"Star Chamber" Conclusions on the Withdrawal Agreement, 12 March 2019

These are the conclusions of the group of lawyers under the Chairmanship of Sir William Cash MP regarding the documents published by the Prime Minister last night, and their impact on the legal position of the United Kingdom under the proposed Withdrawal Agreement ("WA") and Northern Ireland/Ireland backstop Protocol ("the Protocol"):-

1. Yesterday's documents considered individually and collectively **do not deliver "legally binding changes" to the WA or to the Protocol**. They fail to fulfil the commitment made by government to the House in response to the Brady amendment "to obtain legally binding changes to the withdrawal agreement".

2. They **do not provide any exit mechanism from the Protocol which is under the UK's control**. Any exit by the UK from the Protocol cannot take place without the agreement of the EU and therefore the position remains as set out in paras 14-16 of the Attorney General's advice dated 13 November 2018 that "the Protocol will endure indefinitely until a superseding agreement takes its place", and that the WA "cannot provide a legal means of compelling the EU to conclude such an agreement".

3. The **suggestion that "bad faith" by the EU could provide a legal route for the UK out of the Protocol is not credible in practice within any determinate or reasonable timeframe**. The AG's advice at para 29 was that demonstrably bad-faith conduct on the part of the EU "would be highly unlikely; all they would have to do to show good faith would be to consider the UK's proposals, even if they ultimately rejected them." The threshold for demonstrating bad faith before an international tribunal is very high, and nothing in the documents make this a credible possibility.

4. The UK could not unilaterally disapply the Protocol by alleging bad faith, but would be bound to submit the dispute to arbitration under Part 6 of the WA, and would need a prior finding by the panel of breach on the part of the EU in order to invoke the right under Art.178(2) of the WA to suspend (not terminate) provisions of the WA or Protocol. **Any arbitration would be at best a lengthy and uncertain procedure** which under Art.174 requires a reference to the ECJ of any questions of EU law involved. **Even if the arbitration panel found in favour of the UK, para 14 of the Joint Instrument confirms that it would not enable the UK to exit the backstop**.

5. The Attorney General's further advice today (12 March 2019) indicates at para 17 that there is a "reduced risk" of the UK being trapped in the Protocol but this is caveated by the words "at least in so far as that situation had been brought about by the bad faith or want of best endeavours of the EU." We consider that the prospects of such findings against the EU are remote, and note that at para 10 the AG only goes so far as to say that "it is arguable" that the UK could secure termination of relevant obligations under the Protocol. **Such faint and remote prospects of escaping from the Protocol do not materially change the position the UK would find itself in if it were to ratify the WA.** We agree with the AG's final para 19 that "the legal risk remains unchanged that if through no such demonstrable failure of either party, but simply because of intractable differences, that situation *does* arise, the United Kingdom would have, at least while the fundamental circumstances remained the same, no internationally lawful means of exiting the Protocol's arrangements, save by agreement."