



HOUSE OF LORDS

Protocol on Ireland/Northern Ireland Sub-Committee

Corrected oral evidence: The Windsor Framework

[Wednesday 3 May 2023](#)

3.15 pm

Watch the meeting

Members present: Lord Jay of Ewelme (The Chair); Lord Empey; Lord Godson; Lord Hannan of Kingsclere; Baroness Ritchie of Downpatrick; Lord Thomas of Gresford.

Evidence Session No. 5

Heard in Public

Questions 47 - 57

Witnesses

[I](#): Martin Howe KC, 8 New Square; Dr Anna Jerzewska, Director, Trade & Borders; Dr Lisa Claire Whitten, Research Fellow, Post-Brexit Governance NI, Queen's University Belfast.

Examination of witnesses

Martin Howe KC, Dr Anna Jerzewska and Dr Lisa Claire Whitten.

Q47 The Chair: Good afternoon. Welcome to this public meeting of the Protocol on Ireland/Northern Ireland Sub-Committee. We are holding the fifth evidence session of the committee's inquiry into the Windsor Framework. The committee will continue to take oral and written evidence over the coming weeks to inform its detailed report on the framework, to be published ahead of the Summer Recess in July.

We are joined today by academic, trade and legal experts. Martin Howe KC joins us this very second, having run from Temple tube station. Dr Anna Jerzewska, a director at Trade and Borders, and Dr Lisa Claire Whitten, research fellow in post-Brexit governance at Queen's University Belfast, join us remotely. All three of you are extremely welcome and we very much look forward to hearing your evidence. We are keen to examine not only the Windsor Framework as published, but how it might be made to work effectively. I hope that will be one of the strands of our conversation.

We aim to finish by 4.40 pm. Time is short, but I hope that will allow us to get through the questions before us. Please introduce yourself when first you speak. Today's meeting is being broadcast and a verbatim transcript will be sent to you to check its accuracy before publication. I refer to the list of Members' interests, as published on the committee's website.

The first question is: what is your overall assessment of the Windsor Framework and the extent to which it resolves the problems that have arisen with the protocol? Will you say something about the differences of emphasis, if any, in the UK and EU publications accompanying the Windsor Framework? Are there any factual inconsistencies in their description of the agreement?

Dr Lisa Claire Whitten: I thank you, Lord Jay, and the sub-committee for the kind invitation to speak to you this afternoon. I am a research fellow at Queen's University Belfast, working in the post-Brexit governance of Northern Ireland team. I spend a lot of time thinking about the protocol and the Windsor Framework.

On an overall assessment of the Windsor Framework and the extent to which it resolves problems, inasmuch as it is an agreed way forward on implementing some elements of the protocol on Ireland/Northern Ireland that have proved politically and practically problematic, I think it is a very positive development. Regardless of one's starting position, and even regardless of its substance, to the extent that the Windsor Framework is an agreed outcome between the UK and the EU, it is to be welcomed, particularly viewed from Northern Ireland. Being a subject and locus of disagreement between the UK and the EU was not a comfortable or beneficial position for Northern Ireland, so broadly the conclusion of the Windsor Framework is good.

No doubt we will get into the detail, but on the substance the framework addresses some significant issues that had arisen since the entry into force of the protocol, particularly those related to the movement of goods from Great Britain to Northern Ireland, but it does not address all the relevant issues or impacts. What is crucial, in my view, is that the Windsor Framework also lays down new procedures and mechanisms by which to address future problems, including creating new forums for doing so, at least in theory, early on or earlier in the related UK and EU policy-making processes. While perhaps not comprehensive, taken as a whole the Windsor Framework provisions allow room for a more responsive and, therefore, ultimately more potentially beneficial implementation of Northern Ireland's unique post-Brexit arrangements.

Picking up on inconsistencies—your question was on the framing by the UK and the EU—for the sake of clarity it is worth noting what the Windsor Framework is and what it is not. The Windsor Framework is a substantial collection of draft legal texts, joint declarations and unilateral declarations published by the UK and the EU on 27 February this year, many of which were subsequently adopted by the Joint Committee and, according to commitments, are being implemented in UK and EU legislation tabled and proposed to implement the legislation.

To the best of my knowledge, and having read the whole of it, the Windsor Framework is a body of documents that are detailed and comprehensive, and there are no outstanding discrepancies. Any discrepancies that we do see in the framing of the Windsor Framework in separate UK and EU publications—the UK Command Paper and the European Commission question and answer website—are likely to be impactful on the level of politics and communications rather than indicating, I think, future disagreement on the framework's legal substance. In that respect, any inconsistencies evident this time in the framing of the documents are perhaps less significant than those that may have been evident in the immediate aftermath of the conclusion of the protocol.

The Chair: Thank you very much for that good introduction.

Martin Howe: I fear that I am rather more negative on the overall assessment. To what extent does it solve practical problems, particularly in relation to east to west trade from Great Britain to Northern Ireland? If we compare it with the current baseline, we see that much of that trade is facilitated by so-called grace periods, which have been unilaterally extended. It is hard to see that that is positive, and it may well be negative. It contains elements that provide special procedures, in narrowly defined circumstances, for simplification of formalities. None the less, there clearly remains a border—quite a strict border—between Great Britain and Northern Ireland: a border inside the United Kingdom. When using certain facilitations, they take care not to call it a customs declaration. Well, you need to provide information in a way that is not required for trade internally in the rest of the United Kingdom.

Looked at more broadly, the Windsor Framework makes worse, rather than better, the fundamental constitutional problem: the presence of a foreign law-making power, Executive and court system on the territory of the United Kingdom, resulting in citizens in one part of the United Kingdom being subject to a system of laws different from that in the rest of the country, without any democratic means of altering or removing those laws. One is fully aware of the different perspectives of the two communities in Northern Ireland, but from the perspective of the unionist community that is a fundamental problem. The worst element of the Windsor Framework was the agreement to abandon the Northern Ireland Protocol Bill, which is now stalled in your Lordships' House but could have been taken forward as an alternative, much more effective way of addressing the constitutional problems.

The second part of your question was on the published statements. You asked us to contrast the public statements of the Commission and the UK Government. The exercise that I have been involved in—

The Chair: Thank you for the paper to which you drew our attention before you came. It was very helpful.

Martin Howe: I have to say that it was a lot of work. What we have done is more comparing the legal texts that form the Windsor Framework—what they consist of has already been described—with public statements, rather than comparing one set with the other. I would say that in general the Commission's public statements are accurate, but a number of the statements made by the UK Government in the Command Paper are, at minimum, highly misleading and questionable, and some I simply cannot reconcile with reality.

The Chair: Thank you. We will come back to a number of those points on the law as we get into more detailed questions.

Dr Anna Jerzewska: Thank you for the invitation to speak at this session. I run a company called Trade and Borders and advise private sector companies in the UK and the EU on how to import and export. I mainly deal with customs and the movement of goods across borders. I recently spent a year working with HMRC, but not on Northern Ireland.

As Lisa mentioned, the biggest problem for the private sector, which is where my perspective comes from, is its view of how it all works in practice. The biggest issue was uncertainty. From that perspective, it is great to have the Windsor Framework and a bit of stability and predictability for the business and investment environment. That is incredibly important.

I do not necessarily think there was an expectation that the amendment to the protocol would completely remove border formalities, and there are still customs formalities. You can call them declarations or whatever you wish, but there are formalities, even for goods that will remain in Northern Ireland. One of the main complaints from the business perspective was that goods that stay in Northern Ireland, and are

destined for retail consumption in Northern Ireland, had to go through the same formalities as goods at risk of moving to the EU single market. That has been addressed by the red and green lane system, which I am sure we will discuss in more detail.

There were some complaints about commodity codes. Every time you move goods across an international border you have to assign a commodity code – an eight-digit, 10-digit or 12-digit code, depending on the situation. That poses difficulty because you have to find the right commodity code. Businesses, especially supermarkets, complained or raised the issue that it is quite difficult and time consuming. That has been addressed by the green lane system to a certain degree.

Other issues, such as pets and sausages, have been addressed. There are still formalities. It is very important to point out that even for goods that stay in Northern Ireland and will go through the green lane there are still formalities, and still documents that companies need to provide, although they have been simplified. We will get to the challenges with timing and so on.

You asked about the differences between the EU and UK versions. The framework is a series of legal texts. From a practical perspective, we did not get much understanding of how it will all work. The document that details the practicalities is the EU question and answer document on its website. I am not sure whether this is a discrepancy or a difference, but the EU document mentions things that the UK Government are supposed to do—for example, to help companies to classify products and find commodity codes. We have not heard that from the UK Government. I do not know whether that is a difference or whether it has not yet been discussed by the UK side, but the fact that we do not have the same level of practical information from the UK side should be addressed in the coming months. The first element of the framework is supposed to be implemented in September, which does not leave much time for businesses to prepare. I am not sure whether those are discrepancies; they may just be differences in the type of guidance offered, but they should be addressed soon.

The Chair: Thank you for those three helpful introductions.

Q48 Baroness Ritchie of Downpatrick: What is your assessment of the proposed Stormont brake and the conditions for its use? To what extent will it address the democratic deficit under the protocol? What practical, political and legal factors need to be borne in mind in its use and operation?

Martin Howe: May I address the democratic deficit point first? What the mechanism does not do, in any way, is put citizens in Northern Ireland on the same footing as citizens in Great Britain in being able to vote for elected representatives who can change or repeal the body of European Union law to which they are subject. It is a mechanism that applies only to changes made by the European Union to the body of laws that applies

in Northern Ireland. It does not get citizens in Northern Ireland back into the same position as citizens in Great Britain.

It is described as a brake mechanism. I have looked quite closely at a comparable mechanism in the European Economic Area agreement. EEA states are meant to transpose European Union directives and regulations into their own law to maintain consistency within the European single market under the EEA agreement. They have a veto power—unlike the Stormont brake, it is unrestricted; there are no formal limits on it—not to adopt in the EEA agreement annex new European Union measures. The European Union, however, has a right to take measures to disapply aspects of the agreement to remedy the discrepancy. That mechanism has been used, as far as I can find out, only once in its entire history, when Norway decided not to adopt a post office directive. It gave up on that after about a year and agreed to adopt it.

My starting point is that this mechanism, if exercised, gives the European Union the power to take remedial action, and it is most unlikely, even if it were theoretically applicable, to be exercised in practice. Instead of pulling out of an area of law, it is extremely difficult to pull out of a little bit of it and leave a coherent whole behind. When it comes to restrictions on its exercise, it must be measured as being of fundamental importance. You cannot use it to block anything, unlike the EEA agreement, where you can if you want to. The processes for using it are extremely complex. I am not convinced, even if a sufficient minority of Members at Stormont decide to exercise it, that the UK Government necessarily have to follow that, if they think the conditions are not satisfied. My overall assessment is that it is a very poor brake in theory and most unlikely to be of any practical effect.

Dr Lisa Claire Whitten: Thank you for the question. Forgive my partially sidestepping the democratic deficit aspect of it, which perhaps is more subjective and which I will leave for others to pick up.

I want to raise a couple of practical issues and implications of the Stormont brake. The first is the novelty of the Article 13(3)(a) strand of the procedure, which relates to amendments and updates to EU Acts that apply under Article 5(4) of the protocol and are listed in annex 2, primarily regarding the regulation of goods. In both the UK and the EU constitutional context it is worth noting that that process is quite innovative, notwithstanding the EEA example from a different setting.

For the EU, the Stormont brake provides a small group of elected representatives in a sub-state polity and a third country the capacity to initiate a brake on the evolution of EU legislation, albeit confined to the borders of Northern Ireland and with the possibility of remedial action. From a UK perspective, the Article 13(3)(a) aspect of the Stormont brake offers MLAs in Stormont an avenue for decisive effect on a formerly reserved area of UK-EU relations.

Following my remark on novelty, it is important to underline that the Article 13(3)(a) strand, as already articulated, includes a high threshold

for notification, which ought to be understood, I suggest, in the wider setting of the range of changes that have been introduced and proposed under the Windsor Framework for the greater involvement of, and consultation with, Northern Ireland stakeholders and representatives, such that the Stormont brake on amendments to EU laws on goods is likely to operate, and is, I suggest, designed or written to operate, as a mechanism of last resort. I would go as far as saying that use of the Article 13(3)(a) process based purely on a reading of the Windsor Framework legal texts could be considered a failure of other processes introduced for Northern Ireland's involvement in scrutiny of the implementation of the Windsor Framework.

On issues concerning the operability of the Stormont brake process, it is worth highlighting the potential for its implementation to put quite considerable strain on the capacity of Northern Ireland Assembly officials and politicians, due to the breadth of EU law changes that could fall within its scope. The workload of the Northern Ireland Assembly scrutiny committee set up under the dedicated Windsor Framework statutory instrument is likely to be considerable, or could be considerable depending on the level of MLAs' interest. The timelines for scrutiny reporting notification are somewhat unforgiving and assume a level of monitoring of EU law development that has not traditionally been required or conducted at Northern Ireland devolved level.

On that issue, it is also worth noting that the substance of policy that is in scope of the Article 13(3)(a) strand of the Stormont brake and, even more so, its Article 13(4) strand, which relates to any additions to EU law under the Windsor Framework, go beyond Northern Ireland devolved competence. By implication, potentially we are asking MLAs and Northern Ireland Civil Service officials to engage with and monitor areas of policy in the EU for which they are not, nor ever have been, directly responsible.

A final point from me, on a slightly different angle regarding the Stormont brake processes, is about the potential interaction between different aspects of the framework and the Stormont brake. As I anticipate you will hear in more detail in other evidence that the sub-committee might receive, some areas of the Windsor Framework Article 2, which relates to individual rights, that have been identified by the dedicated mechanism unit commissions—the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland—as underpinning Article 2 guarantees are in scope of the Article 13(3)(a) Stormont brake process.

This is hypothetical, but by implication we could see a challenge on or contradiction between the exercise of the Stormont brake procedure and commitments of the UK Government under Article 2 regarding non-diminution and keeping in place certain human rights commitments in respect of the 1998 agreement and EU laws. I mention that because I do not think that the issue has been brought to the fore, and because a

reading of the Windsor Framework statutory instrument suggests that that potential interaction has not been fully considered, at least not yet.

Baroness Ritchie of Downpatrick: Thank you. Dr Jerzewska?

Dr Anna Jerzewska: I do not think I have anything to add to Lisa's very comprehensive response.

The Chair: Lord Godson has a question following one of Martin Howe's comments.

Lord Godson: You eloquently described the constitutional and policy aspects. In some ways, this session is a Janus-faced exercise looking backwards at events of recent months and, therefore, at what is viable. What leverage do you think that the UK Government had, if you had been advising them at the time, to compel the EU to revise said constitutional outrage?

Martin Howe: The leverage was the Bill. That is the primary mechanism that, as far as UK law is concerned, would be effective in restoring the constitutional status of Northern Ireland to, as it were, its position of equality within the United Kingdom. There is a broader political and trade context. We have a wide trade agreement with the European Union under which we are a much bigger customer of it than it is of us. That perhaps goes beyond my legal sphere of expertise, but the leverage is the Bill, in effect.

Q49 **Lord Empey:** How would you assess the Windsor Framework against the UK and EU commitment to protect the Belfast/Good Friday agreement, "including its subsequent implementation agreements and arrangements, in all its dimensions and in all its strands"? Can we start with Anna, please?

Dr Anna Jerzewska: I do not think this is within my area of expertise. I would like to stick to customs and border procedures while providing evidence.

Dr Lisa Claire Whitten: I acknowledge that the actual, perceived and potential interaction of the Windsor Framework and the 1998 agreement is contested. For full disclosure, I wrote a whole PhD thesis on the issue, so I could probably talk for far too long on it.

With that caveat, the one aspect I would highlight about the interaction between the specific changes brought in under the Windsor Framework and the 1998 agreement is on north-south co-operation and, by implication, east-west co-operation. It is fair to say that the provisions of the Windsor Framework and the change under it focus primarily on a subset of what has come to be known as east-west relations, meaning trade between Great Britain and Northern Ireland, which was not the general understanding of east-west relations prior to UK withdrawal from the EU, it being more relevant to UK-Ireland trade.

None the less, arguably the Windsor Framework's concern with east-west—Great Britain to Northern Ireland—is somewhat of a rebalancing or corrective to the previous agreement under the unamended protocol, which focused primarily on ensuring that conditions for north-south trade and co-operation could continue to the extent possible after Brexit. Without necessarily ascribing a value judgment to the unamended protocol or the new Windsor Framework provisions, it is important to underline that the latter, at least from a UK Government perspective, constitute a step change in relation to north-south co-operation, as envisaged in and practised under the 1998 agreement. That point is particularly apparent in the UK Government Command Paper, which states that “inherent in this new way forward is the prospect of significant divergence between the two distinct economies on the island of Ireland”.

Such a framing by the UK Government arguably sits in some tension with the objective of the protocol, now the framework, regarding the maintenance of conditions for north-south co-operation under Article 1(3) as well as in regard to long-standing UK Government policy under the 1998 agreement broadly to support and/or facilitate the development of north-south co-operation and, more recently, to protect it in the context of UK withdrawal from the EU. On the latter issue, I am thinking in particular of Section 10 of the European Union (Withdrawal) Act 2018, which contains provisions on the protection of north-south co-operation in the exercise of powers under the Act.

Regarding established areas of north-south co-operation—for example, in relation to the environment, police and judicial co-operation, tourism or education—the framing of the Windsor Framework suggests a narrowing view of what north-south co-operation might look like after Brexit and the degree of regulatory alignment required to enable it. Notably on that issue, it is worth stating that most of the areas identified by the UK and the EU in 2017 as areas of established co-operation on the island of Ireland underpinned partially or fully by EU law are not covered by the protocol, now framework, meaning that those aspects are less secure post Brexit than they were pre-Brexit. Moreover, by introducing a degree of dual regulation, albeit in controlled circumstances and specific sectors—medicines, agri-food products and retail goods—alongside the Stormont brake procedures, the Windsor Framework increases the potential for north-south divergence in the name of protecting and promoting east-west alignment, understood to mean Great Britain and Northern Ireland.

I am not making a value judgment on the change, but it is worth making it clear that in relation to the 1998 agreement there is a new degree of trade-off between north-south versus east-west co-operation/alignment. This is one of the implications of the specific changes brought in under the Windsor Framework arrangement.

Lord Empey: Thank you. I am sure we will come back to some of that later. May I ask Martin for his assessment?

Martin Howe: I do not know whether it offers reassurance for Dr Lisa Claire to hear that I tend to think that a lot of the emphasis in the UK Government's Command Paper and public statements on factors such as divergence and getting the internal UK market operating properly in relation to Northern Ireland very much oversell what will be achieved by the legal texts in the Windsor Framework.

A point occurred to me in the course of Lisa's answer: whether you are asking about the Windsor Framework compared with what went before the protocol, or whether you are comparing the framework with the protocol. To encapsulate my view, the protocol was and remains extremely damaging to the 1998 agreement because it undoubtedly gravely affects the constitutional status of Northern Ireland within the United Kingdom, which is one strand of the 1998 agreement that is of great importance.

It cuts across, in particular, Article 6 of the Articles of Union of 1800 by putting citizens of Northern Ireland on a different footing in external treaties from citizens in Great Britain. It puts into Northern Ireland law-making systems law interpretation and law-enforcement systems that are operated by a foreign power and do not operate in Great Britain. The damage that that does to the 1998 agreement is to reinforce feelings that Northern Ireland is being separated against its will from the rest of the United Kingdom. The concentration in the Government's rhetoric on the east-west trade issue arises because it is the east-west trade issue that is damaged by the protocol in the first place.

Q50 Lord Hannan of Kingsclere: May I begin by putting a question to our two remote witnesses? In your opening statement, Martin—correct me if I misstate you—you said that the Windsor Framework was no better than and may be worse than the status quo ante, in the sense that it winds up exemptions and grace periods and formalises a customs process, even for green lane goods. Do our two ladies share that assessment?

Dr Anna Jerzewska: It is an interesting question. The assessment depends a little on what is expected. It is true that the green and red lane system includes paperwork and formalities. It formalises what was already in place. Companies need to provide information and paperwork every time they move goods from GB to NI, despite the fact that it is one customs territory. That has definitely been formalised under the Windsor Framework.

My view on whether there was a different option is slightly different. We knew that it was expected that the customs border would remain in some shape or another. The green lane offers simplifications and solutions to problems that stakeholders have raised over the last couple of years. It does not change the nature of the arrangement. Perhaps the fairest way of putting it is that it definitely simplifies trade for a subset of moving goods. If we are talking about goods that are not moving for retail sale or consumption—B2B sales—or goods that are at risk of moving to the EU market, it remains the same: full controls and checks and formalities are still in place.

The question around the protocol is that we do not know what happens to the product the moment it crosses an international customs border. We do not know where it will end up, and traditionally we do not ask about that at borders; we are not concerned with that at customs. We are interested in where the product comes from, but not where it is going to end up. There are always two options for the UK and the EU: a system based on surveillance, requiring businesses to provide quite a lot of information—documentation and paperwork—and trace the goods; or a system based on trust, which we ended up with. The trusted trader scheme is, to a large extent, based on self-certification, as far as we understand it at this point, and that gives businesses in GB and NI a little more flexibility in not having to provide as much information.

I do not think it was ever expected that there would be no formalities, because that was the framework we were working with then. The Windsor Framework was discussed with business stakeholders, economic operators, and so on. It addressed the tangible, practical processes that businesses raised, such as the commodity codes that I mentioned, but it did not change the entire framework.

Dr Lisa Claire Whitten: Thank you for the interesting question. I do not claim to have anywhere near Anna's customs expertise.

Whether the framework is better or worse is a value judgment but yes, it will lead to an increase in the number of checks on certain goods that are red-laned and are currently covered by grace periods. As Anna set out, this is not a fundamental transformation of the system but, in particular, a redefinition of "at risk" and the introduction of some customs easements—facilitations for retail goods subject to conditions primarily relating to data sharing. It is an amendment of the system, not a fundamental rewriting of it.

I emphasise, however, that in assessing its better or worse quality one of the key asks throughout the process, particularly since the protocol came into effect for Northern Ireland businesses, has been certainty. The fact that this is an agreed outcome is crucial. Unilateral outcomes or solutions were, in the longer term, set to put Northern Ireland in a very uncomfortable position between the UK and the EU that was not conducive to beneficial trading arrangements with both markets.

The fact that this is an agreed outcome is crucial. Yes, it will increase barriers for some goods, but reduce barriers for others.

Q51 Lord Hannan of Kingsclere: That is fascinating. All three of you have said something that one does not get from HMG.

May I explore one other aspect? A previous witness to the committee made the argument that, because the checks from the Republic of Ireland to Great Britain were going to be greater than those from Northern Ireland to Great Britain, there would effectively be an incentive for every EU provider to use Northern Ireland as a check-free or lightest-invigilated route into Great Britain. That being the case, it is very difficult to see how

the UK could realistically keep out any goods if its regulations diverged. Do you, Martin, share that assessment?

Martin Howe: The whole protocol puts the United Kingdom on the horns of a very difficult dilemma regarding exports of goods into Great Britain from Northern Ireland. I wrongly use the word “exports”; I should say movements within our own country of goods from Northern Ireland to Great Britain. The principle contained in the United Kingdom Internal Market Act 2020 is not having regulatory or customs barriers that would add to the difficulties caused in Northern Ireland by the protocol structure by restricting Northern Ireland exports into Great Britain.

The problem is that you then end up with the possibility of Northern Ireland having to follow EU single market laws. Where you have EU single market laws that are different and there are goods that we do not want in the United Kingdom, we cannot keep them out of Northern Ireland. Overriding EU law is not possible under the protocol, and in the way it has been entrenched under the 2020 Act. The practical question arises: how do you stop those goods flowing onwards into Great Britain?

The Government have announced their intention to construct a facility in Scotland for SPS inspections and inspections of animals arriving from Northern Ireland, but that is supposed not to apply to goods that originate in Northern Ireland. How do you tell whether goods originate in Northern Ireland? How do you tell in practice? What formalities do you use to strain out non-originating goods? There is a very nasty legal question once you start talking about where goods originate. You get into issues such as rules of origin and minor processing. Would minor processing in Northern Ireland convert them into Northern Ireland origin goods for the purposes of getting into Great Britain? This is a major issue that arises from the fundamental structure of the protocol, which is, in effect, to place an international customs and regulatory border for goods that is misaligned with the political border.

Lord Hannan of Kingsclere: Would either of the other witnesses like to add anything to that?

Dr Anna Jerzewska: This is a very interesting point. Before the Windsor Framework—I have not checked the GOV.UK website—but since the protocol, we have had information on GOV.UK saying that the UK Government would provide the system for qualifying goods that are eligible for unfettered access from NI to GB.

As Martin mentioned, that would have been incredibly difficult technically. To some extent, it probably would have been based on the rules of origin, because that is pretty much all we had. Obviously, the rules of origin are negotiated in a trade agreement. These were not the typical complex rules of origin, but it was a difficult technical question, not to mention the political aspect. It is the same customs territory and there is the difficulty of raising additional formalities and additional difficulties for moving goods from NI to GB.

We know that an incentive exists in some cases. We have anecdotal evidence of EU companies setting up or registering in NI for the purpose of moving goods to GB to avoid formalities and tariffs. We know that it is happening to a certain extent, especially for smaller volumes such as B2C and e-commerce. But in the Windsor Framework it is made very clear that the qualifying scheme will not be published. There was an assessment of the level of risk with the B2C and e-commerce trade versus the difficulty of creating and implementing such a system.

Given what we are already seeing with defining goods at risk and putting it all into practice, doing it the other way round would have been too much of an issue, but it creates a situation where it is true that we do not know what is coming this way. I do not know of any way in which we are collecting data. One thing is controlled, but another aspect is that generally in customs we like to know what is coming in and going out. We are not controlling, and we do not know what is coming out and we are not collecting data, but that is a level of risk that we will have to live with.

Dr Lisa Claire Whitten: On the specific question of effective diversion of trade from Dublin through Belfast into GB, I believe I am accurate in saying that Belfast port reported record turnover figures and movement of goods through it in 2021 and 2022. That said, the record figures do not suggest a radical expansion of EU traders using that avenue and that route. As Anna suggested, while there has been some anecdotal indications that that new route is being used by certain companies if it is beneficial, based on the regulatory environment in which they operate, I do not think it is a dynamic we have seen manifest in any economically significant way.

I would also flag the importance of the UK Government's incoming border operating model, which will be a key determinant of whether that dynamic continues and the nature of it going forward in relation to NI to GB, GB to NI and the implications of that.

Lord Hannan of Kingsclere: Unless I have completely misunderstood, we have carried on with an exemption on checks on incoming EU goods. It would be odd if we already saw such a diversion before there had been any checks put in. Before I cede the floor, I gave the other two witnesses two bites of the cherry, Martin. Do you want to come back on any of that?

Martin Howe: On the complexity of trying to work out whether goods originate in Northern Ireland or not, Anna mentioned the problems of defining that, let alone applying it in practice on the ground. It is interesting to note that that complexity also appears inside the proposed regulation on retail goods. I call it the supermarket depot to supermarket branch distribution green channel. Calling it a green channel is wrong because there are lots of formalities, but it is a simplified procedure in which you need one certificate for a consignment instead of hundreds of certificates for many different types of goods.

That scheme specifically excludes from its scope goods that originate in Northern Ireland, which means that Northern Ireland businesses cannot gain the exemptions from the application of EU rules that British businesses gain when exporting into Northern Ireland under the scheme. It also means that if a Northern Ireland business sells its goods to a supermarket central depot in Great Britain for distribution nationwide, the Northern Ireland business's goods will not be allowed to go back to Northern Ireland under that route. That is just one of the many extraordinary complexities that are created. It is an attempt to try to correct something that is fundamentally flawed, in my view.

The Chair: Lord Thomas has a question, and then we have to speed up a bit.

Lord Thomas of Gresford: I want a quick clarification, Anna. Are you saying that goods in the Republic of Ireland that are exported to Holyhead would have a certain amount of paperwork to go through, but if you drive over the border into Northern Ireland and export your goods through a Northern Ireland port into England, those requirements no longer exist? Is that right? Did you say that there are companies being set up to take advantage of that?

Dr Anna Jerzewska: Yes, that is correct. We know that there are companies that do that. As I mentioned and Lisa pointed out, supporting it with numbers and statistics, we are not talking about large multinationals. We are particularly talking about small companies that are able to operate under the radar to a certain extent, with smaller movements. It is the case that if you move something from the Republic of Ireland to GB directly, you have formalities to the extent that they have currently been implemented by GB. Obviously, GB has not fully implemented its border checks. This is where the interaction of the Windsor Framework and the target operating model comes into play.

However, in the next few years we will see all the checks gradually implemented. To the extent that the checks apply for EU goods going from the Republic to GB, goods are subject to checks, formalities and, if applicable, tariffs, but goods moving from NI to GB are subject to absolutely no controls. There is unfettered access, with the exception of goods that are subject to international agreements such as CITES. These are agreements on endangered species, which affect a very small amount of goods. If you are moving something made from an endangered species, it is a very limited and niche thing.

Lord Thomas of Gresford: That route may be sparingly used at the moment, but it is a breach in the border formalities where importing EU goods into GB is concerned.

Dr Anna Jerzewska: Yes, and that is why the qualifying system or scheme was supposed to be introduced. It has been a good few years at this point, but, if I remember correctly, there was some talk about monitoring the route, initially just in terms of data, to understand whether it was becoming an issue. There was some degree of reliance on

transport and shipping companies to raise that, because they are the closest to the ground and can provide additional information to the Government. The qualifying scheme is now not being introduced, so there is an incentive for that. The incentive has been there from day one, but now it has been formalised. At this point, the volumes are not great.

Q52 **Baroness Ritchie of Downpatrick:** How would you assess the new framework for agri-food retail trade into Northern Ireland, agreed as part of the Windsor Framework? Do you believe that it goes far enough in mitigating the issues that have been raised in relation to the arrangements for agri-food trade under the protocol? What steps needs to be taken to agree a long-term solution for veterinary medicines before the expiry of the grace period at the end of 2025? I will ask Lisa Claire, first.

Dr Lisa Claire Whitten: I do not have that much to say in response to this question because it touches on areas that are not my expertise, including veterinary medicines. Generally and at a high level, the new framework reforms for agri-food and retail trade will have the effect of reducing barriers to trade for movement of goods from Great Britain to Northern Ireland that would have otherwise applied under the Protocol and, as we have been discussing, subject to conditions. In this respect, as well as through some specific measures regarding medicines, certain plant products, seeds, et cetera, the changes clearly seek to address concerns raised by businesses involved in that GB to NI trade since the protocol came into effect.

I suggest therefore that the reforms are positive and set to be practically significant for traders who are impacted. It is fair to say that they do not address all the concerns raised regarding GB to NI trade. The Windsor Framework does not completely remove the barriers from GB to NI trade. There is still the requirement for retail goods, even those that are in the green lane, so to speak, to comply with some EU laws when they pass through it. Some EU laws are already applied under the protocol arrangement.

Some of the new trade easements on the Great Britain to Northern Ireland axis create the potential for new trade frictions or complexities on the Northern Ireland to Ireland axis at the same time. Additionally, an issue that I think we touched on very briefly, but which is perhaps worth underlining, because Northern Ireland producers are still required, under the Windsor Framework, to ensure compliance with all the EU rules that are in its scope, including those that fall into the green lane for GB to NI traders using the green lane processes. The easements on that green lane system could lead to the undercutting of Northern Ireland producers that are still required to uphold the full remit of those EU standards, subject to the regulatory trajectory of both markets.

I suggest that the Windsor Framework, in relation to agri-food retail, responds to Northern Ireland concerns. It is likely to be significant on the ground if it is implemented effectively, but it is not comprehensive enough to address all the issues relating to arrangements for agri-food

and retail trade after Brexit on the GB to NI axis. Indeed, it could create some new challenges and problems.

Dr Anna Jerzewska: I start with the caveat that we are working on the basis of what we know so far. We are still very much waiting for additional guidance. The checks and controls will be phased in. There is interaction with the green lane system, on which we are still waiting for guidance, as well as other elements of guidance.

There are definitely elements that are helpful; I think Martin mentioned the single certificate for mixed loads of agri-food goods, which is something that stakeholders and businesses have raised. There is a reduction of checks over the next couple of years. I think the checks will slowly and gradually be removed or reduced on agri-food projects once all the safeguards are implemented. Chilled meats, one of the big issues, will now be allowed. There will be the removal of certificates for organic products and wine. However, there will be some safeguards in place, such as labelling. Again, these simplifications, as far as I understand it at this point, are applied only to goods for end consumption in Northern Ireland, and even these goods will need to be labelled. There will be a couple of different categories of labelling at the shipment level, product level, pallet level and so on. The goods will be marked as not for EU consumption.

With all these things, when it comes to the impacts on day-to-day trade and businesses, there are two things that need to be taken into consideration. How clear is the guidance, and when is the guidance going to be available? We have some time before these measures will be introduced, but it is about understanding how it will all be done in practice.

Baroness Ritchie of Downpatrick: Martin Howe, do you have anything to add?

Martin Howe: I fully agree with Anna's concluding remarks. The way this operates is dependent on details that are not yet public and may not yet even be decided. For example, we have the primary EU proposed regulations relating to different subject areas, retail goods, plants and so forth, as well as human medicines. What we do not have are Commission-implementing regulations. As a lawyer, I cannot give you a definitive answer as to whether it will be worse or better than what we have now with the grace period. It depends on the detail and how, in practice, it impacts on operators.

For example, what perhaps appears to be a very simple thing to the Civil Service mind is labelling goods with a special label. That can create a very severe business impact. If you are required to label individual goods, it means in practice that you have to have them labelled by your supplier up stream, possibly weeks or even months before they actually come. If you have goods that are differently labelled for the Great Britain and Northern Ireland market, that means you cannot keep a common pool of stock. You would have to keep separate stock, with goods for Northern Ireland only, and there may be businesses that say, "This is just

uneconomic for us given the percentage of the overall market in the United Kingdom”.

On the legal point, the regulations create tunnels through the tariff and regulatory wall that applies under the protocol at the east-west border. They do not fundamentally alter that wall. I have a very serious concern about the legal mechanism that has been used to create the facilitations. They are all being done by European Union legislation. They are not being done either by a bilaterally agreed treaty text or rules adopted by the Joint Committee. That means, as far as I can see, that the United Kingdom has no ability to prevent them being withdrawn or modified by the European Union according to its own legislative processes. It has no control other than invoking a political agreement, not an internationally legally binding agreement, on what the implementing regulations will contain. I am absolutely astonished that the United Kingdom Government should have agreed to have facilitations of that kind embedded in European Union law without embedding them in an international legal agreement. If they are important, as some of them are—for example, the human medicines one—they need to be secure.

I simply cannot see why they did not at least make them part of Joint Committee decisions, in which case they could be amended or withdrawn only by joint consent, instead of allowing them to be enacted as part of internal European Union law. That also cedes the very important point of allowing the European Union to legislate differentially for the territory of Northern Ireland compared with the way these measures apply internally in the European Union. That, itself, is a very dangerous principle. Even if we do not mind these particular measures, that principle could come back to bite us very badly in the future.

Q53 Lord Godson: This is a question for both of the online witnesses and the in-person witness. I want your views on the Windsor Framework proposals on VAT and excise. I also want your views regarding items that would be exempted in future from EU VAT rules, and on the provisions of the framework and its various protocols on state aid and the legal mechanisms for implementing that. You can answer in any order; anyone who wants to can take it first.

The Chair: Dr Jerzewska, do you want to go first?

Martin Howe: Shall I?

The Chair: Okay, Martin, you go first.

Martin Howe: I apologise. As I am here in person, there is a temptation to leap in and exclude people who are online.

The Chair: Dr Jerzewska, do you want to go first, and then we will come back to Martin Howe?

Dr Anna Jerzewska: With VAT and excise, what we know so far is quite limited. There is a list of proposed changes on VAT and excise related to a limited amount of goods. Those are goods installed in immovable

property. The UK does not need to apply the EU scheme for small businesses; it can create its own, but that will take some time. This proposal is about creating a list of goods that do not need to be subject to EU VAT rules.

Similarly on excise, in some cases, especially beverages sold for consumption in the EU, in hospitality venues and so on, the UK can apply its own rates, which cannot be below the minimum set by the EU. That seems like simplification. It seems that there are perhaps concessions. However, because this is a very high-level proposal that will be governed by the enhanced co-ordination mechanism, we do not necessarily know.

From a business perspective, sometimes when you have too many different rules and too much variation, that in itself creates a bit of a barrier to trade because companies need to figure out which rules apply to them. Unless that is clearly outlined somewhere, in a way that businesses can access and understand whether it falls into any of the categories, how can they know whether their beverages are going to be sold here or there, or how they are going to be used? All of that might add to the level of complexity.

It is very important to stress the point, which Martin mentioned as well, that before these things can be applied and before we can assess whether they work or not, we need to understand what it actually all means and who needs to provide the information. Some elements of the solutions will be provided by the UK Government, so the UK Government will unilaterally provide or create a scheme. Some of it will be part of the Joint Committees, or technical committees under the Joint Committees. Some of it has to be part of that work and some of it is already provided. Understanding who needs to provide the information, when it is going to come out and how it is all going to work will make all the difference.

At this point we have an understanding, or an idea, about some possible simplifications in some possible areas, but that is pretty much it. It is not something that businesses can look at and say, "Okay, this is what is happening in my business". We need to wait for information on that.

Martin Howe: We have some limited amendments to the protocol itself in annex 3. In effect, they will allow the United Kingdom to extend the limited changes that have been made to the VAT regime in one or two areas into Northern Ireland, whereas at the moment they cannot be because of conflict with the VAT directive and the excise tax directive. Interestingly, the amendments in Article 3, which allow non-application of certain aspects of two directives, are, as far as I can see, the only respects, contrary to the Command Paper claims, in which European Union laws have been disapplied from continuing to apply to Northern Ireland. It is welcome as far as it goes, but the trouble is that it does not restore the ability in future to set our tax rates across the whole of the UK in line with our wishes, without being subject to European Union interference and negotiation.

My Lord, right at the end of your question, you raised the important subject of state aid. It is not widely appreciated that Article 10 of the protocol is not limited to applying to Northern Ireland. It applies EU state aid law across the whole of the United Kingdom, but it contains a functional test that relates to trade under the protocol, which, interpreted, means trade in goods not just across the north-south border on the island of Ireland but trade in goods from Northern Ireland to the European Union or in the reverse direction.

The so-called reach-back into Great Britain has not been addressed or dealt with. An interpretative declaration has been adopted that should provide some narrowing of the circumstances in which government grants given to businesses in Great Britain may be caught, because there has to be a higher hurdle of a link to an effect in the Northern Ireland market than perhaps was there without the declaration.

While that is a welcome improvement, it certainly has not addressed the fundamental problem. The fundamental problem sits there. If the British Government do not notify to the European Commission a state aid given in Great Britain, it can be challenged up to 10 years later and the company concerned can be required to repay the money. Our courts would have to give effect to Commission action to that effect.

The Chair: Thank you. Dr Whitten?

Dr Lisa Claire Whitten: With apologies, I am quite happy to leave that one for the other panellists, except perhaps strongly to affirm the point made by Anna regarding the need for more operational detail on the new regimes and the complexity challenge facing Northern Ireland traders involved in operating these systems, and in Northern Ireland more generally. I think the challenge of managing complexity in post-Brexit governance in Northern Ireland is broad and significant.

Q54 **Lord Empey:** I want to ask about the significance of the Windsor Framework for regulatory divergence east-west and north-south. I would like your assessment of the framework's provisions regarding the movement of parcels, plants, seeds, machinery and trees. This committee has been battling with the Government to get a central point at which all regulatory divergence is recorded, so that people, businesses, citizens and everybody would have a single point of reference. The Government seem to be resisting that.

Dr Anna Jerzewska: It is an interesting question. I very much stress the point about a single point of information or single source of information for businesses. Perhaps we could just take the example of parcels. Under the framework, we know that there will be simplifications for parcels. It is one of the issues that we had and there were headlines about family members not being able to send Christmas presents to each other because of the protocol and so on. This addresses some real issues. We know that there will be simplifications for B2B and B2C, but we do not know what they are. We know that there will be an authorised carrier scheme. Again, that needs to be worked out.

We know that there are massive issues around liability. An authorised carrier scheme is one of the examples where we have a solution in the framework that sounds very good, but when you look a couple of levels down at the practical application, if it is an authorised carrier scheme similar to the trusted trader scheme, does it mean that carriers such as UPS, FedEx or Amazon—the fast parcel operators—take legal liability for data that is submitted that normally lies with the trader or the customer? There are massive challenges for the Government to work out with economic operators.

On regulatory divergence, it is very difficult to say. I will leave it at that. Businesses are very clear about what they want. Businesses state very clearly that, from a practical perspective, divergence is not helpful if you are serving more than one market. I will leave it at that because it is a very open-ended question, and there is a lot to unpack.

Lord Empey: Martin, may I have your response?

Martin Howe: The question you asked was very broad. In the Command Paper the suggestion is made that all European laws are disapplied and therefore, say, goods coming from Great Britain sold to retail in Northern Ireland can be subject to regulations that diverge from European Union regulations. I have already adverted to a problem that that creates; Dr Whitten also mentioned it. If you allow businesses from Great Britain to sell goods into the same retail market in Northern Ireland as Northern Ireland businesses, but they are allowed to adopt different regulatory systems, you get a risk of economic distortion and unfairness, particularly to Northern Ireland businesses, if you think that the European Union regulations are going to be more restrictive.

The difficulty is that the complexity of the scheme under which that is allowed to happen excludes Northern Ireland businesses from it. You then have an effect the other way round. What is the effect on the United Kingdom as a whole? One view of Brexit, and certainly a view I adhere to, is that there is no point in leaving the European Union and then carrying on doing all the same things that we did when we were members. If there is a point in leaving, which I believe there is, we should frame our laws in the way that suits our national interest, which is not necessarily the same way as our laws were required to be framed when we were EU members. You then have a problem, with the existence of the protocol, of potentially leaving Northern Ireland behind and creating barriers in both directions. There is a wider constitutional effect beyond the immediate legal intricacies of the so-called green channel measures.

Lord Empey: We have been thinking about the long-term consequences. We look at European law as it applies and we can see, in 10 or 15 years' time, that we could be in a totally different environment.

Martin Howe: Indeed, because of course the divergence comes not necessarily from us changing things but from the European Union changing. Even in the short space of time that the protocol has been in

effect there have already been many hundreds of alterations—either replacements or amendments—to the measures that are included in Northern Ireland by virtue of the protocol. The longer that goes on, the longer you will get those divergences.

Lord Empey: Thank you. Lisa Claire?

Dr Lisa Claire Whitten: Thank you for the question. Regulatory divergence is a particular interest of mine too. I do not think the Windsor Framework changes do much to address the standing risk of unmanaged intra-UK regulatory divergence. It is worth stating that divergence in the post-Brexit setting will be a reality across the UK because of differences in both competence and policy trajectories. That was part of the narrative around devolved Governments having more capacity to make choices and diverge.

As you acknowledge, as the UK and EU markets follow different trajectories going forward, there will be divergence. I say that in order to underline that the key is whether that divergence is managed and monitored. That is why it is so problematic that there is no forum for tracking divergence in a comprehensive way, either in the UK-EU relationship context or intra-UK divergence. Of course, the implications of that falls particularly on Northern Ireland because of the requirement for Northern Ireland to continue to follow EU laws in areas where GB producers and traders do not have to.

In that context, the specific changes in the Windsor Framework, at least in theory through the green lane/red lane system, as well as specific derogations and easements, potentially change the location or the setting of intra-UK divergence in respect of regulation of goods. Under the Windsor Framework, through the operation of the green lane system, it is possible and likely that intra-UK regulatory divergence, if and when it arises, will be visible on a single shelf in a Northern Ireland supermarket where products labelled "Not for EU" sit alongside products not labelled as such. In a high-level reading, as we have already discussed and acknowledged, that could lead to the undercutting of Northern Ireland producers or unfair advantage, depending on where the regulatory burden is heavier. Given the policy trajectories, at this point we could expect that Northern Ireland producers would have more regulations to adhere to than their GB counterparts in that system.

On management, it is important to note that one of the new forums to be set up—the specialised committee on goods—has as one of its remits—mentioned in the document—assessing the potential divergence of UK and EU rules, as well as considering UK policy and legislative choices, and the potential divergence effects in that body. In that respect, I think it is welcome that there is at least some acknowledgement of the issue, and provision in the architecture of implementing this arrangement to discuss divergence implications for Northern Ireland under the new model. That said, it is still problematic that that is a very specific context for the discussion of divergence which is a much broader problem—or rather a much broader challenge.

I have one last point on this. Through the Stormont brake procedures, under the Windsor Framework changes there is a new possibility for Northern Ireland to find itself in a position of dual divergence in respect of both the rest of the UK and Ireland and the EU if, under the Stormont brake procedures, there is a pause in the evolution of EU law under a particular instrument. There would be divergence north-south, but, presumably because the retained EU law version of that would not diverge, you would expect to continue to be aligned with EU versions. You would be in a dual divergence position, which could be challenging.

Lord Empey: I think that is the first time I have heard that phrase. Thank you for throwing that one into the pot.

Dr Lisa Claire Whitten: Apologies.

Q55 **Lord Empey:** Thank you very much. I will start with you, Martin, because my next question has a legal side. The Government say that they have removed 1,700 pages of EU law that would apply to Northern Ireland. Where do the 1,700 pages come from? What impact would that have on the application of EU laws to Northern Ireland? Some people have not quite understood where the 1,700 pages come from.

Martin Howe: Indeed, Lord Empey, that caused us a lot of problems. We tried to find out, both from government publications and from informal channels, but got no satisfactory answer beyond a suggestion that it is to be found in the EU regulations that I mentioned relating to regulatory facilitations.

There is one regulation in particular that has a complex name about specific rules relating to entry to Northern Ireland of retail goods, plants for breeding, et cetera. That has an annex—annex 1—which says that when goods are in the special scheme, certain European Union directives or regulations do not apply to the goods when they are traded into Northern Ireland in the special retail scheme. What we have not done is attempted a page-counting exercise, which itself can be contentious. You get into things like whether it is in small print, as in the EU *Official Journal*, or in big type.

The first point is that there is disapplication of some EU measures from certain activities within Northern Ireland. There is no general disapplication of any EU laws for Northern Ireland, with the exception of two articles in directives relating to VAT and indirect taxes. Those are the only ones. There is no general disapplication. There is disapplication of certain measures. In the paper we produced, we exhaustively went through and produced a marked-up version of annex 2 to the protocol, which lists all the EU laws. We marked on that those that are disapplied from within the special retail goods scheme.

I will not expand on it, but it is available as a resource to the committee. We put a lot of work into it. Some measures are disapplied within the scope of that scheme. That is the best we can do. With respect, that was particularly what I had in mind when I talked about misleading

presentation by the UK Government. To say that it is localised disapplication within a specific scheme and write the paper as if it is a complete disapplication from Northern Ireland is misleading, in my view, to anyone. It caused us a lot of problems. We said, "What on earth is this about? Is there something we haven't found?"

There is another one that is related to this—

The Chair: Could you send us what you have? That would be very helpful.

Martin Howe: It says that less than 3% overall of EU rules still apply to Northern Ireland. We cannot even begin to understand what that claim can possibly be based on.

Lord Empey: That is helpful. Thank you.

Q56 **Lord Thomas of Gresford:** This is quite a big subject, but perhaps we can deal with it quickly. What is your assessment of the governance of the framework, including the role of the CJEU and the withdrawal agreement mechanism for arbitration? What change, if any, will be made to the CJEU's role under the framework? I do not suppose, Martin, you require to be reminded that the EU has stated that there is no change to the role of the Court of Justice of the European Union, which remains the sole and ultimate arbiter of EU law.

Martin Howe: I agree with that statement by the EU. There is no change to its powers. There is some political undertaking by the Commission to be more restrained in taking direct actions. Apart from that, the CJEU's powers are the same. The preliminary references are still there from courts in Northern Ireland, or indeed from the Court of Appeal of Northern Ireland. Its other powers remain.

Lord Thomas of Gresford: The withdrawal agreement mechanism for arbitration could have been referred to anyway because the protocol was part of the withdrawal agreement, and that continues to be the position.

Martin Howe: It does. The arbitration mechanism covers the whole withdrawal agreement, including the whole of the protocol. The court's jurisdiction relates to specific articles in the protocol, but not all of the protocol, in particular the annex 2 measures that are applied internally in Northern Ireland—customs matters and state aids. That is where the court has jurisdiction. It also has a separate jurisdiction in the context of the international arbitration mechanism. When the arbitrators are dealing with an issue of EU law, they are required to refer it to the Luxembourg court for decision.

Lord Thomas of Gresford: Thank you. Do you want to add any comments to that, Anna, or Dr Lisa?

Dr Lisa Claire Whitten: I do not have much to add. I do not disagree at all. The provisions in the framework regarding CJEU jurisdiction have not changed. It also applies to Articles 8 and 9 – on the single electricity

market and provisions on VAT and excise – overall Articles 5 and 7 to 10 are covered. The text also provides for CJEU case law to be followed in relation to all EU Acts that are within scope of the framework. Those provisions have not changed under the framework revisions.

There is one other aspect that I flag as something of a known unknown in jurisprudence. It has already been intimated that the novelty of the provision under EU law for non-application of certain EU laws is subject to conditions and review in relation to the green lane. I think I am right in saying that 65 Acts that are listed in Article 5 and annex 2 of the Framework, which, under the new EU regulation on SPS measures, do not apply to goods that are green-laned. I think two other Acts may partially apply. That is what the UK Government refer to as disapplication, but, of course, as Martin articulated, it is very contingent on one's definition of disapplication.

In EU law terms and in respect of the CJEU, that is a novel arrangement. In the event that there was a challenge linked to what is the agreed conditional non-application of EU laws on goods moving GB to NI, subject to labelling and data provision, et cetera, for use or consumption there, there is a known unknown as to what might occur. There are some interesting legal innovations going on.

Lord Thomas of Gresford: Thank you. Anna, do you wish to add anything?

Dr Anna Jerzewska: I have nothing to add, thank you.

Q57 **The Chair:** I have a question that goes back to the discussion we had a little while ago on managing divergence. Do you think that divergence can be managed in the short term, or are we really talking about some more or less permanent negotiation that there will now be between the EU and the UK on how divergence in both directions gets managed over time? Could we have one or two quick thoughts on that?

Martin Howe: One can get overexcited about the issue of divergence in some fields. At the end of the day, we do not believe that the European Union, for example, will allow poisonous food to be presented to its consumers under its laws. I hope they believe the same about us. The fact that there are divergences on pretty marginal matters—whether your chickens are chlorinated or not, for example—if you are intrepid enough to go on a tourist trip to the USA—

The Chair: Not everybody thinks that is a trivial matter.

Martin Howe: It is a matter where people can get overexcited. Perhaps part of the solution is getting less excited about the terrors of divergence.

The Chair: Are there any other thoughts on that?

Dr Lisa Claire Whitten: Crucially, and quite a positive aspect of the Windsor Framework, is that there are new provisions to manage and discuss on a more ongoing basis the implementation of this novel

arrangement, and therefore to avoid divergence that could be unforeseen and more impactful. It is implicit in the arrangement and agreement that there will be a forum for discussion of divergence-related issues, such that a worst-case scenario of divergence making itself known would be avoided.

The Chair: Dr Jerzewska, do you want to comment on that?

Dr Anna Jerzewska: Just to add again that from a business perspective divergence can be expensive. It depends on how it is done and in which areas it applies, but businesses are very clear that they do not necessarily want to be subject to different rules in different markets. It depends on how it will be done in practice, but it is an area potentially of additional costs for businesses, and businesses do not like additional costs, which as you can imagine is no surprise to anyone.

The Chair: One final question. Do you feel, particularly from Northern Ireland, that Northern Ireland stakeholders have been properly involved in the process? As we look forward on all the things that we have been discussing this afternoon, we have the UK Government and the European Commission, but is Northern Ireland being properly involved?

Dr Lisa Claire Whitten: As with the arrangements on trade detail on this matter is still lacking. While the commitments made under the Windsor Framework for the greater involvement of Northern Ireland stakeholders are very welcome, particularly because of both the ask that there has been for greater Northern Ireland involvement and the nature of the issues that have come up, which tend to be technical and lend themselves to being flagged early and on a 'bottom-up' basis. It is very welcome that there are new forums and groups for discussing relevant issues and new arrangements to enable that. That said—similar to the other provisions—we are still lacking the operational detail. It will be crucial that there is, in a sense, wisdom infused in realising the possibility of the new arrangements so that they do not become politicised but allow for broad representation of stakeholders. There must also be the necessary resourcing and capacity building to allow Northern Ireland to benefit under this novel arrangement through the involvement measures.

Dr Anna Jerzewska: The EU Commission, customs authorities of the member states and the UK Government have taken into consideration issues raised by stakeholders and businesses. I am limiting my response to businesses, because obviously there are a lot of stakeholders involved. I have tried to address the practical, on-the-ground, issues.

One final point on involving stakeholders is that it is a two-way communication. I stress this point again. We have a framework that is being phased in. We have the target operating models. We have a range of other changes that have nothing to do with Brexit, such as IT systems being changed in both the UK and the EU. Businesses in GB/NI in particular, and in the EU, have been subject to ongoing deadlines for the last couple of years and will be for the foreseeable future, with the two documents now being published. The deadlines are being pushed and

constantly moved. The constant awareness that something is coming, but we do not exactly know what or when, is really tiring for businesses involved in both GB and NI.

It is fantastic that the framework includes more co-operation, but co-operation works both ways. It would be good to have much clearer communication from all the parties involved, the Joint Committee and the two Governments about what is happening and when and how it is all going to work. I will finish with that.

Martin Howe: I would rather not comment on what is going on in Northern Ireland because I do not claim to be an expert in Northern Ireland politics, although one notes that there are divergent views coming out from different people in Northern Ireland as to the practicalities.

I have a concern, however, about the Commission having direct engagement with people in Northern Ireland. Given that we have the really quite extraordinary constitutional innovation of laws for part of our country being made by a foreign power, it seems to me that to have direct engagement from a foreign power with our citizens who are affected by those laws is a further extension of that extraordinary scenario. I regard it as constitutionally extremely concerning.

The Chair: But given that we are where we are, is it not better that Northern Ireland is involved rather than not involved, or that the people of Northern Ireland are involved rather than not involved?

Martin Howe: You may be right. Given the situation that has been created, it is better that the colonial power knows the views of the subject people before it starts changing the laws that apply to them.

The Chair: Lisa, do you want to say something?

Dr Lisa Claire Whitten: Thank you, but no. I will refrain.

The Chair: I will end by saying that we all hope that, as you said just now, Lisa, wisdom will prevail as we go forward, without specifying exactly which way it should go. Thank you very much, all three of you, for giving evidence to us this afternoon. It has been extremely helpful. It has helped our inquiry a lot. We are very grateful to you.