

European Affairs Committee

Protocol on Ireland/Northern Ireland Sub-Committee

Corrected oral evidence: The role of the CJEU in relation to the Protocol on Ireland/Northern Ireland

Thursday 20 January 2022

10.30 am

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

Evidence Session No. 1

Virtual Proceeding

Questions 1 - 10

Witnesses

I: Professor Catherine Barnard, Professor of European and Employment Law, University of Cambridge; Martin Howe QC, 8 New Square, and Chair of Lawyers for Britain; Anton Spisak, Policy Lead for Trade and Productivity, Tony Blair Institute.

Examination of witnesses

Professor Catherine Barnard, Martin Howe and Anton Spisak.

Q1 The Chair: Good morning, everybody, and welcome to this public meeting of the Protocol on Ireland/Northern Ireland Sub-Committee. Today, we are holding an evidence session to inform the committee’s short inquiry on the role of the Court of Justice of the European Union in relation to the protocol. We are joined by a very distinguished panel of legal and political experts. You are all very welcome and we much look forward to the evidence you will give us.

I would be grateful if you could briefly introduce yourselves for the record, if not for us, the first time you speak. Today’s meeting is being broadcast and a verbatim transcript will be taken for subsequent publication. It will be sent to each of you to check for accuracy. I refer to

the list of Members' interests as published on the committee's website. I think that is all from me by way of introduction. Lord Hain will ask the first question.

Q2 Lord Hain: Welcome everybody and thank you for your time. In giving evidence to us, beginning perhaps with Professor Barnard, can you explain the role of the Court of Justice of the European Union in relation to the protocol? I have two sub-questions. First, in what circumstances and how frequently would you expect the CJEU to be involved in issues pertaining to the protocol? I ask because there is a whole issue about sovereignty, and a great deal of fuss is made about it by the Government and their supporters. In your view, how frequently will the CJEU actually be involved in practical terms?

Professor Catherine Barnard: Thank you very much for your question. I am professor of EU law and employment law at the University of Cambridge.

In answer to your direct question, the Court of Justice is involved in respect of the Northern Ireland protocol probably in three ways. The first and most obvious is via Article 12(4) of the Northern Ireland protocol, which applies all the EU remedies to the relevant provisions of the Northern Ireland protocol, by which I mean the possibility of Northern Ireland courts making references to the Court of Justice under Article 267, the Commission bringing enforcement proceedings against the UK in respect of breaches under the Northern Ireland protocol, and the possibility of firms in Northern Ireland challenging EU provisions.

Unfortunately, it is more complicated than that, because secondly, Article 131 of the withdrawal agreement gives the Commission the power to start enforcement proceedings in respect of any breaches committed by the UK under the transition period.

Thirdly, there is still a role for Part 6 of the withdrawal agreement, and that is the general dispute resolution mechanism. In summary, the general dispute resolution mechanism has two limbs. Limb one is a political mechanism: consultation to try to resolve the problem. Limb two is that if the political vehicle does not sort it out, the matter goes to an arbitration panel. That arbitration panel has the power to, and indeed must, refer matters to the Court of Justice if a point of EU law is at stake. So, in fact, it is a combination of those provisions that apply in respect of Northern Ireland and any breaches under the protocol. That is quite a long answer to your question, but hopefully it is a complete one.

On the second part of your question about how often - will the dispute resolution mechanism be used, the provisions have already been invoked, although no procedure has been taken through to completion. As you will recall, when the UK unilaterally extended the grace periods under the Northern Ireland protocol, two of those procedures were engaged. On the general procedures, the Commission started enforcement proceedings against the UK, using the powers under Article 12(4), and the EU started proceedings under the general dispute resolution mechanism under Part

Six of the Withdrawal Agreement for a breach of the duty of good faith. That was the first time they were invoked. Those proceedings are now on hold.

Secondly, the Commission started proceedings, we think under the powers in Article 131, when the UK started to make amendments to the internal market Bill. When the UK decided no longer to make those changes, which reneged on some of the commitments under the Northern Ireland protocol, those proceedings were stopped.

My final point, and then I will be quiet, is that the number of cases brought by the Commission was relatively high. If you go back to 2016 and the time of the referendum, although the UK was at the low end compared with other states, 28 proceedings were brought by the Commission against the UK in that year, but only half of those had anything to do with a single market issue. Most importantly, there has been a very interesting recent publication by Daniel Kelemen which says that the Commission has backed down on using those enforcement proceedings and now on average brings proceedings against a member state only twice or three times a year. Two proceedings have been started by the EU against the UK and not brought to completion, but if things stabilise, we do not expect many proceedings to be brought directly by the Commission.

Lord Hain: Thank you. That was extremely clear. Would there be any representatives from Northern Ireland or the UK on the arbitration panel? How is it formed?

Professor Catherine Barnard: The list of members has already been drawn up. They are experts from all fields. I am afraid that I have not checked whether there is a Northern Ireland member, but there are certainly distinguished members from Great Britain, one of whom is Sir Patrick Elias, a Court of Appeal judge.

Lord Hain: Martin, could you give us your view on that question and the sub-question?

Martin Howe: Certainly. To introduce myself, I practise at the Bar, principally in the fields of intellectual property law, and until we left the European Union I did a great deal of EU law, particularly in relation to the free movement of goods and services. Additionally, I have a more political role in that I am chairman of Lawyers for Britain, the legal group that campaigned for a leave vote in the referendum. We have since carried on our activities in trying to implement Brexit in a beneficial way for the United Kingdom.

As a matter of minor interest to you, Lord Hain, at one point I was Conservative parliamentary candidate for Neath. I was told on election day by a voter, "No chance here, boyo", which turned out to be quite a prophetic statement.

Lord Hain: I hope you enjoyed the time you were there.

Martin Howe: To answer your substantive question, I agree with Professor Barnard's enumeration of the legal routes by which the European Court of Justice can become involved in making binding decisions under the protocol. One minor but potentially important point to emphasise is that the jurisdiction is not limited to within Northern Ireland. In particular, under Article 10 of the protocol and the state aid provisions, the jurisdiction extends across the whole of the United Kingdom.

The second point, linked to that, is that Professor Barnard catalogued the occasions on which the Commission has taken action and its likely future actions. All of that depends perhaps on the political scenario, in that one would anticipate that it may well be holding back legal action while talks and negotiations progress. Another route, which is the preliminary reference route, may in the long term be very significant, in particular in the field of state aid where commercial interests, including commercial interests in Great Britain-based businesses, will be interested in invoking the state aid provisions.

There is no limitation on the scope of those provisions geographically; there is a functional limitation, which is that there has to be a potential effect on trade under the protocol. For example, if you give a subsidy to a plant in Great Britain that supplies goods into Northern Ireland, that functional effect could well be met. The preliminary reference procedure, as we have seen over the years, is an extremely powerful tool by which the Court of Justice effectively imposes its interpretation of the rules on member states. Of course, Northern Ireland, for many purposes, and the whole of the United Kingdom in effect for the state aid provisions, is in the position of being a member state, effectively, except that we no longer have representatives on the Court or in the Commission.

Lord Hain: Anton?

Anton Spisak: Thank you very much for the invitation to be here today. It is a great honour to be on this panel with such distinguished guests as Professor Barnard and Mr Howe. I am the trade policy lead at the Tony Blair Institute. Previously, I was a civil servant and worked on the Brexit negotiations, including the protocol negotiation in autumn 2019.

Professor Barnard explained the role of CJEU in the protocol very comprehensively, but perhaps I could focus on the circumstances in which the CJEU might get involved and how frequently. There are two possible scenarios in which the Commission could choose infringement against the UK in respect of the protocol. One is if there is an incorrect application of EU law that falls under the scope of the protocol, which is what the Commission tried to do last year when it tried to invoke the provisions with respect to the unilateral extension of the grace periods.

The second scenario relates to the incorrect transposition of EU law, which I am sure many of you are very familiar with from the time when the UK was still a member of the European Union. Those are the two central scenarios where you can envisage the infringement procedure

being triggered, which could eventually result in a case being brought before the EU Court of Justice.

In all this it is important to remember that the question of how frequently that procedure is applied depends on some of the softer factors in the relationship, one of which is trust. In many cases, the first point of recourse for both the UK and the EU is a diplomatic channel. That is a discussion in the Joint Committee, or the specialised committee on Northern Ireland in the case of a dispute over the Protocol. You would have a discussion about the issue at stake. It is only once that process fails that the EU will try to go through the formal process. If there is very little trust in that relationship and the operation of the protocol, you can envisage circumstances in which the second recourse, which is the use of the formal process, may be used.

It is important to bear in mind that there is a degree of discretion about whether or not the Commission decides to use the procedure. It depends on the atmosphere, the trust in the relationship and how quickly potential issues can be resolved through more diplomatic or political channels.

Lord Hain: When you say discussion, do you mean negotiation? What do you mean by that term?

Anton Spisak: The text in the protocol itself and in the withdrawal treaty refers to consultation, but in principle it depends on the problem the two sides are trying to resolve. It can be a negotiation, because in many cases the role of the Joint Committee is to discuss which EU legislation falls under the scope of the protocol. That amounts to a de facto negotiation about whether it falls under the protocol or not. But if it is a dispute about incorrect transposition or application of provisions that have already been agreed to be within the scope of the protocol, I would describe it as a discussion more than a formal negotiation.

Lord Hain: On the second part of my first question, can anything be learned for the operation of the protocol in the role that the CJEU has played in relation to the operation of the single market rules in the cases of Norway and Switzerland? Anton, as you were very brief—thank you—perhaps you could begin on that.

Anton Spisak: The Norwegian and Swiss examples are very different. As many of you know, there is no role for the European Court of Justice as such in the EEA agreements. Instead, there is a separate judicial body called the EFTA Court, which essentially does the same job as the European Court of Justice for the application of EU law, but it does it for the application of EEA law, which is all the EU single market legislation that EEA EFTA member states have to transpose, and forms part of the EEA agreement.

What is interesting about that example is that a lot of people have talked about it in the last couple of years as a potential solution. I am a little more sceptical about it, because the EFTA Court was formed in the very specific circumstances of the EEA agreement and is a result of the

evolution of EU case law on the question of the EEA agreement itself. It is a unique judicial body that deals only with questions of EEA law, not questions of EU law more broadly. Even though substantively they may be the same questions, legally they are quite different.

Lord Hain: For the single market, in Northern Ireland terms it is similar, is it not?

Anton Spisak: Technically, it is the same law, but it has a different legal status in the EEA agreements than in the Northern Ireland protocol. The Swiss case is far more interesting than the Norwegian case for two main reasons. One is that the experience of Switzerland and its relationship with the EU over the last 20 years teaches us something about the EU's attitude to the use of dispute settlement and how important it sees the role of the ECJ and, more broadly, the importance of having an enforceable dispute settlement mechanism in its relationships with third countries.

For many years, the EU has been concerned that the absence of a formal dispute settlement body creates a big problem in managing the body of about 100 different agreements that the EU has with Switzerland. A couple of years ago, it began negotiations with Switzerland—I think in 2014—to try to deal with that question. What this means for the UK is that it is very difficult to envisage a scenario where the EU would want to enter into a relationship with a third country that would apply EU law in any shape or form, but would not have any kind of quasi-judicial body resolving disputes and its dispute resolution would only be political in nature. That is one interesting aspect of the Swiss experience.

The second has to do with the recently concluded institutional framework agreement that the European Commission and the Swiss Government agreed on. In that agreement, there is a formal dispute settlement body that is exactly the same as the dispute settlement body that the UK and the EU agreed for the main body of the withdrawal treaty. That is one element of the package that Professor Barnard talked about.

While this agreement was eventually rejected by the Swiss side, it is nevertheless an interesting precedent because not only does it suggest the EU sees that as an acceptable model for its third-country relationships when they apply EU law, but also because there is an alternative that does not involve a full direct jurisdiction of the CJEU as per Article 12 of the Protocol. That alternative involves the use of an arbitration panel and a role for the European Court of Justice when it is involved in interpreting EU law, but it is not the final arbiter of those disputes. That is a very interesting experience that has often been overlooked in discussions in the UK but has informed the EU's experience of negotiations with us.

Lord Hain: Martin, I saw you nodding at one point in relation to Norway.

Martin Howe: The EEA agreement is an interesting parallel. The EFTA Court, which Mr Spisak referred to, seeks to apply the EU single market

rules and on the whole tries to mirror ECJ jurisprudence where it can. However, that court, in technical terms and in international law terms, is an entirely independent court of the EEA states and is not bound in the same way by ECJ jurisprudence as is the case under the Northern Ireland protocol. The Northern Ireland protocol is completely analogous to the situation of a member state of the European Union, with the exception that there is no participation by Northern Ireland or UK citizens in the relevant institutions, which makes it quite an extraordinary set-up in international treaty practice.

By contrast, the EFTA Court contains judges from the EEA states. The history of it, which Mr Spisak briefly mentioned, is that there was an attempt to set up an EEA court, which would have been a joint court between the EU and the EEA states, consisting of some judges from the ECJ and some judges from the EEA states. That court would in practice have been in a position to set EU single market laws across the whole of the EU as well as within the EEA states. For that reason, and because of its jealous guarding of its judicial territory, the ECJ held that that court structure would be incompatible with its own powers under the founding treaties. That is why the alternative route of setting up a multinational but separate EFTA court was taken. One aspect of that, if one looks at it as a possible precedent, albeit that it is made up of judges from the EEA states with no EU membership, is that it is still a multinational court. That may be one reason why the EU, or the EC as it then was, felt it was acceptable. I am not sure that that is a particularly fruitful route to go down if one is thinking of reforming the Northern Ireland protocol.

On another point, I may not be up to date with developments in Switzerland, but I thought that the agreement Mr Spisak mentioned failed to secure enough support in Switzerland to be ratified. One reason for that was the intrusion of the Ukraine clause, which also features in our withdrawal agreement, giving the ECJ binding jurisdiction over Switzerland.

Lord Hain: Catherine, do you have anything to add to what our other colleagues have said?

Professor Catherine Barnard: I would like to make a couple of points. The first is on the EEA agreement between Norway, Liechtenstein, Iceland and the EU. Article 6 of the agreement expressly requires the EFTA Court to take into account case law of the Court of Justice. Indeed, the homogeneity principle requires an ongoing obligation for the EFTA Court to follow the Court of Justice jurisprudence, and they are pretty closely aligned.

Secondly, it is possible under Protocol 34—for those who would like to see it—for cases to go before the Court of Justice even under the EEA agreement, if the EEA text is the same as the text under EU law. This provision has never been used. The interesting question, once cases go before the Court of Justice (following a reference from a Member State court) is what happens to them. There is something called the Polydor principle, which says that you do not necessarily get the same outcome,

according to the Court of Justice, when there is an interpretation under one of those agreements that is not part of EU law, because the whole purpose of EU law does not apply to those agreements.

The interesting question for us in respect of any cases that go to the Court of Justice under the Northern Ireland protocol is whether the Court of Justice will apply—hook, line and sinker—all the Court of Justice case law on a point raised under the customs union or the free movement of goods, or whether the Court of Justice will say, following *Polydor*, that Northern Ireland is in a different position from a member state of the EU because it is not part of an ever closer union; it is in the unique situation of just being bound by the rules on goods and the customs union, so it has nothing on services and the free movement of people.

Of course, the answer is that we do not know until the first case goes there, but something to watch out for is whether the Court of Justice insists on absolute dogmatic identity between EU case law and the case law that may evolve under the Northern Ireland protocol, or whether it will apply *Polydor* and say that Northern Ireland is in a different situation and it will interpret things slightly differently.

Lord Hain: I am sorry to press again and take up more time. Would there be a case or an opportunity for, let us say, the Northern Ireland Executive to make a point in respect of their distinct status, and would the Court of Justice be inclined to listen to that?

Professor Catherine Barnard: That is the interesting issue going forward: whether Northern Ireland or the UK Government will say that there is a possibility of intervention by the Northern Ireland Executive, and they start saying that Northern Ireland is in a unique situation, and, applying *Polydor*, they do not take the whole of the ECJ *acquis*, the ECJ case law, and apply it to Northern Ireland because Northern Ireland is special. It depends on how the case is framed and whether it is an action starting in a national court with claimants, as Martin Howe suggested, or whether it is the Commission bringing enforcement proceedings.

Lord Hain: Thank you.

The Chair: Thank you. That was a very interesting series of answers. I have to say that the *Polydor* principle is a new point to me, but it is clearly a very important one.

Q3 **Lord Thomas of Gresford:** What is your assessment of the Government's concern in relation to governance and the jurisdiction of the European court as set out in their July 2021 Command Paper, *Northern Ireland Protocol: the Way Forward*, and subsequently?

As we have already heard, the protocol is part of the withdrawal agreement, and the dispute resolution mechanisms in the withdrawal agreement would obviously apply to an issue arising in Northern Ireland that would go to the political Joint Committee and then further, if necessary, to arbitration. We know what the structure of that is: 10 people are nominated by the UK and 10 by the EU, and there is joint

agreement on the chairman. I would like to know from Martin Howe, first of all, whether there are any objections to the dispute resolution mechanism in the withdrawal agreement.

Martin Howe: Personally, I think that what I referred to as the Ukraine clause is wholly unacceptable, and that agreeing to that in the context of negotiating the withdrawal agreement was an egregious failure on the part of those negotiating that agreement. That part of the agreement was negotiated under the Theresa May Administration and, regrettably, was not removed or altered by the subsequent Administration after Boris Johnson became Prime Minister. It is wholly contrary to international treaty practice for one party to an international treaty to have its own domestic courts creating binding rulings for the other sovereign. The argument that for some reason the European Union is special and only its courts are allowed to interpret its own laws is, I consider, a completely unjustified attempt to make the EU exceptional and different from any other sovereign that negotiates international treaties.

Lord Thomas of Gresford: Can I pursue that? The withdrawal agreement mechanism is that the arbitration panel is the final decision-maker, but if a point of European law is involved it can refer it to the European court for a ruling. Is that not sensible? You would not expect it to refer it to a British court for a ruling on the meaning of European law.

Martin Howe: No. I think it is completely unacceptable, and I will tell you why. It is not that it can refer it; it is obliged to refer it. It puts it in the same position as the court of the member state, which, as you know, is the judge of the facts and pronounces the formal judgment. If it is an issue of EU law, the effective decision-maker would be the Court of Justice. The problem in doing that is that you are allowing an organ of one treaty party, which owes no kind of obligation or duty to the other treaty party, to have a final decision on an international dispute. I do not know of any precedent for this kind of thing, apart from the three countries on which the EU previously imposed such a clause, which were absolutely desperate: Moldova, Ukraine and Georgia.

Lord Thomas of Gresford: Would you be satisfied if there was provision for the arbitration panel to refer any point of English law to the Supreme Court of this country to determine?

Martin Howe: I do not know of any international precedent for that either. Obviously if it were mutual, it would make it more balanced.

Lord Thomas of Gresford: That would be a way to see a resolution of this problem, because there is no way the EU will ever agree that any body other than the Court of Justice should interpret EU law. Is that not right?

Martin Howe: I do not agree with that. If you enter into a treaty with the United States, the United States does not impose a clause saying that if an international tribunal decides some point of US law it has to be referred to the US court system, or the Supreme Court. This idea is quite

extraordinary. International tribunals frequently deal with issues involving the laws of treaty parties. For example, a lot of investor-state arbitration is involved in analysing the legal systems and laws of the states that are subject to the dispute. International tribunals do that in a conventional way, by looking at the text and, if necessary, by taking expert evidence on the laws concerned.

Lord Thomas of Gresford: It follows from that that you think that the arbitration panel should determine a point of European law if it arises.

Martin Howe: Indeed.

Lord Thomas of Gresford: That would be your position.

Martin Howe: Absolutely.

Lord Thomas of Gresford: Perhaps I can ask Anton Spisak to comment on that.

Anton Spisak: I agree in general with the statement that it is highly unusual in international affairs for one party to a treaty to be subject to the jurisdiction or institutions of another, but we have to bear in mind the context, which is that the withdrawal agreement is a highly unusual treaty in itself, and so is the Northern Ireland protocol as part of that treaty.

What is so unusual about the withdrawal treaty, exactly as Mr Howe described so well, is the presence of EU law in it. As we know, there is a lot of case law and a clear doctrine of the autonomy of EU legal order which the European Court of Justice itself has established on the conditions in which an external tribunal can interpret provisions of EU law. We can dispute whether that is right or wrong, but that is the reality that has been established over the past 30 years and it is extremely unlikely that the European Commission, or other institutions of the EU, would agree to any international treaty that diverged from those principles. The main reason is simply that any treaty the EU entered into that diverged from those principles would be judged unlawful under EU law itself, and the European Court of Justice could opine on that. Those are the constraints within which the European Commission was operating when it was thinking about the many options for dispute settlement bodies.

The most obvious way to get around that, and there was an attempt to do it very early in the negotiations in 2017, is to agree to only political dispute settlement, which would not involve any quasi-judicial body like the arbitration panel to opine on questions of EU law. In that case, you could argue, as could the European Commission if it wanted to, that there would be no need for the European Court of Justice to be involved, but the cost would be that there would be no other way of resolving disputes but the political route. You can envisage a scenario where that was acceptable to the EU, but, for the reasons that I described relating to the experience with Switzerland, the EU has seen that as something that

would complicate the relationship with a third country, because it has had that semi-traumatic experience with Switzerland over the last 20 years. That is an important piece of context.

As to your question about what justifies the broad use of Article 12 of the protocol, from the EU perspective—I am not justifying it, just explaining it—it is the fact that the UK Government are essentially applying and enforcing EU law when it comes to the movement of goods from Great Britain to Northern Ireland. Therefore, you need all the institutional infrastructure to be able to do that. That is where the EU is coming from. We could dispute whether or not that is the right thing, and I am sure there will be a discussion about it later, but I want to add that context.

Lord Thomas of Gresford: I am conscious that I am sharing this question with Lord Dodds, so I will open the floor to him, if I may.

Q4 **Lord Dodds of Duncairn:** Thank you for the views expressed so far. It has been very interesting. Martin, on the whole issue of the Court of Justice of the European Union. People say that this is being introduced in the Command Paper by the UK Government, it was not raised previously and it seems to be an additional red line. Many people in Northern Ireland who object to the democratic deficit that is at the heart of the protocol would say that the Court of Justice issue is there because of a more fundamental point, which is that Northern Ireland is subject to laws made by a foreign body over which no elected representatives in Northern Ireland have any say or vote. Not only is that in itself undemocratic, but we are separated from the rest of our own country, in that the rest of the UK is not placed in that situation. Is that not the fundamental point?

Martin Howe: I would agree with that. The problem of a foreign court ruling over part of the United Kingdom arises because the provisions of the protocol apply EU law to part of the United Kingdom in a way that does not apply in other parts of the United Kingdom. The fundamental political, constitutional and legal problem of the protocol is not so much the border checks, serious as they are; it is the more fundamental question of the internal application of EU laws within Northern Ireland.

I do not think that a lot of people in politics, certainly in Great Britain rather than in Northern Ireland, fully appreciate the problems, but it will become increasingly problematic in the long term. As European Union law progressively diverges from UK law, because of changes on either part, more and more serious practical problems will arise. To take just one random example, farmers in Northern Ireland will not have the advantages of farmers in Great Britain in being able to grow gene-edited crops.

The medicines field is one of the most serious things. The application of European Union medicines laws within Northern Ireland will lead to a scenario where medicines are available in Great Britain but are not available to patients in Northern Ireland. That is a particularly egregious example. Prescription medicines are tightly controlled, and there is no need to have this regime in order to prevent them crossing the border,

yet we have an entire panoply of European Union law that denies either the UK Government or the Northern Ireland Assembly any democratic input into major sections of law that apply to the people of Northern Ireland.

Lord Dodds of Duncairn: The point I am making, and I would be interested in what Anton and Catherine say on this as well, is that you can try to address issues in and around the court and how it operates, but, fundamentally, as long as EU law applies directly in Northern Ireland, you cannot really get round this problem. Is that not correct?

Martin Howe: The fundamental problem would remain. You could alter the jurisdictional mechanisms of the court, but as long as you still have an underlying obligation to mirror EU law within Northern Ireland, the fundamental constitutional, democratic and practical problems, which will become greater and greater as divergence takes place, would still remain.

Professor Catherine Barnard: Lord Dodds, you obviously make a very valid point, and it is one that concerns me too—the democratic deficit, going forward, of new legislation. Of course, in respect of existing legislation, the UK was at the table. The EU's non-paper on engagement with Northern Ireland stakeholders, which was published as part of the package in October, did not go far enough towards addressing that very fundamental issue.

Going back to your specific question about the role of the Court of Justice, the EU's perspective is that these are EU rules, so it is the EU court which rules on them. It is quite hard to get away from that argument as long as so much of the EU body of law is in the Northern Ireland protocol. This is where I would disagree with Martin Howe; there is a difference between the Northern Ireland protocol aspect of the withdrawal agreement and the trade and co-operation agreement. The trade and co-operation agreement is a free trade agreement that is not borrowing large tracts of EU law and putting it in the trade and co-operation agreement; it is much more of an international agreement, so there is no role for the European Court of Justice.

Going back to the withdrawal agreement, specifically the Northern Ireland protocol, you may not like what is in the Northern Ireland protocol, for understandable reasons, but the fact is that that is the text we have, and the text we have relies on large tracts of EU law. The EU court of justice jealously guards the autonomy of EU law and would say—it has been saying it for at least 20 years but much more vociferously in the last decade, such as in decisions like *Achmea*, for those of you who are lawyers, Opinion 1/91, and Opinion 2/13 on the accession to the ECHR—that only its court, the Court of Justice, can have the final say on the interpretation of that.

Lord Thomas of Gresford: Professor Barnard, can I put to you the suggestion that I put to Martin Howe about having a similar provision, that only points of English law—or Northern Irish law, I should say—that

arise should be determined by the Supreme Court in the arbitration process? What do you think of that?

Professor Catherine Barnard: The answer at one level is that it would make sense and it would have a pleasing equilibrium, which at the moment does not exist under the Northern Ireland protocol. At the moment, we are focused so extensively on EU law, the EU rules and the 300 or so EU regulations and directives that apply that it is difficult to see when there would be a role for the Supreme Court. Yes, of course, that would be a more nuanced and balanced way forward, but how often it was—

Lord Thomas of Gresford: It would be a gesture, would it not?

Professor Catherine Barnard: It would.

Lord Thomas of Gresford: I cannot imagine that a great deal would arise, but at least it would be a gesture balancing the—

Professor Catherine Barnard: I agree. It would balance, although, in reality, because the substance is EU law it seems likely that the ECJ would be more troubled with workload than the Supreme Court.

There is one other point I would like to make on the back of that. If you are looking for silver linings in the Northern Ireland protocol, you could say that, from the point of view of producers in Northern Ireland, it is a good thing that they have access to the Court of Justice, because if they are being bound, as Lord Dodds so rightly pointed out, by all these EU rules, they should be able to have access to some mechanism to challenge those rules if they do not like them, and that is what Article 12(4) of the protocol gives them. Conversely, if the rules are not being properly applied, it does not create a level playing field, and they should be able to challenge that too. Of course, Article 12(4) delivers on that too.

The Chair: Thank you very much, Professor Barnard. I am conscious of time moving on. Can we move on to Baroness Goudie's question? Perhaps Anton Spisak could answer it first.

Q5 **Baroness Goudie:** Good morning. I have found it fascinating so far. Thank you. Are the Government's concerns regarding the jurisdiction of the CJEU legitimate grounds for invoking Article 16? What would be the implications if Article 16 were invoked on those grounds? What are your views, because there are a number of arguments? Anton first, please.

Anton Spisak: Thank you. It is a fascinating question. I am not sure there is one clear answer to it yet, but I will try to give one. Article 16 says that a safeguard can be applied on a temporary basis, if the application of the protocol leads to serious economic, societal or environmental difficulties, or to trade diversion. The question is whether the presence of the Court of Justice of the EU in the Protocol and its associated difficulties, however you define them, fall under the scope of the text of Article 16. I do not believe that it does not, because Article

16's text implicitly refers to the circumstances leading to difficulties on the ground that can be clearly evidenced.

If, for example, the presence of the European Court of Justice led to some societal difficulties in Northern Ireland and there was clear evidence of that, it would clearly provide grounds for invoking Article 16 on that basis. That said, there might be other circumstances in which to trigger Article 16. Trade diversion is another example. A clearly disrupted supply of medicines might provide some grounds for thinking about triggering Article 16 and so on, but I do not think Article 12 of the protocol, which is about the jurisdiction of the European Court of Justice, provides that basis.

We can speculate about what the EU would do in circumstances where the UK Government triggered Article 16, arguing that the Court of Justice is the main problem. I imagine it would say that the use of Article 16 is not legitimate, and would try to challenge that before the arbitration panel that we talked about previously, and basically trigger a dispute about whether the invocation of Article 16 by the UK Government was legitimate in the first place. Those are my main thoughts, but I know there is a whole range of views that no doubt will differ from that.

Baroness Goudie: Thank you. Professor Barnard.

Professor Catherine Barnard: Thank you. I broadly agree. The purpose of Article 16 is to deal with an issue that is temporary, and to deal with that specific problem. It is short term and it allows for a limited, and indeed conditional, deviation from the provisions of the protocol. Article 16 is not a basis for rewriting the protocol as a whole. The very fact that Article 13(8) is in the text of the Northern Ireland protocol envisages that there might be a different route, but Article 16 is to deal with problems, for example over medicines getting on to the Northern Ireland market. It is not to deal with the structural problems that you and Lord Dodds have referred to about the role of the Court of Justice or, indeed, the democracy deficit in the Northern Ireland protocol.

In answer to the question about what could happen next if the UK invokes it, in my view, in an incorrect way—namely, to redraft the Northern Ireland protocol—that would not be invoking Article 16 for the purposes for which it is intended. If the UK were to invoke it for an inappropriate reason, certainly at a minimum the EU could start the rebalancing mechanism under Article 16(2). It could also start the dispute resolution mechanism under Part 6. There is also—I think we have some evidence that the EU has talked about this—a whole range of provisions in the trade and co-operation agreement that might pave the way for much more dramatic consequences, including starting the process to terminate the whole treaty, which would take a year, or to suspend the operation of the trade and co-operation agreement, which would take nine months. The EU might engage in other safeguard approaches, including focusing on retaliation in respect of other aspects of the work such as fisheries. It is potentially quite serious if the UK invokes Article

16 inappropriately rather than for the purposes for which it was introduced.

Baroness Goudie: I feel it is a very serious issue. Martin Howe, please.

Martin Howe: I agree with Mr Spisak's answer. It is very hard to see how the issue of the Court of Justice's jurisdiction as such could give rise to an invocation of Article 16. Article 16 would need to be invoked on other grounds, although one consequence of the invocation might well be that the safeguard measures that are adopted would themselves not be within the scope of ECJ jurisdiction, and thereby the jurisdiction of the court would in effect be extensively diminished if appropriate safeguard measures were adopted.

I have a little difference of emphasis from Professor Barnard over the scope of what can be done under Article 16. It is important to note that Article 16 provides two grounds for taking safeguard measures. The first is the serious economic, societal or environmental difficulties that are liable to persist.

The other is diversion of trade. It seems to me that there is compelling evidence that the operation of the protocol is causing diversion of trade that was previously going from Great Britain to Northern Ireland and is going from the EU to Northern Ireland instead, or trade from Great Britain has to divert through the Republic—like the Amazon warehouses that had to be set up there—because of the problems caused by the protocol.

It seems to me that safeguard measures can validly be taken under Article 16 as long as the problems persist. If they are long-term problems, you can validly take the safeguard measures under Article 16, which are long term in nature. That seems to me what the Command Paper was foreshadowing as a possibility with the system of allowing goods to come in from Great Britain without needing to satisfy EU law formalities, provided that they are to be consumed in Northern Ireland when they cross the border.

Professor Barnard mentioned retaliation. It is important to note that the word "retaliation" does not feature in Article 16. It does not authorise retaliatory measures. It authorises rebalancing measures in consequence of the safeguard measures, which themselves need to be proportionate. There is a lot of bluff and bluster from the European Union about retaliation under the TCA, or suspending the TCA. There is very little that is concrete behind it. It should be borne in mind that the TCA gives enormous advantages to the European Union in allowing tariff-free access to the UK market of its enormous trade surplus of goods into the UK. The idea that it would seriously disrupt that to considerable damage to its own industries needs to be taken with caution, in my view.

Baroness Goudie: Thank you very much.

Q6 **Baroness Ritchie of Downpatrick:** Thank you for the evidence we have

received so far. The Government produced their Command Paper on 21 July last year. Do you perceive any evolution in the Government's position since the publication of that Command Paper?

Professor Catherine Barnard: Thank you for your question. Yes, there is an evolution in the Government's position. In Lord Frost's statement on the protocol on 17 December, which I think was his last statement on the issue before he resigned, he notes, "The Withdrawal Agreement already provides for the use of an independent arbitration mechanism"—that is what we have already heard about in Part 6 of the withdrawal agreement—"and the simplest and most durable way forward would be to agree that this should be the sole route for settling disputes in the future". He appears to be suggesting that the Part 6 dispute resolution mechanism of the withdrawal agreement should be extended to the Northern Ireland protocol and thus Article 12(4) of the Northern Ireland protocol—the provision that applies all the EU remedies—should be replaced by the application of Part 6.

It is very difficult to see from what Liz Truss has said publicly, but, as far as we can tell, she is following the line that her predecessor took on the role of the Court of Justice. There is evolution. It seems that Lord Frost was prepared to move away from the argument that there should be no role whatsoever for the Court of Justice, and instead there should be a more residual role through the mechanism that Anton Spisak has been talking about, which is consultation, and then, if that does not work, off to the arbitration panel. The arbitration panel must refer any point of EU law to the Court of Justice, but the case is decided by the arbitration panel, not the Court of Justice.

Baroness Ritchie of Downpatrick: Thank you. How, therefore, would you interpret the emphasis in recent statements by the Foreign Secretary on the need for "independent arbitration" and for ending the role of the Court of Justice of the European Union as "the final arbiter of disputes" in relation to the protocol?

Professor Catherine Barnard: Depending on how you read it, you could say that there is independent arbitration under the withdrawal agreement and the Part 6 mechanism. Both sides have put forward the names of their candidates, and they have been published in the *Official Journal*. As regards the Court of Justice not being the final arbiter, of course, the Court of Justice will have a role. It must interpret EU law if there is a point of EU law in dispute, but the final arbiter will not be the Court of Justice; it will come back to the arbitration panel. That would square with extending the Part 6 mechanism to the Northern Ireland protocol.

There are two points I would like to make. To go down that route requires a mandate from the EU, and there is no evidence that the European Commission has been given the mandate to make an offer, to make such a radical change. That is the first main issue. Secondly, if there are any issues under the Northern Ireland protocol, given the structure of the Northern Ireland protocol, which is a single market for

goods and a customs union, these are, by definition, EU law matters, so it would seem to me that there will be a regular reference to the Court of Justice if a case gets as far as an arbitration panel.

Baroness Ritchie of Downpatrick: Thank you. Anton?

Anton Spisak: I very much agree with what Professor Barnard just said. Relating to your previous question, perhaps I could add something about how the position of the Government has evolved. What is very interesting about the Government's position, and this also includes the Command Paper, is that they explicitly talked about arbitration.

Why is that interesting? The arbitration panel is a quasi-judicial body, and there is clear EU case law about what that means for a potential role for the European Court of Justice if there are aspects of EU law involved. People who drafted the word "arbitration" in the Command Paper and who maintained that public line must have known that if there are aspects of EU law in the protocol or the withdrawal treaty, there must be some role for the European Court of Justice in offering its interpretation of what that EU law means. It would have been very different if the Government had said at the time that what they wanted was primarily a political dispute settlement body without any role for the arbitration panel. In those circumstances, I envisage that you could have a discussion with the EU about an appropriate dispute settlement body that would not involve the ECJ, but that is not what the Government's line was, so I think that is very interesting.

There was another very interesting point in the evolution of the Government's position when Lord Frost was still the Minister responsible for the negotiation. He said that it is not the Court of Justice that is the problem; it is the presence of EU law in the protocol that is really at the core of the problem. That, to me, seemed to suggest some evolution of the Government's position from not simply removing Article 12 but actually trying to limit the scope of EU law as it applies to the protocol, and therefore, by extension, trying to minimise any interference by the Court of Justice in the protocol. It is a bit of a nuanced point, but it is quite important.

With Liz Truss taking over the negotiation, it seems that the language and the position has evolved a little bit. Again, there is emphasis on arbitration, and there is the added language of "the final arbiter of disputes", which to me suggests something very similar to what Professor Barnard said, which is that the Government might be happy to live with something like a more limited role for the European Court of Justice in offering interpretation of what EU law in the protocol means, as long as it is the arbitration panel that makes the binding decision and it is the decision of the arbitration panel that is binding on the parties to the agreement—the UK and the EU.

Baroness Ritchie of Downpatrick: Thank you. Martin?

Martin Howe: I do not know what the Foreign Secretary means by her words. It is conceivable that Professor Barnard's interpretation of her words is correct, in which case I would certainly be extremely disappointed and would regard it as sophistry. To say that the arbitration panel is the final arbiter in a case where an issue of EU law is involved is, I think, a sophistic statement, because the arbitration panel in those circumstances merely acts as a postbox and rubber stamp for the substantive decision-maker, which would be the Court of Justice at Luxembourg. You can look at the words and choose how to interpret them. It is difficult to interpret.

It is notable that in the face of greater resistance the European Union did not in the end insist on including the Ukraine clause in the arbitration mechanism in the TCA. Of course, you can say that is linked to the fact that the TCA does not contain provisions that directly apply European Union law in the same way as the Northern Ireland protocol and other aspects of the withdrawal agreement do. None the less, it seems to me that the way forward to normalising our future relationship with the European Union is to take the TCA template and say, "That applies to relations between the EU and Great Britain. Why shouldn't it apply to relations between the European Union and Northern Ireland?" That is the only viable way forward long term, which then puts Northern Ireland on the same constitutional basis as Great Britain, as indeed is required by the Acts of Union 1800.

Baroness Ritchie of Downpatrick: We are entering into quite a minefield with all this, with the different opinions offered.

Lord Thomas of Gresford: Before we leave that point, I have to say that I have flown a kite for having a special chamber of the European court, with equal judges from the UK and the EU, for determining these things. This is a very brief question, so I will not develop that. Does it have any appeal at all to anybody?

Martin Howe: It is very similar to an EEA court proposal that was shot down by the Luxembourg court as incompatible with the founding treaties, so I imagine that would be a problem.

Professor Catherine Barnard: I very much agree. In Opinion 1/91, on the EEA court, that was exactly what was proposed. It seems logical and sensible, yet the Court of Justice struck it down as interfering with the Court of Justice's autonomy.

Q7 **Lord Godson:** Thank you to our distinguished witnesses for their most valuable testimony. I know this has been touched upon in one or two comments so far, but I wonder whether you could reflect in a little more detail on two particular issues. The first is the reasons the EU has given for the CJEU's powers of jurisdiction in regard to the protocol as set out in Article 12(4). Secondly, could you add a little more detail to your response to suggestions of "mission creep" in respect of the CJEU's role in regard to the protocol, from interpretation of EU law to judging its application and the arbitration of UK compliance?

Professor Catherine Barnard: I think the EU's position is, "Our rules, our courts. It is our rules and we are the referee, and therefore it is the Court of Justice that should have the key role in interpreting what the Northern Ireland protocol says, specifically the application of the provisions under the protocol".

On your second point about mission creep, I respectfully suggest that in fact it is the very thing that the Court of Justice is there to do. Yes, it is meant to be interpreting EU law. It is quite careful most of the time in judging its application on the ground. We see that in Article 267 and references that come from the national courts. There is a division of responsibility. The Court of Justice interprets EU law and the national courts apply it to the facts, and that essentially is what would be going on with the arbitration panel, although the court is not consistent on that point. I freely admit that. The court sometimes goes beyond interpretation to application, or to consider whether the member state has applied the law correctly. Of course, if it is an Article 258 enforcement proceeding, it is about the application of EU law on the ground, so the Court of Justice will have the say on that.

Lord Godson: Thank you. Martin Howe, do you want to respond further?

Martin Howe: Yes, indeed. I am very concerned about the issue of mission creep. I frequently appeared in front of that court. The more I appeared in front of it, the more I was concerned about the nature of its decision-making processes, both in political and less political contexts. Defenders of it would, I suppose, call it policy driven. I would call it political in the way it goes around interpreting what should be legally objective rules in order to further political ends and interests.

I am particularly concerned at the prospect of a court whose mission statement—its mission function—is expanding the powers of European Union institutions and acting in the interests of the European Union as it sees them, having powers over interpreting the Northern Ireland protocol and the withdrawal agreement. That raises a serious risk that decisions will be taken that are policy or politically driven.

To give one clear example, an important issue under Article 10 is the scope of the EU's powers over state aid across the United Kingdom as a whole, which all turns on the functional test of whether or not the measure concerned may affect trade under the protocol. I can see the European court, if this is referred to it, taking a very expansive line on what is within the scope of Article 10 in order to bring wide-ranging measures under the control of the European Commission, including measures that were given to entities in mainland Britain.

Lord Godson: Thank you. Anton Spisak, do you want to say anything, bearing in mind the strictures about limited time? I do not want to put unfair pressure on you, but it would be nice to hear your thoughts.

Anton Spisak: In the interest of time, perhaps I could focus on the first part of the question, which was about the EU's reasons for not wanting to

diverge from the text of the protocol. The main reason is that the EU says it does not want to engage in any renegotiation of the protocol, and amending the text of the protocol would de facto mean its renegotiation. I am a bit more sceptical of that argument. I do not think it really holds ground, because there are a lot of things that we can do within the protocol itself and the withdrawal agreement that allow for some amendments of the treaty. Decisions of the Joint Committee are one example. There are some other mechanisms that we can talk about later.

I think the reason behind it is political. It would signal that the EU has engaged in renegotiation. It is also important to remember a little bit of the context of what is happening inside the EU at the moment, which is the intra-EU challenge to the supremacy of EU law from Poland and the decision of the constitutional court in Poland to challenge some of the primacy of EU law. If you speak to EU diplomats and Commission officials, they tell you that changing the scope of what it means for the Court of Justice to interpret EU law in a treaty with the UK would simply signal that the position of the court is not as central to defending the primacy of EU law as it is. There is a bit of politics on the EU side in respect of that.

Again, I do not think that is a very good argument, because it is very different for a member state to challenge the primacy of EU law and for an international treaty—the withdrawal agreement—to have some involvement with the ECJ. That aside, that is basically a bit of context for what is happening inside the EU, to understand its rationale.

Lord Godson: Following on from that, the protocol is not only supposed to uphold specific EU regulations; it is also required to uphold the Belfast agreement of 1998. The court is not an interpreter of the Belfast agreement. How, then, can it be the sole interpreter of the protocol? I would be grateful for a parting shot on that.

Anton Spisak: The scope of the involvement of the ECJ in the protocol is about some of the very specific aspects of the protocol. It is not about the protocol as a whole. It is only about the provisions in the protocol that apply EU legislation—the EU customs code, single market legislation with respect to manufactured goods and agri-food, a single electricity market and state aid. That is really the scope of where the ECJ can get involved, nothing more than that; no opining on any other aspects of the protocol or anything else. I see that as the boundaries of any potential involvement of the ECJ within the protocol.

Lord Godson: Thank you. Catherine Barnard and Martin, do you have valedictory points on that brace of questions?

Professor Catherine Barnard: The context is the Good Friday agreement. That is the whole reason why the protocol was introduced. As Anton Spisak said very clearly, Article 12(4) quite clearly delimits which of the provisions of the Northern Ireland protocol the Court of Justice will have jurisdiction over. So far, it is Articles 5 to 7 and 10. It does not extend, particularly, to Article 2.

Lord Godson: Thank you.

Martin Howe: I agree with that. It is wide but it is limited. The only query is that there might be circumstances in which somehow or other it could get involved in interpreting the Belfast agreement as background in some way to some issue it is involved with, but it is quite hard to think of those circumstances.

Lord Godson: Thank you.

Q8 **Lord Hannan of Kingsclere:** Thank you very much, and thank you to all the lawyers. I found that enormously informative, and I am much more enlightened than I was. I will ask you to step just marginally beyond your brief and look at what you see as a possible landing zone. There is actually quite a lot of commonality on what the parameters are, what the EU regards as irreducible and what the UK regards as a core demand. Given the Chair's strictures on time, I have a sense of that. We heard Mr Spisak flag up the Swiss model as a possible precedent, and we heard Martin Howe say that it needs to be similar to the TCA, so we do not need to repeat anything.

Briefly, what do you see as an achievable solution that would allow the UK to say, "This is now more or less in line with other institutional frameworks and other international treaties", while allowing the EU to say, "We have protected the single market"? Maybe I can start with Professor Barnard.

Professor Catherine Barnard: Thank you very much for your carefully framed question. I think the only way forward—it is still a big ask—is to apply the Part 6 dispute resolution mechanism to the withdrawal agreement as a whole and include the Northern Ireland protocol. To be clear, when I say the Part 6 mechanism, that is broadly the same as what was proposed in the Swiss agreement and in the Ukraine agreement. Optically, you could say that it works for both sides, because it would mean that the ECJ is not the final arbiter from the UK perspective, which, of course, is what it appears Lord Frost and Liz Truss have been saying. From the EU point of view, it would still ensure a role for the Court of Justice because any point of EU law would still have to be referred to the ECJ.

As I have already indicated, anything to do with the Northern Ireland protocol, by definition, will involve a role for EU law and thus for the European Court of Justice. Presentationally, it seems to me the only way forward. It is very difficult to see, certainly at this moment in time, that the TCA mechanism could be applied to the Northern Ireland protocol, given the volume of EU law that is at issue under the Northern Ireland protocol. Of course, we should remember that the EU still does not have a mandate to negotiate anything of this kind, and remember, as I said earlier, decisions such as *Achmea*. The Court of Justice is ever more jealous about preserving its role as the sole arbiter on points of EU law, and that is getting stricter rather than more relaxed.

Lord Hannan of Kingsclere: Thank you very much. Mr Spisak, you

talked earlier about other precedents for getting around Article 12. Which do you think are realistic and might be palatable?

Anton Spisak: I agree with Professor Barnard that is the simplest way forward—and probably the only way forward, given the circumstances—without changing the fundamental nature of the protocol, which is to apply some EU legislation to Northern Ireland. If we were to move away from that and there was no EU legislation in the protocol, it would be a very different scenario, but it is very difficult to envisage the European Union moving away from that entirely. Assuming for a second that there will be some EU legislation applied to Northern Ireland, the simple solution is extending the arbitration mechanism from the main withdrawal treaty and its scope to cover all questions of the Northern Ireland protocol, even where questions of EU law apply. As Professor Barnard said, that would mean that the arbitration panel was the final arbiter of disputes, but there would be a role for the Court of Justice in offering interpretation of EU law where that question arose.

The question of how to get there is much more difficult, because it would mean amending the text of the protocol in some way to limit Article 12 and what it means, or at least agreeing with the EU some common interpretation of when Article 12 can and cannot be used. My view is that you could do that with some kind of creative solution that would not amend the text of the protocol itself but would involve a joint interpretive instrument that clarified that the arbitration under the withdrawal agreement should be applied to all disputes under the treaty, including those under the Northern Ireland protocol.

That would be my suggestion for overcoming some of the difficulties with the lack of mandate and the lack of political will on the EU side, while achieving broadly the same outcome for the UK, which is to limit the scope for the Court of Justice to get involved. I appreciate that that is suboptimal in many respects. It would be far more beneficial to have a clear text in the protocol if we can get to that point.

Lord Hannan of Kingsclere: Thank you. Martin Howe, would a new arbitration mechanism be significant, or would it be a fig leaf for the surrender of 1,000 years of history?

Martin Howe: Let us see. I do not think the arbitration mechanism under the withdrawal agreement provides the solution, because it contains the Moldova clause, so you are back to the ECJ being the final arbiter on all issues of EU law. One could, in theory, go down the route of replacing that with the TCA arbitration mechanism, which does not involve the reference to the Luxembourg court, but you are still left with the issue of the fundamental obligation to maintain laws in Northern Ireland identical to laws in the European Union, including as they are changed unilaterally by the European Union in the future, and we must follow. It seems to me that that is the heart of the problem.

That gives rise to the constitutional democratic deficit. That is what needs to be tackled more fundamentally than the issue of arbitration. If you do

that, you need to offer a practical solution to the issue of the European Union saying that goods may flow across the land border if there are no customs checks. My favoured one would be a mechanism of so-called mutual enforcement of rules under which we would enforce European Union rules against exporters in our territory who want to export across the land border, and they and the Irish Republic equally would enforce UK rules on businesses that want to export across the land border northwards. It seems to me that the jurisdiction of the European court is a very important point. It is important in its own right, but there is a much more fundamental issue that would not be solved just by tackling the jurisdiction issue.

Lord Hannan of Kingsclere: I am sorry to hog. I just want to draw out one point of clarification on Martin Howe's answer. I suspect that would not be achieved by amicable renegotiation, given the EU's public positions. It could be done, of course, just by the UK Government. The UK Government could say, "We are making the following changes, but we are safeguarding the integrity of the border". Why would there have to be mutual enforcement? Why would the UK particularly care about EU goods entering Northern Ireland? We have been remarkably relaxed until very recently about applying checks in regard to EU goods entering Great Britain.

Martin Howe: The answer is that it need not be. Ideally, it would be mutual, because then you could have a system, and you could have exchange of information between customs authorities to make it all work better. It could be implemented unilaterally in the UK. I believe it would be possible to do that as part of an Article 16 measure. If you take measures that allow goods into Northern Ireland from Great Britain more freely, you can balance that with another measure that restricts the ability of businesses to export across the border unless the goods comply with EU law. In a sense, not mutually but on our own part, we could enforce provisions that are to the benefit of the EU and make it far harder for the EU to legitimately complain that we are doing something that is disrupting its internal market.

Lord Hannan of Kingsclere: Thank you. No further questions.

The Chair: Professor Barnard or Anton Spisak, do you want to comment on the last question that Daniel Hannan asked?

Professor Catherine Barnard: Thank you, Chair. You can see the appeal of the mechanism that Martin Howe proposed, but hard to get the EU to agree to that point. There is one very narrow example of what is called parallel marketability of goods between Switzerland and Liechtenstein, but we are talking about such a different context that it is hard to imagine that the EU would agree to extending that to the Northern Ireland situation, given the huge sensitivity of Northern Ireland in all its dimensions.

The Chair: Thank you very much.

Q9 Lord Empey: Good afternoon to the panel and thank you for attending. To some extent, this question has been answered, or at least dealt with to quite an extent. We have covered the drawbacks of the arbitration mechanism and how likely the EU would be to agree to such things. I think we have dealt with quite a lot of them. Am I right in saying that an application of Article 16 could be subject to domestic law and could be challenged under domestic law for it to be triggered? Is that correct, Professor Barnard?

Professor Catherine Barnard: Thank you, Lord Empey. I am afraid your line was not very good at my end, but I think your question was whether Article 16, if invoked, could be subject to challenge under domestic law as well. Is that your question?

Lord Empey: Yes, that is correct.

Professor Catherine Barnard: Yes, that is my understanding too. The Northern Ireland protocol, as part of the withdrawal agreement, became part of UK law via the 2020 Act, which amended the 2018 European Union (Withdrawal) Act. If the UK were to invoke Article 16 in an inappropriate way—I use that term with caution, because Martin Howe and I disagree somewhat about what is an inappropriate use—such as, to take an extreme example, to remove the role of the European Court of Justice, I would argue that that is an inappropriate use of Article 16. It is not what Article 16 was set up for, not least because the court has had no role, as yet, in deciding any matter under the Northern Ireland protocol, so it is hard to argue that the court's role has led to a distortion in trade. There could be a challenge that any decision by the UK Executive—Westminster—to trigger Article 16 is ultra vires, beyond the powers of the 2020 Act amending the 2018 Act, and that would be the essence of any judicial review challenge.

Lord Empey: Do the other panellists agree with that? Anton?

Anton Spisak: I do not feel best placed to comment on the potential of domestic challenge, but I broadly agree with Professor Barnard's assessment that because it is part of domestic law you could have the potential for a court case.

Lord Empey: Martin, do you accept that as well?

Martin Howe: I broadly agree. It is important to distinguish two different issues. One is whether the Executive or prerogative decision to invoke Article 16 could be subject to challenge itself. That is a difficult question. The Miller 1 case is perhaps the closest analogy. The second issue is that in order to take safeguard measures, having invoked Article 16, there needs to be a legislative basis under UK law for taking those measures.

One route would be to make statutory instruments under Section 8C—it was put into the 2018 Act, but it came from the 2020 Act, which is analogous to the old Section 2(2) of the European Communities Act—in relation to the Northern Ireland protocol. Since Article 16 is itself part of

the protocol, there is quite a reasonable argument that the Government would be entitled to use statutory instruments under Section 8C in order to implement Article 16 in UK domestic law. However, if they took that course, there would be potential for judicial review of whether or not that was a valid exercise of the power.

Thirty years ago, I would have predicted that our judges would have shied away from whether or not the international law issue was justiciable before them. Now, after the first Miller case and other more recent judicial decisions, I expect that our judges are much keener to become involved in that sort of issue. I suggest that, if Article 16 is invoked, the safe way to implement it in domestic law is to have a firm basis in primary legislation for doing that, which makes it clear that international aspects of whether or not the invocation is in line with what the EU claims are outwith the jurisdiction of the UK courts.

Lord Empey: Thank you. We discussed earlier whether the EU would agree to any change to the mechanism for arbitration and so on, and the question of its mandate was mentioned. To what extent is the absence in the negotiating mandate a tactic? If the Commission genuinely wanted a meaningful negotiation, could it seek a mandate from member states? Anton?

Anton Spisak: The answer to that question depends on who you ask in EU institutions. If you asked the Commission legal service, it would tell you that it does not have the mandate, because the withdrawal agreement was completed on the legal basis of Article 50 and that restricts what it can do. If you asked the Council legal service, it might tell you that there are potentially things to do in amending the treaty if member states can get behind them. There are different ways of doing that, one of which is the Joint Committee taking a mutually agreed decision to amend the withdrawal treaty, including the Northern Ireland protocol, in some ways. There are some restrictions as to what the Joint Committee can do, and they are set out in the text.

One of them is to address omissions in the text and circumstances that were unforeseen when the treaty was signed. You could make a legitimate case, if you wanted to, that some of the provisions in the protocol may need to be changed after the realities of implementing the protocol became clear, or if the provisions of the TCA with respect to state aid might have superseded some of the open questions that were left unanswered at the time the protocol was made. That would require the Commission to want to do that and the Council to have the buy-in of member states as to whether that is something that really satisfies their political objectives.

My assessment—I do not think this is the assessment of the EU at all—is that you could do some clever amendments of the old text or clarify its meaning as long as that meaning was mutually agreed between the UK Government and the EU, and as long as you really wanted to.

Martin Howe: I agree that we have to distinguish between a formal thing, which is a mandate to the Commission, a very formal legal process under which the Commission is given a mandate by the member states to negotiate external agreements, and the political reality, which is that if the EU collectively, including the member states, is convinced that it is in its interests to renegotiate, it will do so.

Renegotiation and alteration of the protocol is explicitly provided for in particular in Article 13(8). The European Union has to be given a political incentive to go down that road. Before Boris Johnson renegotiated the protocol, the European Union claimed that it had all been done and dusted and that it could not possibly renegotiate it. When enough political pressure was put on it, it did, and this is exactly the same scenario, in my view.

Professor Catherine Barnard: I think there are two issues relating to the mandate. The first is the legal basis for any steps to be taken forward, and the second is the legal mandate necessary to be given to the Commission to do any negotiations. On the first point, there is a tension between whether the famous Article 50 still has any legs or whether it has been turned off, or whether it could be done under Article 13(8) of the Northern Ireland protocol. Martin Howe suggests yes. The other view might be that Article 13(8) is rather more limited in scope and that one of the other legal bases in the treaty on the functioning of the EU might be able to deliver on that, such as Article 207. That is the first issue.

Secondly, yes, the Commission must be given a mandate. It cannot operate of its own free will. This is both legal and political, in answer to your question, Lord Empey. It is legal because the EU is based on a system of attribution of powers, so the Commission can act only when it expressly has powers to do so, but political because it enables the Commission to say, "We can't do anything at all without a mandate from the member states", so it has used that very effectively in its negotiations, because it can say, "We'd love to make further concessions to you, but we can't because we do not have the mandate to do so".

Lord Empey: Thank you.

Q10 **The Chair:** Thank you very much for that. I have one final question that relates to a point that Martin Howe has mentioned once or twice during the discussion so far. That is the significance of the risk of reachback of EU law and the CJEU's application of it into UK state aid policy in view of the provisions of Article 10 of the protocol.

Do you want to say a bit more about that? Others may want to comment on it too. Do you think there might be a case for removal of Article 10 from the protocol in view of the provisions of the trade and co-operation agreement and the Subsidy Control Bill currently before the House? What is the EU's reaction to that likely to be? Do you want to start on that, Martin Howe, because you have touched on the issue already?

Martin Howe: Yes, thank you, Lord Chair. I am not sure I want to say much more than I have already said. The issue is that most of the articles of the Northern Ireland protocol under which the ECJ has jurisdiction apply to the United Kingdom in respect of Northern Ireland—in other words, to Northern Ireland territory. Article 10 does not contain that restriction. On the face of it, it applies across the whole of the United Kingdom geographically. That said, there is a limitation in it. It is probably best if I read out the exact words: “in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol”.

If you give a subsidy to a plant in Sunderland, on the face of it that is not engaged, but if the plant is sending or will send goods into Northern Ireland, there could be arguments that they may then displace goods coming in from the EU, because trade under the protocol, it should be remembered, is not just trade across the land border; it is all trade between Northern Ireland and any EU member state.

The problem is that it could be exploited. Even if somehow one squares the Commission, which the Government are attempting to do, not to overuse the clause, it is open to private commercial interests to use it. If it is established, it could cause very serious consequences across the whole country, because, if permission is required, Commission rules have to be followed for the grant of subsidies to bodies in Great Britain. At a minimum, it could result in prolonged delays.

When we were a member state, at least we had a political seat at the table on the Commission, but we have a foreign body adjudicating on state aid in a way that we could not effectively challenge, with no British representation within that body. It seems to me that the European Union has accepted the principle of having a different subsidy control regime under the TCA. In principle, the solution would be to roll that across to Northern Ireland. It may have a legitimate ground in some respects for wanting something more stringent, where there are actually subsidies within Northern Ireland, simply because it does not have the possibility of countervailing duties, for example, which it would have under the TCA if there was an unfair subsidy. With some modifications such as that, I cannot see why it is not a practical way forward.

The Chair: Thank you very much. Anton Spisak, do you have thoughts on that?

Anton Spisak: I agree with the assessment of risks related to Article 10. It is a very broad provision that legitimises subsidies given to firms in Great Britain to fall under its scope. I think it is problematic as drafted.

If I was in the UK Government’s position, there are probably two arguments that I would want to make to the EU. One is that this is, in my view, a good example of the situations that fall under the special powers given to the Joint Committee to pass amendments to the protocol under Article 164, if I remember correctly, which allows it to address situations unforeseen at the time of signing the agreement. You could argue that

because there was uncertainty about the shape of the post-Brexit subsidy control regime in the UK, and now we have the TCA provisions, it is legitimate to look again at Article 10, what it does, its purpose, and whether it should be superseded by the TCA provisions. That is the first point. It does not really involve renegotiation or any kind of new mandate on the EU side. That is very important.

I also agree that the absence of something like that creates an environment of uncertainty, essentially, for businesses and for the Government. It is very important that there is a little more clarity about what Article 10 does, and that, potentially, the text of Article 10 is amended in appropriate ways.

The Chair: Do you think that if trust had been established, as you put it earlier, and there was discussion of amendments of this sort, the European Union or the European Commission would understand the point and be ready to do that? Would that be your judgment?

Anton Spisak: I believe so, because it is not a question of the absence of a mandate on the EU side. There is clearly a provision in the withdrawal agreement that entitles the Joint Committee to do these kinds of things if it wants to. It is fundamentally, as you say, Lord Chair, a question of political trust in the relationship. If there was trust, I imagine that the EU could be open to discussing something like that.

Professor Catherine Barnard: On the first point, you will remember that the UK tried to remove Article 10 in one of the clauses in the internal market Bill, which precipitated instant action from the EU under Article 131, as I mentioned at the beginning. The context has changed since then. We now have the trade and co-operation agreement with the level playing field provisions, including those on state aid, and we now have the subsidy Bill going through Parliament, so you could say that the context is somewhat different. I agree with Martin Howe that the provision in Article 10 is strikingly broad.

You could well imagine that had a selective furlough scheme, for example, which was introduced UK-wide, been introduced now, it would have had to be notified under the state aid provisions because it clearly has an effect on interstate trade. I think there is a case going through the British courts involving Tate & Lyle, which produces sugar only in the UK—I think in London—and whether any aid given to it has to be notified to the commission. You can see the potential breadth of problems arising from Article 10. There might be a new context once the subsidy Bill becomes law, and possibly once the EU has seen how it operates in practice. On the positive side, the CAT, which is the decision-maker, is highly respected, so that would engender some trust on the part of the EU.

The Chair: Thank you very much indeed for the answer to that question, and, indeed, thank you all very much for the answers you have given to the whole range of questions we have asked you over the last couple of hours. It has been extremely helpful to us, and we are very grateful to

you. We will send you a transcript, as I said at the beginning, so that we can correct any errors of fact that have crept in. With thanks again to all of you, there are some more magic words that I have to say: the meeting is now concluded.