10 of the Protocol.

Broadly speaking these are all the rules of the single market relating to the placing of goods on the market and the processes and procedures they must undergo before being placed on the market, and rules relating to movement of goods (such as rules on live animal exports), but also includes connected matters such as EU legislation on intellectual property (Annex 5, para 45), and an eclectic collection of additional legislation such as, for example, Council Regulation (EC) No 2182/2004 of 6 December 2004 concerning medals and tokens similar to euro coins (para 47).

In addition, the EU’s legislation relating to VAT and excise duties will continue to apply in Northern Ireland but not in the rest of the UK (Art.9 and Annex 6). These means for example that Northern Ireland would be restricted from introducing a lower VAT rate to encourage tourism, even if such a rate were brought in elsewhere in the UK.

Under the Protocol, the single market and tax rules must apply in Northern Ireland very much in the same way as EU law now applies in the UK as a Member State. As I explain in my briefing on ECJ Jurisdiction and Supremacy of EU Law, the WA requires the UK to legislate to make these provisions of EU supreme over UK law (including Acts of Parliament) in UK courts. The supervisory powers of the EU Commission and other institutions and the jurisdiction of the ECJ (both in direct actions and in preliminary references) will continue to apply in Northern Ireland, just as if it were still part of an EU Member State: see Art.14(4).

These provisions mean that the UK Supreme Court will plainly not be supreme when it comes to dealing with these areas of law within Northern Ireland. It will be required to refer any issues of EU law to the ECJ and will be bound by the ECJ's ruling.

And the Protocol obliges the UK to apply all these legal rules not as they stand today but as they are amended from time to time by the EU (Art.15(3)). The same applies as regards judgments of the ECJ: the UK will be bound by future judgments of the ECJ when interpreting these EU rules, as well as by judgments given before we leave (Art.15(4)).

It is worth considering the democratic implications of these provisions. A part of our country with a population of 1.8 million would be subject to laws imposed and amended by a foreign power, enforced by a foreign Commission, and interpreted by a foreign court. Neither the Westminster Parliament nor the Northern Ireland Assembly will be able to change any of these laws or indeed prevent them from being changed without their consent by the EU. Citizens of Northern Ireland will have no vote in any legislature which can change the laws to which they are subject. As I explained in the previous briefing, it cannot be assumed that this will be a temporary state of affairs, since the UK will be unable to exit the Protocol without the consent of the EU.

There are a number of further areas of EU law which will apply directly to Northern Ireland but which do not apply to the rest of the UK. Under Art.6(2), the whole body of EU customs legislation applies directly within Northern Ireland - the rest of the UK is required to mirror much of this under the customs union obligations but it does not apply directly. The EU rules of the single electricity market apply (Art.11 and Annex 7). EU rules on state aids apply to measures which may affect trade between Northern Ireland and the EU (Art.12).

Impact on the United Kingdom's constitution

A single market without internal barriers and with uniform external trade relations with foreigners has been a central pillar of the United Kingdom's constitution since the formation of the Union. The original Articles of Union between England and Scotland of 1706 abolished all customs and other restrictions on trade between the two parts of the new United Kingdom, and provided that the external customs duties of England and Scotland should be aligned.

When the United Kingdom was extended to include Ireland in 1801 the same principles were applied. Customs duties between Great Britain and Ireland were abolished after a phase-out period. Article VI of the 1800 Articles of Union states that "*in all treaties with any foreign power, his Majesty's subjects of Ireland shall have same the privileges, and be on the same footing as his Majesty's subjects of Great Britain*." Article VII states that all prohibitions on the export of products of Great Britain to Northern Ireland or vice versa should cease from 1 January 1801.

These parts of the Articles of Union remain part of statute law applying both to Great Britain and Northern Ireland to this day, and are not affected in their application to Northern Ireland by the partition of Ireland and the separation of the Republic from the UK. The legislation which set up the original Parliament of Northern Ireland (the Government of Ireland Act 1920) excluded matters relating to trade within the UK from the scope of the Parliament's devolved powers in order to preserve the integrity of the UK's single market.

The recognition of the UK internal market was carried forward into the legislation which established the current Northern Ireland Assembly, the Northern Ireland Act 1998, continues to recognise the importance of preserving the UK's internal market. Section 26(4)(b) contains a power to revoke legislation which "*(b) would have an adverse effect on the operation of the single market in goods and services within the United Kingdom*".

There can be no doubt that the maintenance of free trade within the UK's internal market, as embodied in both the 1706 and 1800 Articles of Union, is an important feature of the United Kingdom's constitution.

This Protocol cuts across the Articles of Union in two ways. First, the citizens of Northern Ireland plainly under this Protocol (which is "*a treaty with a foreign power*") will not - "*have the same privileges, and be on the same footing*" as citizens in the rest of the UK. They will be subject to rules and restrictions and the rulings of a foreign court which are not imposed on citizens of Great Britain.

Secondly, although the Protocol allows the UK to permit goods to be imported from Northern Ireland to Great Britain, it requires the export of goods the other way to be banned if they do not conform with the EU rules which will apply within Northern Ireland. I explain below why this would disrupt the UK's internal market and disadvantage consumers and businesses in Northern Ireland.

The Articles of Union have the status of an Act of Parliament. It is therefore legally possible for a later Act - such as an Act to implement the Withdrawal Agreement - to repeal or over-ride them. It nevertheless remains the case that by overriding them in order to implement the Protocol as part of UK law, Parliament would be altering the constitutional status of Northern Ireland relative to other parts of the United Kingdom. Making such an alteration to the constitutional status of Northern Ireland within the UK without Northern Ireland's consent would breach the UK government's obligations under the Belfast Agreement.

Article 1(iii) on "Constitutional Issues" of the Belfast (Good Friday) Agreement states:-

> "the present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and, accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies upon that wish; and that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people;"

The Republic of Ireland is also a party to the Belfast Agreement. The present Irish government's support for this constitutional land grab by the EU breaches Ireland's solemn obligations to respect the constitutional status of Northern Ireland.

The Protocol and the UK's single market: the new country called "UK(NI)"

As mentioned above, the Protocol requires that a large number of EU regulations and directives relating to goods, the environment and connected matters shall continue to apply in Northern Ireland. Symbolically, goods made in Northern Ireland are required no longer to be marked "UK", but to be marked UK(NI) instead, if they are on the market in the EU or within Northern Ireland (Art.8(2)).

As a special dispensation, Art.7(3) of the Protocol graciously states that: "*Nothing in this Protocol shall prevent a product originating from Northern Ireland from being presented as originating from the United Kingdom when placed on the market in Great Britain.*" This does not alter the underlying reality that "UK(NI)" will become a separate country from Great Britain for goods regulatory purposes, with its own separate laws relating to goods on the market and its own system of certification and technical standards assessments controlled by EU law.

Controls on goods movements from Great Britain to Northern Ireland

This means that the UK will be obliged to prevent the importation into Northern Ireland of goods from Great Britain that do not comply with EU law, although not vice versa. This will entail a requirement to operate checks on goods which cross the Irish Sea from East to West. Art.7(2) of the Protocol says that the Joint Committee overseeing the arrangements will seek "*to avoid, to the extent possible, controls at the ports and airports of Northern Ireland.*"

The UK government has issued as so-called "Technical Explanatory Note" about Arts.6-8 of the Protocol. This note, rather unreassuringly, says that "*the practical operationalisation [sic - this word is actually in the original text] of such a regime ... would clearly require further work and discussion between the UK and the EU.*"

It goes on to say that checks on the movement of industrial goods from Great Britain to Northern Ireland "*can **mostly** be undertaken on the market or at traders' premises*" (emphasis added). As regards agricultural products, in a convoluted paragraph 4(d), it appears to indicate that many checks will be carried out at ports "*noting the island of Ireland's status as a single epidemiological area*".

These points are red herrings. Nobody doubts that it makes sense to operate checks against the spread of animal or plant diseases from the island of Ireland to Great Britain or vice versa. It does not raise constitutional issues, any more than operating such checks between the Isle of Wight and mainland England would affect the constitutional status of the Isle of Wight as part of England. In fact, the Government of Ireland Act 1920 in 4(1)(7) specifically conferred on the Parliament of Northern Ireland the power to issue "*regulations made for the sole purpose of preventing contagious disease*" as an exception to the general ban on measures which might restrict trade between Northern Ireland and elsewhere.

But these epidemiological checks are a complete red herring. What the Protocol requires and the Technical Note acknowledges is a far wider range of checks, which are to be conducted for economic purposes rather than for the prevention of the spread of disease. Their purpose is to prevent the entry into "UK(NI)", and possibly via UK(NI) to elsewhere in the EU market, of goods which are better or are cheaper to produce than goods made according to EU laws. It is fanciful to suppose that the UK will allow dangerous or defective goods on the market in Great Britain and the purpose of these checks and restrictions is protectionism of EU producers against more efficient competition from the UK.

The checks themselves are not the point - it is divergence that matters

The government seems to think that the fact that some of the checks might be carried out unobtrusively away from ports makes it all better. But the location of where checks are carried out is beside the point. The need for checks is an indication of the underlying syndrome, which is subjecting Northern Ireland to different laws from those which prevail in Great Britain and preventing consumers and businesses from benefiting from goods imported from Great Britain or goods which can lawfully be imported into Great Britain from elsewhere.

The damage to consumers in Northern Ireland is obvious, since they will be denied the opportunity to buy goods which may be cheaper or better than goods made under EU rules but which the UK Parliament believes are fit to be sold on the market for consumers in Great Britain.

Northern Ireland businesses will also be damaged. For example, a farm would be unable to use agrochemicals which are permitted in Great Britain, which may produce superior crop returns to those permitted under EU law. Or to acquire superior breeds of plants or animals created by gene editing which become available on the market in Great Britain if the UK decides to revive its world-beating life sciences industry by departing from the anti-science restrictions placed on this technique in the ECJ's judgment *Confédération paysanne v Premier ministre* (Case C-528/16, 28 July 2018) which extended the EU's restrictive rules on GMOs to gene edited organisms.

Or an industrial company in Northern Ireland might wish to make use of a chemical available in Great Britain which does not conform to the "REACH" Regulation (Regulation (EC) No 1272/2008 which is made to apply in Northern Ireland by paragraph 23 of Annex 5 to the Protocol.

The government ignores the interests of Northern Ireland consumers, and seems to think that Northern Ireland industry and agriculture will be unaffected because the UK will retain the right to permit goods to flow freely Eastwards across the Irish Sea. But this is not right. In the event of progressive divergence in regulations, Northern Ireland businesses and farmers will have to compete directly with businesses and farmers in Great Britain who are subject to a different regulatory regime, which is likely to grow progressively less protectionist.

Great Britain is by far the biggest market for Northern Ireland's exports.

Destination of exports	£ millions	% of total
Great Britain	14,008	58.0
Republic of Ireland	3,401	14.1
Rest of EU	2,334	9.7
Rest of World	4,391	18.2
Total	24,134	100

(Source: Northern Ireland Broad Economy Sales and Exports Statistics, Northern Ireland Statistics and Research Agency, 22nd March 2018)

Thus, Northern Ireland's trade with Great Britain is two and a half times bigger than its trade with the Republic of Ireland and the rest of the EU combined. This indicates that above and beyond the constitutional implications, it makes no sense at all to place regulatory barriers on its trade with Great Britain to escape barriers on its trade with the EU.