

European Affairs Committee

Protocol on Ireland/Northern Ireland Sub-Committee

Corrected oral evidence: Scrutiny of the UK Government command paper on the protocol on Ireland/Northern Ireland and the EU proposals

Wednesday 27 October 2021

4 pm

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

Evidence Session No. 1

Heard in Public

Questions 1 - 9

Witnesses

[I](#): Jess Sargeant, Senior Researcher, Institute for Government; Professor Ronan McCrea, Professor of Constitutional and European Law, UCL; Professor Peter Shirlow, Director, Institute for Irish Studies, University of Liverpool.

Examination of witnesses

Jess Sargeant, Professor Ronan McCrea and Professor Peter Shirlow.

Q1 The Chair: Welcome to all three of you at this in-person meeting of the sub-committee on the Northern Ireland protocol. We are today continuing our detailed scrutiny of the Government's July command paper on the protocol, with the EU's proposals published on 13 October. We have three distinguished academic experts before us today. We are very grateful to you all for coming and giving evidence to us for our inquiry. Thank you very much indeed for that. You are all extremely welcome.

If I may, I will ask you to introduce yourselves when you speak for the first time, so that, for the record, it is clear who you are. That would be very helpful. Today's meeting is an on-the-record evidence session. The meeting is being broadcast and a transcript will be sent to you shortly

after the meeting to have a look at and check that it accurately reflects what you have said. Finally, can I remind all members of the Committee to declare any interests the first time they speak? We will aim to finish the session by 5.45 pm at the latest, which I hope will give us time to cover the questions that we have for you.

With that, I will just say, once again, that I am very grateful to you for being with us. Perhaps I could ask you how you would summarise the socioeconomic and political impact of the protocol, nearly 10 months after it came into force. Who would like to have a go at that first? Shall we go from right to left—sorry, right to left from my point of view, rather than yours.

Professor Peter Shirlow: This is nearly as confusing as the protocol. I am the director of the Institute for Irish Studies at the University of Liverpool. Through the institute, we have done two reports. The first was *The Contagion of Uncertainty*, which worked with the business sector across Ireland and the UK to work out what they saw as the problems that were coming down the line or otherwise.

In July, we did a paper, *Responding to Tensions or Enacting Opportunity*, where we tried to encourage a certain direction of travel. Within that report, we pointed to the potential opportunities of Northern Ireland being placed in a very unique trading relationship, which I think all of us would agree with, and looked at whether that would be significant enough to change the economy from a consumption economy to a production economy. We were trying to think of the protocol and whether those opportunities were within it. Could this be the peace dividend that is very much required for this society?

More generally about the socioeconomic conditions, we are still in a data fog. There is not a lot for us to actually base our opinion on. At the institute we commissioned a survey on the mitigations and the proposals made by Lord Frost. We are aiming for 1,000 respondents. That will be available this Friday, at 5 pm. I do not want to talk any more about it, because I do not want to encourage people's opinions, but we will have some evidence, which is critically important, to ask the people of Northern Ireland what they think about the protocol, the mitigations and Lord Frost's proposals. We will see what that produces.

One thing that is important here is the role that civic society has played. In terms of both being consulted with and ensuring that they were consulted with, that has been critically important. In some ways, it is quite heartening to think that the business community, trade unions and other sectors have actually come forward with ideas and initiatives about how we resolve the tensions.

That is really important in terms of reconciliation and finding solutions within the negotiations, but it also shows an intracommunity capacity to deal with trading issues, to not engage in binary politics, to think of ways in which those things can happen. Despite the media, I think that is something that we should look to. That is a positive within. Maybe I will

stop there, because obviously my colleagues have other points to make and I am sure we will come back to some of these themes.

The Chair: Yes, indeed we will.

Professor Ronan McCrea: Hello, thanks for the invitation. I am a professor of constitutional European law at University College London. Where are we? We have 10 months of the protocol, but what we really have is 10 months of an overall Brexit settlement, of which the protocol is a part. There is no doubt that that overall settlement has proved destabilising. The protocol is not immune from also creating destabilising effects.

As was said, we are in a data hole. We do not really know. We have had no rulings by the Court of Justice. We have had no rulings from any of the arbitration mechanisms. We have had Covid, which complicates working out how things might operate in normal times. We have had no full implementation of the protocol and we have ongoing negotiations, which means that the overall future settlement is still not clear in its detail.

The other thing we have is very slow burn change in the Republic of Ireland and Northern Ireland relationship, a much slower, but nevertheless significant, distancing between the Republic and the north in areas such as services and free movement that results from the Brexit settlement overall. Certainly we have not achieved a state of equilibrium.

Unfortunately, the protocol and the wider Brexit issue have been enmeshed in the broader Northern Irish political systems and problems, with one side identifying something as necessary and the other side identifying that same thing as something it absolutely cannot live with. We are stuck with that. Until we have stability, we really do not know what people's red lines are.

If you look back over time, once the situation stabilises people often realise they can live with things they did not realise they could live with. Sinn Féin can live with a devolved Northern Ireland within the union, to some degree. It turned out that unionists could live with the Anglo-Irish agreement. If you had asked six months after the signing of the Anglo-Irish agreement, "Is this sustainable?", you would have said no. Then it works out in the longer term. If we can achieve some stability, we might find it is easier to get compromise than otherwise.

The Chair: You said we had not yet reached a state of equilibrium. What does a state of equilibrium look like?

Professor Ronan McCrea: The first thing would be some degree of certainty—what the protocol will be like when fully implemented, in the medium term. That is the first requirement. Until we know roughly where we are going to land, the instability encourages people to dig in their heels. While the negotiation process is ongoing, they might get more.

Intransigence may be rewarded. We cannot know what equilibrium is like until we reach some degree of stability.

The Chair: Jess Sargeant, welcome back.

Jess Sargeant: Thank you for having me again. I am a senior researcher at the Institute for Government, working primarily on devolution and Brexit, so the protocol is a particular area of interest for me. I would agree with what Ronan and Peter have said about the lack of data. That is a particular problem in trying to assess the impacts of the protocol, particularly data about how the protocol has changed trade between Great Britain and Northern Ireland. We know very little about that, in part because we knew very little about that before Brexit, so there is not much to compare it to.

It is hard to assess overall what the socioeconomic impact is. We know that businesses that move goods between Great Britain and Northern Ireland are reporting that that has become harder. There are certain problems because of new paperwork and checks, although some of those are not being fully implemented at that stage, so that is another unknown. We also know that some businesses see the protocol as beneficial. They are able to get unfettered access to both the EU market and the GB market.

One question here is how we address the problems, while also maintaining the benefits. It might seem like a best of both worlds sort of thing, but, at the same time, some of those solutions to those problems are on the table. In trying to achieve them, we need to also maintain the benefits.

I would agree with what Ronan said about certainty, because we are also hearing that uncertainty, in and of itself, is preventing Northern Ireland from taking advantage of some of the benefits it might have from its unique position or just creating a climate where some of the problems for traders in GB are potentially worse. Not only are they having to comply with new requirements; they do not even know what those new requirements are. It is really important, and I imagine it will be a big theme of this session, that the UK and the EU are able to find agreement to address the problems of the protocol in order to maintain the benefits, but, most importantly, to provide certainty and stability for the Northern Ireland economy and its politics.

The Chair: I have one question, if I may. You both talked about the lack of data and its importance. You referred in particular to trade issues. In fact, there has at least been quite a lot of data quoted and cited, on both sides of the argument really, about diversion of trade flows. Is that significant enough to be usable, in your view, or does that fall into the category of insufficient data?

Jess Sargeant: We have a few snapshots of data. In particular, one figure that has been widely quoted is the change in trade between Northern Ireland and the Republic of Ireland. You can make some

assumptions or predictions as to what is causing that, but, without the other half of the picture, particularly the GB-NI route, it is quite difficult to put things fully together.

A lot of the data used in the Government's command paper were from things such as surveys conducted by membership organisations, which have gone out and asked their members what challenges they are facing. Those are obviously very valuable, but that does not necessarily give you a representative sample of all businesses. It is not necessarily weighted for the size of the business or the level of trade.

While that information is helpful, I do not think we yet have a complete picture. Quite often, when some of the data is presented, that fact is not necessarily acknowledged. It is important that we identify the lack of data. One thing I recommended in the past was that the UK and the EU should jointly commission some more research into this area. That might not help in current discussions, but there will be ongoing discussions on the protocol well into the future. Allowing that to be informed by evidence could be really valuable and help us break the political impasse.

Lord Caine: Could I come back to what you said, Jess? Forgive me if I misheard you. I think you said that there are reports of a number of businesses that have said that they see opportunities from the protocol. I have to say that that has not been particularly apparent in much of the evidence that this committee has heard. Without naming individual businesses, which sectors are they likely to be in?

Jess Sargeant: In some sectors where suppliers that were serving Northern Ireland businesses were based in GB, we might see those supplies instead being sourced from within Northern Ireland—so an increase of Northern Ireland businesses supplying Northern Ireland businesses. In some cases, we might see businesses in the Republic of Ireland that, again, previously sourced things from GB getting supplies from Northern Ireland. It depends heavily on the industry and sometimes on the geography. There are certain parts of Northern Ireland that have perhaps benefited from this more than others.

There are some people who might not have seen an increase of trade but perhaps, because they maintain frictionless access to the EU, have not faced some of the challenges that GB businesses are now facing because of the introduction of checks and controls on goods moving from Great Britain to the EU. There is no one answer and every individual business will have a different experience, but there is evidence that some people are finding this beneficial.

Professor Peter Shirlow: There may not be data in the traditional sense of empirical evidence, but the role that the business sector has played in trying to maximise the mitigations would suggest that it does not feel that there is a competitive advantage at present.

Q2 **Lord Empey:** Good afternoon. I want to ask you a question. What is your overall assessment of the Government's command paper, published on

21 July? Do you think these proposals represent a viable means to address the current impasse?

Jess Sargeant: There was a lot in the command paper and I am sure we will get into specific aspects of that later. Overall, there were three proposals. The first was to exempt goods going from Great Britain to Northern Ireland and remaining in Northern Ireland from controls and checks entirely, which is obviously different from the EU's proposals. The second was this prospect of a dual regulatory regime, where any good that was produced in Great Britain would automatically be acceptable in Northern Ireland. The third was on ending the oversight of the EU institutions.

On the first point of removing checks and controls, the principle that goods that are remaining in Northern Ireland should be treated differently from goods that are going elsewhere is a good one. It makes sense and we see elements of that in the EU's response. The real challenge is designing a system or a mechanism to distinguish between goods that are staying in Northern Ireland and goods that are going on to the Republic of Ireland, or elsewhere in the EU, that is robust enough to prevent it being abused or to prevent leakage into the single market, while also not replacing the burdens of paperwork created by the protocol with the burdens of proving that your goods are staying in Northern Ireland. That is really difficult.

There is not a huge amount of detail in the command paper, but it essentially proposes that traders will self-declare. I do not think that will be robust enough for the EU to accept or to work in practice necessarily. There is something to be looked at there. It could work in principle. In practice, more work is needed to make that workable and acceptable to the EU.

On the aspect of the dual regulatory regime, this is one of the proposals in the command paper that are somewhat underexplored. On the one hand, it would certainly guarantee GB businesses that they would always be able to sell their goods in Northern Ireland, which would be beneficial since it would prevent any threat to supply chains because of regulatory divergence between Great Britain and Northern Ireland.

It appears that under the Government's proposals Northern Ireland will still be required to comply with EU law in areas covered by the protocol. Exactly the mechanism for ensuring that they comply with EU law is up for discussion and is something that Lord Frost has made proposals on, but that principle is there. Northern Ireland businesses will comply with EU law, whereas businesses based in GB that sell goods into Northern Ireland will not. They can comply with the law in GB.

We know the UK Government want to take advantage of post-Brexit freedoms in order to make businesses more competitive. There is a risk here actually of Northern Ireland businesses being placed at a competitive disadvantage by this proposal. That has been underexplored

or underdiscussed in a lot of the discourse around it. We might want to pay closer attention to that.

The third element is ending the oversight of EU institutions. Again, this is something that Lord Frost has recently said is potentially a red line of the UK Government, which it is going to be very difficult for the EU to accept. On political grounds, there is a question of whether that is going to be possible. I know we will discuss that in more detail later, so I will leave time for the others.

Professor Ronan McCrea: My overall impression when I read it is that you are unclear of the Government's objectives. Do they want to make the protocol work better, or do they want to, essentially, remove it, destroy it or replace it with something entirely different? Some of the things that Jess just discussed are in fact changes that may or may not, to some degree, be deliverable by the EU. The ability to get there is somewhat undermined by the tendentious framing in the early sections and a lengthy account of regret at having ever signed this, which would make the EU think that the Government are not interested in making the protocol operate at all.

It is very unclear what the Government are doing. It is a mixture of proposals that might improve the protocol and other proposals that would effectively destroy it. One of the key things there is the status of the Court of Justice. I remember early in the peace process, in Northern Ireland, I used to often wonder at the tendency of people to portray their preferences as unalterable facts of nature and other's preferences as the stuff of negotiation. Sinn Féin said all the time, "Decommissioning will never happen, so move on". Actually, everyone's preferences have to be subject to negotiation.

The Government have tended to frame their objectives as unalterable facts of nature: "We need a hard Brexit, we need absolute ability to diverge and everything else can be negotiated". Actually, other people have red lines too. The Court of Justice is one of those things. The EU is very nervous about it. The single market is the core of the EU. It is as if the UK had outsourced some of the rules around the succession to the monarchy or the NHS to civil servants of another country. They would be very nervous about what that would mean. The EU does not have the ability really, without really seriously undermining itself, to play fast and loose with the single market. It would be flexible, but there are real limits.

One key thing is this idea of mutual recognition, because the EU does not have absolute mutual recognition for goods. It has a general principle of mutual recognition that states may depart from, as long as they do so according to agreed rules interpreted by one body, the Court of Justice. Without the Court of Justice, that whole system does not make any sense. If EU law is to apply to Northern Ireland, in terms of goods, you need the Court of Justice. You cannot have EU law without the Court of Justice. The Court of Justice has annulled several agreements entered into by the EU if they appeared to undermine what the court called the

autonomy of the European legal order and the Court of Justice's monopoly on interpreting EU law.

If we are going to have EU law in Northern Ireland, which is the core proposal of the protocol, we are going to have to have some role for the Court of Justice. Maybe it will be a Swiss thing, maybe not, but there has to be some role for the Court of Justice. The fact that the command paper takes issue with that places a cloud over the other, potentially more realisable, goals that they would have.

Coming away from the command paper, if the Government wish to fundamentally change or remove the protocol, they are assuming that the EU's preferences have changed. Before the deal, the EU's policy was "no broader TCA without the Northern Ireland protocol". The Government seem to be assuming that the EU's preferences might have changed and that it will not be willing to bring down the whole TCA arrangement if the Northern Ireland protocol is abrogated. That may not be the case and that could be a very dangerous bet to place.

Professor Peter Shirlow: We have had the statements by Vice-President Šefčovič and other statements by Lord Frost since then. As we know, this is a very fluid moment or series of pronouncements and ideas that are coming forward. It is an important paper, in the sense that it basically publicly expressed the mood that was coming from one section of the political actors involved in the negotiation. It was some sort of response to what had gone before and the issues were clearly going to be incremental. There were going to be more clear statements about what needed to happen or whatever else. Of course, as the three of us keep saying, there was data fog, which was also an important thing at the time this was written. We made that point quite strongly.

There are some things in it that are important. It concentrated minds. It was a very clear assertion that there was a sense within the British Government that the protocol was not working, not just because of ideological reasons but because of what they understood the effect was on the ground. One of the problems within it, of course, is the overall problem within all of this—the semantics and the use of words. The command paper refers to unnecessary burdens. What is a burden? You should have invited philosophy professors. What does that mean? Then of course you have statements about removal. What does removal mean? What exactly is this trying to say, in terms of the command paper?

Of course, then it is preceded by the four non-papers that come from the EC, so then we have a different conversation. We have the command paper. Then we have the EC response. Is that EC response answering the question about the semantics? We could argue maybe that the direction of travel in the command paper is to say, "Let's have no checks on goods moving east-west; let's minimise this to such an extent that it disappears". Is that the intention?

It also maybe does not help in other ways. What do we mean by a proportionate response? Maybe in the semantics, which is of course part

of a dialogue, you do not play your hand, but clearly it raises lots of questions that then lead to a great deal of speculation.

It is also important that it speaks about building on the conditions in article 5 for the application of customs duties on goods at risk of subsequently being moved into the Union. It talks more about a self-regulatory replacement system. Without going through all the jigs and the reels of the content and the detail, I suppose what it does, and what has been said afterwards, brings us back to a very critical question. There are two parts, which are the same but different in their intention. Are there going to be high checks east-west, because there is very low guarantee that these goods will not filter into the European Union? Is this a process where, if you can convince Europe that there will not be this leakage, you have a check on goods that can be much lower?

It seems to me that what this all points to in particular—there are many other issues—is Europe asking, “How are you going to enforce?” It seems to me that, to the extent that the British Government can secure and guarantee enforcement, that surely helps the negotiations to create more mitigation and greater easements within the whole system. Do not forget—according to the last general election survey we did, the vast majority of people in Northern Ireland, both unionists and pro-united Ireland, do not want checks on goods in either direction.

That is the point I made originally. Things are moving in a direction, but there are these walls that need to be clarified and less semantic, because the business community needs confidence. This goes back to Lord Caine’s point. This has to be a confidence building exercise at some point.

The Chair: On Professor McCrea’s thoughts on the European Court of Justice, I might say that Lord Thomas, when he returns from the Chamber, where he is at the moment, will have a question on the role of a version of the European Court of Justice.

Q3 Baroness O’Loan: Is it possible to resolve the most technical issues, including on medicines, SPS and customs, within the scope of the protocol? What is your response to the Government’s arguments that medicines should be removed from the scope of the protocol entirely?

Jess Sargeant: This is a difficult question, because it depends on what you mean by resolving the technical issues and what you mean by what is within the scope of the protocol. What is considered in scope of the protocol appears to have changed a bit since the protocol came into force. The EU is now more open to doing certain things that it might have considered not within the scope of the protocol before, such as changing its own EU laws in order to accommodate Northern Ireland, but now would consider that within the scope of the protocol.

There are quite a few mechanisms, not to change the text itself, but to change how it operates in practice, EU law being one of them. There is a bit of scope to make some decisions in the Joint Committee. I am not a lawyer, but there is a provision to correct errors, omissions in

circumstances that were not foreseen. If there is political agreement that it should be used, that could be used. More major changes would require a new treaty, which would require a new mandate for the European Commission and a whole different sort of process that would need to be gone through to ratify that. That is a lot more difficult.

Coming back to the question of what you mean by resolving them, if you wanted to end up in a position where there are no checks on goods going between Great Britain and Northern Ireland, you probably would have to have a major change to the protocol—this renegotiation or new treaty that I was talking about. As for resolving the technical issues, the position I would take is that you can reduce checks to the point that we have a different balance between protecting the UK single market and the EU single market within the scope of the protocol, now that the scope of the protocol has been broadened somewhat. The short answer to that, after all my preamble, is probably yes.

You asked a question about the medicines. This is one of the questions where those exact issues come up. Removing medicines from the protocol makes sense in a lot of ways, because medicines are very different from goods and there are good reasons why you might want to treat them differently. Obviously the proposal that the UK Government have put on the table is to remove it from the protocol. That has some support in industry. The priority for a lot of businesses is to make sure that they can make a single pack of medicines for both markets.

There are ways of achieving that that do not involve removing medicines from the scope of the protocol. There are other ways through regulatory co-operation that could be done within scope. No one should have any specific red lines about legally what they are and are not willing to do. The point is finding the right solution. A lot of businesses, particularly in the medicines sector, are less concerned about what the agreement is now than that there is agreement. There is quite a lot of scope and the focus should be on finding political solutions. The legal part comes after, I suppose.

Professor Ronan McCrea: To some degree, it is a political question and a matter of political preference of the actors. The EU has indicated that it is willing to be more flexible than it might have been a few months ago. We will get on to proposals later, but the devil of its proposals is in the detail. They are phrased in quite general terms, but, even by floating figures such as 80% reduction in checks, the Union is indicating a degree of flexibility. That is flexibility within the existing governance system. Insofar as the Union is not reassured that things such as the role of the Court of Justice would be respected, that will dampen its appetite for further concessions.

I do not have much particular expertise on medicines. There probably is a case for some degree of flexibility, since the risk to the single market is lower because the NHS is always going to be the biggest buyer of drugs in Northern Ireland, so the chances of significant leakage are probably lower. The key issue is what level of risk to the integrity of the single

market the EU is willing to tolerate. It is a small proportion of overall EU trade. That is one reason to tolerate some degree of risk. On the other hand, if arrangements are agreed that open a hole in the border of the single market, of course people with an interest in smuggling—and smuggling is not unknown on the Irish border—will target that.

The question is how much risk the European Union is willing to take. It is willing to take more risks with the single market than it seemed a few months ago, but it will not give in on the governance issue.

Professor Peter Shirlow: I do not have much to add to that. Sometimes we forget that the way in which the protocol was designed was that you would go back and check, go back and check, and ask, "Does this work? Does this not work? Does this create difficulties? Does this create tensions?" There is a sort of process within it, which is to create checks and balances on its actual operation. Sometimes I think we forget that. We have got caught up now in a round-the-houses type approach: "They say this and they responded this way"; "How will they respond?"

Clearly, if there is some sort of settlement over the protocol, the proof is in the eating. Under Article 13(8), et cetera, you can go back and check; you can go back and monitor, and all that. It goes back to what I said before and what Ronan has just said. Say there is an agreement on the protocol and the movement of goods east-west, and that is in ABC, is the enforcement mapped tightly on to that ABC? I still think that is the surety and the other issue.

I agree with Ronan's point. We have to be mindful that, if the protocol was always going to be a system within which it had its own checks and balances, and if we understand that it is something that evolves, that is important to note, but we cannot just have something agreed that is not right. We cannot envisage what many of the problems will be, but we cannot just accept something because we are frustrated, want to move on, or want this to stop being an issue.

Can we move on with the trading issues and park the constitutional issues, or are these things that are so tightly wrapped together that we just cannot move on? The direction of travel is most certainly better. There are things to respond to now. The EC has stretched itself. I do not think anybody would disagree with that. We need to find a way in which we understand what the next stage of that negotiation is. Is that next stage of negotiation a deadline of two or three weeks, or is that next stage of negotiation something we have to accept that rumbles down the years?

The Chair: Professor Shirlow, do you envisage that there is a permanent negotiation going on over the protocol and so on? Even if it is agreed, there will still be a constant series of negotiations about exactly how it should be implemented.

Professor Peter Shirlow: It is the whole way in which this has evolved. We were told at the start that there would be a hard border. There was no hard border. We were told at the start that there would be a diminution of rights. There has been no diminution of rights. We were told that trade would collapse. Trade has not collapsed. We were told that Europe would never move. Europe moved.

With the question of the European court, there now seems to be a red line. I assume a lot of people who are involved in these negotiations have learned a lot about Northern Ireland. If they understand it, I would hope that they would explain it to me. Northern Ireland, as a place, and its issues and complexities have come into the foreground and resolutions are becoming more linked to that local-regional problematic.

It does not seem to me that you are going to resolve that by setting a date and saying, "By this date, everything will be resolved". What is really critical in the first instance is to get that trading relationship mitigated to such an extent that it is virtually invisible, and commitments that there will be high levels of enforcement, which calms down other things. Sorry, it is a bit vague, but the answer to your question is that it does not seem realistic that you are going to deal with the problematics that will continue by simply setting a date and saying, "Everything will be done by that date".

That comes to the question of local democracy, which I know we are going to talk about later. How we bring in civic society and local political actors in Northern Ireland to be part of the resolution of future tensions and difficulties is what is missing here. Something is being done to Northern Ireland from afar, where there probably is more capacity for resolution of these issues if we work within the more local political arena. It cannot just be a red line. It cannot be a date. It is going to have to evolve.

Lord Empey: Professor McCrea referred to the 80% reduction that was alleged to be taking place. Is that 80% of what is currently being done, or 80% when the protocol would be fully implemented? The two are very different things.

Professor Ronan McCrea: We do not know. The non-papers are deliberately vague because they are negotiation documents. We will not know, until the negotiations go on, just how flexible the EU is willing to be. Obviously, an 80% reduction in either is significant, but one is more significant than the other. We do not know the degree of flexibility.

Lord Empey: People do not have a measure of what percentage of the checks are actually taking place. We know that significant swathes of the protocol have not been implemented yet.

Professor Ronan McCrea: Even if checks doubled, 80% of 200% is 40, so it would be 60%, which would still be a lot, but we do not know. This is a negotiation position and we do not know until the negotiation.

Q4 Baroness Ritchie of Downpatrick: In the command paper and particularly in paragraphs 66 to 70, the Government assert that the parties should devise alternative dispute settlement arrangements to replace the jurisdiction of the Court of Justice of the EU. In that respect, what is your assessment of the Government's proposals to replace the jurisdiction of the CJEU over the protocol? Are there any viable alternatives? If so, what are they?

Jess Sargeant: We have spoken a bit already about the CJEU, which I think will be one of the main sticking points in the negotiations that are coming up. In the command paper, the UK Government float the idea of replacing Article 12 of the protocol, which gives the European Commission oversight of the application of EU law, with a mechanism similar to that in the trade and co-operation agreement, which is the future relationship.

The first point to make is that the trade and co-operation agreement is very different from the Northern Ireland protocol. Obviously it is a very loose relationship that GB has with the EU under the trade and co-operation agreement, whereas the protocol requires EU law to have direct effect in Northern Ireland. It is quite unsurprising that the governance mechanisms for those two different types of relationships and agreements are different and were negotiated by the UK Government in the first instance.

I was interested yesterday, when Lord Frost appeared before the European Affairs Committee, in his answer to that problem I just raised that EU law has direct effect in Northern Ireland and therefore it makes sense that the ECJ has a role. He said that the answer was to have less EU law that has direct effect in Northern Ireland or to create some other mechanism via which EU law would apply. He is very unlikely to be able to make much progress with that idea. Fundamentally, if you want access to the single market, the EU's position is that you need to apply EU law and the whole EU architecture needs to sit behind that.

Some people have been talking about some of the provisions for the level playing field in the trade and co-operation agreement, where, instead of making a reference to EU law, there is a reference to international law or some kind of equivalent standard. That is another example of where the TCA is very different from the protocol. The TCA has some high-level level playing field commitments. The Northern Ireland protocol has over 300 regulations setting things such as product standards, the single-use plastics directive and very practical, small directives that it would be very hard to replicate.

The main point here is, again, about the similar things that we have seen with the GB-EU relationship. The EU will require some level of alignment if you want to continue access to the single market. If we talk about Lord Frost's proposals, the logical conclusion, if you were able to make progress with that, would be less, if any, access to the single market for Northern Ireland. As I mentioned in my opening remarks, a lot of businesses in Northern Ireland would be unhappy with that.

I have focused more on yesterday's debates and yesterday's proposals, because they were slightly different from what has gone before. A lot of people have spoken about the Swiss mechanism for dispute resolution or potentially even moving the application of EU law under the dispute mechanism in the withdrawal agreement itself, which has a role for an arbitration panel and those sorts of things. Lord Frost's statement yesterday suggested that it was not really about dispute resolution. It was not about that kind of process. It was something much more fundamental. It is hard to see how you can find a compromise in the middle of those two positions, ECJ or no EU law, that would suit both parties. One of those parties is going to have to compromise on those initial positions.

Professor Ronan McCrea: This is the key issue that will determine whether the UK Government are seeking to improve the protocol, just replace it with something entirely different or abandon it. The central feature of the Northern Ireland protocol is the mitigation of the effects of a hard Brexit by placing Northern Ireland under EU law for the purposes of goods. How can you have that arrangement unless the Court of Justice is involved? We have an arrangement where Northern Ireland applies EU law on goods, but that law is not interpreted by the Court of Justice. Then it is really not EU law.

If a country agreed that it would be applying British law under some deal, it could not then say, "We will not ask the Supreme Court of the UK what that British law means". The protocol cannot exist in any recognisable form if EU law does not apply in Northern Ireland. That is its central objective. It cannot then be applied without the Court of Justice interpreting that law.

There are a lot of cases. There was a case, for instance, when the European Union tried to accede to the European Convention on Human Rights. There were very small bits of that agreement that meant that the Court of Justice worried that the Court of Justice would not be the interpreter of EU law for all purposes. The court says that you cannot do this under EU law, so there are real legal impediments.

Politically too, if you think of how the clash between Poland and the EU has become so hot recently, it was due to the role of the Court of Justice, because Polish judges were not accepting the primacy of the role of the Court of Justice in interpreting EU law. We cannot abandon the Court of Justice without abandoning the protocol altogether, realistically, or making it something entirely unrecognisable. We would probably need to have a new one and have it ratified by the member states.

There are these suggestions that you could have an arbitration mechanism, something akin to the abortive Swiss deal where you would have an arbitration panel. When an issue of EU law came up, it would refer to the Court of Justice and get an answer about what EU law means in this case, and then the arbitration panel would apply that ruling.

Baroness Ritchie of Downpatrick: The Court of Justice in that instance

would mainly be a court of interpretation.

Professor Ronan McCrea: Yes, but it always is. Even under the current protocol, you would have a Northern Irish court making a reference to the Court of Justice, asking, "How should I interpret EU law in this case?" and then applying the ruling. Because EU law on goods is intended to apply to Northern Ireland, the arbitration panel would not have much to do. If the issue is how EU law should be interpreted in this area, and it has to ask the Court of Justice that question and be bound by its answer, why bother with the arbitration panel? Arbitration may be a help, but it is not going to change the final reality that EU law is interpreted by the Court of Justice.

The other query about the Swiss issue is that Switzerland is also what is called a monist system, where treaty obligations are part of national law and applied by national courts. Arbitration rulings and international bodies are more influential there. The UK is a dualist system, where that is not the case. International law and national law are separate.

In relation to Lord Frost's proposal about reducing the amount of EU law, he is essentially saying that the protocol is intended to mitigate the effects of a hard Brexit. Brexit, in the form it took, involves certain changes that increase the distance between Northern Ireland and the Republic of Ireland in services, free movement of people and broader administrative and legal changes. The protocol mitigates that by saying, "Where goods are concerned, the previous arrangement stays. EU law applies".

Lord Frost is saying, "Let's reduce the mitigation to make it much smaller". Why would that be a cure for the instability that the protocol and the Brexit arrangement have caused? That is just saying, "We had a compromise, but now we are going to take away some of the compromise". That will just inflame one side, rather than the other. I do not see it as a possible solution.

Professor Peter Shirlow: I do not really have much to add to that. That picks up many of the issues. Article 10, with state aid, for example, has that issue of reach-back. I do not think any case has ever been taken around that area. If the EU state aid law were to apply only to a UK measure that was politically sensitive, surely the European Commission might be able to resolve problems. It goes back to what I said earlier about these mechanisms, checks and balances that are partly there.

Can this be allied to what the TCA said? Yet again, we are in the problematic of how much of this is symbolically important and how much of this is practically important. The protocol is not about building a peace dividend; it is not the intention of the protocol to build a peace dividend. But when you place Northern Ireland in a unique trading relationship, and when Invest NI tells us that there is historically the highest level of interest in investment in Northern Ireland, we get into the realities and the socioeconomic issues we started with. If all this is going to get bogged down in ideological geopolitical games, the delivery of that peace

process, which is the next generation of stability in Northern Ireland, is going to be missed.

Even the question itself points to a potential conflict. The people in this room and elsewhere should be pointing to the fact that we have solved bigger problems than this. Two people sitting close to me were there in 1998. You ended a major conflict in our society. The first point is that this has never gone before the court. Ronan has talked about the ways it could be mitigated before we even get to that point.

It is that type of thinking because, at the end of the day, we keep moving our eyes away from the prize, which is that this could build social prosperity and change us from a consumption to a production economy, which is exactly what Northern Ireland needs. Constitutionally, it could save Northern Ireland's place in the UK, or it could make constitutional change easier. There is a bigger, wider socioeconomic impact here, which has to be the goal of everything that is happening.

Baroness Ritchie of Downpatrick: That is fascinating.

Lord Hain: Following on your last answer, Peter, I think you used the phrase "ideological symbolism", or at least that is more or less what you were saying, versus practical things. Could you give some practical examples under the current arrangements, leaving aside the ideological, symbolic issues, where you foresee the difficulties arising that could give rise to ECJ issues?

Professor Peter Shirlow: I think of the exchange between Lord Empey and Professor McCrea—80% of what?—about not actually knowing what these things mean when somebody says 80% of 20% of 40%.

Lord Hain: Could you give us a guess of practical things? Given this is now the monumental clash involved, what actually, in practical terms, could it mean?

Professor Peter Shirlow: At present, it means that the businesspeople are telling you that they are filling in 23 documents to bring something into Northern Ireland.

Lord Hain: I understand that. Where is the ECJ reference going to come from?

Professor Peter Shirlow: I do not know the answer to that question, sorry.

Q5

Lord Hannan of Kingsclere: It is nice to see you all. It is nice to see you again, in Jess and Peter's cases. I wanted to pick up the last point that you were making there, Peter, about the state aid provisions. If I may phrase this more widely, in terms of the relationship between the TCA and the protocol, it seems a different age, but, when the argument was going on about whether a backstop was necessary, the UK position was that many of these potential issues will be dealt with in an ambitious, comprehensive free trade agreement and therefore, until we know what

that is, there is no point in talking about Northern Ireland. The EU said, "No, we need to have Northern Ireland first", and eventually got its way on sequencing.

Now we have the TCA, I wonder whether the point you have just made about state aid applies elsewhere. I will put this to any of you. You do not all three need to come in, but do if you like. The command paper argues that the general provisions in the UK-EU deal make redundant any specific additional provisions on state aid in Northern Ireland. First, do you think that is true? Second, do you think that the same is true in other areas—that, if you have ambitious deals on free flow of goods, some of the other aspects of the protocol may be deemed obsolete? Jess, you look as though you have an answer.

Jess Sargeant: I do not know whether I have all the answers. It is an interesting question. On the specific issue of state aid, there were a lot of discussions when the TCA was being negotiated that it could supersede the protocol. The time for doing that was potentially when the TCA was negotiated. Perhaps part of the reason that it was not superseded is that the UK Government were not willing to sign up to the level of assurances about the new state aid system that the EU wanted. I certainly think theoretically it is possible, but clearly there is a political barrier there. I am not sure what has changed since the TCA to warrant revisiting that.

On the specific state aid issue, there is a particular issue about reach-back that Peter mentioned. I think the EU has conceded on the principle that EU state aid laws should not apply to goods unless they have a direct and real link with Northern Ireland. Unfortunately, the way that it gave that assurance was not considered legally watertight. Perhaps that is a bit unfair. Maybe there is something the EU could do to make that assurance legally watertight, because it has agreed that in principle. There are two slightly different issues there.

Parts of the TCA could have superseded the protocol. The point you made there about there being a comprehensive and ambitious trade agreement is the key part. It completely depends on what relationship the UK Government want with the EU. One solution that was talked about in relation to the protocol, slightly less so now, was a UK-EU deal on SPS. That could have been in the TCA and would have superseded elements of the protocol potentially, or just reduced its impact. The way that the protocol works means, essentially, that the checks and processes that are required on goods going between GB and EU apply GB-NI.

There is a lot that could be done in the UK and EU relationship. One of the questions is, given that we have just concluded negotiations, whether the political temperature has changed enough for either side to be willing to give more. That would be necessary to get an agreement that would supersede elements of the protocol.

Professor Ronan McCrea: State aid is an area where they are not a million miles apart. We do not fully know how the new UK regime will operate. We have not had any cases. It is a new set of laws and for the

first few cases there is always a degree of uncertainty about how things will operate. The new UK system is a little more permissive than the EU one in some ways and less in others. They are not so far apart, so maybe something could be worked out.

I am not sure about spreading it beyond that to other contexts. The EU's fear would be less, because, if you have a small hole in the border of the single market for goods, it could become a big hole if smugglers get wind of it. That is not going to happen with state aid reach-back, with some subsidy that has some knock-on effect through some subsidiary in Northern Ireland. That is not going to be the end of the world ever for the European Union, so the stakes are lower and that helps to get a deal.

We are running out of time, so I will just say that the TCA is not that broad and ambitious. There is not that much free movement, in terms of mutual recognition, goods or services. We are looking at goods for the protocol. The ability of the TCA to shoulder the weight of the protocol is probably very limited.

Lord Hannan of Kingsclere: Let me put a very quick question to any of you who wants to answer. You do not all need to come in on this. In fact, I think I might put it to every witness we get from now on. Given that we have had now however many months of unilateral exemptions, waivers, opt-outs, carve-outs and so on, what have so far been the tangible negative consequences on the EU of these various opt-outs?

Jess Sargeant: I will take that one unless anyone else wants to come in. We have not seen massive consequences. A big reason for that is the very close level of regulatory alignment still between GB and the EU. Most of the laws that GB is applying are copied from EU law, as happened when we left the EU, so there are not concerns about goods that do not meet EU standards entering Northern Ireland from GB, because GB goods are currently made to the same standards.

In some sense, it is a hypothetical risk, but, if we continue in this scenario where there is non-application without agreement of both sides, those hypothetical risks could become tangible risks. We could see products that do not meet EU standards entering the single market. Then we have more of a problem and another political issue.

Q6 **Lord Caine:** The Prime Minister said in the House of Commons earlier today, "The real-life issues on the ground in Northern Ireland have not gone away. As we have been saying for some months, if we cannot see progress—rapid progress—in the way that we spelt out in our command paper, I think it will be clear to everybody that the conditions for invoking Article 16 have already been met". In which case, could I ask the panel how likely you think it is that the UK Government will, ultimately, be forced to trigger Article 16? In those circumstances, what do you see as the most likely political, legal, economic and societal implications or consequences for Northern Ireland, if this were to happen?

Professor Peter Shirlow: Article 16 would be hard to enact. "Given that the EC has stretched itself, what are you responding to?" "We are responding to its belligerence". Actually, it has stretched itself, so it is hard to use that as a motivation.

We have to make this very clear. Article 16 is not a rewrite of the protocol. I do not know whether we are in a vicious or virtuous cycle, but it is a cycle none the less. Back to the semantics, what do "appropriate measures" or "strictly necessary" mean? What is a serious economic, societal or environmental difficulty? How do we measure that? In many ways, that takes us back to the courts and all that friction that is created.

Lord Caine: Sorry, could I just interrupt you? This is what I am really driving at: if this were to happen, would it have a further destabilising impact on the politics, society, et cetera, in Northern Ireland?

Professor Peter Shirlow: The tensions that came out of loyalism and, at the start, from republicanism were well managed. A lot of that was internal within loyalism, for example not bringing people out on Ulster Day to parade in Larne, where people said, "This is not appropriate" or "This is not what we need to do". There has been that type of leadership.

It might encourage a section of Northern Irish society that is ambivalent about unification to think that perfidious Albion has done it again, whether that is the right analysis or otherwise. We have seen that in the data we have collected. There has been a small growth in people who want the Irish unification, especially among younger people, and you can map that directly on to Brexit. Something such as that would confirm what is a harder narrative somewhere else in Irish nationalism.

Lord Caine: From a unionist perspective, there are clear dangers in taking that course of action.

Professor Peter Shirlow: There are people in Northern Ireland who are culturally Irish, but they are cultural nationals. They are not necessarily political nationals. They can live with the status quo. There is anecdotal evidence from friends, and the research we are doing, about people like that, who are not pro-union but can live and exist within the union. They work in the public sector; their lives and businesses are invested in the union. They are actually unionists without knowing it.

The point is: how much pressure are you going to apply to that community before it reacts to the more vociferous end of nationalism and says, "Actually, you were right all along. This was always about blocking and impeding. It is not about being fair"? I am not taking sides in that. I am just saying that is what I think the big threat to the union is. It is that community, which is prepared to live in Northern Ireland but at one point might go, "If you are going to harm the economy, I am not staying". That is really important.

Lord Caine: I totally get that.

Professor Ronan McCrea: The decision to invoke is a political one. The key thing is that the decision to invoke Article 16 is a beginning, not an end. It just opens up a whole new series of problems. It does not bring to an end the current problems.

The text of Article 16 is fairly broad: diversion of trade, serious societal, economic or environmental difficulties. They can probably legally invoke it. Of course, we do not know, because we have not had any rulings as yet. There has been diversion of trade, but would the arbitration panel be willing to countenance an invocation of Article 16 where there is a diversion of trade that was a predicted and inevitable consequence of what was signed? Maybe not, but if I was a betting man I would say it probably would permit that.

Article 16 measures have to be tailored and proportionate to the problem, and have to affect the operation of the protocol as little as possible, according to the text. If Article 16 is invoked in relation to a central feature that effectively destroys the protocol, is that a legitimate use? Can Article 16 be used to undermine the protocol as a whole? Again, it is not clear that an arbitration panel would allow that.

Particularly in relation to the CJEU issue, the status of the CJEU is not causing diversion of trade. The fact that there are different laws for Northern Ireland and for GB is causing diversion of trade, but who is interpreting those laws is not the reason. Restricting CJEU jurisdiction would not seem to be legitimate as a reason in terms of diversion of trade. You could say that societal difficulties are being caused by CJEU jurisdiction, if you imagine that that is why people are protesting, but it seems a stretch.

The main thing I want to ask is this: if they involve Article 16, what then? You still have the same problems. It could eventually, after several steps, lead to a trade war, in which, to be realistic, the EU can impose more pain on the UK than vice versa. Imagine they successfully use Article 16 and the arbitration panel allows them to abrogate most of the protocol. Then it may be put up to the Republic of Ireland: will it police the border north-south, rather than risk its status in the single market?

Then what do you have? You have permanently poisoned relations between Dublin and London. You have equal, perhaps greater, instability, this time coming from nationalists. Where will it get us? I see it as just opening a Pandora's box of further problems.

Jess Sargeant: I agree with a lot of things that have been said. Triggering Article 16 would continue this state of uncertainty and perhaps even create more. That is a problem politically, because it means that the protocol will continue to be quite a disruptive feature of Northern Ireland politics. It is very important to try to find a solution before next year's elections. Otherwise that could contribute to quite a toxic environment and debate.

Similarly, on the economic side, there would be continuing uncertainty, which would prevent some of that interest and investment that we spoke about earlier, which is very important. It could actually end up with some GB businesses, which, if they knew what the status quo was, would be able to continue to trade with Northern Ireland, pulling out because it is all too complicated and too much of a mess. There would be serious consequences. As Ronan says, the only way forward is through an agreed solution, whether that comes now or in three years' time. If we can get there with causing the least amount of pain, that is the most important thing.

Lord Caine: That is very helpful indeed.

The Chair: That was a very interesting set of answers.

Q7 **Baroness Goudie:** Good afternoon. I have so enjoyed the discussion so far. I mean to talk to you on two questions and the EU's proposals, coming on from everybody else's proposals. What is your overall assessment of the EU's proposals published on 13 October? Do they go far enough in addressing the problems that have arisen under the protocol? To what extent do the EU's proposals tackle the fundamental issues at the heart of the protocol? As we are a bit short of time, I am going to do the two questions together.

Do the Commission's proposals on SPS and customs go far enough to mitigate the impact of the protocol on movement of goods between Great Britain and Northern Ireland? How reasonable and practical is it for the UK Government to meet the conditions and safeguarding measures set out in the non-papers in order to gain the flexibility offered by the EU? All this flows together. I think we know some of the answers, but we need to get it on paper.

Professor Ronan McCrea: I will be quick, because I have more to say on the other questions than this. I am not an SPS expert. My impression is that the EU is in the market for a deal. It is going to be flexible. The details have to be confirmed. How much it will give probably depends on whether it is reassured on the more fundamental aspects of the protocol, which are the facts that EU goods law applies in Northern Ireland and the Court of Justice must be the interpreter of that law. If it is reassured on that, it looks like it is in the market for a deal and its appetite for risk to the single market is higher, but we do not know the details until the negotiations start. However, they could be poisoned from the beginning if it appears that the UK Government wish to abandon the Court of Justice role and sink the protocol.

Professor Peter Shirlow: I understand the questions, but we go back to the same issues. It is a bit like asking, "How long is a piece of string". In terms of SPS, at the minute EU and UK standards are not that far apart. It goes back to what I said earlier on—the plate tectonics. What are we prepared for? If, at some point, the UK standards change, we are in a different terrain. It comes back to what the objective of all this is. Is it that we resolve the tensions, put in practical solutions and accept that

that is not a sticking plaster but something more considered than that? All this comes back to the future, how the TCA operates and the deals the UK does elsewhere. That will influence what we are trying to negotiate on now. You are negotiating on something that you know at some point is going to change.

Baroness Goudie: That is right, exactly.

Jess Sargeant: The EU proposals went further than a lot of people were expecting. To use Lord Frost's words, the EU crossed the Rubicon in some senses in agreeing to change EU law in some areas and, I suppose, being willing to be a bit more flexible on SPS. That was one of the main issues and something on which it had stood firm—that it was concerned about the integrity of the single market, health and threats to animal and plant health. There is some good progress there.

I want to talk a bit about the conditions, because they are the devil in the detail aspect of these proposals. Some of them are very reasonable, for example the construction of border posts. That is something that the Northern Ireland Executive is responsible for and starting to make progress with.

There are areas where the conditions pose some practical challenges. I spoke earlier about how I felt that the UK Government's proposals for distinguishing between goods remaining in Northern Ireland and those going on to the EU were somewhat underdeveloped. The same is true of the EU proposals. It proposed something like rules of origin requirements for SPS goods, which is not particularly familiar as a concept in international trade. Again, there is a balance of ensuring that these mechanisms are robust enough to prevent them being abused, but also we need to make sure we are not replacing the burden of the checks and paperwork with a different burden of proving that your goods are staying in Northern Ireland. There will need to be some discussions on how you design a scheme that works in that sense.

There are also some of the conditions that will pose political challenges. Here, there is potentially a requirement to align with EU law for GB on some of the basic production requirements for certain agri-food products, if the exemption that would allow sausages to continue to move between Great Britain and Northern Ireland would be used. That is going to be very difficult for the UK to accept and require a lot of further discussions.

Similarly, there is an increased role for Union representatives in overseeing the application of EU law and a Commission presence on the ground. I think the UK is also going to be very uncomfortable with that. It has previously said that it did not want a European Commission Belfast office for this reason. That is another thing that will have to be discussed, as well as some rapid reaction and termination clauses also that would allow the EU to unilaterally terminate some of these flexibilities.

While I can understand the desire for these mechanisms where the EU has found itself slightly powerless to try to force the UK Government to

implement parts of agreements that have been made before, it does not necessarily help this point about uncertainty, if these arrangements can be terminated at any point. The devil is in the detail and these will require further negotiations. The question is how much the EU thinks they are up for discussion. I hope that it thinks they are.

Baroness Goudie: That was very helpful.

Q8 Lord Dodds of Duncairn: Thank you very much for your comments so far, which have been, predictably, extremely interesting and, in fact, fascinating. We talked about the fundamental issues at the heart of the protocol. There are a lot of issues: trade, state aid, VAT and so forth. One of the main problems is sovereignty and the democratic deficit. Somebody talked earlier about contracting out the monarchy or the NHS. Northern Ireland's laws are effectively contracted out now for vast swathes of our economy. The EU in its non-paper talks about proposals for more transparency and exchange of information, processes for more structural dialogue, setting up a website and so on.

There is nothing in the proposals I can see that gives decision-making powers to any elected representative in Northern Ireland, here or in Stormont, no matter what side you come from, in terms of the political party you represent. How do we address that point? How do you see that being resolved? Clearly, the ECJ is the apex, because it interprets the law. How do we resolve this problem of the democratic deficit in Northern Ireland?

Professor Peter Shirlow: If you went to most people in Northern Ireland, talking about the Specialised Committee and the Joint Consultative Working Group, they would go, "What are you talking about?" There might be a fatigue. It would be interesting to see what this data that we will have on Friday will say about what people think about all this.

As I said earlier, it is a place that is devolved and a place that has, since 1998, created its own way of moving on and coming out of conflict. This is a place in which a quarter of the city of Belfast was flattened and we have been able to build this new city—fintech, cybercrime and the film industry. It is a place that is going in a certain direction, on a certain journey, and what comes along is this process where something is done to you from outside.

That is a critically important question that needs to be answered. A democratic deficit, in the sense that you might affect but you are not going to make the laws, is critically important, in terms of the mood. What has come out of all this is the importance of the totality of the relationships. People talked about the relationship north-south, but the primary relationship is east-west, culturally, economically and X, Y and Z. It is the primary relationship. All those things, in many ways, have been lost in these multiple rabbit holes of technocratic laws, regulations and rules et cetera.

Sorry, I know I am sounding like a broken record. This whole process, whenever it is resolved—let us hope it will be resolved—has to be something that gives status and prospects to the society that is Northern Ireland. It goes back to the point about being in two codes. The one thing that has to come into these conversations is not just the sovereignty questions. Between you and I, we might have the same desire to stay in the union, but we might have different understandings. Monarchy may be important to us, or radical British socialism, whatever that is. We have different understandings of Britishness, Irishness and all those things. It is very important.

Is the goal of all these negotiations to simply apply one set of rules and clash against those rules with another set of rules? Is this about the opportunity to sustain growth within the Northern Irish economy? Is this about the next generation of economic development? We need to bring in that voice of the Northern Ireland Assembly; that is critical.

One thing that the pandemic and the protocol have shown, as I spoke about earlier today, has been the role of civic society. Civic society has been knowledge giving, idea giving and solution giving. It seems to me that, even though it would not have any regulatory authority or power, the Northern Ireland Assembly could set up some sort of review panel or some sort of body that would take local ownership over future tensions, issues and problematics, as well as successes. That could feature, in some way, into the EU's intention of engagement.

One thing that is proven here—and I am sorry to repeat myself—is that many of those mitigations have been based upon the role of civic society. Civic society stepped up to the plate. Civic society did not sit with the high rhetorical stakes. Civic society did not rehearse the old identity arguments. Civic society sat about the boundary. As much as there are unintended consequences of everything, it seems to me that any future consultation, any future influence over decision-making, should now be rooted in something the Assembly creates, which includes civic society's voice.

It could be influential. It is not going to be legally constituted, but it seems to me that, if we had had that type of conversation earlier on, and that type of practical thinking and pragmatic approach, many of these things would not have ended up the way they did. Consultation has been poor until we ended up in a tension. Consultation should have happened before we ended up with many of these tensions.

A businessperson told me 80% and whatever else. On "Good Morning Ulster" a few weeks ago, I cannot remember who the representative was, but it was from an agri-business group I think, and they said that 80% is okay for the people who are covered by the 80%. There are certain sectors where they fall under the 20%, so for them it is not a good deal.

There is that type of knowledge capacity. The Good Friday agreement was supposed to deliver that type of civic space and civic capacity. It has

been proven to work. It is robust, resilient and capable. It has to feature in any future ways in which we resolve the issues as they arise.

Lord Dodds of Duncairn: I take Peter's point. Lack of consultation has been at the heart of the entire process relating to the Northern Ireland protocol. Never mind civic society; nobody in the political world was consulted about the protocol either, so it was not politicians. You can add in civic society's role and those mechanisms for trying to resolve problems. That is absolutely vital. Take today, for instance, the excise duty regime for alcohol here in Great Britain. That would not apply to Northern Ireland. Things are being done to Northern Ireland, by change in EU regulation or GB laws. How do Northern Ireland legislators, either here or in the Assembly, cope with that for the best of Northern Ireland?

Professor Ronan McCrea: There is a problem in principle that you have identified. There are no MEPs from Northern Ireland. There is no Minister representing Northern Ireland on the Council, where they are making the laws. Then there is data and mitigations of that, which may not readdress the problem in principle.

There is a further problem as well because we have now divided goods law from services law. Ideally for an economy, goods law and services law will dovetail together. The danger for Northern Ireland is that you will have goods law made by the EU, and Westminster or Stormont, as is the area, making services law, and they might not fit together. You would need the EU legislature to be made aware of the concerns of Northern Ireland.

There are various ways. The UK can involve Northern Irish Ministers or civil servants in the Joint Committee. When the UK was an EU member, where the EU Council was discussing devolved areas, it co-ordinated with the agriculture Ministers from Wales, Scotland and Northern Ireland and brought them in. It could do that. Even if it does that, and there are these structured dialogues and we get information, the key political actor in legislation in the EU is the Council. Northern Ireland will not be there because the UK is no longer there.

I suppose you could use the North/South Ministerial Council. You could get a system where Northern Irish Ministers or civil servants could have a structured dialogue with the Irish Government and they undertook to ventilate the concerns relevant to Northern Ireland in the council. I can understand that, symbolically, that is a bit much for some people. I understand that, symbolically, that is not a runner for many people.

These structured dialogues, with civil society, making sure at least that Northern Ireland is consulted or its information is fed into the EU law-making process, can help. Then there is the problem of principle that you identified. It is not an unprecedented situation. A lot of countries that have relationships with the EU, such as Ukraine and Switzerland, have undertaken to follow EU law in various areas and they do not get to vote on that law. There is EEA membership for Norway. They talk about fax diplomacy. They receive the laws by fax and just have to approve them. I

suppose the answer to the democratic thing is that that is what they want. They wish to have that relationship with the EU, as long as they are free to terminate it, as the Assembly is, so they can walk away.

Lord Dodds of Duncairn: That applies to the entire country. The problem is here when you have one part of the country applying laws made here and another part applying EU laws. That does not affect Norway or Switzerland.

Professor Ronan McCrea: The Assembly can terminate the arrangement if it wishes. I am not denying there is an issue.

Jess Sargeant: The points that Professor McCrea was making there about how to involve Northern Ireland interests or views, even if it is not decisions, in EU policy-making processes is an interesting one. The barrier here is that, in a lot of areas, it is the UK Government that are responsible for applying EU law with respect to Northern Ireland. The EU does not want the UK there and the UK does not necessarily want to be there either. That is a barrier and more could be done to see if we could carve out a particular arrangement for Northern Ireland civil servants or political representatives to participate in some of those areas. I am not an expert on the EU institutions, so I will have to defer to someone else to help us with that one.

The other area is also where the UK Parliament and the Northern Ireland Assembly can create scrutiny processes to ensure they are thoroughly considering changes to EU law that apply in Northern Ireland. I know that is one of the big purposes of this committee. Certainly there has been some progress made in this place. Perhaps there could be equivalent mechanisms in the Commons. I know there are some questions about the role of the European Scrutiny Committee, but that role is not as explicit as it is here.

Similarly, in the Northern Ireland Assembly, there is a risk that just doing that scrutiny through normal committee structures means that it might be slightly missed. Things will be missed and I think Northern Ireland's view on proposed or in-force changes to EU law would come best from the Northern Ireland Assembly. There are also questions about how the UK Parliament could support the Northern Ireland Assembly in that, where it has limited resources, and, similarly, the Executive and the UK Government. I recognise that that does not address this fundamental problem that has been raised, but there are things that could be done above what is already being done.

Baroness Ritchie of Downpatrick: I have a tiny question of Peter. You mentioned a Northern Ireland panel and you are thinking mainly of representatives from civic society, because, after all, that is who Vice-President Šefčovič came to talk to, by and large. Would that Northern Ireland panel have an elastic remit, meaning would it deal with issues, in your estimation, outside the protocol, including other political, business and economic issues, similar to what maybe the Civic Forum was originally intended to deal with?

Professor Peter Shirlow: You must like the idea with that question. The protocol and all this is a wake-up moment. It is a moment at which we need to go back. We had the Good Friday agreement; then we had a crisis over policing and everything else. We had a certain level of settlement. Stormont falls.

Baroness Ritchie of Downpatrick: Some of us lived through it.

Professor Peter Shirlow: Exactly, yes. Some of us had to endure it. The point is that this sits at the heart of what concerns people: "I understand the constitutional questions but I am an employer. I cannot get these goods that allow my workers to produce the goods that I need to sell to pay their wages". "I am the farmer who can no longer"—whatever that is. All those realities are a wake-up moment. The threat of the start of violence because of a hard border was a wake-up moment. The violence that took place was a wake-up moment.

That review panel should most certainly be working as a site of conversations and evidence, which are about investment strategies. The question is this: say this protocol goes wrong; what do we do? For argument's sake, say something breaks down in the trade relationship for something out there. Are we going to kneejerk and react, or are we actually going to sit down for once and put together a comprehensive strategy, between civic society and the Assembly? Are we going to take the programme for government and proof it against the protocol, Brexit and everything else? Are we going to use that strategy to look at intermediate labour markets and the skills shortages? What do we do now about migrant workers?

All those things that these people deal with as an everyday issue should be fed into a reawakening, which should be some role for a panel like this to look at the relationship—NI, GB, UK, EU, America, emerging markets, all that. There is a dynamism there. There is social economy. Not everybody in Northern Irish society is going to go to university and get a graduate job. There are other ways in which you build that and do things. That whole capacity is sitting there. It always has been there and has always been something that we have called for.

The protocol proves the need for that bumper on the car that can be resilient, to take the crashes and the hardships that came out of this, or people can pour oil on troubled waters. I have spoken to a guy somewhere up in the north-west: "My order book has never been so full. Tension, what tension? Crisis, what crisis?" You go to somebody else: "I'm having real problems. I can't access this. I can't access that". A florist said to me, "I have to bring stuff in from the south. I've had to put 12% on the price of flowers. My market is there but I can't sell these flowers because they are too expensive".

All that takes us away from saying, "I have an ideological dream; I have an ideological position on this" to real impacts and real concerns. It could be the missing element that would bring a level of knowledge and understanding that would be really important to rebuild or to build a new

economy.

Q9 Lord Hain: Can I ask about possible areas of compromise between the EU and the UK and what sorts of steps would need to be taken for that? What will the consequences be if those compromises are not achieved? Linked to that, do you think the UK Government want to compromise? Do you think they want an agreement, or was Ian Paisley Jr's reported view of the Prime Minister, that he is going to dump it, accurate? Is this about picking a fight, to use a phrase one of you used—I think Ronan—earlier?

Professor Peter Shirlow: I will be very quick on this. I will go back to what I said to Lord Caine earlier. If this Prime Minister is not pro-union, that is exactly what he should do. If he wants to destroy the United Kingdom's link or Northern Ireland's place in the UK, scrap all this and take us into a constitutional crisis that we have not had in 100 years. I would hope very much that that is not his intention. There is a unit within Downing Street that was created working on pro-union issues. It would seem to me counterintuitive, if you are a pro-union Government, that you would do anything that would harm the union and its stability in the long term.

Professor Ronan McCrea: Northern Ireland is part of the UK now. The more instability there is, the more the status quo is likely to change. The Northern Ireland protocol did not come out of the air. It was not the only possible outcome. I myself back in 2017 and 2018 was very sceptical that it was the only form of Brexit mitigation worth pursuing. I thought there were other strategies that the Irish Government and the EU could have taken, but that did not happen.

The Northern Ireland protocol came from a handbrake turn by Boris Johnson in October 2019, so he may do that again. We do not know.

Lord Hain: Which way would that handbrake turn be?

Professor Ronan McCrea: He could certainly say, "It is all about mitigation. We are okay with the Court of Justice". I think that would be the easiest way to a deal. If the UK chooses to accept most of the governance issues around the protocol as they are, the core of the protocol, there is probably a lot of scope to work around the edges. The EU wants to help its member state, Ireland, avoid a conflict, so it is willing to be flexible.

If you remove the EU law from Northern Ireland and remove the Court of Justice jurisdiction, the protocol does not exist any more. That is the central feature of the protocol. That is not a change; that is an abrogation. Compromise is difficult because the protocol has been fed into the Northern Ireland political system. As I said before, what one side sees as necessary the other side readily sees as unbearable. I do not think we know what people can bear until we have a degree of stability and people see what they can and cannot live with. The constant uncertainty about whether the British Government are committed to the protocol at all probably fuels intransigence on both sides.

Why make a compromise now if you are not sure whether the whole thing is going to collapse? Why make a compromise to make it work if the British Government may just pull the rug out from under it? As I said before, the British Government have to calculate. Has the EU's previous policy, which was no broader relationship TCA without dealing with the Northern Ireland issue, changed because we now have the TCA? Some member states want to move on. It might have changed, but it might not, and the risks are very high of a trade war that will hurt the UK very badly.

It is also true that we should bear in mind the broader EU context. It is possible that, if things really get bad between Poland, Hungary and the rest of the EU, they would start blocking attempts of the EU to react against the UK. That is possible too. It depends how toxic that relationship gets.

The main thing I would say is this. Imagine, in the British Government's fantasy world, the EU gives way on everything—then what? The EU did not create the need for the Northern Ireland protocol. It is the divergent identities and policy preferences within Northern Ireland that created it. Even if the EU gives up, then what? Then you will have a situation where nationalists are told, "Brexit happened. You didn't want that, and the mitigation measures didn't please the other side, so they're gone too". That is not going to produce a stable outcome.

Brexit is a destabilising process. The Northern Ireland protocol is an imperfect way of mitigating part of that. It needs mitigation in some form to stabilise the Good Friday agreement. That need is not going to go away.

Baroness Goudie: You mentioned the one thing that I keep in my mind all the time: the Good Friday agreement. The great mistake of the Good Friday agreement, having been involved on the periphery of that, is that there were no timelines in it. Going forward with trying to sort this situation out and the Good Friday agreement, we have to try—sorry, I should not be speaking for myself. I am so sorry. Timelines of some sort have to come through over the next period. I really feel that. For any peace agreement, or any agreement now, I have taught myself a lesson that you have to have timelines in anything you do. We set ourselves timelines.

Professor Ronan McCrea: Thinking of the Good Friday agreement, imagine if, in the second last week of the Good Friday negotiations, the British Government said, "By the way, we're going to leave the EU in 20 years". What would have happened? There would have been a massive reaction: "We need to have a whole 500 pages more to cope with that situation". We did not think that was going to happen and so each party had a mutually inconsistent but sincerely held view about what the role of the EU was in the Good Friday agreement.

One side thinks it is part of the agreement because the agreement was constructed on the basis that both states were EU members. The other

side says, "It's not even mentioned in the agreement". There are reasons for both of those, but imagine that. If that had been announced mid-negotiation, obviously the agreement would have changed, so that means the agreement is relevant to EU membership and some adaptation of Brexit in relation to Northern Ireland will always be necessary.

Lord Hain: Jess, could you pick up on what Ronan said before this important question from my colleague Mary? Ronan made the point: if this all went up, then what now? Add whatever else you wanted to in answer to my earlier question.

Jess Sargeant: If there is not agreement, we are in very difficult territory. In that situation, the UK Government probably would trigger article 16, whether strictly in accordance with the terms of the protocol itself or perhaps taking their own interpretation. If they were using a perhaps legally shaky interpretation, it is very clear that the EU would pursue several mechanisms to retaliate, infringement proceedings being one of them. It would probably spark the dispute resolution procedure in the withdrawal agreement itself.

If it were found that the UK was in breach of its obligations, there is the possibility that the EU could cross-retaliate with the trade and co-operation agreement, which could mean tariffs in certain areas or suspending parts of the agreement. Similarly, the EU might take some unilateral action in the more immediate term, so thinking about areas such as data adequacy, when it can make a decision unilaterally. There is a possibility it could withdraw them and various other things.

Politically we would be at a very bad point, in UK-EU relations and, potentially, in domestic Northern Ireland politics. I mentioned earlier the elections coming up, which everyone should bear in mind. We are in a very bad place. Where does this leave us? The only way forward on the Northern Ireland protocol is agreement between the UK and the EU. That is the only way we are going to get a stable settlement. Whether that agreement comes within the next couple of months or two years later, after we have had a very fractious and damaging period of UK-EU relations, it is still going to need to happen at some point. At some point, both sides are going to need to return to the negotiating table.

There is a very strong imperative to try to get an agreement this time round. Perhaps that is why I have slightly misplaced optimism that we might get there. In areas such as customs and agri-food, we are very close. Those are some of the most important issues on the ground, so that is really positive. There are some things, such as pets, where the EU has not made counterproposals. There could be movement there. That is important to people in Northern Ireland, if not businesses.

There are the outstanding issues of VAT, state aid and governance. There could be something on VAT and state aid. I would agree with Ronan that governance and the role of the ECJ is going to be the major sticking point. It would be very regrettable if we ended up in a situation where practical solutions that could help businesses on the ground mitigate

some of the problems with the protocol and help us move forward were not implemented because of a lack of agreement on something such as the role of the European Court of Justice.

The question, "Do the UK Government want a deal?", is very hard to determine. I spend a lot of time trying to think as if I were Lord Frost and I am not very good at it. Again, perhaps it is my misplaced optimism, but there are certain things that might be said in order to influence negotiations that are not quite as hard-line in the UK Government's mind as perhaps they might say that they are. Maybe there is some hope that we can find an agreement and move forward. That is the only way out of this cycle of constant negotiations.

The Chair: Thank you very much. Optimism, whether misplaced or not, is usually the best policy. That was a good point on which to finish. I would like to thank all three of you very much indeed on behalf of all of us for giving us your time, giving us a huge amount to think about and answering our questions with great skill and immense, for us, interest. We will, as I said earlier, send you a transcript to look at.