James Webber – Written evidence, dated 16 December 2021

European affairs sub-committee on the Protocol on Ireland/Northern Ireland.

Thank you again for the opportunity to give oral evidence to the committee on 1 December 2021. At Lord Hain's request, I am writing to explain my proposal for "Mutual Enforcement" as an alternative to the goods provisions of the current Protocol. This is a good faith proposal which I fully accept would need further work to operationalise. However, I do think it represents an intellectually coherent way to avoid the problems Lord Frost rightly identifies while protecting Ireland's place in the single market.

Also as agreed, I have shared this letter with my fellow witness, Dr Sylvia de Mars and have had the benefit of her input. For avoidance of doubt, the views expressed in this letter and any errors in it are my responsibility alone.

I also address Lord Empey's question to me with respect to use of the institutional structures of the Belfast (Good Friday) Agreement such as InterTradeIreland.

1. Mutual Enforcement Concept[1]

    a. Each side makes a reciprocal treaty commitment to enforce the rules of the other with respect to goods trade which crosses the border. Each side maintains autonomy – but commits to the enforcement of whatever rules the other seeks to impose in respect of goods crossing the border.

    b. On the UK side, this would require a UK Act of Parliament that operates in a similar way to s2 ECA 1972 but limited to goods exported to Ireland from the UK across the land border. UK agencies would need access to EU law and customs databases in order to be able to operate the rules for (and enforce against) economic operators in the UK. Disputes about the meaning of the relevant EU law would be referred by UK courts to the ECJ under a preliminary reference procedure.

    c. The Irish side would require the same. Create either in EU law

[1] This idea was originally described as "dual autonomy" in a paper published by Joseph H.H. Weiler, Daniel Sarmiento and Sir Jonathan Faull on Verfassungsblog – https://verfassungsblog.de/an-offer-the-eu-and-uk-cannot-refuse/

or in Irish domestic law the requirement to comply with UK rules and duties applying to goods exported to the UK from Ireland across the land border. Similarly, Irish agencies would need access to the UK rules and customs databases in order to be able to operate the rules for (and enforce against) economic operators in Ireland. Disputes about the meaning of the relevant UK law would be referred by Irish courts to the UK Supreme Court under a preliminary reference procedure.

d. A customs border post is usually the first (or main) opportunity that a territory has to assert their jurisdiction over goods movements – i.e., enforce their rules and collect their duties. The obligation to pay duties and ensure compliance rests with the importer, since this is the party within the jurisdiction of the importing territory.

e. In a Mutual Enforcement approach, the obligation to comply with the importing territory's rules and pay duties owed is placed on the exporter as a matter of law of the exporting territory. The importing territory relies on the structures of the exporting territory to obtain confidence that its rules will be applied beyond its border, in respect of exports from the exporting territory. By placing trust and confidence in the exporting territory, the importing territory can dispense with a customs border post to do this job. A practical example of this is developed in Annex 1.

f. Enforcement operates primarily within domestic legal system of UK and Ireland. This is used against individual traders for failure to comply with a rule that would be enforced at the border e.g. payment of duties or import of a product that does not comply with regulatory requirements. Detection of traders evading the system like this would work via i) identification of the likely arbitrage opportunities. In terms of customs duties these opportunities are reduced very substantially by the TCA, but may still exist where transhipment occurs (i.e. onward shipping of a good originating from e.g. China), anti- dumping, subsidy or safeguard measures are adopted by either side; ii) focused market surveillance on the arbitrage opportunities that exist; iii) record keeping requirements for traders operating across the land border – similar to those imposed on taxpayers – such that if non-compliant widgets are found in the UK or Ireland, they can be traced; iv) treaty obligations to share information to assist in law enforcement on either side.

g. For persistent breaches by each State – such as failure to adequately enforce against their own traders - enforcement would use the dispute resolution procedures of the TCA and the 'rebalancing' approach that that provides for.

h. The concept can apply to any rule that the importing state wishes to enforce at its border - except, importantly, those rules that themselves prescribe a particular mode of enforcement at the border such as SPS – discussed in section 3 below.

i. The solution is "legally operable" and leaves no gaps behind. In this way, it is of quite a different character to ‘Alternative Arrangements’, which were essentially a basket of legal, procedural, and technological customs facilitations.

2. Advantages vs Protocol

   a. Obligations and rights are in balance. The scheme is mutual – each side depends on the other. This removes the asymmetry and inherent instability of the Protocol.

   b. Mutual Enforcement as a legal matter applies to anyone exporting across the land border. As such it applies to the entire UK not just NI. As such, it removes Irish sea border within the UK, treats NI in the same way as GB and meets unionist objections to the Protocol.

   c. Removes the general application of EU law to NI, the imposition of which under the Protocol currently has no democratic oversight, representation or legitimacy. EU law would continue to operate in the UK, but only in respect of goods that cross the land border and – as such would be subject to EU law in any event. Mutual Enforcement therefore meets the democratic objections to the Protocol.

   d. Avoids any need for a hard land border. Each territory on the island of Ireland relies on the legal system of the other to enforce their rules on the trade in goods and does not need customs infrastructure at point of import. As such, it maintains the existing free flowing/infrastructure free border for goods and people, protects the single market and meets the central difficulty for the island of Ireland caused by the UK's withdrawal from the customs union and single market.

3. Sanitary and Phyto-sanitary ("SPS) controls

   a. Mutual Enforcement does not work well with current EU SPS rules. For this reason, objections to Mutual Enforcement are typically framed using SPS / agrifood examples.

   b. The reason it does not work well in this area is that these rules are highly prescriptive as to the *manner* of their enforcement. SPS rules require agrifood to enter the EU via a Border

Inspection Post ("BIP"). As such the BIP has to go somewhere to serve this purpose and we are unable even in a Mutual Enforcement environment to avoid border infrastructure.

c. One solution, from the EU's point of view at least, is for the UK to agree to align itself dynamically to EU SPS rules. If we could otherwise replace the Protocol with a Mutual Enforcement structure, there would be real merit to this idea in my view. I believe this was also the proposal of the Alternative Arrangements Commission but their report is no longer available online to allow me to verify this. EU SPS rules are associated in the public mind with high standards and there is little domestic political interest in altering them – even in order to win new free trade agreements.[2] It would also be strongly welcomed by the EU and as such likely ease the negotiation of a new Protocol based on Mutual Enforcement more broadly. Moreover the only jurisdiction for which EU SPS standards are likely to be a barrier in negotiating an FTA is the United States – which is currently a distant prospect anyway and is also itself heavily concerned with stability in Northern Ireland. It maybe possible to include a provision that allows for the UK to depart from an EU SPS agreement if the US notifies the UK that it that doing so is a condition of a UK/US FTA. This would place a degree of shared political responsibility for such a step on the US administration of the day.

d. An alternative way to handle SPS rules could be as described on the flowchart the following page. The objective is to provide a structured way for the UK to diverge and for measures to handle that divergence to be focused on the products where it occurs instead of across the entire sector, with remedies available to the non-diverging side to ensure their market did not have products that fail to meet their standards circulating. Crucially, this structure would not simply amount to simple reliance on market surveillance.

e. Even this however would require an amendment to EU law to remove the BIP regime for north/south trade on the island of Ireland. During the original negotiations, the EU successfully maintained that adjustments to its rules were impossible. Since then however, the EU has offered to alter its own laws to

[2] For instance during the passage of the Agriculture Bill last year, the Government explained: "This government has been clear it will not sign a trade deal that will compromise on our high environmental protection, animal welfare and food standards, and claims to the contrary are unhelpful scaremongering. We are a world leader in these areas and that will not change. Chlorinated chicken and hormone injected beef are not permitted for import into the UK. This will be retained through the EU Withdrawal Act and enshrined in UK law at the end of the transition period. The government is focused on getting trade deals that protect and advance the interests of our farmers and consumers. If a deal isn't the right one, we will walk away." Available at: https://deframedia.blog.gov.uk/2020/10/08/protecting-our-high-food-standards/

facilitate a settlement in Northern Ireland in the context of medicines.[3] This

proposal does not require the EU to alter its substantive SPS rules, rather the manner in which they are enforced on the island of Ireland.

[3] See for example paragraph 10 of the EU's non-paper on Medicines and the implementation of the Protocol on Ireland and Northern Ireland https://ec.europa.eu/info/sites/default/files/eu_non-paper-proposed-solution_medicines_en.pdf

Sanitary & Phytosanitary Controls in Northern Ireland – alternative to dynamic alignment

UK and EU agree to align their *current* standards. These will be specified in an annex to the agreement and comprise the baseline – to be adjusted via mechanism below

Divergence point (party has a new standard or party opts to diverge)

Non-diverging party can decide to match new standard

Yes

No

Non-diverging party grants *equivalence* of diverging party new standard

AND

Diverging party decision on *continuing equivalence* of non- diverging party standard

No

If equivalence denied by either party, the *other* party introduces labelling of now non-conforming plant / animal / agrifood product at risk of crossing border “Not for sale in [party denying equivalence]”

Labelling obligation to apply throughout supply chain, such that any product *containing* a non-conforming ingredient must be labelled “Not for sale in [party denying equivalence]”

Mutual Enforcement used to enforce against labelled non-conforming agrifood product throughout food chain to ensure not exported across the land border.

Live animals (except pets) tagged with country of origin.

Reflect same scheme as for other goods. Access to information / databases / audit and temporary official access

If additional supervision is desired, non-diverging side can trigger notice period and negotiation of *additional* controls beyond the mutual enforcement regime for other goods. e.g. behind border checks by non-diverging party, sealed trucks, farmer / agrifood producer ability to "opt in" to the regulatory regime of their customer with certified supply chains.

If no acceptable outcome can be delivered, each side has a right to trigger rebalancing negotiations within TCA. Leading to cross retaliation via tariff and rebalancing obligations as with LPF in TCA

4. Impact on British Sovereignty

a. Requires the UK to enforce EU law, and with EU law comes dynamic alignment (i.e. UK law will automatically track changes in EU law without separate negotiation) and reference to the CJEU in the event of uncertainty about the meaning of EU law. This is a significant concession by the UK - but unlike under the Protocol, this is not respect of all goods in NI, neither is it pervasive across the NI economy. It is only in respect of goods that actually cross the land border – i.e. goods that would be subject to those EU rules anyway (since the exporter has opted in to being subject to EU rules, by transmitting exports). It is also symmetric. It requires Ireland to enforce UK rules crossing to the same extent.

b. Mutual Enforcement depends on each side trusting the systems of the other. This trust is likely to require reinforcement through auditing and information rights, including by permitting officials to obtain information and ultimately ask to make observation (temporarily) on the territory of the other. Again, this would be mutual.[4] 4 Sensitivities associated with this; e.g. British officials present at Ireland's borders are obviously substantial. A way around that would be for each side to have the ability to nominate outsourced firms to undertake audits alongside colleagues from HMRC or Irish Tax & Customs to avoid the presence of uniformed customers in the other jurisdiction. Since the sensitivity goes both ways, it is likely that such rights would be used sparingly and responsibly – unlike under the current Protocol where the asymmetry allows EU / Irish officials to use inspection rights without any regard for Unionist sensitivity.

c. While lack of trust is cited as a major barrier to a new agreement, trust is required for operation of the current Protocol as well. The 'incremental' trust required for Mutual Enforcement is effectively zero, indeed arguably the mutual nature of the structure would give the EU a greater range of leverage points since it would be operating the UK's external border in return.

5. Anticipated Criticisms

[4] Given the sensitivity of UK officials attending at border posts within Ireland, the reciprocal nature of this right will act as a significant disincentive to its use.

a. Mutual Enforcement has never been formally proposed by the UK and as such has not been formally rejected by the EU. Nevertheless, it is sometimes criticised as unrealistic. It is very important to differentiate criticism that focuses on *practical* issues – i.e. would it leave enforcement gaps, be complex and costly etc – from issues of *political* acceptability.

b. I would encourage the Committee when collecting evidence or reflecting on Mutual Enforcement to focus on the practical workability of the idea. Only if it is workable does it become a political choice. But if it is workable, Mutual Enforcement has the ability to avoid a hard border on the island of Ireland while removing the Irish sea border and protecting the single market. At which point it is hard to see what legitimate political objection could be made to it, especially given the parties' common goal of protecting the Belfast (Good Friday) Agreement in all its dimensions.

c. Annex 1 contains a summary of criticisms of Mutual Enforcement I have encountered and a response.

6. Structures of the Belfast (Good Friday) Agreement ("GFA")

a. The GFA does not regulate trade in goods. Nor does it require the UK and Ireland's joint membership of the European Union in order to sustain an open border for trade in goods.

b. The GFA does require the UK to remove "security installations" – a term that is not defined but almost certainly includes customs infrastructure – or the security presence required to protect it. This obligation is not reciprocal. Mutual Enforcement's principal purpose is to avoid customs infrastructure without imposing a (now wholly foreign) law on Northern Ireland, so as to allow Northern Ireland's constitutional status within the United Kingdom to remain unchanged.

c. The objective of the Protocol at Art 1(3) refers to the GFA and says the Protocol should "*avoid a hard border and protect the 1998 Agreement in all its dimensions*". Notwithstanding this, the Protocol makes no reference to the institutional framework of the GFA.

d. The institutional framework established by the GFA – especially the British Irish Council (BIC) and the British Irish Intergovernmental Conference under Strand Three - provide an existing architecture to discuss issues arising from trade in goods between Northern Ireland and Ireland. The BIC mandate is very broad - to

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

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

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

f. This best endeavours obligations on Ireland and the UK to discuss these issues bilaterally under the GFA is ignored by the Protocol.

g. The Protocol also ignores the principle of cross-community consent embedded in the GFA in favour of majoritarianism in Article 18(5).

h. A new Protocol based on Mutual Enforcement could mandate a role for the BIC, prior to a relevant determination of the Joint Committee. A possible formulation which tracks consultative bodies within the EU may be "following consultation with and having regard to the opinion of the British Irish Council, the Joint Committee decides…" This would embed and respect the institutions of the GFA into the Protocol and enhance the working relationships required to make Mutual Enforcement work between the UK and Ireland.

i. Lord Empey asked whether another all-island body established under the GFA, InterTradeIreland could play a role in a Mutual Enforcement context. InterTradeIreland is a trade development body whose role is to facilitate trade on the island of Ireland. It helps small and medium-sized enterprises (SMEs) across the island with a wide range of services in particular to assist firms with growth, funding, capacity building and research and innovation.

j. IntertradeIreland would be very well placed to play a role in facilitating trade under a Mutual Enforcement – as explained in Annex 1 "How do lawful traders use the system?"

Thank you again for the opportunity to give evidence to your Committee.

I remain at your Lordships' disposal.

Yours sincerely,

James Webber

16 December 2021

Annex 1

Anticipated Criticism of Mutual Enforcement & Response

How does Mutual Enforcement stop smuggling without a border?

A custom border post is largely a one-shot enforcement opportunity as goods move from one side of the border (where they are lawful) to the other (where they are not). A Mutual Enforcement structure implies constant enforcement on both sides of the border. The good becomes unlawful on the exporting side of the border the moment it is exported in breach of the importing territory's rules. This approach could be expanded to catch inchoate and conspiracy offences as well. The importing territory benefits from the protection of the exporting territory's law enforcement agencies as well as its own.
The goods with which we are concerned are not illicit goods that are unlawful in each jurisdiction (drugs, counterfeit products, endangered species, etc.). Sheep meat or sofas that do not pay the required duty or comply with the relevant standards will be sold via normal distribution channels. Each side will know where the largest smuggling opportunities are (eg, where the greatest differential in duties or production techniques exists). Customs enforcement can require evidence as to from where such products were supplied and proof that duty was paid. This can be assisted by recordkeeping requirements, similar to those that exist in tax matters. Such enforcement informs a prosecution on both sides of the border. The supplier of the product is therefore prosecuted as opposed to just the buyer/importer under the normal arrangements.

This is a stronger enforcement mechanic than a border post offers.

To develop this in greater detail. Imagine a producer of widgets in the UK who wishes to sell into Ireland across the land border. As a matter of UK law those widgets therefore have to be produced to EU standards and CE marked. The starting point is that for the vast majority of goods – from child car seats to sofa foam to automotive components – the UK and the EU standards will be and will remain the same since both are members and cooperate still today in the European and international standard setting process.

Compliance with those requirements is done via self-assessment today. The UK would require a Mutual Recognition Agreement (similar to the arrangement the EU has with Japan, Australia and New Zealand) in order to be able to nominate notified bodies. Enforcement is then done by national authorities and notified bodies in exactly the same way as it is within the single market i.e. subject to the domestic law enforcement mechanics in the Member State in which the producer is established. In the event there is uncertainty over the rules, the UK courts would be competent to make a reference to the ECJ for preliminary reference – in the same way as a member state does today.

Producers who do not comply with EU standards and do not produce CE marked goods whose products are found to be on sale in Ireland will be vulnerable to removal from the market in Ireland, retailers being prosecuted in Ireland and the producer being prosecuted in the UK. This legal outcome is similar to what would occur if the Irish authorities discovered non-compliant Belgian or Bulgarian goods on the Irish market today.

Once a producer has made a compliant product, they then need to pay any duties owing before shipment to Ireland across the land border. Notwithstanding the TCA being zero tariff / zero quota FTA, there are still many goods shipments that may trigger duty payments, e.g. transhipped foreign goods, good subject to a trade defence tariff etc. These goods will need to have tariffs declared and paid to HMRC (on behalf of Ireland) before they are exported across the land border.

While it is true that a system that depends on declaration could be circumvented by those who do not declare, that is also true of the tax system generally. The solution – as with tax – is to ensure that economic operators are subject to record keeping requirements that enable the Irish and UK authorities to audit compliance with payment obligations after the event. As such, an Irish steel importer would if asked, need to be able to demonstrate where its stock came from and that correct duty had been paid. The importer is usually liable for payment of duties anyway. If that product originated from (or via) the UK and was subject to duties the importer would need to show that they had been paid. Crucially, if they have not been, that triggers legal enforcement against not just the importer but also the exporter from the UK – who has broken UK domestic law in exporting across the land border without paying Irish duties.

There is an implicit bargain embedded in this proposal. In return for giving up the opportunity to conduct a spot check at a customs border post, each side obtains a more effective enforcement tool against any non-compliance that is detected. Additional trust building measures could be agreed, permitting as the Protocol does now, short term visits to observe checks or to request information to undertake audits. This is particularly important for SPS compliance which requires a high incidence of physical checks.

This system requires both the UK and Irish authorities to have access to each other's customs systems. In this way each knows what is being declared and can see what goods are being exported to their territory –

in the same way as a customs border post would work – except effectively the exporter will be able to combine import and export declarations into a single interaction with the authorities in their home state.

How do lawful traders use the system?

Much of this is discussed above, but to reiterate, Mutual Enforcement removes the need for border infrastructure. It does not remove a trade border itself, remove tariffs or harmonise rules. Friction caused by these differences will persist, although Mutual Enforcement offers some mitigation opportunities.

The central control mechanisms to operate a border are the export and import declarations. Both declarations are based on the same transaction, which would joined in one procedure on the exporting territory side in a Mutual Enforcement structure. The exporting territory could apply the export procedures of its territory and in addition could apply the import procedures on behalf of the importing territory. The same basic data can be used in both declaration systems. Export customs authorities would also apply the regulations and taxation of the importing territory. There would be only one point where checks and inspections would take place. Duties would be collected from the exporter and paid to the importing customs authorities. Authorities would have access to the customs and regulatory declaration systems of the other territory to apply uniform procedures. This requires officials and data systems work collaboratively so as to provide data in the necessary formats. Import duties collected would be paid periodically to the other territory - or set off against duties owed in the other direction.

Helping exporters navigate this system on both sides of the border would be a good role for InterTradeIreland – as a single point of contact for both Irish and Northern Irish firms.

Why would the EU trust the UK to operate such a system – which is not in operation anywhere else in the world?

It is true that Mutual Enforcement is not used anywhere else. This is not a principled objection however to the unique circumstances of Northern Ireland in the context of the UK's departure from the EU's customs union and single market. The existing Protocol is not replicated anywhere else in the world either.

It is also true that Mutual Enforcement depends on a high degree of trust between the parties. However, all available solutions - whether proposed by the EU or the UK - have this feature:

- The previous Commission proposal of an 'NI Backstop' arrangement required the UK and EU to rely on the robustness

of each other's legal system to protect the boundary of the Single Customs Territory and apply the "common rulebook".
- The current Protocol depends on the UK authorities to police the border of the single market at entry points to Northern Ireland – and is frequently cited by EU politicians as a matter of trust.

Under Mutual Enforcement, both customs territories would have to trust each other's enforcement of customs regulations. Thus, a Mutual Enforcement system is fundamentally *mutual*, which increases trust and interdependence relative to the current Protocol where one side is in permanent tension with the other in enforcing asymmetric rights. An important characteristic of this approach is that exporters become liable in their own jurisdiction for failing to comply with the rules of the other jurisdiction.

The EU (or Ireland) would need to require goods leaving crossing the north/south border to comply with UK standards. Ireland could do this bilaterally without changes to EU law since goods exports (with the exception of dual use, trade sanction or export controlled products) would not be regulated by EU law.

Does the EU not have to offer the same on all its land borders under the WTO MFN principles?

Were Mutual Enforcement construed to grant favourable treatment to goods entering the UK from the EU (or vice versa), it would likely, as a formal matter at least, violate the Most Favoured Nation obligation of GATT Article I.

However, this could be readily justified under the essential security provision of Article XXI of the GATT. This allows the reasonable transgression of GATT rules on the basis of safeguarding public order. Since removing customs border infrastructure – and hence complying with the obligations of the GFA, is the stated goal there is an excellent argument that the type of favourable treatment anticipated by Mutual Enforcement is acceptable under GATT rules. The Mutual Enforcement procedure may assist in preventing any escalation of conflict associated with a full customs border and would likely be viewed as such by a GATT panel in light of recent WTO case law that demonstrates a deferential approach to Article XXI. Moreover, the current grace periods are also formal breaches of the MFN principle and have not elicited complaint from other WTO Members to my knowledge.

With an open border, Northern Ireland will need to remain under EU single market rules (such as State aid) to prevent the single market from being undermined?

Mutual Enforcement removes the need for customs border infrastructure for the specific circumstances of Northern Ireland – i.e. the means of control and enforcement. It does not remove a customs border as such. In this respect, there is no principled difference between the land border and the Dover/Calais border. The divergence and similarity in rules is identical in each case. As such there is no reason for the Level Playing Field requirements for goods in NI to be any different from the rest of the UK under the TCA.