

European Affairs Committee

The Windsor Framework Sub-Committee

Corrected oral evidence: Regulatory divergence and the Windsor Framework

Wednesday 15 November 2023

4.35 pm

[Watch the meeting](#)

Members present: Lord Jay of Ewelme (The Chair); Lord Dodds of Duncairn; Lord Empey; Lord Godson; Baroness Goudie; Baroness O'Loan; Baroness Ritchie of Downpatrick.

Evidence Session No. 2

Heard in Public

Questions 9 - 16

Witnesses

I: Anton Spisak, Head of Political Leadership, Tony Blair Institute for Global Change; James Webber, Partner, Shearman & Sterling.

Examination of witnesses

Anton Spisak and James Webber.

Q9 The Chair: Welcome to this public meeting of the Sub-Committee on the Windsor Framework. We are holding another evidence session today for our inquiry into regulatory divergence. We are very glad to have you both with us, not for the first time. You are very welcome back, Anton Spisak, head of political leadership at the Tony Blair Institute for Global Change, and James Webber, partner at Shearman & Sterling. You are both attending in person, which is particularly nice for us, and we much look forward to the evidence that you will give us this afternoon.

Perhaps when you first speak you could introduce yourselves, not necessarily for us but for those who are listening. That would be helpful. Today's meeting is being broadcast and a verbatim transcript will be taken for subsequent publication, and will be sent to you both shortly after the end of the session in order to check for accuracy. I refer to the

list of our Members' interests as published on the committee's website.

Perhaps I could start the session by asking you both how you would describe the issue of regulatory divergence in the context of the Windsor Framework. Anton Spisak, you are sitting straight in front of me, so you go first.

Anton Spisak: Thank you very much again for the invitation to appear before the committee. It is always a pleasure. I would like to start by conceptualising the issue a little. It is worth thinking about and reflecting on the circumstances in which regulatory divergence arises. That is because regulatory divergence is now a fact of life, simply because the UK has left the European single market and the customs union, and it is not under an obligation to follow EU legislative changes.

The first instance when regulatory divergence arises is when the EU continues to legislate in areas where the UK had previously aligned with the EU rulebook. The second instance is when the UK proactively decides to change the rules that it had by virtue of EU membership. Those two issues and ways of diverging are slightly different. The first is what I would describe as passive divergence, because it is like a slow puncture; it simply happens over time organically. It is very difficult to manage, it is much more difficult to control, and the kind of cost it imposes on businesses is gradual. Things happen simply by virtue of the EU legislating.

The second kind of divergence, which is a more active type of divergence, when the UK Government decide to proactively change the rules that are already in place from the time when it was a member state, is a bit more like a flat tyre, in that it introduces a one-off cost to business because the rules and legislation change all of a sudden. That conceptual difference is important in thinking about this issue.

It is worth thinking about this in the context of trade between Great Britain and the EU, slightly differently in the context of Great Britain and Northern Ireland, and slightly differently again in the context of Northern Ireland and Republic trade. There are all those slight nuances, but the issue is most pronounced in the context of trade in goods between Great Britain and the EU, simply because Great Britain is now under no obligation to follow EU rules on trade in goods and services, while Northern Ireland, by virtue of the withdrawal treaty and most notably the Windsor Framework, continues to be under an obligation to follow EU regulations in some areas, mostly in relation to the trade in manufactured goods and agri-foods. That is the most notable difference, and we can get into the details in a minute.

The Chair: Thank you very much for that. James Webber, does Shearman & Sterling have a conceptual approach to regulatory divergence?

James Webber: I am pretty sure that the firm does not have a conceptual approach. To give you my experience and background, I have been an EU lawyer for 23 years and have worked in subsidy controls,

state aid, EU regulatory law and EU constitutional law for my whole career, in Brussels mainly and in London.

How would I describe regulatory divergence in the framework? In my view, the framework embeds a fundamental analytical error that was made when the Northern Ireland protocol was first conceived. The practical effects of that error will worsen over time. When I say that, I am referring to a phrase in this committee's report from July of a "no man's land", where Northern Ireland is in a place that does not exactly replicate either GB or the EU, and I suspect that that is going to increase over time. The fundamental analytical error I am referring to is to accept, as the Windsor Framework does, and as the protocol did before it, the application of foreign law and foreign courts over part of the United Kingdom.

That choice, or that mistake—I am pretty unambiguous in having always thought that it was a mistake—means that, until this is altered, Northern Ireland will now permanently be caught in a trap. In this no man's land—which I think is the right phrase—we have changes to UK laws that will not apply to NI and so divergence in that dimension on areas that affect the protocol; changes to EU law that do not apply to GB, which is the passive concept that Anton just described; and changes to UK law that apply to NI because they are outside the current scope of the Windsor Framework, and therefore increase the level of divergence that exists between Northern Ireland and the single market. It is sometimes said that Northern Ireland is in the single market, which is not actually true. It is in the single market in respect of the goods acquis. Northern Ireland is not part of large parts of the single market.

The requirements to apply the full acquis to production within Northern Ireland are often skipped over. Much of the work of the Windsor Framework is in easing east-west trade flows. None of it actually alters the fact that EU law—essentially a foreign system of law—applies to the production of goods inside Northern Ireland.

As I came in—we will cover this in our session, too—you were talking about the deadweight costs of trying to work out which rules apply to you and in which direction divergence affecting your business is likely to discourage investment and reduce trade volume, and favour those incumbents that are finally able to thread the needle and work out how the system works over new entrants. Over time, that will reduce competitiveness, productivity and economic and wage growth.

I am a pessimist, I am afraid, in respect of what the Windsor Framework has achieved. It does not mean that it has achieved nothing, but I think it reflects an underlying mistake that remains uncorrected.

The Chair: Thank you very much for that. Those are two rather different perspectives. We will build on them as we go through the afternoon's session. I turn next to Baroness Ritchie.

Q10 Baroness Ritchie of Downpatrick: Gentlemen, you are very welcome.

In your opinion, and from whatever evidence you have gathered, what impact, if any, has the agreement of the Windsor Framework had on the issue of regulatory divergence? I will go to you first, James.

James Webber: As I said in my remarks, and I think Anton said as well, the Windsor Framework operates to ameliorate some of the harm that the protocol caused in respect of east-west trade flows for certain products, especially retail food products, plants and medicines. Doing so means that a GB food producer—a retail sandwich maker or some such—has been relieved of the obligation of complying with EU rules if it wants to put its product on the market in Northern Ireland. At that level, for a GB producer, it reduces the cost of divergence. The UK can diverge and those products can still be put on the market in Northern Ireland.

There are no equivalent changes, as far as I understand, for manufactured goods. Any GB producer of manufactured products would still need to comply with EU rules in order to place them on the market in Northern Ireland and even for final consumption within Northern Ireland. To the point I made before, the Windsor Framework has left unchanged the entire EU acquis in Annexes 1 to 5, which applies to anyone producing in Northern Ireland. There is an amelioratory effect, but it is narrow. It is meaningful, but it is narrow.

Anton Spisak: Thank you very much for the question. I agree that the Windsor Framework has had an effect on the issue. It had quite a substantial effect on minimising the effects of regulatory divergence. If we look back to when the original Northern Ireland protocol was agreed, we see that under the terms of the original protocol GB effectively would have been in a different regulatory zone from Northern Ireland, for the purposes of trade in goods and movement of goods from Great Britain to Northern Ireland. That reality, and the costs that that reality would have imposed on businesses, particularly in moving goods from Great Britain to Northern Ireland, has now been eased. That is a significant achievement of the Windsor Framework.

The real risk of regulatory divergence in the context of the Windsor Framework is the uncertainty that it imposes in areas where UK legislation evolves in a different way from EU legislation. The Windsor Framework deals with that problem in a very practical way and, in my view, a very pragmatic way by allowing GB products to be placed on the NI market to the extent that they are intended for final use and consumption in Northern Ireland. That, in my view, is a very good thing, because it reduces the practical effects of divergence and means that, for businesses moving goods, a lot of the impacts will be lower.

It also introduces uncertainty, because Northern Ireland producers are still under an obligation to follow EU regulations and standards, especially in relation to manufactured goods and agri-food. It introduces discrepancy and uncertainty. It may lead to some potentially difficult issues around competition and a level playing field, which I am sure we can return to in a second.

Q11 Baroness O’Loan: To develop the line that you are on, Mr Spisak, what do you think are the main risks or opportunities in relation to regulatory divergence now and in the future? For businesses affected, how does the impact of regulatory divergence differ between Northern Ireland and GB, between GB and the EU, and between Ireland and Northern Ireland? In those instances, which sectors of the economy are potentially most affected negatively or positively by regulatory divergence? It is a complex question; I apologise.

Anton Spisak: Thank you for that. There is a tendency to think of regulatory divergence as something inherently negative, and I do not think that is necessarily the case. There are many instances even within the UK internal market of areas of policy and regulations where the four nations take a different approach and where that different approach is tolerated. Even within the EU itself, going back to the 1980s and 1990s and the evolution of the single market, there was a presumption of mutual recognition and the fact that you can have different regulatory approaches. To the extent that you maintain the same regulatory objectives or outcomes, those differences can be tolerated. Regulatory divergence in itself does not have to be a bad thing. It can encourage innovation in how things are regulated and in how different sectors and different regulators approach their regulation.

From my perspective, the real difficulty with regulatory divergence in the context of the Windsor Framework and the movement of goods between Great Britain and Northern Ireland arises when it begins to undermine competition in the Northern Ireland market in instances where GB producers are able to comply with standards that are different from those on the NI market, simply because NI producers are under an obligation to follow European standards. I can imagine circumstances in the future when that kind of difference arises, and then it will be really important to find a way of managing it. It is very positive that there have been some institutional innovations included in the Windsor Framework that have tried to deal with some of that problem, mainly the establishment of the Office for the Internal Market and some of its new mandate for monitoring divergence, but I do not think it goes far enough.

From a business perspective, the real risk is that of uncertainty and difficulty in navigating the regulatory environment. That is perhaps the biggest risk of all. Most of the regulatory divergence will be passive divergence that will organically arise over time. It will be very difficult for businesses to keep navigating the changing regulatory landscape. It is the complexity of the regulatory landscape that is now being created, and is going to be accentuated in the future, that is the real problem that a lot of businesses, especially small and medium-sized businesses, will have to find a way of navigating. That is the one area where the Government probably need to do a bit more to help them.

James Webber: Divergence, the former Prime Minister said—or perhaps two Prime Ministers ago at this point—was the point of Brexit. Of course, doing things differently means that the UK will regulate things differently, in substance or procedurally or conceptually, from the EU. That is, in lots

of ways, the point. However it arises, divergence will happen. Whenever you have a policy point on which you are going to diverge, especially with the EU, it presents a trade-off.

Is the UK's different regulatory choice going to encourage greater levels of investment or innovation in the economy or increase competitiveness? If we think that it is, will that effect be sufficiently big to offset the reduction in market access for the EU? One of the problems of our system is that you cannot see much in the way of a strategy for answering those questions systematically. One is probably starting to form actually—we are getting there through experience.

On divergence, economic incumbents—I say this as a competition lawyer—typically take the view that the current system works and should not really be altered. Incumbents have typically sunk costs into understanding, and sometimes even contributing to, the existing system of regulation, and they do not want to alter it. Their systems are optimised for the current regime. The existing regime—say the EU regime—may be quite convenient. It may create barriers to entry for other competitors. It may reduce the dimensions of competition on which existing competitors play. One has to have the incumbency problem in mind when thinking about divergence and hearing evidence about divergence. Oftentimes people say that they do not want divergence, and you have to colour that with the view as to what people's interest is.

It is a particularly pronounced effect in Northern Ireland, where we have a small market that now has a really complicated regulatory matrix, between all the features we have been talking about, and it takes great effort to navigate it, understand the rules that apply to you and how to make the best of them. Once you have understood that, you will not want it to change. That is an intro to saying that, when we think about risks and opportunities, we have to bear in mind the incentives acting on some of the incumbents who will tell you that they do not want things to change.

On divergence itself, what are the risks and opportunities? To my mind, the opportunity comes from a difference in legal method in how you approach regulation. The EU is necessarily a complicated organisation, and it has a complex approach to regulation, largely via legislation. In fact, regulation is the word. Regulation is a form of EU legislation, and it is highly deliberative; it is not knee-jerk in any sense. It works through the legislative system of the EU, and it tends to create large volumes of rules that are quite prescriptive in their application. What that style of regulatory rule-making generates is hard-wiring of rules and definitions that operate in practice in a way that can be hard to understand and harder to change.

I will give you two areas from my professional experience. The bank recovery and resolution directive, the BRRD, deals with the arrangements for restructuring banks in difficulty after the eurozone crisis and is an incredibly complicated piece of legislation. I do not want to be glib while saying this but, when a particular factual circumstance is presented, the

legislation is so hard that practical effects created by a straightforward application of that legislation are so tough that you end up with very complicated workarounds for any individual bank.

It is the same for the general block exemption in state aid. That exemption allows subsidies to help disabled workers. The definition of what amounts to a disabled worker is 19 lines long and the definitions at the front of the GBER are almost 50 pages long. I do not think that that style of regulatory approach is the UK's traditional style. The UK traditionally has a different system of regulation, where we have legislation that is drafted in a more spartan way and, rather than being focused on creating rights and defining very precisely your rights and obligations, it is focused on trying to create liability and restrictions on your freedom of movement but not regulating outside that. There is also much greater dependence in a UK common-law structure on allowing the courts to embellish and build out the precise boundaries of a prohibition or a liability, depending on a particular set of facts. That regulatory style, in my view—and it is just a view—tends to be more adaptable, and it allows the contours of the regulation to follow real rather than theoretical issues. That is a strength of our system.

A particular instance of divergence that we have seen thus far that adopts that approach is the Subsidy Control Act—in which I played a significant part, which was a huge honour—as does the proposal for the AI regulatory sandbox, which is another idea in contrast to the EU's AI Act.

Personally, I think the UK approach to regulation, which it is starting to exercise, is superior. Over time, we will have to assess whether it is sufficiently superior in generating increased investment, innovation and competitiveness to compensate for the reduction in market access to the EU that will result. However, under the Windsor Framework for Northern Ireland, divergence is almost always going to be a net negative, because if the UK, as I have suggested, diverges and regulates in a characteristically different way, you will increase the complexity of running a business in Northern Ireland where you have to try to manage trade flows between GB and NI and between NI and the rest of the EU.

That is an extremely long answer. There are opportunities. I do not think they are likely to vest for businesses in Northern Ireland, sadly.

Q12 **Baroness Ritchie of Downpatrick:** I have two questions. I will ask Mr Webber the first and then proceed with the second to Mr Spisak. You referred a few minutes ago to subsidy control, Mr Webber. What do you think is the real significance of regulatory divergence for subsidy control?

James Webber: Subsidy control is a huge achievement. The UK Subsidy Control Act is a significant piece of divergence, and it represents intellectually a fundamentally different way of approaching subsidy regulation. For that, the Government and Parliament ought to be congratulated. I say that it is fundamentally different because, by design, the prohibition works the other way. Essentially, subsidies are permitted.

The public authority granting them has to justify how they are lawful, as you would justify spending money in any context. You do not have a prior approval structure through an administrative system; it is enforced via the courts. It creates the opportunity, which does not exist under the EU rules, of allowing different solutions to the same problem.

As I say to people, Preston can choose a particular scheme for regenerating its football stadium, let us say, and that could be different from the similar scheme that Blackpool adopts just down the road. Rather than having to do a checklist of whether that complies with the administrative proxies for whether that subsidy will distort competition, you can just answer those questions originally. That additional flexibility means that we will be able to use different things as test beds, try different solutions and see what public policy outcomes we get from different policy choices.

The big problem with subsidy control—the remaining problem—is that EU state aid law remains in Northern Ireland and, not unusually for the framework, not just in respect of goods but in respect of the entire economy. In my professional life, I come across a wide range of views about state aid and subsidy control, but I have never read or heard from any serious participant in the state aid world say that it is defensible or justifiable that EU state aid law continues to apply to Northern Ireland. The reason you will never hear that opinion is that it is transparently not justifiable. The EU is protected against distortions caused by subsidies in Northern Ireland by the trade and co-operation agreement, by its own foreign subsidies regulation, by the WTO anti-subsidy investigation measures it is using currently against Chinese batteries, and by the UK Subsidy Control Act—which, by the way, explicitly protects the EU as a trading partner of the UK and has a requirement on public authorities to think about those effects on our trading partners, and is not a protection that is in the EU state aid rules for the UK.

To layer on top of that mille-feuille of protections that the EU already has, and to say that it needs EU state aid rules to apply in Northern Ireland such that the European Commission and European Court of Justice have ex ante control over fiscal decision-making in Northern Ireland is indefensible, and I remain astonished that the Government agreed to such a thing. I suppose there is a lot in there on subsidy control. There are a few more points if you want to me to continue on subsidy control.

The Chair: If you have some more points, it would be very helpful to have those in writing, but we might move on now to the question to Anton Spisak.

Q13 Baroness Ritchie of Downpatrick: In your view, Anton, is divergence primarily an issue concerning trade in goods under the terms of the Windsor Framework? To what extent does the issue have a potentially wider impact on individual rights such as Article 2, under which both the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission have a statutory responsibility as per the provisions in the Good Friday agreement, and, beyond the scope of the

Windsor Framework, with regard to services? If so, in what ways?

Anton Spisak: Regulatory divergence as it applies in relation to east-west trade is primarily about movement of goods across the de facto border. The question of regulatory divergence in Northern Ireland is broader than that, of course, not least because the whole of the UK left the European single market and the customs union, and there is no obligation for the UK, including Northern Ireland, to continue complying with aspects of the EU acquis that are not included in the Windsor Framework. For example, on services, there is significant divergence between the services legislation as applied in Northern Ireland and the rest of country and the Republic of Ireland, and similarly on mobility and so on. There is a difference in how divergence needs to be thought about in the context of the Northern Irish economy as it affects goods, services, movement of people and so on.

Specifically to your question about the rights under Article 2 of the Windsor Framework, I believe there is a possibility of potential divergence of rights because Article 2 of the Windsor Framework requires Northern Ireland to continue complying with the rights and safeguards of the relevant EU rights legislation. If the UK were to depart from those principles in domestic law, there would be scope for divergence in practice. To remind ourselves, the reason for Article 2 in the Windsor Framework is that those rights are contained in the Good Friday/Belfast agreement, and that is the reason why the EU, as I understand it, insisted on including them in the Windsor Framework.

Q14 Lord Dodds of Duncairn: Thanks to our witnesses for their answers so far. I want to come on to something that was raised earlier, which is about the mechanisms to manage divergence. The Office for the Internal Market was mentioned earlier, and then we have the special goods body. They look at the situation where Great Britain diverges from the EU. What is your view of how effective they will be in practice? On the issue of EU divergence from GB law, we have the Stormont brake. How easy, smooth, flexible and practical is the Stormont brake in reality, compared to the theory? I will ask Anton to kick off on those.

Anton Spisak: In general, the innovations, as I would describe them, in the Windsor Framework with respect to the institutions that have been now created to manage divergence are a positive step to increase transparency in how legislation and regulations diverge over time. There have been three main mechanisms created by the Windsor Framework.

The first is the so-called enhanced mechanism on VAT and excise, which is aimed at co-ordinating VAT rates and resolving any potential discrepancies. The second mechanism is the special body on goods, which is meant to serve as an early identification mechanism in instances where potential regulatory changes on the EU side could lead to some kind of material impact on the Northern Irish economy, especially for GB traders, so that the two sides—the European Union and the UK Government—can deal with those questions early on. I believe that that is a positive thing.

Lastly, and really importantly, there is a new responsibility for the Office for the Internal Market to monitor regulatory divergence in practice. The reason I describe it as really important is that, unlike James, I am slightly less concerned about the practical effects of divergence on the Northern Irish economy, because ultimately Northern Irish producers will be able to place their products on the GB market in an unfettered way, as has been the case until today, and GB traders importing goods into Northern Ireland will be able to choose whether they comply with GB standards or EU standards.

The one instance where I am concerned is around what happens in circumstances where GB regulations in a particular sector—for example, in manufactured goods or the agri-food sector—depart from EU standards in a substantial way, such that Northern Irish producers face a far greater threshold for meeting regulatory standards and that allows GB producers to place products on the NI market based on lower regulatory requirements. That is a practical risk that can happen. It can be minimised, if not managed completely, if the Office for the Internal Market takes a greater role in monitoring those developments as they happen and mitigates those circumstances.

What we have not seen so far from government is a lot of clarity on the mandate of the Office for the Internal Market in managing those circumstances, in particular in setting out very clear criteria against which the office would respond to those circumstances arising in the future. I would like to see the Government offering that clarity so that we know the circumstances under which regulatory divergence creates competitive effects for the Northern Irish economy.

Lord Dodds of Duncairn: Okay, thank you. What about the Stormont brake?

Anton Spisak: The Stormont brake is another very big question. In one way, the Stormont brake would enhance the ability of the Northern Ireland Assembly to disapply changes to EU rules. Under the current agreement, any replacements of EU legislation that are already in the scope of the protocol would come into effect automatically under the Stormont brake. That is the novelty of that arrangement. Northern Ireland Assembly Members would be able to express their views on those replacement Acts.

Let me give you a practical example—all of this can be quite theoretical. The EU has now legislated to replace general product safety regulation, which is a really important piece of regulation within the EU that regulates a lot of the manufacturing goods. Those changes will come into effect next year. They are already included in the annexe to the Windsor Framework, which means that the new changes will come into effect automatically. In the absence of the Stormont brake, which at the moment could not be triggered because we do not have the Northern Ireland Assembly, that change to EU regulation would come into effect automatically. If the Stormont brake were in place, Northern Ireland Assembly Members would be able to have, de facto, a say and make a

proposal to the UK Government as to what position they are to take in the joint committee discussion regarding that piece of legislation. That is just one example, but you could find other examples at the moment.

Lord Dodds of Duncairn: Thanks very much. Our previous witnesses mentioned the very high threshold for getting the brake to be operational and all the rest of it. You are talking about the theory of it, but have you any concerns about how difficult in practice it would be to operate? The theory is what you have set out, but in practice the thresholds are very high, are they not?

Anton Spisak: That is absolutely right. The Stormont brake can be applied only in—I think the phrase is—exceptional circumstances, and there are a number of conditions under which it could be applied. Ultimately, it is up to the UK Government to decide whether they would take up a proposal or a recommendation of the Northern Ireland Assembly, so I agree that the threshold is very high. However, it offers the Assembly a say in the pre-legislative stages, so it could be quite important.

Lord Dodds of Duncairn: Thank you. James, what do you think?

James Webber: On the Stormont brake, the points have been made well already. The threshold is set at an unusably, high level, and that was deliberate. The EU needed something to meet the analytical criticism of the democratic deficit. Essentially, foreign laws and foreign courts applying in Northern Ireland with no democratic oversight is politically embarrassing for the EU. It needed something to point to, to meet that criticism, and the Stormont brake is it, but of course the Commission phrase that I have read about it is that it is to be used in “the most exceptional circumstances”. The model from the EEA agreement, where there is an equivalent provision for EEA member states to resist legislation, has never been used. I do not think it provides in any sense a meaningful answer to the fact that EU law applies in Northern Ireland without Northern Ireland having any representation or say about what those laws are.

Anton set out the other mechanisms very articulately, so I will not repeat them. Their usefulness, a bit like the usefulness of the institutions under the Belfast agreement, depends on how they are used and how seriously people approach their use and the recommendations that they make. For the special goods body to be useful, the parties would have to use it quite systematically. The monitoring that the special goods body needs to do to have foresight as to divergent change needs to be effective and regular. The quality and timing of information shared by both parties as to potential divergence needs to be of high quality and timely. There is then the extent to which workable solutions can be identified. To what extent do we need to alter the green lane rules or the red lane rules as the result of a coming rule change? Then, of course, there is whether the joint committee is actually able to act on the recommendations. It is a good idea in theory, but it will depend entirely on how the parties to the agreement actually operate it, in my view.

Q15 Lord Empey: Are you aware of any government attempts to track instances of regulatory divergence from the Windsor Framework? If so, how would you assess them? Do you think that areas of regulatory divergence should be centrally logged to the Government or another body?

Anton Spisak: As far as I understand it, government departments individually track instances of divergence, but to varying degrees. One of the problems in this context from a business perspective—a lot of this is just managing the practical effects—is the fact that, as a business, you would need to go out and look up change after change on the government website, trawling through hundreds of pages of government websites and documents to be able to identify how particular regulatory requirements may differ for you. That is a problem. It introduces complexity in the regulatory system, which needs to be dealt with. Improving transparency around changes and how divergence impacts business would be a very welcome step to be taken by government. A central register of those changes in a way that allows government to monitor what is happening and improves transparency would certainly be useful.

There is a very big question, which goes back to Lord Dodds's question about the Stormont brake. If such a mechanism were to be implemented, it relies on the presumption that the Northern Ireland Assembly would be able to identify future regulatory changes early on. That, of course, requires investment in the capacity of the institutions to do those things effectively, and so far I do not believe we have seen enough of that investment, not only in the Northern Ireland Assembly, the Executive and the institutions there, but in UK government itself. There is a missing piece of consistency in approach in tracking divergence in the first instance.

There is a broader point. If the goal of the UK Government were, effectively, to minimise the effects of divergence and some of the negative consequences it could have on business, the single most useful thing they could do is to clarify in which instances they would continue, de facto, to align with EU regulations not only in Northern Ireland but in Great Britain. In many instances, I imagine that regulatory objectives and the outcomes that UK regulators are seeking may be identical to the EU's, and there may be a very good public policy case to maintain that regulatory continuity. At the moment we have not seen that from government, and we have, effectively, divergence by default.

In my view, a much better and more sensible strategy would be to have, in the area of goods acquis, convergence by default and to identify divergence by exemption—to be very clear about areas where the UK Government want practically to diverge from the changes that the EU is making and to be able to spell out the reasons for that. It could be for reasons of encouraging more regulatory innovation or competitiveness, or for the reasons that James outlined in relation to subsidy control. It would be a much better approach than what we have currently, which is

just divergence by default and letting businesses navigate that complex environment.

Lord Empey: What do you say, James?

James Webber: There is not, as far as I am aware, a single government database. All the witnesses have said that.

There are two things. One is knowing what the rules are. As an adviser, at one level it does not matter whether there is divergence or not; you are just trying to find out what rules are applicable to the situation that your client has. Even that itself is quite a challenging thing to do. That is a problem. The second thing is a strategy on where divergence is going to be most useful. As I said in my remarks some minutes ago about what divergence is and the trade-off it represents—market access versus perhaps an improved regulatory approach—you can identify areas where the UK can make an improved regulatory approach. Financial services is one; technological and digital regulation is another. In crypto regulation, which I suppose crosses between financial services and digital, or AI regulation, you are looking at areas where the UK has identified a potential comparative advantage through regulating differently.

I completely agree with Anton that there are quite large areas of goods regulation where there is very little comparative advantage obvious to me. The most prominent example I can think of is PPE regulation, for face masks and suchlike, where you think, “How is the UK ever going to do anything other than what the EU does?” If we say that face masks ought to be different in some way, we massively increase the costs of face masks, because whoever produces them—and it is not us—has to produce them to our individual standard, and if we decide to lower it in some way there will be political outcry around not protecting people to the same extent as in the EU. It seems to me not a difficult political decision to say that that will stay the same; there is very little advantage to changing it.

If we had a strategy that set out the things for which we think there is comparative advantage, potentially, or interest in regulating differently, and—in my view, frankly—the quite large group of things where there is much less reason, just that political strategy would make a significant difference to investment incentives and the chilling effect of the complexity that divergence represents.

Lord Empey: To a very large extent—

The Chair: Baroness O’Loan wants to ask a question before we go on to the next one.

Baroness O’Loan: Mr Spisak, you have told us twice that individual departments are tracking regulatory divergence. I do not actually think we have seen any evidence of it, apart from occasional observations in documents that we get for the purposes of legislative scrutiny. Do you think all departments are doing it? The purpose must be to inform

business. Do you see any sign of business being informed by Governments who are conducting divergence tracking?

Anton Spisak: I imagine that departments are looking at those issues in very different ways and considering the questions differently, depending on their interest in the question. I do not think there is consistency across Governments in answering the question. That is my impression, at least. I have not seen any signs that government departments or the Government as a whole would take a proactive approach to this. What I have seen are small instances, but certainly businesses have to go out of their way to find out. That is my impression, and that is, ultimately, one of the problems.

Baroness O'Loan: That was my understanding.

The Chair: Can you see an understandable and proper reason why the Government would not want to keep a log of regulatory divergence across the board?

Anton Spisak: One reason would be purely practical; it is a complex exercise. We have just seen in the context of the recent legislation on the revocation of EU law how complex it is just to find out what EU Acts are already in place, and that was a big exercise across Whitehall. I imagine that, from a purely administrative perspective, it is a large exercise, but that is not to say that it is impossible.

The other reason—I am just speculating—is that it might become too apparent what the large differences are in regulations and how difficult it is actually to navigate them. That is, of course, not a reason for the Government not to do it. A good example of good practice from the past would have been the work of the European Secretariat in the Cabinet Office.

The Chair: In which I once served.

Anton Spisak: In which I was an official at some point, too. A process that was very well established was publishing Explanatory Memoranda on forthcoming pieces of EU legislation, which was a very effective process of analysing the impacts. It seems to me that a very similar process that would look at regulatory issues arising in the context of trade, post Brexit, is missing in Whitehall at the moment.

The Chair: So you think it is an administrative reason. It is an explanation but not a justification.

Anton Spisak: That is a very nice way of describing it.

The Chair: Lord Empey, I am sorry; we interrupted you.

Q16 **Lord Empey:** Actually, that has teased out a very important point, and to some extent we have already covered my question. If you were advising a business, James, where would you point them to get this information? If I could extrapolate from what the Chair said, if we do not

have something like that, surely, ultimately, it will mislead businesses and could in fact end up in them being taken to court under EU regulations if they were not aware. Businesses are used to making for different markets. We know that, but we are in a very tight corner. Is it that they do not actually want to admit where this is going, as I think the Chair says?

James Webber: Typically, the question that you would in fact get is much more specific. In many ways, the specifics make the question easier to answer. A company produces a particular product, and it asks about market access for the EU, or about a particular obligation under EU rules or UK rules. In general terms, for a specific product and a specific question, you can provide an answer, because you can look at what the law is and what the law says. The harder thing is in relation to investment, where you are looking at producing something new and trying to predict the regulatory environment for the product.

Imagine a hypothetical manufacturer of domestic appliances or components for domestic appliances, and that those domestic appliances are going to embed some form of AI machine learning. You have two quite different systems of regulation of AI between the UK and the EU, and indeed in other places around the world. There you are dealing in shades of grey and uncertainty. Knowing what the UK approach is going to be and what the EU approach is going to be will probably be an imponderable, because those rules are still in the process of development; you do not actually know how far diverged they are going to be.

The other thing around advising companies is that you typically are trying to advise on consequences rather than on what the abstract rules say. If someone is trying to export a product, what is the risk you are dealing with—the recovery of a subsidy—embedded in that product? Is the risk you are dealing with a customs classification risk or are you dealing with a potential breach of product safety legislation? You can order the level of resource that you put into answering it by reference to how severe the consequences are for getting it wrong.

That is a long way of saying that you can triage those questions against more specific facts, and it gets easier to answer. It is hardest to answer in respect of future investment, because the matrix makes it much more difficult to see what the regulatory overlay for your product or your service is likely to be. The last thing is that, when advising companies, you always think in terms of legal consequence and risk, and you would start with the greatest level of risk and work down. For some of it, you will then say, “Let’s see what happens”.

Lord Empey: Thank you. We have covered most of the ground.

The Chair: I think we have. Thank you very much indeed, both of you. It has been a very helpful session indeed, and quite a complex and technical session. It is one of those subjects that is quite complex and quite technical, but when you are a businessperson it matters an awful

lot to get it right, so we need somehow to find a way between the two. We are very grateful to you for giving evidence. With that, I declare this formal session of the afternoon closed. Thank you.