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A. Effective Parliamentary scrutiny of the Joint Committee during transition and in relation to the Protocol

1. How important is the role of the Joint Committee in terms of decisions that need to be taken during the transition period? How can Parliament effectively scrutinise these?

2. How important is the role of the Joint Committee in terms of the application of the Protocol? In addition to the general powers of the Joint Committee set out in Article 164 of the Withdrawal Agreement, we note its specific powers in relation to the Protocol, provided in Articles 5, 6, 8, 10(2), 11, 12(3) and 13(4) of the Protocol.

3. Do you have any suggestions for how Government can facilitate effective Parliamentary scrutiny of the activities of the Joint Committee as regards Northern Ireland? For information, this letter was sent by eight Select Committee Chairs to the Chancellor of the Duchy of Lancaster on 24 March 2020.

4. How can Parliament effectively scrutinise the application of the following provisions relevant to the Protocol:

- **Article 164(5)(d) of the Withdrawal Agreement allows the Joint Committee to amend the Protocol, if such amendments are necessary to "correct errors, or to address omissions or other deficiencies". Suggestions should go beyond the established powers of this Committee to scrutinise the EU position in the Joint Committee (see this letter from the Committee to Mr Gove of 18 June 2020).**

- **Article 13(3) of the Protocol provides for dynamic alignment with EU law applying under the Protocol, when it is amended or replaced. Article 13(4) provides for the Joint Committee to decide whether new EU law which falls within the scope of the Protocol applies in NI.**

B. Application of EU Law

5. What is the extent of the application of EU law to Northern Ireland (NI) under the Protocol? What are the implications of this for UK Sovereignty?

5.1 See response to Question 14 below.

6. Can you give examples of where EU law could also apply to Great Britain (GB) under the Protocol (see also the specific question in the State Aid section below)?

6.1 See response to Question 14 below.

7. How will EU law apply under the Protocol, taking account both of Article 4 of the Withdrawal Agreement and the question of dynamic alignment with EU law?

7.1 Article 4 of the Withdrawal Agreement ("WA") is not specific to the Protocol but applies to all of the WA.

7.2 The provisions of the WA (including the Protocol) and any EU law provisions that the WA or its Protocols make applicable to the UK shall have "direct effect" if the nature of the provision satisfies the current test under EU law for direct effect. If a provision has "direct effect" it means that it can be relied upon directly in UK courts without the need for any UK legislation to transpose it into domestic law.

7.3 This has been implemented in the UK law via section 5 of the European Union (Withdrawal Agreement) Act ("EU Withdrawal Act"), which provides for "general implementation of the remainder of the withdrawal agreement". "Remainder" here means the parts of the WA outside the scope of the transition period (which is covered by the repealed European Communities Act 1972 (the 1972 Act). Section 5 (which technically works by inserting a new section 7A into the EU Withdrawal Act) uses wording that in substance is identical to Section 2(1) of the repealed 1972 Act to give general direct effect to the WA under UK law. Subsection 7A(3), echoing the substance of the wording in Section 2(4) of the 1972 Act, also says that "Every enactment… is to be read and have effect subject to" the directly effective provisions. Section 5 of the EU Withdrawal Act, therefore, continues the Factortame[1] doctrine under UK law in relation to those aspects of the WA that persist after the end of the transition period. Future UK Acts of Parliament that are held by the UK courts following binding European Court of Justice ("ECJ") guidance to be contrary to the persisting parts of the WA will still be struck down and rendered ineffective by the courts.

[1] In the well-known *Factortame* case in 1990, the House of Lords disapplied a UK Act of Parliament intended to protect the British fishing industry, following the ECJ's ruling that the Act conflicted with the EC Treaty. This case made clear to all that our membership of the EC required the UK to over-ride our constitutional principle of Parliamentary supremacy, and have UK courts overturn Acts if they are found to conflict with EC law (now EU law).

7.4 Exactly as when the UK was a Member State, EU provisions within the WA (including the Protocol) shall have primacy over all UK laws, including Acts of Parliament subsequent to the date of the WA, which must be set aside by UK courts if found to be incompatible with any directly effective provision.

7.5 In interpreting the meaning of the WA, its Protocols, or any EU law provision that they apply to the UK, the UK courts are bound by ECJ judgments rendered up to the end of the transition period and must pay "due regard" to ECJ judgments rendered after that date (note there is no provision under which the ECJ must pay due, or any, regard to UK court decisions, in contrast to normal international treaty practice under which the courts of co-signatories to a treaty will look at each other's judgments and try to produce consistency of interpretation if possible).

7.6 With respect to State aid, dynamic alignment for future changes in EU law has already been conceded for the entire UK under Article 10(1) of the Protocol in respect of measures that the European Commission ("Commission") or ECJ considers in their sole discretion might have an effect on "trade subject to this Protocol".

7.7 Dynamic alignment for the rules on industrial goods and agri-food is established in NI pursuant to Article 13(3) Protocol.

7.8 “Due regard” to subsequent development of EU law is the route by which dynamic alignment will be attained for all other areas of EU competence via the courts. Unless there is a clear Parliamentary decision to depart from ECJ rulings, “due regard” is an instruction from Parliament to the courts to follow ECJ norms as they develop – this is distinct from an unincorporated treaty or customary international law where there is no expectation that the courts should follow international norms as they develop2.

8. To what extent, if any, does the application of EU law under the Protocol constrain the legislative freedom of the UK after the transition period?

8.1 In ratifying the WA and passing the EU Withdrawal Agreement Act, Parliament has ceded sovereignty within NI in respect of those areas governed by the Protocol as a matter of both domestic and international law.

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[2] See L.Q.R. 2008, 124(Jul), International law in domestic courts: the developing framework, Philip Sales & Joanne Clement.

8.2 The UK will also be unable in practice to sensibly enact a subsidy control regime that is distinct from the EU. Doing so would create two systems of overlapping subsidy control. A given measure could be subject both to the UK domestic regime and the supervision of the Commission under Article 10 of the Protocol. There would be no point the UK regime being different (or more accurately more liberal) than the EU regime since the measure would be prevented or modified to achieve compliance with the EU requirements anyway.

9. To what extent, if any, does the application of EU law to NI under the Protocol constrain the freedom of the UK to negotiate whatever trade deals it wants with other countries or how these deals will apply in NI?

10. What are the EU mechanisms for enforcement and supervision of the UK's obligation to apply the provisions of EU law applying to NI under the Protocol? How strictly do you expect them to be exercised?

11. What is nature and extent of the jurisdiction of the Court of Justice (CJEU) under the Protocol?

12. How well-understood is the extent of Article 13(2) requirement to interpret EU law-based provisions or concepts in conformity with case law of the CJEU, including judgments delivered after the end of transition?

C. <u>State aid in the Protocol</u>

13. What is the nature and extent of the application of EU laws on state aid to NI under the Protocol?

13.1 See response to Question 14 below.

14. Article 10 of the Protocol applies EU laws on state aid to UK measures which "affect trade" between NI and EU which is subject to the Protocol. To what extent could EU state aid laws also apply to GB, particularly considering the role of the CJEU in interpreting that concept?

14.1 The effect of the Protocol is to apply EU State aid law (dynamically aligned and subject to full Commission and ECJ jurisdiction) to the whole UK – provided the measure in question affects trade in goods between NI and Ireland. The meaning of "affects trade" is to be determined by the Commission and ultimately the ECJ. There is no formal role for UK

institutions in determining the meaning of the EU's jurisdictional perimeter.

14.2 This will create very significant difficulties for UK government. Imagine a UK government wishes to support Nissan in Sunderland. The Commission would be entitled to be notified of that intention and to prevent the subsidy entirely or require changes so as to protect the interests of EU competitors. It is also worth recalling that the Commission is under no equivalent obligation to consider the effects on the UK of such subsidy granted elsewhere in the EU. Should the UK Government refuse to notify, the subsidy could be readily stopped by the Commission or a competitor (via the English courts). The obligation to notify the Commission has direct effect and is therefore enforceable directly in the UK courts under the mechanisms described above. The UK courts would likely need to issue an injunction preventing the subsidy proceeding until the Commission had been notified and had approved.

15. How, if at all, could the state aid provisions in the Protocol be renegotiated or superseded as part of the future relationship negotiations (see Article 13(3)). Could alternative arrangements for NI-Ireland trade replace the Protocol?

Alternative approach to State aid

15.1 In my view, the full extent and significance of Article 10 of the Protocol was not appreciated at the time it was negotiated. The UK's acquiescence to it was a significant failure of Government and Parliamentary scrutiny. That failure can and should be assertively remedied now by replacing Article 10 with an alternative compromise position for subsidy control in a UK/EU FTA. Appropriately designed, such a structure would be more than sufficient to assure the EU of a level playing field. I described this in detail in my recent blogpost for the UK State aid Law Association[3].

15.2 One important and often overlooked issue is that the EU definition of State aid cannot simply be cut and pasted into the FTA. It brings with it confusion and legal uncertainty from ECJ jurisprudence that was developed to use State aid as a tool to perfect the single market. That imperative – while understandable in an EU context - is completely irrelevant to a trade agreement with the UK.

15.3 In my view, specificity – one limb of the legal test for aid and the most significant in tax and infrastructure cases – should have its traditional meaning in the subsidy control provisions of the UK/EU FTA whereby a

[3] See https://uksala.org/compromise-position-for-subsidy-control-in-a-uk-eu-fta/.

measure is specific if it is not generally available. Recent ECJ case law – mainly in an attempt to tackle distortions to the single market caused by disagreeable tax measures (especially in Ireland, the Netherlands and Luxembourg) – has tried to redefine specificity by moving away from a test of availability and considering whether the measure is an exception to a "reference framework". This change introduces a great deal of complexity. Broadly speaking, a measure is considered specific if it deviates from a reference framework where that deviation is not justified by the 'objectives' of the reference framework. But what does that mean? Are a series of tax provisions that differentiate between two taxpayers considered together as 'the reference framework' – if so there is no exception or deviation that could be considered a specific measure? If they are considered separately, then the inevitably more generous treatment of one taxpayer over another is an "exception" to the reference framework, which must be justified. How can we predict whether the Court or Commission will consider the exception to be justified by the objectives of the reference framework? Indeed do we even know what the objectives are? In the *Brauereri* case, Germany, the Commission and the taxpayer had three different (but arguably equally valid) views on what the 'objectives' of the tax measures in question were.

15.4 It becomes excessively difficult to predict whether a measure is a subsidy or not, such that the legal certainty of corporate taxpayers depends to an unacceptably large extent on an ex post view of the Commission and Court as to what the perimeter of the 'reference framework' is. There's no precedent for or merit in importing such a complex and incoherent assessment into a trade agreement.

15.5 The other area where the EU definition of State aid cannot be used in a UK/EU FTA is in relation to effect on trade and competition. While these are two separate limbs of the formal definition of State aid in the Treaty on the Functioning of the European Union ("TFEU"), they do not have either a separate or practical meaning. According to established ECJ case law, any aid measure in a market open to competition can affect trade and competition – regardless of whether there is any actual such effect.

15.6 In my view, the subsidy control provisions of an FTA with the EU should only bite on subsidies that appreciably distort competition between the UK and the EU. Effect on competition and trade can be dealt with in the FTA using the following framework[4].

[4] It is worth noting that – as with EU State aid currently – it is not necessary in my view to attempt to separate the analysis of trade and competition for this purpose. The concepts are best understood and assessed together.

15.7 First, safe harbours should be agreed *which would not lead* to appreciable effects on competition and trade. This will include any aid below a sum, indexed each year. This sum would have to be material – say in order of €50/€75 million per measure. In addition, categories of aid should be noted as not liable to affect competition and trade, for instance competitively tendered infrastructure projects or aid for non-traded goods and services (such as toll roads, 5G rollout, or railway franchises).

15.8 Second, there should also be features which *would lead* to appreciable effect on competition and trade. These could track what the Commission currently calls "manifest negative effects" in its common assessment principles (such as aid explicitly to move jobs or investment from the UK to the EU or vice versa) or, alternatively, aid that is demonstrably unnecessary (such as that paid to support investment where the decision to invest had been made before aid was offered).

15.9 Third, aid outside the safe harbour but not caught by manifest negative effects would be subject to an assessment by each parties' domestic authorities regarding the effect on trade and competition. At the level of determining whether a particular measure is a subsidy / State aid, such an approach is alien to the EU since the effect on trade and competition criteria in Article 107 TFEU do not have a practical meaning. This said, the Commission's compatibility assessment (i.e. once aid is notified is it permissible) does look more closely at effects on competition – and the State aid modernisation process over the last decade or so has increased the use of economic analysis to assess effects.

15.10 Analytically, therefore, it is perfectly possible to assess the effects on competition and trade of a subsidy. It would require the CMA (in my view the most desirable competent authority for investigating subsidies in the UK) and the Commission to investigate and find a reasonable likelihood of trade and competition distortion – a similar evidence-based, forward-looking analysis as used in the merger regime.

15.11 If either party considers a competitive effect exists that disturbs the level playing field, and which is not justified by an objective of common interest, it could take unilateral action.

15.12 First, they have the right to appeal through each jurisdiction's domestic courts. The effectiveness of the system would be enhanced if private parties from each jurisdiction could also bring such claims in the domestic legal system of the UK and before the CJEU respectively.

15.13 Second, each side would also then retain unilateral tariff measures to permit proportionate retaliation. Such countermeasures are to the fullest extent possible focused on the same beneficiary or sector that received the aid complained of and should be proportionate, meaning they should not exceed the harm caused to competition by the subsidy complained of – again taking into account any objective of common interest.

Alternative proposal for NI-Ireland trade

15.14 The State aid provisions of the Protocol cannot be changed in isolation. They are there in the first place because NI is functionally within the single market and customs union and must therefore follow its rules. To remove the State aid provisions, the trade in goods provisions also need complete revision to move the trade border from the Irish Sea to the land border between NI and Ireland. Taking NI out of the single market and customs union and allowing to be treated in the same way as the rest of the UK.

15.15 This however recreates the original problem of avoiding a hard land border – something both sides have rightly committed to avoid. I explained how this could be achieved in the recent Centre for Brexit Policy Paper, "Replacing the Withdrawal Agreement" at p.54 onwards[5], in particular through the concept of "mutual enforcement".

15.16 Mutual enforcement refers to each side making a reciprocal legal commitment to enforcing the rules of the other with respect to trade across 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.

15.17 It works by inverting the usual approach to customs enforcement.[6] In a mutual enforcement approach the obligation to comply with the importing territory rules and pay duties owed is placed on the exporter as a matter of law of the exporting territory. The importing territory can therefore assert its jurisdiction (i.e. enforcing standards and collecting duties with regard to imports) beyond its own border. Provided the importing territory can rely on the legal system of the exporting territory – the critical ingredient – the border post becomes redundant.

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[5] See: https://centreforbrexitpolicy.org.uk/wp-content/uploads/2020/07/REPLACING-THE-WITHDRAWAL-AGREEMENT-How-to-ensure-the-UK-takes-back-control-on-exiting-the-transition-period-12-July-20.pdf

[6] Typically where there are two distinct customs territories (even between those with an FTA) customs border infrastructure is necessary as this is the first opportunity that either side has to assert their jurisdiction (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 to the transaction which is within the jurisdiction of the importing territory.

15.18 The key benefit to this approach is that it is a purely legal concept that can apply to any rule the importing territory wishes to enforce at its border – it is "legally operable" and leaves no gaps behind.

15.19 This approach could be used in conjunction with alternative customs facilitation techniques to ease administrative burden, such as AEO (trusted trader), economic zones, and exemption schemes.[7]

15.20 A mutual enforcement structure removes the border post, but rather than increasing smuggling risk, it is likely to be more efficient than a border post at detecting and deterring those who do not wish to comply with the law. The supplier of the product can be prosecuted as opposed to just the buyer/importer as at a customs border. This is a stronger enforcement mechanic than a border post offers. Customs enforcement can require evidence of where such products were supplied from and 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.

16. What, if any, flexibility will there be for UK state aid measures which may still need to be introduced in the wake of the COVID-19 crisis and which are caught by the Protocol?

16.1 The UK would be subject to the same EU rules on State aid so to the extent these give flexibility to introduce measures in the wake of COVID-19 these would apply also to the UK.

D. <u>Legal certainty and potential disputes arising from the Protocol</u>

17. What, if any, legal difficulties are created by the Protocol providing for NI being part of the UK customs territory, yet applying EU customs and goods- related law to NI?

17.1 See response to Question 18 below.

18. What, if any, legal difficulties are created by the Protocol providing for protection of the UK internal market (unfettered market access for goods moving from NI to GB), yet allowing for regulatory divergence between NI and the rest of GB?

18.1 The Protocol does not respect either the UK or the EU's legal order. For the UK, it involves conceding large areas of sovereignty over – at least – NI. The Protocol applies the single market for goods in NI; EU law will

[7] For example, an AEO (trusted trader) scheme may allow qualifying companies to self-certify and account for duty on a periodic basis – rather than in advance of every movement of goods across the border.

have direct effect and supremacy over UK laws (whether passed by the Westminster Parliament or the NI Assembly) and will be subject to Commission oversight and enforcement and full direct ECJ jurisdiction. See also response to Question 14 above in respect of State aid.

18.2 For the EU, it involves a potentially permanent arrangement under the inadequate legal basis of Article 50 TEU and ceding control over the border of the single market to the UK.

18.3 The Protocol reflects the EU's decision (and the UK's acquiescence) to sequencing the negotiations. Since the EU was not prepared to negotiate a permanent trade relationship during the Article 50 process; it became necessary to obtain an insurance policy in the WA. This would prevent a hard border in NI – in all circumstances – even in the event that the future trade negotiation failed.

18.4 The final Protocol however did not achieve that. First, it is nominally a permanent fixture even with a trade deal in place – not an insurance policy in the event one could not be achieved. Second, the consent mechanism means that it can be unilaterally rejected by a simple majority of the NI Assembly.

18.5 The Protocol needs to be replaced by an agreement that governs the trading relationship between the UK and EU. That relationship also needs to ensure that there is no hard border on the island of Ireland. See question 15 above for an alternative proposal.

19. The UK and EU are taking different approaches to the question of when goods moving from GB to NI are "at risk" of onwards movement into the EU and therefore liable to tariffs. This also involves interpretation of the concept of "processing".

- **What are the respective legal merits of those approaches?**
- **The Joint Committee is tasked with deciding what are the "at risk" criteria. How easily can it reconcile the two conflicting approaches?**

19.1 Application of the UK legal obligations under the Protocol leads to a number of problems for the UK.

19.2 The Protocol establishes a customs border within the UK for goods trade between NI and GB. Goods going into NI from the mainland will be subject to EU mandated customs checks and tariffs.

19.3 The EU (via the Joint Committee) will decide which goods are not at risk of entering Ireland from NI and can therefore be exempt from EU tariffs on entry – or have them repaid. Article 5(2) of the Protocol is clear that all goods are potentially at risk, until the Joint Committee decides otherwise. Decisions in the Joint Committee are subject to independent arbitration, with the ECJ ruling on matters of interpretation of EU law. As a legal matter therefore what is deemed 'at risk' is effectively for the EU to determine, although the UK is responsible for the practical implementation. These requirements will add a significant burden to NI business, act as a disincentive to intra UK trade and being under EU and ECJ control will demoralise the Unionist population. For example, if NI consumers are unable to access UK branches of EBay and Amazon without extra administration, it would add to the feeling they are not full members of the UK's single market. Likewise, NI fishermen would be required to face a customs and regulatory border - effectively paying tariffs and complying with import quotas to land fish in their own home ports – unless the EU acquiesces in the Joint Committee to treat such fish as for UK consumption.

20. The UK and the EU are taking different approaches to the need for export/exit summary declarations for the movement of goods from the NI to GB. What are the respective legal merits of those approaches?

21. Is it clear whether "services" are caught by the Protocol at all and if so, to what extent? For example, where EU law applicable to NI under the Protocol applies not only to goods but also to services? Is there any difference in the EU and UK positions on this?

21.1 The Protocol does not apply to services. I'm unaware of there being any difference in the UK and EU position on this.

22. Can you give other examples of where there is a lack of legal certainty in the Protocol?

22.1 The definition of State aid (as contained in the TFEU and interpreted by the ECJ), which Article 10 of the Protocol imports back into UK law (see response to Question 14 above), is inherently uncertain in two respects.

22.2 First, the concept of 'specificity' – as mentioned in the response to question 15 above is inherently uncertain. Specificity is the term used in subsidy control to separate measures that are normal public policy (corporation tax rates or decisions to build a new motorway) from subsidies to a company. Historically whether a measure was specific was

measured against availability. If it was generally available then it was not specific. As described in response to Question 15 above, recent ECJ case law – mainly in an attempt to tackle disagreeable tax measures – has tried to redefine specificity by moving away from a test of availability and considering whether the measure is an exception to a "reference framework". This change introduces a great deal of complexity. Broadly speaking, a measure is considered specific if it deviates from a reference framework where that deviation is not justified by the 'objectives' of the reference framework. What does that mean? Are a series of tax provisions that differentiate between two taxpayers considered *together* as 'the reference framework' – if so there is no exception or deviation that could be considered a specific measure? Or do we pick out the provision that treats taxpayers in a certain situation more generously and say that is an 'exception' to the reference framework? If the latter, how can we predict whether the Court or Commission will consider the exception to be justified by the objectives of the reference framework? Indeed do we even know what the objectives are? In the *Brauereri* case, Germany, the Commission and the taxpayer had three different (but arguably equally valid) views on what the 'objectives' of the tax measures in question were. It becomes excessively difficult to predict whether a measure is a subsidy or not.

22.3 Second, recent ECJ cases have also started to see a confusion develop between the concept of advantage and specificity. In these cases, the existence of an advantage results in a *presumption* of specificity – effectively merging the previously separate criteria together. This is also very undesirable. Specificity is a vital and separate element in the test for State aid. For example, a business may get an obvious advantage from a new motorway junction or flood defences built on the seaward side of their premises. However, it is inappropriate to claw that cost back from the business concerned after the event – which is the implication of finding the advantage is *specific* and therefore State aid. The business concerned may not even have been asked. Had it known the risks, it may have preferred the extra costs of driving to the next junction or flood insurance etc.

22.4 In my view, and as described in response to Question 15 above, Article 10 of the Protocol should be replaced by an alternative compromise position for subsidy control in a UK/EU FTA[8].

[8] See https://uksala.org/compromise-position-for-subsidy-control-in-a-uk-eu-fta/.

23. To what extent are any of these issues specifically identified as a matter for the Joint Committee to determine under the Protocol?

23.1 See response to Question 18 above.

E. Constitutional implications of the Protocol for the status of Northern Ireland

24. What is the potential for divergence between laws in NI and GB as a result of the Protocol and what implications does divergence have for the legal and constitutional coherence of the UK?

24.1 The Protocol would over time, if allowed to become permanent, realign NI away from the UK's single market and towards the EU's Single Market. This is despite the EU's commitment under paragraph 17 of the Political Declaration to respect the UK's single market[9]. It is unclear how any non-EU compliant mainland goods going into the province would be treated. In general, goods could not be marketed within NI if they do not comply with the EU laws in Annex 2 of the Protocol – as amended and replaced from time to time. Uncertainty and costs would disincentivise mainland companies' trading with the province and further alienate NI from the UK's single market.

25. What implications do the differences in supervisory and enforcement systems as between the NI and GB have for the legal and constitutional coherence of the UK?

26. What are the implications of customs or regulatory checks on goods moving in either direction between the GB and NI for the legal and constitutional coherence of the UK?

26.1 Parliament has granted a foreign power the ability to control trade flows within the UK; the right of prior approval of fiscal decision making within the UK; to govern the entire body of law relating to the production, distribution and sale of goods, agri-food and fisheries products within a part of our territory. Parliament has also agreed to a mechanism whereby the courts of the foreign power have exclusive jurisdiction in respect of the vast majority of disputes.

26.2 I am not aware of any similar arrangement that is tolerated by a sovereign state anywhere in the world. The Protocol is obviously inconsistent with

[9] Political Declaration para 17 "integrity of the Union's Single Market and the Customs Union **as well as the United Kingdom's**": https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840656/Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom.pdf

the constitutional coherence of the UK and its removal should be a central task for the UK Government.