



Select Committee on the European Union

Oral evidence: The Protocol on Ireland/Northern Ireland

Tuesday 11 February 2020

4.10 pm

Watch the meeting

Members present: The Earl of Kinnoull (The Chair); Baroness Brown of Cambridge; Lord Cavendish of Furness; Baroness Coultie; Baroness Hamwee; Lord Jay of Ewelme; Lord Kerr of Kinlochard; Lord Lamont of Lerwick; Baroness Neville-Rolfe; Lord Oates; Lord Ricketts; Lord Sharkey; Lord Wood of Anfield.

Evidence Session No. 1

Heard in Public

Questions 1 – 18

Witnesses

[I:](#) David Henig, Director, UK Trade Policy Project; Dr Sylvia de Mars, Senior Lecturer in Law, University of Newcastle; Colin Murray, Reader in Public Law, University of Newcastle.

Examination of Witnesses

David Henig, Dr Sylvia de Mars and Colin Murray.

Q1 **The Chair:** Good afternoon, and thank you very much for coming to this public evidence session of the EU Select Committee in the House of Lords. It is being broadcast and will also be available as an internet link later on. As well as it being broadcast, we will take a transcript, which will be sent to you in due course. I would be very grateful if you could make any corrections and let us have those going forward. It would also be very helpful if you could introduce yourselves briefly, so that those watching know who you are. Colin, perhaps you could start.

Colin Murray: Thank you. I am a reader in public law at Newcastle University and a principal investigator for an ESRC governance after Brexit grant, looking into Northern Ireland border arrangements after Brexit.

The Chair: The ESRC is?

Colin Murray: The Economic and Social Research Council.

Dr Sylvia de Mars: I am a senior lecturer at Newcastle University. I work alongside Colin on the "Northern Ireland project", as it is known in my head. Beyond that, I am an EU law specialist. Historically, I have worked primarily on public procurement and free movement of people, but Brexit has made me branch out significantly into other areas.

David Henig: I am director of the UK Trade Policy Project at a think tank, the European Centre for International Political Economy. I consider myself to be a trade specialist but, like my colleagues, in the context of Brexit, I have been drawn into questions about Northern Ireland and many areas that I had not previously been involved in. I have looked at Northern Ireland, particularly in the context of trade implications.

The Chair: Thank you. This evidence session will last an hour and a half and we are focusing on the Northern Ireland protocol, which made up one-third of the withdrawal agreement. Before we come to our specific questions, do you have any brief opening remarks about the protocol? Perhaps we could go left to right and begin with you, Mr Murray.

Colin Murray: Seamus Mallon, the deputy leader of the SDLP, died earlier this year, but was deputy leader at the time of the Belfast Agreement. He once referred to that agreement as "Sunningdale for slow learners". In certain regards, the debacle over the protocol mirrors that. It took from 1973 to 1998 to find roughly the same solution once again.

Theresa May's first efforts towards reaching a withdrawal agreement centred around the backstop and, in certain respects, attempted to defy the gravity of Northern Ireland's constitutional position. After 1998, Northern Ireland was essentially set up and arranged constitutionally as a distinct part of the United Kingdom. It was tied to a relationship with the Republic of Ireland through strand 2 of that agreement, allowing

north/south co-operation and a free flow across that border. That, by definition, is a special arrangement for Northern Ireland.

In many regards, while Theresa May attempted to incorporate that within a UK-wide framework with the backstop, we have gone back to that centre of gravity of a Northern Ireland-specific arrangement under the withdrawal agreement drafted in October last year and ratified earlier this year.

Dr Sylvia de Mars: I am trying to come up with something succinct to say about it, but I have been looking at drafts of the Protocol for what feels like three years now, and there are still aspects of those drafts about which I can honestly say that I do not fully understand how they will work in practice and what their implications are. It is a tremendously complicated piece of legislative work.

The Chair: That is in itself a very valuable statement. Thank you.

David Henig: I would echo that. I have spent a few hours today, and many hours over the last few weeks, looking through this document and seeking to understand as much as possible what the trade implications would be, following the various legal cross-references. You realise just how complex it is, because we are dealing with not just this Protocol, but the Good Friday agreement, the common travel area with Ireland, and World Trade Organization rules; the Protocol interfaces with all of those. In the future it will interface with the free trade agreement between the UK and the EU, or any other arrangements put in place.

There is also a heavy interrelationship between the Protocol and EU law, which is not always made obvious. In some cases there is a list of regulations in the annexe so it is made obvious, but the implications are not well studied. In other cases the link is a simple reference to text. For example, there is a very innocuous reference to a particular article of EU law and, when you look at it, that article references in turn the entire customs arrangements and laws of the European Union. I suspect that it would take several people several months to understand this, but we will do our best to do this today in an hour and a half.

Q2 **The Chair:** I am very grateful all round. I will now kick off on the more detailed questions. What primary and secondary UK legislation do you feel will be necessary to implement the Protocol and ensure that EU law applies in Northern Ireland on a continuing basis?

Colin Murray: At the moment, it is easiest to think of Northern Ireland as the centre of a very complicated and convoluted Venn diagram. It is the space in which the European single market and the UK's internal market will overlap in years to come, once we reach the end of the window on 31 December this year.

When you think of Northern Ireland within that space, you have to put together a set of rules that will allow civil servants and members of the Northern Ireland Executive who make policy and administer law while

essentially having one foot in each of these different arrangements. That is in itself particularly difficult to envisage.

You also have to look at the history of these arrangements. The UK has never had to arrange its own internal market. Since the beginning of devolution in 1998, it has just piggybacked on the European single market rules to allow seamless trade flows throughout the United Kingdom. Even within that, from 1998 onwards, there were myriad opportunities for each of the devolved Administrations to diverge in policy, moving towards EU directives when they were able to implement them, while Westminster, in comparison, applied its own policy.

That whole framework currently hinges on the devolved Administrations accepting a framework arrangement that will be set up and administered between them and the United Kingdom. At the moment, none of the devolved Administrations are particularly happy after the way the Sewel convention was treated in the last month to enable the withdrawal agreement Act to be passed.

All those different bits of domestic constitutional law and applicable EU law make this doubly complicated in Northern Ireland. It is a much more complicated ask than it is for relations between Wales, Scotland and Westminster. That all has to mesh together within the next 11 months so that a set of rules under Sections 21 and 22 of the withdrawal agreement Act can give power but, at the moment, those powers are just skeletal. They set out that government Ministers will have powers in Westminster to implement the Protocol and that the Northern Ireland Executive will likewise have powers to do the same.

They sketch out some opportunity for shared competences. I should probably put that in very generous inverted commas, because I am inventing a term that has never really applied in the context of UK constitutional law. We have not liked mixed competences but quite strict divisions between what Westminster and the devolved authorities can do. We have to invent a framework that is much more flexible, but that doubles up with this arrangement in Northern Ireland, which essentially keeps Northern Ireland in the European single market for goods.

The Chair: Thank you. Would either of the other witnesses like to comment further on that?

Dr Sylvia de Mars: I will comment on this very quickly from the EU's perspective. Having gone through the Protocol and its annexes, what needs to continue to apply in Northern Ireland as EU law under the Protocol amounts to a total of 300 pieces of legislation that are indicated in all these annexes. As David indicated, some of these sound innocuous, such as the regulation of the Union Customs Code, but, off the top of my head, that document is almost 2,000 pages long—it is insanely lengthy.

The EU is agnostic as to how the UK ensures that this remains part of the law of Northern Ireland. It can be through Acts of Parliament, regulations, or any combination thereof; they just need to be

implemented. Where they do not have to be implemented, they have to be what in EU law is known as “directly applicable”, meaning that the EU regulation simply has to have effect in Northern Ireland as though it is a member state. Where they are directly effective, individuals will be able to go to courts anywhere in the United Kingdom and raise these EU documents in so far as they have cases concerning the Protocol in place.

Effectively, what we used to do through the ECA 1972 has to be recreated for the purposes of Northern Ireland. That has been done in the European Union (Withdrawal Agreement) Act 2020 but the details of the pieces of legislation impacted by the promise to keep acting as though Northern Ireland is a member state for the purposes of the movement of goods have yet to be drawn up.

David Henig: I am not a legal expert, but business will expect to have certainty. They will also expect their trade, whatever it might be, to be fed into this process, with some sensible laws coming out of it, bearing in mind that there are different trades and different people trade in different ways. They will expect at some point in the year to feed into this and to have clear guidelines as to what it all means—what they are allowed to do and what procedures they have to go through. They have made it entirely clear that they would like to have that as soon as possible. It is a huge task, but there is a question over how business will understand it, bearing in mind that the text is not at all clear.

We have the general case that Northern Ireland is to be treated as part of the single market of the European Union and the single market of the United Kingdom, but we do not have specific cases. How, for example, would you act if a business was headquartered in London and had a subsidiary in Belfast? What would that mean? I suspect that the answer is incredibly complicated. I am afraid that you are already getting the sense that everything is going to be very complicated.

Colin Murray: Just to follow on from that, there is fragility around the devolved arrangements in Northern Ireland. At the moment, the devolved, power-sharing institutions are only just re-establishing themselves and it will take time for them to be able to process what needs to be done. That is on top of the cost and the experience that will be needed to administer the new arrangements that must be put in place to cover Northern Ireland.

The Chair: That is all very helpful. I think you are all saying that the back-book of EU legislation that somehow needs to be pulled forward into UK legislation for Northern Ireland is substantial, and that actually the UK has a choice as to how to bring it into legislation but that we are a bit in the dark at the moment as to what that choice would be.

Perhaps I may ask two very small additional questions before I hand over to my colleagues, who have many questions. First, if a new EU law is made in, say, the latter half of this year, how can it be brought through? Secondly, what amount of new EU law a year would you expect would also have to be reflected in Northern Ireland’s legal arrangements?

Dr Sylvia de Mars: That is a purely EU law question, I think, so I will embrace that one closely. Any law adopted during the transition period will automatically be applicable to the entirety of the United Kingdom for the duration of the transition period. It will come into UK law in the way that any EU law came into UK law while we were a member state of the EU. What happens after the transition period is slightly more complex. The EU might show up to a meeting of the Joint Committee that oversees the withdrawal agreement as a whole and say, "We have a new piece of legislation. It's not an update to something that is already in the annexes." If it is an update to something in the annexes to the Protocol, it is automatically binding on Northern Ireland while the Protocol is in force.

However, it might be a different piece of legislation. Let us say that we are dealing with extremely technical, boring law here on the part of the EU—for example, regulations on different products. Let us say that the EU starts regulating widgets of some kind and says, "This will be something that affects the single market for goods. We have a new regulation on widgets and we believe that this needs to be covered by the Protocol, so let us ensure that widgets can move back and forth between Ireland and Northern Ireland without any barriers." That then has to be discussed in the Joint Committee—under Article 13(4) of the Protocol, off the top of my head—and the Joint Committee then has one of two options.

Either the UK agrees and say, "Okay, that one gets added to the annexes", or, if the UK disagrees, we end up in the first of many situations where we are in some kind of trouble. If the UK does not agree to accept the new regulation on widgets as part of the Protocol, within six months the EU can say, "We don't think that the Protocol is functioning any more, so we're going to take some sort of remedial action to try to level out the ways in which the Protocol no longer works." That might involve raising tariffs in some direction, trying to pull back responsibilities or different types of co-operation. In the event that the UK does not accept any new EU law coming in, the ways in which the EU can rebalance the Protocol are very general.

The Chair: That is very helpful. Lord Kerr.

Q3 **Lord Kerr of Kinlochard:** I am trying to understand how Article 12 works. If the relevant EU directive is implemented in Northern Ireland by a Northern Ireland-specific piece of legislation through the Northern Ireland Assembly, it looks as though that does not absolve the UK Government from being responsible for making sure that it is so translated into Northern Ireland law. If an infraction proceeding is brought, it would not be against the Northern Ireland authority; it would be against the United Kingdom Government in the ECJ.

From Article 12, it looks as though the Commission would have the right to be present through the proceedings to check that the EU's law was being properly implemented in Northern Ireland, and infraction proceedings could be brought on the basis of improper implementation.

Is that right—that single market law will apply on a dynamic basis in Northern Ireland? For the most part, that will mean legislation in Northern Ireland but the United Kingdom Government will be responsible for ensuring that it is done and they will be arraigned in the Court of Justice if it is not done to the satisfaction of the Commission.

Dr Sylvia de Mars: Absolutely.

Colin Murray: There have been examples of the UK, while an EU member state, having to step in at a Westminster level and pass legislation because the Northern Ireland Assembly did not find itself in a position to fulfil its EU obligations with regard to particular aspects of discrimination law soon after the St Andrew's agreement restarted the Assembly in the last decade. Therefore, it has happened in the past and the obligation will continue to rest with the UK as the state responsible for Northern Ireland.

The Chair: We might return to that area later. Lord Oates, perhaps I could turn to you.

Q4 **Lord Oates:** Given the huge complexity that you have all described, can you share with us any thoughts that you have about how the UK Parliament and the Northern Ireland Assembly should go about scrutinising both the operation of the Protocol and any new EU law that is applicable to Northern Ireland?

Dr Sylvia de Mars: I will tackle the EU law dimension. I would say that it is important that there are committees within Parliament that continue to monitor what is in the annexes to the Protocol. Those annexes apply as though at least one part of the UK remains a member state. We scrutinised EU law when we were a member state, and I suggest that that needs to continue in so far as EU law is applicable to the UK. Even though the responses to, and feelings about, the relevant EU legislation would obviously differ tremendously from when we were a member state, I do not think it is inappropriate or unnecessary, shall we say, for parliamentary scrutiny of those provisions to continue, given the impact they will have on Northern Ireland.

Colin Murray: For those dynamic aspects of the single European market that you have been talking about that will continue to apply to Northern Ireland, the scrutiny is of a UK government decision. Yes, it might have to be implemented at the Northern Ireland level but, in effect, you will still have to duplicate that scrutiny, with a scrutiny process for the implementation of law within Northern Ireland and some form of scrutiny process for the UK's dealings in the joint committee.

If you look at *New Decade, New Approach*, the agreement last month to restart power-sharing in Northern Ireland, you will see that in any activity before the joint committee, the UK has committed, in paragraphs 8 to 10 of annex A to that document, to allowing the Northern Ireland Executive representation in those sessions. It is already trying to build in that

overlap in involvement, so that Northern Ireland will be able to red-flag or say it has problems with implementation at some point.

David Henig: It seems clear from what we have said that the complexity of translating this legal text into arrangements means there will need to be a lot of external help to government to understand what this all means. I would have thought that is part of a parliamentary scrutiny process. One thing that I have seen since this was published—in fact, since the original withdrawal agreement was published—is a real lack of a detailed guide to what this all means. In the work that I and, I think, my fellow panellists have been doing recently to try to understand the different links between all the legal arrangements and what exactly is referred to, I am not aware of any such documents having been published. There is a question about who is actually responsible, within the whole UK system of government or Parliament, for ensuring that we have some understanding of what our treaty obligations are—I am not clear on that.

Colin Murray: Beyond responsibility, there is also a capacity issue. If you have followed the renewable heat incentive scheme debacle in Northern Ireland over recent years, which precipitated the collapse of power-sharing, at the heart of that problem was that energy policy was a devolved policy in Northern Ireland. How Northern Ireland would apply EU law relating to energy was almost uniquely an issue for it alone; it could not bounce ideas off the devolved institutions in Scotland or Wales. It had to deal with that policy and with state aid policy.

Really serious errors were made in the implementation of that scheme, in part because of a capacity issue within the civil service in Northern Ireland. It makes it very difficult to see, when Northern Ireland has to sit out on its own, in effect, on these issues, how it will be possible to apply state aid law or energy policy, all coming from the EU level, without a shift in capacity from what is currently done at a UK central government level and moving the responsible civil servants into the Northern Ireland system to manage that.

Q5 Lord Kerr of Kinlochard: I would like to follow up your answers to my question about legal responsibility and Article 12. It will not be possible to devolve responsibility so, in addition to the capacity argument, there is a UK government legal argument that states that they will be responsible if implementation is inadequate. They cannot be hands-off about it; they have to be involved.

There are two supplementaries to that. The first is: what should Parliament be doing? We cannot say that this is just for the Northern Ireland Assembly, for the reason that I have given. What is the correct degree of scrutiny which the Westminster Parliament should require? Secondly, what happens if it all goes wrong in a particular case? Supposing we end up in the Court of Justice and there is an infringement case which the UK Government loses, are we still treated as if we were a member state and, therefore, responsible for paying a fine if we have got it wrong? Is that what this treaty means, that we could end up in the

Court of Justice being fined for inadequate implementation in Northern Ireland of EU laws in which we have had no say?

Colin Murray: I will take the first point about devolved competences. It has always worked that way up to this point. If an EU law affects an issue of devolved competence, it is for the devolved institutions to deal with that. I cannot see that that would change simply because the overarching legal framework of the UK's relations with the EU changes. For Northern Ireland's purposes, it is still in the single market and would still have to work on that basis.

Lord Kerr of Kinlochard: Something has changed, because in this Parliament, a lot of people are breathing a sigh of relief and saying, "At least we're not going to have to scrutinise any more EU law". But we are going to have to, if we are responsible for implementation in Northern Ireland.

Colin Murray: Some years ago now, going back to the Calman commission report on devolution, there are some really interesting ideas in that report on joint select committees between the Parliament in Westminster and devolved institutions across the country as an alternative to—let us face it—the very hands-off approach of the joint ministerial council. You can do lots of things to smooth the way on the Executive path in the JMC but, if the devolved institutions in Northern Ireland and the Parliament here in Westminster are to be serious about their joint responsibilities as legislators, maybe we need to dust off some of the ideas for adding a legislature-based element alongside the JMC's Executive-based element.

The Chair: Dr de Mars, were you going to address the second part of the question that Lord Kerr asked?

Dr Sylvia de Mars: Yes. You are doing a very good job of understanding what is happening. Article 12(4) of the Protocol says, very gently, that the Court of Justice of the European Union shall have the jurisdiction provided for in the treaties in this respect. It means it has all the jurisdiction that it has now—sorry, that it had when the UK was a member. I apologise, I will keep saying "it has now" as if we were still a member state. It is like when the year changes; it takes me a while to realise I have got older.

The Court still has the jurisdiction over the UK with respect to Northern Ireland that it has over the member states, which is to say on infringement proceedings and then an ability to fine. The Commission can chase up these things if there is a lack of compliance with the obligations set out in the Protocol that pertains to EU law.

The Chair: Mr Henig, we are quite short of time, but I know you want to say something here.

David Henig: I was just going to say that, in regard to Parliament scrutinising this, the other part of this, which I am not aware has happened, is questioning Ministers and, even more so, officials and

government lawyers—perhaps in closed session if need be—on their understanding of these matters in this Protocol and how they expect it to continue to work, with the questions it raises about everyday business matters. How do you interpret how this will work? I am not sure that has been done sufficiently.

The Chair: Thank you. Perhaps we can move on.

Q6 **Baroness Neville-Rolfe:** We may have touched on this, but what aspects of the Protocol are—or should be, given the uncertainties that you have described—the responsibility of the UK Government on the one hand, or the Northern Ireland Executive on the other? How do those interact with reserved, retained and devolved competences? I am a business person, so I need to know how these will work in practice, which we touched on at the beginning. Who will be responsible for implementing EU law in Northern Ireland and on what basis will it be decided, if regulations are made by the UK Government, the Northern Ireland Executive Ministers, or indeed both together? I need to know how I might influence the course of events.

David Henig: From a practical business point of view, it seems to me that the ultimate responsibility for this, as it is an agreement of the UK Government, lies with the UK Government. They are the only organisation that can balance international treaty responsibilities to which they are signed up not just in the withdrawal agreement but in the other agreements that I mentioned, such as the World Trade Organization. They are the only body that can have ultimate responsibility and oversight, and it seems to me that Northern Ireland is, in so far as this agreement has a spirit as opposed to letter of the law, as much a part of the UK single market as it is the EU single market. That seems to me to be the spirit of where this agreement is

Baroness Neville-Rolfe: But does it vary from sector to sector? You mentioned energy and the single market. Is all of the Protocol all the responsibility of the UK, leaving very limited power for the Northern Ireland Executive? That seems quite a surprising conclusion to me.

Dr Sylvia de Mars: There are two distinct answers to this. Legally, internationally, all of it is the UK's responsibility. That said, the EU will be wholly ambivalent about who in practice regulates. It does not care as long as it gets done, so it can be the responsibility of the Executive.

Colin Murray: It is an internal matter.

David Henig: Looking at the devolved powers, which I know are more Colin's area, the UK has exclusive competence over international trade matters, so in most trade between Northern Ireland and the Republic, the UK Government have exclusive competence. As Lord Kerr intimated, the problem is that that has to a degree been overtaken by the implementation of the Good Friday agreement. Under the North/South Ministerial Council, certain decisions are made on an all-Ireland basis, but that can also be defined as international trade. I think I am right in

saying that the Government of the Republic and the Northern Ireland Assembly both have competence and can act under the North/South Ministerial Council, so there seems to be some ambiguity there.

Colin Murray: At the moment, Sections 21 and 22 of the withdrawal agreement Act overlap in many ways. They hand the power to Ministers of the Crown at Westminster to make secondary legislation as necessary to bring the Protocol into effect, and at the same time they hand powers to the Executive in Northern Ireland to do very similar things. How that overlap is resolved has not yet been set out. We are still in the territory of working out how it will be divided up.

As David said, we get to a zone where the UK is ultimately responsible, but the problem is the sleight of hand inherent within the Protocol as redrafted in October 2019. Northern Ireland is within the UK's customs territory but does not apply UK rules; rather, it continues to apply EU single market rules. That creates a fissure as to who is responsible in practice, and resolving that will take us into the territory of not very strict competence division. We cannot continue to manage a complex system where effectively two markets overlap in one space. Northern Ireland is the centre of this Venn diagram without framework arrangements—without some things being set out at a UK level, trade policy most clearly being a reserved competence. How will that be put into practice when this is now essentially an economy where the land border on the island of Ireland is not taken into account for goods?

Q7 **Lord Cavendish of Furness:** I suspect that my question has been comprehensively answered already. What happens if Northern Ireland Executive Ministers are unable or unwilling to make regulations? Does Westminster have to insist?

Colin Murray: If Westminster does not insist, a breach of the Protocol will be on the cards and the different proceedings for enforcement will come into play.

Q8 **Lord Jay of Ewelme:** It seems to me that quite a lot of the issues that we thought might have been resolved at an earlier stage when the withdrawal agreement was being put together have been pushed forward to the implementation period and beyond. The committee structure is rather complicated, with the joint committee, specialised committees and joint consultative working group. I am not sure that I fully understand how that will work. However, how do you think that decisions that the joint committee will be required to reach during 2020 relating to the operation of the Protocol will be resolved?

I have another tiny specific question about goods classified as at risk of moving from Northern Ireland into the EU. Who will decide whether they are at risk or not? It is really quite important that there is a clear understanding of what is at risk because of the conditions that will apply.

Colin Murray: Looking as a whole here, we probably need to start to disaggregate all the enforcement mechanisms that are in place with regard to the Protocol on Northern Ireland. When we have to date

discussed Article 12 and Commission enforcement proceedings, that covers only Articles 5 to 12 of the Protocol. It is a very specific remedy focused on the protection of the European single market. There is then the joint committee system, which overarches the implementation of the withdrawal agreement as a whole, and there is a specialised committee applicable to the Protocol on Northern Ireland.

To take a provision of the withdrawal agreement, Article 2 of the Protocol on Ireland/Northern Ireland allows only for enforcement through the specialised committee and then through the joint committee system, so there are entirely different enforcement mechanisms in play within it. Having said that, Article 2, which protects various types of EU non-discrimination law, also allows enforcement through judicial review for certain of those elements by individuals within Northern Ireland. Therefore, we have duplication of domestic enforcement mechanisms and arbitral enforcement mechanisms overlapping and interacting with the Commission enforcement proceedings that are available under the single market. Then we have the joint committee's very specific role under Article 5 to flesh out how these single market provisions will work and to define what something at risk of moving across into the single market proper will be.

Lord Jay of Ewelme: How does it do that?

Colin Murray: I will punt that very specific question to David but, before doing so, will add one thing. You said that this has all been brought forward. Everything in the withdrawal agreement's Protocol that is now in place brought forward processes that would have been punted back to the end of the association agreement or the future relationship agreement with the backstop. The backstop was an insurance policy; it came down the line, explicitly. All this has been brought forward and accelerated, and consequently made much more difficult, but on that difficulty I will defer to my colleagues.

Dr Sylvia de Mars: How are those decisions likely to be resolved? It has to be by consensus, and that is part of the problem. There has to be an agreed definition. I do not know how they will come to an agreement on what is at risk. The way the Protocol is drafted, however, is very interesting. As a lawyer, I always give a little smile when I look at it. They drafted Article 5 to make it look as though the exception is the rule. It starts by saying that no customs duties shall apply unless something is at risk of crossing into Ireland. It actually means that all goods that can move into Ireland—basically all goods—will be subject to customs duties. That is the rule. What they have to define is the exception to that rule, whereby customs duties will not be applied. Leaving to David the definition of what is at risk, if they do not agree a definition, my understanding is that the EU tariffs will simply apply to all goods because they will all maybe be at risk of moving from Northern Ireland to Ireland. How does that then get resolved? The Protocol is beautifully silent on this. It just says, "We will come to a decision on what 'at risk' means"—the end.

Lord Jay of Ewelme: When you answer your part of the question, could you also say what happens if no agreement has been reached by the end of 2020? It is not quite clear to me what happens then.

David Henig: Okay. Let us try. Sylvia is correct about the way it is drafted; it is drafted in an interesting way. But there are some fairly clear parts to this. Within much of the EU, there are certain de minimis requirements, levels of importation below which customs duties and VAT are typically not paid. For the Republic of Ireland, it is consignments valued under €22. I would suggest that those—and anything, therefore, that someone might personally buy through Amazon or wherever—are straightforward; they will be exempted.

There are also exemptions explicitly made for personal belongings when you are travelling between Great Britain and Northern Ireland. Although that is, it seems, subject to the full Union customs code and I have not explored exactly what is in it. After that, most trade experts I have spoken to have treated “at risk” in the same way that I have just described, that everything else is therefore at risk and they have assumed that there would be a rebate procedure, which is explicitly allowed for in the Protocol text, where consumers and businesses would have to prove, the other way around, that the good concerned had not been onward processed or onward sold in order to claim a rebate on any EU duties paid.

That is the general assumption about how that would work. The text sounds very soft, that no customs duties shall be payable; in fact, the chances are that customs duties will be payable on most importations into Northern Ireland and then reclaimed where it can be proved otherwise.

Lord Jay of Ewelme: And if there is no agreement by the end of 2020?

Dr Sylvia de Mars: In effect, this same thing.

David Henig: In practice, that is what will be implemented. It is very hard to say. I do not know what happens if the Protocol is not followed by a set of detailed rules. There are different scenarios here. I would think that a free trade agreement between the UK and the EU could include a separate Northern Ireland or Ireland-specific chapter to cover various areas that are ambiguous. In a situation where that has not been agreed and these detailed rules have not been agreed, then I guess that the responsibility will lie with the UK Government to put in place sufficient rules that they feel meet the obligations. I am not quite sure what happens then if the EU does not feel that sufficient rules have been put in place, but I guess that takes us back to the dispute proceedings that we discussed earlier. That is another way of saying that even this gets very messy, and the idea of how you put this in place is not very clear either.

Lord Sharkey: Do you think, in that case, that they will be subject to the arbitration procedure?

Dr Sylvia de Mars: Yes. I do, personally. I have looked at this in some detail, because the answer is not immediately obvious. Is this a matter of EU law? Not specifically. I cannot imagine infringement proceedings being started in the light of something that the UK and EU promised to negotiate in the Joint Committee. That is difficult; it is hard to say who is at fault for no agreement being reached. But if there is no agreement and if the parties are not both happy with saying that EU tariffs apply on all products going from Great Britain to Northern Ireland, then one of the two parties is likely to start consultations in the Joint Committee leading to arbitration on that point.

Colin Murray: It is possible to sound apocalyptic on this. I do not think that no agreement would lead to a complete breakdown, but there might be specific issues where there is a genuine disagreement between the UK and the EU. You might be able to—I hesitate to use the percentage that was bandied around about the withdrawal agreement—95% agree on what “at risk” means, and then still have something outstanding that goes to arbitration. You might be able to put in rules that cover an awful lot of transit across the Irish Sea but where certain things might need to be arbitrated to, if you like, complete the circle on what “at risk” means.

Lord Sharkey: And to provide certainty to business these have to be concluded before the end of the year.

Dr Sylvia de Mars: The decisions would have to be taken, yes. The arbitration on any disagreement could not start until after the end of transition.

Q9 **Lord Sharkey:** Could I ask you about some of the other institutions in Northern Ireland and the role they might play vis-à-vis the joint committee, the specialised committee and the joint consultative working group on the Protocol? There is the Executive, the Irish Government, the North/South institutions under the Good Friday agreement and business itself and civil society. How are they going to interface with the joint committee?

Colin Murray: Standing before the joint committee, who gets to access the joint and specialised committees is very complex under these arrangements. The *New Decade, New Approach* agreement said, in effect, that the Northern Ireland Executive would be allowed into the room on any issue before the committee system that comes between the UK and the EU. You can bring in a method by which they will have representation, but it will not be as the Northern Ireland Executive. They will be there on the invitation of or as part of the UK’s team before the joint and specialised committee.

Specific standing provisions are given to the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland to protect the Article 2 guarantees of non-diminution of rights or protections against discriminatory behaviour, protection of the EU’s discrimination directives, and a broader commitment to not diminishing human rights protections in the Northern Ireland context. They are, under the terms of

Article 2 of the Protocol on Ireland/Northern Ireland, the dedicated mechanism that has been put in place to protect those rights elements of the Protocol, but they are quite distinct; they apply only to Article 2, not to any of the workings of the Protocol more broadly.

So, again, when you are talking about enforcement and standing, you are talking about gatekeepers who are able to access the committee system. Even those gatekeepers are able to access it on only certain aspects of the Protocol, as separate from the Commission enforcement proceedings that would exist around Articles 5 to 12 on the European single market.

Lord Sharkey: Are there any provisions for making the deliberations of the joint committee even fairly transparent?

David Henig: I do not think there is anything that stops that happening, but it is not normal. Overall, the joint committee has to issue an annual report; I think that is the only explicit transparency, but there is nothing to prevent the UK Government or the EU sharing various information, to the best of my knowledge. I do not think that many of these structures have yet been set up to discuss these issues. That is the impression I get. I assume that, in the coming weeks, the Government and EU will be setting these up.

In terms of the business community, and I have many friends in the Northern Ireland business community, the policy at the moment is generally to shout quite loudly about these issues and to hope that the Northern Ireland Assembly, the Northern Ireland Executive, the UK Government, Secretary of State for Northern Ireland, MPs and Members of the House of Lords—anybody—will take note and take this up. I am not sure they know what else they can do at this stage.

Colin Murray: But beyond that reporting requirement, there is nothing explicit in the withdrawal agreement that speaks to a transparent committee system. It could be that, in terms of reasoning, we will need on, say, an Article 2 issue, the Northern Ireland Human Rights Commission makes a reasoned presentation public and says “That is what we put to the specialised committee”, and then all you get to find out is whether the committee accepted it or did not accept it. It might be transparent or it might not be, but certainly the commitments in *New Decade, New Approach* to allowing the Northern Ireland Executive representation in the room and all the disparate party elements involved in the Northern Ireland Executive mean that you could foresee circumstances where what is going on in those committees, supposedly behind closed doors, end up being quite leaky.

Lord Sharkey: What responsibility will the EU members of this joint committee have to reporting to, let us say, the European Parliament?

Dr Sylvia de Mars: That is a very good question. I do not know. I am not sure. Can I look into that and get back to the Committee?

David Henig: Again, it is not clear where the EU committee would be reporting into, because for trade agreement committees there is typically a clear place which they report back into—the relevant trade bodies in the European Union system, whether that is the European Parliament international trade committee or the relevant Council groups. However, I am not quite sure what applies to this joint committee, because I am not sure where it would dock into within the EU.

The Chair: I thank you for the offer, Dr de Mars. I wonder if you would not mind writing to us with your answer to that. Although for the trade negotiations, as you said, there are clear provisions in Article 218 and a clear set of provisions in the interinstitutional agreement, it is not clear at all—to me, at least—what might be the case for this year.

Perhaps I could turn to Baroness Brown to kick us off on a slightly different direction.

Q10 **Baroness Brown of Cambridge:** Thank you, Lord Chairman, and thank you very much to our witnesses.

I move us on to the potential checks on goods between Great Britain and Northern Ireland and between Northern Ireland and Great Britain. What customs, VAT and regulatory checks would be required, and what is your view of the likely scale of such checks and where they might take place?

I would also be interested to know which ones are WTO requirements, which are UK requirements, and which are EU requirements. If I may, I will throw in a slight red herring, although it is slightly related as lots of the goods will be agriculture-related. Will the position of Northern Ireland and the Protocol inhibit it moving from the common agricultural policy subsidies for farmers to some form of the proposed environmental land management system subsidy for farmers? Would it need to stay in the EU forum, so to speak?

David Henig: There are multiple parts to the question, and I will cover as much as I can. I will start with the WTO element, because the most important thing that we need to recall from our membership of the World Trade Organization is the most favoured nation commitment, which is that broadly—I am simplifying to a great degree—we treat imports from all the different countries with which we have no other arrangements in the same way; I will come back to that.

Therefore, there is potentially an issue with deciding that we are not going to check goods that come in via the land border into Northern Ireland and on into Great Britain, let us say to a port in Liverpool. If we treat those differently from goods that are coming in from, for example, the United States into Liverpool, there is, *prima facie*, the potential for a most favoured nation breach under WTO terms.

There are two follow-up points to make on that. The first—I am sorry, this is getting complicated—is that if we have a new relationship with the EU, and this is where there might have to be an Ireland chapter, in that situation we can discriminate between other members of the WTO and

imports from the EU. That is the point of a preferential trade agreement or free trade agreement, so that helps.

Another question that is raised, indeed for Northern Ireland as a whole, is whether this creates a huge ambiguity in the WTO itself with regard to being part of two customs territories. The best answer from most of the trade law specialists I have spoken to is that essentially other countries will be prepared to turn a blind eye to Northern Ireland such that Northern Ireland itself appears to be in breach of most favoured nation because it could take in imports without equivalent checks both from the EU and from other countries. Most people think that that will be overlooked—"Let's not worry about it"—not that we have an answer as to why.

The issue of goods going from Great Britain to Northern Ireland seems to be relatively clear. During the negotiations on the withdrawal agreement and various plans for Northern Ireland, the Commission published the list of standard checks that it makes; certain goods, and the percentages of certain goods, are checked. These are reasonably well established such that in many cases the check is merely a customs paperwork check, and many products do not require an at-the-border check.

However, under the SPS—sanitary and phytosanitary—rules, there are usually particular checks to be made at the border for food products. There are already checks on animal products going into Northern Ireland, as Ireland is a single veterinary zone, but they will be built on and more products will need to be tested. Most of those, as I say, are in the food arena, but not all of them, and that list is published.

It is more difficult to ascertain precisely what will happen in the other direction. The real issue is one for the—

Lord Lamont of Lerwick: Does that include the at-risk issue?

David Henig: I am not sure off the top of my head. The existing guidance does not include the at-risk element, but I am sure that when a system is put in place—

Lord Lamont of Lerwick: You say that these checks will be very light and only for a certain percentage, but separately you were talking about goods having to be judged at-risk.

David Henig: Yes, that will be put into common guidance, or I hope it will be, for customs. Only a certain proportion of customs checks are made. Various paperwork elements are required, and that will presumably be part of the new system. The new system will be the EU's existing checks plus the new at-risk checks, which apply specifically to trade from Great Britain to Northern Ireland—I think.

Dr Sylvia de Mars: On a practical point, it is difficult to check for "at risk of moving into the EU" at the border, I imagine. A car that is being used in Northern Ireland will look pretty much the same as a car that is going

to be used in Ireland, so I am not entirely sure what a physical border check there would achieve.

David Henig: Hence why you expect payments to be made on entry.

I just wanted to cover the issue of goods going from Northern Ireland to Great Britain. There, there is a big question for the UK Government as a whole: are we treating goods that come in from Calais to Dover differently from goods going from Calais to, say, Cork up through Ireland and then transported on from Belfast to Holyhead? Essentially, will the UK Government give an incentive to those who wish to bring goods in that may not be allowed in some way, such as huge amounts of contraband material?

If there are no checks on trade from Northern Ireland to Great Britain, you create an incentive to bring in as much produce as you like—say, alcohol—from the single market into Great Britain with no checks. This seems to be a question particularly for the UK Government as to how they intend to operate that system. Even at the moment we know that there are not checks on everything coming into Great Britain.

It will also depend on whether our regulations diverge. Will there be any areas where we have a higher level of regulation than the EU? If there are, that might require checks on produce entering Great Britain. Then, as I say, there are the simple paperwork checks. Are the goods being brought in from Northern Ireland? If they are, under the Union customs code you have to fill in an exit summary declaration. How will those be checked, if at all, and verified to make sure that they are accurate?

I am not sure that I have done that subject complete justice, but it is a huge question.

The Chair: You have been very helpful, and I am sorry that I am not going to offer your colleagues the opportunity to respond to that question, because we are coming on to similar areas that will be much more legally focused. Lord Wood, will you take up the running?

Lord Wood of Anfield: Yes, but I have a question about the exit summary declaration before I ask my main question. Is it absolutely clear that the customs code requires exit summary declarations to be filled in for everything shipped from Northern Ireland to Great Britain?

David Henig: That is my belief, but I confess to not being a customs specialist, and that question needs to be asked of customs specialists.

Lord Wood of Anfield: If you are not customs specialists, God help us all.

Lord Lamont of Lerwick: Do UK government officials agree with your interpretation?

David Henig: There seem to be some differences of opinion, from what we have understood, between officials who have answered the question—

who believe that there needs to be at least some form of checks both ways—and some Ministers who may have answered differently. I find that a very difficult question to answer.

Colin Murray: There is an uneasy relationship between Articles 5 and 6 of the Protocol on Ireland/Northern Ireland. Article 6 says that nothing in the Protocol should prevent the United Kingdom ensuring unfettered market access. With that very clear statement, you could say that nothing in the Protocol sidesteps or overwrites any requirement on customs declarations. You could put forward that interpretation.

You could then come back and ask whether that is a market access issue or simply an understanding of the EU's duties under the WTO rules on movement between different customs territories. That then brings you to a potential clash of interpretation between those two provisions, which will again feed up through the arbitration mechanisms in place under the agreement.

Q11 **Lord Wood of Anfield:** That is the very question that I was going to ask. We hear a lot from the Government on unfettered access as a pledge that will characterise trade relations. Reading the Protocol and being experts on it as you are, is there consistency between unfettered access as a pledge and the way the Protocol is likely to pan out in practice?

David Henig: Colin may want to come back on this, but I have one comment on unfettered access. The Protocol clearly says that nothing within it shall prevent unfettered access, but that does not mean that that is true of any other agreement, such as the commitments under World Trade Organization rules. That is one area of confusion.

Lord Kerr of Kinlochard: It depends on how you define a fetter. If filling in a form to satisfy EU export rules constitutes a fetter, the trade is fettered. However, not many people would say that filling in a form constitutes a fetter. It sounds as though most people think that it will be necessary to fill in that form, even if they are in Northern Ireland and not the Republic. They also think that they will have to pay a charge for it, but that the chances are that the spot checks will be fairly light. That seems to be the way to reconcile what everybody is saying, provided you do not define that as a fetter.

David Henig: There is thought in that direction, but we will have to see how the UK Government and HMRC wish to implement that.

Baroness Neville-Rolfe: But some paperwork already exists, does it not? If you have sent lorries backwards and forwards, you have existing paperwork, so you might be able to use that for this purpose.

David Henig: I am told that the exit summary declarations are quite challenging and can take some time to fill in, but I have not filled one in myself, so I am not a specialist.

Lord Wood of Anfield: Are you saying that the pledge of unfettered access is optimistic or a decent characterisation of what we can expect?

Dr Sylvia de Mars: Again, coming at this as a lawyer, if you read Article 6(1) as a whole, it is trying to stop products being prohibited or restricted in their movement between Northern Ireland and Great Britain. The question then is: is filling in some paperwork a restriction of movement? The EU and the UK may disagree on this.

David Henig: Checks would be run at the border using a risk-management approach. If you are making some checks at the border following a risk-management approach, does that constitute a fetter? You are getting into those areas.

In any case, many goods coming in from other countries do not go through the full process of checks, although the paperwork may be checked. We have to understand that not all goods are checked in all cases. Easements can probably be made. That issue of Northern Ireland to Great Britain trade is almost a whole subject in itself. There will be some increase in paperwork and checks, but we do not know the extent to which that will be the case.

Lord Wood of Anfield: I have one quick follow-up question on compatibility. There is another compatibility issue, which is that the UK Government are trying to agree common frameworks with all the devolved Administrations. Northern Ireland is considered a devolved Administration for that part of the commitment, but it is also the subject of the Protocol and, indeed, a part of delivering it. Is there an incompatibility with seeing Northern Ireland through both those lenses, or is that something that can be worked through?

Colin Murray: If there are incompatibilities, they will emerge during the operation of these two regimes alongside each other. That will lead either to arbitration under Articles 169 to 174 of the withdrawal agreement, or fixes in whatever frameworks are put in place.

Northern Ireland can be part of those framework arrangements for the UK's internal market. There will be goods that travel between Great Britain and Northern Ireland that stay in Northern Ireland. The UK's internal market rules will apply, as the goods are not at risk of passing through.

However, there is an overlap with this at-risk category, which means that the joint committee's job of defining goods that are at risk of moving into the single market becomes so important in working out the interlocking between those two layers. There has been some talk of Northern Ireland being in the best of all worlds, but if you are a civil servant trying to manage these two relations, it might look like the worst of all worlds.

The Chair: Just reflecting, to take a loop, the family motto of a large chunk of the Murray family is "Furth, Fortune, and Fill the Fetters". That refers to an early business that the Murray clan was involved in—kidnap and ransom. The fetters concerned were ankle chains, but there we are. I turn now to Baroness Couttie.

Q12 **Baroness Couttie:** You touched on this in your earlier answers to Lord Kerr, but I would be interested to understand what the practical mechanisms on the ground will be, and how the EU will supervise these arrangements. In particular, what is the role of the ECJ and how will the EU make sure that this works as it would like it to? Perhaps that is difficult to answer.

Dr Sylvia de Mars: It is a slightly complicated question in that the Protocol seems to say two things simultaneously: first, that the Commission and the European Court of Justice have the responsibility to supervise the entire arrangement and, simultaneously, that making sure the arrangement actually works will be the responsibility of the UK authorities.

Baroness Couttie: So how does that translate on the ground?

Dr Sylvia de Mars: We will have to wait and see. The one conditionality that the EU has put in place is that it is allowed to inspect whatever the UK is doing. Under the Protocol, if the EU wants its representatives to look at what the UK is doing at the border, or in checking animals for import and export, or whatever, it has the right to send them to stand there with clipboards and take notes on whatever they see fit.

As to anything else, I would imagine that the Joint Committee plays an unspoken role here in terms of the extent to which the Commission is aware of whether everything in Northern Ireland is working correctly. It is very much left unstated, but one imagines that, if disputes arise in the specialised committee or the Joint Committee, the EU representatives will go and knock on the Commission's door and say, "Psst, that one is not going well". It is likely to step in if problems escalate to that level.

Colin Murray: When Sylvia says "whatever", the Commission has very broad powers in terms of point inspection. We hear a lot about everything aligning in terms of regulation on day one. The Commission will be very alive to any move to de-align regulations between the UK and the EU. Let us take the example of cars being manufactured in the UK to a lower standard—a standard applying to, say, the engine and its CO₂ output. If the Commission was aware of something like that happening in the UK's legislative process, it would look at what checks are being imposed on cars going across the border and whether they are at risk of coming into the single market.

Baroness Couttie: So will the intensity and how difficult it is for businesses to operate depend on the degree of divergence, or do you think that most of the scrutiny will be on the administration side of the goods coming in and out, as opposed to what actually impacts on the businesses?

David Henig: I suggest that initially most of the burden will come from the extra administration. However, as Colin said, once regulatory divergence happens or is at risk of happening, it is likely that the level of checks will intensify. So initially the burden will be on the administrative

side and it will also lie with food products—with the SPS measures. Those will involve the greatest number of extra checks. Depending on where the UK Government decide to diverge in respect of Great Britain, that will affect the number of checks required between Great Britain and Northern Ireland.

There are many extra complications, not all of which I can think of right now. There are also provisos. I mentioned earlier that I am still not quite sure what will happen in the event that goods are transferred within a company that has offices in both London and Belfast. Exactly how that will work and what the regulatory regime will be, I am not sure. I have not really thought it through properly.

Colin Murray: There is a flipside to that. If the UK looks to bring new, ambitious targets into place for something like electric cars and they are more ambitious than the EU targets, will the EU regulations in place apply to UK manufacturers? If we are to be a high-value economy majoring in the production of green automobiles, unfettered trade from west to east in the Irish Sea begins to be something that the UK Government cannot necessarily do. It would freely admit to the UK market lower-standard vehicles that would potentially add to pollution and undercut UK manufacturers.

Baroness Couttie: Alternatively, you have to impose the same standards on Northern Ireland. As you say, it is the Venn diagram—it is in two places. Which is the overriding set of regulations that it has to follow? Presumably, in order to have the access that you would want, you would have to graduate to the highest standards.

Dr Sylvia de Mars: That would be really problematic. You might say, “Let’s go with the hyper-environmentally friendly cars”—the Tesla-plus range or what have you. If that became the norm for production in the UK, including Northern Ireland, there would not be a problem. I cannot imagine the EU saying that it was a too-environmentally-friendly car. So I do not think that there would be a problem with something of a higher standard moving into the EU. The problem would arise when the regulations moved in different directions.

Baroness Couttie: That is why I say that, in this Venn diagram, Northern Ireland would be forced to take the highest standards, whether from the EU or the UK.

Colin Murray: Even if Northern Ireland did that, it would not prevent fetters on trade in the Irish Sea, because anything produced anywhere in the European single market could just go through a back door into Great Britain through Northern Ireland if no fetters were in place. It is not just about the production of, say, buses in Northern Ireland; it is about the whole architecture of Articles 5 and 6 of the Protocol. It only works either if the UK is in line with the EU’s regulations or if its regulations are in some way lower, as you can then unfetter to allow in higher-regulation goods. As soon as the UK tries to make a commitment to higher

regulation on something, unfettered access suddenly becomes unattainable.

Baroness Couttie: I am sorry to bang on about this, but if Northern Ireland were forced to go to the same standards, there would be unfettered access. At issue would be whether the EU could continue to import goods into the UK under whatever trade agreement we get if our standards were higher. However, that is separate from the Northern Ireland issue, as I see it.

Baroness Neville-Rolfe: You have not commented on the possibility of tariffs, levies or charges, which in my experience of these cross-border matters tend to be more problematic. They are an incentive to people to send things round in circles to make money.

David Henig: If we agree a free trade agreement between the UK and the EU that has no tariffs and no quotas, we will all breathe a deep sigh of relief and say, "Thank goodness we don't have to deal with this issue in the Northern Ireland Protocol." If that is not the case and we fail to reach a free trade agreement by the end of the year and have to implement the Northern Ireland Protocol with tariffs and quotas in place, it will be even more complicated than we are saying it will be at the moment.

Q13 **Baroness Couttie:** Will EU oversight of state aid in Northern Ireland have an impact on its operation in the UK as well? How will that work?

Dr Sylvia de Mars: Yes. The entire Protocol is directed at the UK rather than at Northern Ireland. It is directed at the UK on behalf of Northern Ireland. The EU has guaranteed that EU state aid law will apply to the UK in so far as any state aid that it gives has an effect on trade in goods between Northern Ireland and Ireland or the rest of the EU 27.

Any state aid that the UK gives that might have an impact on goods moving between Northern Ireland and the EU will be subject to EU state aid law. That is very broad. It does not only mean that an entity in Northern Ireland given state aid would be subject to EU rules, which on the basis of the protocol you would expect; it also means that if, for instance, a car manufacturer in Nottingham got a subsidy and traded its cars in Northern Ireland, that would run into the problem of aid affecting the single market, because those cars moving from Northern Ireland to the EU market would have an advantage in the sense that they had been subsidised in one way or another.

Due to the way that Article 10 and Annexe 5 of the Protocol work together, a lot of the state aid decisions that the UK would make would not appear to be connected to Northern Ireland specifically but, none the less, would be captured by the idea of trade between Northern Ireland and the EU being affected. So there is very limited space for movement in terms of big state aid action that the UK can take that would not be covered by EU law.

Baroness Couttie: Unless there were some curtailment of those goods

leaving Northern Ireland, so you could sell them in the Northern Ireland market but would be limited in where you could sell them on to.

Dr Sylvia de Mars: Yes, absolutely, unless you worked to counteract the subsidy if the goods are in Northern Ireland. We are now setting out on an administrative nightmare for someone, I think, although not us. That would be the distinction. Again, it is complicated. I imagine that, after having left the European Union, part of the freedom to be enjoyed by the UK is to do things, including state aid to some extent. However, in that case it has to be very careful not to trigger these EU rules because products move through Northern Ireland.

Lord Wood of Anfield: If I were a Tunbridge Wells widget manufacturer—although I am not sure that there are many of those—and I sold some widgets to Northern Ireland, I would fall within EU state aid rules.

Dr Sylvia de Mars: Yes. It is a matter of scale and it is also a question of whether that manufacturer would qualify for an exemption from EU state aid rules in general, as some things are exempted. Again, this is likely to end up in arbitration in one way or another, the question being: how does it affect trade between Northern Ireland and the EU?

Lord Wood of Anfield: The flipside of that is that if the UK Government decided to give, outside the EU, a form of state aid that would not be permissible inside the EU but was outside the EU, Northern Irish firms could not get that form of state aid.

Dr Sylvia de Mars: Not without falling foul of the rules.

Lord Wood of Anfield: So they will be excluded from a UK form of subsidy that is prohibited by EU state aid rules.

Dr Sylvia de Mars: Unless they can demonstrate in one way or another that the subsidy they are getting has no impact on trade between Ireland and Northern Ireland.

Lord Lamont of Lerwick: In answer to Lord Wood, you talked about the widgets just being sold to Northern Ireland. You do not mean that they have to go from Northern Ireland into the EU?

Dr Sylvia de Mars: No, not necessarily, because there will be a competitive disadvantage. If the widget is sponsored by the UK and can be sold for only £10 in Northern Ireland, whereas the equivalent subsidy does not exist in the EU, so a similar widget produced in Amsterdam or Dublin will be much more expensive, we are in state aid territory. It is about ensuring level competition between Northern Ireland and Ireland because the product is moving within that single market territory.

Colin Murray: Interestingly, because of where this fits within the Protocol on Ireland and Northern Ireland, companies dealing with these rules could, in an England and Wales court case, still potentially make a preliminary reference to the Court of Justice of the European Union over

state aid elements because of their effects on the Protocol on Ireland/Northern Ireland.

Lord Kerr of Kinlochard: I am struck by how wide the definition of state aid in Annexe 5 to the Protocol is. It includes all sorts of stuff: training aid, employment aid, regional aid, and so on. In GB, aid to a company in Aberdeen could be banned if the goods it produced were at risk of going into the EU, or one could end up in court on infringement proceedings because of that aid. I find it hard to see how it will work out in practice but, in theory, this state aid article is very wide-ranging.

Dr Sylvia de Mars: Yes, it is. I would suggest that, to play it safe, the UK Government might in general wish to keep EU state aid rules in mind when deciding on any subsidies.

The Chair: I am sorry that we are running out of time, but I would like to bring in Baroness Brown on this point.

Q14 **Baroness Brown of Cambridge:** Given that very broad definition of state aid, could there be a danger in the UK Government trying to replace some of the support that has come through the European Regional Development Fund, which might support a company in Wales or somewhere with R&D or training? Now that we are no longer in the EU, could something that replaced that be regarded as state aid?

Dr Sylvia de Mars: Yes. Off the top of my head, the only exception noted in the Protocol is agricultural subsidies to farmers in Northern Ireland. Those would be exempted from the EU state aid rules, as far as I am aware, under certain conditions which I think are to be defined by the Joint Committee. The Joint Committee is not busy enough yet, so it is also working on that.

Baroness Brown of Cambridge: So is there potential that our CAP replacement in Great Britain could be regarded as state aid, depending on what precisely it does?

Dr Sylvia de Mars: The point of Article 10(2) is to avoid that being an issue and ensure that whatever replaces the CAP is not prohibited because of the Protocol on Northern Ireland. I think that is the only type of subsidy that was negotiated on.

Colin Murray: But regional development funding is innately different—

The Chair: We are very short of time, so I would like to turn to another very important subject.

Q15 **Lord Ricketts:** This is telling. You started to touch on the issue of the potential, putative EU-UK free trade agreement and its impact on the Protocol. I think you said that there would be a sigh of relief if all tariffs were abolished as part of that agreement; that would certainly simplify things. Would a free trade agreement have any other impacts on the operation of the Protocol, beyond that yes or no on tariffs? If we do not get a free trade agreement, are there any other aspects apart from tariffs

that would have an impact?

David Henig: Essentially, all the checks between the European Union, Northern Ireland and Great Britain can be reduced or eliminated through a free trade agreement. So, for example, regulatory alignment is an obvious one. I know that the Government are saying that there will not be any alignment, but if there is, that could potentially reduce the level of checks.

Typically, within EU trade agreements, and certainly within the EU-Canada agreement, you have some kind of equivalence regime with checks on food-related products, which reduces the checks on those considerably. It actually lays out the percentage of products which will be checked, which can be as low as 1% or 2%. That would be of great assistance as well.

Procedures to simplify customs can also be agreed in trade agreements. For example, one can mutually recognise authorised economic operators, which would also help reduce the checks. Many things can be included which would help trade between not only Great Britain and Northern Ireland but Dover and Calais, for example. I take Dover and Calais as my starting point, as we will have to invent something like that for trade between Northern Ireland and Great Britain. So if we simplify that, we would also simplify the checks between Northern Ireland and Great Britain.

Lord Ricketts: Putting it the other way around, if the Government do what they say they will do and move towards regulatory divergence in whatever free trade arrangements are made, does that make life in the Protocol environment even more difficult than you have already described, or does it remain equally difficult?

David Henig: I think we were describing a no-deal or thin-deal case. The more one agrees with the European Union, whether in the form of a free trade agreement or in other mutual recognition agreements, the more checks between Northern Ireland and Great Britain one should be able to remove.

Lord Lamont of Lerwick: Can you be completely clear on this? Are you saying that the vast majority of the checks on Northern Ireland-GB trade could be eliminated by an FTA? If that is the case, why do people object to this Protocol being described as a Northern Ireland-only backstop? Is that not what it is?

David Henig: I would want to do a lot of research before putting a figure on the number of checks that can be removed. However, it is clearly correct to say that the number of checks can be reduced in this situation. It is unlikely that a free trade agreement will eliminate all checks; in fact, I cannot think of a thin free trade agreement in the style of the EU-Canada agreement that has removed all checks. It will not remove checks in their entirety, but some will be removed.

The Protocol very much governs trade and implies the maximum level of checks which one could start to remove in other ways, such as through free trade or other agreements.

Colin Murray: This gets into the area of how many pluses you add after Canada. This is about the level of regulatory alignment and whether the UK Government in their current position want that level of alignment with the EU as part of a free trade area or association agreement.

When you talk about the status of Northern Ireland, it exists now, under the Protocol, in a position of deep alignment with the European single market. It is little removed from, say, the Norway model of how relations between the EU and a non-member state work in practice. In fact, in some ways, with the Court of Justice's explicit involvement, it is almost a deeper form of alignment.

An FTA, as with the EU-Canada agreement, represents a very different form of alignment. It could take in a lot of regulatory areas, but when the UK Government talk about zero tariffs and zero quotas, that is in some ways quite an old-fashioned way to look at a trade agreement. Regulatory alignment is where a lot of those checks—

Lord Lamont of Lerwick: But does this not show the similarity between what has been agreed and the previous May deal, except that it is now restricted to Northern Ireland?

Colin Murray: As I said in my opening comments, the very logic of Northern Ireland's special constitutional condition was to militate towards some form of special arrangement for Northern Ireland. May tried to defy the logic of that unique circumstance, saying that we could apply this on a whole-UK level. The Johnson deal goes back to applying some form of Northern Ireland-specific arrangement. It is Northern Ireland-specific and it is one of deep alignment. It is very different from an association agreement, which would certainly apply in terms of trade between the EU and the rest of GB.

The Chair: Dr de Mars, do you have anything to add here? It is a very important point.

Dr Sylvia de Mars: The thing that I would stress about regulatory alignment, which I think is frequently misunderstood or missed, is that it is not enough just to have the same rules. We have the same rules now, obviously; we have not been able to change any rules since we ceased to be an EU member state. That is not good enough. It is about the overseeing architecture. It is the extent to which the EU has insight into what we are doing in practice that determines whether or not there is friction at the border. That is why the single market is so unique.

So, my answer on all these matters of regulatory divergence is that, if the EU starts to fear that the rules are changing and becoming more and more incompatible, friction at the border will increase. If the UK is adamant that there is no dynamic regulatory alignment on anything to do

with the free movement of goods, I imagine that that implies that kind of divergence.

If we are not planning on diverging on, say, technical standards of manufacturing, I am not entirely sure why regulatory alignment, in that sense, would be problematic. It would be simplest, for the purposes of the border, if there were alignment with the single market on goods. Saying that we are diverging implies that, for now, the rules are broadly the same. Some risk-space checking might be appropriate but, as there is more divergence in different directions, all that will increase. The proposed free trade agreement will not address those increases in divergence unless there are commitments in it to some form of regulatory alignment.

The Chair: Thank you very much. Before we come to our last question, I know Baroness Hamwee had a series of questions, but one or two of them have been answered in part.

Q16 **Baroness Hamwee:** I think that most of them have been answered, unless you can add anything on what is required to be put in place to make the Protocol operative by the end of 2020. It strikes me that no one has mentioned technology. You are not technocrats or engineers, so you might feel that this is not for you, but is there scope for technological developments to minimise the requirements at the border?

Colin Murray: As we ran towards the possibility of a no-deal exit, the Government formed the technical advisory group on alternative arrangements last summer. Essentially, all that has happened is that the border issue has moved. When 1 January 2021 comes, there will no longer be a land border on the island of Ireland; it will move to the Irish Sea. A lot of the work of that group should not go away, except we have stopped talking about it. I was looking for parliamentary Questions about it; I know it met through to September, but there have been no headlines or reports about its operation. As David mentioned earlier, things like trusted trader schemes or accreditation schemes were emphatically part of that group's mandate. If we are looking to reduce friction at the sea border, that group needs to stay operative. The problem has not gone away, it has just moved.

David Henig: Yes, there is scope for technology to play a role here. The problem with the discussion when we were talking about the Irish land border was that you still required a border, and border infrastructure. We are now saying that there will be border infrastructure on either side of the Irish Sea. Once you have that border infrastructure, it is possible to use technology to reduce levels of friction. I would be quite disappointed if the group that Colin referred to has been wound down. I was quite disappointed that the Alternative Arrangements Commission, set up to look at the Irish land border, then decided to stand down when the new Protocol came in, almost as if it did not matter to the sea border. Actually, it should matter even more. I would very much like to see technology play a role, as it could in other UK ports of entry.

Colin Murray: Trusted trader schemes and assurance schemes are all much easier to do in a sea border framework than they ever would have been with a land border framework.

Baroness Hamwee: Because you do not have 200 crossings.

Colin Murray: But Michael Gove in his speech yesterday said that there would be an operational border. He said that it would take quite some time, maybe five years.

Dr Sylvia de Mars: 2025, I believe, is when he said the smartest border in the world would be ready.

Colin Murray: If that applies at Calais/Dover, it applies equally at Cairnryan/Larne.

Q17 **Lord Sharkey:** Article 4 of the Protocol says that Northern Ireland is part of the UK's customs territory and we can include it within the scope of any future FTA. What are the implications of that?

David Henig: Yes, we are free to include it, but let us look both ways at this. Let us take an example of a country with which the EU does not have a trade agreement—say, the United States. Will the United States be happy to include produce from Northern Ireland going to the United States at reduced or eliminated rates of tariff when those products could have come from the EU without further checks? Well, we will see; the US could be quite sympathetic to Northern Ireland in that situation, but I would not take that as guaranteed. So, yes, we can include Northern Ireland, in the sense of Northern Ireland exports, but our trading partners might have different views.

Lord Sharkey: That is complicated by the notion of equivalence in regulation as well. It is not just tariffs that matter.

David Henig: It depends. I think that if the UK as a whole does not have equivalence with the US as a whole, it is not any more complex. The US will have its forms of checking produce anyway. I do not think that that is so complicated. If the means of reducing checks between the UK and the US have been introduced, some of those should be open to Northern Ireland exports as well. I am just flagging up that there may be some issues.

In terms of products coming into Northern Ireland and whether they are taking advantage of the new rules, the rules apply within the Protocol. Again, a judgment will have to be made as to whether goods coming from elsewhere to Northern Ireland—not from Great Britain but from other countries—are at risk and will have to have the EU tariff paid before, if applicable, it is rebated. In that sense, you could argue that Northern Ireland will not get the full advantage, but it should still get some advantage from UK trade agreements.

In respect of EU trade agreements made with countries that the UK does not have agreements with, in theory Northern Ireland products that go

into Ireland and are then exported to trade partners should qualify. However, that is a bit of a grey area. So I am sorry but it is not entirely clear.

Colin Murray: The issue could be multiplied if you are a small or medium-sized enterprise. If you are a very big business, you will have the resources to try to understand these overlapping regulatory arrangements, but lots of businesses in Northern Ireland will not necessarily have that capacity.

The Chair: Dr de Mars, do you have anything to add?

Dr Sylvia de Mars: This is all theoretical. How it will work in practice we will just have to wait and see. As David indicated, as and when the UK concludes trade agreements with partners, especially ones that the EU does not have trade agreements with, this might become a very big problem or a very small problem.

The Chair: We are deep into injury time but the ultimate supplementary will now come from Lord Kerr.

Q18 **Lord Kerr of Kinlochard:** Can I cheat and ask two? First, what happens if all these unknowns are not known and settled with systems set up by the end of the year? We know that legally the UK Government are responsible for ensuring that they are all set up, but what happens practically on the ground if they are not?

Secondly, what happens four years out if the Northern Ireland Assembly refuses, democratically, to consent? The article seems to say that the joint committee will sort it out. What does that mean? If democratic consent is refused, this Protocol arrangement will presumably fall, because we are a democracy—but what do you revert to? Do you revert to a frontier across the middle of Ireland? I do not know.

David Henig: I will take the first supplementary. Apart from saying the word “confusion” in response to what happens if the arrangements are not in place, I would hope that the UK Government would unilaterally put in place what they thought was the best approximation of what had been agreed with the EU in order to eliminate the possibility of confusion. I would hope that they would say, “We didn’t agree. This is what we think it is. We’re going to just do that.” That would seem to be the pragmatic approach.

Colin Murray: Some efforts towards implementation in that regard would at least stop it becoming a tit-for-tat situation, with the UK and the EU taking retaliatory measures against each other, which of course could never have happened when the UK was an EU member state. You cannot impose retaliatory measures against an EU member state.

On the second issue, if, four years out, the Northern Ireland Assembly takes that call, there is almost an unreality to the question in that the call is massive for the Northern Ireland economy. It is a one-stop question. There are no gradations of being in or out; you take this call and

potentially everything changes as soon as that happens. It is a little like the retention of counterterrorism measures in UK law and the idea of an annual sunset clause. Yes, Parliament had a sunset clause and could at any point stop the UK having counterterrorism law throughout the conflict in Northern Ireland, but it never got close to using that power. There was almost a chimera of democratic accountability in the process.

The Chair: Dr de Mars, I will give you the final word.

Dr Sylvia de Mars: What will the Joint Committee do if Northern Ireland says that it no longer wants the Protocol? Those are going to be the world's most unpleasant discussions. I honestly do not know. This goes back to the pre-withdrawal agreement situation when we said that we needed an alternative to replace the backstop. We did not get very close to finding an alternative to the backstop when that was the goal. This is saying that we have something that resolves the border issue, but Northern Ireland does not want it any more, so now please find us something that avoids all borders for ever. I wish the politicians involved the best of luck, as I do not think that this is a legal matter per se.

The Chair: Thank you very much indeed for a thoroughly absorbing hour and 40 minutes. We are very grateful to you for coming and for being so frank with us.