

# ADDRESSING BREXIT PROBLEMS

This document has been prepared at the invitation of:

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## **‘ADDRESSING BREXIT PROBLEMS’: EXECUTIVE SUMMARY**

This paper (called ‘Addressing Brexit Problems’) takes political, legal and factual reality as its starting point. Brexit has happened. But what has happened to the UK as a result of Brexit? And is the identifiable damage that is being caused to many sectors of the UK – to British citizens and to the British economy – simply the unfortunate but inevitable consequence of the historic political choice made by the British people in the 2016 referendum?

Addressing Brexit Problems argues that that damage is not inevitable. The British people did not vote to be worse off when they voted for Brexit. Many of the adverse consequences – in terms of prosperity, opportunity, security, and (in short) jobs – result from government choices about the nature of the UK’s future relations with the EU. If pragmatic good sense were to replace purist ideology, many of the current problems would, to a significant extent, be capable of remedy.

The paper looks at a number of specific areas in which difficulties have arisen: the application of the Northern Ireland Protocol (the “NIP”), touring musicians, labour mobility rights for the under 30s, staffing the NHS, technical / scientific areas where duplicating standards results in unnecessary extra costs, trade, service sectors of the economy, and cooperation on security and intelligence. It outlines the mechanisms for negotiation and collaboration with the EU that already exist within the NIP and the Trade and Cooperation Agreement (the “TCA”) and argues that these should be put to systematic good use.

It also addresses briefly the issue of retained EU law (“REUL”), and suggests that the immense resources that will need to be devoted to eradicating or replacing REUL against a tight timeline would be better devoted, both to identifying genuine opportunities that Brexit has made available and to focusing our regulatory effort on resolving particular problems which Brexit has created.

Importantly, Addressing Brexit Problems does not try to ‘undo Brexit’. It urges the government to acknowledge the various problems frankly and to negotiate intelligently with the EU to achieve mutually advantageous solutions. The legal and administrative routes are already available. The UK’s political leaders and key players now require the political courage, in the national interest, to displease a faction of Brexit purists. The result will not be Brexit betrayal. It will be to palliate unnecessary damage, to promote greater prosperity for the UK, and to restore better relations with the UK’s near neighbours.



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## ADDRESSING BREXIT PROBLEMS

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### Introduction

1. As former British members of the two jurisdictions comprising the Court of Justice of the European Union (“CJEU”) in Luxembourg, we were naturally disappointed by the result of the Brexit referendum.<sup>1</sup> We are not here re-fighting the 2016 campaign. For present purposes we accept the political, legal and factual reality that Brexit has happened. This document is not a call to re-join the EU. Events since the UK left the EU on 31 January 2020 have, however, revealed various adverse consequences in terms of prosperity, opportunity, security, and (in short) jobs. The Brexit vote did not compel those particular consequences. Rather, they resulted from subsequent choices made by the government. In this paper we explore why some of those consequences have arisen and suggest pragmatic ways forward to undo unnecessary damage, promote greater prosperity for the UK, and restore better relations with our near neighbours.
2. The Brexit referendum was held on June 23, 2016. It was conceived to address a perceived discomfort about the UK’s position within the European Union and to end a specific Conservative Party controversy. No plan B was drawn up by the Civil Service to elaborate what Brexit would mean in practical terms or to outline alternative approaches. Prime Minister Cameron was so confident of a successful outcome (meaning, a vote for “Remain”) that no safeguard was deemed appropriate, such as a requirement for a super-majority in favour of “Leave”, or unanimity among the four nations of England, Scotland, Wales, and Northern Ireland. The referendum campaign itself was painfully unsatisfactory, being characterised by exaggerations and oversimplifications by all sides. Brexit was presented as a straightforward binary choice between gaining independence from an intrusive Brussels machine and remaining within a friendly, but democratically flawed, European Union.
3. What emerged was therefore a political consensus for *a* Brexit, but no consensus on what Brexit meant. Some 17 million voted to leave and some 16 million voted

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<sup>1</sup> We write this report in our personal capacities. We should like to thank those on whose research we have drawn; and those who, although their positions require them to remain anonymous, have nevertheless helped us with valuable comments and insights during the drafting process.

to remain. Although the polls are shifting,<sup>2</sup> they still show that a significant number of people would vote the same way as in 2016 were a new referendum to be held today. Brexit remains a polarising and divisive topic seven years after the vote.

4. The power vacuum that ensued after the vote in June 2016 was soon filled by confident assertions about what the British people had voted for. Understandably, those who regarded “Europe” as corrupt, bossy, interfering and insensitive to English traditions and merits were vociferous; and their sentiments as winners carried more weight than the Remain faction which had suffered an unexpected defeat.
5. Although some Brexiters (such as Daniel Hannan, one of the progenitors of Brexit)<sup>3</sup> had during the referendum campaign assumed that the UK would stay in the Single Market, such an approach was disparaged in the excitement of the victory. The country would no longer be “shackled to a corpse”.<sup>4</sup> “Global Britain” would be free to enter advantageous and more lucrative trading relations with distant countries such as the United States, Australia, New Zealand, and India.<sup>5</sup> Likewise, the end of free movement of workers would respond to electoral concerns about excessive immigration.<sup>6</sup> Yet others said that there was no point in doing a Brexit if that involved still accepting rules made in Brussels whilst no longer participating in the rule making.<sup>7</sup>
6. Thus, divergence from the European Union’s rules became an affirmative merit, a proof of independence, an opportunity to make new rules to satisfy the needs and aspiration of British voters.
7. We realise that those who voted for Brexit did so for a variety of reasons. Whatever the view, we are now seeing the consequences of leaving the European Union and starting a new relationship on the terms incorporated in the “Trade and Cooperation Agreement” (“the TCA”) and the special arrangements for Northern Ireland contained in the Northern Ireland Protocol (“the NIP”). Those consequences include certain specific problems. Whilst seeking solutions for those problems may be politically sensitive, the legal mechanisms for doing so already exist. They are described in more detail later in this paper.<sup>8</sup> In what follows, we

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<sup>2</sup> <https://whatukthinks.org/eu/questions/if-there-was-a-referendum-on-britains-membership-of-the-eu-how-would-you-vote-2/?removed>

<sup>3</sup> [https://www.huffingtonpost.co.uk/entry/open-britain-video-single-market-nigel-farage-anna-soubry\\_uk\\_582ce0a0e4b09025ba310fce](https://www.huffingtonpost.co.uk/entry/open-britain-video-single-market-nigel-farage-anna-soubry_uk_582ce0a0e4b09025ba310fce)

<sup>4</sup> [https://www.telegraph.co.uk/news/politics/9636417/Britain-shackled-to-corpse-of-EU-says-Douglas-Carswell.html?onwardjourney=584162\\_v3](https://www.telegraph.co.uk/news/politics/9636417/Britain-shackled-to-corpse-of-EU-says-Douglas-Carswell.html?onwardjourney=584162_v3)

<sup>5</sup> [https://publications.parliament.uk/pa/cm201719/cmselect/cmfa/780/78008.htm#\\_idTextAnchor03](https://publications.parliament.uk/pa/cm201719/cmselect/cmfa/780/78008.htm#_idTextAnchor03)

<sup>6</sup> <https://news.sky.com/story/theresa-may-says-ending-freedom-of-movement-is-top-priority-after-brexit-11568339>

<sup>7</sup> For commentary, see <https://ukandeu.ac.uk/sovereignty-and-brexit-control-of-what-exactly/>

<sup>8</sup> See paragraphs 71 *et seq.* below.

suggest that government policy should pursue specific objectives which do not question the political act of Brexit, but which do seek to palliate its adverse practical consequences in particular fields.

## **The immediate legal situation requiring to be addressed upon Brexit**

8. By way of background, we recall that the rules of the EU are made by consensus between national regulators from Member States which have decided to pool their sovereignty to reach rules acceptable to all Member States. Historically, the UK and France have been particularly successful in securing rules which match their national preferences, and which are technically appropriate.<sup>9</sup> The rules underpinning the Single Market, which previously applied in the UK as in all Member States, are often very technical and detailed.
9. It would have been infeasible, indeed dangerous, simply to deregulate these areas under UK domestic law when the UK left the European Union. After the referendum, fifty years' worth of collectively drafted legislation (EU law within the UK's national legal system) was therefore rebranded as UK law under the label of "retained EU law", thus solving the problem of apparent sovereignty.
10. However, since "retained EU Law" is an affront to some in the present government, it has laid before Parliament the Retained EU Law (Revocation and Reform) Bill which proposes to introduce a "sunset" expiry date for that entire corpus of law. Individual rules still deemed to be desirable will be retained and relabelled. By divergence from alien (and what Lord Frost describes as undemocratic) EU norms, those new-minted and home-grown regulations will afford a practical demonstration of regained sovereignty in action.
11. The exercise of that regained sovereignty comes at a price. For example, the UK chemical industry has lobbied against the adoption of new standards specific to the UK and claims to have spent £ 2 billion on complying with them.<sup>10</sup>

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<sup>9</sup> S.HIX AND S. HAGEMAN, DOES THE UK WIN OR LOSE IN THE COUNCIL OF MINISTERS?

[HTTPS://BLOGS.LSE.AC.UK/EUOPPLOG/2015/11/02/DOES-THE-UK-WIN-OR-LOSE-IN-THE-COUNCIL-OF-MINISTERS/](https://blogs.lse.ac.uk/euoppblog/2015/11/02/does-the-uk-win-or-lose-in-the-council-of-ministers/)

<sup>10</sup> <https://www.ft.com/content/f41e3350-c870-41a7-b350-80d3a483ef8d>.

12. It has been suggested that 20,000 civil servants will be required to review the corpus of 3,200 pieces of retained EU law <sup>11</sup> and, where it is deemed appropriate, to produce new regulations to replace those previously drafted collectively by the UK and EU27 experts.
13. The target is to complete this exercise by December 2023, and it would consume a high percentage of civil service and government activity during the year. The objective of the effort will thus be to endow the UK with new rules which apply only to the UK, making a deliberate virtue out of divergence and achieving political satisfaction for a particular, small, section of the Conservative Party. Failure to repeal retained EU law is said to be a betrayal of what the British people voted for. Since there will not be enough Parliamentary time to discuss the thousands of rules individually, Ministers will be endowed with the competence to repeal, re-enact, or modify norms governing many aspects of daily life. Ministers would thus be able to alter the rules on (for example) employment, water purity, animal welfare or pensions with no scrutiny or oversight by Parliament. Such executive licence is tellingly nicknamed the grant of ‘Henry VIII powers’. <sup>12</sup>
14. That exercise of repealing regulations which are necessary for public health and safety, but which have an EU origin, and (partially) replacing them with ‘Made-in-Britain’ versions to please Brexiters requires the investment of considerable analytical skills, time, and effort. We suggest that those could be better devoted, both to identifying genuine opportunities that Brexit has made available (e.g., gene editing), <sup>13</sup> and to focusing our regulatory effort on resolving particular problems which Brexit has created. <sup>14</sup>

## **The current economic position: a snapshot**

15. Sterling depreciated by about 10% after the referendum vote and has remained there, <sup>15</sup> with the result that imports have become dearer and wages lower in real terms. Raw materials have become more expensive. Inward investment has fallen due to the political turmoil affecting the economy: <sup>16</sup> since the Brexit referendum,

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<sup>11</sup> <https://www.theneweuropean.co.uk/bonfire-of-insanity-the-unwelcome-return-of-the-retained-eu-law-bill/>. See also <https://ukandeu.ac.uk/the-retained-eu-law-revocation-and-reform-bill/>.

<sup>12</sup> For a recent commentary, see <https://lawandlore.substack.com/p/here-is-evidence-that-we-are-moving>.

<sup>13</sup> J. Rutter, ‘Even Eurosceptics should be sceptical about the Retained EU Law Bill’ <https://www.ft.com/content/53894a09-396c-4d25-afa0-4361d6107989>.

<sup>14</sup> We note that our view appears to be shared by the Director General of the Confederation of British Industry (the CBI): see <https://www.cbi.org.uk/media-centre/articles/is-the-uk-stuck-in-a-rut-on-growth-speech-by-cbi-director-general-at-university-college-london/>.

<sup>15</sup> <https://www.bloomberg.com/news/articles/2022-09-22/pound-slump-this-year-has-surpassed-2016-brex-it-vote-hit-chart>.

<sup>16</sup> <https://www.piie.com/research/piie-charts/uk-and-global-economy-after-brex-it>.

Prime Ministers Cameron, May, Johnson and Truss have succumbed to that turmoil. The UK has become a less attractive platform for supplying continental Europe since the consequences of leaving the Customs Union and the Single Market include customs formalities, paperwork on rules of origin, border checks and the end of automatic recognition of product standards. While it is true that there are no tariffs on trade in goods between Germany and the UK, frontier formalities in the form of inspections, checks for health and safety, VAT/TVA recording (etc) have been established.

16. It used to be as easy to ship cheese from Stirling to Frankfurt as from Stirling to Bristol. Opting to leave the Single Market has served the political purpose of confirming that the UK is different. Many small or medium-sized businesses that used to depend on trans-border trade for a significant part of their turnover will also confirm that it has entailed the creation of fresh burdens which, in some cases, have posed a serious threat to their viability. Trading with customers located on the European continent has often become too cumbersome administratively to be worth continuing. This can be seen in the data: the number of small businesses which continue to export to the EU has dropped significantly.<sup>17</sup> Provision of services has become more difficult, in part because of the ending of free movement and in part because the TCA signed between the UK and the EU is so thin in its provisions on services.<sup>18</sup>
17. Unquestionably Brexit is not the only cause of the UK's current economic woes. The Covid-19 pandemic, Russia's invasion of Ukraine and soaring energy prices have also caused serious dislocation. But it is disingenuous to pretend that Brexit has played no part in generating specific present ills and instead to airbrush Brexit and its legal and economic effects out of the economic and political narrative.
18. In contrast, the fruits of Brexit seem thus far to be rather disappointing.
19. The use of imperial measures (pints, furlongs, ounces, miles, quarts, acres), as opposed to metric ones, is symbolic at most. The navy-blue colour of machine-readable passports does not shorten the queues at airports. Small businesses may relish the prospect of operating as part of Global Britain; but cannot presently export smoothly to their near neighbours in continental Europe. The EU, taken as a whole is the UK's largest trading partner. In 2021, UK exports to the EU were £267 billion (42% of all UK exports). UK imports from the EU were £292 billion (45% of all UK imports).<sup>19</sup>

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<sup>17</sup> R. Freeman et al, <https://blogs.lse.ac.uk/businessreview/2022/04/26/brexit-the-major-trade-disruption-came-after-the-uk-eu-agreement-took-effect-in-2021/>.

<sup>18</sup> <https://ukandeu.ac.uk/explainers/mobility-rights-for-service-providers-and-the-uk-eu-trade-and-cooperation-agreement/>.

<sup>19</sup> [https://commonslibrary.parliament.uk/research-briefings/cbp-7851/#:~:text=The%20EU%2C%20taken%20as%20a,%25%20of%20all%20UK%20imports\).](https://commonslibrary.parliament.uk/research-briefings/cbp-7851/#:~:text=The%20EU%2C%20taken%20as%20a,%25%20of%20all%20UK%20imports).)



20. Many thousands of EU 27 citizens departed the UK,<sup>20</sup> in part due to the hostility which emerged during the Brexit campaign, with the result that key trained workers were lost from the National Health Service,<sup>21</sup> and tons of fruit and vegetables rotted in the fields for lack of pickers from Eastern Europe.<sup>22</sup> The much-heralded new trade deals with other countries have likewise not delivered game-changing advantages.<sup>23</sup>

## The pragmatic way forward already exists

21. Re-joining the EU is not on the table at present. Nor are we here arguing for a renegotiation of the whole TCA, nor for its replacement by another agreement (Swiss-style or otherwise). The referendum campaign was painfully divisive and the coarsening of the dialogue about Brexit has not diminished. If the recent opinion polls are correct, there may conceivably be some growing appetite in the country for re-opening that wider debate; but this Brexit Commentary is not the place for doing so.

22. Rather, our present purpose is more circumscribed and more modest. We are convinced that some of the damage being done by the execution of Brexit thus far could be palliated without putting in question the political choice reflected in the Brexit vote. As Chancellor Hammond said, “the British people did not vote to become poorer”.<sup>24</sup>

23. Crucially, the technical apparatus (the legal tools and mechanisms) required to explore pragmatic solutions to a number of present problems in constructive discussion with the EU does not require to be invented. It already exists, written into the texts of the TCA and the NIP.<sup>25</sup> What is needed is the political will to make use of those tools and mechanisms.

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<sup>20</sup> <https://migrationobservatory.ox.ac.uk/resources/briefings/eu-migration-to-and-from-the-uk/>.

<sup>21</sup> <https://www.nuffieldtrust.org.uk/news-item/has-brexite-affected-the-uk-s-medical-workforce>.

<sup>22</sup> <https://www.bloomberg.com/news/articles/2022-08-15/uk-worker-shortage-leaves-60-million-of-food-to-rot-in-fields>.

<sup>23</sup> The **UK Government’s impact assessment for the Australia agreement** estimates the agreement will increase UK GDP by 0.08% or £2.3 billion by 2035. The overall **value of the agreement with New Zealand** is estimated to be lower, with UK GDP increasing by 0.03% or £0.8 billion by 2035: <https://research.senedd.wales/research-articles/the-uk-s-trade-deals-with-australia-and-new-zealand-what-do-they-mean-for-wales/>.

<sup>24</sup> <https://www.politico.eu/article/philip-hammond-chancellor-of-the-exchequerwarns-of-brexite-turbulence/>.

<sup>25</sup> See further paragraph 71 *et seq.* below.

## “Getting Brexit done”

24. We begin with three simple but important observations.
25. First, the period of negotiation leading up to the UK’s formal departure from the EU on 31 January 2020 was – understandably – characterised by tension and antagonism. Since that date, the UK’s relationship with the EU has sadly continued to be fractious and ill-tempered.
26. In particular, the present government has taken several steps – such as introducing draft legislation relating to the NIP to override obligations binding on the UK in international law – which has undermined the UK’s previous reputation for respect for law and for keeping its word. It appears to us that, overall, the government has cultivated a confrontational approach towards “our European friends”. If the UK is to engage in useful and productive discussions with the EU, these poisonous atmospherics must be remedied. Fortunately there are some signs that this is happening under the Sunak government.
27. Sadly, it may also be necessary to convince our European interlocutors that proposals for amendments put forward are genuine, and that the government will not change its mind once the new arrangements have been agreed. Recent suggestions from certain elements within government that although the UK signed both the NIP and the TCA, it never really intended to respect their terms in specific areas were – we speak deliberately and plainly – both an astonishing manifestation of bad faith (*mala fides*) and deeply damaging to the UK’s future credibility as a negotiating partner.
28. At the same time, ultra-Brexiter fears that some sacrifice, some betrayal of Brexit principles, must automatically be involved if the UK negotiates with the EU will need to be assuaged.
29. Second, we observe that every sovereign country in the world has agreed to be bound by certain international obligations that it considers to be beneficial to its interests. Thus, even North Korea agrees to membership of the International Postal Union. Sovereignty is not lost by making such arrangements. It is used, for a specific purpose. If the UK decides to agree amendments to the current arrangements under the TCA that it considers will be beneficial for UK businesses and nationals, it will not be surrendering or betraying its post-Brexit sovereignty. It will be exercising that sovereignty intelligently to further its aims and benefit its citizens.
30. Third, it is not realistic – and therefore not fruitful – to expect that the UK can simply present the EU with a shopping list of what it would like to have, and that the EU will automatically signal acceptance of that list. It is essential to remember that, just as the UK is proudly a free and sovereign State, so too the EU is a sovereign

actor, drawing on the pooled sovereignty of its 27 constituent Member States. We believe firmly that adjustments can be made that would be significantly more beneficial to both sides than the present position. That can only happen by negotiation (which will involve some give and take) on a basis of rational and truthful dialogues between equals with different yet legitimate goals which need to be reconciled.

31. Against that background, we turn to examine particular sectors of activity that present problems that we believe could profitably be addressed. We have chosen a limited number of policy areas which are currently topical and not merely theoretical, and where it is obvious that a solution would confer real benefits.
32. We have not sought to conduct a comprehensive analysis stretching across all economic sectors. Rather, we offer a number of illustrations. In some instances, we consider that the solution should be obvious and should fall under the heading “this is plain common sense”. But even where a particular matter has regrettably become tainted by ideology, it seems to us that there too a workable solution can probably be found provided only that the ideology can be put aside, in the national interest, to be replaced by good old-fashioned British pragmatism.
33. We begin with the highest profile and most contentious of the unresolved Brexit-related problems: the NIP.<sup>26</sup>

## **The NIP**

34. The Good Friday Agreement<sup>27</sup> of 1998 relied on the fact that both the Republic of Ireland and the UK were EU Member States. Both therefore were inside the EU Customs Union, and both shared the full set of Single Market standards. As the two adjoining countries were following the same regulations on such things as food safety and animal welfare, there was no need to verify the status of trade crossing the land border between the twenty-six counties of the Republic and the six counties comprising Northern Ireland. The frontier between south and north, with its associated checkpoints, could be made to evaporate and with it the manifestations of state power (and the ensuing flashpoints) at that frontier likewise disappeared.

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<sup>26</sup> Formally, the ‘Protocol on Ireland / Northern Ireland’ to the Withdrawal Agreement. The full text of the NIP is available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/840230/Revised\\_Protocol\\_to\\_the\\_Withdrawal\\_Agreement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf).

<sup>27</sup> Also known as the Belfast Agreement, signed on 10 April 1998; full text available at <https://www.gov.uk/government/publications/the-belfast-agreement>.

The diverging political sympathies of the two main communities in Northern Ireland could be accommodated without friction, because the heavy symbolism of the border had disappeared without any alteration in the legal status of Northern Ireland as a constituent part of the United Kingdom.

35. Once the decision was made to choose a form of Brexit that involved the UK leaving both the Customs Union and the Single Market, a physical and legal border somewhere between the EU and the UK became inevitable – and with the border, the associated checks.
36. Where to put that border? Restoring it to the old frontier on the island of Ireland risked jeopardising the Good Friday Agreement and re-igniting the Troubles. That was unthinkable. Once Northern Ireland was therefore granted a special dual status under the NIP (inside the EU Single Market but also inside the UK's customs territory), the only other place for the border was between Great Britain and Northern Ireland.<sup>28</sup> The volume of detailed paperwork and checks required, and hence how intrusive (or otherwise) that border is, depends on two factors. The first factor is the degree of alignment between UK standards and EU standards. As a third country – in EU legal parlance – the UK can choose to use its unquestioned sovereignty to maintain a common set of standards with the EU, or it can choose deliberately to diverge from those standards. The smaller the divergences the easier cross border trade becomes. The second factor is the perceived level of risk that goods which diverge from EU standards will be traded commercially into the EU single market via the “back door” of Northern Ireland.
37. The possible legal tools to address the problem are known both to UK civil servants and their EU counterparts who have worked on the NIP, and to external technical experts and commentators on trade law. Those tools include (for example) creating sophisticated databases accessible by the EU authorities to enable real-time monitoring of commercial imports into Northern Ireland from Great Britain;<sup>29</sup> or making a sanitary/phytosanitary agreement (a “SPS agreement”) that would obviate the need for a large percentage of the checks. The UK agreed on a particular solution (the NIP) following talks between Prime Minister Johnson and the Taoiseach, Leo Varadkar, an agreement since regretted by the current government. Both sides recognise the need to settle the matter. However, pursuing a negotiated settlement which will involve practical concessions by each side is potentially politically controversial. We are clear that the problem is essentially political, rather than legal.

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<sup>28</sup> See the discussion of the ‘Brexit trilemma’: <https://www.geg.ox.ac.uk/publication/brexit-impossibility-triangle>

<sup>29</sup> C.f. Article 12 of the NIP. Recent events are more promising in this respect: <https://www.theguardian.com/politics/2023/jan/09/ni-protocol-uk-and-eu-agree-deal-on-trade-data-sharing>.

The Protocol was signed by the UK and the EU as two sovereign powers. To implement it sensibly, those same two sovereign powers must engage in pragmatic negotiations.

38. We observe that progress will be easier if technical non-political matters are solved by minimising divergence. For example: does the UK really wish to have a different regime for food additives or animal welfare from the regime UK scientists earlier agreed with their scientific counterparts from the other 27 EU Member States? The less the divergence, the easier it becomes to solve the institutional questions.
39. Were some proposed future trading agreement with a major partner – for example, the USA – to be incompatible with such a SPS agreement with the EU, the UK would be free to decide in the exercise of its sovereignty whether it wished to give priority to the UK-USA trade deal and therefore to withdraw from the SPS agreement with the EU. (For example, the proposed new arrangement with the USA might allow hormone-fed beef or chlorine-washed chicken, both of which might be prohibited under the SPS agreement.) At that stage, it would of course become necessary to revisit the conundrum that gave rise to the drafting of the NIP: how to execute desired post-Brexit trade policy without jeopardising the Good Friday Agreement.
40. A particular institutional question is the controversy over the role of the ECJ under the NIP. We realise (of course) that in addressing this question we are likely to be viewed as not impartial. Both of us served, for varying lengths of time and in two different jurisdictions, within the Court of Justice of the EU (“the CJEU”).<sup>30</sup> But we are not here approaching the ECJ reverentially as some kind of sacred cow. We merely seek to draw attention to its constitutional role within the EU legal order, because that necessarily sets the parameters within which any intelligent, pragmatic discussion of the role of the ECJ under the NIP must take place.
41. The role of the ECJ in ruling on the interpretation and validity of EU law is assigned to it by the EU Treaties.<sup>31</sup> That role is an integral part of EU constitutional law, just as the role of the UK Supreme Court is an integral part of UK constitutional law.

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<sup>30</sup> The CJEU comprises the Court of Justice and the General Court. Since the former is normally referred to in the UK as ‘the ECJ’, we use that abbreviation here also.

<sup>31</sup> Specifically, by Article 19(1) TEU, which provides that, “The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.”

For EU customs law and EU single market law to work, there has to be a single, final court that decides on the meaning of the texts. That court is the ECJ. As well as deciding the big institutional questions, the ECJ therefore also rules on whether a Rubik cube is to be classified as a mathematical puzzle or a mere toy for the purposes of applying customs duty.<sup>32</sup>

42. Suppose that a UK toy manufacturer based in Glasgow makes model cars and exports them to Northern Ireland. Some of the models are sold there and are a great success; and soon the model cars are travelling by lorry in commercial quantities into the Republic of Ireland and finding their way into retail outlets in Dublin. Following a complaint, the Competition and Consumer Protection Commission (the “CCPC”)<sup>33</sup> investigates and decides that the model cars do not comply with the requirements of Directive 2009/48/EC (the Toy Safety Directive).<sup>34</sup> They should not be being sold within the EU Single Market. The CCPC orders measures to prevent the model cars being sold. It also points to the lack of proper checks when the model cars were imported into Northern Ireland – checks that, under the NIP, ought to have been carried out – as the reason why these unsafe model cars are entering the EU via the “back door” of Northern Ireland. In separate, unrelated proceedings, the Consumer Council for Northern Ireland (“CCNI”)<sup>35</sup> also investigates the model cars and reaches the same conclusion as the CCPC in the Republic of Ireland.
43. The Glasgow-based manufacturer indignantly retorts that its model cars are fully compliant with both UK safety standards and with the Toy Safety Directive, and that the CCPC and its counterpart the CCNI are simply misreading the directive. It therefore contests the findings in both jurisdictions. The judges north and south of the border before whom the two resulting cases are argued both find the text of the directive opaque. Each<sup>36</sup> therefore makes a reference to the ECJ under Article 267 TFEU, asking for a ruling on interpretation. Naturally enough, the ECJ handles the two references together and obliges with a ruling as to the proper interpretation of

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<sup>32</sup> Case 164/88 *Ministère Public v Rispal* [1989] ECR I-2041.

<sup>33</sup> See website at <https://www.ccpc.ie/>.

<sup>34</sup> Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys (OJ 2009 L 170, p.1), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0048&from=EN>. The Toy Safety Directive is listed under point 17 of Annex 2 to the NIP (“Provisions of Union Law Referred to in Article 5(4)”). Article 5(4) of the NIP states, “The “The provisions of Union law listed in Annex 2 to this Protocol shall also apply, under the conditions set out in that Annex, to and in the United Kingdom in respect of Northern Ireland.”

<sup>35</sup> See website at <https://www.nidirect.gov.uk/contacts/consumer-council-northern-ireland>.

<sup>36</sup> By virtue of Article 12(4) of the NIP, the ECJ has “the jurisdiction provided for by the Treaties” in respect of (*inter alia*) Article 5 and a Northern Ireland court can, in that context, use the procedure for making a reference for a preliminary ruling under Article 267 TFEU. The judge in Dublin is exercising his normal power under Article 267 TFEU.

the relevant provisions of the Toy Safety Directive. The two national courts then apply that ruling to the cases before them.

44. This is a straightforward, classic example of the ECJ performing its constitutional function within EU law. Whether the order making a reference for a preliminary ruling comes from Dublin or Douro, from Belfast or Berlin, it is essential to the functioning of the Single Market that there be one, authoritative, ruling as to what this particular EU law text (here, the Toy Safety Directive) means.
45. More generally, because Northern Ireland is in the EU Single Market by virtue of the NIP, much EU law applies in Northern Ireland.<sup>37</sup> However, EU law – like any law – may present uncertainties and its interpretation will need to be decided by a local judge. If that judge needs guidance as to how to interpret or apply a certain phrase, the competent court to give her that guidance is the one which makes rulings for the EU. Consistency is necessary. Conversely, when the Northern Ireland judge is applying UK law, the ultimate authority on the meaning of that law would be the UK Supreme Court.
46. We regard it as unrealistic to expect that the EU would agree to constitutional change within its own legal order in order to remove that essential role in relation to the interpretation of EU law in a territory (Northern Ireland) in which, because of the particular arrangements agreed and signed up to by the UK (the NIP), specific listed provisions of EU law have parallel effect and force alongside domestic (British) law.
47. That said, there may nevertheless be scope for thinking collaboratively about ways of delineating the ECJ's role in respect of Northern Ireland that offend neither objective UK sensibilities nor objective EU constitutional law concerns. One possibility (there may of course be others that are, or that could be, being discussed) might be that the general dispute resolution mechanism in the Withdrawal Agreement, which does contain a residual role for the ECJ, but starts with a more obviously political approach to dispute resolution, could be extended to the NIP.
48. Fortunately, it appears that progress is now being made to resolve this thorniest of the Brexit-related problems.<sup>38</sup> We hope fervently that those discussions come to fruition. Resolving the issues surrounding the NIP (even in outline only, with additional technical details to be added over the coming months) would represent a

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<sup>37</sup> See Annex 2 to the NIP.

<sup>38</sup> See Joint Statement by Vice President Šefčovič and UK Foreign Secretary Cleverly following their meeting in London (9 January 2023), available at [https://ec.europa.eu/commission/presscorner/detail/en/statement\\_23\\_101](https://ec.europa.eu/commission/presscorner/detail/en/statement_23_101), and the further Joint Statement following their video meeting on 16 January 2023, available at [https://ec.europa.eu/commission/presscorner/detail/en/statement\\_23\\_221](https://ec.europa.eu/commission/presscorner/detail/en/statement_23_221).

major constructive step forward towards restoring positive relations between the EU and the UK. We are convinced that that would greatly facilitate addressing some of the other problems that we now discuss.

## **Touring Musicians**

49. We turn from the NIP to an illustration that should surely be uncontroversial: the present plight of touring musicians (and actors, models and the like). Britain has an enviable reputation for developing musical talent, right across the spectrum of musical genres. But young musicians need to spread their wings, to get experience and exposure to build their reputations and their careers. Whether you play an electric or a classical guitar, whether you are a vocalist or a violinist, you need to get out there and perform to as wide and varied an audience, in as many different venues and countries, as possible. The same is (of course) historically true of composer-performers: Handel, Bach and Debussy all travelled widely to perfect their craft.
50. Musicians on tour are no threat to the “local” workforce. If anything, they “grow” the size of the market by enhancing variety and disseminating culture. But, of course, you need mobility rights to go on tour. If essential equipment is difficult to transport and is then held up in customs at destination, and you yourself cannot get the necessary visa to allow you to perform, the gig is not going to happen. Money is also, for young artists starting to establish themselves, a serious consideration. Where procedures exist but are both lengthy and expensive, the effect can be the same as a simple prohibition on touring.<sup>39</sup>
51. In March 2019, the Commission issued a paper in which it proposed that it should be permissible to provide paid services in this sector for 90 days out of 180. For whatever reason, the idea did not gain acceptance.<sup>40</sup> UK musicians wishing to go on tour must now comply with different administrative regulations in each of the 27 EU Member States and burdensome restrictions on transporting equipment.
52. A more sensible approach was evidently once being contemplated. Could a first step now be to re-examine this specific issue?<sup>41</sup>

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<sup>39</sup> For a careful analysis of the problem, see House of Commons Research Briefing 2 November 2022 Number 9658, Ilya Josepa, “Touring artists and the UK-EU economic partnership”, available at <https://researchbriefings.files.parliament.uk/documents/CBP-9658/CBP-9658.pdf>.

<sup>40</sup> According to Michel Barnier, the European Commission’s chief negotiator, the offer was rejected on the UK side of the negotiating table: see <https://www.politico.eu/article/michel-barnier-brexit-touring-artists-work-permit-visa-free-travel/> (article published 15 January 2021). Politico’s own account of what happened is at <https://www.politico.eu/article/how-eye-for-an-eye-brexit-talks-visas-hit-musicians-performers-arts-hard/>.

<sup>41</sup> For example: limited EU-wide visa free travel could be reinstated; and a customs bond could be required to guarantee the re-export to the UK of valuable equipment used for a tour on the Continent.



## **The “Erasmus” programme and, more generally, limited mobility rights for young people under 30**

53. The Erasmus programme brought tens of thousands of Continental students to UK universities and exposed UK students to foreign languages and to different academic approaches in Europe. The pursuit of Global Britain and the consequential favouring of links with New Zealand or Australia should not exclude the more realistic opportunity of travelling to study closer to home in Leiden or Bologna or Barcelona. Likewise, students from the EU27 desire to study in the English language and benefit from the leading centres of learning available in the UK.
54. Paris is closer than Melbourne. Brexit has not changed geographic reality. Any university lecturer can confirm that the embryonic Turing programme is far less attractive than the well-established Erasmus programme. Instead of denying that, HMG should explore a participation on terms to be agreed in the Erasmus system.
55. According to a recent study, the UK economy has lost hundreds of thousands of workers due to Brexit.<sup>42</sup> We suggest exploring a youth mobility programme, pursuant to which those under (say) 30 would have the right to travel and to work in the UK for up to two years without visas or permits; and their British counterparts would enjoy equivalent rights in the EU27. There is nothing in the TCA which excludes such a regime: to the contrary.
56. For example, it is evident that the UK hospitality sector is particularly damaged at the moment due to lack of staff. Pubs, restaurants, and cafes are closing for several days in the week. The British people did not vote to weaken the tourism and hospitality sector. A youth mobility programme would help to alleviate those difficulties. More generally, it would open up opportunities which are currently closed down due to the slow, costly and unpredictable processes by which visas are granted. Fruit would be picked, food would be cooked and served, and health sector gaps could be filled.
57. Clearly the government will have to balance the relative merits of breathing some oxygen into important sectors of the economy and the possible disapproval of a faction in the governing party which is opposed to migration for fear of “welfare tourism” or social non-integration. But those under thirty are, on the whole, likely to be economically active, to be healthy, to be net contributors to the public purse through taxes and social security contributions, and to be interested in integrating socially in the host country.

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<sup>42</sup> See Early impacts of the post-Brexit immigration system on the UK labour market | Centre for European Reform (cer.org.uk).

## The NHS

58. The NHS is enduring multiple crises, evident to all. Thousands of NHS staff left the UK for the EU27 after the Brexit campaign because they felt unwelcome and because prospects at home had got better. Some may wish to return. Others may wish to work in the UK. It is not the case that the referendum decreed that health workers from the EU27 must depart. As Secretary of State Rudd said in October 2016, “The test should ensure people coming here are filling gaps in the labour market, not taking jobs British people could do.”<sup>43</sup> At the same party conference, Health Secretary Hunt spoke about doctors and nurses from abroad working in the National Health Service. “Currently a quarter of our doctors come from overseas. They do a fantastic job, and the NHS would fall over without them. When it comes to those that are EU nationals, we’ve been clear we want them to be able to stay post-Brexit.”<sup>44</sup> So it is not the case that excluding European health workers was ever adopted by ministers as a Brexit goal.
59. The delays, uncertainties, and costs of a visa are serious obstacles to the recruitment of EU27 doctors and nurses (who could previously enter without incurring those costs). Creating more medical school places to train more home-grown doctors and nurses is a laudable target; but training, examining and certifying suitable candidates is a process that will take years, not weeks or months. We suggest that at least for the period of the current staffing emergency it is appropriate to open visa free entry for qualified doctors and nurses.

## Technical / scientific areas where duplicating standards results in unnecessary extra costs

60. The Thatcher government was instrumental in pursuing what became the Single Market. To create that extraordinary free trading space, literally thousands of rules were adopted at EU level governing matters which – as a matter of practical good sense – had to be regulated, in fields such as animal feed, pesticides, potentially toxic chemicals, vehicle noise, pharmaceuticals, environmental protection and food safety. These rules are often very technical and detailed, the fruit of lengthy negotiations between scientific experts, with annual adaptations to respond to technical developments and scientific knowledge.

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<sup>43</sup> <https://www.theguardian.com/uk-news/2016/oct/04/rudd-announces-crackdown-on-overseas-students-and-new-work-visas>.

<sup>44</sup> <https://www.gponline.com/read-jeremy-hunts-speech-four-year-nhs-service-overseas-doctors-full/article/1411054>.

61. We take just one example, from a totally non-political domain. The EU's Scientific Committee on Animal Nutrition adopts the list of permissible feed additives, aware of the dangers of inadequate regulation which led to the outbreak of Creutzfeldt-Jakob disease ("CJD" or "mad cow disease") among humans. UK scientists helped to draw up the list and to adapt it in line with scientific progress along with scientists from the 27 other Member States. Regular meetings update the list to take account of technical progress in veterinary medicine, toxicology, animal welfare and farming techniques. What real purpose would be served by drawing up a new and separate British listing to cover exactly the same substances?
62. More generally: manufacturers establish production lines that are geared to turning out products that comply with the technical requirements of the markets for which those products are intended. A manufacturer wishing to sell his products into the EU will necessarily organise his production line so that the resulting products comply with the prevailing EU standards. If a new set of British standards is adopted that deliberately diverge from those EU standards, that manufacturer will be faced with unpalatable choices. Does he retool and recalibrate his production line so as to comply with the new British standard and give up his EU export business? Does he decide to maintain his existing focus on the EU market and accept that he can no longer sell into his domestic British market? Or does he incur the (often very substantial) additional costs of setting up and maintaining two separate production lines to be able to comply with two divergent regulatory regimes?

## Trade

63. Ministers claimed that Global Britain would enter successful worldwide trading relationships. However, it is evident that there has been a sharp diminution of trading opportunities, especially for small businesses with a history of trading with European customers in such products as cheese, jewellery, fish, meat, wine and hundreds of other goods. It is true that post Brexit trade with the EU remained tariff free. The problems arise due to VAT formalities, customs procedures (these apply even if there is no tariff), health checks, and other formalities. Although the disruption of the early days has diminished, a number of businesses have given up exporting, while others have opened subsidiary operations in France, Belgium, or the Netherlands, in order to trade swiftly and efficiently. In the latter case, jobs that used to exist "onshore" in the UK have thus moved "offshore" to those distribution hubs within the EU.
64. It is pointless to deny that these difficulties have arisen. It is modest comfort to claim that all will be well once Global Britain's trade network bears fruit. An English wine trader or shirt maker may very reasonably wish to restore mutually profitable operations with known customers fifty miles away, rather than exploring chances in

Australia. Instead of discounting the existence or the seriousness of the problems, ministers should acknowledge them and explore solutions in a pragmatic manner. Since farmers and traders and small businesses in (for example) France likewise want to export smoothly to the UK, as in the past, there ought to be a mutual interest in finding a solution. Yet again, this is not to renounce Brexit but to pursue prosperity and employment by opening negotiations with neighbours who are geographically close at hand.

65. At the other end of the complexity scale, a modern motor car may consist of 35,000 components, which are produced and assembled and treated and adapted in successive plants. It used to be routine that wiring harnesses, lighting, gear boxes and exhaust systems and their components crossed several frontiers before being assembled into the final product in a modern car plant. While car companies have not yet left the UK, it is undeniable that the UK has become less attractive since its talented manufacturing sector lies outside the Single Market. Inward investment in the UK has thus become less attractive.
66. Claims in the media about so-called trade deals which by implication will fill the gap created by the loss of smooth access to European markets should be viewed with some circumspection. It was recently announced that there had been a “US trade deal”.<sup>45</sup> Had a trade agreement with the US indeed been concluded, that would have been of great national importance. The reality was that a “memorandum of understanding” (a “MOU”) had been signed with the US state of Indiana,<sup>46</sup> comparable to Finland’s MOU with the US state of Michigan.<sup>47</sup> Article 10 of the MOU with Indiana explains that the MOU is “not legally binding and does not create any legal, equitable or financial rights, obligations, or liabilities for the participants”. The same limitations apply to other MOUs with other US states. The MOU with Indiana contemplates friendly co-operation, close relationships, deepened economic development and removing barriers to trade. Precisely because it is not a legally binding document, such a MOU could have been agreed without leaving the EU.<sup>48</sup>
67. The importance of the new deal with Indiana is supposedly enhanced by the fact that the US is the UK’s ‘biggest’ trading partner. Statistically that is true, but only if the individual Member States of the European Union are counted separately. The

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<sup>45</sup> <https://www.express.co.uk/news/politics/1602685/us-trade-deal-news-brex-it-update-joe-biden-penny-mordaunt>.

<sup>46</sup> <https://www.bloomberg.com/news/articles/2022-12-07/uk-signs-third-us-state-trade-pact-in-absence-of-a-broader-deal?leadSource=uverify%20wall>.

<sup>47</sup> See [https://finlandabroad.fi/web/usa/current-affairs/-/asset\\_publisher/h5w4iTUJhNne/content/finland-and-michigan-lead-the-way-in-the-transition-towards-a-cleaner-economy/384951](https://finlandabroad.fi/web/usa/current-affairs/-/asset_publisher/h5w4iTUJhNne/content/finland-and-michigan-lead-the-way-in-the-transition-towards-a-cleaner-economy/384951).

<sup>48</sup> External trade, in the sense of the common commercial policy (“CCP”), is an EU exclusive competence: that is, the EU has exclusive competence to negotiate and sign legally binding agreements with third countries falling within the CCP on behalf of its constituent Member States (see Article 3 TFEU). As the existence of the Finland-Michigan MOU demonstrates, there is no bar to an EU Member State signing a non-legally binding MOU with (part of) a third country.

EU as a trading bloc is by far the UK's biggest trading partner.<sup>49</sup> We are obviously not criticising the existence of these friendly understandings. We are saying that problems close to home for producers and traders and farmers are real and that it is not a betrayal of anyone to seek to alleviate them.

## **Service sectors of the economy**

68. The great majority of the veterinarians who worked for the Food Standards Agency prior to Brexit came from the EU27.<sup>50</sup> The same applies, albeit less dramatically, in respect of fruit pickers, nurses, care workers, lorry drivers and various other service activities. While it is true that manufactured goods can be imported free of customs duty (but not free of the complications described above as to VAT, and customs formalities), the negotiations leading to the TCA delivered to the service sector much less assistance by way of protected opportunities. Doctors, architects, lawyers, electricians, plumbers, ski instructors and pilots are subject to rules about their qualifications, which are reinforced by recognition of those trained elsewhere. If the formalities were eased and if the UK signalled its readiness to receive qualified service providers, there would be opportunities for skilled persons from the EU 27 to come to alleviate the immediate labour shortage in the UK. UK nationals might also, in exchange, acquire opportunities to work in the EU.
69. We do not suggest repealing all constraints on inward migration. We suggest exploring a pragmatic solution. That might comprise, as a possible temporary measure, accepting without protracted formalities EU service providers who possess qualifications and skills that are needed, at least for a specified time period whilst the UK trains, upskills and finds technological solutions to address its labour needs. Such a pragmatic approach would ease the current labour shortages and inject some needed additional tax revenue into the public finances.

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<sup>49</sup> See paragraph 19 above. More generally, see Matthew Wood, Statistics on UK-EU Trade, 22 December 2022, House of Commons Briefing Paper CBP 7851, available at <https://researchbriefings.files.parliament.uk/documents/CBP-7851/CBP-7851.pdf>.

<sup>50</sup> For comment as to the shortage of veterinarians post Brexit, see <https://www.foodmanufacture.co.uk/Article/2022/10/17/uk-is-struggling-to-recruit-veterinarians-in-wake-of-brex-it>.

## Cooperation on security and intelligence

70. We make the brief but obvious point that, when Brexit was voted upon (2016) and duly came into effect (2020), no one envisaged that Russia would launch an invasion of its neighbour, Ukraine, on 24 February 2022. The ensuing months have brought into sharp relief the real need for intergovernmental cooperation between Western allies. Whether the appropriate forum be the newly fledging European Political Community or something else, we suggest that it is plainly in the interests of both the UK and the EU to deepen and enhance cooperation in this sector.

## Mechanisms for negotiation and collaboration

71. The draftsmen of both the NIP and the TCA foresaw that the UK and the EU would need to meet together to identify, discuss, and resolve practical difficulties arising from the application of legal texts designed to deal with an entirely novel situation. Accordingly, both the NIP and the TCA contain mechanisms that can be activated as required.
72. Thus (for example), Article 12 of the NIP contains structured arrangements for “implementation, application, supervision and enforcement”. Article 14 thereof gives the “Committee on issues related to the implementation of the Protocol on Ireland/Northern Ireland established by Article 165 of the Withdrawal Agreement” (the “Specialised Committee”) very wide powers to oversee the application of the NIP and to make any necessary referral to the Withdrawal Agreement Joint Committee.<sup>51</sup> There is also a Joint Consultative Working Group (Article 15 of the NIP).
73. Within the TCA, there is a hierarchy of bodies (all co-chaired by an EU and a UK representative): a Partnership Council, a Trade Partnership Committee, ten Trade Specialised Committees and eight other Specialised Committees (more can be created), four Working Groups, and (if desired) a Parliamentary Partnership Assembly. Annex 1 of the TCA contains the rules of procedure for the Partnership Council and the various committees.<sup>52</sup>
74. Our purpose here is not to weary the reader by discussing in detail the operation of any of these mechanisms. Our point is merely that they have been provided for by the treaty draftsmen; and that appropriate use can and should be made of them to

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<sup>51</sup> For the work of that committee, see <https://www.gov.uk/government/collections/withdrawal-agreement-joint-committee>.

<sup>52</sup> For more detailed information and the revised text of the TCA, see <https://www.gov.uk/government/publications/ukey-and-eaec-trade-and-cooperation-agreement-ts-no82021>.

resolve practical difficulties of the kind that we have sketched out above. If a problem is discussed in a suitable forum and a consensus emerges as to the way forward, the next question will be whether that solution can be accommodated within the existing texts. If it can, well and good. If not, a consensual proposal can be placed before the appropriate body to instigate the necessary amendment to those texts.

75. Seeking a negotiated solution is often presented as seeking concessions which our EU neighbours will be reluctant to grant; or which will make the UK appear weak, or a suppliant – an image of itself that a sovereign nation cannot possibly endorse. We believe that such a categorisation of the negotiating process is misconceived. A French producer of Brie de Meaux or an Italian producer of Gorgonzola is just as anxious to restore obstacle-free trade with customers in the UK market as his British Stilton-making counterpart is to re-establish his previous smooth dealings with customers in France and Italy. To use sovereignty to negotiate benefits for one's citizens and one's economy is to make the fullest intelligent use of that sovereignty.

## Conclusion

76. In this paper we have identified certain illustrative areas where the way in which Brexit has been implemented thus far has caused real economic and social damage. Attributing blame for what has happened is not useful. Recognising that the problems exist and realising that they are curable is essential if the UK is once again to thrive and prosper.
77. We believe it would be possible to make materially more advantageous arrangements without reversing Brexit and we urge those with political responsibility, in the national interest, to approach addressing those problems objectively and pragmatically, as we have sought to do here.



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30 January 2023