



Select Committee on the European Union

Oral evidence: The Protocol on Ireland/Northern Ireland

Tuesday 25 February 2020

3.15 pm

Watch the meeting

Members present: The Earl of Kinnoull (The Chair); Lord Cavendish of Furness; Lord Jay of Ewelme; Lord Kerr of Kinlochard; Lord Wood of Anfield.

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Questions 24 – 31

Witnesses

[I:](#) Professor David Phinnemore, Professor of European Politics, Queen's University Belfast; Dr Viviane Gravey, Lecturer, Queen's University Belfast.

Examination of Witnesses

Professor David Phinnemore and Dr Viviane Gravey.

Q24 **The Chair:** Good afternoon and welcome. Thank you very much for coming to this public evidence session, which is being broadcast live on the web and will be available as a link on the web afterwards. A transcript will be prepared and sent to you. We would be very grateful if you could check it and send us any necessary corrections. We have just short of an hour this afternoon. When you first speak, it would be helpful if you briefly introduced yourselves. While we know who you are, I am afraid that those watching will not.

In view of the shortness of time, I will go straight in and ask you for a high-level assessment of the protocol. How would you summarise its legal, political and economic impact?

Professor David Phinnemore: I am professor of European politics at Queen's University Belfast. I focus very much on the EU, its institutional development, its external relations and, in particular, its enlargement. We have been following the Brexit developments over the last three years or so with a particular focus on Northern Ireland, hence my very strong interest in the protocol.

The protocol is a very interesting legal document in that, although the UK is leaving the EU and Northern Ireland is very much part of the UK—and will continue to be so until that situation changes through democratic consent—it provides for particular arrangements and differentiated treatment for Northern Ireland in the context of the UK's withdrawal.

It is interesting for lawyers, because it creates an unprecedented set of arrangements, as Northern Ireland will de facto remain part of the EU's customs territory, because the Union Customs Code will apply to it. It will also remain part of the EU's single market, at least as far as the free movement of goods is concerned. The reason for this, as I think everybody knows, was to avoid the hard border on the island of Ireland, but we also have the protocol to ensure that the Good Friday agreement can continue to be implemented in all its parts and to address other unique circumstances on the island of Ireland. There is also a reference in there to supporting the all-Ireland economy.

It is also a very interesting set of arrangements because, when it was originally devised, it was there as a backstop which could come into force depending on the nature of the UK-EU relationship. During the autumn, it was very quickly turned into what is now colloquially referred to as a "frontstop"—in effect, a permanent, or potentially permanent, basis for relations. One of the challenges we have is to ensure that the protocol, as it is, fulfils its functions as a permanent arrangement, rather than being something that was envisaged as being temporary, if it ever came into force.

There are challenges here, essentially because the future of the protocol and its implications are so tied up with the future UK-EU relationship.

Whereas a year ago we anticipated that that arrangement would limit the amount of difference between Northern Ireland and the protocol and the rest of the UK, it looks as though the negotiations will pan out in a way that leads to far more differentiation between Northern Ireland and the rest of the UK than we originally envisaged.

Dr Viviane Gravey: I am a lecturer in politics at Queen's University Belfast and co-chair of Brexit & Environment, which is an ESRC-funded network—it receives UK public research funding—looking at the impact of Brexit on the environment. I am currently on strike, so I am speaking here in a personal capacity and not for Brexit & Environment.

For me, the key thing on the backstop is something we perhaps have not really heard about. The 2018 withdrawal agreement had an extremely ambitious environmental component. The backstop was a kind of return from the EU to the fact that trade and the environment are extremely closely interlinked. However, with the 2019 backstop, the EU and the UK have completely rowed back on this. Right now, the Environment Bill is going through Westminster; there would not be an Environment Bill without the original backstop. The requirement for complete reform of environmental governance and the recognition of environmental principles was all tied to the original backstop.

So some of the effects of the backstop are still with us today, but the frontstop that we have now includes much less on the environment. This is extremely interesting when we consider why there was so much on the environment in the 2018 backstop. It was because of the theoretical operation of the single customs territory. That was the way in for the environment. What we see now is that, while in practice Northern Ireland will still have to comply with so many EU customs rules, all the environmental requirements have been removed.

You end up in a situation in which there are not only questions about divergence from GB but the possibility of using Northern Ireland as a weak point to allow goods produced with much lower environmental processes to enter the single market. There are key concerns for the EU in removing all these environmental commitments that it has perhaps not completely realised. Perhaps because the renegotiation of the backstop into the frontstop was done so quickly, a lot of it was about paring things down to a minimum. That could come back and be really problematic in the future relationship, and also in the operation and implementation of this new frontstop through the protocol and the joint committee.

The Chair: That is very interesting. I am not sure we have ever had a *gréviste* before us, but that is very nice indeed.

Q25 **Lord Kerr of Kinlochard:** The protocol sets out a dynamic requirement to maintain Northern Ireland's compliance with EU single market law in a wide range of areas. How heavy do you think that workload will be? How easy will it be to implement laws which had no Northern Ireland or UK voice in their making? Will that be tricky politically, logistically or technically? How will the responsibilities be divided between Northern

Ireland making regulations and the UK being responsible for ensuring that Northern Ireland makes them?

Professor David Phinnemore: As with so many questions about the protocol, part of the answer is that it depends. We are still waiting for a lot of the mechanics to be sorted out. The starting point is that the legislation that will apply to Northern Ireland is already applied in Northern Ireland, so the challenge comes around any changes to those regulations. We are talking about around 300 pieces of secondary legislation in the EU and about the Union customs code. That legislation falls well short of all the single market legislation. It is restricted to goods and, within that, was pared down to the absolute minimum deemed necessary by the EU and the UK to ensure the free movement of goods across the border. It does not include services.

When we look at the legislation in place, under the protocol the UK will obviously be committed, in respect of Northern Ireland, to maintaining dynamic alignment with the pieces of legislation listed in the annexes. This raises the question of how often those are likely to be changed. Some of those pieces of legislation have been around since the 1960s. That said, some date from the last 10 years. It will be interesting to see which of those get amended and replaced in due course. It is very difficult to identify how much will come through. The growth areas in EU legislation are not necessarily in the free movement of goods, so we should probably not overstate how much change there will be to that body. That said, there will be changes coming through.

That raises the question of how to ensure that Northern Ireland's voice is involved in the adoption of any new legislation at the EU level. There are quite developed mechanisms in place in the protocol. The joint committee has a key role here, particularly when it comes to new pieces of legislation. There is also a specialised committee, but beneath that there is a joint consultative working group, which—as far as I am aware—is unique in EU external relations. It provides for an exchange of information between the UK and the EU in respect of the protocol. There are probably opportunities there to ensure that the Northern Ireland voice is heard, so that when it comes to some of the technical issues around changes to pieces of legislation, the implications for Northern Ireland can be fed into the EU policy-making process through that route.

The key question there is the extent to which the UK includes the Northern Ireland voice in the delegation to the joint consultative working group, the specialised committee and the joint committee. We have no clarity on that at the moment, other than a commitment on the part of the UK Government that the Northern Ireland Executive will be involved as appropriate when it comes to the joint committee and the specialised committee. The key challenge is making sure that the Northern Ireland voice feeds into the joint consultative working group.

As we know from studies of EU external relations, if as a non-member state you are to influence EU policy-making, you need to be in early, at the very technical level and bringing forward expertise. If mechanisms

can be put in place that facilitate that, there is a good chance that Northern Ireland's interests can at least be reflected in the EU's understanding of the legislation it is putting forward. The key point to make there is that, in the areas already listed in the annexe, the UK will not be able to block the application of that legislation. It will not be able to block additions, changes or supplements to legislation. Where it will be able to resist is when it comes to new pieces of legislation, but there we do not know what the implications—the possible sanctions for non-implementation—will be if the EU deems it necessary for this legislation to apply in Northern Ireland. This will all have to be worked out in the joint committee in due course.

Q26 Lord Kerr of Kinlochard: Thank you. How does it interact with the devolution settlement? Regulation will be required in a number of reserved areas. Take the customs code, for example. Any adjustments to the customs code—I think there are quite a lot over time—would presumably need to be made by the UK Parliament, by us, unless there was some additional devolution. It seems unlikely that the Government will devolve only to Northern Ireland. It would be difficult with the Scots and the Welsh if they did. They will therefore not extend the devolved powers of the Executive here, but we will make laws in Westminster that will be applicable only in Northern Ireland. Is that right?

Professor David Phinnemore: We would need a lawyer to interpret what is anticipated on the part of the UK Government. My understanding is that when EU law is adopted, replaced or amended in those areas covered by the annexes, that will automatically apply in Northern Ireland.

Dr Viviane Gravey: This is not just about new legislation. The protocol is about continued compliance in a completely different context. I see parliamentary oversight as about overseeing implementation and having executive accountability. There will be a lot of questions there. You are right that there is some overlap between reserved and devolved competence. In some areas it is not really clear where the competence currently lies. There will need to be some institutional creativity, and we have examples of that already.

For example, we see that the House of Commons Welsh Affairs Committee can organise and sit jointly with committees of the Welsh Assembly. If we could see this reproduced between Northern Ireland Assembly committees and the Northern Ireland Affairs Committee, or even perhaps between the Lords EU sub-committee and Northern Ireland Assembly committees, it could help to have joint evidence on both reserved and devolved matters and to be able to have discussions on where there are potential contradictions between these two. A lot can be done internally in the UK. While we prepare for the implementation of the protocol, it is not just about what is agreed in the joint committee. A lot of preparatory work also has to be done on the EU and UK sides domestically to prepare for this.

Lord Kerr of Kinlochard: What happens if Northern Ireland Ministers and the Northern Ireland Assembly are unable or unwilling to make a

regulation that, under the terms of the protocol to the withdrawal agreement, it is the UK Government's legal responsibility to ensure is made?

Professor David Phinnemore: I would leave that to a legal colleague. Unfortunately, I cannot answer that one.

Dr Viviane Gravey: Yes, it is a complex question. We have some insight from what happened when the UK was in the EU. If Northern Ireland had devolved competence to implement a piece of legislation and was found in breach, legally and internationally the UK was in breach but the fine was taken from the block grant. In the end, the money was taken from Northern Ireland. You have different levels of responsibility. The UK could be responsible, but if it found that Northern Ireland should have done it and there is no good reason why it did not, any fines or anything would fall back on Northern Ireland—but these are completely untested waters and I am not a lawyer.

Lord Kerr of Kinlochard: Will there be any special regulation-making or monitoring role for the Brexit committee here in Stormont? I do not know what it is for, to be honest. Do you think this is what it is for?

Dr Viviane Gravey: Of course, we have not had an official Northern Ireland voice in Brexit negotiations for a long time. This is about making sure that there is a unified, clear, official Northern Irish voice in the negotiations, making sure that Northern Irish interests are heard and potentially—I assume—using the Brexit committee here to try to feed into the preparatory work of the joint committee, the special committee and the joint consultative working group. It is a completely new committee. Its role is still up for discussion; I assume that a lot of it will have to be oversight, but it cannot really have oversight over UK Ministers. Again, that is where I suggest that we need much more interparliamentary work, because we will need Northern Ireland expertise but also oversight of UK Ministers.

The Chair: Just picking up a little on this variety, do you feel that, on the devolution settlement for the Executive and the Assembly, there was cross-community support for any variation to that settlement? In other words, I am sure that some people think there should be additional powers here in Belfast but is there a general feeling that additional powers of any sort should be devolved?

Professor David Phinnemore: If there is that feeling, it would not necessarily have cross-community support. We have been without a functioning Executive and Assembly for three years. A lot of people have possibly lost their familiarity with the way they work and what their functions are.

Once the Assembly and Executive have been up and running again for a couple of years, we will then get into a further debate about whether we have the right competences and whether there need to be changes. As part of that discussion, we will need to look at how the implementation of

the protocol is working. At the moment, there are lots of structures that possibly need to be put in place, but we have not really thought those through.

For example, what oversight role would the Assembly here have of the contribution of Ministers to the UK debate? What monitoring will there be of the content of the meetings of the specialised committee? To what extent will officials, possibly coming from the Northern Ireland Civil Service and Northern Ireland Executive, be obliged to report back to some committee that might be established by the Northern Ireland Assembly?

What might then be the link with any bodies set up by Parliament in the rest of the UK? What might be the arrangements to draw on the institutions of the Good Friday agreement in relation to north-south co-operation? What role will the North/South Ministerial Council have? It has the right to make recommendations to the specialised committee.

There are all sorts of institutional structures which need to be developed in response to the existence of the protocol. We are still at an early stage with respect to how that will operate.

The Chair: That is a very sensible answer.

Lord Jay of Ewelme: Could I just go back to something that Dr Gravey said right at the beginning, which I may have misunderstood? I think you said that, under the Northern Ireland protocol, lower environmental standards were required than had been the case and would be the case elsewhere in the United Kingdom. I was not certain if I got that right. If it is right, was it deliberate or by error, and what might the implications be?

Dr Viviane Gravey: In 2018, when we had the original backstop, the environmental non-regression article was in the protocol. There were elements in that list of environmental aspects that had to be complied with that were even more than what the EU currently asks of Norway on nature protection. There were also requirements for independent, well-resourced governance arrangements. All bodies—either UK-wide or you could have four bodies—would oversee the implementation of this, basically replacing the roles of the Commission and the European Court of Justice to fill any governance gaps that arise.

All this has been either completely removed or moved to the political declaration. So, we now have a lot of what Northern Ireland was getting in the backstop, which was easier access in the single market and being kind of—almost—in the customs union. This came with having to maintain very high environmental standards; the UK as a whole had to do this. Now we still have this easy access for Northern Ireland but far fewer environmental asks from the EU side.

Q27 **Lord Jay of Ewelme:** Okay, thank you very much. I wanted to ask a little about the various committees that will be set up under the protocol. You have talked a little already about the Northern Ireland Executive and

their role in the specialised committee and the joint consultative working group; at least, you said arrangements will need to be made to enable them to play some part. Would you like to say a bit more about that? Also, what role do you think the Irish Government and the north-south institutions established under the Belfast agreement might play? Will they have a role, and will that be a formal role? How will that side of things get fed into the work of the joint consultative working group and the other committees?

Professor David Phinnemore: The main route in for the North/South Ministerial Council will be through the recommendations that it can make to the specialised committees. If we think about the institutional structure under the protocol, there are three tiers. We have the joint committee at the top, which will basically bring together Ministers and officials, the specialised committee on—

Lord Jay of Ewelme: We do not know yet who any of the people working on any of these will be. Is that right?

Professor David Phinnemore: Not the individuals. We know from the EU side that the Commission will represent the EU at all three levels. It has not been made clear from the UK side, although there is a commitment to include representatives from the Northern Ireland Executive as appropriate. There is a certain amount of nervousness in London about devolving some of these representation questions, although I do not think it would be a question of representation but of being part of the delegation. Someone from London will have to lead the UK delegation.

Lord Jay of Ewelme: Do we know what is meant by “appropriate”? Is that if Northern Ireland issues are principally being considered?

Professor David Phinnemore: That depends on the view of the protocol taken in London. Arguably, all the content of the protocol is of relevance to Northern Ireland. The question is: in which areas does the Northern Ireland Assembly have competence? You could have part of a meeting that deals directly with devolved matters and other parts that do not. What do you do? Do you have the Northern Ireland part of the delegation in and out of the meeting? Equally, when you get down to the joint consultative working group, we will be looking very much at the technical dimension of issues, which will relate to law that applies in Northern Ireland. The composition of that body probably has to have far more Northern Ireland input. Ultimately, it is for the UK Government to decide the representation of the delegation.

Lord Jay of Ewelme: But would it seem sensible to you to have Northern Ireland, in effect, represented all the time?

Professor David Phinnemore: I would go back to the point I was making earlier. If we look at non-member states trying to influence EU bodies, the way to influence is by bringing the expertise that you have to the table to address the particular circumstances where the law will

apply. With all due respect to civil servants and Ministers in London, as we have seen over the last three years, the level of understanding of Northern Ireland issues in London is probably not as great as—

Lord Jay of Ewelme: As high as it might be.

Professor David Phinnemore: Indeed. If we go back to your question about the north-south bodies, there were a number of references there to the institutions of the 1998 agreement. Obviously, they involve not just the Northern Ireland Executive and Assembly and the north-south bodies but the east-west bodies. We need to think about what role they can play.

These institutions were created at a particular time to serve a particular set of functions, and on the assumptions that the UK and Ireland would be part of the EU. One of those key assumptions has changed now; plus, we have new differentiated arrangements in place for Northern Ireland. So what role can the existing institutions play once they are up and running again, and how should they, possibly, be supplemented?

One possibility, if we are looking for a way to have parliamentary oversight of this, is to have something north-south and, indeed, east-west: draw the parliamentary bodies there to keep an eye on the protocol and have the UK and Irish Ministers reporting to it.

A lot depends on how the protocol is implemented and how it evolves. But we have to address some of the clear gaps that exist in the institutional structures of the protocol. I go back to an initial point that was made: this was originally meant to be a backstop arrangement, which might not come into force and which would soon be replaced by the future UK-EU relationship. That now looks exceedingly unlikely. The expectation is that we will have this protocol for quite some considerable time to come, unless the MLAs do away with it. Therefore we need appropriate institutions in place to ensure that there is effective oversight and scrutiny of what is going on.

Lord Jay of Ewelme: Do you have any sense that this is being considered at all?

Professor David Phinnemore: The issues have certainly been put to the UK Government and to members of the Executive and political parties here. We are still very much at the early stages of coming to terms with what is actually in the protocol and how we will implement that, before we move to the stage where the increased need for oversight and scrutiny comes into play.

Dr Viviane Gravey: To contribute to what David has said, of course the way the decisions made by these bodies are scrutinised is important, but it is also interesting to see who gets to input into the preparation work. If the idea is that we need to come up with the best ideas, and that it is through the excellence of our propositions that we will be able to have any influence on this, that will mean drawing on the expertise of Northern

Irish civil society. It also means being clear and quite open about the types of groups that are being consulted, perhaps making sure that it is not just business groups but trade unions, environmental groups and so on. That would allow us to build in accountability and stakeholder engagement every step of the way. A lot of this preparatory work is in the gift of the Northern Ireland and UK authorities and their ability to reinforce the authority of the agreement.

Lord Jay of Ewelme: Thank you. Picking up on something you said just now, if an agreement on the things that the joint committee is looking at has not been reached by the end of 2020—one probably has to assume that it will not have been, but perhaps that is wrong—what would happen then?

Professor David Phinnemore: For the implementation of the protocol, there are four sets of issues which need to be addressed. The first is that of goods which are deemed to be not at risk of onward movement into the EU single market, which can therefore be exempted from tariffs. If there is no decision there, any tariffs which apply between the UK and the EU will apply to trade between Great Britain and Northern Ireland.

The second question relates to fish. In the absence of an agreement between the UK and the EU on fisheries, you would have to determine what the exemptions from the Union Customs Code are for the movement of fish caught by vessels registered in Northern Ireland in Northern Ireland ports. One assumes that they would want to reach an agreement on that.

The third issue is the level of subsidies for agricultural producers in Northern Ireland, so that they can continue to operate within the EU agricultural market. One assumes that the baseline there will be that, as long as those subsidies are not greater than those given to farmers in Ireland and the rest of the EU, that should be okay.

The fourth set of issues relates to arrangements so that the EU can monitor what UK officials are doing on the implementation of the customs code and EU legislation in Northern Ireland. That needs to be sorted out. I suppose that, if there is no agreement on the agricultural subsidies, you would then have the question of whether the goods produced by Northern Ireland producers can be traded across the border.

Lord Jay of Ewelme: Could you say again what the last one was?

Professor David Phinnemore: Following the original version of the withdrawal agreement, EU officials would have ensured implementation of EU law in Northern Ireland. It was then agreed that you would have an arrangement whereby UK officials would ensure implementation of the UK's obligations, with oversight from the EU. You have to look at the mechanics of that. When do you bring those arrangements in? What sorts of arrangements do you put in place to assure the EU that the customs code is being implemented effectively at the border or on goods moving between Great Britain and Northern Ireland?

Lord Jay of Ewelme: What sort of arrangements might one put in place to ensure that, in your view?

Professor David Phinnemore: The understanding is that the starting point is that you have officials in the UK who know how to implement the Union Customs Code. A certain amount of trust has developed over the years, notwithstanding the arrangements and position we have at the moment with divergent views on what is involved in the protocol.

We can probably anticipate reporting processes confirming what movements there are and what declarations have been made. I would have thought that, provided those are coming through regularly and that any spot checks confirm that everything is being addressed appropriately, there will not be a need for much oversight on the part of the EU. It will be a trust-based system, which will evolve over time.

Lord Jay of Ewelme: It need not be particularly controversial, provided that there is trust.

Professor David Phinnemore: Yes, provided that there is trust and effective implementation.

Dr Viviane Gravey: But there is no trust. It need not be controversial, but it will be currently. The content of the protocol as it stands describes monthly reports on customs implications from the UK to the EU and vice versa. That is notable. If there are any queries on whether or not the UK Government are levying the customs duties that they are supposed to, there is supposed to be discussion on this monthly. These discussions can quite quickly become heated.

David was saying that we have civil servants who know how to implement the customs code. Yes, of course, but we do not have many. This is very different from implementing the customs code for goods, especially on the agri-food side, as there are not that many goods in these areas coming in from outside the European Union. You are increasing the amount of work greatly and most customs officials are not based in Belfast, Larne or other Northern Irish ports. There is a big capacity issue. Do we have enough people? Do we have enough veterinarians to do all the SPS checks that will be required? We cannot train all these people in 10 months.

Lord Jay of Ewelme: It seems to me that there are two sets of issues. There is the issue of whether we have enough people to do what needs to be done and whether they are in the right place. As you said, there seems to be a genuine issue there. Leaving that aside, there then seems to be the issue of whether there is sufficient trust between both sides to enable such a system to work. I can see that there is a problem on the first point, but I am not personally convinced that there is a problem on the second, but that remains to be seen, I guess.

Professor David Phinnemore: It depends how much the administrative side is infected by the politics.

Lord Jay of Ewelme: Indeed.

Lord Wood of Anfield: Do you mind if I come in? This question is even more complicated, is it not? It is not just about getting UK officials who can supervise and implement EU customs codes. The EU will know that those officials will be under huge pressure from London to do things in slimline, light-touch ways. Presumably, the GB-NI interface will also be quite different from other interfaces into and out of the EU. So there is a uniqueness about this, plus a political context, that means that there will be huge pressure on the EU to do more than just carry out the occasional spot check and have a high-trust relationship from day one. Is that right?

Dr Viviane Gravey: There is a political aspect here. The EU will not want to be seen as always having a representation there and overstepping the boundaries of what is politically agreeable. However, at the same time, this is about protection of the EU single market. The EU takes SPS controls and food crime especially extremely seriously. The EU does not trust the UK on food, for long-standing reasons of food-health crises that originated in the UK in the past. There are concerns and there are, of course, very interested parties. Think of French farmers or agri-food suppliers in Europe being quite clear that they do not want a back door into the single market through Northern Ireland. They will put on a lot of pressure and it will be politically expedient for some parts of the EU to use that pressure. Everyone wants to stand up to the UK, politically.

The Chair: Lord Kerr, before we move on, did you have something to add?

Lord Kerr of Kinlochard: I want to pick up on Professor Phinnemore's point about how provisions drafted for a backstop have been brought into the withdrawal agreement to play a completely different role. You have written interestingly about how a couple of defects have got through—in particular, the absence of an evolution clause. You have also said something which I, for once, do not agree with—which, for me, is a shocking thing. You have said that it would be important to annex the Irish protocol to the future FTA treaty, if there is one, because this would provide a firmer legal base for the arrangements contained in the protocol.

Why do you say that? I see no conceivably firmer base than being in an international treaty—the withdrawal treaty, where the protocol is. I see that its provisions are suboptimal for the situation in which they find themselves, but I do not see why it would have any more legal weight or authority if it were taken away from that—which it cannot be—and put in addition, I suppose, as a protocol to the next treaty, if there is one.

I also agree strongly with you that the idea of an evolutionary clause is starting to look a bit academic. If we have a Government who are in denial about what this says and are going to argue for forms of flexibility that will be innovative, it is hard to see the EU doing anything other than entrenching and putting all this in concrete. At the moment, it is hard to see it feeling that we are to be trusted with an evolutionary pattern. It

will want to hang on to what Mr Johnson signed up to and try to make him implement it.

Professor David Phinnemore: When I talk about something evolutionary, it is more to reflect the fact that there is widespread concern in Northern Ireland that what we have is a suboptimal arrangement. When one thinks about the protocol, what it was trying to achieve and the European Union's original language that we can look for "flexible and imaginative solutions" to address "the unique circumstances on the island of Ireland", nothing was really coming forward from London to see how we could create a maximal arrangement to deliver on those objectives. As a consequence, what we have in the protocol is the bare minimum that one needs.

For example, all Article 11 of the protocol on north-south co-operation does is list the areas, even though we have had an extensive mapping exercise undertaken. So there are big questions about what will happen in those areas. Equally—I recognise that this is only in the preamble—we talk about supporting the all-Ireland economy, and the British Government back in 2007 said that prosperity was fundamental to peace in Northern Ireland, but when the economy is so dependent on services, and we do not have the free movement of services, was there not a missed opportunity with the protocol to look at a broader understanding of how to support the all-Ireland economy and minimise the disruption of a border on the island of Ireland? The arrangements in place at the moment address only the movement of goods, not services, across the border, which is concerning.

The Chair: That is a vital area. Unfortunately, time is not our friend, so we ought to move on to Lord Cavendish.

Q28 **Lord Cavendish of Furness:** Thank you. Professor Phinnemore, in your opening remarks you touched on the democratic consent mechanism. What is your assessment of the mechanism contained in the protocol? What impact will the requirement for the Assembly's consent every four and eight years have on the stability of power-sharing institutions?

Professor David Phinnemore: It is a complex set of arrangements, which I have tried to simplify in my own mind. The mechanism essentially involves Members of the Northern Ireland Assembly being given the opportunity to vote on whether to maintain the arrangements as regards Articles 5 to 10. I think there is a slight lack of awareness that the democratic consent provisions apply only to Articles 5 to 10, not the entirety of the protocol. That said, there are other mechanisms by which you can replace elements of the protocol. After just under four years of implementation, we will probably have a vote in the Assembly on whether to continue the arrangements. If there is a simple majority to maintain the arrangements, they will continue. If there is a cross-community majority, we move to another vote in eight years.

This obviously means that the protocol will remain a politically sensitive issue throughout politics in Northern Ireland, particularly in the lead-up to

those votes. At the moment, the assumption is that there is likely to be a majority in favour of keeping the protocol, but—as a number of commentators have indicated—we have the lived experience of the implications of checks, controls and differentiation between Northern Ireland and the UK to come. We do not know what the economic implications of these arrangements will be.

A concern I have is that the protocol becomes very politicised, particularly in the context of increasing discussion about the constitutional future of Northern Ireland. We have seen some data today about the way in which public opinion sees Brexit as having a significant impact on debate about the constitutional future of Northern Ireland. I cannot see that necessarily going away.

Another key concern I have with it is: what happens if the MLAs vote it down? You then have a two-year period in which the provisions continue to apply, but there is no clarity about what happens at the end of that period. The default position is that Northern Ireland would simply be covered, in relation to the free movement of goods, by whatever arrangements are in place for the UK and the EU. Given where we are currently with UK ambitions for the future relationship and the UK's refusal to contemplate signing up to a single market and customs arrangement with the EU, the consequence is that you are back to the prospect of checks and controls on the movement of goods on the island of Ireland. We are almost back where we were in how that can be addressed.

I suppose some people would think we talked about alternative arrangements and various processes being put in place. People said there was no way they could be put in place before the end of the transition period, but some people were optimistic that they could be put in place within a four or five-year period. I think we are back into the territory of whether that would be possible. That simply moves us back to a position in which the Irish border question is centre stage. If there is one benefit of the protocol, it is taking the Irish border question out of the debate at the moment.

Dr Viviane Gravey: From a business perspective, barriers to NI to GB and GB to NI trade could see a furthering of the all-Ireland economy and agri-food reorganising itself even more on a north-south basis then, four years down the line, having two more years to completely reorganise itself on an east-west basis. If it keeps changing, it is very different supply chains and could be very problematic for all businesses here, not knowing which way to turn. Obviously, they want to be able to trade freely in both directions—but it does not look as though it is going that way.

Lord Cavendish of Furness: That was a very interesting answer. Thank you.

Q29 **Lord Wood of Anfield:** I could ask you lots of questions about customs and regulatory checks—do not worry; I will not. One thing I do want to

ask you, which we have been talking about all day—at least, I have—is the concept of what counts as a good that comes across the Irish Sea and is at risk of being sold on to the EU single market. As experts, what do you think that regime will look like? Where will it be done? Who will do it? Do you suspect it will, in the end, be done with the presumption of everything being at risk unless proved not, or of everything not being at risk unless it is proved that there is a risk?

Dr Viviane Gravey: It depends a lot on the future relationship. Theoretically, there are two possible ways of looking at an at-risk good. First, it is at risk because, while it is theoretically going into Northern Ireland, it could go further into the EU single market. Secondly, it is at risk because there has been regulatory dealignment and divergence. You could end up with goods that are not considered proper for the EU single market entering through the Northern Ireland backdoor. The more divergence between GB and the EU, the more that second way of being at risk becomes important and the more need you potentially have for spot checks and all this.

Lord Wood of Anfield: That is interesting.

Professor David Phinnemore: The starting point is very clear: everything is at risk of onward movement until the EU Commission is assured otherwise. That is our starting point.

Lord Wood of Anfield: So the UK is on probation from day one, essentially?

Professor David Phinnemore: It is already on probation. These decisions have to be taken, initially at least, by the end of this year; otherwise, if tariffs are due on the movement of goods between the UK and the EU, they will have to apply from 1 January.

Lord Kerr of Kinlochard: That means that, if this regime is going to come in at the end of the year, it is absolutely crucial for the rebate system, particularly for small and medium-sized enterprises, to be invented and communicated very quickly.

Dr Viviane Gravey: Definitely.

Professor David Phinnemore: Yes, businesses are crying out for that. It goes back to the point about democratic consent. The last three years have been all about uncertainty. There is a desperate need, particularly in the Northern Ireland context, for a degree of certainty.

We may have been in the position before where, under the May deal, we could have had the least worst of both worlds. I do not think you will find any economic operator in Northern Ireland who believes that this is a good deal for Northern Ireland. So it is imperative that any arrangements that create a degree of flexibility, and create certainty for Northern Ireland, are put in place as soon as possible.

That does not mean from day one of the post-transition period; it means much earlier, so that planning can be done and reassurances can be given to Northern Ireland's economic partners, particularly when it comes to supply chains. At the moment, the understanding in some quarters in the rest of the UK is that there will be checks, controls and goodness knows what on the movement of goods between Great Britain and Northern Ireland.

Some businesses will simply not want to engage with whatever is required. They need clarity; they need certainty. Businesses here need to be able to tell customers and partners what the arrangements are, not what they might be.

Q30 The Chair: We are very short of time, so I would like to move to our last area of inquiry. This is really about the protocol and how it can evolve. The first aspect is regulatory divergence within the EU, or the development of EU law. Do you feel that the protocol is a living enough instrument that it can evolve to take account of a certain amount of divergence? Are you able to tell us whether there is a limit, or no limit, to the amount of divergence that the protocol could take in relation to new EU or UK law?

Dr Viviane Gravey: It is not really about the law but the attitude of the two parties. If you have a breakdown in communication, with even less trust, it will make collaboration extremely difficult. In the annexe, every time there is a laboratory requirement, there is a need for a laboratory to be involved. It would be not a UK lab but an EU lab.

Lots of these checks are already taken away from the UK. It is about how it works on the ground in practice, and whether civil servants on both sides will still be able to comply and make sure that things work in practice if you end up having a breakdown at the political level; I think that is where there will be a lot of tension. For me, the way the EU works in general, and the way it does international agreements, is for the long term, not for the five years of this Parliament. There is a difference.

I think the EU will try to see this in that way, potentially hoping for a different attitude from a different Government, and will not throw this out of the window quickly. For me, the problems are definitely more on the political side than about the EU coming up with lots of new legislation.

As we have seen, it takes a long time for the EU to legislate. In these areas, the EU has not changed the legislation so much. But on the UK side, with "taking back control", and the Environment Bill, the Agriculture Bill and the Fisheries Bill, you could have more and more Bills and common frameworks; this could potentially create some tension, but I think it would coming from within the UK, not from the EU side.

Professor David Phinnemore: One thing to remember here is that the extent of divergence will be somewhat constrained by the amount of EU legislation that will continue to apply in Northern Ireland. It is delimited in the annexes.

The Chair: It is quite a long list

Professor David Phinnemore: It is, but I would go back to an earlier point. It relates essentially to the free movement of goods. We are not talking about the other areas of the *acquis*. It is an important area, involving significant obligations on the part of the UK. But, if you are to add anything to the *acquis* that is applicable to Northern Ireland, it has to be through the Joint Committee; it has to have UK agreement.

The extent of divergence will be determined by the extent to which the UK diverges on those pieces of legislation that already apply, and which have to apply to Northern Ireland under the protocol.

There is another way that we might see divergence, and this depends on how the protocol is used. If we take a minimalist approach to addressing the challenges we face on the island of Ireland and minimising the disruption caused by the UK's withdrawal, we might move into a phase where we begin to build on the differentiated treatment of Northern Ireland within the UK/EU relationship through the protocol.

One could argue that some mechanisms within the protocol allow for this, in that the Joint Committee can take some decisions to adjust the withdrawal agreement. But, going back to my point earlier about the lack of an evolutionary clause, there is nothing explicit about that.

The Chair: It is quite a wide power though, is it not—the ability to change the withdrawal agreement?

Professor David Phinnemore: Having seen those arrangements, I have asked about this in the Commission. At the moment, its line is that this is to address small omissions or things that it possibly worded wrongly or overlooked. It is not really seen as a basis on which you could expand the protocol.

One other thing to mention—this has been picked up—is that, in the Council decision on the conclusion of the withdrawal agreement, there is a provision in respect of the protocol that allows the EU Council to authorise Ireland to conclude bilateral arrangements with the UK in areas of exclusive EU competence, to ensure that the protocol can be implemented effectively. At the moment, there is very little talk about what that might mean, but once we move beyond the implementation period, there may be a mechanism there to address some of the issues on the island of Ireland that critics of the protocol would say need to be addressed.

We have to look at it creatively. That then raises the question of increasing divergence between what is happening for Northern Ireland in the context of the UK-EU relationship and what is happening for the rest of the UK. There is a big political question for the UK Government about how much of that they are willing to countenance and accept. The history of the last three or four years would suggest that the amount is minimal, but we may move into a different space.

Q31 **Lord Kerr of Kinlochard:** I am a gloomy Scotsman, so I would like to take you to the scenario of what would happen if, in the situation that Lord Cavendish discussed, the Northern Ireland Assembly refused democratic consent to the continuation of the arrangements set out in the protocol. For the record, could you tell us what you think would happen? I think you believe that, under the protocol, the UK and the EU would take necessary measures, which could mean some sort of replacement arrangement taking into account the obligation of the parties to the 1998 agreement, or Northern Ireland reverting to the UK-EU relationship, the new one, which would be the default. I think you believe that, unless somebody comes up with a brainwave one or two years after the Northern Ireland Assembly has said no, the default is that everything disappears and one goes back to whatever arrangement the UK as a whole has with the EU at that date.

Professor David Phinnemore: That is only in respect of Articles 5 to 10 of the protocol. My understanding is that the default position would be the UK-EU relationship that is in place at that time, unless an agreement on a different set of arrangements for Northern Ireland has been reached between the UK and the EU. This is where you may see some differentiation coming through, because one of the key concerns we have at the moment is that, in that package of Articles 5 to 10, you have the single electricity market as well as the free movement of goods question. Even though they are a bundle, you may negotiate to have particular arrangements for Northern Ireland on some part of that, possibly regarding the single electricity market but, for the purposes of goods, that Northern Ireland moves into whatever regime the UK has with the EU.

Lord Kerr of Kinlochard: Which would mean a hard border across the middle of Ireland.

Professor David Phinnemore: Yes, a harder border.

Lord Kerr of Kinlochard: That seems to me to make it rather unlikely that the Northern Ireland Assembly would ever say no or refuse.

Professor David Phinnemore: I think that is the assumption—

The Chair: I thought you were a gloomy Scot.

Professor David Phinnemore: But, then again, there would be voices in Northern Ireland politics that would have no objection to a hardening of the border between Northern Ireland and Ireland.

The Chair: That is a very good place to leave our discussion. I thank both of you again for coming in for what has been a very stimulating hour.