WWW.CENTREFORTHEUNION.CO.UK

RESTORING NORTHERN IRELAND'S PLACE IN THE UNION

CENTRE FOR THE UNION
CONSTITUTIONAL STUDIES GROUP

A paper analysing the impact of the Protocol on Northern Ireland's constitutional status as part of the United Kingdom, and setting out proposals on the way forward to restore the Union.

BY
JAMIE BRYSON AND ETHAN THOBURN

FOREWORD BY
JAMES BOGLE BL

RESTORING NOTHERN IRELAND'S PLACE IN THE UNION

Centre for the Union

Constitutional Studies Group

By Jamie Bryson and Ethan Thoburn

Foreword by James Bogle BL

First published 9 January in 2023 by Centre for the Union, Constitutional Studies Group

ABOUT

Centre for the Union

The Centre for the Union is a pro-Union think-tank set up to develop policy and strengthen links between pro-Union citizens across the United Kingdom. As part of our work we regularly bring together prominent unionists from legal, political, and academic backgrounds to strategically develop policy and analyse political and legal developments.

Ethan Thoburn is the founder and Director of the Centre for the Union, the Editor of the Bruges Group and a former officer in the Conservative Party. He has worked in Parliament and on the Brexit Referendum campaign. He has also worked alongside several pro-Union and Conservative organisations developing policy and campaigns.

Jamie Bryson is the founder of Unionist Voice Policy Studies and is the group's Director of Policy and Legal Research. He is the author of *Brexit Betrayed: Writings from the Referendum to the Betrayal Act*; *NI Constitutional Law: Acts of Union and NI Protocol*; and the *Justice, Law and Human Rights* community handbook. He has written extensively on UK Constitutional law, including providing written and oral evidence to various Parliamentary committees. He runs his own consultancy business working in Public Relations, Law and Advocacy.

James Bogle BL is an eminent counsel in private practice with Middle Temple in London. He is a former regular and reserve Army officer (including having served in Northern Ireland). He was awarded the Territorial Decoration ('TD) and Volunteer Reserves Service Medal ('VRSM'). In practice as a Barrister James specialises in civil, banking, commercial, chancery and public law. He appeared before the UK Supreme Court as counsel for an intervener in the seminal 'Brexit' case of *Miller v Secretary of State for Exiting the European Union* (2017) UKSC. He has been made a Freeman of the City of London.

Acknowledgments

We wish to thank all those who we have engaged with, particularly across political unionism, MPs, members of the House of Lords, and academia during the formulation of this paper.

This engagement, exchange of ideas and feedback has assisted us greatly in the formulation of our proposals, and (we hope) led to a situation whereby we have been able to produce a paper which in regards broad principles, will command widespread support across both political and grassroots unionism/loyalism.

We are especially grateful to several Kings Counsel who have provided invaluable feedback and analysis, enabling us to strengthen our proposals with each draft, and plug any ‘gaps’. This contribution was invaluable to our work.

Due to the nature of our work on this paper, we engaged on an undertaking of confidence, to enable the free exchange of ideas/suggestions. We have considered and taken onboard all feedback, in some cases adopting in whole or in part suggested changes, and in others not. When we haven’t adopted suggested changes, no disrespect is intended.

We look forward to continued engagement and the development of ideas, policy and legislation that will defend and strengthen the Union.

Table of Contents

Appendixes (slides):

Appendix 1 – Key points: Trade

Appendix 2 – Why build in Retained EU law model?

Appendix 3 – Key points: Constitutional Bill

Appendix 4 – UK Sovereignty lock: Ending EU law in NI

Appendix 5 – EU tunnel concept

Appendix 6 – UK Regulatory model

Appendix 7 – Restoring Article VI of the Acts of Union

Appendix 8 – UK Constitutional Bill 2023 (Draft)

Foreword

Since the decision to leave the European Union, following a UK-wide referendum, debates in Parliament and a final vote, the one issue remaining to be resolved is the issue of the so-called Northern Ireland Protocol. Its effect is, and has been, to compromise the full integrity of the BREXIT process by putting a false and artificial barrier between parts of the United Kingdom, namely between the Province of Northern Ireland and the remainder of the United Kingdom.

This, in effect, has shifted the border between the United Kingdom and the European Union from where it ought to be, namely between the Province of Northern Ireland and the Republic of Ireland (Eire), to an artificial line drawn through the Irish Sea cutting off Northern Ireland from the rest of the United Kingdom.

That, in turn, has created an entirely unjust and unequal status for Northern Ireland so that, despite being fully a part of the United Kingdom, it is treated as partly in the United Kingdom and partly still within the European Union, at least for trading purposes.

There can be little doubt that such an arrangement was entered into at the behest of those who still think, notwithstanding the result of the referendum, that Northern Ireland should remain part of the European Union preparatory to its later separating from the United Kingdom and being annexed and incorporated into the Republic of Ireland.

That such a situation is unjust and unequal ought to be obvious to everyone and anyone. Northern Ireland has been part of the United Kingdom for many centuries and has never been part of the Republic of Ireland which is a separate and different country that can have no claim upon any territory within the United Kingdom. The Protocol can thus only ever have been a temporary arrangement and the time has now come for it to be reviewed and the injustice and inequality to be rectified.

This paper, commissioned by the Constitutional Studies Group within the Centre for the Union aims to provide workable solutions that remedy and repair the constitutional

damage occasioned by the Protocol and to remove the attendant threats to peace, security and stability arising therefrom.

In short, this means restoration of the full meaning of the Acts of Union; European Union laws to cease to apply, an may only be mirrored in UK law (as part of the body of Retained EU law) if the Northern Ireland Assembly so chooses; only the United Kingdom Supreme court and not the European Court of Justice must be the final appellate court in Northern Ireland, and there must be unfettered free trade between Northern Ireland and the rest of the United Kingdom, and vice versa.

There has been some criticism of Unionists that they have failed to engage in debate to find solutions to the Protocol issue. As this paper readily shows, that is not a fair criticism, and the reverse is true.

The Unionist community have been subject to an alleged failure to engage in the debate around potential solutions, and/or as having a reluctance to set out a 'bottom line'. This criticism is misplaced in so far as the Unionist community simply seek the restoration of, and respect for, our place in the Union.

This paper proposes a solution to the Protocol issue which recommends itself to all parties concerned: (1) the creation of an "EU tunnel" for those wishing to trade direct with the European Union; (2) the creation of a flexible hybrid process which would allow EU law to be mirrored in UK law as part of Retained EU law; (3) to restore the full integrity of Northern Ireland as a full member of the United Kingdom and its markets pursuant to the Acts of Union.

It is argued that this can be best achieved by, among other provisions, the creation of a 'sovereignty lock procedure' which would require that specified provisions within the Protocol be subject to a bespoke domestic procedure in Parliament or, if sitting, the Northern Ireland Assembly (subject to cross-community consent safeguards), prior to having effect in the United Kingdom.

This would help address the democratic deficit in a compatible fashion, provide for the continued stability of the Belfast Agreement institutions and yet also provide flexibility, subject to cross-community safeguards.

In addition, there be the creation of a hybrid model affording the Northern Ireland Assembly significant powers to adopt European Union law, via mirroring it in UK law, should it so choose, but nevertheless remaining subject to the cross community consent protections and overriding sovereignty of the United Kingdom Parliament, which would retain the ability to annul any adopted provision or extend the scope of any relevant Retained EU law to other parts of the UK, thus preserving the equal footing guarantee in Article VI of the Acts of Union.

I warmly recommend the paper as a rational and workable set of proposals for resolving what has been, and remains, a running political sore unnecessarily harming and upsetting relationships both within Northern Ireland but also between major protagonists in Northern Ireland and the rest of the United Kingdom.

James Bogle, TD VR, Barrister-at-Law

Introduction

This paper is commissioned by the Constitutional Studies Group within the Centre for the Union. Our remit was to produce a paper achieving broadly two objectives: (i) to set out a general overview of the constitutional impact of the Ireland-Northern Ireland Protocol to the UK-EU Withdrawal Agreement, 'the Protocol' on the United Kingdom of Great Britain and Northern Ireland; (ii) to provide outline proposals to remedy the constitutional damage (and resulting instability) caused by the Northern Ireland Protocol.

Due to the fast-pace of developments regarding Protocol discussions, this work was by necessity done on an urgent basis. Accordingly, we have produced this paper over two-weeks at Christmas. Had we had more time, we would have liked to devote greater attention to various other elements of the Protocol, however we resolved to focus in on the key aspects, in so far as they relate to NI's place in the Union.

We concluded that the best means to achieve objective (ii) that we set out *supra* was to propose general concepts, however we have at times offered suggestions as to legislative techniques for implementation, and crucially provided a draft of a potential Bill to remedy some of the most serious constitutional issues.

In our view the outline proposals we offer here are *prima facie* compatible with the United Kingdom constitution and could, therefore, provide the basis for workable solutions to the Protocol, a Protocol which has already significantly damaged our precious Union and which has been conceived as a blueprint for the absorption of Northern Ireland in the Republic of Ireland.

We emphasise that these outline proposals are designed to assist discussion; they are not our final views, let alone those of the Centre for the Union.

We do strongly believe that there are fundamental constitutional principles which cannot be the subject of negotiation.

These are:

(i) the Acts of Union 1800 must be restored to their pre-Protocol vigour and integrity and any future arrangements replacing the Protocol must be consistent with the Acts of Union in their full force and integrity;

(ii) there can be no continued application of EU law in Northern Ireland (dynamic or otherwise). Our proposal for a sovereignty procedure which would permit the copying of EU law into our domestic body of Retained EU law if approved by the Northern Ireland Assembly (in a manner consistent with the 1998 Agreement and, thus meaning cross-community safeguards must be a necessary component; and consistent with the Acts of Union) exists solely to provide a degree of flexibility, which is limited to circumstances whereby there is no incompatibility created with the Acts of Union, or GB-NI divergence; This aspect the sovereignty procedure would be subject to a sunset Clause whereby if any provision approved by the NI Assembly subsequently diverged with GB (due to that which is applicable in GB changing) then the provision applicable to NI could only continue with a fresh affirmative cross community vote. In addition, the proposed Constitutional Bill would (if enacted) prevent any Minister of the Crown from laying regulations which created an inconsistency with the Acts of Union. The proposed bulk transposing of EU law which presently mirrors Retained EU law applicable GB is simply designed to re-align NI with GB, and avoid a complete regulatory vacuum, or the continued application of EU law during any transitionary phase.

(iii) It is not for the United Kingdom to pay the price of the EU's adoption of the nationalist demand that there can be no North-South border. It is for the EU to protect their own single market, and if they wish to adopt arrangements compatible with the wishes of the Irish Gov/Nationalism, then it is for the EU to absorb any associated risk with doing so. The UK should not, and unionism should not, concede this principle by undertaking the obligation of creating a border in our own country to achieve what is essentially the EU's objective.

(iv) there can be no checks or controls at all on goods moving within the United Kingdom, there must be unfettered trade GB-NI and vice versa. There can

be no requirement to 'opt in' to a system to facilitate internal UK trade (such as a trusted trader scheme), rather the UK regulatory system must be the default in all parts of the UK, with an option to opt-out and self-declare as exporting to the EU and thus comply with their regulatory standards in order to do so;

(v) Subject always to the sovereignty of the King in Parliament, the United Kingdom Supreme Court must be the ultimate judicial authority in relation to all parts of the United Kingdom, and whilst that court could seek advisory opinions from the ECJ, it cannot be bound either to do so or to regard such an opinion as binding. In any dispute in regards the performance of obligations under the Protocol, the ultimate authority should follow the same mechanism as the Trade and Co-Operation Agreement.

(vi) Section 1 of the Northern Ireland Act 1998 must be altered in order to provide adequate protection for Northern Ireland's constitutional status, the core of which is formed by the Acts of Union 1800.

As regards the exploration of potential solutions that we tentatively embark upon in this paper, we nevertheless emphasise the fundamental and unalterable requirement that Northern Ireland's constitutional place within the United Kingdom must be fully restored.

The discussion points setting out some suggested solutions are premised on the basis that their technical outworking would be compatible with constitutional principle. If, however, the ultimate technical outworking of the broad concepts we have developed does not satisfy the key tests on sovereignty and Northern Ireland's constitutional status, then we would without hesitation reject such an outcome.

It is accepted that these proposals mean the UK has a different trading model for those trading into the EU via the Republic of Ireland, than, for example, those trading to the EU via France. This is a practical effort to recognise the unique circumstances of the UK-EU border between NI and Republic of Ireland. We are prepared to go so far as creating the EU tunnel model which would require- via voluntary declaration- electronic information and paperwork, to be shared with the EU, to be submitted and criminal penalties for failing to do so. This is on the express basis that this model applies

equally across the UK, recognising NI's place within the UK customs territory and internal market. NI cannot be treated differently in any shape or form in regards these trading arrangements with the EU.

In regards terminology, throughout this paper we alternate between abbreviations and full titles (e.g., 'NI' and 'Northern Ireland'). We do this to avoid excessive repetition of one or the other in the same sentences or paragraphs. In referring to the Belfast Agreement, we use that name, which is what the Agreement is titled, or occasionally 'the 1998 Agreement'. We do not deploy the politically contrived phrase 'The Good Friday Agreement', let alone use the somewhat absurd formulation 'Belfast/Good Friday Agreement'.

There has been repeated criticism of the unionist community, alleging failure to engage in the debate around potential solutions and/or a reluctance to set out a 'bottom line'. This criticism is misplaced in so far as the unionist community simply seeks (and has always sought) the restoration of, and respect for, our place in the Union.

We hope that the material canvassed, and proposals put forward for discussion in this paper can, at least, provide a coherent basis for a shared unionist position and ensure that however we ultimately assess any proposals that come forward by the EU and UK, that this is done from a place of knowledge and understanding.

In formulating this paper, we are mindful that different parts of unionism have different ideas on how to arrive at our shared objective of restoring NI's place in the UK. Therefore, it is unlikely every specific proposal/suggestion in this paper will find favour with every section of political and grassroots unionism; however, we hope- and having engaged extensively in the short period of time available to us- that this paper is broadly reflective of at least the core principles shared by all of political and grassroots unionism.

In the appendixes of this paper we have included visual 'slides' setting out (in broad terms) how the various proposals would work.

This publication seeks to contribute to the public works in relation to the Protocol, and particularly its constitutional impact. We note, with concern, that the vast majority of

academic material generated in Northern Ireland is by those who have an overtly pro-nationalist/EU viewpoint.

All this feeds into a wider issue around the huge imbalance between pro Union and pro Nationalist, and – aligned to that ideology- pro Remain/Protocol and pro Brexit, material generated by academia, which influences decision makers in society (such as judges) by conditioning society to accept their overwhelmingly skewed analysis (in favour of nationalism/EU) as being intellectually and legally sound.

The Centre for the Union seeks to unashamedly confront pervasive institutionalised influences which create an inherent anti-union bias. We seek to ensure the case for the Union is promoted with vigour.

Jamie Bryson and Ethan Thoburn

January 2023

Part One: Executive Summary

(ii) Constitutional impact of the Protocol

The Acts of Union is the fundamental constitutional basis for the Union. We endorse the formulation of the late Lord Trimble: "*The Act(s) of Union is the Union*". The Protocol is plainly incompatible with its provisions, evidenced by the fact that to operate, the Protocol must subjugate/disapply/impliedly repeal Article VI of the Acts of Union.

Regulation 2017/625 is now to be read, following the judgment of Colton J in *Rooney* and *JR181 (3),* as when referring to the United Kingdom as meaning only Great Britain, with Northern Ireland treated as part of the European Union and accordingly the entry point into same. There can be no doubting the constitutional incompatibility of such an interpretation.

In *Allister et al* it was held by McCloskey LJ that "*Northern Ireland now belongs more to the EU market…than the UK"*. This is a definitive statement illuminating the constitutional change imposed upon Northern Ireland by the Protocol.

Whilst harbouring significant doubts as to whether *Robinson* is now inconsistent with later judgments of the House of Lords/Supreme Court, and in any event believing it was wrongly decided, we nevertheless accept the proposition that the Northern Ireland Act 1998 (giving effect to the Belfast Agreement in domestic law) is a constitutional statute and generally speaking a component of the UK's unwritten constitution.

The Protocol has led to the express amendment of the 1998 Act, removing the applicability of cross community consent for a key decision in relation to the Protocol (as required by Article 18 of same).

In addition, the principle of consent, given effect in section 1 of the 1998 Act has either (i) been breached due to the constitutional change imposed without consent; or (ii) the Protocol has illuminated the structural frailty and deceptive nature of section 1, in so far as it does not protect against substantive constitutional change short of the final

formal handover of sovereignty. If section 1 does not protect against substantive change in the status of Northern Ireland within the Union this removes the core premise on which unionism supported the 1998 Agreement. This was and is fundamental in relation to securing unionist support for the institutions of the Belfast Agreement.

(ii) Summary of proposals to restore NI's constitutional place in the UK

In recognising the unique position of Northern Ireland (sharing a land border with the entry point into the EU), the proposals seek to achieve these objectives:

(i) to create an EU 'tunnel' for those who want to trade into the EU, and thus voluntarily self-declare and opt into the full burden of EU regulatory requirements necessary to do so, thus creating a good faith guarantee to the EU in regards the security of their internal market. This 'EU tunnel' would require the same declarations from anyone within the UK (either in GB or NI) exporting into the EU via the Republic of Ireland and compliance would be policed with an invisible 'smart border' in line with the EU's own proposal.[1]

(ii) this EU tunnel model would therefore create a regulatory regime whereby the UK would create criminal penalties for not 'opting in' to the EU tunnel for businesses exporting from anywhere in the UK, and as such the EU would have to absorb any 'risk' they believed this posed (in order to achieve their objective of an invisible NI-ROI border), with compliance checked via the smart border.

(iii) to create a flexible procedure allowing for the NI Assembly (subject to cross-community safeguards) and subject to the ultimate sovereignty of

[1] EU paper on Smart Border: Smart Border 2.0 Avoiding a hard border on the island of Ireland for Customs control and the free movement of persons (europa.eu)

UK Parliament, to- subject to compliance with the entrenchment of the Acts of Union as fundamental constitutional law- choose the nature of the relationship with the EU law imported by the Protocol and to do so on an ongoing dynamic basis. The provisions of EU law could be adopted by the NI Assembly (in specified areas) or UK Parliament, and would then become part of the body of the UK's Retained EU law, which could no longer be added to or amended by the EU. This provision only exists to manage the transition and vacuum which would otherwise be created by stripping out all EU law, due to the regime which has been created by the Retained EU law model, primarily applicable in GB. In the absence of such a solution, NI- at the moment section 7A of the 2018 'conduit pipe' was switched off- would be left neither subject to the Protocol, or GB's Retained EU law. As NI will be fully in the UK regulatory regime there is unlikely to be any practical benefit to adopting any EU law beyond that to be initially adopted which mirrors GB, as the UK regulations as apply in GB will be sufficient for NI. This provision is purely to act as a flexible procedure.

(iv) to reset the default legal position to NI being fully within the UK market in line with Article VI of the Acts of Union, with the 'at risk' concept abolished and NI no longer being within or aligned to the EU's regulatory regime.

We propose the creation of a sovereignty lock procedure which would require that specified provisions of EU law proposed to be adopted into Retained EU law in respect of NI, which haven't automatically become Retained EU law because they do not mirror GB, would be subject to a bespoke domestic procedure in Parliament or, if sitting, the Northern Ireland Assembly (subject to cross community consent safeguards), prior to having effect in the United Kingdom. If democratic consent was granted, the relevant provisions would become part of UK law as Retained EU law. This would replace the current regime whereby a large body of EU law automatically applies in Northern Ireland. Article 13 (2) and (3) of the Protocol (which has effect in domestic law via section 7A of the European Union (Withdrawal) Act 2018 ('the 2018 Act')) allows for presently listed provisions to be unilaterally amended by the EU, or

additional provisions to be adopted, subject to the joint-committee procedure, without democratic consent of the NI Assembly or UK Parliament.

This sovereignty lock procedure would achieve the following outcomes:

(i) address the democratic deficit in a substantive way which is compatible with the unique devolved arrangements in Northern Ireland applicable following the Belfast Agreement, alongside having due regard to the *Sewell convention* and respecting the sovereignty of the UK Parliament;

(ii) provide flexibility whereby if, subject to cross community safeguards, it is agreed that particular aspects of EU law would provide a benefit to the citizens of Northern Ireland, then this can through a procedure we have termed 'adopted EU law'. It would then have effect in the UK in respect of Northern Ireland as part of the UK's body of Retained EU law, subject to the overriding sovereignty of the UK Parliament and (iii) below.

(iii) ensure that any EU provisions adopted as UK law in the body of Retained EU law complied with the Acts of Union (therefore prohibiting the creation of any GB-NI divergence). Parliament and NI Assembly would be prohibited from by regulations adopting any provision which created an incompatibility with the Acts of Union. This would be secured due to the proposed UK Constitutional Bill, a sunset Clause on Retained EU law which is applicable in NI but then diverges due to changes in GB, and also a proposed further safeguard making clear that legislating contrary to the Acts of Union is beyond the legislative competence of the NI Assembly.

We suggest the sovereignty procedure would operate as a two-stranded hybrid model allowing for the NI Assembly to adopt (subject to cross community safeguards and the ultimate sovereignty of the UK Parliament) EU provisions into UK law (forming part of the body of Retained EU law) in respect of Northern Ireland, in so far as it would otherwise be applicable via Article 5 (3) and (4) of the Protocol.

The hybrid model would also- via the second strand of the sovereignty procedure- separately provide for the UK Parliament to by Regulations adopt into UK law as Retained EU law the provisions of EU law which would otherwise be applicable via Article 2 (1), Article 8, Article 9 and Article 10 of the Protocol, therefore giving it effect in the UK in respect of NI, within the UK regulatory regime. These provisions could also be rejected and/or replaced and the UK Parliament would be sovereign, as a matter of practice as well as symbolism, in respect of Northern Ireland. In practice, the UK Constitutional Bill would act as a safeguard preventing any provisions being adopted which created a conflict with the Acts of Union.

This hybrid model whilst affording the NI Assembly significant powers to adopt EU law to apply to the UK in respect of NI in specified areas, would nevertheless remain subject to the overring sovereignty of the UK Parliament, and the provisions of our proposed UK Constitutional Bill (which being in force as an Act would be a pre-requisite to the workability of these proposal).

EU law applicable to NI via the Protocol, as it applied on Exit Day and only in so far as it is mirrored in GB and didn't create any incompatibility with the Acts of Union, would automatically be transposed into domestic law as part of the body of Retained EU law, which can be amended or repealed by the UK Parliament and/or devolved institutions (as appropriate). This would not give rise to any divergence or necessity for checks, because the relevant EU law would already be mirrored in GB via the body of EU law which became Retained EU law when adopted by the UK on Exit-Day.

An issue does arise in relation to the potential for there to be divergence between GB and NI if regulations were passed, for example, by the NI Assembly and Retained EU law applicable in GB changed, and thus created divergence. This is dealt with in this proposal via (i) a sunset Clause which if any provision adopted by the NI Assembly, subsequently (due to GB divergence) created GB-NI divergence, that the relevant provision could not continue without an affirmative cross-community vote and more fundamentally; (ii) the UK Constitutional Bill which would prohibit any Minister of the Crown or devolved administration from doing any act (including laying of regulations) which conflicts with the Acts of Union. It is of course true that (arguably- subject to our points *infra* about fundamental constitutional law) Parliament via primary legislation could repeal any Constitutional Act such as that which would be created by our

Constitutional Bill, but nevertheless the entrenchment of such safeguards would provide an enhanced protection that would be difficult to dislodge, certainly without Parliament having to face up to altering the fundamental constitutional basis of the United Kingdom.

We propose that there would be the ability for a Minister of the Crown to unilaterally recognise EU standards for the purposes of businesses trading in both the UK and EU regulatory zones, which would permit those voluntarily following EU rules to have unfettered access to the UK internal market without having to comply with both the EU and UK regulatory requirements.

The application of EU law and regulatory requirements in relation to customs and the movement of goods as set out in the Protocol would continue only if businesses self-declared as destined for entry into the European Union (which for the avoidance of doubt, is at the point of entry into the Republic of Ireland). Those who self-declare would avail of a metaphorical 'EU tunnel' in which they would have to comply with EU standards (with criminal penalties in UK law for failing to do so), and this procedure would apply for all those from any part of the UK exporting into the EU. The compliance would be checked- to a level determined by the EU- via a largely invisible smart border between NI and Republic of Ireland.

The 'at risk' concept would as an inevitable consequence of our proposals be completely abolished, with Northern Ireland and all goods moving there from GB by default being within the UK regulatory regime, unless a business self-declares as transporting goods into the EU and in which case chooses to opt-in to the EU regulatory regime.

We propose and would endorse a robust enforcement system constructed by the United Kingdom to monitor goods self-declared as destined for the European Union. This to include criminal and/or administrative penalties for anyone who is exporting to the EU and fails to self-declare.

In regards goods manufactured or subject to processing in Northern Ireland for exporting into the EU, there would be a legally binding obligation to provide via electronic means the appropriate declarations, with robust criminal penalties for failing

to do so. The price of the EU's desire to ensure an open land border between UK and the Republic of Ireland is that they must absorb some risk.

A trusted trader scheme for those voluntarily entering the EU regulatory zone (via the entry point of the Republic of Ireland) by exporting from the UK could be developed.

The EU tunnel concept, underpinned by robust criminal penalties for failing to self-declare, provides robust reassurance to the EU that exporters will be required, under pain of criminal penalty, to comply with EU regulatory requirements.

There is an element of risk, albeit negligible, in regards the self-declaration model, which would not be subject to physical checks, however this is the price of a largely open land border which is the EU's objective. It, as a fundamental principle, is not for the UK to absorb the obligation to protect the EU's single market. If they wish to do so with an open NI-ROI land border, then it is for the EU to absorb the increased risk and pay the price for this adherence to nationalist requests.

Goods moving internally and remaining within the UK would be subject solely to the UK regulatory regime, with no checks whatsoever, other than any which applied in advance of EU Exit Day.

We reject the concept that the UK regulatory model should require any business or citizen lawfully within the United Kingdom to sign up to a 'trusted trader scheme' in order to trade freely within the UK internal market. Any such requirements amount to a fettering of economic rights *vis-à-vis* Northern Ireland, amounts to a border in the Irish Sea and is plainly incompatible with Article VI of the Acts of Union.

We believe the proposals achieves the fundamental objective of securing the restoration of the equal footing guarantee in Article VI of the Acts of Union by restoring Northern Ireland to its rightful place in the UK internal market, and *inter alia* ensuring all citizens of the UK (whether trading into the EU from NI, or from GB via NI) can equally access the EU tunnel model via self-declaration.

We take the view that statutory protection for the Acts of Union is a pre-requisite to any sustainable solution. In addition, it is necessary to ensure the meaning of Northern Ireland's 'constitutional status' is properly defined, in order that the principle of consent

(section 1 of the NI Act 1998) protects the substance rather than merely the symbolism of Northern Ireland's place in the United Kingdom.

Therefore, as set out *supra*, we propose a Constitutional Bill, which would be a necessary component for the working of the proposals we put forward in this paper. In the absence of this, these proposals would be unworkable and unacceptable.

A mechanism for the re-building of North-South relationships between the Irish Government and those from the British tradition in Northern Ireland, which would entail creating an 'advisory buffer' of honest-brokers who could begin engagement at a community, civic and/or political level. These engagements would to relationships between the two jurisdictions and/or broader international arrangements (ie, the best means of removing the Protocol) but would not be mandated to engage in relation to the internal affairs of Northern Ireland.

Part Two: The constitutional impact of the Protocol

The Northern Ireland Protocol represents a fundamental assault upon, and alteration of Northern Ireland's place within the United Kingdom. There has been repeated claims, including piously from the Government in court (notwithstanding that their public pronouncements repeatedly contradict their own legal positions) that the Protocol "is not a constitutional issue" and/or "does not alter Northern Ireland's constitutional status". These claims lack any credibility and by accident or design entirely fail to engage with the impact of the Protocol on the core fundamental legal basis of the United Kingdom, and moreover the disapplication of more recently devolved provisions which has become part of the fabric of our constitutional arrangements.

(iv) The Acts of Union

We start first with an analysis of what the Union, as a legal construct, is. It is trite to point out save for having the construct of the Union rooted in law, it would be merely an 'idea' or abstract concept. We have no hesitation in adopting the words of the late Lord Trimble, who stated: "*the Act(s) of Union is the Union*".

This is self-evidently true. The Acts of Union refers to two parallel Acts of the old Irish and GB Parliaments, namely the Union with Ireland Act 1800 and the Act of Union (Ireland) 1800.

The United Kingdom's foundational basis is the Acts of Union, Article III of which creates the sovereign Parliament, and thus the political Union, and Article VI of which creates the UK internal market, and thus the economic Union.

In *Halsbury's statutes* the Acts of Union is described in the following way:

"…the Act(s) remains the statutory warrant for the continued incorporation of Northern Ireland within the United Kingdom."

We observe that, constitutionally, the doctrine of Parliamentary sovereignty could not credibly be said to extend to, for example, Parliament abolishing itself and ushering in an authoritarian state. Whilst there are interesting debates legally about what, if any, limitations there are on the doctrine of Parliamentary sovereignty, it is beyond any dispute that constitutionally (which is not the same as 'legally') Parliament could not abolish itself, and thus remove a constitutional fundamental.

If that proposition is accepted, then the root of its authority (as to Parliament itself being a fundamental constitutional principle) is found in Article III of the Acts of Union. Applying that principle to Article VI, the question must be asked: on what basis could it be said that Article III of the Acts of Union is a constitutional fundamental, but Article VI is not?

If, as we assert, the principle of fundamental constitutional principles cannot be differentiated between Article III and Article VI, then it follows as a matter of simple logic that Article VI cannot be constitutionally abolished, or, in our view, "subjugated", "disapplied" or reduced to being "subject to" another provision.

It should be noted, for the purposes of this paper, we do not delve into the deeper constitutional debate around whether, in exercise of Parliamentary sovereignty, changes to the constitutional fundamentals in Article III and VI could be legally made, but rather confine ourselves to stating that we do not believe it could be done constitutionally.

It has further been asserted, including by some distinguished academics and members of the House of Lords (and even suggested by a Supreme Court justice during oral argument in *Allister et al*), that the Acts of Union was repealed by the Government of Ireland Act 1920, or alternatively that the guarantees therein no longer apply outside of GB because the Acts of Union directs itself towards 'Ireland' which, in the form it was in 1800, no longer existed following the Government of Ireland Act 1920.

Those propositions are demonstrably incorrect. The Government of Ireland Act 1920 simply made provision for two separate devolved arrangements in one part of the

United Kingdom (at that time) which, in respect of Ireland, was to be divided into two separate Parliaments, but which crucially remained under the sovereign authority of the overarching UK Parliament.

It is clear therefore that the 1920 Act did not in any way amend or repeal the Acts of Union 1800.

Indeed, Sir Arthur Quekett viewed the Act as the means "*by which a constitution within the United Kingdom has been bestowed upon Northern Ireland"*, Ulster Unionists having "*accepted a local constitution as the only means whereby the close connection of Ulster with Great Britain under the Act of Union could at that time be preserved*".

The 1920 Act was plainly operating within the overarching fundamental constitutional principles of the United Kingdom, rather than in any way subverting them.

Northern Ireland was defined in section 1 (2) of the 1920 Act as follows:

> *(2) For the purposes of this Act, Northern Ireland shall consist of the parliamentary counties of Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone, and the parliamentary boroughs of Belfast and Londonderry, and Southern Ireland shall consist of so much of Ireland as is not comprised within the said parliamentary counties and boroughs.*
>
> *On 6 December 1921, the Articles of Agreement for a Treaty were signed in London between the United Kingdom Government and Sinn Fein (the often used term treaty for these Articles of Agreement is a misnomer; treaties are concluded between sovereign states, and the Articles of Agreement were ratified by members of the Parliament of Southern Ireland elected pursuant to the terms of the 1920 Act).*

The 1921 Articles of Agreement provided for the secession of the 26 counties of Southern Ireland from the United Kingdom, and would form one of His Majesty's dominions analogous to Canada

The Free State Agreement Act 1922 via section 1 (2), which give effects to much of the Anglo-Irish treaty of 1921, and thus provided that the Southern Parliament created by the 1920 Act would be dissolved.

The Irish Free State (Consequential Provisions) Act 1922 (the 1922 Act) provided that the 1920 Act ceased to apply beyond Northern Ireland. In consequence, section 75 of the 1920 Act was amended to state that the *"supreme authority of the Parliament of the United Kingdom shall remain unaffected and undiminished over all persons, matters and things in [Northern Ireland]".*

In consequence, Southern Ireland no longer remained part of the United Kingdom. This did not alter the fundamental constitutional law of the United Kingdom in the form of the Acts of Union, but rather simply modified the territorial application of that fundamental constitutional law.

Northern Ireland- as defined territorially within section 1 (2) of the 1920 Act- remained part of the United Kingdom and under the Parliament created by Article III of the Acts of Union.

This is further evidenced by an obscure provision found in the Irish Free State (Consequential Adaption of Enactments) Order 1923, which inter alia, provides:

> *"…references in any enactment passed before the establishment of the Irish Free State to "the United Kingdom" or "the United Kingdom of Great Britain and Ireland" or "Great Britain and Ireland" or "the British Islands" or "Ireland" shall, in the application of the enactment to any part of Great Britain and Ireland other than the Irish Free State, be construed as exclusive of the Irish Free State…"*

As is plain from this provision, which albeit was simply tidying up the statute book, the Acts of Union in reference to "Ireland" is to be read as the part of Ireland exclusive of the Irish Free State (Republic of Ireland), and thus means Northern Ireland.

There was a change in the territorial application of the Acts of Union, but Northern Ireland remained firmly within its ambit.

However, we further make good this point by reliance upon the Court of Appeal judgment in *Allister et al's application* [2022] NICA 15.

In para [180] of the majority judgment of Keegan LCJ and Treacy LJ the Acts of Union was described in the following way:

> *"[180] All of that said the Acts of Union remain of constitutional significance. Article 1 of the Acts of Union contains the core provision which declares the Union and reads that Great Britain and Ireland "to be united for ever from 1 Jan 1801." This provision has obviously been modified by virtue of the partition of Ireland."*

At paragraph [368] of his concurring judgment, McCloskey LJ described the Act(s) of Union in the following terms:

> *"[368] The Act of Union is an indelible, and fundamental, part of the vexed history of the island of Ireland. In enviably uncluttered language, it united the two kingdoms of GB and Ireland, creating a single kingdom. Uniquely, its contents were agreed by two separate legislatures. For some 122 years of its existence the populations of the previously two separate kingdoms were the subjects of the Sovereign. This new constitutional order was radically altered a century ago as regards the inhabitants of the Republic of Ireland. However, it endures for the population of NI." (Underlining added).*

In assessing the objective and meaning of Article VI of the Acts of Union, McCloskey LJ in his concurring judgment in Allister et al said, *inter alia*, at para (377):

> *"[377] I consider the underlying intention to be unmistakable: from 1 January 1801 all subjects of this newly unified single state were to be treated equally in the respects specified."*

In the majority judgment, Keegan LCJ and Treacy LJ defined Article VI in the following *terms:*

> *"[183] To our mind the clause relied upon is clear and unambiguous i.e. all citizens by this provisions were to have the same rights in terms of trade."*

It is clear therefore that, contrary to some misinformed assertions, the Acts of Union remain firmly in force in respect of Northern Ireland. That being so, it is difficult for there to be any credible suggestion that any interference with those core constitutional provisions could be anything other than a constitutional issue and/or a change to Northern Ireland's constitutional status.

(v) The Protocol's impact on the Acts of Union

We turn now to look at the extent of the constitutional change imposed on Northern Ireland's place within the Union by virtue of the Protocol.

Dealing first with the Acts of Union, the core provision of which for present purposes is Article VI, the fundamental basis of the economic Union, otherwise known as the UK internal market.

In the first instance judgment in *Allister et al*, Colton J held that the Acts of Union had been subjected to implied repeal. In the Court of Appeal, a different approach was taken.

Keegan LCJ and Treacy LJ in the majority judgment held that the Protocol was inconsistent with Article VI of the Acts of Union, stating in para [186]:

> *"[186] The exact outworking of this arrangement is not clearly defined and is subject to change within the Protocol architecture. However, it appears clear that in some respects the EUWA 2018 does bring about a difference in footing between the citizens of Northern Ireland and those in the remaining part of the United Kingdom in terms of trade. Therefore, the court is prepared to accept the proposition that there is some inconsistency between the terms of the two statutes in relation to trade in agreement*

> *with the trial judge. In doing so we stress that this conclusion relates to one specific part of the Acts of Union regarding trade and not the entire statute. That is our answer to the first question" (Underlining added).*

In terms of the effect the Protocol therefore had on the Acts of Union, they went on at para [222] to find that the Protocol (via the European Union (Withdrawal) Act 2018) had the effect of subjugating the Acts of Union:

> *"[202] Parliament has made itself clear and expressly determined that all previous Acts of Parliament will be read "subject to" the EUWA 2018 as amended. This means that the terms of the Protocol take precedence. What has happened is that some provisions of the Acts of Union found in Article VI in relation to trade are now, in accordance with the sovereign will of Parliament, to be read and have effect subject to the terms of the later Act, the EUWA 2018, which was necessary to effect the United Kingdom's exit from the EU. This subjugation has been expressly provided for in the words of the EUWA 2018 itself." (Underlining added).*

As canvassed at the outset of this chapter, for present purposes we do not enter the debate about the extent to which Parliamentary sovereignty can be taken to permit the abolition, or subjugation, of fundamental constitutional principles. The court held this subjugation was legal, but that is an entirely different proposition that it being constitutional.

In the judgment of Keegan LCJ and Treacy LJ there is, with respect, somewhat of an effort to soft peddle the constitutional impact of the Protocol in what seems to be a political effort to conceal from the unionist community the true extent of the impact of the Protocol on NI's place in the Union.

In his concurring judgment, McCloskey LJ, which characteristic intellectual honesty and without concern for the political impact (which should never be a concern of any court), expressed himself in much clearer terms in regards the impact of the Protocol at para [325]-[327]:

"[325] The effect of the Protocol is that NI on its own, without GB, is in regulatory alignment with an extensive body of EU rules governing manufactured and agricultural goods: per Article 5(4) and Annex 2. This is conveniently summarised by Professor Stephen Weatherill in McCrudden (op cit), pp 71 – 72. Annex 2 to the Protocol lists 287 EU legislative instruments: a non-static list which is subject to amendment and enlargement. The NI/EU alignment also embraces EU customs regime trade rules, VAT and excise rules, the single electricity market and specific state aid rules: Protocol, Articles 5 to 10. All of this means that the treatment of NI products differs from that of GB products. By virtue of these divergent regulatory regimes there is a customs and regulatory border between NI and GB. In consequence, NI belongs more to the EU internal market than the UK internal market. Resulting alterations in trade patterns are inevitable. The trial judge, Colton 107 J, commented that the evidence of this impact is vague, adding that the advantages of NI's access to the EU internal market must not be overlooked.

[326] By way of resume, the Protocol has the following characteristics and effects. First, it represents an attempt to preserve the soft texture, or invisibility, of the NI/ROI border pre-Brexit. This is both economically and politically significant. Second, the de facto external border between NI and GB is located within the territory of, and policed by, a non-Member State (the UK). Third, the economic freedoms and internal market rules affecting NI are divided. Fourth, the border between NI and GB is of the trade variety and is not an international one. The effect of all of the foregoing is that the NI/GB geographical border has become hardened, in contrast with the arrangements of the preceding three centuries. In overarching terms, the Protocol and its associated arrangements were driven by the EU's need to preserve the integrity of its heavily regulated internal market which, in turn, required protection by an external

> *border. In basic terms, the international deal, ultimately, struck between the UK and the Union sacrificed the long standing soft border between NI and GB (dating from the Act of Union) and altered internal trading arrangements, while simultaneously perpetuating the application of a discrete and potentially evolving corpus of EU laws in NI.*
>
> *[327] In a nutshell, the Protocol creates a customs and regulatory border between NI and GB in those specified areas of trade to which it applies. It positions NI primarily within the EU internal market rather than that of the UK. With hindsight, there is general agreement that in the aftermath of the Brexit referendum vote there were only three choices: (i) no hard border between NI and GB; (ii) no hard border between NI and ROI; and (iii) regulatory autonomy for the whole of the UK. Only two of these outcomes were achievable (see McCrudden, op cit, pp 5, 71 and 72). The solution effected by the Protocol enshrines a classic compromise, the effect whereof is to subject NI to a uniquely regulated trading regime." (Underlining added).*

The impact of the Protocol could not possibly be any clearer. Northern Ireland is, inter alia: "*belongs more in the EU market than that of the UK*", there is a "*customs and regulatory border between NI and GB*" and the Protocol "*sacrificed the long-standing soft border between NI and GB (dating from the Act of Union) and altered internal trading arrangements*".

However, if the Court of Appeal in *Allister et al* was not sufficient to demonstrate the constitutional impact of the Protocol, then the judgment of Colton J in *Rooney* and *JR181 (3) [2022] NIKB 34* puts the matter beyond any credible dispute.

In the decision of Colton J, it states the following at paragraphs [178]- [181]:

> *[178] The way in which the European Regulations have been legislated for in NI is such that the OCR should be read so that the checks in dispute should be carried out at ports in NI. It is at*

> *that point that Union territory is entered for the purposes of the Withdrawal Agreement.*
>
> *[179] Thus, the UK is not to be treated as a unitary state for the purposes of OCR checks coming from GB into NI. This textual analysis is entirely consistent with the purpose, intention and objective of the Protocol itself.*
>
> *[180] This interpretation is reinforced by what has happened in domestic law with respect to the OCR. Thus, the regulations which apply in GB post withdrawal (the Officials Controls (Animals) Feed and Food, Plant, Health etc (Amendment) (EU Exit) Regulations 2020) refer solely to Great Britain – see Article 3(40) as amended which provides that "entering Great Britain or entering into Great Britain means the action of bringing animals and goods into Great Britain from a third country. In similar vein, Article 3(40A) provides that "'first arrival' means the point of first arrival in Great Britain from a third country;" which was provided for by the same regulations.*
>
> *[181] Therefore, the regulations in relation to customs control are treated differently for GB and NI. GB is subject to domestic norms whereas the regulations in respect of NI are governed by EU norms."*

In short form, the relevant Official Control Regulations (OCR 2017/625) requires that checks take place when entering EU territory. The UK is defined in the same regulation as the territory of Great Britain and Northern Ireland. However, the Government argued, and the court held, that 'UK' should be read as applying to Great Britain only, with Northern Ireland instead treated as the entry point into the EU.

This exposes in clear terms the duplicity of the Protocol, which despite claiming to protect the UK internal market and NI's place therein, it in fact does no such thing. It, in the words of McCloskey LJ, "*speaks with a forked tongue*". We will say more about the duplicitous nature of the Protocol *infra.*

There could not conceivably be a greater constitutional change that the UK being "…*no longer a unitary state*…" with NI treated as part of the EU territory rather than being within the Union of Great Britain and Northern Ireland.

There are additional concerns around the decision of Colton J, not least in so far as it appears to adopt a highly political tone. This is addressed further in Appendix 9.

It is worth pointing out how incontestably beneficial the Protocol litigation in *Allister et al*, and the actions of Edwin Poots which lead to *Rooney* and *JR181 (3)*, has been. It has enabled a significant body of material built up which puts beyond any doubt the constitutional damage inflicted by the Protocol.

Put simply, the cases may have resulted in legal losses, but they are of enormous constitutional and political value in so far as they have exposed the vacuity if not deceptiveness of the Government's position, of the Protocol itself and crucially they have made the Protocol impossible to politically defend for anyone who purports to value the Union of Great Britain and Northern Ireland.

Therefore, as we address in detail within this paper, the restoration of the Acts of Union is a fundamental red line.

(vi) The Protocol's impact on the Belfast Agreement and NI Act 1998

In the recitals to the Protocol, and in repeated public pronouncements, the EU has set out their commitment to the Belfast Agreement "*in all its parts*". This is as dishonest and deceptive as the Protocol itself.

This is so for two reasons: (i) the Protocol via Article 18 expressly required the disapplication of one of the core pillars of the Belfast Agreement and NI Act 1998, namely cross community consent, in order to deprive unionism of the opportunity to prevent the continued imposition of the Protocol; and (ii) for reasons set out above, the Protocol causes constitutional change to NI's place in the Union, and in consequence illuminates that either the principle of consent (section 1 of the NI Act 1998) has been breached or, more fundamentally has exposed that the principle of

consent is a deceptive snare which does not in fact protect the substance of NI's place in the Union at all.

We turn first to the disapplication of cross community safeguards. In order to give effect to Article 18 of the Protocol, which has effect in domestic law via the 'conduit pipe' of section 7A of the European Union (Withdrawal) Act 2018, the Government via regulations amended the NI Act 1998 to insert section 56A and Schedule 6A which at paragraph 18 (5) expressly disapplies cross community consent (section 42 of the 1998 Act) for the 'consent' vote on the Protocol.

It is not clear whether this express amendment was even necessary, as there is an argument that cross community consent had already been disapplied by virtue of Article 18 having direct effect via section 7A of the 2018. We do not enter into that debate, as either way the end result is the same. However, the express disapplication illuminates in clear terms what the Government has done.

There is a (purported) limitation within section 10 (1) (a) of the 2018 Act which made clear that the making of any regulations had to be consistent with the Northern Ireland Act 1998. The trickery here is that it is now argued that what this really meant was: 'consistent with the 1998 Act, as amended by the Protocol'.

Put simply, on this basis of this argument, the supposed limitation in section 10 (1) (a) of the 2018 Act whilst symbolically expressing fidelity to the 1998 Act (and thus the Belfast Agreement) in fact means nothing because if the Protocol via section 7A of the 2018 Act had already by implication disapplied cross community consent, then when the Government expressly disapplied it they were acting consistently with the 1998 Act, because the 1998 Act had already by stealth been changed.

This is of course entirely circular and dishonest. It is another example of the Protocol boldly pronouncing one thing, but in fact deceptively doing another.

If there was to be true adherence to the principles of the Belfast Agreement, then this would include fidelity to its most fundamental provisions, such as cross community consent for key decisions.

Strand One (5) (d) of the Belfast Agreement, dealing with safeguards, provides that "*key decisions*" of the Assembly are to be made based on cross community consent. There is no limitation on the safeguards only applying to devolved matters voted on which are within the legislative competence of the Assembly.

This treaty provision is given effect in domestic law via section 42 of the NI Act 1998 which provides that a petition of concern can be laid which would require "*any matter to be voted on by the Assembly*" to be subject to a cross community vote. Again, there is no limitation as to devolved or reserved matters. It is in broad terms, similar to Strand One (5) (d), directing itself to "*any matter*…".

In the High Court and Court of Appeal in *Allister et al* the Government made much of claiming the cross-community consent provision only related to devolved matters, but entirely abandoned this somewhat hopeless point before the Supreme Court.

In any event, the Article 18 vote on the Protocol is a devolved matter. That is so because the 1998 Act operates on the basis of specifying excepted and reserved matters at Schedule 2 and 3 respectively, and anything which is not excepted or reserved is devolved.

In Schedule 2 paragraph 3 it states that "*international relations*" is excepted, however sub-paragraphs (a) to (c) contains a list of exceptions. Paragraph 3 (c) excludes "*observing and implementing international obligations*".

In holding the consent vote required by Article 18 of the Protocol, this is observing and implementing an international obligation. Therefore, the Article 18 consent vote is in fact devolved. The notification of the outcome is a matter for the UK Government, but the holding of the vote itself is a matter for the NI Assembly.

It is fundamentally dishonest to proclaim fidelity to the Belfast Agreement, whilst by sleight of hand stripping out one of its fundamental safeguards in order to deprive one community of the ability to deploy it. The question must be asked, what is the point of the Belfast Agreement, if the purported key safeguards therein only truly apply to preserving the interests of the nationalist community, whilst being disapplied at will when it comes to unionists seeking to rely upon them in defence of their interests?

We turn now to section 1 of the NI Act 1998 (the principle of consent). It is worthwhile to first briefly consider the background to that provision.

In 1949 the Irish Free State left the commonwealth. This was given effect by the Ireland Act 1949 ('the 1949 Act'). The introductory text of the 1949 Act stated:

> *"An Act to recognise and declare the constitutional position as to the part of Ireland heretofore known as Eire, and to make provision as to the name by which it may be known and the manner in which the law is to apply in relation to it; to declare and affirm the constitutional position and the territorial integrity of Northern Ireland and to amend, as respects the Parliament of the United Kingdom, the law relating to the qualifications of electors in constituencies in Northern Ireland ; and for purposes connected with the matters aforesaid."*

In section 1- titled '**Constitutional provisions**' it was provided:

> *(1) It is hereby recognised and declared that the part of Ireland heretofore known as Eire ceased, as from the eighteenth day of April, nineteen hundred and forty-nine, to be part of His Majesty's dominions.*
>
> *(2) It is hereby declared that Northern Ireland remains part of His Majesty's dominions and of the United Kingdom and it is hereby affirmed that in no event will Northern Ireland or any part thereof cease to be part of His Majesty's dominions and of the United Kingdom without the consent of the Parliament of Northern Ireland.*
>
> *(3) The part of Ireland referred to in subsection (1) of this section is hereafter in this Act referred to, and may in any Act, enactment or instrument passed or made after the passing of this Act be referred to, by the name attributed thereto by the law thereof, that is to say, as the Republic of Ireland.*

Firstly, and most crucially, there is developed in the introductory text two distinct concepts, namely "*constitutional position*" and "*territorial integrity*" of Northern Ireland. What do these distinct concepts each mean?

The constitutional position of Northern Ireland must refer to the fundamental constitutional law of the United Kingdom, which- as we have explored in detail is the Acts of Union.

The territorial integrity of Northern Ireland means simply what it says. It relates to the geographical extent of Northern Ireland, as set out in section 1 (2) of the 1920 Act.

In 1973 the Northern Ireland Constitution Act 1973 ('the 1973 Act') repealed section 1 (2) of the 1949 Act, instead providing Northern Ireland:

> *"…remains part of Her Majesty's dominions and of the United Kingdom, and it is hereby affirmed that in no event will Northern Ireland or any part of it cease to be part of Her Majesty's dominions and of the United Kingdom without the consent of the majority of the people of Northern Ireland voting in a poll held for the purposes of this section"*

Section 4 (4) of the 1973 reasserted the legislative supremacy of Parliament (created by Article 3 of the Acts of Union).

It will be noted the 1973 Act is effectively a forerunner to section 1 of the Northern Ireland Act 1998 which provides:

> *Status of Northern Ireland*
>
> *(1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.*
>
> *(2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom*

> *and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.*

It is obvious to point out that the 1998 Act did not strengthen the principle of consent, which was always there from as a far back as the 1920 Act, the 1949 Act and the 1973 Act. Rather it now appears to have weakened it by inserting sub-section 2 thus expressly placing a duty on the Secretary of State to call a border poll in defined circumstances, and limiting the lifetime of the Union until by NI only self-determination, a majority vote to leave.

We observe, briefly, that accepting the principle of self-determination as applying purely to one component part of the Union, rather than the Union as one unified entity, was, and is, a fundamental error. It is moreover not in keeping with the international law definition of self-determination, which was dealt with in the recent Supreme Court case *Lord Advocate's Reference (Scottish Devolution issue)* [2022] UKSC 31, in paras [88] – [89]:

> *88. There are insuperable obstacles in the path of the intervener's argument based on self-determination. First, the principle of self-determination is simply not in play here. The scope of the principle was considered by the Supreme Court of Canada in the Reference re Secession of Quebec [1998] 2 SCR 217. There, the Governor in Council referred a series of questions to the Supreme Court including whether there exists a right to self-determination under international law that would give Quebec the right to secede unilaterally. In its judgment the Supreme Court explained (at paras 136-137) that Canada was a sovereign and independent state conducting itself in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction. It considered that the then current constitutional arrangements within Canada did not place Quebecers in a*

disadvantaged position within the scope of the international law rule. It continued:

> *"In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions." (at para 138)*

It went on to say that in other circumstances peoples were expected to achieve self-determination within the framework of their existing state:

> *"A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the Page 33 circumstances, the National*

> *Assembly, the legislature or the government of Quebec do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally." (at para 154)*
>
> *89. In our view these observations apply with equal force to the position of Scotland and the people of Scotland within the United Kingdom. They are also consistent with the United Kingdom's submission to the International Court of Justice in the case of Kosovo, adopted by the intervener as part of its submissions in the present case: "To summarise, international law favours the territorial integrity of "States. Outside the context of self-determination, normally limited to situations of colonial type or those involving foreign occupation, it does not confer any 'right to secede'": Written Proceedings in relation to UN General Assembly Resolution 63/3 (A/RES/63/3) (8 October 2008), Written Statement of the United Kingdom in response to the Request for an Advisory Opinion of the International Court of Justice on the Question, 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?", (17 April 2009), para 5.33. The submission went on to state that international law does not, in general, prohibit secession; but the relevant point, in relation to the intervener's submission based on a right of self-determination under international law, is the absence of recognition of any such right outside the contexts described by the Supreme Court of Canada, none of which applies to Scotland."*

We firmly hold the view that the principle of self-determination (and thus the principle of consent) should be a question for the whole Union, rather than NI (or any other component part of the Union).

The late Sir John Laws, former member of the England and Wales Court of Appeal, writing extra-judicially said the following in relation to the Scottish Referendum:

> *"…it seems profoundly undemocratic that in 2014 only those resident in Scotland , and not the inhabitants of England, Wales or Northern Ireland, were allowed to vote on the prospective dissolution of the United Kingdom."*[2]

Whilst Sir John Laws roots his argument in 'democracy', rather than 'self-determination', the same logic applies and the therefore the ultimate outcome is the same, namely that consistently with the true concept of self-determination and democratic principles, any vote on the potential dissolution of the Union should be, as a matter affecting the Union as a whole, voted on by the electorate of the Union as a whole.

We would further point out the fundamental imbalance in the innovative concept of self-determination as it applies to NI. Whilst the people of NI alone can vote to dissolve the Union, the people of the Republic of Ireland must vote to accept NI as part of their country. There is no equivalent requirement for the rest of the UK, even voting in parallel (i.e.., concurrent referendums in NI, ROI and GB), to provide consent for NI to unilaterally dissolve the Union.

A detailed examination of these matters is ultimately beyond the scope of this paper, but in so far as it is relate to the present issue under consideration, we confine ourselves to the analysis above.

Returning to the evolving nature of the 'principle of consent' in the 1920 Act, the 1949 Act, the 1973 Act and subsequently in section 1 (1) of the 1998 Act, there is a failure to transpose the distinct concepts of "*constitutional position*" and "*territorial integrity*" into the relevant constitutional provisions, which seem on a *prima facie* basis to be purely territorial/geographical rather than relating to the substance of the constitutional position of Northern Ireland within the United Kingdom (as defined by the Acts of Union).

If it were to be the case that the purported protection for Northern Ireland's status in the United Kingdom is construed as purely territorial (and thus of limited value) rather than fundamentally constitutional (and thus substantive) then, for example,

[2] Laws, J. (2021) '*The Constitutional Balance*': Hart Publishing. Chapter 2, page 35

governance powers over Northern Ireland could be devolved to Dublin, with the Irish Supreme Court made supreme over Northern Ireland, so long as territorially the six counties of Northern Ireland remained at least geographically part of the United Kingdom. This type of approach is precisely that which has been adopted in relation to the imposition of the Protocol.

Therefore, only one of two propositions can be true: either the principle of consent does protect the substance of NI's place in the Union and has therefore been breached by the Protocol, or it does not and rather the principle of consent is purely territorial and thus merely symbolic. In simple terms, you can change everything but the last thing in relation to Northern Ireland's place in the Union, the last thing being merely the final formal handover of sovereignty.

Lord Trimble, the unionist leader who delivered the Belfast Agreement by a slim majority in the unionist community, analysed the Protocol *vis-à-vis* the principle of consent in the following way in a detailed article in the Irish Times before his death:

> *"My primary objection to the protocol is that it changes fundamentally the constitutional relationship between Northern Ireland and the rest of the UK. The laws that will apply to the economy, the environment, agriculture, workers rights, and regulations covering everything from building standards to use of weedkillers, no longer will be made at our parliament in Westminster or the local Assembly in Belfast. They will instead be determined by a foreign authority in Brussels.*
>
> *The protocol lists 70 pages of EU laws to which Northern Ireland must adhere. This amounts to tens of thousands of separate regulations. In addition, all future EU laws on which no one in the UK or Northern Ireland is able even to discuss – let alone vote on – will apply to Northern Ireland. Moreover, they will be enforceable by the European Court of Justice. This amounts to a seismic and undemocratic change in the constitutional position of Northern Ireland and runs contrary to the most fundamental premise in the Belfast Agreement.*

As someone who, along with the late John Hume, negotiated the agreement, I recognised the significant compromises it contained, which caused great disquiet in the unionist community that I represented. If these compromises were to be made acceptable, then the central pillar of the agreement had to be the need for democratic consent to any change in the constitutional arrangements for Northern Ireland. We had endured 35 years of a bitter terrorist conflict perpetrated by those who believed that by terrorising the Northern Ireland population, bombing prime targets in Britain and killing soldiers and police officers they could force Northern Ireland out of the UK.

They didn't succeed and the whole point of the Belfast Agreement was to bring that terrorism to an end and present a democratic way forward that would enable both unionists and nationalists to pursue their aspirations and objections peaceably and democratically. That is why the very first clause of the agreement states: "It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for that purpose."

And the second clause is clear: "it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people".

Thus, the Northern Ireland protocol ignores the fundamental principle of consent. Northern Ireland is no longer fully part of the UK – it has been annexed by the EU and is subject to EU laws and an EU court without any right of dissent. I personally feel betrayed by this. I made huge personal and political sacrifices to persuade the people of Northern Ireland of the Belfast Agreement's benefits. The party that I led at that time also suffered electorally because we made difficult trade-offs.

> *The unionist population, especially, was asked to swallow unpalatable compromises in order to reach an agreement, which eventually brought an end to the terrorist campaign. They did so because I was able to argue that their position as citizens of the UK was safeguarded by the commitment that they would have the final say over any change in the status of Northern Ireland. I fully expected the British and Irish governments, which were cosignatories to the Belfast Agreement, to honour that promise. But they have broken it; indeed, the Northern Ireland protocol wilfully tears it up. Not only do I personally feel betrayed, but the majority unionist population in Northern Ireland feel betrayed too."*[3]

As is plain from these words of Lord Trimble, the only reason he was able to secure support for the 1998 Agreement within the unionist community was because of the principle of consent which he understood, and in turn the unionist community understood, to protect against any change to NI's constitutional status. The principle of consent was promised to the unionist community, and was understood by that community, as being something more than a territorial guarantee protecting against merely the last lowering of the Union.

Why would any unionist ever have supported a principle of consent which provided for the Union to be incrementally salami sliced out of existence (and indeed sitting within the framework of a 'process' which by design requires that very incremental dismantling) with only a protection against the final severing of sovereignty?

The Supreme Court will rule on this issue in *Allister et al* and there can only be one of two outcomes: (i) the principle of consent protects the substance of the Union, and thus the Protocol conflicts with that fundamental constitutional provision; or (ii) the principle of consent only applies to the final territorial handover of sovereignty, and thus the Union can be incrementally dismantled, so long as the UK Parliament remains nominally sovereign.

[3] Lord Trimble, Irish Times, 20 February 2021 David Trimble: Tear up the Northern Ireland protocol to save the Belfast Agreement – The Irish Times

If it is (ii), then this raises a more fundamental question. Given, as set out expressly by Lord Trimble, the sole basis for unionist support for the Belfast Agreement was based upon the promise the principle of consent meant protection for NI's place in the Union, but it now transpires that in truth it offers no such substantive protection at all, then upon what basis could any unionist support the Belfast Agreement institutions, even if the Protocol were to be removed?

The deception once seen cannot be un-seen. Therefore, the problems run much deeper than merely resolving the Protocol, rather the Belfast Agreement itself has been exposed as a fundamental deception, in which the key safeguards and guarantees are no such thing at all for the unionist community.

In 1998, IRA commander and Sinn Fein politician, the late Martin McGuinness, set out the objectives of the nationalist/republican movement. He said:

> *"We fought for and got the repeal of the Government of Ireland Act, which underpinned the union, and insisted that other relevant legislation including the Act of Union and the NI Constitution Act 1973 must also be altered, repealed or rendered inoperable by any new Act … The union has undoubtedly been weakened as a result of the inclusion of a clause limiting the life of the union to the will of a majority in the Northern state … There is now no absolute commitment, no raft of parliamentary acts to back up an absolute claim, but only an agreement to stay until the majority decides otherwise."*

Whilst McGuinness failed to point out that despite their (IRA and Sinn Fein) "*insistence*", the Act of Union was not repealed or rendered inoperable by the Belfast Agreement, nevertheless the Protocol has delivered this fundamental republican objective by the "*subjugation*" of the UK's economic Union (Article VI of the Acts of Union).

However, one point which McGuiness did correctly identify was that *"the union has undoubtedly been weakened as a result of the inclusion of a clause limiting the life of the union to the will of a majority in the Northern state…".*

This ought to have been obvious given that there was no such provision in the Government of Ireland Act 1920, the Ireland Act 1949, or the NI Constitution Act 1973. In short form, the supposed principle of consent contained within section 1 of the 1998 Act did not even maintain the status quo protection of the Union, let alone strengthen it, rather it weakened it by sub-section (2).

In conclusion in relation to the constitutional impact of the Protocol, it is beyond any doubt that the Protocol fundamentally alters the nature of Northern Ireland's place within the United Kingdom. It delivers the key republican objective of rendering the Acts of Union inoperable (via the "subjugation" of Article VI), thus undermining the very fundamental basis of the Union itself and NI's place therein.

In addition, it exposes the purported safeguards for the Union and unionism in the Belfast Agreement and NI Act 1998 as being wholly deceptive (the principle of consent being directed to merely the symbolism rather than the substance of the Union) and (as with the disapplication of section 42 (cross community consent) for the Protocol) offering no genuine protection for the unionist community at all.

There is no greater constitutional issue than the Northern Ireland Protocol. We endorse the words of Jim Allister KC MLA: "*if we do not kill the Protocol, it will kill the Union."*

Part Three – The way forward

In Northern Ireland, the system of democracy adopted has at its central pillar the concept of cross-community consent for key decisions (Strand One (5) (d) of the Belfast Agreement and s42 of the Northern Ireland Act 1998). Therefore, much of the proposals which follow largely centre on the requirement for such consent safeguards to be available. In the absence of the suggested following discussion points containing the cross-community consent element, they would be wholly unacceptable, and no unionist could consider them let alone endorse them. They would not provide any basis for the restoration of power-sharing. It is only because cross-community consent has been built into the discussion points set out in this paper that they are worthy of consideration. **We cannot emphasise robustly enough that cross-community consent is absolutely essential to many of the following proposals providing potential solutions.**

More fundamentally, the underlying principles of any solution must be that Northern Ireland is, both symbolically and in practice, part of the UK customs territory and regulatory regime rather than (as is the case under the Protocol) effectively part of the EU regulatory regime.

In addition, and of equal fundamental importance, is that all which follows must adhere to the Acts of Union, which would be entrenched via the proposed UK Constitutional Bill. That means all regulations laid, and any provisions adopted, must be compatible with the Acts of Union. This would safeguard against any GB-NI divergence and thus the creation of an Irish Sea border. If, for example, EU law had been adopted as Retained EU law (and thus part of UK law) in respect of NI by the Assembly, but Parliament subsequently wished to alter Retained EU law as it applies to GB, then a Minister of the Crown would be prohibited from doing so if it would create any incompatibility with the Acts of Union, or would be required to apply any provision on a UK wide basis, thus amending any inconsistent provision which had previously been adopted by the NI Assembly. Alongside the obvious objective of protecting NI's

Constitutional status, this would also prevent the NI Assembly using cross-community safeguards to effectively entrench constitutional change by refusing to remove regulations which had- due to GB alterations- occasioned a breach of the Acts of Union.

In addition, it is a basic principle of sovereignty that the laws which apply to the UK in respect of Northern Ireland must be made or adopted (in areas relevant to NI) by the NI Assembly (with cross community safeguards) or the UK Parliament, which in any event must be the ultimate law-making legislature for all parts of the United Kingdom.

The interpretation and enforcement of the laws applicable to citizens of the UK must be under the ultimate jurisdiction of the UK Supreme Court, which can neither be bound nor superseded by any other judicial authority.

We summarise three core principles which must, in respect of the issues relating to Northern Ireland and more generally, ground arrangements governing the UK's relationship with the EU following Brexit:

(i) The laws applying to Northern Ireland must be made solely by the UK Parliament or, in line with devolved arrangements, the NI Assembly.

(ii) NI must be a full part of the UK, inclusive of having the economic rights guaranteed by Article VI of the Acts of Union fully upheld. This means any arrangements now, or in the future, must be consistent with that fundamental constitutional principle.

(iii) The United Kingdom Supreme Court must be the ultimate authority in interpreting and enforcing the laws applicable within all parts of the UK, including Northern Ireland.

We believe the proposed solutions we set out below delivered upon those core principles, subject to the method of implementation remaining faithful to the fundamental and unalterable constitutional principles summarised above.

(vii) EU Law- Restoring sovereign democratic accountability

In summary in respect of EU law we propose the following: (i) EU law as would otherwise apply in NI via Article 2 (1), Article 8, Article 9 and Article 10 of the Protocol could only apply- as part of UK domestic law- if adopted (either in whole or in part) into UK law as part of the body of Retained EU law , by Regulations laid before the UK Parliament in a manner consistent with the proposed UK Constitutional Bill; (ii) EU law presently applicable via Article 5 (3) and (4) (and thus Annex 2) of the Protocol, in the form it existed immediately pre-Exit Day and only so far as it mirrored that which is applicable to GB and did not create any inconsistency with the Acts of Union, could be in bulk transposed into domestic law as Retained EU law, thereafter forming part of the UK wide regulatory body of law; (iii) EU law- which had not been transposed into UK law as part of the body of Retained EU law- that would otherwise apply in NI via Article 5 (3) and (4) of the Protocol could only apply if adopted (either in whole or part) into UK law and thus forming part of Retained EU law, by a vote in the NI Assembly, subject to cross community safeguards, with the UK Parliament in any event remaining sovereign. Crucially, the adoption of any such provisions would only be lawfully permitted (due to our proposed Constitutional Bill) if they were compatible with the Acts of Union, and any adopted provision which in future diverged with relevant provisions applicable in GB would require a fresh affirmative cross community vote.

The EU law which is transposed into UK law, and that which is subsequently adopted either by Parliament or in specified areas the NI Assembly, would 'join' the present body of the UK's Retained EU law and therefore all parts of the UK would be within the same legal order in respect of the effect of what was previously EU law. This is a necessary component of Article VI of the Acts of Union.

The proposal for transposing specified elements of Annex 2 law (that which mirrors GB) into domestic law as Retained EU law is simply copying the system adopted in the rest of the UK whereby EU law as it applied on Exit Day became Retained EU law. It could no longer be amended or added to by the EU post- Exit Day. In time, the UK Parliament (or if appropriate devolved institutions) could amend or repeal any Retained EU law.

The power of devolved institutions to make changes in certain areas of Retained EU law is already provided for within section 12 of the European Union (Withdrawal) Act 2018. In respect of Northern Ireland, that power is now to be found within section 6A (2) of the NI Act 1998. That too would be subject to the supremacy of the Acts of Union, as proposed by our UK Constitutional Bill proposal.

In Northern Ireland by virtue of the Protocol, EU law continues to directly apply and can be changed at will by the EU without any UK democratic input.[4] The Protocol- via section 7A of the 2018 Act- effectively created a conduit pipe through which EU law would flow directly into Northern Ireland, but no other part of the UK. These proposals would undo that constitutional and democratic incompatibility, and ensure NI was not part of an EU regulatory orbit. This is unacceptable and must end.

A amendment of section 7A of the 2018 Act would be required to create a bespoke hybrid- provision, known as a sovereignty lock, for Parliament to approve (or reject) any EU law (in whole or part), other than that which has by bulk become Retained EU law, which would otherwise be applicable via Article 2 (1), Article 8, Article 9 or Article 10 of the Protocol; and to provide the ability for the NI Assembly to adopt into UK law (as Retained EU law) provisions which would otherwise apply via the requirements of Article 5 (3) or (4) of the Protocol (other than that which was automatically transposed into Retained EU law given it mirrored that applicable as Retained EU law in GB).

This sovereignty lock provision would ensure that any EU law which presently would under the Protocol apply in NI, would now only do so (now as UK rather than EU law) having secured NI Assembly (inclusive of cross community safeguards) or Parliament's approval, and if the relevant provision was compatible with the Acts of Union, and further would remain subject to a dynamic sunset Clause to prevent divergence. It is only in such circumstances the provisions would form part of UK law as a component of Retained EU law.

This hybrid-model allowing for the adoption of EU law is designed to provide necessary flexibility because in the context of our regulatory proposals set out in detail *infra* in the next chapter, it would, for example, be the only means by which NI could voluntarily choose to comply with particular standards (albeit adopted into UK law) for the purpose

[4] See Article 13 (2) and (3), NI Protocol

of continuing the Single Electricity Market, or for standards of vehicles that travel North-South and vice versa regularly. These specified areas (provided purely as examples) are some which would not give rise to 'checks' between GB and NI, and in any event would be limited- in terms of being adopted and continuing- to areas which did not create a conflict with the Acts of Union. The necessity for this model really comes about due to the Retained EU law model adopted by GB.

We come back however to the central features of the sovereignty model permitting the adoption of EU law, via a hybrid-procedure (either NI Assembly or UK Parliament can adopt the EU law into domestic law, subject at all times to the overarching sovereignty of the UK Parliament).

The two key features are (i) if approved, the EU law would become UK law, as part of the body of Retained EU law, rather than EU law, made without democratic consent, having effect in the UK in respect of NI; (ii) EU law adopted domestically into the body of Retained EU law creates one unified body of laws operating as the UK regulatory regime, of which NI would be an equal part, and which would have to be, and remain, consistent with the Acts of Union.

In potentially making the NI Assembly (if sitting) the appropriate first instance (ultimate authority must always reside with the UK Parliament) 'gatekeeper' for the sovereignty lock procedure on adopted EU law in respect of that which would otherwise flow from Article 5 (3) and (4) of the Protocol, this would be broadly consistent with the *Sewell convention*.

However, it is accepted that the proposals herein represent a significant expansion of the *Sewell convention* in so far as the NI Assembly would have the ability to adopt EU law (applicable only to NI) into UK law in relation to non-devolved matters, limited to circumstances whereby no inconsistency with the Acts of Union was created, albeit with the UK Parliament retaining the ultimate authority to annul any provisions adopted to which it objects, or which transpires in the future to be the source of incompatibility with the Acts of Union. A procedure could be explored that would build upon (although substantively amend) Schedule 2 to the 2018 Act.

However, as emphasised, fundamentally the UK Parliament would (and must) retain absolute power to annul any provision adopted by the NI Assembly, and/or to apply it

more widely to all parts of the UK (and thus preserving the ultimate equal footing guarantee in Article VI of the Acts of Union, in so far as Parliament retains the option to adopt such EU law for all parts of the UK, even if in practice there is unlikely to ever be any practical benefit in doing so).

(viii) Restoring NI to the UK Regulatory regime

In summary- and interconnected with and in reliance upon our proposals on EU law- we propose a regulatory approach with the following components:

(i) goods moving between GB and NI and remaining in the UK should be subject to no checks which did not apply pre-Exit Day, and should not be subject to any requirement to opt-in to any procedures (such as trusted trader schemes). The UK regulatory regime should apply by default, consistent with Article VI of the Acts of Union;

(ii) goods self-declared (with criminal penalties for those who export into the EU via NI without opting-in to the EU tunnel) in the UK as moving into the EU would be subject to EU regulatory standards via an EU 'tunnel' concept. As the NI- under our proposal- would be restored to the UK customs territory and regulatory regime, there would be no difference on obligations for those exporting into the EU via the entry point of the Republic of Ireland, than applying to those exporting from NI. The EU tunnel is a UK wide model. The compliance would be checked via the NI-ROI 'smart border'. Accordingly, even those exporting to the EU from GB, would not be subject to checks GB-NI, because the exit point of the UK would be the border between NI and Republic of Ireland.

The fundamental principle can be summarised in this way: NI would be restored to the UK internal market and regulatory regime, with that being the default position. The EU tunnel would exist for anyone exporting from the UK to the EU via the Republic of Ireland, and compliance checks would take place via a smart border between NI and ROI. The strength of this smart border would ultimately be a matter for the EU.

The general architecture of the Protocol Bill was- to a limited degree- a starting point, however in regards what has become commonly known as the 'Red lane-Green lane' concept, this has given rise to fundamental constitutional issues, and given the proposed mode of implementation of the concept would still mean that the UK is effectively taking upon itself the obligation to protect the EU single market, the price of which is a border internally in the UK, this is not a price which should- or could-

constitutionally be paid in order to achieve an objective which is in truth that which is important to the EU.

The constitutional incompatibility of the proposed mode of implementing this proposal was flushed out by Baroness Kate Hoey who put down an amendment in the House of Lords to Clause 22 of the Protocol Bill, which would have required any regulations to give effect to arrangements replacing to the Protocol to be compatible with the Acts of Union.

In response Lord Caine said:

> *"Let me say at the outset that I entirely sympathise with the noble Baroness's position and amendment. Clause 1, as she pointed out, explains that the Acts of Union are not to be affected by provision of the protocol that does not have effect in the United Kingdom. I agree with her and noble Lords who have pointed out the fundamental importance of the Acts of Union as the bedrock of Northern Ireland's constitutional position in the United Kingdom.*
>
> *However, I am sorry to point out to the noble Baroness that her amendment has the potential to risk the exercise of the powers under the Bill. For example, the red lane in our new model will continue to apply EU rules to goods moving through Northern Ireland into the European Union and single market. This is crucial to ensuring that there is no hard border on the island of Ireland and to upholding the overall objectives of the Act of Union regarding the free flow of trade in the United Kingdom. The restrictions imposed by her amendment could risk the implementation of this revised operation of the protocol, which is designed to uphold our commitments to the union."*[5]

[5] House of Lords debate, 7 November 22, available at: https://hansard.parliament.uk/Lords/2022-11-07/debates/78E0BC0F-3EBB-469E-A52E-B34EDEACB25E/NorthernIrelandProtocolBill#contribution-D275D02C-E535-4E43-A43C-2F525C3F035D

Notwithstanding this definitive reason as to why the solution, as it suggested it would be implemented in the Government's plans as they presently sit, would be constitutionally incompatible, it is also trite to point out that Lord Caine correctly points out that in the Protocol Bill, the Act of Union is not to be affected by any provision which does not have effect in domestic law. This is somewhat of a 'trick' in the Protocol Bill, because it means that that which is not excluded provision still could, and would, interfere with the foundational constitutional statute of the United Kingdom.

Moreover, the Protocol Bill does not in fact completely strip out section 7A of the 2018 Act, but only disapplies it in relation to that which has been designated 'excluded provision', thus leaving it intact in a range of other areas. This is unacceptable and the primary objective is for it to be removed completely. However, at the very least, as we propose in our Constitutional Bill, it must be made subject to the Acts of Union, thus preventing any provision of the Protocol coming down the 'conduit pipe' which creates an incompatibility with that foundational constitutional statute.

There is the additional issue of there being a requirement to opt-in to the 'green lane', and thus this imposes a barrier to unfettered trade within the UK internal market, which does not apply elsewhere. For example, someone moving goods from Manchester to Glasgow does not have to 'opt-in' to a trusted trader scheme, rather the default position is that goods move freely within our own country (the UK as a unitary state).

In our proposals there is an option to opt-in, via self-declaration, to the EU regulatory regime and observe those requirements for exporting into their single market, but the default position is that all goods moving are free to do so without impediment. This is where we differ significantly with the proposed 'green lane- red lane' concept. In our view it is only our proposal that can be constitutionally compatible with Article VI of the Acts of Union.

We suggest in regards terminology a more constitutionally appropriate theme for our proposals rather than 'green lane-red lane', which is why our model focuses on an EU tunnel.

There is a valid question- particularly in light of the aggressive behaviour of the Irish Government towards Northern Ireland and the UK more generally- as to why the UK would even go as far as- via the EU tunnel model- of adopting the 'opt in' procedure

(which would of course mean the UK would have to provide the information gathered to the EU) underpinned by criminal penalties in UK law.

We agree that is a valid question. It is beyond dispute that the EU, much less the Republic of Ireland, do not deserve any goodwill given how they sought to impose the Protocol upon the unionist population. However, we are open to considering practical solutions in so far as it relates solely to goods moving into the EU, and the process for adhering to that regulatory regime is one of self-declaration. If the process is not one of self-declaration, then that amounts to an internal UK border and is unacceptable. However, we return to the fundamental point: any solution must respect the UK as one unitary state, and therefore 'opting in' must impose the same obligations on all parts of the UK in which there is exports to the EU via the Republic of Ireland, with compliance checked via the smart border between NI and ROI.

Those bringing goods via the EU tunnel would be subject to the full EU regulatory regime, as set out in the Protocol (in so far as it relates to standards to be adhered to). A procedure could be developed whereby a Minister of the Crown could by regulation unilaterally (or by agreement via the joint committee) specify that EU standards contained within a particular legislative provision are recognised within the UK regulatory regime, and therefore businesses moving goods for sale both within the UK and EU could adhere to EU standards but nevertheless trade freely in the UK, rather than having to adhere to two regulatory regimes.

If additional compliance checks in regards exporters were required then these could be carried out in UK territory by UK officials (who would be empowered to ensure compliance with UK law which would require self-declaration and adherence to EU standards for those exporting into the EU) either around the border, or at business premises.

The self-declaration system would be necessity require data-sharing between the UK and EU, and a robust system could be developed to facilitate this.

The purpose of the adopted EU law option is to allow Northern Ireland to incorporate into the UK regulatory regime, in respect of Northern Ireland, particular EU law provisions, giving them effect, subject to compatibility with the Acts of Union. This model (if there isn't strict adherence to the Acts of Union) would in some instances

have the inadvertent consequence of causing divergence within the UK internal market. This would be guarded against by the Constitutional Bill, which we set out in chapter (xiii).

We nevertheless note with regret that the Government's present position appears to remain focused on the green lane- red lane concept. We feel it imperative to set out three key principles which must be applied to any solution put forward by the Government.

They are as follows:

(i) There can be no requirement to opt-in, declare, or sign up to any trusted trade scheme to trade internally within the UK. The commercial data provided for those moving goods from GB-NI must be identical to that which would be provided for goods moving from, for example, Glasgow to London. There can be no additional requirements for moving goods internally within the UK from GB-NI. If there is, this represents a breach of the Acts of Union.

(ii) There can be no imposition of EU law or standards on the citizens of Northern Ireland. The laws which apply in Northern Ireland must be part of the UK regulatory regime, and be made by the representatives of Northern Ireland, subject to the fundamental cross-community protections which form the cornerstone of our devolved arrangements, or by our sovereign UK Parliament (respecting the *Sewell convention*).

(iii) There must be entrenched arrangements to ensure any differential UK law applicable in NI can only differ from GB with the cross-community consent of the Northern Ireland Assembly. There default position must be that the UK laws and standards apply to the whole UK, with differences only coming about if, subject to the devolved arrangements (including NI's cross community safeguards), this is adopted by the devolved administration. The Acts of Union must be protected, such as (which is included in the proposed Constitutional Bill) inserting an amendment into section 6 (2) of the NI Act 1998 to make it beyond the legislative competence of the NI Assembly to do adopt any provision which is incompatible or creates an inconsistency with the Acts of Union.

We urge the Government, and other stakeholders, to take onboard the foregoing. In the absence of ensuring- at the bare minimum- the fundamental principles we have set out are satisfied, then we are confident that the majority of unionism, and unionist elected representatives, will reject any such proposed solution.

(ix) "Forked tongue" – How the Protocol says one thing, but does another

At para [316] of his concurring judgment in *Allister et al* McCloskey LJ further called attention to the dishonesty at the heart of the Protocol, in so far as it purports to do one thing, but in fact does another:

> *"[316] In addition to the extensive recital of the provisions of the Protocol in the judgment of the LCJ, I would highlight certain of its provisions. Article 6(1) is one of those provisions of the Protocol which appears to speak with forked tongue. While it purports to proclaim unfettered trade between NI and UK, on closer scrutiny this is clearly subject to those provisions of Union law "… made applicable by this Protocol which prohibit or restrict the exportation of goods …" The effect of what follows is that in the matter of the exportation of goods from NI to UK, the UK undertakes to ensure fulfilment of the Union's international obligations and compliance with the applicable Union law prohibitions and restrictions on the exportation of goods from the Union to third countries."* (Underlining added).

Throughout the Protocol, it is riddled with evasive language at best, and outright deceptions at worst. In all cases when the Protocol says one thing, but does another, it is to the detriment of the unionist community in NI, and to the benefit of the nationalist community/Irish Government/EU.

Whilst it is beyond the scope of this paper to embark on a detailed analysis of all the Protocol's provisions (there is a book in that in of itself), we do briefly draw some attention to some of the starkest inconsistencies. A number of these deceptive provisions were highlighted by John Larkin KC on behalf of the applicants at all stages of the *Allister et al* case, and for a fuller analysis of the issue than we propose to delve into in this paper, we would recommend Stephen Weatherill's chapter in '*The Law and Practice of the Ireland-N Ireland Protocol'*[6]

Article 4 of the NI Protocol proclaims that NI is part of the customs territory of the United Kingdom. But is it?

The way by which the Protocol operates in fact ensures that NI is, in practice, part of the EU's customs territory. This much is clear from Article 5 (3) of the Protocol which provides that NI is subject to the EU's customs code and various other related provisions.

In Article 13 (1), the deception is confirmed. Article 13 (1) provides:

> *"…any reference to the territory defined in Article 4 of Regulation (EU) No 952/2013 in the applicable provisions of the Withdrawal Agreement and of this Protocol, as well as in the provisions of Union law made applicable to and in the United Kingdom in respect of Northern Ireland by this Protocol, shall be read as including the part of the territory of the United Kingdom to which Regulation (EU) No 952/2013 applies by virtue of Article 5(3) of this Protocol"*

If we look then to what "…t*he territory defined in Article 4 of Regulation (EU) No 952/2013*…" is, we find that it is the EU's customs territory. If we turn then to look at what part of the territory of the UK that Regulation (EU) No 952/2013 speaks to, we find that it is Northern Ireland. It is therefore self-evident that whilst the Protocol claims NI is the UK customs territory, for all practical purposes it is in effect in the EU's customs territory. An extraordinary state of affairs for any sovereign country.

[6] McCrudden, C. (2022) '*The Law and Practice of the Ireland- N Ireland Protocol'*, Cambridge University Press, Chapter 6.

Article 6 of the Protocol again states that trade from NI to GB is to be unfettered (a commitment repeated in the New Decade, New Approach commitments). This in practice isn't the case. The provisions thereof don't enable the setting aside of obligations under, for example, Article 5 (3), therefore even trade between NI and GB will not be as it should be.

We have further witnesses the duplicity of the Protocol whereby, via the backdoor, it now in Regulation 2017/625 ensures that 'UK' is to be interpreted as meaning 'GB', with NI treated as the entry point into the EU.

These are just some examples of the duplicity and deception at the heart of the Protocol which, in the words of Lord Justice McCloskey, "*speaks with a forked tongue*".

We have already canvassed in detail in Part two, (ii) *supra* as to the deception in regards the purported commitment to protecting the Belfast Agreement and acting compatibly with the NI Act 1998.

The meaning of 'protecting the Belfast Agreement' has in truth come to mean 'protecting nationalist interests', with every constructive ambiguity or interpretative question in regards its meaning resolved, without question, in favour of nationalism.

How else would the situation come about whereby the commitment to protect the Belfast Agreement meant there could not be so much as a CCTV camera between NI and the Republic of Ireland, but there could be a full customs and regulatory border between NI and GB. That appears to be devoid of any logic or rational basis, and is an apt demonstration as to how the Belfast Agreement was, and is, weaponised against unionists.

(x)The compatibility of our proposals with the Acts of Union

In assessing the compatibility of any arrangements (whether those suggested in this paper or otherwise) with the Acts of Union, we refer to the decision in *Allister et al* [2022] NICA 15.

At paragraph [185] Keegan LCJ, with whom Treacy LJ agreed, said:

> *"[185] However, the respondent did not offer much resistance to the argument that changes have been effected to trading arrangements by EUWA 2018. In our view there is also a valid argument that the EUWA 2018 as amended conflicts with the same footing provision in Article VI because the citizens of Northern Ireland remain subject to some EU regulation and rules as part of the withdrawal framework which 71 does not apply to other citizens of the United Kingdom. These are the provisions in Article 5-10 of the Protocol which are discussed in foregoing paragraphs." (Underlining added).*

At para [378] of the concurring judgment, McCloskey LJ set out and accepted the first instance formulation of Colton J, which said at para [62]:

> *"Although the final outworkings of the Protocol in relation to trade between GB and Northern Ireland are unclear and the subject matter of ongoing discussions it cannot be said that the two jurisdictions are on "equal footing" in relation to trade. Compliance with certain EU standards; the bureaucracy and associated costs of complying with customs documentation and checks; the payment of tariffs for goods "at risk" and the unfettered access enjoyed by Northern Ireland businesses to the EU internal market conflict with the "equal footing" described in Article VI."*

We distil from these judgments, which the applicants did not appeal in regards the specific finding that the Protocol created an inconsistency with Article VI of the Acts of

Union,[7] three core questions which must be applied to assess compatibility of any arrangements with the Acts of Union.

They are as follows: (i) are citizens of NI subject to EU laws, regulations or standards which do not apply to other citizens of the United Kingdom?; (ii) is there enhanced bureaucracy, costs (including the payment of tariffs for goods 'at risk') or customs declarations for the movement of goods from GB-NI?; (iii) do Northern Ireland businesses enjoy privileged unfettered access to the EU internal market?

In applying these questions to the suggestions in this paper, we reiterate that this paper contains broad concepts, rather than dense technical detail as to the form the ultimate outworking of such concepts would take. That is why we put the case no higher than stating the proposals are *prima facie* compatible with the Acts of Union.

Turning to question (i) and (ii) which we deal with together due to their interconnected nature.

The citizens of NI would not be subject to EU law, regulations, or standards such as which presently applies automatically via the Protocol.

Any adopted EU law becomes UK law and would be unable to be amended or added to by the EU, as it would be UK law and solely a matter for the sovereign Parliament or devolved administration. It would also, by default, be required to be compliant with the Acts of Union.

The voluntary adoption of EU provisions into the body of UK law, which in practice would require cross-community consent for at the very least devolved matters within the competency of the Assembly, and in line with these proposals, which must also be compatible with the Acts of Union, does not make citizens of NI subject to EU law in the way the Protocol does, rather citizens of NI would have voluntarily adopted such laws into the UK regulatory regime in respect of NI, via the bespoke devolution arrangements. Interconnected to this, and necessary for solving the incompatibility, is

[7] The applicants appealed to the Supreme Court on four grounds, including the finding that the Protocol prevailed over the Acts of Union, but agreed with the courts below as to their finding of an inconsistency between the Protocol and the Acts of Union. For a UKSC case summary see In the matter of an application by James Hugh Allister and others for Judicial Review (Appellants) (Northern Ireland) - The Supreme Court

the proposal for the 'EU tunnel' which should be equally accessible and applicable to all UK businesses, rather than solely to those in NI.

The present constitutional incompatibility, *inter alia*, arises from the fact NI (and NI alone in the UK) is subject to EU law without any democratic consent in a manner consistent with the 1998 Agreement, and flowing from this is the GB-NI checks and the accompanying increased bureaucracy and costs given that NI and GB are de-facto in two different regulatory regimes.

If NI is restored fully to the UK's customs territory and internal market, alongside our proposed method of ending the application of EU law, then there would be no EU law applicable in NI at all, and the UK Constitutional Bill (any sovereignty lock) would prevent any divergence incompatible with the Acts of Union.

The equal footing provision would be preserved (subject to the 'EU tunnel proposal being viable) because businesses in all parts of the UK could voluntarily decide to follow EU law to trade into the single market either from GB via NI, or directly from NI.

The suggestions in this paper would abolish the 'at risk' concept in its entirety, therefore no consideration arises in that regard. NI would be fully restored to the UK internal market, and the EU tunnel would simply be a voluntarily route into the EU single market which can be opted into.

In regards question (iii), businesses in GB that voluntarily chose to follow EU requirements would *prima facie* have the same access to the EU internal market.[8] The unfettered access to the EU single market which presently applies in NI would no longer apply. The fundamental principle is, and must be, that all parts of the UK are subject to the same requirements to export into the EU. NI should not have unfettered or privileged access to the EU single market. Businesses who export from any part of the UK into the EU would be subject to electronic declarations and paperwork, and compliance checks via the smart border, or any additional procedures at the Republic of Ireland border the EU adopted. There could be scope for exploring with the EU a trusted trader scheme to lessen any friction, and intelligence-led checks in or around

[8] This would be subject to the EU accepting the arrangements provide sufficient protection for their internal market. If they do not, it would be for the EU to conduct enhanced checks at the entry point to their own territory (the Irish land border).

the border, alongside the criminal penalty regime for those who fail to comply with the necessary regulatory standards, provides strong protection to the EU single market. The loss of completely unfettered access to the EU single market is the price of restoring NI's place in the Union, and thus our largest market, whilst ensuring there is no permanent physical checks between NI and Republic of Ireland.

All businesses across the UK could chose to voluntarily follow EU requirements and trade from GB via NI and onwards into the EU. Put simply; the EU tunnel would be open equally to all citizens of the UK. It just happens the entry into the tunnel would be from NI, which is no different than the geographical location of, for example, a free port in so far as the free port being in one geographical part of the UK could not be said to represent an incompatibility with the Acts of Union. The equal footing guarantee would be preserved.

It is accepted it could be argued that this proposal would, from the EU's perspective, significantly increase the risk to their single market, however there are two competing fundamental objectives, and to 'square the circle' the EU need to face the consequences of their purported desire to find solutions which respect all communities in NI, rather than solely the nationalist community,

Those from a unionist perspective require the restoration of the Acts of Union, which at Article VI requires equal footing on matters of trade, which in turn precludes any internal UK border, or citizens of NI having privileged access to the EU single market.

Those from a nationalist perspective require, on their case, an open land border for the purposes of trade.

The EU, purportedly, have the overriding objective of protecting the Belfast Agreement in all its parts. That, if it is to have any credibility, means respecting the fundamental cross-community balance at the heart of the 1998 Agreement.

In our view the route to reconciling these fundamentally competing objectives of the two main traditions is for the EU to be true to their apparent overriding objective to protect peace and the 1998 Agreement in all its parts, and therefore bear the cost of increased risk (on their case) to their single market that would come with from 'squaring the circle' in the following way.

For the equal footing guarantee in the Acts of Union to be preserved, *inter alia*, NI citizens cannot be on an unequal footing *vis-à-vis* citizens of the rest of the UK. Therefore, it must be open to all businesses in the UK (whether trading from NI into the EU, or GB via NI and onward into the EU) to voluntarily follow EU regulatory requirements and benefit from the same access to trade into the EU single market. The proposed 'EU tunnel' needs to be accessible for all businesses across the UK, who can all therefore have the equal opportunity of trading into the EU single market via NI.

In equal terms, this solution ensures trade across the NI-Republic of Ireland border is preserved, and thus preserves that which is important to those from a nationalist tradition. It is trite to point out that if it was found to be acceptable for there to be the requirement to fill in paperwork, or be subject to checks GB-NI as part of the 'at risk' concept, then it surely it can't be said with any credibility that it would be unacceptable for a much lesser regulatory burden to apply on those trading North-South (whether originating in GB or direct from NI).

The Protocol purports to respect both communities, but does not do so. It in fact prioritises the objectives of the nationalist community in regards keeping the NI-Republic of Ireland open, over the constitutional integrity of NI's place in the UK, and thus the objectives of the unionist community.

If the EU's position was followed to its logical conclusion, it would lead inevitably to the solution proposed in this paper in which the EU bears the cost of its desire to keep an open NI-Republic of Ireland border, by freeing NI from the burden of being de-facto in the EU single market and absorbing the increased risk of granting the same access to all businesses in the UK who choose to trade into the single market via NI and thus the EU tunnel, complying with the EU regulatory requirements to do so. Compliance is policed primarily by the criminal law.

In doing so, they would preserve the equal footing guarantee in Article VI of the Acts of Union in so far is it relates to the third question we have distilled in terms of the tests to be applied to ensure constitutional compatibility.

At present NI businesses have unfettered access because all relevant goods circulating in NI must follow the EU regulatory regime. This is due to the 'at risk'

concept, which allows the EU to offer unfettered access because they are content that the Irish Sea border between GB-NI offers sufficient protection to their EU internal market.

The concepts suggested in this paper, and indeed the NI Protocol Bill, fundamentally alters that position and we would entirely abolish the 'at risk' concept. It is possible therefore that the EU could 'switch off' access or conduct enhanced checks- beyond the limited intelligence led spot-checks we suggest- at the Irish land border. If that is so, then so be it. That approach would helpfully expose the EU's own self-interest, rather than their purported overriding objective of preserving peace and the 1998 Agreement in all its parts.

But if the EU are genuine about seeking a solution, then entrusting to the UK a system of self-declaration for the 'EU tunnel' is a means by which those who voluntarily want to follow EU requirements (whether trading in the United Kingdom from within NI, or via NI from GB) could have unfettered access to the EU internal market in a way which would preserve the Acts of Union.

It must be reiterated that the restoration of, and compatibility with, the Acts of Union is the fundamental principle which must underpin any solution. There cannot be, and we trust will not be, any compromise on the constitutional foundation of the United Kingdom, and Northern Ireland's place therein.

(xi) VAT

The provisions of Article 8 of the Protocol, and thus Union law listed Annex 3, would be subject to the sovereignty procedure in so far as that corpus of law, and/or each individual provision thereof, would only apply in the United Kingdom in respect of Northern Ireland (as part of the UK regulatory regime) if a regulation subject to a positive resolution is laid before Parliament by the Minister of the Crown.

It must be entirely a matter for the sovereign Parliament as to the VAT which applies to any component part of the UK, and this cannot be set or fettered by the EU.

(xii)Court of Justice European Union (CJEU)

The UK Supreme Court should be the final authority in domestic law. There could be scope for the UK Supreme Court to seek an advisory opinion from the CJEU on matters arising in relation to adopted and/or Retained EU law, but the UK Courts could not be bound by the CJEU.

It seems obvious to point out that the CJEU is entirely different than the European Court of Human Rights, which has nothing to do whatsoever with the European Union. There is nevertheless often confusion, even amongst supposedly well-informed contributors.

In regards any disputes as to the working of an international treaty obligations, and thus International law disputes between states, this should not be determined by the CJEU (at least not finally), but rather by an Independent Arbitration Tribunal.

(xiii)Constitutional protections for the substance of the Union

A UK Constitutional Bill – a suggested draft of which can be found at Appendix 8- should be laid before Parliament which would entrench the supremacy of the Acts of Union 1800. This Bill would further require that a Minister of the Crown would be prohibited from doing any act (including making regulations) which is incompatible with the Acts of Union.

The effect of the Bill would be that that if in taking any steps in relation to the GB element of Retained EU law, that such proposed action would create divergence (in a manner inconsistent with the Acts of Union) between GB and NI that either (i) the provision in force in NI must be amended to mirror that in GB, or disapplied; or (ii) in the absence of (i), the Minister is prohibited from taking any further steps.

In the UK Constitutional Bill, it is further made clear that every other enactment should be read subject to the provisions of the UK Constitutional Bill, and therefore any arrangements made- whether via international treaty using the Royal Prerogative, or the making of regulations by a Minister of the Crown- must not create any inconsistency with the Acts of Union.[9]

The meaning of constitutional status within section 1 of the Northern Ireland Act 1998 should further be defined in statute as encompassing, at the bare minimum, the Acts of Union 1800. This is included within the UK Constitutional Bill.

We observed that number seven of the Democratic Unionist Party's key tests directs itself to the requirement that the substance of the constitutional guarantee be preserved. This emphasises the importance of addressing this issue; without doing so there will be no basis for unionist support for a return to power sharing.

In addition, regarding issues arising following *Rooney* and *JR181 (3)* the UK Constitutional Bill provides a territorial definition of 'United Kingdom' to which every

[9] This would entrench in statute the dicta at paragraph 55 of *Miller 1*, in so far as it relates to there being no power to exercise the Royal Prerogative in a manner which creates an inconsistency with statute.

other enactment is subject. This prevents interpreting 'United Kingdom' as meaning 'GB only'. It further entrenches that the UK is a unitary state.

Finally, the Bill would amend the NI Act 1998 to ensure that any provision which causes an incompatibility with the Acts of Union would be beyond the legislative competence of the NI Assembly, and any provision adopted which give rise to a concern as to incompatibility could be subject of a Reference to the UK Supreme Court by the Attorney General for Northern Ireland.

(xiv)Rebuilding North/South relationships

It is obvious that the behaviour of the Irish Government, particularly Leo Varadkar and Simon Coveney, has significantly damaged relationships between the British community in Northern Ireland and the Irish Government/State. It is difficult to envisage any scenario whereby these relationships with those personalities, certainly at a community/civic level, could be rebuilt. However, we observe that the same is not true in relation to Micheal Martin who has, to some degree, demonstrated a greater respect for and understanding of the views and concerns of the pro Union community.

However, there remains the potential to utilise long-established relationships between unionism/loyalism and former senior Irish political and civic figures (such as, for example Bertie Ahern). If such persons could be utilised to engage with the pro Union community, and in turn represent such views to the Irish Government, this has the potential to facilitate more productive dialogue.

We emphasise such engagement should be about repairing relationships, whilst respecting that the internal affairs of Northern Ireland are not the responsibility of the Irish Government. This key principle must be re-established and respected.

In addition, engagement cannot be about trying to 'buy-off' or create gatekeepers by the provision of Irish Government funding or other resources. The pro-Union community cannot be (nor should ever have been, or in the future be) financially

incentivised into compromising on Northern Ireland's constitutional position, and/or the rights (including cultural and identity rights) of British citizens in Northern Ireland.

Conclusion

The proposals in this paper are, as we stated at the outset, broad concepts. In commissioning us to produce this piece of work, the Centre for the Union emphasised the importance of producing proposals which were workable, but also more fundamentally that operated as a baseline as to what would be constitutionally acceptable and provide the basis for stable governance in Northern Ireland.

We believe the material in this paper can provide a useful resource, and the proposals can ignite further debate. We are open to discussions on how the proposals can be refined and/or strengthened, and are willing to engage openly with any criticisms which may be made.

In all the proposals we have developed, central to our objective has been the restoration of Northern Ireland's place in the Union. It is our guiding star, and the paper carries that title for a reason. It is not for us to advocate for the interests of the nationalist community, Irish Government or EU. There is plenty to do that, even some within the UK who to their shame have consistently sided with those determined to incrementally dismantle the United Kingdom.

We have engaged with representatives of all sections of political unionism (other than the UUP) throughout the development of this paper, and sought to find proposed solutions which can command broad support. Of course, not everyone will be in agreement on every proposal, but we believe that this paper at least can form the basis for broad agreement on fundamental principles, despite that there may still be intra-unionist differences as to how those principles are best achieved.

Finally, we express our unwavering support to the unionist elected representatives in Northern Ireland of the DUP and TUV, and at local council level the PUP, who remain

steadfast and strong in their refusal to operate power-sharing institutions, the price of which is to implement the subjugation of the Union.

There can be no backsliding, no weakening of the position. Whether it be proposals in this paper, others, or a mixture of both, the end result must be judged against the fundamental constitutional principles which (we hope) we have set out in detail within this paper.

It is true that there is much scope for further development and refinement of many of the issues canvassed in this paper, but we would point out that due to the urgency of the need to begin developing proposals to counter that which is seems will soon be presented (and will inevitably be constitutionally flawed) by the UK and EU either together or unilaterally), that this paper has been produced over a two-week period over Christmas. We plan to continue this work into the New Year, with a few to expanding further upon the ideas contained herein.

Restoring Northern Ireland's place in the Union

Centre for the Union, Constitutional Studies Group

Proposed solutions to replace the NI Protocol

Appendix 1

Key points: Trade

EU law will no longer apply in the UK in respect of NI

Provisions of EU law in Annex 2, which mirror GB, will become UK law as part of the body of Retained EU law; other EU law provisions flowing from Articles 5-10 of the Protocol will be subject to a Sovereignty lock, and only if adopted by NI Assembly (cross community safeguards apply) or Parliament will they form part of the body of the UK wide body of Retained EU law. NI businesses, unless they 'opt in' to the EU tunnel, will by default follow UK regulations.

Northern Ireland fully part of UK regulatory system

NI by default will be in the UK regulatory system. There will be no requirement to 'opt-in' (i.e. via a trusted trader scheme). There will be no checks on goods moving internally within the UK internal market.

EU tunnel for those exporting to the EU

Those exporting from GB or NI to the Republic of Ireland (EU) will be required to 'self declare' and thus opt-in to the EU regulatory regime, with criminal penalties for failing to do so. Compliance will be monitored by largely invisible procedures centring on the NI-ROI border, via the adoption of the EU's initial 'Smart border' proposal.

Why build in Retained EU law model?

‘Copy and paste’ EU law into Retained EU law to align with GB

The rest of the UK transposed large swathe of EU law into domestic law, and thus the UK regulatory regime, on Exit Day. In order to bring NI in line with this regime, EU law- only that which mirrors GB- which applied in NI via Protocol (and was thus EU law) needs to be equally copy and pasted into UK law. If it isn’t then NI won’t be aligned with the GB system, and left in a vacuum.

Flexibility

There may be some limited areas whereby NI would wish to adopt EU law (into UK law) to mirror standards applicable in the EU (i.e. single electricity market or vehicle standards). Having the ability to do this- in limited circumstances (must be consistent with Acts of Union, and subject to cross community consent and Parliamentary sovereignty) is simply preserving a flexibility.

Constitutional Bill

Entrenching the supremacy of the Acts of Union 1800

The Constitutional Bill (Clause 1) provides that's every enactment must be read subject to the Acts of Union. Therefore, the Acts of Union have complete supremacy over every other domestic law provision, including section 7A of the EUWA 2018, which Clause 3 expressly amends.

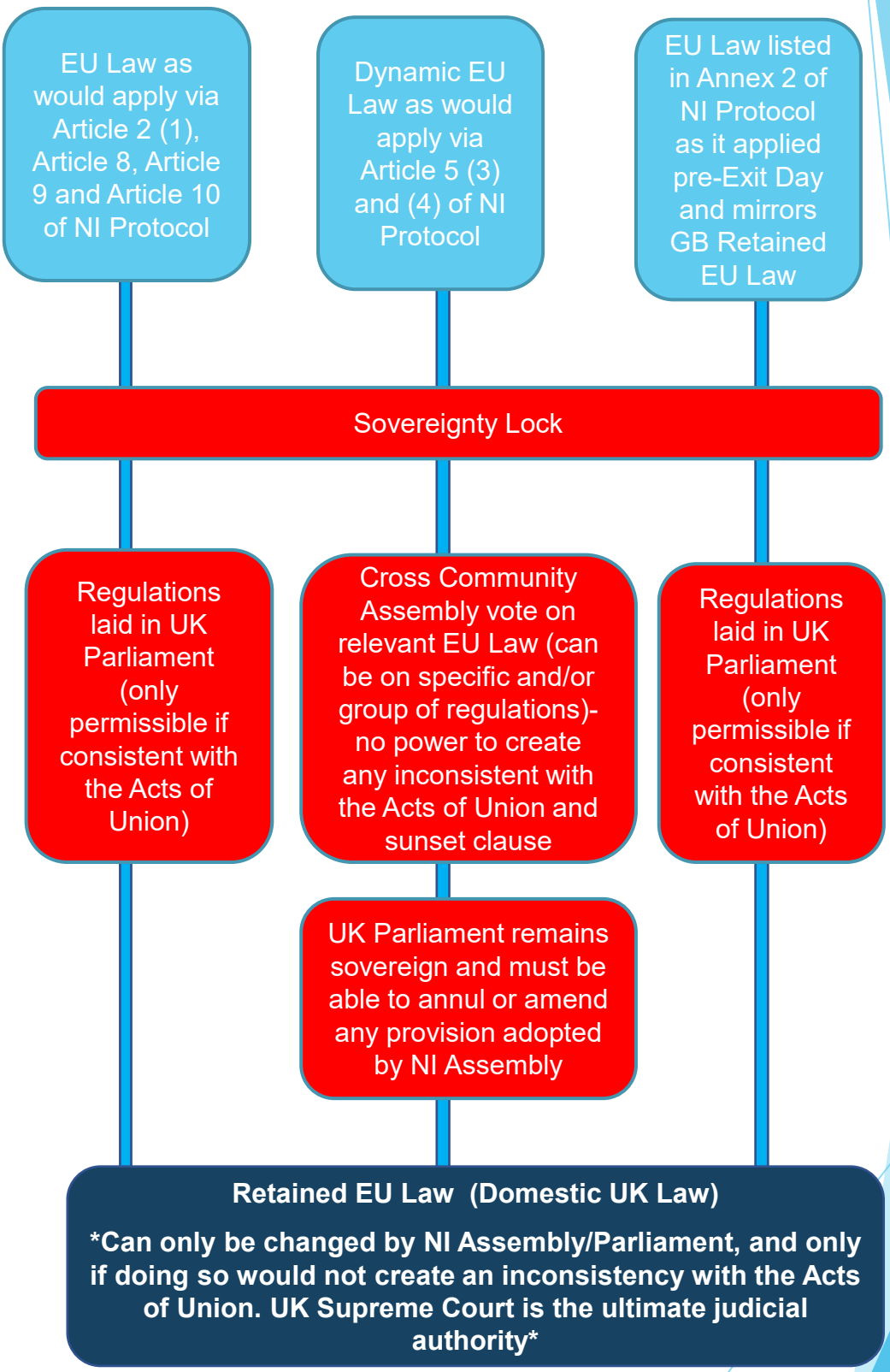
Protections for the substance of NI's constitutional status

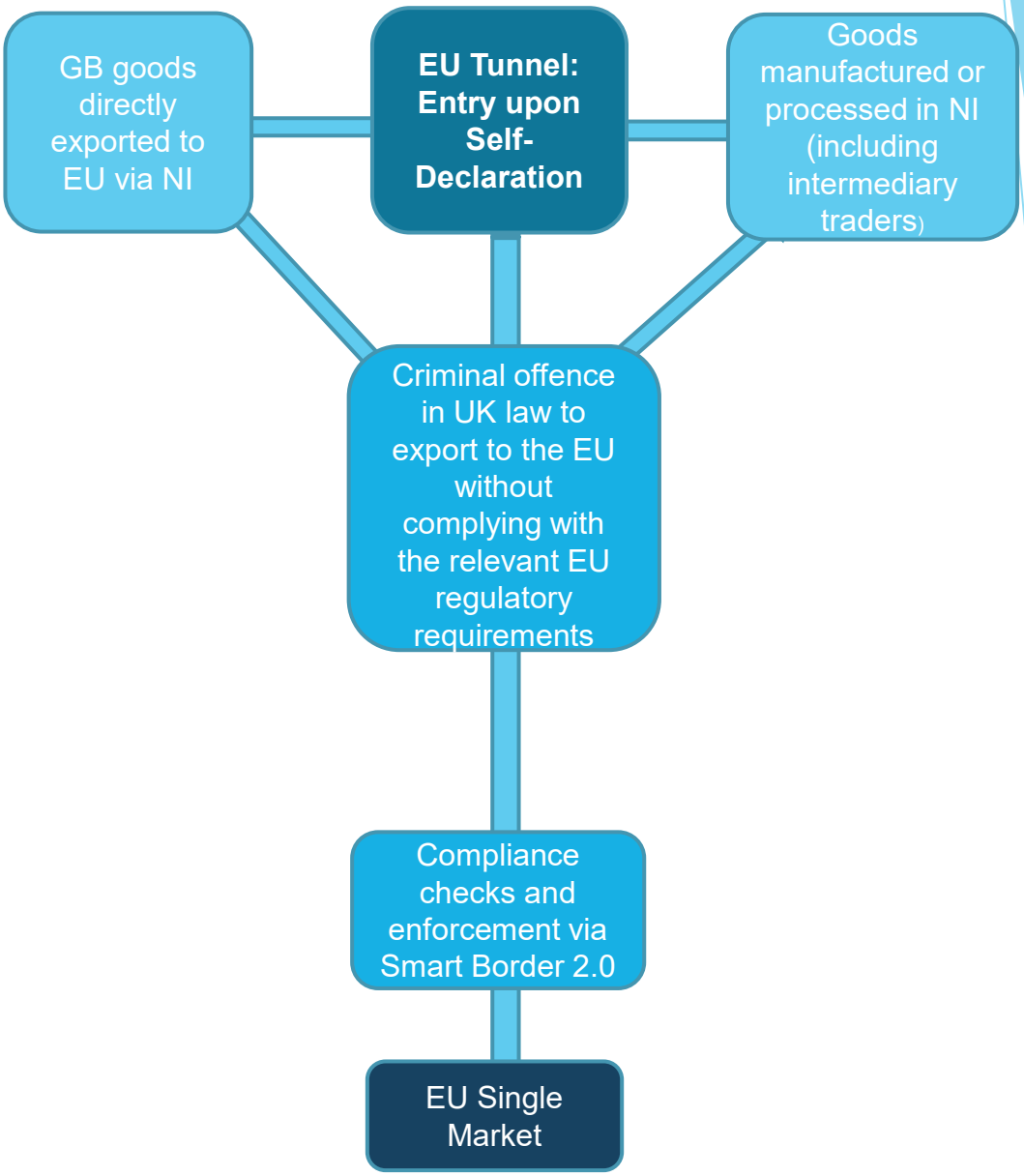
The Protocol, which subjugated the Acts of Union, exposed a fundamental flaw in section 1 (principle of consent) of the NI Act 1998. The sole basis for unionist support for the 1998 Agreement was rooted in the principle of consent. It must be substantive rather than merely symbolic. You can not change everything but the last thing in regards NI's place in the Union. If unionist support for the 1998 Agreement is to be restored, then the principle of consent must be fixed. Clause 4 defines NI's constitutional status in section1 of the 1998 Act as encompassing the Acts of Union.

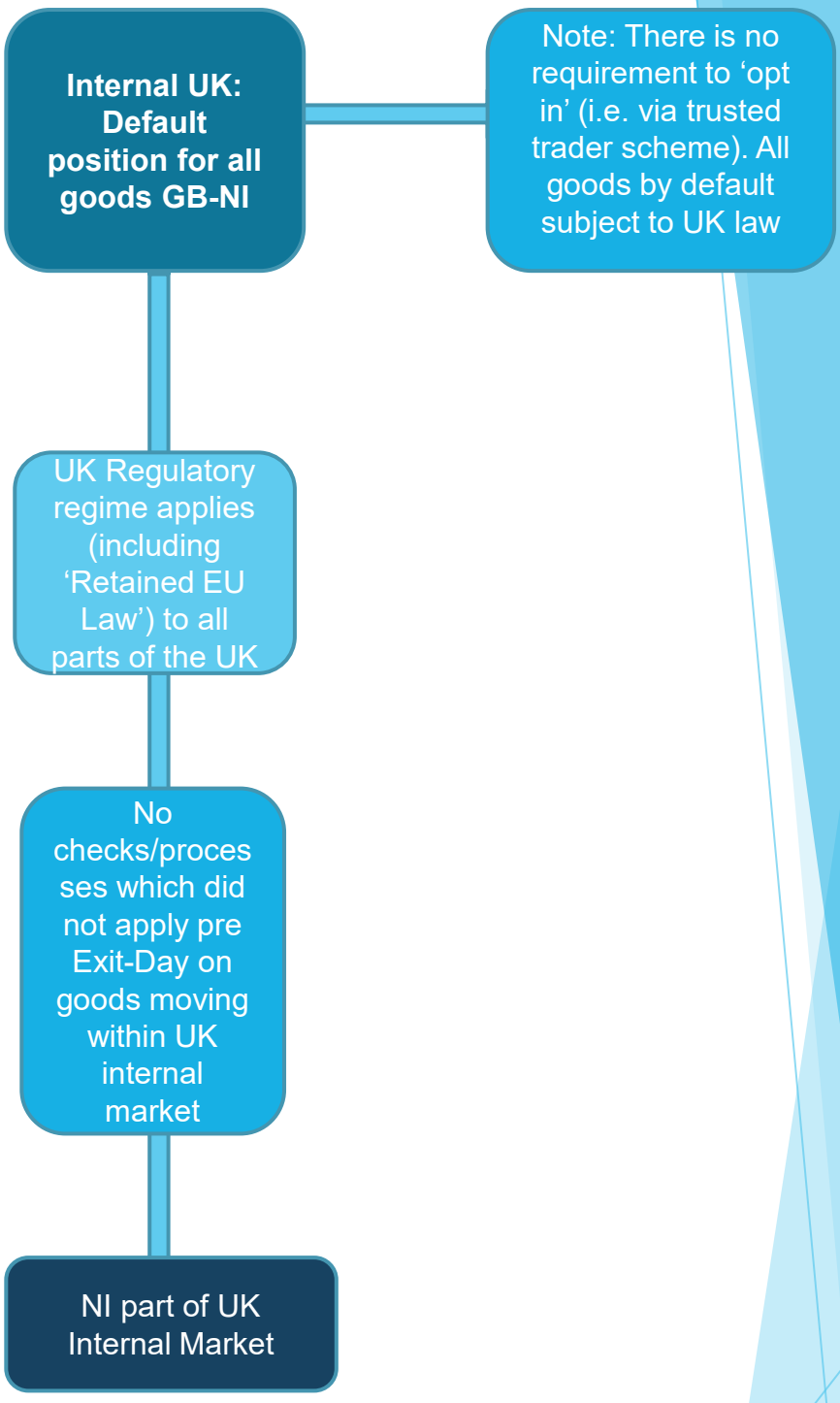
United Kingdom of Great Britain and Northern Ireland

In Rooney and JR181 (3) 'UK' was interpreted by the court as applying only to Great Britain, with the UK "no longer a unitary state". This must be corrected by Parliament. Clause 4 would do so and define UK in both the interpretation of domestic enactments and international treaties as being GB and NI.

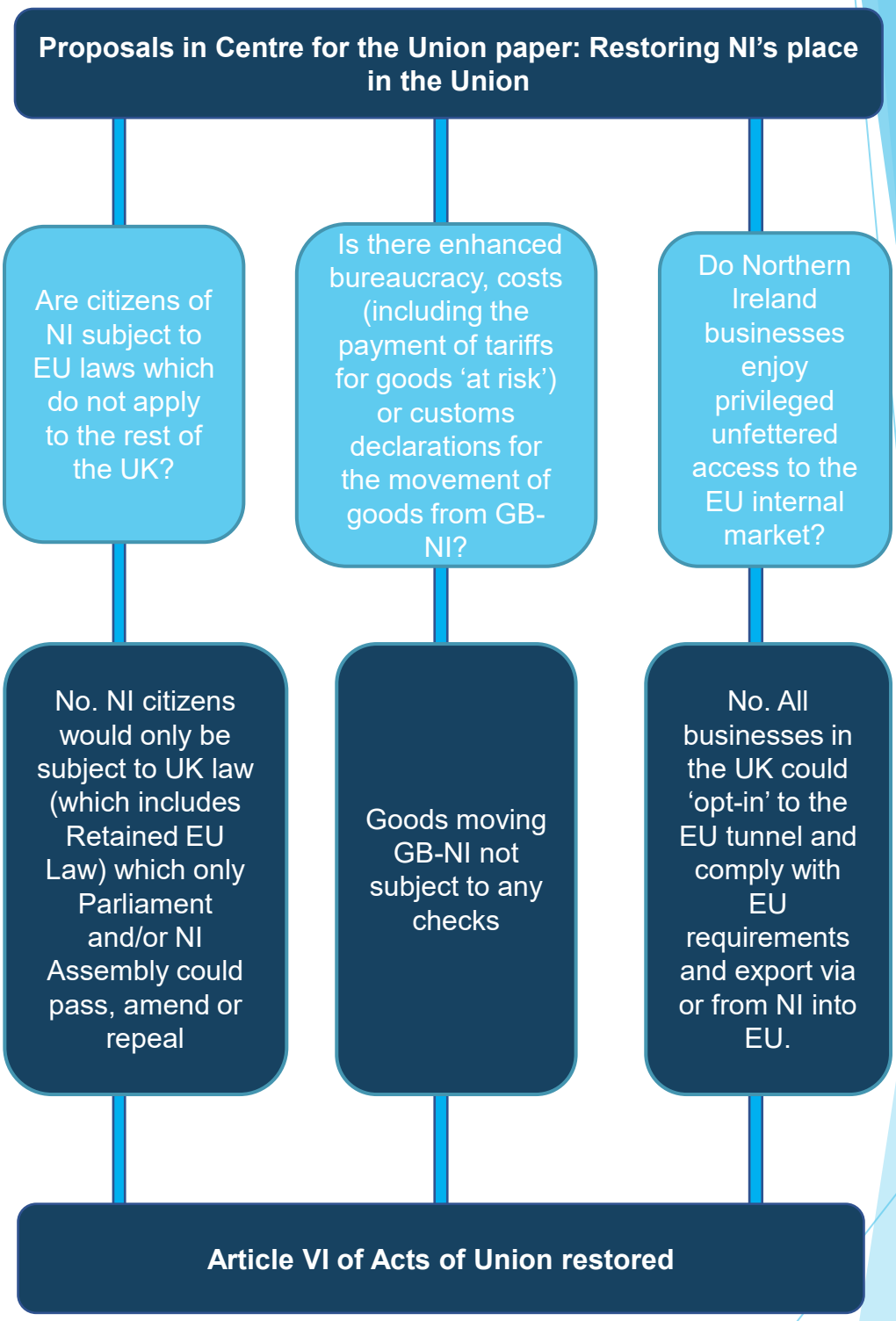
UK Sovereignty Lock: Ending EU law in NI




GB goods directly exported to EU via NI
EU Tunnel: Entry upon Self-Declaration
Goods manufactured or processed in NI (including intermediary traders)
Criminal offence in UK law to export to the EU without complying with the relevant EU regulatory requirements
Compliance checks and enforcement via Smart Border 2.0
EU Single Market


Internal UK: Default position for all goods GB-NI
Note: There is no requirement to 'opt in' (i.e. via trusted trader scheme). All goods by default subject to UK law
UK Regulatory regime applies (including 'Retained EU Law') to all parts of the UK
No checks/processes which did not apply pre Exit-Day on goods moving within UK internal market
NI part of UK Internal Market

Restoring Article VI of the Acts of Union 1800



A

B I L L

TO

Make provision in domestic law for the supremacy of the Acts of Union

BE IT ENACTED by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Clause 1 – The Acts of Union

1

(1) Reference in this Act to the 'Acts of Union' means the Union with Ireland Act 1800, the Act of Union (Ireland) 1800, and the Union with Scotland Act 1707

(2) Every other enactment is to be read and shall have effect subject to the Acts of Union.

(3) A Minister of the Crown or devolved administration may not do any act that would be inconsistent with or create an incompatibility with any provision contained within the Acts of Union;

(4) Subsection (3) includes any act in exercise of the Royal Prerogative power

Clause 2- Northern Ireland

2

(1) In section 1 of the Northern Ireland Act 1998 –

(a) after subsection (1) insert-

"(1A) The expression 'part of the United Kingdom' in subsection (1) includes the continued application of the Union with Ireland Act 1800 and the Act of Union (Ireland) 1800.

(2) In section 6 of the Northern Ireland Act 1998 –

(a) after subsection (2) paragraph (f) insert –

"(g) it creates an incompatibility with any provision of the Union with Ireland Act 1800 or the Act of Union (Ireland) 1800"

(3) In section 24 of the Northern Ireland Act 1998 –

(a) After subsection (1) paragraph (e) insert –

"(f) is incompatible with any provision of the Union with Ireland Act 1800 or the Act of Union (Ireland) Act 1800

Clause 3 – Other Limitations in Interpretation of law

3

(1) In section 7A of the European Union (Withdrawal) Act 2018-

(a) after subsection (3) insert-

"3A This section is, and shall be read subject to, and as always having been subject to, the UK Constitutional Act 2023 (The Acts of Union)."

Clause 4 – Territorial definition of the United Kingdom

4

(1) The United Kingdom shall be defined as territorially encompassing Great Britain and Northern Ireland.

(2) Any judicial authority within the United Kingdom interpreting international provisions contained in any treaty, agreement or other relevant document shall apply subsection (1)

(3) Every enactment, whenever made, shall be read and given effect subject to subsection (1).

CENTRE FOR THE UNION
CONSTITUTIONAL STUDIES GROUP

'Restoring Northern Ireland's place in the Union' was commissioned by the Centre for the Union constitutional studies group and is authored by Jamie Bryson and Ethan Thoburn, with a foreword by eminent counsel, Mr James Bogle BL.

The proposals on the way forward include:

• A UK Constitutional Bill (a draft of which is included) which would entrench the supremacy of the Acts of Union; restrict the legislative competence of the NI Assembly to prevent the adoption of any provision incompatible with the Acts of Union; and amend section 1 (the principle of consent) of the NI Act 1998 to encompass the Acts of Union within the meaning of Northern Ireland remaining part of the Union.

• A model which would end the application of EU law in Northern Ireland by transposing EU law which currently applies in respect of NI- only in so far as it mirrors GB- into domestic law as Retained EU law and requiring that any further EU law adopted be subject to the cross-community consent of the NI Assembly.

• The development of a new regulatory model which restores NI fully to the UK's customs territory and creates an 'EU tunnel' which requires those exporting from anywhere in the UK into the EU via the entry point of the Republic of Ireland to self-declare, with criminal penalties for failing to do so, or for exporting without adhering to EU standards.

BY
JAMIE BRYSON AND ETHAN THOBURN

FOREWORD BY
JAMES BOGLE BL