

# European Scrutiny Committee

## Oral evidence: The UK's new relationship with the EU, HC 122

Monday 25 October 2021

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Members present: Sir William Cash (Chair); Richard Drax; Margaret Ferrier; Mr David Jones; Marco Longhi; Anne Marie Morris; Greg Smith.

Questions 121-157

### Witnesses

I: Rt. Hon. Lord Frost CMG, Minister of State, Cabinet Office, and Susannah Simon, Director, Trade Partnership, EU Secretariat, Cabinet Office.



## Examination of witnesses

Witnesses: Lord Frost and Susannah Simon.

Q121 **Chair:** Good afternoon, Lord Frost. It is very nice to see you today. Thank you for appearing to give evidence this afternoon. The last few weeks have seen important statements in respect of Government policy on the Northern Ireland protocol, and on the European Union's side we have finally seen the European Commission acknowledge that changes can, and even must, be made to its operation. Government pressure and your clear articulation of the problems faced by the people and businesses of Northern Ireland, who are part of the UK, have, I believe, played an important part in bringing the Commission to the negotiating table.

The withdrawal agreement on the 19 October 2019 recognised both our sovereignty and the autonomy of our legal order, together with our third-country status. We passed section 38(2)(b) of the European Union (Withdrawal Agreement) Act, and the repeal of the European Communities Act 1972, including section 3, which deals with the Court of Justice. That is not to mention that the EU is only an observer in the United Nations, whereas we have sovereign status.

I must be frank. Minor changes or superficial or insufficiently clear legal text as to how the protocol operates will not suffice. Without fundamental amendment, I do not see a way in which it can persist and be anything other than disruptive to trade, democracy and, ultimately, the sovereignty of the United Kingdom. We will focus on why this afternoon.

Over the next hour, we will ask you about Government plans for how the protocol could or should operate, including removing the European Court—its case law and principles—from its purview; applicability as to European Union law in relation to Northern Ireland; and also limiting the significant amount of red tape and bureaucracy faced by businesses in Great Britain when trading with counterparts in Northern Ireland. Time permitting, we will also ask you about other aspects of UK-EU relations, focusing on the Trade and Cooperation Agreement and its specialised committees, fishing rights and Gibraltar. I believe that we have met your officials before, but for those watching at home would you kindly introduce us to her, and perhaps she could explain her responsibilities?

**Lord Frost:** Thank you, Chair. It is very nice to be here before you and the Committee, and to be here in person—it is very good to have that personal interaction at last. As you say, my co-witness is Susannah Simon, who is director in the EU secretariat. Perhaps I will let her say two or three sentences about her responsibilities.

**Susannah Simon:** Good afternoon. I am responsible for the implementation of the TCA as far as the economic and trade elements are concerned.

Q122 **Chair:** Thank you very much indeed. I will ask the first question, which will be in two parts. Then I will move on to David Jones. Lord Frost, is the



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Government's position, in the light of what I have just stated, that the European Court of Justice should no longer have any role in relation to the protocol, and what dispute resolution procedure would you propose in its place? How would you ensure the independence of arbitrators, and on what principles would they take their decisions required, for example, in relation to CJEU caselaw? That is the first question. Would you be kind enough to answer that one to begin with?

**Lord Frost:** Yes, of course, Chair. Our position is as set out in the Command Paper. That remains the expression of our position on all issues in this negotiation. What we said in paragraph 41 was that "we should look to normalise the governance basis of the Protocol so that the relationship between the UK and the EU is not ultimately policed by the EU institutions including the Court of Justice." That is our position, and that is what we are taking into these negotiations.

What we would like to see instead—we think this is the most natural way forward—is an arbitration mechanism, which is normal in these sorts of treaties. It is exactly what we have in the Trade and Cooperation Agreement. There is a lot of good custom and practice as to how arbitrators are appointed and how these systems work. The arrangements in the TCA are good arrangements. We worked very hard on them all last year, and it would be a good model to follow in this case, too.

Q123 **Chair:** Would that not mean that the European Court's principles and case law would somehow slip in, as I said in my opening remarks, on the basis of some legal interpretation—a legal text that would then fudge the issue—and we would then find that, although we thought we had escaped the European Court of Justice, in practice there would be disputes and arguments about the wording?

**Lord Frost:** We want to avoid that situation, clearly. We are not interested in arrangements that keep the court in by some other name at one remove or in some other way. It is highly unusual in an international treaty to have disputes settled in the courts of one of the parties, and that is the fundamental principle that we take into this, and the fundamental thing we need to remove from the arrangements going forward.

Q124 **Chair:** That could not be clearer. How could section 38 of the European Union (Withdrawal) Act 2020, which guarantees UK sovereignty, be used in the event of a continued dispute between the UK and the EU over the operation of the protocol? I mentioned that section 38(2)(b) had a little bit to do with this, and I would be interested to know what your reaction to it is.

**Lord Frost:** Section 38 is useful for all kinds of purposes, and not just in this particular context. I guess you could say it is a codification of what has always been understood to be the case. It is very important for the avoidance of doubt provision that the UK Parliament is sovereign and is the final arbiter within the UK. That is a very important statement of principle that we can take into these disputes, or indeed to any other. It is incredibly useful to have it there. In particular, it makes it clear that the direct effect-like arrangements that are in the withdrawal Act, which give



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implementation to the withdrawal agreement and the protocol, have to be read in that context; they cannot be read in their own right. They have to be seen through the prism of section 38, which, let us not forget, was voted through by a very wide majority in Parliament.

**Chair:** And not only in the Commons; it went through without any comment in the House of Lords.

**Lord Frost:** Exactly.

Q125 **Chair:** A further point is that section 38(2)(b) specifically refers to applicability and direct effect, and it is notwithstanding the arrangements set out in the protocol and the withdrawal agreement. For practical purposes, it does provide for British domestic legal purposes an override of both the withdrawal agreement and the protocol, were it necessary to use it, by way of further primary legislation. Would that not be correct?

**Lord Frost:** That has always been the case, and section 38 makes it abundantly clear that this Parliament can make or unmake any law within the United Kingdom. That is clear and that fact has consequences.

**Chair:** One last point on this. I had a letter in *The Times* only a few days ago in which I made it clear, quoting Lord Bingham, one of our greatest judges, that this would be the case in terms of providing for parliamentary sovereignty in respect of all matters, even if it was in respect of the rule of law. As far as he was concerned, the whole question of parliamentary sovereignty comes first, as you just described. Thank you very much indeed.

Q126 **Mr Jones:** May I press Lord Frost on one of the answers he gave? You will be aware, Lord Frost, that there was a report in *The Times* last week suggesting that the Government might be softening its position on the role of the European Court of Justice by allowing it some vestigial interpretive role. The following day there was an article in *The Daily Telegraph*, which said that that was effectively a load of nonsense. Was it a load of nonsense?

**Lord Frost:** There has been all kinds of speculation around our position for the last two or three weeks. We have tried to make it clear—and the position in the Command Paper is authoritative—that we cannot have the Court of Justice settling disputes between us in this protocol in future. As I have said, we are not interested in the Court by another name or by another route.

I think that probably the most important principle is one of equality. That is what we put into the TCA: two equal, sovereign entities with an equal arbitration mechanism that settles disputes between the two parties fairly. To us, that seems the best way forward in this case as well.

Q127 **Mr Jones:** So, no role whatever for the European Court of Justice?

**Lord Frost:** No role for the Court as the final arbiter of disputes, as the summit of a system that imposes EU law—no role for the direct settlement of disputes between us.



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Q128 **Mr Jones:** Thank you. I would like to talk about the Act of Union of 1800. This may be sub judice to a certain extent, of course, so I would like to skirt around that if possible. What is your assessment of arguments that the protocol conflicts with UK domestic law in the shape of article 6 of the Act of Union, which does provide for unfettered trade in both directions between Great Britain and Ireland—or Northern Ireland now.

**Lord Frost:** As you say, I think this matter is sub judice. I think proceedings on that in the Court of Appeal are imminent, or relatively imminent, so I don't want to say anything that would get in the way—I don't think it would be right to do so. Having said that, our position has been that the protocol is compatible with the Act of Union, and we have set out arguments for that in the court case so far. That is probably as far as I should go, without getting into arguments that are better settled in the court.

Q129 **Mr Jones:** Of course, article 6 of the Act of Union provides not only for unfettered mutual trade, but that in all treaties with any foreign powers "his Majesty's subjects of Ireland shall have the same privileges, and be on the same footing as his Majesty's subjects of Great Britain." That, presumably, is a matter that you are very well aware of.

**Lord Frost:** Indeed. As I said, the arguments are set out, and I had probably best not go into them here. However, you are correct in what you say.

Q130 **Richard Drax:** Good afternoon, Lord Frost. It is nice to see you. Aside from dispute resolution, how satisfied are you with the proposals that the Commission has put forward in areas of medicines, governance, customs, and food safety checks? Do you accept that these areas need to be addressed in order to resolve the issues that have arisen? Is anything missing from the set of plans put forward, aside from the dispute resolution? I think that will do for the moment. There is a part three, but I will come to that in a second.

**Lord Frost:** Obviously, there is a negotiation underway on these proposals and ours, so I don't want to say too much that gets in the way of that. Having said that, I think that there are things to welcome in the Commission proposals and things that are problematic. The things to welcome are the fact that they have moved on from the position that they took at the start of the year, which is that the only thing to do was to implement the protocol and that would solve all of the problems. It is now understood, on both sides, that there are problems with the current situation. To be fair to the Commission, their proposals do, for the first time, acknowledge that they might be ready to change their own laws in order to deal with the special situation in Northern Ireland. That is a very welcome admission, because we clearly aren't going to get to a solution without that being understood.

The problem with the proposals is that they don't go far enough. I think it is fair to say that we are still trying to understand all the technical detail behind them and how the Commission see them working. I am not sure that they would quite deliver the ambitious freeing-up of trade between



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Great Britain and Northern Ireland that we want to see, but we are trying to test whether they could provide the basis to go further than what has been put on the table. That is the kind of discussion we are having. It has been constructive so far, but the gaps between us remain significant and there is a lot of working through to go.

To answer the other part of your question, goods, SPS/agrifood and medicines are certainly important issues in this. They are not the only problem areas for us. Governance, in terms of the courts and dispute settlement, as you say, is an important part of it. I would say that the state aid provisions in article 10 are also an issue for us. There are, you might say, important consequential issues to these arrangements, such as VAT and excise, that also need to be worked through. We would frame the question more widely than the Commission has so far, but that does not mean we cannot talk about it. Indeed, we are, and let's see how far we can get.

Q131 **Richard Drax:** Bearing in mind that the EU rarely go far enough—certainly in my experience and, I suspect, yours—what is the likely outcome? The only outcome I can see is that we are going to have to leave the protocol completely, regain the independence of our island, which is what we voted to do, and crack on as the United Kingdom—as was the intention in the first place. The Chairman and you have hinted at it, but can you assure me that there will be no watering down, so far as the United Kingdom is concerned, in retaining the United Kingdom, which includes Northern Ireland?

**Lord Frost:** This is one United Kingdom, and clearly it is very important that we protect and sustain that. As I have said before, it is the Government's position that there will always need to be some sort of treaty arrangement between us and the EU that covers the special situation of Northern Ireland, because we want to preserve an open border without infrastructure checks and controls, and we want to support the Good Friday agreement, as all sides do. It is necessary that there be some special arrangements to make these special circumstances work. That is what we are trying to get to.

It will be much better for stability and prosperity, and certainty for everyone in Northern Ireland, if we could reach an ambitious agreement with the EU that dealt with the problem, because then we could move on and everyone would know where they stand. I am still focusing on that. Obviously, as we have said, we think that the test for using article 16 has passed, but we would still like to come to an agreed arrangement if we can. That is what we are trying to do.

Q132 **Richard Drax:** Lastly, would you agree that the Commission's proposals still require a considerable degree of Northern Irish alignment with EU law?

**Lord Frost:** The Commission's proposals do not really deal with the question of direct imposition of EU law through the normal institutions of the EU in Northern Ireland. They provide for some limited exemptions to



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those for trade between GB and Northern Ireland. As I have said, we would like to see it go much further, but they do not deal with the fundamental parameters of how the system works. Our view is that you have got to deal with those fundamental parameters, or you will not get something that is going to last.

Q133 **Marco Longhi:** Lord Frost, you made a statement a few moments ago in which you said that you believe that the test for invoking article 16 has been passed and that you would prefer to resolve this through agreement. Are you able to say at what point and how long we would have to wait until you believe that we have an agreement? Is there some defined framework one could work to before we say, "Actually, now it is time to invoke"?

**Lord Frost:** It is difficult to say. We have always been clear that we don't want the situation to run on for a very long time. To be fair to the Commission, they have said that as well. We all see this as an issue for this autumn, to be settled one way or another.

I think our test is: do we still believe there is a possibility of bridging the gap between us? Obviously, if we conclude that it cannot be bridged in the real world, we are in a different situation, but we will, and we are, trying everything and exploring every avenue, so that if it comes to that conclusion, it was genuinely possible to reach no other conclusion and therefore other routes had to be followed. It is right to give it a little time and to allow the technical talks taking place at the moment to take place and try very hard to see if we can bridge these gaps.

It is a pity that the Commission waited three months from our Command Paper in July before coming up with its proposals. That would obviously have given us a little bit more time, but there we are, and we work with the situation as it is.

Q134 **Anne Marie Morris:** If I may, Lord Frost—though you will probably get fed up with each of us going back to some of the questions you have already been asked—in response to Mr Jones's question, which asked for your confirmation that the Court would have no role, period, in relation to the protocol going forwards, you said that the Court have no role in any final determination. That is not the same thing as having no role, period, in a protocol. Are you able to confirm to me that the Court will have no role, period, in the protocol?

**Lord Frost:** I think many people have been trying to play on the words that we used to make them bear a meaning that they will not support and to explore nuances that do not exist. I think the position that is set out in the Command Paper is the fundamental one, which is that we cannot have the Court of one of the parties settling decisions and disputes between us. That is a relatively simple test, and it is one that we have got to come out of the end of this arrangement with. It is a fundamentally unbalanced arrangement, and we have to put in place arbitration arrangements that are balanced. That is what we are trying to do and, really, there is no more complexity in it, I would say, than that.



Q135 **Anne Marie Morris:** So, with regard to the Court, does it have any other role in the protocol?

**Lord Frost:** I do not think that it does. In the EU's view, it is the apex of a system that imposes EU law, and that is why it is so problematic in the way that it works in the protocol. As far as the EU is concerned, it is part of a total system of how they make their laws work within the EU that is partially imposed in Northern Ireland. It is that system that is non-democratic, and it is that system that we have got to find a different way of working with, I would say, for the future.

Q136 **Anne Marie Morris:** Thank you, Lord Frost. With regard to the questions that Mr Drax put to you, it is clear, and I think you are right, that this is not really just about governance, customs, and food safety checks; it has to be about principle. Are you able to confirm that it is your intention in these negotiations to get to an agreement on the fundamental principles rather than just these individual items? Because I have a concern that other issues will arise as time goes on, in particular when we—if we—diverge. If that is not addressed now, we leave a running sore for the future.

**Lord Frost:** That is a very good question. It is intellectually possible to imagine a solution that deals with all the current difficulties, but leaves in place a system that generates a set of further difficulties down the line and leaves us in the same place in a year or two. We have tried to say in the Command Paper that we want a solution that delivers stability and that can work for good, and that deals with the aspirations of everybody in Northern Ireland, so you are right.

I do not think a total solution can be one that sets up future divergence. We have to find a way of dealing with that. That is why we came up with the idea in the protocol—it is not a new idea—of dual circulation of goods in Northern Ireland, which, to us, seems to provide a sort of safety valve to avoid that becoming a problem in future, while still working with some of the aspirations that were in the original protocol. That is one of the reasons why we say that our proposals are a compromise—albeit an ambitious one—and not something that simply sweeps away the entire protocol and leaves everyone wondering what comes after it.

Q137 **Anne Marie Morris:** That is very helpful, Lord Frost; I wish you well with that challenge. On article 16 more specifically, how much of a threat is it to the EU? I guess the extent to which it is a real threat, and that they perceive it as such, is in the specific safeguard measures that you are considering. Could you elaborate on what those safeguard measures might be? I will come to the second half, on the complexity of article 16, once I have allowed you a chance to respond to that.

**Lord Frost:** I would not want to go into too much detail on that because it is part of all the different factors that weigh on the discussions that we are trying to have. If I look at article 16, it is quite broadly drawn. It talks about safeguards to deal with "serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade". It does not really give much more detail beyond that. I think you have to be able to



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say that what you are taking is a safeguard against a situation that has arisen, and that it is something that is, to a reasonable person, capable of being a safeguard against that problem. That is the kind of approach to it that should be taken, and I think it is the one that we will take.

Having said that, there is a very significant political problem in Northern Ireland, of all the natures that I have just mentioned. If we do take safeguard measures under article 16, they will have to deal with the significant problem that is there.

**Q138 Anne Marie Morris:** There has been speculation in the press about what those safeguard measures might be. Will you comment on the accuracy of that speculation or will you leave it a blank sheet of paper?

**Lord Frost:** I would rather leave the speculation to the speculators, as it were. We will have to deal with the situation as we find it. If we get to a point where article 16 seems the only possible course of action, it has to be something that is capable of stabilising the situation and dealing with the political problem that exists with the protocol. I do not want to say more than that at this point.

**Q139 Anne Marie Morris:** Let me ask you, then, whether you could foresee a situation where invoking article 16 would require changes to UK domestic law. Depending on the safeguarding measures applied, would the United Kingdom Internal Market Act 2020 have to be amended?

**Lord Frost:** It depends. Obviously, there are provisions in the withdrawal Act that provide for direct effect for the protocol—to simplify massively—and would therefore provide for direct effect for measures under article 16 as well. However, that does not exclude that, depending on what measures were taken if we got that far, we might need secondary legislation to change some aspects of our own rule for clarity, I guess. It hugely depends on the measures that we take, how far-reaching they are, and what we are trying to accomplish with them. It is not a straightforward question, and it is hard to answer without going into detail about the sorts of measures, which, for now, I think it best not to do.

**Q140 Anne Marie Morris:** Should we choose to trigger article 16 and put in place specific safeguarding measures, the other party effectively has the right to take what they perceive to be mitigating action. Have you given some thought as to what that mitigating action could be? I suspect you may say, “If I don’t know what the safeguards are, I’m not going to tell you what the mitigation is going to be”, but you must know, in general terms—I think it would be helpful for the Committee to understand—what sort of things might be capable or possible, or which might be seen by the EU to be reasonable, in generic terms, by way of a response.

**Lord Frost:** It is quite a complicated international law question and relates to how both the TCA and the withdrawal agreement work. I hope that the EU would think twice before taking such measures. If we had to act under article 16, as I say, it would be to introduce safeguards to preserve stability and prosperity in Northern Ireland. It is not obvious that adding retaliation to that situation would necessarily help anybody. Both



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we and the EU are committed to supporting the Belfast/Good Friday agreement and to supporting stability and prosperity in Northern Ireland. In that sense, it is not necessarily logical, even though it might be what happens—they might go down that road. That is for them. One can imagine all kinds of things. I think it would depend on the situation at the time, if we get that far, and the broader atmosphere between us. As we have seen, the EU is quite capable of talking about retaliation, totally disconnected from the Northern Ireland problem, in respect of other issues. That is just how it is.

**Anne Marie Morris:** Lord Frost, you have been very generous. Thank you.

Q141 **Mr Jones:** Very briefly, Lord Frost, you mentioned in a reply just now that secondary legislation may be necessary if article 16 is invoked. Are you contemplating any measures under article 16 that might require primary legislation?

**Lord Frost:** As I say, we will have to wait and see what measures are required. I would like to preserve a degree of flexibility about how we use article 16 and the extent of the measures that are possible within it. The legislative basis of such measures would vary. I would possibly give away a little too much about our positions if I was to answer that fully. All I will say is that it is possible that amendments to our own domestic legal order might be necessary to provide total clarity for economic actors in Northern Ireland in those circumstances.

**Mr Jones:** Thank you.

Q142 **Chair:** You gave a very clear answer on the question of the attitude of the EU. You quite rightly described it as the apex for them, in relation to the whole construction of the European Union. Of course, we have the current situation with regard to Poland, for example, and there are others; there are some in the wings. From the European Court of Justice's point of view, as part of the EU institutions, on certain case law, including *Van Gend en Loos*, *Handelsgesellschaft*, the *Costa* case—these are very well understood assertions by the Court of Justice in relation to its overriding of constitutions; over not only laws but the constitutions themselves. It seems to me, in terms of the comparison with Poland, on the one hand, and other countries of a similar persuasion at the moment, that the Northern Ireland question is actually equivalent, or in many respects less difficult to deal with than the whole constitution of Poland, for example. I wonder if you might like to comment on that.

**Lord Frost:** Yes. First, it is obviously interesting, as a matter of political science if nothing else, to see the same kind of tensions rising in other member states as arose here over many years about the role of the Court and its relationship with the domestic national legal order. We see it in Poland, and we have seen it in a slightly different way in Germany. Of course, my old friend, Michel Barnier, has put a foot in those waters recently, as well. I think there is something that is kind of fundamental to the way the EU works, and the national politics there.



I personally think that, while the Court's writ runs in Northern Ireland, it is perfectly reasonable for us to comment on these questions, even though we do not want that to be the case. Unfortunately, it is the case, and it seems reasonable for us to have something to say on those debates if we need to—as I have just done. You are right that it is simpler, in the sense that, obviously the amount of EU law that is applied in Northern Ireland is segregated; it is not about the entire domestic, national legal order. However, in a way, the simplicity is part of the problem, because for member states that get into an infraction process—get into the Court—there are all sorts of checks and balances in the system. Every other member state has lots of issues at stake with the Commission and the Court; these things are often handled with these checks and balances in mind. That is not the case in Northern Ireland; it is a simple imposition of the EU's legal order on a non-member state, where none of the other checks and balances apply. That is why it is so problematic compared with one of the 27.

**Chair:** Of course, they have recognised our third-country status as well. I am going to move on because I have got a question from Greg Smith.

Q143 **Greg Smith:** Lord Frost, I think you have alluded to some of these points in answers to other questions; article 16 is one way of looking at this and is a potential solution, but it is still caught up in the trappings of reasonable steps. We all know how the word “reasonable” can be tested over many years, yet we can see problems with the operation of the protocol right now. Without wanting to sound like one of the lower-down options for a title of a Bond film: what if article 16 is not enough?

**Lord Frost:** That is a hypothetical question, and we will have to see what situation arises. I think that article 16 is quite a strong power; it is quite an unusual power in these sorts of treaty arrangements. It is designed to deal with a situation of considerable political sensitivity and complexity in Northern Ireland—that is why it is there. I hope that negotiations will be enough. That is the first, best option in this; that we find a consensual solution. If we cannot, article 16 is the alternative. That is where we are focusing our attention, for now, if negotiations fail.

Q144 **Greg Smith:** I hate to use the term, but is there a plan B? If we do get to the point where article 16 has been invoked, and, with your best negotiations—and you have done a pretty good job negotiating thus far—what has been negotiated is still causing supply chain issues and problems in Northern Ireland on the ground, are the Government keeping options beyond article 16 open?

**Lord Frost:** I do not think any Government ever rules anything out when it is a question of the territorial integrity of the country, which this is. It would be irresponsible to do so. I suppose that I might argue that, if the situation you describe arose, it could be a sign that more safeguards were needed; that the safeguards had not worked and, therefore, further safeguard-type action was needed. I am struggling slightly because there are so many hypotheticals between now and then. Article 16 is a power that is designed to stabilise the situation and deal with some of the

harmful consequences that could arise from it. If you have not removed those consequences, I guess it would still be usable, but we're a long way ahead of where we are now.

**Greg Smith:** I appreciate the question was very hypothetical. Thank you.

Q145 **Chair:** I will express just one thought on that if I may. Is it not the case that if you were to apply the same criteria, shall we say, to Russia, to China or even to the United States and you took the same position in relation to third-country status, in relation to the EU, you would get a very swift answer from all three countries? Is that not the case?

**Lord Frost:** I am sure that is correct.

**Chair:** That may put it in some sort of perspective—perhaps. The next question will come from Margaret Ferrier.

Q146 **Margaret Ferrier:** Thank you, Chair. Lord Frost, today our Committee published a report on the UK's contributions to the EU budget after Brexit, including its participation in certain EU programmes like Horizon Europe and Copernicus. What is the state of play of the UK's participation in these programmes, which was provisionally agreed as part of the TCA but has yet to be finalised?

**Lord Frost:** Well, it's not a very happy state of play, as you identified in the Committee's report, and we are sorry about that. It was agreed at the end of last year that we would be able to participate in Horizon, Copernicus and so on; and the only reason it was not finalised fully at the time was that the EU had not put in place its own legislation at the time. We were waiting for that to happen, and it has now happened and there is absolutely no reason why we shouldn't be fully part of Horizon. Indeed, the EU has put in place these arrangements for Norway, for Iceland and for the Ukraine, so there is no reason why it shouldn't be the case for us.

We are getting quite concerned about this, actually. There is an obligation in article 710 of the TCA to finalise our participation. It uses the word "shall". It is an obligation. Every day's delay is a further day when UK entities cannot participate. Obviously, we are not paying into the pot either. It would be a breach of the treaty if the EU does not deliver on this obligation in article 710, or delays excessively in doing so, so that our participation becomes less worth while. I think it does raise questions of good faith now, as far as we are concerned. We have waited quite a long time and not made a great deal of this, in the hope that it would fall into place, but it is now the best part of a year, UK entities cannot participate, and the EU is depriving itself of the big net contribution that we would otherwise be making. It is hard to see why they would do that if there isn't wider politics behind this, and that is the problem.

Q147 **Margaret Ferrier:** There is the assessment by the president of the Royal Society, Sir Adrian Smith: he described the uncertainty as "a serious problem" relating not just to funding, but to the ability to attract scientific talent. Do you accept how frustrating these delays are, both to businesses and to UK researchers, and why is the EU delaying, especially



if it is not getting the money for these programmes?

**Lord Frost:** It is incredibly frustrating. Obviously, tenders for all these projects are going on, and our entities cannot participate in them. Perhaps there will come a point where the value-for-money case for this looks less compelling than it did at the start of the year. We are not at that point yet and not close to it, but it could happen if there are endless delays. I have raised this with Maroš Šefčovič; we raise it all the time. And I haven't really had a clear answer as to why it is happening. I can guess, but nobody has explained it fully to me. The one specialised committee—for all of which Susannah is responsible—which the Commission has not set a date for is the one on Union programmes, and that is part of the problem.

Q148 **Marco Longhi:** Lord Frost, how do you respond to criticism by the French maritime Minister that the UK has contravened the trade and co-operation agreement in its issuing of licences to EU vessels to fish in UK waters, including those around Jersey? What engagement have you had with the Commission to develop a system to issue licences for UK waters, including those around Jersey?

**Lord Frost:** To be honest, we are slightly frustrated by that issue. The situation is that we have granted 98% of the licence applications that we have received. The current dispute relates to a very small number of boats under 12 metres in our 6 to 12-mile limit or around Jersey and Guernsey. We put in place perfectly clear criteria for granting those licences: under the clear criterion in the TCA, you have to have previously fished in those waters. If you can prove that you have, we will grant a licence; if you can't, we won't. We have been very generous in the kind of evidence we are willing to accept for that. We are absolutely open to receiving more evidence and, indeed, when we received more evidence for three French vessels in the 6 to 12-mile limit last week or the week before, we granted licences to them. We can carry on doing that if evidence comes forward, but there must be evidence—otherwise, it is not in line with the treaty.

We are a little frustrated, in that we are acting in accordance with the treaty and not, perhaps, getting the credit for it. We are in the process with the Commission, the French and the Jersey authorities, in slightly different configurations for different subjects; that is being led by DEFRA and George Eustice, rather than by me. It is a very active discussion with the Fisheries Commissioner and the officials concerned on all sides, which has been relatively constructive and has taken some of the heat and complexity out of the situation. We hope that we can find a good solution on that basis.

**Chair:** Anne Marie, would you like to ask the next question?

Q149 **Anne Marie Morris:** Thank you, Chairman. The UK's new relationship with the EU is built around the TCA partnership council and the specialised committees. Do you accept that EU proposals that do not directly relate to those bodies could impact and implicate the UK's vital national interests, such as new EU rules on state aid? Would you agree that this Committee should, with Government input, scrutinise those



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proposals?

**Lord Frost:** On scrutiny and the role of this Committee, I am happy to explain any issue of political interest that comes up to the Committee. On the formalities of scrutiny, we have made an offer, as it were, to you and we are waiting for a response on the details of that. I would like to see what that is and to continue those discussions.

You raised the point that important legislative EU decisions or proposals may affect the relationship between us, and that things the EU chooses to do for itself may affect us. That was the core of the level playing field discussions we had last year. There is, as you say, a specialised committee to deal with that, which has already had some interesting discussions.

Q150 **Chair:** Can I throw into the pot the fact that, when section 38 went through, there was another provision in the Act of Parliament that was passed on the same day? That enabled the Committee, through a motion that I was able to put down, which people can look at, to have the right to insist on a debate in the House of Commons on what were described as vital national interests. So actually, it seems that there is some form of parallel arrangement—with respect to what we had then—and the need for us to be able to form a judgment about what may or may not be a matter of national interest in the light of the way in which these Committees operate. I put that on the table because I think that there is a parallel, where it has already been conceded by Acts of Parliament.

**Lord Frost:** Yes, Chair. I suppose I would say, without running now the discussion that we probably need to have on scrutiny, that that particular provision—section 29—was about the transition period and the continuing imposition of EU law without consent in this country. In those circumstances, Parliament should be able to debate and raise concerns about that. I think that is what that section was about. As regards EU law in Northern Ireland, we have agreed enhanced scrutiny arrangements to reflect the fact that there is a similar sort of situation, but I would be very happy to look at whatever proposals you make in that ongoing dialogue on scrutiny, which we want to make as open and useful as possible to both sides.

Q151 **Chair:** Moving on the question of EU retained law, what is the proposed timing and scope of the review of EU retained law that you are now engaged in? When do you think we will be able to see more detail on the proposed review? Can we expect something on the substance before the end of the year, and how long do you envisage it would take to change or replace all the EU retained law that is not right for the UK? Also, what would be the methodology for doing it in terms of constitutional arrangements?

**Lord Frost:** There is a lot there, Chair.

**Chair:** There is, in volume as well as substance.

**Lord Frost:** On your process question, I hope we will have something to say before the Christmas break by way of preliminary assessment of some



of the issues that have arisen. We are just setting up the process now. The way I think of it is that there are two aspects to this. One is: what is the status of the retained EU law? What is its status in the statute book? Why is it distinct, and what do we do about the question that I have raised before of laws that were passed at the EU level and have direct effect in this country? Perhaps we voted against them in Brussels. Nobody in this Parliament has ever voted on them and yet, here they are, part of our statute book as primary legislation. I think we have to do something about that situation. That is the status question: can we find a way of regularising and reforming the status of EU law?

There is then a substance question, which is about all the actual areas, Department by Department, where this law has been brought on to the statute book. We need to do a mapping exercise, I suppose you would say, of that this autumn. Some Departments have already begun reviews of their areas—for example, the Treasury; the Chancellor announced a few months ago that there will be a review of a lot of the financial services legislation that came in through EU law. But we need to do a mapping exercise of where this legislation sits on the statute book and which areas are the most problematic, and then, armed with that and, I hope, some thoughts about how we can change it, we can take it forward next year. That is the sort of core of the proposal, as we are taking it forward.

**Q152 Chair:** I have been taking something of an interest in this for the last 36 years, because that is when I first came on this Committee. If one was to look back to the way in which these laws were made, one would see that they were made behind closed doors by so-called consensus, because everybody knew what the outcome of the vote would be if there was one, and without even a transcript—that is one of the most astonishing parts of this whole exercise. Of course, in the White Paper of 1970-71, it was absolutely clear, before the Act of 1972 went through, that the decisions that were being taken were going to be on the basis of what was described as a veto, which was, as they put it, in our vital national interests, because otherwise, they said, we would destroy the fabric of the European Community. That was the basis on which it was put, so a very high test was applied; yet bit by bit the competences grew. I would simply say that, as we nodded them all through over those 36 years, I got more and more frustrated. That is why I put down my sovereignty clause in 1986.

Given that, the issue of EU retained law surely remains a massive issue of great significance in terms of self-government, and the withdrawal agreement Act includes a provision enabling the courts to quash any proposals that are put forward for legislation, or indeed any Act of Parliament that has been passed, if they think that it is inconsistent with the principles of EU law. It is a bit of a mouthful, but for practical purposes do you not agree that this is something of such importance, which goes to the heart of self-government and to the heart of our constitutional principles and everything that we have talked about in terms of sovereignty?



**Lord Frost:** I do agree with that. You are absolutely right. Probably many people would be surprised that we need to do a mapping exercise at all. One likes to think that the Government know what the laws are. In fact, it is not entirely clear what EU laws have been brought on to the statute book, or at least it is not easily known, and it requires quite a lot of research in some areas to work this out. It is not an impossible task and we will do it, but it rather illustrates your point.

The other thing that I would say is that one of the problems with the EU set-up is the inability to correct error. It takes a long time to pass laws. They are very reluctant to change them having done them because it requires so much effort. One of the advantages that we have is that we can proceed more nimbly than the EU. I draw from that the conclusion that we must be able to look at the inherited stock of EU legislation in a similarly nimble way if we are going to be able to get the benefits that we aim to from Brexit. That is the spirit in which we look at this.

Q153 **Chair:** That is very interesting. Finally, on that point, I remember from when, once upon a time, I was doing Jolowicz on the question of reform of the law of the Roman Empire, which is going back a very long time, that Justinian managed to achieve it in five years. I hope and believe that we will be able to do it in a lot shorter time than that.

**Lord Frost:** I hope so.

**Chair:** If we can move on to Gibraltar, David was going to ask the last question.

Q154 **Mr Jones:** The Government recently opened negotiations with the EU over Gibraltar. Back in July, both the UK and the Gibraltar Governments made it clear that the EU's negotiating mandate would undermine sovereignty in respect of Gibraltar. What has changed since then?

**Lord Frost:** A bit has changed, but not enough. As is well known, we did a political deal at the end of last year with the EU over Gibraltar that provides the basis for how things are currently working. We now need to put that into legal form. The EU's mandate, as you rightly say—the Commission's draft—was not in line with that deal, so gave us problems. That has now gone through the Council and I think one aspect of it has changed, which is that the EU has agreed that Frontex will be the body that is involved in policing aspects of entry to the Schengen area via Gibraltar and not Spain. However, that is not the only problem. That was one of the most visible ones; it is not the only one.

Once again, as is its wont, the EU is looking for more extensive alignment, a role for the Court of Justice, which was not in the December deal, and so on. It is the usual playbook really, and that is what we have to now work through with them as the negotiations begin. That is a negotiation that the Foreign Office is leading, but I and my team take a very close interest in it because there is all sorts of read-across, even if the underlying situations between Gibraltar and elsewhere are very different.

Q155 **Mr Jones:** Has the EU in any sense scaled back its proposals for a



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substantial body of EU law to apply in relation to trading goods in Gibraltar?

**Lord Frost:** It does not look like it at the moment. Again, we are just beginning the discussion, so let's see. It is not unknown for a mandate to be much broader than the real core of interest to the EU when it is written. The final solution has to take account of the fact that Gibraltar hardly produces any goods. It is not a great manufacturing centre. The arrangements need to reflect that reality, and it does not make sense to impose large chunks of essentially irrelevant EU law and policing arrangements via the courts and the institutions and so on that make no meaningful sense in Gibraltar. I would like to think that we usually find solutions on Gibraltar in the end, and I hope that in this case we will be able to do the same. I just hope that we do not take excessively long over it.

Q156 **Mr Jones:** How concerned are you that any agreement in relation to Gibraltar may be a re-run of the Northern Ireland protocol?

**Lord Frost:** There are obviously aspects that raise similar sorts of problems, but I think the differences are more marked than the similarities. Gibraltar has never been part of the UK's customs territory, for example. It was never part of the EU's customs territory for goods either, so the whole politics of it is very different from Northern Ireland. That said, as I have just been saying, some of the things that are in the mandate raise similar kinds of problems, but I think the underlying situations are so different and raise such different real-world issues that in real life the read-across from one to the other is not that great.

Q157 **Mr Jones:** Are you concerned that the Spanish may exercise a veto in respect of whatever agreement you may arrive at with the European Union over Gibraltar?

**Lord Frost:** One has to foresee any possible eventuality, but at the moment, and for the last year or two, the relationship with Spain has been good. They have been constructive in these talks. We would not have got to the deal at the end of last year without a constructive approach by Spain, and that is continuing as far as we can tell. Obviously, we do not know what gets said within the EU Council, but as far as we can tell Spain has been very constructive over this, and that is extremely good. It has not always been like this over Gibraltar, but it is very good that it is at the moment. That is one of the reasons why I think we probably can find a way through on this.

**Chair:** Just one last point on that. We have the pleasure of having Mr Picardo QC, Chief Minister, coming to see us in a few weeks' time, so we will be able to carry that conversation on with him as well. That concludes the proceedings at our end, Lord Frost. Thank you very much for coming. It has been informative and very useful.

**Lord Frost:** Thank you very much. It has been a pleasure.