

Protocol on Ireland/Northern Ireland Sub-Committee

Corrected oral evidence: The Windsor Framework

Wednesday 22 March 2023

3.15 pm

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Members present: Lord Jay of Ewelme (The Chair); Lord Dodds of Duncairn; Lord Empey; Lord Godson; Lord Hain; Lord Hannan of Kingsclere; Baroness O’Loan; Baroness Ritchie of Downpatrick of Downpatrick; Lord Thomas of Gresford.

Evidence Session No. 1

Heard in Public

Questions 1 – 10

Witnesses

I: Jess Sargeant, Senior Researcher, Institute for Government; Dr Andrew McCormick, former Director-General of International Relations, The Executive Office, Northern Ireland; Anton Spisak, Senior Fellow, Tony Blair Institute for Global Change; James Webber, Partner, Shearman and Sterling.

Examination of witnesses

Jess Sargeant, Andrew McCormick, Anton Spisak and James Webber.

Q1 The Chair: Good afternoon, and welcome to this public meeting of the protocol on Ireland/Northern Ireland Sub-committee. Today we are holding the first evidence session of the committee's new inquiry into the Windsor Framework following the UK-EU in principle agreement announced on 27 February. Over the coming weeks, the committee will be taking oral and written evidence in order to inform its detailed report on the framework to be published ahead of the summer recess.

We begin today with four experts in the field, who are all known to us on the committee. We are joined by Jess Sargeant, senior researcher at the Institute for Government; Dr Andrew McCormick, former Director-General of International Relations for the Northern Ireland Executive Office; Anton Spisak, Senior Fellow of the Tony Blair Institute for Global Change; and James Webber, a partner at Sherman and Sterling. It is very good to see you all again, and we look forward to hearing your evidence.

Today's meeting is being broadcast and a verbatim transcript will be taken for subsequent publication, which will be sent to you all to check for accuracy. I would like to refer you to the list of members' interests as published on the committee's website.

The first question, just to get us going, is: could you give us your overall assessment of the Windsor Framework and the extent to which it resolves the problems that have arisen with the protocol, and in doing so could you also give us your views on whether there is a difference of emphasis between the UK and the EU publications accompanying the Windsor Framework? If you do detect a difference of emphasis, does it matter?

Jess Sargeant: Overall, my assessment of the Windsor Framework agreement is that it is a good, pragmatic compromise solution between the UK and the EU. It addresses a lot of the concerns that have been raised by the business community and the Unionist community in relation to the Northern Ireland protocol, importantly by reducing the amount of paperwork and the extent of checks and controls on goods going between Great Britain and Northern Ireland. It does not remove them entirely, which was the UK Government's initial position, but there is some really good work in minimising them to the extent to which they are necessary to protect the EU single market, so that is really positive.

The Stormont brake does give the Northern Ireland Assembly the power to raise concerns about the implementation of new EU regulation, and that is a big improvement from the situation under the initial protocol, where those laws were automatically applied. It is important to compare the two there. There are obviously areas where the UK Government in particular did not get everything that they asked for. Governance is a big area; they have not necessarily removed the role of the European Court of Justice to the extent they would have liked, but the focus on issues that affect citizens and consumers in Northern Ireland is the right focus. It is good that they have resolved everyday issues such as the movement of pets, which might seem trivial but which has an important impact on people who move regularly between Great Britain and Northern Ireland.

In terms of the difference of emphasis between the UK and the EU, we see this in a couple of areas. The first is on some of the derogations that the EU has provided, on SPS in particular, which allow goods that are produced in Great Britain and sold in retail in Northern Ireland to comply only with some parts of EU law. There are times when the UK Government call that a dual regulatory regime, and the EU has been very clear that it is not a dual regulatory regime. Having said that, when you look at the substance of what they say, it is pretty much the same.

Similarly on the Stormont brake, the EU has emphasised its exceptional nature as an emergency mechanism, whereas the UK Government have not presented it in the same terms, suggesting that it is wider. Having said that, if you look at the detail of both the UK and the EU documents, the actual conditions that are applied to the Stormont brake are the same. It is more about the differences selling the deal, rather than the

substance. Overall, it is a good landing zone after all of the long-standing challenges that we have had in negotiating this agreement.

The Chair: Thank you very much. Pets are never trivial. Perhaps I could turn to Andrew McCormick next to answer the same question.

Dr Andrew McCormick: Thank you, Chair. It is very good to be here virtually, and I am using the freedom of having retired from the Civil Service to speak more freely than I could before.

It is important in answering your question to pause for a moment on the definition of the problems that we are seeking to address, or that the Government and the EU were seeking to resolve. Jess has correctly focused on the pragmatic issues that affect both businesses and citizens, which were proving very difficult. In fairness, a lot of them were known and identified during the negotiations in 2020 but not resolved then. I would venture to say that there are four points that have emerged over the last couple of years, which have become aspects of the definition of the problem but have quite weak foundations.

Controversially, I would say that the Act of Union does not have much relevance in the 21st century. The basis of the union of Northern Ireland and Great Britain is very well set out in the Good Friday agreement, which had the support of a majority of people in both parts of Ireland. It was a very important success, and we are marking its 25th anniversary. In contrast, the Act of Union was not supported by the people of Ireland and does not really have a legitimate democratic basis, even if we look at it constitutionally at the time. I know that is a controversial thing to say, and I will go further if need be.

Secondly, the New Decade, New Approach deal did not promise the restoration of Northern Ireland's place in the UK internal market. The reason for that is very simple: that under the protocol, and with the nature of the way in which the Johnson Government chose to settle Brexit, there is no basis on which Northern Ireland can have identical provisions as the rest of the UK. Some degree of difference is necessary if it is accepted that there cannot be a hard land border. That has been the received wisdom from quite early after the referendum and remains the Government's clear position. The rest is logic, in my humble opinion.

The third point is that being a rule taker is not necessarily undemocratic. Norway and the EEA countries accept that they trade a significant amount of sovereignty in exchange for participation in the single market, and the position that the UK legitimately adopted when it passed the withdrawal agreement in January 2020 was to apply that same basic approach to Northern Ireland. There are quite important differences, which I can go into, but the principle is that it is a legitimate democratic choice. There are plenty of reasonable arguments against it, saying that you should not do it, and those who favour Brexit will argue those points very strongly, but it is not axiomatically wrong.

Finally, the Good Friday agreement was not breached by the consent provisions made in relation to the protocol, and that was clearly the Government's position in 2019. They would not have made the declaration they did without being sure of their legal grounds, that the consent provisions were legitimate because international trade was and has been an excepted matter since 1921, so the Assembly had no role in relation to matters of international trade. Uniquely, giving the Assembly a voting role was an unusual measure and, as the Government argued at the time, it was legitimate to do that by a simple majority. There is no provision for cross community consent in relation to anything that is of such that unique nature.

Very simply, if you accept the Brexit trilemma—in other words, that if the land border is open—there have to be checks somewhere. Again, if the two limbs of the trilemma that the Government have chosen are to withdraw from the single market and the customs union, and to have no land border, the remaining question is how to make sure that the checks that are needed at points of entry into Northern Ireland are as undramatic, low key and minimal as possible, and I think that the Windsor Framework has addressed that primary problem. That was the problem that could be addressed, and it was the only problem that it was actually reasonable to try to address. The Windsor Framework has made good progress on that. Then, added in, we come to the Stormont brake, which, as Jess said, added an important dimension, but that was the test. The Windsor Framework is very, very much better than the protocol as applied and as agreed originally. That is my summary.

The Chair: Thank you very much. That is very helpful. Let us move to James Webber, next, and then we will come on to Anton Spisak.

James Webber: Thank you very much, Chair. I am a competition and state aid lawyer, originally working in Brussels but now working in London. My main expertise in this area is in respect of state aid and Article 10, although I will make the slight caveat that I have been strongly involved in other areas.

I take the view that the Windsor Framework is an improvement on what we had before, but that should not take away from the fact that what we had before was very poor indeed. The protocol was unnecessary as a way to protect the single market and as a way to solve the trilemma, as Dr McCormick just described. I have previously given evidence to the committee on the alternative solution that I and others were working on at the time of the original withdrawal agreement negotiations. That has come and gone, but at the time it was called mutual enforcement. That would have not placed the border in the Irish Sea. It would have created the difference about the application of EU law within Northern Ireland, but it would have solved the problem through a bilateral arrangement between Northern Ireland and the Republic of Ireland to enforce each other's trade rules and collect the duties that were owing. I readily concede that that period of history has passed, and we are with the protocol as it stands in the solution that it presented.

I would say that the Windsor Framework ameliorates some of the problems the protocol presents, but it has created fresh problems as well. We will come on to this particularly in relation to state aid and Article 10, which is the provision in the Windsor Framework that is about applying state aid rules to the entirety of the UK. This remains an extremely unusual and problematic provision, which has serious effects for the UK's sovereignty, and it was very unwise to continue it in its current form.

The other area is that some of the problems that the Windsor Framework is trying to fix were not actually fully realised because of the application of the grace periods prior to now. When we come to look at the red channels and the green channels, we will perhaps see some of those issues come out. The solution that the Windsor Framework represents is indeed a solution versus the protocol but may actually feel like a more intense level of Irish Sea border versus the grace periods that we have in place today.

The Chair: Thank you very much for that. Anton Spisak, over to you.

Anton Spisak: Thank you very much for the invitation today. I am a senior fellow at the Tony Blair Institute.

My view on the Windsor Framework is that it is the best practical answer to the dilemma that the objective of eliminating the border with Ireland in the wake of Brexit has created, and which the decision to leave the single market created at the same time. I believe that it significantly improves the status quo, which is the full obligation of the protocol and, at the same time, it addresses some of the concerns over the democratic deficit that is related to the automatic adoption of EU legislation and the protocol. That process has significantly changed as a result of the Windsor agreement, but it does give elected Northern Irish representatives a far greater say over the application of new and changed EU legislation. That is a really important concession that the European Union agreed, and it significantly moves from its initial position, which was that the mechanism for dynamic alignment is sacred and there was no initial scope for changing that mechanism.

What I am a little bit concerned about is the political dimension of this agreement. There is a significant risk that the Stormont brake will create the potential for future disputes, and that it might, in some circumstances, encourage hostility towards the EU and be tested in ways that are not currently envisaged under the current arrangement.

That is where we get into your second question, which was about the differences of emphasis between the UK Government and the European Commission. There is a big difference of emphasis actually in the description of the Stormont brake, because the text that the EU set out talks very clearly about the most exceptional circumstances and the use of that brake only as a matter of last resort.

The way the UK Government has tried to portray the Stormont brake has been quite different and has been essentially as a mechanism for allowing

any group of MLAs, at least 30 of them from at least two different political parties, to use the brake. There is potentially a big difference of emphasis in understanding what the brake is meant to do, and that might create some difficulties.

The Chair: Thank you for that. It is clear to us all that the Stormont brake is one of the more important things to discuss this session.

Q2 **Lord Hain:** Good morning. It is good to have you with us. Perhaps I could start with Jess's description of the Stormont brake as an emergency mechanism. Could you elaborate on the extent to which you think it will ever be used, and the implications, both legally and of its operation?

I would like to follow up with a subsidiary question to you all, once we have addressed that, on the general principle about the scrutiny regulations that we have passed today. They seem to me to have quite significant implications, but I am not sure of your views on that.

Jess Sargeant: In characterising the brake as an emergency mechanism, I was technically quoting the text of the deal. Also, as Anton said, that was an element that the EU were keen to emphasise in their own document. The phrases "emergency" and "last resort" are references to the terms under which the petition of concern can be used in the New Decade, New Approach deal. The UK Government have said that the use of the brake should be equivalent to the use of the petition of concern in that circumstance.

We have not had much chance to test out the petition of the concern under the new arrangements, but I do not think it will be as strong a legal test, the conditions of being a significant change to EU law and having a significant impact on the community are more important. It is just intended to signal that it should not be the first thing you reach for; essentially you need to have exhausted every other potential to find a solution through the Assembly and through discussions with the UK and the EU before it is used. The more important tests are those around it being a significant change that has significant implications. It is a little bit difficult to predict how often that test is likely to be met, because we do not have a clear sense of how EU law might change over time and therefore how substantial those amendments or updates to the existing regulations might be.

I can foresee a situation in which the EU updates a piece of legislation that means that there is quite significant divergence between Great Britain and Northern Ireland that is not captured under the sort of SPS derogation that already exists under the Windsor Framework. So if, for example, the EU changed certain laws on product standards that GB had not, that could create a real problem in importing certain products from GB. That would meet the test of being a significant change and having significant implications on Northern Ireland, because it would affect consumers' ability to purchase certain goods from Great Britain.

One of the questions is whether changes in EU law will be implemented through an update or an amendment to an existing EU law that is

covered by the Stormont brake, or whether that will be a completely new Act that goes through a slightly different procedure. Under that procedure, the UK still has the opportunity to veto that in the joint committee, and, as part of the statutory instrument that has just been voted on in the House of Commons, the UK Government have committed to providing an opportunity for a cross-community vote on that, saying that it will add to that new EU Act only in the event that there is cross-community support for that new Act. There is a different type of brake there that is being extended to new Acts as well as amendments or updates.

Lord Hain: On that issue of cross-community versus the 30 MLAs, how does that play out, in your view?

Jess Sargeant: It essentially creates a two-stage process for the Stormont brake. The first stage is the 30 MLAs triggering it on an amendment or an update, which leads to its automatic suspension as long as the UK agrees that the conditions for triggering it have been met, so you are in this position where that EU law no longer applies. Then there is a second stage where the joint committee is required to consider the amendment or update on which the brake has been pulled as if it were a completely new law. At that stage, there is another opportunity for the Assembly to have input.

Lord Hain: On a cross-community basis.

Jess Sargeant: Yes, on a cross-community basis. Part of the reason why the process has been designed in this way—having several different points at which the Assembly has the opportunity to express a view, but also having a mediation point for the UK in determining whether the conditions have been met or coming to a decision with the joint committee—is to allow space for discussions and to try to find an alternative solution. Ultimately, we should not see this procedure as a cliff edge, that the first port of call should be that the EU Act does not ever apply, because we know the EU has the opportunity to take remedial measures, and that can also create some challenges about Northern Ireland's access to the EU single market.

We should conceive of this process as providing lots of opportunities for the UK and the EU to try to agree another solution. That could be through the EU providing derogations to the Act that it is proposing. It could be through the UK or GB law changing in order to prevent certain types of divergence. We should really be seeing this as an opportunity for Northern Ireland to raise concerns. Ultimately if they, or certain communities in Northern Ireland, raise concerns, there is a possibility that if a solution is not found, that the EU Act will no longer apply. However, our priority should be to try to find solutions before we get to that point. That is the really underappreciated part of the Stormont brake; it creates a very strong incentive for both the UK and the EU to come to a mutual agreement, rather than get to that cliff-edge point where nobody really knows exactly what would happen.

Lord Hain: Anton, you were nodding at that point. James might have been as well. I will come to you in a minute.

James Webber: At certain points, probably, yes.

Anton Spisak: I broadly agree with Jess's description. It is a very significant improvement on the status quo, which is that all EU legislation that changes legislation that is currently listed in the annexes—about 300-plus pieces of legislation—would be automatically updated without any involvement of either elected Northern Irish representatives or the UK Government. That status quo essentially falls away now, and there is a very clear process by which the European Union would first notify the UK Government and the Northern Irish Assembly. That is where we get into the democratic scrutiny regulations. It would also notify the Northern Irish Assembly of any upcoming changes to EU legislation as it applies to Northern Ireland.

Then there is a process, which Jess described, where the Stormont brake could be used by a group of MLAs under certain conditions. I would say that those conditions are quite tightly drafted. It is definitely not an opportunity to raise a petition of concern for any change to existing EU laws that apply to Northern Ireland. There are two conditions that have to be met simultaneously, and one of them is that essentially the nature of replacement EU legislation has to have changed, and it has to have demonstrable impact on the everyday life of communities in Northern Ireland.

What has also changed—just to add to Jess's description—is the process for new EU legislation coming into the protocol. To give you an example, the European Union is currently legislating for the so-called carbon border adjustment mechanism, which would impose certain tariffs for carbon heavy products like steel or aluminium.

Lord Hain: Could you just explain the practical effect in lay terms?

Anton Spisak: For example, if you are a GB steel producer and you are exporting steel into Northern Ireland, in some circumstances a duty could be applied to that steel under the new mechanism, but this legislation has not been added yet to the protocol. The only way for it to be added on to the protocol would be by a joint committee taking a mutual decision. At that point, you would expect the UK Government to raise some questions and say, "This is all very well, but we'd like to see what the actual impact of this legislation would be on businesses in Northern Ireland and on citizens".

The UK Government have now proposed in the statutory instrument that any decision they take in future at the joint committee when they essentially decide on their position would have to be preceded by a Motion in the Northern Irish Assembly, and that Motion would have to be passed on a cross-community basis. That is a very significant change to the way this process will work in practice, and it gives elected Northern

Irish representatives a far greater say over any future changes to EU law than we have previously seen.

Lord Hain: To that extent, it addresses the democratic deficit that lots of people, including me, would be concerned about.

Anton Spisak: I believe that, to a very large extent, it does address those concerns.

Lord Hain: James, you were nodding and disagreeing at the same time. Would you say something about the state aid issue in all of this?

James Webber: On the Stormont brake—

The Chair: We will come to state aid later.

James Webber: Yes. I would make four points. The first is that the Stormont brake does not apply to all EU laws across the whole of the protocol. It is limited to those set out in headings 1 and 7, and then 7 to 47 of Annex 2, and the EU laws that define the relief from duties on personal possessions under Article 5.1. There are laws outside the scope of the Stormont brake that will apply in Northern Ireland—for example, VAT, the customs code, the single electricity market, state aid, trade and defence. That is the first point.

The second point, which has already been alluded to by Jess and Anton, is that the ability to exercise the brake is quite strongly circumscribed and tightly drafted. The law objected to must significantly differ from the previous one. Given that the TFEU itself defines the legal basis on which any EU law has to be founded, what “significantly differ” means, compared to the legislation the EU has on the books already, will be an open question. There is also the significant impact, which is specific to the everyday life of communities in Northern Ireland and is liable to persist, so there is some echo there, although it is more narrowly drawn than the Article 16 criteria that we discussed previously.

The determination of that threshold is also subject to EU dispute mechanisms. The EU has the right to raise a dispute, through the arbitration mechanisms of the withdrawal agreement, as to the applications of those criteria. That is an important differentiator from the EEA agreement, where the EEA states are able to decide for themselves whether or not those criteria apply, and the EU’s remedy is suspension under the EEA agreement.

That is the third point: that the remedial measures that the EU is empowered to introduce in response to activation of the Stormont brake are cast wider than the suspension of the treaty. In the EEA, which is essentially the model for this concept, that permits suspension of the benefits of the treaty, whereas here we have a different formulation that refers to remedial measures. You addressed this, Jess: there is quite a strong assumption that the EU will act in good faith and that those remedial measures will be in proportion to the threat to the single market represented by the law that you are attempting to disapply using the

Stormont brake, but that is essentially a political obligation. The remedial measures are for the EU to decide.

The fourth point, which builds on something that Dr McCormick commented upon, is whether it requires the cross-community consent provisions under the New Decade, New Approach deal, because it is not obvious—I could be wrong, but I do not think it is clear—and insofar as these provisions are not GFA provisions, because they are an exception, as Mr McCormick was describing.

Lord Hain: The Good Friday agreement position.

James Webber: Yes. It is not obvious to me that the cross-community consent provision would apply. That is my fourth point.

Lord Hain: Andrew, can we have your take on this? Also, since the question of the democratic scrutiny committee has come up—there is a new proposal in the Assembly, which seemed to me to be an advance on where we were before this—is it subordinate to the Northern Ireland Ministers? I am not clear what the relationship is. Given your own Northern Ireland Executive experience, would the scrutiny committee be able to interrogate Northern Ireland Office Ministers, or would it be confined to the Stormont arena?

Dr Andrew McCormick: Looking at this in the last few days, one of the questions that struck me was the absence of any mention of the devolved Ministers in the scrutiny process, but I do think that overall it is a helpful dimension.

In general terms, my hope would be that it is more difficult in theory than in practice; that, in practice, most of the relevant amendments to EU law will not be significant or have a major impact on everyday life. As others have said, the tests in the documentation are high and are challenging. Although, as Jess said, we need to avoid cliff edges, there is a potential cliff edge. This links again to the important points James made about the EEA, and is one of the differences that struck me strongly about the position that Northern Ireland would be in compared to the EEA countries. For them, the choice is relatively simple. If something is so significant for their economy that they are prepared to put their participation in the single market at risk, that is a judgment with high stakes and potentially very significant consequences, but it is a choice for a sovereign state.

Trying to look at the worst case, the dilemma that could emerge is that there is a change to EU law that significantly increases divergence with the rest of the UK. That seems to me the kind of reason there would be for the criteria to be met, so the choice for Northern Ireland is who to stay aligned to. It is not like Norway, or other EEA countries that have one big partner market—not, as in our case, two—so that is an enormous difference that brings in concepts of identity and legitimacy that need to be thought about very carefully.

Where I have a big concern, and I think James is correct here, is that the position on cross-community voting was not clear in the original documentation. However, the SI that has just been passed by the Commons seems to introduce a final applicability vote that would be subject to cross-community consent. Again, worst case, if the consequence of that vote is to put our participation in the EU single market at risk, the world's most exciting economic zone becomes an issue that could be overturned by a minority. I would question whether a decision of that substance should be made on the basis of a minority view in Northern Ireland, which is a potential consequence.

Lord Hain: Could you explain that?

Dr Andrew McCormick: If the application of a law that is essential, in the EU's view, to allow Northern Ireland's continued participation in the single market—I find it hard to imagine how that could arise, but theoretically it could—in that circumstance, if the new law does not get cross-community support, it does not apply and the EU invokes remedial measures, as James said, which certainly could include the kind of provisions that are in the EEA agreements. That is a high risk. When I worked on the Good Friday agreement—some of this goes back to 1992—and we worked through the principles of how you take decisions, cross-community votes were required to change the status quo. The problem in this case is that the status quo is ambiguous. You can look at the status quo generally, as in Northern Ireland participating in the EU single market, or you can look at it legalistically and narrowly and say, "It's this particular body of EU law". One of those will change.

For me, the primary vote should be the original decision on consent that was provided for in the original protocol, where the Assembly looks at the principle of the application of the protocol, or the defined articles of the protocol, and consents or does not consent. Ideally it would consent on a cross-community basis, but explicitly the provision in October 2019 was that if there was only a simple majority, it would stay in place for four years. That is the general and overarching position, and if the majority of the Assembly want that to be the position, it seems a bit of a contradiction to say that, on the basis of a particular amendment to EU law, the whole position might change radically. I would just question whether that is democratic. I can understand entirely why they are trying to do it.

The other point is that it should work if the tests are applied rigorously, and therefore a really big issue of principle arises. What I observe, having worked for Northern Ireland Ministers from 1998 to 2002 in the first Assembly, and then from 2007 onwards, is that there is a tactical ingenuity—if I can put it as gently as that—as to how the rules can be applied. That is characteristic of our parties, and it is part of the reason we are where we are today without a Government. Will the words, as agreed with the EU, be applied in good faith? That seems very, very important. It would be better if there was more time for scrutiny, for an

open and transparent process, that allows businesses to express their views pragmatically about what would be implied by the changes.

All these things come down to how the concepts will work out in practice. I remain hopeful in principle. It is better to have than not to have, but the detail is quite challenging.

Lord Hain: May I conclude by asking you, Andrew, and then the others, to say something briefly about the relationship between the new democratic security committee of the Assembly and the Northern Ireland Office Ministers—i.e. UK Ministers—and MLAs? I do not want to overstay my welcome, but this is quite an important issue.

Dr Andrew McCormick: Briefly, in a sense, it matters less in practice than in theory, because the parties behave really coherently in the Assembly. I find it odd that there is no role for Ministers, but if the parties work according to party mandates, you can see a process and expect to see scrutiny. It would be better if that was open and transparent, but the logic of the process, and the degrees of scrutiny, have an internal coherence.

James Webber: It is outside my expertise, I am afraid. I will not add anything to that.

Anton Spisak: It is an important addition to the whole process, because essentially it introduces a level of scrutiny that was not available previously, which is essential. One of my objections to the original protocol was that it did not provide sufficient opportunities on the one hand for Northern Ireland's elected representatives to engage with upcoming EU legislation in the pre-legislative stages, or for the UK Government to be sufficiently informed of what was coming up the pipeline. Both these concerns have now been broadly addressed.

If I can just draw the committee's attention to one very specific technical point here, there has been a change to the rules of procedure of the Joint Consultative Working Group, which is essentially a technical committee underpinning the protocol, and the EU now has an obligation to inform the UK Government well in advance of any potential changes. There is a new kind of consultative mechanism that would, I think, significantly help to ensure that any changes are brought to people's attention well in advance. I see it as an improvement, but I agree with Andrew on the potential risks, which are that this mechanism can be subject to political influence and be under significant pressure if it is not used correctly and as defined in the framework. There are some risks but, on the whole, it is a big improvement.

Jess Sargeant: There is precedent for UK Ministers to appear before devolved committees. It is fairly common but very inconsistently applied. It depends on whether the Ministers decide to accept that invitation, so one thing that could be done is to ask UK Ministers for assurances that they will appear before this new committee where there is an issue within their responsibility on which they may be required to take a decision.

Lord Hain: Not just NIO Ministers, but all UK Ministers.

Jess Sargeant: Yes. There is definitely a precedent for that and, likewise, there is a precedent for EU officials also to appear before committees, including Northern Ireland Assembly committees. That has happened before and would be a very valuable part of the process.

Q3 **Lord Thomas of Gresford:** I have been looking at the EU side of it, and I quote from its question and answer document explaining the Windsor Framework, "The Stormont brake is a new emergency mechanism that will allow the UK Government, at the request of 30 members of the Legislative Assembly in Northern Ireland (Stormont), in the most exceptional circumstances, as a last resort as set out in a unilateral UK Declaration, to stop the application of amending or replacing provisions of EU law, that may have a significant and lasting impact specific to the everyday lives of communities in Northern Ireland".

Lord Hain's first question was: will it ever be used to deal with that? The problem that I see, and I would like your comments on, is that this is dealing with something that has come from Brussels, whether it is amending or original or whatever, is complete, and is then stopped as opposed to more input in the pre-legislative process. Surely that is where the emphasis should have gone?

Dr Andrew McCormick: Even with the way things are, that is entirely the right approach. It is what the EEA countries do, and their access to working groups and so on has been very important for them in the ongoing evolution of the regulatory regime. They are key. There will be a big need, and this will be a very major demand on Northern Ireland's Civil Service resources.

Looking ahead, the NICS's office in Brussels will need to be very active in liaising and understanding what is coming through, because, as I am sure many committee members are well aware, once a proposal emerges it will be the result of probably quite a lot of difficult compromise amongst the 27. To go back around the loop and say at that stage, "We want it to change for this reason", and to get that agreed by all 27—or sufficient if it is under QMV—is quite a challenge. It is better to be sufficiently well informed and to flag up at a very early stage and say, "If you do that, we have a problem". That does not create instant solutions, but it seems to me to give a much better chance of dealing with the issue in a pragmatic way than waiting. The levels of scrutiny after publication are important, but getting up stream and ahead of it is, to me, vital.

Jess Sargeant: I would absolutely agree with Andrew. It is very important that these issues are considered before the EU Act is published, in part because the timescale for using the brake is very short. The brake has to be triggered. The UK has to give the EU notification that the brake has been triggered within two months of the EU Act being published. That suggests that a lot of the heavy lifting needs to take place before the actual publication of the Act. That is foreseen to some extent in the statutory instrument, which says that "The new committee that will be

established to scrutinise it can be given a notification of EU acts that have been proposed”, which suggests that there will be some level of pre-legislative scrutiny here. There is also provision in the Joint Consultative Working Group that the EU is required to share information with the UK about upcoming Acts, and, I presume, that it is intended that the UK notify the committee.

That is not happening very well at the moment, in part because of the poor relationship between the UK and the EU, but also because there is no really strong incentive to do it. Both the UK and the EU can carry on with their own regulatory proposals without really thinking about Northern Ireland. As I said earlier, one of the really positive consequences of the brake is that it creates a “so what?” If they do not share information at an early stage, hold these discussions and consider Northern Ireland in developing EU proposals, they run the risk that the brake might be triggered later on. The brake creates an incentive for that engagement at an earlier point.

Lord Thomas of Gresford: There does not appear to be a place for Northern Ireland elected representatives, or no explicit place for Northern Ireland civil servants in the pre-legislative consideration.

Anton Spisak: I would probably push back slightly on this point, because as part of the changes to the Joint Consultative Working Group, there is now an obligation on the EU to inform the UK Government of any upcoming changes, not just after an Act has been published in the official journal but in the stages when the Act is being passed. That is my interpretation and reading of that provision.

In practice, this all depends on how good the working relationships are between officials in the European Commission, in the EU system and in the UK Government, including the Northern Ireland Executive. If those relationships are strong and productive, quite a lot of heavy lifting will be done in that early stage through the technical committee.

Lord Thomas of Gresford: Are officials included at the moment?

Anton Spisak: It is not clear to me, but I see no strong reason why those officials should not be included as part of that process, because the definition is very broad.

Jess Sargeant: I understand that the UK Government have committed to including either Northern Ireland politicians or officials, depending on who is appearing in its delegations in meetings of the joint committee and subsequent structures.

Lord Thomas of Gresford: At the moment, I think, only the First Minister and the deputy First Minister have a right—

Jess Sargeant: That is at the joint committee level.

Lord Thomas of Gresford: They are invited, not to have a right, but they are invited to the joint consultative committee.

Jess Sargeant: Yes. That is at the joint committee level. There are several structures under it, some of which are just attended by officials. Again, the UK Government has committed that the appropriate level, essentially, would attend as part of the delegation.

Q4 **Baroness Ritchie of Downpatrick:** Good afternoon. You are all very welcome. I declare an interest as a member of the board of Co-operation Ireland. I am also a former member of the Assembly and was a Minister of the Northern Ireland Executive several years ago.

The background briefing to the political declaration by the European Commission and the UK Government states that the framework reflects the full commitment of both to protect the Good Friday agreement of the 10 April 1998 and its subsequent implementation agreements and arrangements. In that respect, how would you assess the Windsor Framework against the UK's and the EU's joint commitment to protect the Belfast Good Friday agreement, including its subsequent implementation agreements and arrangements in all its dimensions and strands 1, 2 and 3?

Jess Sargeant: The agreement goes a long way to try to protect those three strands. First, the purpose of it is to try to restore the domestic institutions that are obviously a very important element of this, and in doing so to try to address some of the concerns that have been created about that with the NI-GB relationship, which in itself is not a specific strand but is also an important dimension here. It has maintained north-south co-operation, including maintaining frictionless action between the two.

It is important to emphasise that the north-south institutions, including the North/South Ministerial Council, have been in abeyance longer than the Assembly and the Executive, in part in protest at the protocol. I hope that if the Assembly is restored, we will also restore those north-south institutions. I know there has been some legal challenge to that particular action, and I hope that will be part of any progress if we do see it.

One of the things that the agreement does very well is re-establish the east/west dimension and improved relationships between the UK Government and the Irish Government, which have really suffered as a consequence of Brexit and the ongoing disagreement. The extent to which those seem to have repaired quite quickly after this new agreement has been very heartening. The Good Friday agreement requires ongoing work and support in order to continue the functioning of all those strands, but there are elements of this agreement that speak to all three of them.

Anton Spisak: I would just add one point to that description. The EU has moved its position and showed more flexibility in how it applies EU law. It now applies EU law essentially by exempting Northern Ireland from aspects of its own legislation, which is quite an important concession. It reflects that special status of Northern Ireland and the special conditions that the Good Friday agreement established. That is now more reflected

in the European Union's position, in its own legislation and in how it treats Northern Ireland.

The other aspect is Article 6.2 of the protocol, a little clause which says that it is really important to ensure Northern Ireland's place within the United Kingdom. There has been an amendment through the Windsor Framework to that clause, and the two sides have committed to giving each other more flexibility as to how that provision is implemented, which again speaks to that east/west dimension and its strengthening through this arrangement.

James Webber: The Northern Ireland protocol was about protecting the EU single market, as is the Windsor Framework; that is its purpose. The Good Friday agreement had nothing to say about trading goods, which is what the Northern Ireland protocol and now the Windsor Framework are about, so it is not surprising that there is a level of dissonance between the two documents. The Windsor Framework has made some progress towards recognising the Good Friday agreement, but it still does not use the institutional architecture or even really refer to the institutional architecture of the Good Friday agreement in terms of the British-Irish Council. The obligations on the Irish and the British Governments to reach bilateral agreement on EU issues, which is part of the Good Friday agreement, is also not present. It is probably a step forward that the EU seems to be increasing its understanding of some of the issues and complications, but, ultimately, in my view, it is not really about the Good Friday agreement; it is about protecting the EU single market.

Baroness Ritchie of Downpatrick: Would you accept that when the Good Friday agreement was made, people were very conscious of our common membership of the European Union? In fact, you could say that models used in the European Union translated that as bringing people together, power sharing and reconciliation. Could that be right?

James Webber: To an extent, that is definitely true. The Good Friday agreement did not need provisions on trading goods because we were obviously both members of the single market, so at one level that is absolutely right.

At another level, the Good Friday agreement refers to a bilateral UK—the Republic of Ireland relationship, and the institutions of Northern Ireland—and does not refer to the institutions of the European Union, whereas the Northern Ireland protocol and Windsor Framework are all about the institutions of the European Union, and the interlocutor is the European Commission and not the Irish Government. That is a fundamental difference between the two agreements.

Dr Andrew McCormick: I will go back to the beginning. As others have said, trade issues were not foreseen as an issue in 1998. The assumption of ongoing EU membership was not explicit, but perhaps it was taken for granted. There is no outcome of Brexit that does not disturb the delicate balance—that phrase has been used a lot—of the agreement in some way. It is also a matter of fact that the threat of a hard land border had a

head start of at least a year, conceptually, in the rhetoric of the debate before anybody really realised and focused on the fact that there was a potential risk of dislocation between Northern Ireland and the rest of the UK.

It can certainly be argued that if you looked at the issue only in constitutional terms, the trilemma would be resolved by a hard land border. There are strong constitutional arguments for that, and there are land borders elsewhere—I crossed the one between Croatia and Bosnia last year through a queue of lorries. But if you add into the mix both the pragmatic impact and the dislocation of society, the case is there for managing the checks in a minimalist way through the ports of entry. It probably should have been approached as an open political judgment in saying, “Oh, we now have a problem. What’s the most pragmatic solution to it?” I am trying to rewrite history here, which perhaps is not helpful.

We have been on a long journey. Getting back to that, I would quote from Article 1.5 of the agreement itself, which says: “We, the participants, pledge that we will, in good faith, work to ensure the success of the arrangement established”. The institutions, as you said, are interdependent. The strands are interdependent. There is an issue arising from the effect of Brexit on strand 2, because north-south co-operation was affected and there was a perceived threat. That is a very significant issue. Of course, there was no discussion in 1998 on the relationship between GB and NI, but the fact was that Northern Ireland was remaining part of the UK. How that operated remained, as before, from principles established in 1921 and in the Constitution Act in the 1970s rather than being reinvented. The powers given to the Assembly were the issue, in strand 1: how those would be exercised and how power sharing would work.

These are unforeseen problems. The better way, to me, would have been to look at them in an open way and say, “We’ve got a set of problems here. What will be helpful? What will provide a pragmatic compromise that is as close as possible to the spirit of the agreement?” Attempting to apply it to the letter when it did not say anything about these issues is really very difficult.

Q5 **Baroness O’Loan:** I would like to ask you for your assessment of the Windsor Framework’s provisions in relation to customs procedures and the movement of goods between GB and Northern Ireland, including the arrangements for green and red channels and an enhanced trusted trader scheme, handling of tariff rate quotas and the system of commercial data sharing. Finally, how would you assess the particular arrangements for the agrifood retail trade into Northern Ireland?

James Webber: Conceptually, the red lane is the default; the red lane is what applies. Then there is a set of exceptions where you can use the green lane. The green lane concept is that they would permit imports from GB to Northern Ireland where processing in Northern Ireland is for the purpose of selling a limited number of things—it is certainly better than we had before, but it is limited—such as: the sale of food to end

consumers, so that fixes the M&S sausage problems; the incorporation of processed goods into a permanent structure; the provision of a recipient of healthcare or care services by the importer or subsequent entity; not-for-profit activities by an importer; and, finally, the use of animal feed. There is also a safe harbour for SMEs with an annual turnover of less than £2 million. The green lane operates by way of exception, if you can qualify under any of those provisions, and removes the need for checks.

One of the difficulties is that everything else then comes in under the red lane, and you have items where tariff obligations may apply because you still have to comply with the rules of origin requirements of the TCA in order to benefit from the tariff-free treatment. Therefore, you have potential tariff barriers, or at least the need to show compliance with rules of origin, which makes importation from GB into NI difficult if you are using the red lane.

There is also the original structural problem created by the design in Article 5 of the protocol, which is that everything is caught by the EU rules. Because everything is at risk of subsequent importation to the EU, unless it is decided not to be, that structure has been retained. Essentially, the green lane represents a further definition of things that are not "at risk" of further importation into the EU, but the "at risk" concept is still something that the EU controls.

The better approach would have been to agree to switch that, so that the things that were at risk were truly at risk, based on the evidence of actual trade flows across the north-south border, either statically looking back or dynamically based on the market surveillance of trade surges and such like, and using that to inform what the concept of "at risk" means rather than essentially the green lane operating by exception to the default regime.

Lord Thomas of Gresford: That was your original concept, was it not: that the way of enforcing the differences would be drastic draconian penalties for people who crossed the border?

James Webber: It would involve the use of criminal law to enforce the rules of the other party, so that exporting a product that did not comply, or had not paid the duties, would be a criminal offence in the exporting jurisdiction. That was the fundamental idea behind mutual enforcement. My commentary on this is based on the balance of where the exception lies. The green lane is an exception to the red lane, which means that the exception is drawn reasonably tightly, and you can have lots of examples where you are outside of the exception, where the EU gets to continue to decide what is at risk. In my view, that is fundamentally excessive.

Jess Sargeant: I am not a trade or customs expert, but the points I would raise would be about implementation and ensuring that the scheme works in practice. It is good that it builds on existing schemes, such as the UK Trader Scheme, which we have already had experience of operating. The UK and the EU have already identified some problems that have been remedied through the Windsor Framework, but that suggests

that there might need to be a bit more wriggle room for further adjustments as this scheme beds in and is actually being implemented.

Another point I would make is about UK administrative capacity, because in some cases where there is less burden on the traders to provide customs information, some of that burden falls on the UK Government and the trader support service. Ensuring that it maintains a free service that traders can use is really important, and there should be assurances on that.

There is also a need to maintain trust. The data-sharing agreement between the UK and the EU and the new bespoke database that the UK Government have built have been really important in being able to reach this agreement. The continued data sharing and building of trust is really important there.

The agrifood retail trade scheme was one of the areas where I was surprised that the EU would move this far. We had heard for a long time that it was not going to budge. We have landed on the really pragmatic solution that, where there is actual risk of diseases spreading across borders, those rules have to be complied with, but, on other consumer protection matters, if the products are coming from GB, they do not need to comply with those requirements. That solves an actual problem that we could be facing. For example, in the coming years when the UK changes its definitions of gene editing, that was a problem that could have prevented goods going into Northern Ireland. That has now been solved. It is a really positive development that will maintain supermarket supply chains, which was one of the primary concerns about the application of the protocol.

Anton Spisak: I would say that quite a lot will change in practice, because we have to remember what the status quo is at the moment, or what it would be if the protocol had been fully implemented, which would have been GB businesses moving any goods into Northern Ireland—whether they are intended for the final consumer in Northern Ireland or elsewhere—facing the exact same regulatory and customs burden.

We have now moved completely from that default. There is an important distinction here that is based on the final destination of goods and the extent to which the goods are destined for Northern Ireland and the final consumer in Northern Ireland. Essentially, for all the purposes of movement of those goods from GB to NI, they will be treated very differently, although it is important to say that the burden on businesses will be heavily reduced but not completely eliminated. Where previously as a business you had to fill out 24 customs fields on a piece of paper, you will now not have to fill out a single one because it will be a responsibility of HMRC to fill out the form for you, although it will still be your responsibility to pre-declare the goods they are moving. That is a significant practical change for businesses.

The scope of the trusted trader scheme will also be expanded, which is really important, because previously a business that was moving goods

from GB to NI had to have physical premises in Northern Ireland to qualify for that scheme. That will no longer be the case, so more or less any GB-based business will be able to qualify for the scheme.

There will be some initial requirements in order to do that, but they will ultimately outweigh any kind of benefits from participating in the scheme. I do think this will make a real difference, and I am really glad to see that the EU has been able to take a more proportionate and risk-based approach to any kind of controls and requirements that are necessary for movement of goods, because it is the right approach to be able to trade in the goods space and the final destination.

Dr Andrew McCormick: The outcome on the general application of the green lane/red lane idea is much better than when I originally proposed it in March 2018. It has moved on in a much more pragmatic way. I would look at it as glass half full. With experience and trust, there is opportunity for the concerns that James has raised in particular to diminish, and for more things to normally be accepted in the green lane as a matter of practice.

If you look at it tactically, it is not that surprising that the default is the safer option, given that the UK agreed definitions about risk and an approach to agri-food in December 2020. It said that it was happy with them at that time, and within eight weeks it was desperately unhappy with them. That was a major U-turn by the UK Government that at that time was based not on the actual experience—given that the grace periods had applied—but on what I would regard as tactical opportunity. Trust was low. To achieve this and to build trust—part of the really important benefit of the agreement that has been reached is a massive improvement—and for that to build and grow is important.

Like Jess, I was also surprised. I did not include agri-food goods at all in my original green line/red line proposals in March 2018. Picking up on something James said earlier, the advocates of alternative arrangements in the autumn of 2020 acknowledged that there was no way you could stop a pathogen with a camera, and the purpose of the SPS rules is to stop disease. When, in his paper in October 2019, Prime Minister Johnson proposed the full application of EU law and that all agri-food goods would come into Northern Ireland through border control posts, it was a very black and white expression but it was safe and logical if the Prime Minister was actually to put it in the paper to protect the island of Ireland as a single epidemiological zone.

We have moved on a long way from that, and the EU's ability to find a different way to manage those risks solves an immense problem. The Northern Ireland Civil Service knew through 2020 that the agri-food was a really difficult thing. This is much better than it might have been. Yes, there are continuing difficulties. It has been oversold in too simple a way, but, looked at in detail, it stands as better than anything else I have ever seen in this context.

The Chair: Thank you.

Q6 Lord Dodds of Duncairn: I want to come in on the issues of state aid and VAT and excise. At one stage, the British Government proposed that state aid be taken out of the protocol altogether, that there was no need for it in view of the arrangements in the trade and co-operation agreement. We then ended up in a situation where there is no change in relation to the legal position on state aid, but there has been a declaration on the application of Article 10. I want to get your views on the status of that declaration and what change there is, if any, in the legal position regarding state aid rules for Northern Ireland.

Secondly, on VAT and excise, please comment on the way you see any changes being applied to Northern Ireland and on the UK-EU co-operation mechanism, which seems to give the EU a greater role in the wider issue of taxation in the UK as a whole. I will start with James, since you are quite an expert on state aid.

James Webber: I am certainly not an expert on VAT, so I will limit my remarks to state aid. You are right that the provisions do not change. There is no change to the provisions of Article 10, which means that the EU state aid rules apply not just to Northern Ireland but to the UK as a whole. A very important distinction between Article 10 and many of the other provisions of the protocol is that the formula applies to the relevant rule. It is typically framed as applying to the UK in respect of Northern Ireland. That is not used in respect of Article 10. The EU state aid rules apply to the whole of the UK.

With Article 10 in place, we now have two competing subsidy regimes, one piled on top of the other. One is our domestic Subsidy Control Act 2022, which we introduced, which reflects the obligations of the UK under the trade and co-operation agreement. On top of that, accepted by the Windsor Framework, we have the EU state aid rules, which, as I said, apply to the whole of the UK.

What the protocol did and what the Windsor Framework also does is talk about the circumstances in which the state aid rules apply to the whole of the UK. However, there is a sort of jurisdictional test, so they apply to the whole of the UK only in certain circumstances. Under the protocol, those circumstances were that the relevant aid measure had to affect that trade covered by the protocol: i.e. essentially the north-south—NI-EU—trade in goods or electricity. The new formulation, which is not a change to the protocol itself but a joint declaration and probably amounts to the same thing, is that there has to be a genuine and direct link to Northern Ireland that is material and not merely hypothetical, that sales in Northern Ireland of themselves are insufficient, and that there has to be an economic effect of the aid in Northern Ireland.

We essentially have a group of words that have been piled on top of each other to say, "When do we have a situation of the EU state aid rules applying to a GB or UK aid measure?" They have to have that strong connection to Northern Ireland. That is certainly an improvement on what we had before, but it creates a number of problems.

The first problem, which is very underestimated, is that the UK is increasingly competing in an environment for international mobile investment. The UK, uniquely in the world, has two subsidy control regimes—the EU rules and UK's own rules. Under the UK rules you can deliver certainty, and under the EU rules you can deliver certainty, but that requires you to notify the European Commission.

The difficulty will come when you have a project in the UK—say a battery factory in Sunderland—that receives aid. Does that engage the Northern Ireland protocol? Is selling the cars in Northern Ireland that come from that battery factory a sufficient link to Northern Ireland to engage the protocol? Beneficiaries' sales on their own might not be enough, but what about that plus a subsidiary, that plus a branch or a dealership network? There has to be an economic effect in Northern Ireland.

What sort of economic effect is to be litigated? Let us say you have a problem with a battery factory in Sunderland. The UK Government issue it with a subsidy and approve it under the UK's own Subsidy Control Act 2022, and then you have a latent risk lurking under the surface. Did you or did you not infringe the Northern Ireland protocol or Windsor Framework by not also notifying it to the European Commission? The problem is that, unless you notify it, you will not know. The limitation period for that answer is 10 years, so you are asking an investor to take the risk that, for a 10-year period, their subsidies are potentially challengeable.

If you solve that by notifying the European Commission—having worked in this area for 20 years, I have a certain degree of cynicism—you will give the European Commission the decision about what amounts to a sufficient and material connection to Northern Ireland. They will decide, and the only court you can appeal to at that point is the European Court of Justice, which I can confidently predict will give you an expansive interpretation of that. The decision, or the omission, to leave the EU state aid rules applying on top of the Subsidy Control Act 2022—and bear in mind, the Subsidy Control Act 2022 reflects the arrangements of the TCA, which the EU has accepted as sufficient to generate a level playing field—is a very serious mistake.

Lord Dodds of Duncairn: Thank you very much.

Anton Spisak: On state aid, I was surprised that Article 10 was not amended, because I thought I understood why it was drafted in the initial context, which was that at the time the UK did not have a domestic subsidy control regime. That was in 2019, but the circumstances have changed, and we have quite a robust subsidy control regime after Brexit. There is a provision in the withdrawal agreement—Article 164—on what the joint committee can do that can address circumstances not foreseen at the time of signing the treaty. I had expected that the negotiators would use that provision to amend that article for the reasons that James mostly outlined, because it potentially creates difficulties with certainty and stability for businesses and investors, but I do think that this will

ultimately be settled in courts because of the ambiguity that this provision creates.

On VAT, the EU VAT regime still applies as a default to Northern Ireland, but there is a set of quite broad, and I would say ambitious, exemptions from that EU VAT regime. There is now more flexibility to set VAT rates for Northern Ireland in a way that is more consistent with VAT rates in the rest of the UK, and there are certain ways of doing that, including quite wide exemptions for SMEs and for alcohol duties and so on. There is a degree of flexibility that was not there in the original protocol, but the EU VAT still applies as a default.

Jess Sargeant: The original protocol gave quite a lot of flexibility on VAT; it just was not used. That would be my interpretation, in that the joint committee is empowered to adopt measures in relation to VAT where the application of the EU regime could have implications for the UK internal market. We have seen that with the exemptions, for example, on some of the environmental policies and in alcohol duties and things like that. I do not think we actually needed the Windsor Framework in order to get those exemptions; they could have happened at any point, but the politics obviously prevented that from happening.

This is more the joint committee using powers existing under the protocol rather than necessarily creating a whole new set of arrangements, although, as Anton said, there were the kinds of blanket exemptions for SMEs and the enhanced co-ordination mechanism to try in part to facilitate future exemptions where they might be necessary. At the moment, we have a case-by-case approach, and we need to make sure that where there are legitimate cases going forward, we see further exemptions and those discussions taking place, because, as Anton says, the default is that the EU VAT regime applies.

Dr Andrew McCormick: All I would say is that I could understand the EU being cautious about these things, because it has been clear all the way through that it has been in no doubt that the protocol was giving Northern Ireland a unique set of economic advantages in relation to the general issue of dual market access, so caution about issues of level playing field and competition has a rationality. I defer more to the technical points that others have made on how that works out. That is only a broad tactical point.

Q7 Lord Empey: What is the significance of the Windsor Framework for regulatory divergence both east-west, and north-south? To what extent will the Windsor Framework protect Northern Ireland's integrity and place in the United Kingdom's internal market and its unique access to the EU single market? I have been concerned about divergence, and the committee has taken it very seriously over the last year or so. I would be very interested in the witnesses' response to it.

Jess Sargeant: I have also been very interested in divergence, not just between GB and NI but within the UK internal market with regard to Scotland and Wales as well, so this is something I have been thinking

about a lot. To that extent, the Windsor Framework allows more GB-NI divergence to be tolerated in the areas in which the UK is most likely to diverge. Here, I am referring specifically to some of the SPS regulations. That exemption for retail goods not to have to comply with EU law in areas that are not related to animal health is a really useful development in order to allow GB—or in this case specifically England—to implement some of its plans for gene editing, for example, to prevent challenges that might arise from changes to EU law on things like labelling.

The Windsor Framework helps to resolve a lot of those problems and allows the UK—England, more specifically—to diverge in those areas without it immediately meaning that it is much more difficult to sell goods to Northern Ireland. That is a positive development. Obviously, that exemption does not cover all regulatory areas; one of the concerns raised earlier in the debate on the statutory instrument was about manufactured goods and the fact that they will still need to comply with EU law. As the Command Paper itself points out, in areas like product standards a lot of those regulations are informed by international standards, so we would not expect a huge amount of divergence in those areas anyway, so that is less of a problem.

The particular exemption from SPS is particularly important. In terms of how much the Windsor Framework will protect the internal market, one of the challenges here is that the UK internal market is still a very new and contested concept—particularly between Scotland, Wales, the UK Government and Northern Ireland—so it is a bit difficult to test what exactly that means, because there is some extent to which particularly the Scottish and the Welsh Governments might like the opportunity to have more regulatory barriers in some way, and some extent to which they are a little bit jealous of the fact that Northern Ireland can prevent the entry of certain goods if they do not meet EU standards in a way that they cannot, because they argue that it could undermine their own regulatory standards. It is quite difficult to judge exactly whether that test has been met, but these arrangements certainly permit more divergence. Whether that will be desirable to all businesses at all points is a slightly different question.

Anton Spisak: Thank you very much for the question. It is a fascinating issue that arises in this context. There is one problem that I can envisage in this context: a problem of competition. Imagine a scenario, such as a step further on gene editing, where GB decided to change its gene editing standards, as the Government intend to do, but the EU would not reciprocate; the EU obviously has its own processes for deciding what it does do. That would essentially end up with GB producers being able to lawfully place products that are of slightly different standards on the Northern Irish market, while Northern Irish producers still have to produce the same product but to a different standard. That standard may be higher or lower depending on the exact nature of that legal change, but it might create problems around competition within the Northern Irish market on its own. It raises questions of consumer choice, and so on.

I am not a consumer protection expert, but it seems to me a potentially important issue that has been slightly overlooked in this whole context. At the end of the day, it will all depend on how well the new domestic internal market surveillance regime works in practice. There is a whole new office for the internal market. I presume that one of its responsibilities will be to monitor some of those questions and how they operate in practice, but it will be quite a tricky job to do well.

Also in this context of regulatory divergence is the risk that the Retained EU Law Bill 2022 raises in the context of the Windsor Framework. I am of the view that, as currently drafted, the Bill is fundamentally incompatible with the Windsor Framework and requires substantive amendments if it is to be made compatible. There are three very specific reasons for that. One is the fact that a lot of the EU legislation that would be subject to the sunset clause is essentially within the scope of the amended protocols that stand right now, even after the latest changes.

The other problem, which is much greater than that, is the fact that the withdrawal agreement requires the UK Government to produce the same legal effects for any new legislation within the protocol, as for any member states. Again, the Retained EU Law Bill 2022 would fundamentally change the nature of how retained EU law is treated in the UK legal order, which I believe is incompatible with the commitment in Article 4 of the withdrawal treaty as it stands. It raises a whole set of separate questions that need to be looked at properly, and the Government need to properly reflect on how the Windsor Framework requires further changes to the Bill as drafted at the moment.

Lord Empey: Thank you, Anton. You started a few hares running there.

Dr Andrew McCormick: Yes, hares with various genetic modifications. I have nothing to add technically, just a reminder that the New Decade, New Approach agreement was very clear on the commitment to unfettered access for NI to GB. But the sentence about Northern Ireland as an integral part of the UK internal market is in the context of the application of the protocol. It is explicit in the NDNA itself. I mention that only because the issues that have been raised by the other contributors are real and will apply. The question is how, collectively and operationally, we can minimise the difficulties that will arise. That is all I would want to add at this point.

James Webber: I have very little to add to the comments that have come before. The issue of Northern Ireland businesses not benefiting from changes to UK regulation and yet facing competition from goods that are produced to UK standards is a real problem. The second issue comes from the question we discussed earlier: the fact that the Stormont brake does not anticipate significant consultation. It operates as a brake at the end rather than having a formal role of consultation during the process of legislative development. One consequence of that is that, insofar as things come up in working groups or at an official level, the EU will take the view that the UK can solve any problems that it is raising in that context: such as if you change the law, it will harm Northern Ireland

in A, B, C way. Then the EU's response will be, "Well, the UK is in a position to fix that by tagging along too", and it will create a natural drag-along effect, which is sort of in the nature of it.

Q8 Baroness Ritchie of Downpatrick: I have a question to Anton in relation to the Retained EU Law Bill. In fact, I had some amendments to it to do with Article 2 of the protocol and human rights, equality and environmental considerations. The Minister, Lord Callanan, kept insisting that there would be no incompatibility between the Windsor Framework and the Bill. If you have any background information on that, that would be of immense help to the committee.

Anton Spisak: I can definitely provide that in writing after the session. I would just make a brief comment. There is a very easy way of dealing with this problem, and that is by carving out legislation that is required under the amended protocol to be exempted from provisions of the Bill to the extent that those constraints arise. That would essentially deal with that problem. Of course, the Government's approach was to carve out NI-specific legislation from the scope of the Bill, but I am afraid that does not deal with the problem of UK-wide legislation that has applicability in Northern Ireland. Equality protections are one very good example of that; standards for manufacturing products are another. Those are not dealt with by NI-specific legislation but by UK-wide standards. There is a whole set of examples that would fall in this camp.

Q9 Baroness Ritchie of Downpatrick: Could I move on to the question on veterinary and human medicines? The Windsor Framework already deals with human pharma, or human medicines, so how would you assess the current situation with regard to veterinary medicines, and what steps need to be taken to agree a long-term solution before the expiry of the grace period at the end of 2025? In the commentary associated with the Windsor Framework, there were indications that they would hope to reach a permanent agreement.

Also, what is your assessment of the Windsor Framework provisions on the supply of human medicines to Northern Ireland, and do you think they deal sufficiently with the issues previously raised by industry in relation to the protocol? Many of those issues were raised by those involved in the human pharmaceutical industry to our particular committee in our last inquiry.

Jess Sargeant: In the interest of brevity, when it comes to veterinary medicines it is clear that a solution needs to be found. As you say, the intention was signalled in the agreement. I am not exactly sure why that was not part of this agreement, but it is important that that issue gets resolved. On the provisions on human medicines, this agreement goes a long way to resolving a lot of the issues that some of the industry have been raising, particularly the ability to produce a single pack in order to sell medicines both in Great Britain and Northern Ireland by removing the requirement to comply with the falsified medicines directive. That has been achieved, which is really helpful.

Allowing the MHRA to regulate for the whole of the UK, again, particularly on innovative and novel medicines issues, is a really positive development that addresses some of the concerns of industry. That, coupled with some of the recent announcements in the Budget on regulatory co-operation with the EMA and the FDA, also goes further in ensuring that we are unlikely to end up in a situation where certain medicines are not accessible in Northern Ireland.

That seems very positive. It does not go quite as far as the UK might have liked in the Command Paper—removing medicines entirely from the protocol—but one of the other things I have heard very clearly from industry, particularly in the medicines industry where pharmaceutical companies often have to take regulatory decisions for several years in the future, is that certainty is really important to them. Hopefully this has gone a long way in providing that.

Anton Spisak: I would just add that medicines are where we see a genuine example of dual regulatory regime where Northern Irish businesses will now be able to benefit from authorisations by both the European Medicines Agency and the MHRA, which is a domestic regulator. This is a very good arrangement for Northern Irish businesses, and it opens up possibilities and introduces a degree of regulatory competition, which can be a good thing because it can encourage regulators to think differently and more creatively about approaching the same regulatory objectives in a slightly different way.

In relation to veterinary medicines, this is still an outstanding question, because it is dealt with by a temporary exemption that has been passed by the European Parliament, but it does not provide a permanent solution yet, so I hope that the joint committee would, at some point, look at this issue again and address it by an extension or turning into a permanent solution.

James Webber: I have nothing to add to Anton's comment.

Dr Andrew McCormick: Likewise, in the interest of time, I have nothing to add.

Q10 Lord Thomas of Gresford: There are two competing views about the role of the European Court. In the briefing I referred to, the EU said that there is no change to the role of the Court of Justice of the European Union. The Court of Justice remains the sole and ultimate arbiter of EU law. On the other hand, the UK Government say that the Stormont brake and the UK's veto in the joint committee can only be challenged through independent arbitration mechanisms, not the ECJ, removing the ultimate authority of the ECJ in areas in which it would affect day-to-day lives. There are other statements made by the British Government that we have got rid of the ECJ.

I understood that the arbitration arrangements, which are referred to, do of course contain the possibility of an arbitrator seeking the views of the ECJ on a point of European law. That is how it is supposed to work, is it

not? I have also suggested, at least for face saving, that you propose that any point of UK law should be referred to the Supreme Court of this country, but never mind about that. What do you think about the arbitration situation and the role of the ECJ?

James Webber: The EU position is closer to the truth. There is substantively no change to the role of the ECJ, except in the context of the Stormont brake and the dispute arising under it, which would be whether the UK was entitled to exercise it, the various procedural requirements that we have talked about, together with the substantive requirements of significant effect and all of that. That dispute is raised before the arbitral tribunal, the bilateral arbitration mechanism in the withdrawal agreement, rather than directly to the ECJ, whereas, under the European Union (Withdrawal) Act 2018, failure to implement a rule would have been treated as if it were a member state failure and gone straight to the ECJ. That is a change, but other than that there is no change to the role of the ECJ, in my view.

The second point is that insofar as you were going to have any mechanism based on EU law, the questions of EU law have to go to the ECJ because of the decisions of the ECJ itself. In the *Achmea* case and in other judgments, the ECJ has been very clear that it is the only court that is competent to interpret EU law. If you have EU law in your agreement, you have the ECJ in your agreement pretty much to the same extent. The only question then is the procedural route by which you reach the ECJ.

Lord Thomas of Gresford: Effectively, the arbitration procedure has been placed in between—

James Webber: In respect of the Stormont brake?

Lord Thomas of Gresford: The Stormont brake has been placed in between the—

James Webber: The Stormont brake, which only applies in the circumstances we have discussed earlier, is a new law where the substantive provisions are allowing its application, otherwise the ECJ's position under the protocol is unchanged.

Lord Thomas of Gresford: Right, yes.

Anton Spisak: I broadly agree with James's assessment that there has been no material change to Article 12, which is essentially granting the European Court of Justice jurisdiction over provisions of EU law that apply to Northern Ireland. It also means that UK courts that are dealing with any domestic disputes relating to potential application of EU law would still be empowered to, and in some cases be under obligation to, seek preliminary reference to the European Court of Justice with respect to those issues. That is really important in the context of the Retained EU Law Bill, which contains some provisions for giving UK courts small discretions to decide how they want to approach questions that had been previously dealt with by the European Court of Justice.

I can see potential for some inconsistency here. From a business point of view, if you are a business in Northern Ireland that feels that its rights have been infringed by another company in the EU and seeks a remedy, it is in the interest of that business to ensure that it receives the same remedy as any other European business facing a similar issue. That is ultimately ensured by asking the European Court of Justice for its verdict. So from a business point of view it provides a degree of certainty and stability and is not necessarily a bad thing, although I appreciate that there has been no change to that provision.

Lord Thomas of Gresford: So the Northern Ireland business would want to go to the European Court to resolve an issue that involved, for example, the application of certain regulations. Is that right? Is it a benefit to business in Northern Ireland?

Anton Spisak: It is a benefit to ensure that, at the end of the day, businesses that are competing in the same markets have access to the same remedies if there is a concern for them. Ultimately, you can get final recourse through the European Court of Justice, so I can see that silver lining of this arrangement.

Lord Thomas of Gresford: On the other hand, if a contract had been agreed to be ruled by UK law, they would use the UK courts to resolve disputes.

Anton Spisak: That is right, but if that dispute was about application of EU law under the amended protocol, it could end up in a scenario where the UK domestic court might have to ask the European Court of Justice for its opinion on the points of interpretation through the preliminary reference procedure, which does exist.

Lord Thomas of Gresford: Jess, do you have anything to add?

Jess Sargeant: That seems to be enough.

Dr Andrew McCormick: The points were all made.

Lord Thomas of Gresford: I am very grateful, thank you.

The Chair: Thank you very much, all of you. That has been extremely helpful, and it has got our new inquiry off to an extremely good start. There are a lot of quite tricky and important issues to consider, and we have started well, so thank you very much indeed for the evidence you have given us. We are extremely grateful.