

Northern Ireland Affairs Committee

Oral evidence: [Future of the Land Border with the Republic of Ireland](#), HC 700

Wednesday 23 November 2016

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Members present: Mr Ian Paisley (Chair); Tom Blenkinsop; Mr Stephen Hepburn; Lady Hermon; Jack Lopresti; Dr Alasdair McDonnell; Nigel Mills; Bob Stewart

Questions 44 - 90

Witnesses

I: Professor Dagmar Schiek, Professor of EU Law, Queen's University Belfast; Dr Katy Hayward, Senior Lecturer in Sociology, Queen's University Belfast; and Professor Cathal McCall, Professor in European Politics, Queen's University Belfast.

Written evidence from witnesses:

- [Professor Dagmar Schiek](#)

Examination of Witnesses

Witnesses: Professor Dagmar Schiek, Dr Katy Hayward and Professor Cathal McCall.

Q44 **Chair:** You are very welcome, Dr Hayward, Professor Schiek and Professor McCall, to our Committee today, and I hope that you enjoy yourselves in the hot seat and are able to give us some material that is very useful. This is our second session in our inquiry into the future of the land border with the Republic of Ireland, and the impact of Brexit on that. Really it would be helpful if maybe you want to give us some views—a kind of overview—of the situation as you see it, and then we will go around the Committee for questions. Who wishes to start?

Professor Schiek: I am sitting in the middle and I think I am the oldest, so I will take the honour of starting. My name is Dagmar Schiek. I am professor of European Union law and I am also Jean Monnet ad personam chair for EU law and policy, but I will stick to the law in this session as my colleagues from the politics department are so much more informed on those matters. Presently my focus substantively is substantive European law, which is the law of European integration. Of course, it might seem strange to you that I appear on a committee on the borders. But when we look at the question of what a border is, the relevance of European economic interaction and other integration becomes clearer.

What is a border? Is it a geographical location? A geographical location is important, but what makes it a border is the legal space it encloses. The legal space is a body of relationships and entitlements that creates barriers for persons, goods and services and even for capital. All this differentiation is the reason it has become customary to distinguish between different aspects of the border, so we have a border for goods, as I have said already, which is summarised as the customs border. I printed out the Customs Code yesterday, and now I have left it in Belfast. It was so thick, which indicates that even the customs border is very much differentiated with different goods.

There is a border for other trades. Financial services have been much in the press. The passporting rights and other services, such as health services, have enjoyed attention in the press recently with upcoming passport controls for people receiving health services. There is also the border for people, but the border for people is differentiated as well between European Union citizens and other citizens, and between those citizens who are economically active and those who are not. With the other citizens who are not from the European Union, we differentiate between asylum seekers and refugees who have an internationally acknowledged status and others. We have four person borders altogether.



On the legal aspects of these borders, I am afraid I cannot really contradict Michael Dougan. I read your first statement. Of course the legal question is: who is actually controlling the border? I would differentiate a little bit. Whose authority is it to grant exceptions and whose authority is it to issue and effect controls at the physical border but also beyond the physical border? Nowadays, borders are not that one line that we see on the map. Borders are more a corridor around which control takes place, and that of course is the main point of a border. With the UK leaving the European Union, the border will become different. I do not like this talk about hard and soft, because it is too binary and it does not really illustrate the continuum of the different options that exist. Whether it is a hard border or a soft border, or hard Brexit or soft Brexit, we will have to look at all these categories and what controlling the different legal statuses after the UK has left the European Union will entail.

Q45 **Chair:** Professor Schiek, in your examination of borders, have you any examples of good and bad EU/non-EU borders?

Professor Schiek: One of the most vicious examples of a border is around Croatia in the former Yugoslav Republic. That is a border that is still embroiled in conflict, although it is nowadays managed very much electronically and technologically, but you can see what past conflict around a border can do and how difficult things can become. As for good borders, you know the example I gave in the last session: the Swiss and Norwegian borders are positive examples, but even they are characterised by controls, especially for goods and also for persons.

Borders beyond the legal dimension are also a matter of trust. I could see this summer, when I travelled from Germany through Austria to Italy to go mountain hiking, what that trust does. Travelling across the Brenner would take 12 hours rather than four because of intensified person controls. We went through the mountains, which also took 12 hours but was much nicer, so even a border that is open can become sensitive and a hindrance to business, as tourism is.

Dr Hayward: Just to give some background, I have experience on projects on EU border security technology and on the resolution of EU border conflicts. I am currently based in the Mitchell Institute for Global Peace, Security and Justice at Queen's, continuing my work on borders. I just want to make four points. First, the Irish land border, of course, has undergone several iterations since its creation nearly 100 years ago. That tells us it is possible to have soft and hard borders at the same time. You can have a soft border for travel, through the Common Travel Area, at the same time as having a hard border for customs. For example, the Common Travel Area continued even when the Anglo-Irish trade war was going on. At the same time of course you can have a hard border, as we had for travel through the military checkpoints at the land border, and a softer border for customs, as came about with the creation of the single market in 1993. In some ways, if we could imagine a sort of elastic



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Brexit, if you like—the possibility of softness in some ways and hardness in others—that is conceivable and that has already been experienced.

The second point I would like to make is on the political and symbolic significance of the border. The agreement of 1998 recognises this and formalises the role of the Republic of Ireland vis-à-vis Northern Ireland's future and also vis-à-vis cross-border relations. Any decision to be made about the border, of course, is not a unilateral decision for the United Kingdom. It very definitely involves the Republic of Ireland and, if it becomes an external border, it involves the EU and the 26 other member states as well. It is important, too, to acknowledge that the European Union's approach to the conflict in Northern Ireland has been one that recognises the legitimacy of both forms of nationalism, so British nationalism, of Unionism, and Irish nationalism, too.

The third point I would like to make is that the European context is one that tries to facilitate prosperity and economic growth within the European area. Freedom of movement of goods, people and services has been essential to that. Notwithstanding that, at this current time, mainly in response to the migration crisis, we see a hardening of borders, not just around the European Union but within the European Union. It is conceivable that the European Union would be willing to see a harder border across the island. It is not anathema to the European Union, if you like. Although most certainly we have the impression the European Union would not like to see that, it does not make it inconceivable.

The final point, which we will possibly discuss in more detail, is about the use of technology. Technology is very much present in relation to border management and border control. However, its effectiveness depends on the follow through on that. There are two things to bear in mind. One is the importance of the information and data gathering that goes on before you have technology being used. This is increasingly the case, particularly in Schengen. There are initiatives at the moment to enhance the amount of data being gathered about citizens and passengers; it is very notable. You have that, which affects the way that technology is used at borders. The second element is follow through, so you need enforcement of whatever this data is telling you or however it is interpreted by border agents. If we do not want to have people at the border, to check and follow through on the data coming through with this technology, the question is where that follow-through happens. Increasingly, already, within the UK and across Europe we see the role of ordinary citizens acting almost as border agents. They are the ones making the decision about whether somebody has the right to work or whether somebody has the right to healthcare.

Professor McCall: I suppose I am very interested in the shift away from notions of border softening to border hardening that has taken place over the last 20 years. The 1990s can be seen as really the halcyon days of border softening through cross-border co-operation in the European Union, through the creation of the single market. Certainly, in terms of



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the Irish border, that had a very dynamic effect: single market customs posts going after 1992, followed then by the diminution of the security regime ending around 2005/2006. That is very interesting. That had a very interesting effect on the border region and on border communities who started to reconnect again and meet one another on a regular basis after decades of not meeting. I would argue, and others have argued as well, that that played a very important role in the peace process in Northern Ireland, and between Britain and Ireland and between north and south as well.

For us, that was very important and very worth looking at, but obviously things have changed since 11 September 2001, where there has been a move towards securitisation. Borders are a focus for securitisation, particularly when it comes to the free movement of people. Added to that, then, we have the Brexit campaign and now Brexit itself. Of course, with Brexit, no one, apart from Prime Minister Theresa May, knows anything at this point.

Chair: I think they do. They are more just not divulging what they are up to and what they know.

Professor McCall: Okay. From our point of view, we know nothing outside this House, but we can talk about hypothetical situations. It is important to consider the hypotheticals; it is important to consider options. It is important to consider whether in fact Brexit will impact on the Irish border or whether other alternatives will emerge, such as hard bordering Britain, hard bordering the island itself. It would be much easier in terms of security and customs to do that, given the relatively small number of ports and airports. But obviously that would have serious implications in terms of the peace process, I would venture, because the Unionist community would not be happy with that.

A third alternative would be to hard border the isles of Britain and Ireland. There is some hard bordering of that already through the Common Travel Area. The Common Travel Area is not just about the free movement of people within these islands; it is about protecting what used to be called the outer perimeter of the British Isles, or the external border, from illegal migrants and illegal migration. There is a lot of information sharing between the two states with regard to that under the banner of the Common Travel Area. Hopefully we will be able to talk a little more about that.

Q46 **Chair:** We will come to all these things. Thank you very much. Before I call members, can I ask you a question, Dr Hayward? It is about the electronic border or the technological advances that you have identified already. Could you maybe talk us through the sort of technology that is available and where you think that is going in the future in terms of a high-tech border?

Dr Hayward: There are two settings for the use of automated border controls. The one we are most familiar with, the one that is most



effective, is a closed setting. You would see it in airport security, for example. The effectiveness of technology in that case relies on pre-registration and pre-knowledge, so the information is already there. At the check, they are checking to see that the person is eligible to hold that passport or that pass. They are checking with police databases, which is increasingly the case. In the European Union it links to the European Arrest Warrant. They are also checking to see that the live data coming through matches with the data on the chip, so the biometric. That is working in a closed setting.

Now an open setting for automated border crossings is much more complicated and difficult, because it is not based on pre-registered information. You can have an open setting that works with the use of chips or a radio frequency ID. We would see this in the eFlows, for example, on roads in Ireland already and elsewhere.

Chair: There is the number plate recognition system.

Dr Hayward: There is the number plate recognition, too, but of course that is based on pre-registration. Somebody has to have gone through that procedure to register their vehicle if it is going to lift up a barrier, for example, or they have already gone through the procedure of registering to have the tag in the car to open up that barrier. Those are the two kinds of options or settings but, as I mentioned before, if you speak to people involved in implementing these security measures at airports or at ports or what have you, they really emphasise the importance of the information beforehand. They use technology—be it sniffer dogs, technology replacing sniffer dogs, or X-ray machines—just as a follow on through from the intelligence that they already have.

If we place that in the context of the land border, we see the difficulties therein. The most effective use of technology could conceivably be where you have a very hard border, a fence or what have you, and then people or goods channelled through particular access points within that border. Then technology can be effective, possibly, but of course it relies on pre-registration and the people or the goods that are not pre-registered are the ones we would be most concerned about, of course. That links to smuggling and human trafficking or what have you. The technology is not going to fix that problem.

Chair: We currently have number plate recognition and security number plate recognition, which is not pre-registered.

Dr Hayward: That is connected to existing data, of course. That information does not lead to a follow on through in terms of monitoring the border for shutting it down.

Chair: There might be some difference on that, I think. If you recall, there was a very large armed robbery in Belfast. Millions were stolen from the Northern Bank; the van was traced all the way from Belfast to Newry, over the border.



Dr Hayward: That is in relation to police communication about crime and criminal activity. That is all based on intelligence. It is a very different use of technology compared with allowing or enabling border crossings. It is a different kind of thing.

Q47 **Dr McDonnell:** What you are sharing with us now, or what you appear to be suggesting, is there are many levels of the border: six, eight, 10 different things, depending on whether it is a customs, a single market, a Common Travel Area or a security aspect or whatever. Is that a reasonable assessment? Do you see those being dealt with differently? In other words, do you see a situation where it might be possible for us to have relatively free movement of people across the border, in the Common Travel Area, but at the same time have a hard border in terms of movement of goods? That is really what I am asking.

Professor Schiek: First of all, these different borders at the moment exist at the outer borders of the European Union. Perceiving that the outer border of the European Union will move within Northern Ireland, then of course these borders have to be managed somehow. As Cathal said, there are different territorial options for that, but presently these 10 categories of borders are managed at the outer borders of the European Union. The question of what we can do with relatively free movement seems to me to indicate: "What is the notion of free movement?"

I understand that a very traumatic development for Northern Ireland would be for fences and border posts to go up again. I have said already, I think at the last session, that with the progress of technology much of that can probably be avoided. I am not sure whether what we will have as a result can conceivably be called free movement, because we will have a corridor, rather than the border, in which controls of persons travelling under aspects of all those 10 borders will take place.

In addition, in that electronic or virtual corridor around the border, we will have other controls, which are also virtual. I am not sure whether that means free movement. Also, when we look at even the best managed borders, in Norway and Switzerland, and ask whether they avoid spot checks of vehicles transporting goods and spot checks of persons crossing the border to control their eligibility, the answer to both those questions is "no". There are spot checks of goods, sometimes inland, which can avoid the traumatic thing of having a border at a certain point. But there will still be checks, which will slow traffic down and inhibit movement. There are also spot checks of persons around their eligibility to travel, their eligibility to remain, or their eligibility to engage in certain activities. That will not vanish. Those checks will increase and they will inhibit free movement. They will not necessarily have to take place at one point, which is the territorial border.

If I think about what free movement means for social and economic integration, what is perhaps equally important as the absence of border posts is the ability of persons to interact, to trade, to interact



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economically. That ability will be limited and we will have less free movement when the UK leaves the European Union.

Q48 Dr McDonnell: Just to follow through on that, how do they identify people for spot checks away from the border? How do they know somebody five kilometres away from the border is planning to cross the border either as a person or with a vanload of goods?

Professor Schiek: Usually the spot checks take place after the border crossing. That is then of course dependent on what the Chair mentioned: electronic controls such that you know who crossed the border. If you know what number plate crossed the border, that is very efficient. Once I started paying my dues on the M50, I found out, "Oh, well, I have some backlog there over a year." That is very efficient, but how do these controls tell you who is in that car, what is in the trunk, and what that person is up to? The pre-information that Katy mentioned can be done by the person themselves; it can also be based on data collected. You need more serious surveillance of people before they cross the border to be able to know whom to spot-check after they cross the border. All this soft bordering leads to more hard data collection and a harder border in the electronic space.

Q49 Dr McDonnell: Are there circumstances in which any arrangement that might be worked out between the UK and Ireland might not be acceptable in the broader European sense and in which Europe would want a harder border? You talked about the periphery of the European Union and the need for a relatively definable border in that. You talked about Croatia and places like that. Is there a case that perhaps any, let's say, mutually acceptable arrangement between the UK and Ireland might not fit within the EU parameters for that peripheral border?

Professor Schiek: The question is difficult to answer but I do not blame you for asking it, because it characterises the situation in which we are with the UK leaving or withdrawing from the European Union. We really do not know—I do not know but maybe Members of Parliament know more—what the Government's direction is. That means you need to think about multiple potentials. I can imagine that there may be a regulatory state that allows the crossing of goods and services, and financial services as well, over the border where the European Union would have an interest in controlling a border crossing of services, persons or goods and where they would say, "I do not really have to control this."

I am also speaking to the German Parliament in January, and I observe that in some member states there is a lot of awareness of the situation in Northern Ireland. We need to ensure that that awareness does not go away, and that the desire and the need for the European Union to control its customs borders and market borders is exercised in such a way that perhaps the borders do not run on the land in Ireland.



I find it difficult to imagine a state where there is no border, neither on the land nor on the sea, and the European Union agreeing to that. It often is said, as Cathal said correctly, that it is a point of concern for parts of the community in Northern Ireland, but if you look at what happens already in the sea, one of the cases where the Common Travel Area has been discussed in court, the Pachero case, was exactly about third country nationals crossing from Belfast or Larne—I do not quite know. However, they landed in Cairnryan, which was where their passports were controlled and where it was observed that they did not have a right to stay in the UK although they had a right to stay in Ireland. There was a very complex reaction to that. It is already happening, so maybe the sea border is not as new as some people think.

Dr Hayward: Could I just follow up on two points? One is the European Union would be keen to ensure there would be systematic checks on third country nationals coming into the European Union. It would also be keen to ensure that there is free movement for EU citizens. That is a fundamental problem vis-à-vis the land border. In that case, yes, an agreement between the UK and Ireland would have to be acceptable to the rest of the European Union in that regard. I would just follow up on one other point you mentioned earlier: bear in mind that the Channel Islands, of course, are not part of the European Union or single market, so there would be checks in relation to taxes and duties on travel from the Channel Islands and vice versa to the UK, but there are no immigration checks. That is an example of where you have membership of the Common Travel Area but you still have customs checks.

Professor McCall: Just to underline the point made, in terms of the principles of the European Union as they currently stand, freedom of movement of workers, goods, services and capital stand as the red lines for the European Union prior to the negotiation on Brexit. Therefore, if the Republic is to remain within the European Union, it will still have to observe—and probably still wants to observe—the principle of freedom of movement of workers. That obviously then would pose a problem with regard to the future configuration of borders within these islands. That is the key problem that we are going to face.

Q50 **Lady Hermon:** Thank you so much for coming to give us evidence this morning. It has been really very interesting. Just before I come to the Common Travel Area, as a matter of curiosity, you have demonstrated this morning in about half an hour your expertise about European law, its impact on the border and how Brexit is going to impact upon Northern Ireland, so can I just ask if your expertise has been harnessed? Have you been asked for submissions by the Northern Ireland Executive and has there been much engagement from the Northern Ireland Office?

Professor McCall: We are still waiting.

Professor Schiek: We are not only waiting; we are also trying to engage in discussions. With the Jean Monnet Centre of Excellence's Tension at the Fringes of the EU, we have a stream called Variegated Geometry in



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which we are starting to get a series of events, which are closed and where we can get open discussions. We have not been invited. We are not only waiting for the invitation; we are trying to open a dialog.

Q51 Lady Hermon: Are you disappointed?

Professor McCall: I am very disappointed. I think the last time I was here I commended this House for having the previous session and now you are having another one. The European Union Committee of the House of Lords has had one and they even came over to the parliament buildings to hold the session, so that we could attend, which was very gratifying. We hope that the Northern Ireland Assembly does start to engage fully with academics, the business community and NGOs as well, because it is a vitally important issue. Private sector actors are contacting us, inviting us to their palatial establishments to talk about the implications, because they are caught in a state of flux, particularly the multinationals, in terms of wanting to develop their, for want of a better word, outposts in Belfast and Strabane and Derry/Londonderry.

Lady Hermon: The Secretary of State for Northern Ireland is very keen, I know, and he has said publicly he is very keen to meet and to have meetings with businessmen and all the rest of it. I am sure it will not go unnoticed from this Committee that there is a desire among academics at Queen's and elsewhere to meet with the Secretary of State.

Chair: You may not know that his PPS is in the gallery, listening.

Q52 Lady Hermon: Back to the questions. Thank you very much. That was very helpful. Professor Schiek, in response to a question from my colleague Dr McDonnell, you mentioned that you have been speaking and that you have close ties with Germany.

Professor Schiek: No. I said I will be speaking to Members of the German Parliament in January—members of, not all.

Q53 Lady Hermon: Yes, but you also went on to explain that there was already an awareness within European governments of Northern Ireland and the—if I may call it this—special status of Northern Ireland. Do you think it is desirable? Do you think it is feasible that Northern Ireland, in the Brexit negotiations, should have a special status if there is already that awareness about the sensitivities about having a border between the Republic of Ireland and Northern Ireland?

Professor Schiek: I think there is an awareness that the border is a sensitive point. The next question of how realistic it is to get special status for Northern Ireland is a question that misses a few steps in between. I would say that, first of all, the UK needs to set out its cards on the table and needs to give at least a few baselines about the way they would want to withdraw from the European Union. It would of course then be really helpful if the UK would address some of their own awareness of the Northern Irish status. Before that happens, I am aware of talks by the politicians of the Republic of Ireland with different



countries. I am not the only one who has taken a private initiative to talk to people they know to raise that awareness. That will also make the special status more likely.

It will still be a very difficult feat to achieve: special status for part of a country without dividing the country itself and also without adventurous solutions, such as Reverse Greenland. I do not think that is realistic, but a special status that tries to avoid the substantive borders should at least be looked at and tried. I would not say it should be fought for; that sounds too aggressive, but it is worthwhile pursuing this.

Dr Hayward: It is important to note, of course, that the letter from the OFMDM back in August made several points that indicate the particularities of Northern Ireland as distinct from Great Britain in relation to, for example, welcoming and recognising the importance of unskilled workers in Northern Ireland, and recognising the importance of the agro-food industry or agriculture. Those things emphasise the distinctiveness of Northern Ireland. There is precedent around the European Union and its external borders in relation to non-member states to have special arrangements that acknowledge such particularities of one side of the border.

Q54 **Lady Hermon:** Where would these precedents be?

Dr Hayward: For example, there is the opportunity for small border traffic zones. This is allowed for in European integration, so you have particular arrangements for ease of movement for workers from one side of the border to the other, so between Poland and Russia. This works very effectively. But of course a lot of these arrangements depend on recognition of certain principles. Again, in the Nordic passport union, the principles of Schengen apply and so does subscription to the *acquis* in that regard. This is going to be important, too, for Northern Ireland. Maintaining the principles of freedom of movement, for example, would be necessary or encouraged in relation to a special status or a bespoke arrangement.

Professor McCall: The special status is obviously an interesting debating point. Unfortunately it does point to some sort of rebordering of Britain rather than the United Kingdom. As I have said previously, that obviously would be a point of concern for Unionists in Northern Ireland. That goes without saying.

Lady Hermon: It is worth putting on the record. It is a point that has not been made to us before.

Professor McCall: Okay. There was a debate in this House not so long ago, in 2008, on a proposal to introduce immigration controls or ID checks between this island and the other island. Reading Hansard at the time, there was a lot of Unionist outrage. A lot of the Unionist MPs—DUP, UUP—were absolutely outraged. We can all be outraged in Northern Ireland in terms of people here, even politicians and MPs here, not



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understanding that the United Kingdom is the United Kingdom of Great Britain and Northern Ireland. I remember the former leader of the Ulster Unionist Party was very outraged whenever a Labour speaker confused Great Britain and the UK.

- Q55 **Lady Hermon:** Professor McCall, to enlarge on your evidence to us earlier, you said a hard border in GB itself rather than across the island of Ireland would have serious consequences for the Unionist community. Do you want to elaborate on what you meant by the hard border in GB? Is that passport controls as you arrive into Heathrow Airport or Gatwick or wherever?

Professor McCall: There are two aspects of it, I suppose. From the Brexit point of view, if there is a hard Brexit, the control of inward migration from the European Union will be paramount. Ports and airports are relatively easy places to keep a control on these things. Airports and ports are points of border control, unlike a rambling land border, unless you build a wall or a fence. From the Brexit point of view, it is about controlling migration; from the EU point of view, it is about the customs union, so the key point therefore is whether the UK not only leaves the European Union but leaves the customs union as well.

Professor Schiek: Katy very helpfully referred to the letter of the First Minister and Deputy First Minister, who said they would like to see the preservation of free movement of goods and persons and services. We have been talking about the market aspect of all of it, but if you talk about the free movement of persons you also have to think about the non-market aspects, which are free movement for education, leisure, political activities and cross-border organisations, which of course have a very important role in maintaining the peace process. If what the First Minister and Deputy First Minister have set out as the basic requirements for the special status of Northern Ireland comprises all this, we need to think also beyond the market.

I also would like to stress what Katy said: that the European Union will have an interest in the control of the free movement of persons who are not EU citizens as well as of customs control in some ways. I live just south of Larne. There are ways to cross the sea border that are not going beyond ports and airports. I can see that quite frequently.

- Q56 **Lady Hermon:** That takes us quite nicely into the area that in fact we need to explore. We have received a lot of evidence about this, and certainly in the run-up to the referendum, the Common Travel Area was emphasised repeatedly. What is the legal basis for the Common Travel Area?

Professor Schiek: The Common Travel Area has been in existence for a long time, since 1920, if I am not mistaken, and its legal nature is still an interesting point of research, to put it in a positive way.

- Q57 **Lady Hermon:** Is there no Statute or Act of Parliament that we can turn



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to?

Professor Schiek: There is, of course, an Act of Parliament in the UK. The first one is from 1949, which acknowledges that Irish persons are not foreigners, which is seen as one aspect. There is a series of understandings, not agreements, between Ireland and the UK on what the Common Travel Area encompasses. It is a very wide-ranging notion. It encompasses not only free movement of persons within Ireland but rights to social security and healthcare to British and Irish citizens within the respective jurisdictions. It means different things in both jurisdictions. It does not have the character of an international treaty. That has been clarified in a common declaration of both Governments in 2011, so that is not that recent, but it is relatively recent; it is not 1920. Many people have been saying that if the UK withdraws from the European Union, it would be easier to maintain the Common Travel Area by putting it on a more secure footing legally.

Q58 **Lady Hermon:** In other words, we should legislate for the Common Travel Area. Wouldn't that be sensible?

Professor Schiek: The Common Travel Area is not even an international agreement. The Common Travel Area is something that exists between two states, Ireland and the UK, and it does not have a legally binding character as an international agreement. There is UK legislation in a lot of bits and pieces that acknowledges the reality of the Common Travel Area, but that does not give it a standing between those two states. If those two states are in different legal spheres, one remaining a member of the European Union and one no longer a member of the European Union, it would be advisable from the legal point of view to have it also on the basis of this.

Lady Hermon: Absolutely, yes.

Q59 **Nigel Mills:** Could Ireland sign a treaty on that basis? Could Ireland sign an agreement to formalise the CTA without the EU's consent?

Professor Schiek: There are two dimensions to that question. There is a time dimension and there is a content dimension. On the time dimension, we have a situation in which we are still pre-Brexit, but we have heard that the pre-Brexit time will end, possibly by the end of March or a bit later, and then we will have Brexit negotiations, which are called negotiations on the withdrawal agreement under Article 50 of the Treaty on European Union. That withdrawal agreement has to be negotiated with a view to the future relationships with the withdrawing member state. However, the future relationships are another step, so there is a time pre-Brexit negotiating the withdrawal agreement in view of negotiating future relationships. While all these negotiations are ongoing, any member states, including Ireland, would be barred from negotiating bilateral agreements without the consent of the European Union.

I think I said last time round that good lawyers can make a lot of treaties and, if everybody agrees, you can also have the consent to have bilateral



negotiations in between. It is quite unlikely that that happens. That was the time dimension. Only after all these negotiations are ended could Ireland and the UK engage in bilateral negotiations if no exception is agreed.

On the content dimension, as long as the Common Travel Area only looks into free movement of persons, that is still the capacity of member states. Member states are not barred. It is a concurrent competence of the European Union and member states. The European Union can make regulations on movement of persons into the European Union and out of the European Union, but the member states also remain in control. In the concurrent area of legislation, as long as the European Union has not legislated, there is scope for bilateral agreements. The customs union is a monopoly of the European Union. The Common Travel Area does not venture into the customs union.

Chair: Shall we let Tom just come in very briefly on that?

Lady Hermon: Sorry, I think Dr Hayward wanted to say something.

Dr Hayward: I have just a small point on the Common Travel Area: it is important to recognise that Ireland and the UK do not have the same immigration policy and they do not have exactly the same visa regimes either. This has implications for the assumption that Ireland might be able to be the border point of control on behalf of the UK.

Professor McCall: It is all about joint statements between governments. That is what informs the Common Travel Area. There was one relatively recently in 2011.

Lady Hermon: We have found out already that has no legislative basis. Nothing followed.

Professor McCall: There was an attempt to align the visa arrangements between the two states to develop e-border management and data sharing etc. All of that presumably is ongoing, but the key problem is that if EU citizens are now regarded as something to be excluded or people to be excluded or controlled from entering the United Kingdom, that has serious implications for the Common Travel Area, because the Republic of Ireland wants those people, and to remain within the European Union they need to keep them.

Lady Hermon: Following on from the letter from the First and Deputy First Minister, they too want EU nationals to come, skilled and unskilled. That was clear from the letter. Sorry, Tom wanted to come in.

Q60 **Tom Blenkinsop:** In relation to the 1949 agreement, in your opinion is there a custom and practice element there where an agreement that predates the existence of the European Union could, in custom and practice terms, continue to be used rather than the United Kingdom having to negotiate with the EU following the UK's exit from the European



Union?

Professor Schiek: I did say that the United Kingdom could also negotiate with Ireland after all those future relations have been concluded, so bilateral negotiations are not excluded totally, but they are excluded while the other negotiations are going on. Your question was on international law. Is the Common Travel Area, although not a formal international agreement, accepted as custom and practice under international law? There are several points on how custom and practice are established in international law. It is not my speciality, but I looked it up beforehand. One counter evidence for custom and practice being accepted is if you have a declaration of the countries involved that they do not think that the custom and practice they have developed has a legally binding force. That exists in the 2011 declaration, so that is a point that shatters this idea that we can have ongoing custom and practice.

I wanted to get to my point C about free movement of persons. I hope I have not forgotten it. As Cathal helpfully reminded us, the Republic of Ireland remains bound by the EU treaties. Those EU treaties have two implications. First they need to treat equally all EU citizens and also they cannot treat EU citizens less favourably than they would treat foreign citizens. In the questions that have been forwarded to us, there is a question, "Could the Republic of Ireland be hindered from replicating favourable treatment of Irish citizens in the UK by that obligation not to treat UK citizens more favourably than other EU citizens?" The answer to that is of course "yes", if they do treat UK citizens more favourably than other EU citizens. I have looked into the question of how they are treated on pensions and there is a slight favouritism. It would have to be adapted—other EU citizens would have to be treated equally or UK citizens would have to be treated differently—so there is a lot of detail to be looked into on the social security aspects of the Common Travel Area after Brexit.

- Q61 **Lady Hermon:** One last question, if I may, and then please open it up to my colleagues and I will come back. The other questions are about completely different issues. I am going to put pressure, so to speak, on Professor McCall. Should we legislate for the Common Travel Area or not? Would it be advisable for the UK Government, given that in fact the Common Travel Area is so important and has been so important for such a long time and featured because it was in place before both countries joined the EU? Now we have this unusual situation where the UK is going to come out of the EU but the Republic of Ireland is clearly going to remain in. Is there not an argument to be made that, outside of the Brexit negotiations, whatever shape or form that is going to take, the British Government and the Irish Government could, with goodwill, legislate—separately, obviously—for the Common Travel Area and put that on the statute book? That would send out a message, wouldn't it? Is that feasible?



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Professor McCall: I do not think it is feasible, because the Republic of Ireland will still be a member state of the European Union. As I have said before, the Common Travel Area does have similarities with the Schengen border regime, which is what Schengen has become. It is about the external border of these islands. If you want to control the movement of people from the European Union to Britain, that is all well and good; that is the democratic decision. But you cannot maintain the Common Travel Area, because the freedom of movement of European citizens and of European workers is still intact in the other state that is a fundamental part of the Common Travel Area, so I cannot see how you would legislate for that.

Dr Hayward: My understanding would be that you could have a bilateral arrangement, but the nature of the Common Travel Area, across scattered law and interpretation over time, means it would be extraordinarily difficult and it would raise all sorts of anomalies perhaps in the practice that goes on between the two states, and indeed with the Channel Islands and the like. You would probably need Commission approval for this bilateral arrangement given that, as Cathal and Dagmar have already said, it relates to the movement of people and will affect those kinds of issues around freedom of movement. It will not be something that can be dealt with in ignorance of the importance of those issues for the European Commission and the European Union.

Q62 **Chair:** Your Russia/Poland example was very interesting. Have you any documents on that you could send the Committee?

Dr Hayward: Yes, I can send you a summary of that.

Chair: That would be very useful.

Q63 **Bob Stewart:** The border between Northern Ireland and the Republic of Ireland will be largely determined by the amount of abuse that occurs, i.e. what people are doing wrong crossing it, and that will not really be determined until almost we have exited from the European Union. I have seen hard borders. I presume a hard border is somewhere like Aughnacloy, where I ran the checkpoint for two years one way or another. I cannot remember us having to check passports when people crossed the border. I do not think we ever checked the passports. We just asked people who they were. Do you remember that, Chairman? Did anyone going from the north to the south have to use a passport? No. That is not fully a hard task.

On the other hand, I know pretty well the border, which Professor Schiek will probably be familiar with, between Switzerland and France, and particularly Ferney-Voltaire to Geneva; more often than not, there is no-one there. They can harden it if necessary, but I have very rarely seen that happen and normally cars just drive straight through. I am making the assumption that people will want a border rather like between Switzerland and France rather than anything else, so that might be the model where we start until we discover that there are abuses from both



sides, in which case it will have to change. It may well be that they will go for a soft type border to start with in the hope that that will be enough. What is your view?

Professor McCall: I will start with a little Aughnacloy story myself.

Bob Stewart: Did I used to stop you?

Professor McCall: No, I was not behind the wheel but I was in the back seat as my father's sweaty palms grabbed the wheel as he came up to what looked like a fairly hard border.

Bob Stewart: But it was not that hard.

Professor McCall: For civilians it was pretty hard, especially because there was a hangar to the one side and my father always used to say, "We do not want to be going in there," because if you were taken in there you were in for a bit of a grilling. You are right about the passports. It was always the driver's licence, not least because this was in the 1970s and a lot of people did not have passports.

Bob Stewart: It could be harder then.

Q64 **Chair:** If you had a passport, of course you presented it. It was at your discretion. Of course are talking about a terrorist-related border. With terrorism gone, it is a very different discussion.

Lady Hermon: I think Dr Hayward has just indicated by her facial expression that she is surprised by that comment.

Dr Hayward: In the European Union, hardening of borders under the premise of terrorism has not gone.

Chair: No, but I am talking about during the 1970s and 1980s. You know what I am talking about: the historical terrorism in Northern Ireland.

Dr Hayward: Absolutely. Yes, I appreciate that.

Professor Schiek: That is something the European Union is very aware of: the ongoing relevance of terrorism—not necessarily within Northern Ireland but other terrorism also crosses borders everywhere. If that border between Northern Ireland and Ireland is an external border of the European Union, that will be of interest and another perspective.

Coming to the Swiss border, of course cars cross freely. However, that border region is embedded in the Schengen area, which allows police forces of both countries, Switzerland and France, to make other controls within the other country. If the French had suspicion that a criminal or person was smuggling goods or an illegal immigrant has crossed that border, they could follow them up into Switzerland and the other way round. Why would they follow up? They would follow up because they have electronic observations in place, because they have police intelligence and because they have gathered data on both sides of the



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border and exchanged that data. The legal framework for all that exchange and all that control and also for the policing across borders is the Schengen agreement, to which both France and Switzerland are parties.

In my very short written evidence I wrote that there is no precedent for any country that does not subscribe to free movement of persons joining Schengen. But if you talk about those model borders, which I mentioned earlier, we have to realise that all those countries are in Schengen. That is why I have looked into another border, the Polish and Ukrainian border, which is also an external border of the European Union and is now covered by the Ukraine/EU agreement, which has been in the making for quite some time, since the Orange Revolution in the early 2000s, so it has not been negotiated in a short time. That also entails border control mechanisms and protocols for border controls, which somehow take up electronic control mechanisms from the customs code but also transfer these to the persons' code. That is an example for an external border.

I realise that having posts, as you described in your exchange, is very much a sticking point and should be avoided. I would, however, argue that avoiding posts is not everything. It is not enough to realise the free exchange of persons in economic interaction and other interaction across the Irish border, which is taking place at the moment. It is a precondition. But if you have the so-called soft border, you will still have hindrances for all that exchange.

Q65 Bob Stewart: There are a heck of a lot of public cars in Brittany, where I go for my summer holidays, and they come in from Roscoff across from the Republic. You made the point that you are entering the European Union when you go into the Republic from Northern Ireland. Currently does an Irish citizen have to show a passport when they get off the boat at Roscoff to go into France? In other words, is there an internal border there? I think they do.

Professor Schiek: I think there will have to be, because it is a Schengen border, and at the Schengen border you have to show your passport.

Lady Hermon: But the point being of course that the Republic of Ireland and the United Kingdom are the two countries who are not parties to the Schengen agreement.

Bob Stewart: Forgive me. I was just trying to get that accurate.

Professor Schiek: You said France, didn't you?

Bob Stewart: I am new here. This is my first Committee. I am a new boy.

Lady Hermon: No, but the point is a very good one, Bob.



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Professor Schiek: If you cross to France, you are crossing a Schengen border, which means you have to show your passport. If you cross to the UK, you do not cross a Schengen border.

Bob Stewart: I see. Thank you very much.

In the absence of the Chair, Mr Mills was called to the Chair.

Q66 **Chair:** Mr Paisley gives his apologies; he has had to depart for another meeting. Can we just explore the issue of Ireland effectively operating our external border for us? Do you really think that the deal the UK does with the EU will mean that any EU citizen coming here for tourism or for short-term business reasons will need a visa?

Dr Hayward: It depends a lot, of course, on what the UK wants vis-à-vis the EU, but at the moment visa-free travel is open to many countries. For example, Uruguay and the United Arab Emirates have visa-free travel into the Schengen area, so it would be extremely surprising if UK citizens had to have visas to go into the EU, but of course it does depend on what the UK decides to do regarding EU citizens. If you have visa-free travel, the assumption is then that you can have relatively free access and movement into the UK, which then comes back to the point about how you know who you are monitoring and where the record of movement is taking place. That is where the data gathering comes into play. Significant advances are taking place in the gathering of data within Schengen.

Q67 **Chair:** I was just wondering, because I think Professor McCall was suggesting that the issue with the Common Travel Area comes if Ireland gives free movement to EU citizens; the UK presumably will not.

Dr Hayward: Ireland will not have a choice in that.

Q68 **Chair:** I guess what I was going to explore was if we are going to give—let's pick a nationality completely at random—Romanians the right to come to the UK for tourism or short-term business visits without a visa, I am not sure how it matters to us whether they come in through Dublin and across a land border without being spotted or if they come in through Heathrow and say, "I am here on holiday." If our concern is making sure they do not start working or staying beyond their permission, we have to have the same checks either way, don't we?

Dr Hayward: That is the issue. The question we have to ask ourselves is what is the purpose of the monitoring? Who are we monitoring and why and what do we want to prevent? Those kinds of decisions are unknown at the moment in terms of differentiation between peoples and types of movement and purposes of movement. This is where the issue is at what point the border is implemented. Borders are about inclusion, exclusion. It is not necessarily at the ferry port or at the airport terminal; it is in the university or in the hospital or what have you. That is where we may see data-gathering and information about individual citizens and individuals really coming into play.



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Q69 **Chair:** The fundamental conflict between the CTA and EU free movement only comes if the UK wanted to effectively somehow restrict EU citizens coming in at all without a visa.

Professor Schiek: That is the point my legal colleague Bernard Ryan has been making repeatedly since 2001. If the UK allowed visa-free travel for short-term stays, there would be much less need for the control. However, the control need would then emerge after the short term is over. The point that has to be made is: who makes that control? Is that part of the Common Travel Area yet? I do not think it is, because the Common Travel Area operates on the presupposition that Ireland and the UK are in the same space either inside the EU or outside the EU, and if they are in a different space you need other arrangements.

I personally think that the Common Travel Area can be put on a legal footing after all these agreements have finished. However, it will be a very complex thing and it is very difficult to put something on a clear legal footing when it has been in operation on the basis of common understanding and usages for such a long time and will now enter a totally different phase of legal environment, with one of the states no longer being a member state of the EU.

Q70 **Lady Hermon:** Do we have a difference of opinion between you?

Professor Schiek: I do not think we do. Cathal has made the point that the Republic of Ireland will have to safeguard its obligations under European Union law.

Q71 **Lady Hermon:** Does that not take precedence? Can the emphasis we have heard to date about the Common Travel Area remaining intact and unchanged post-Brexit be sustained? The CTA is obviously affected by Brexit.

Professor Schiek: That notion of remaining intact and unchanged is very important. It needs to change because the circumstances have changed, but that does not mean you cannot have an international agreement called the Common Travel Area, which can be either negotiated after all the withdrawal and new relationship negotiations have been concluded or before, with the consent of the other EU member states, but it will be a very complex process.

Professor McCall: Dagmar does not like to hear anything above and beyond the law.

Professor Schiek: That is not correct. I just referred to this.

Professor McCall: There is the wider political point to make as well. Ireland, it has to be remembered, is a very small state. The UK is a former empire and a very large state. You can see already in the political discourse in the Republic that some politicians are seeking to make political capital out of this idea that the Republic will control the UK's borders for it post-Brexit. Micheál Martin, the leader of Fianna Fáil, and



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the former leader of Fianna Fáil, Bertie Ahern, have both been making the point that this cannot happen. They would say there is this wider political context that this is an independent state within the European Union and we cannot be doing the UK's bidding to the detriment of our own position within the European Union.

Professor Schiek: That is not only a political issue. I am not averse to politics. I am just trying to keep out of it, because it is your expertise. I am not always very successful in that. There is also a legal point there: the Republic of Ireland as a member of the European Union will also have advantages in being supported by all these other member states.

Dr Hayward: I have just one small point to follow up your question about visa-free travel. It is important to recognise that in the Schengen area there are increasing moves to having an entry and exit system very vigorously imposed. Of course being outside of that raises questions of how we manage that particular issue of recording entry and exit, if you have a non-EU member state and an EU member state. That adds to the complication around the Common Travel Area.

Q72 **Chair:** Do you think Ireland will be inside or outside the EU ESTA, or whatever we are going to call it?

Professor Schiek: That depends. First, if Ireland joined the Schengen area, it would not be outside the EU ESTA. Even if they do not join the Schengen area, there are always options to opt in to specific elements. We do not know. That is another hypothetical development we will have to observe.

Dr Hayward: Just to note: the opting in that has been done, as has been allowed by the Treaty on the Functioning of the European Union, by the UK and Ireland has been almost exclusively in relation to security and control measures, and justice to some degree, not in relation to freedom of movement. Leaving the European Union throws that into doubt and does raise issues for how the UK is going to manage those particular issues around security and control.

Q73 **Dr McDonnell:** Thank you so much for the depth and quality of the information you are sharing with us, but are we into a situation like in the US? Basically, when I go into the US I have a tie. I have to fill in an entry card, and half or two-thirds of that card is taken at the entry point and the other bit of it is taken and filed at the exit point and goes into the computer to say that I have left the country—I have not broken my contract, if you like, or my arrangement with them. Equally, Chair, you were referring to the ESTA arrangement, whereby I have to give/signal 48 hours, or 72 hours, before I arrive in the US that I am coming, what flight I am on and all the rest. Are we moving into that? Would that sort of system be of benefit? Would it solve a lot of our problems? Would it get round a lot of our problems?



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Dr Hayward: We are already in that in many ways; it is just invisible to us. That information is already taken in databases, electronically, and the passenger name records that are now taken through airlines, or are about to be taken, which the UK signed in to, in Schengen are that kind of measure of monitoring and screening of individuals. This is going on. We are not dealing with pieces of paper so much, but the data that is necessary for that monitoring and then control of movement is in place already.

Q74 **Dr McDonnell:** Yes, but if we were to start producing pieces of paper, does our ESTA form almost act like a supplementary passport or a supplementary identity? Are we in a process of reinforcing what is already there? Can the reinforcement of what is already there solve most of the problems and are we anxious beyond sense?

Professor Schiek: It can be deceptive if you enter the US via Dublin, because it is so much more convenient. Before I moved to Ireland I had the experience of getting into the US on the ESTA system without moving via Dublin, and it can be quite a cumbersome process. It is different and takes longer. Of course, it is what we have been saying throughout: the electronic controls make the physical controls less apparent. That does not mean that there are fewer controls.

The European Union presently thinks about whether an ESTA system should be introduced for the Schengen area, and it is under review. It is difficult to say what is going to happen, but I would think that probably something similar will be adopted for Schengen entry visas.

Professor McCall: If you are going to go down this route, this is focused really on the movement of people. The key personnel involved in checking this type of data are airline liaison officers, so you are going to have to employ a lot more airline liaison officers. That might placate those who want to control immigration to the United Kingdom or to Britain, but the other aspect to all of this is the free movement of capital and the free movement of goods and services. That is a distinct problem, and if the UK leaves the customs union, you will have to have a customs regime.

Professor Schiek: It is not only the customs union but the financial services. It is underestimated how much cost these other electronic regimes may produce. It will not only be cost for the public services, which you have just mentioned; we need more officers. It will also be a cost effect on business and on anybody engaging in non-business-like interactions. Already, nowadays I have to control whether students not from the European Union are turning up regularly to class, which is my part in the border control of the European Union as a lecturer. That activity will of course increase. If you have a border between Northern Ireland and Ireland, we will have to have the same control in relation to Irish citizens. Landlords and business were mentioned. It is very costly for business also to engage in a customs border. I am not sure that was mentioned in the last discussion you had.



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Q75 Lady Hermon: Are you expecting as a lecturer to keep an attendance record for citizens of the Republic of Ireland?

Professor Schiek: Not presently, of course, because presently it is all European Union and I do not have to check any EU citizens.

Lady Hermon: Yes, but under the Belfast agreement, the Good Friday agreement—

Professor Schiek: That would be very difficult, yes.

Q76 Lady Hermon: They have rights in terms of nationality, both British and Irish. Are you suggesting that, in fact, post-Brexit as a lecturer, and not just as a lecturer, you would have to keep tabs on those who are Irish citizens?

Professor Schiek: Who are only Irish citizens?

Lady Hermon: Or EU citizens.

Professor Schiek: As you mentioned, many people in Ireland have dual citizenship. It is an aspect that needs to be looked into more severely, because we are always thinking about the physical border. Of course that is very important, but we also need to think about the restrictions of migration and free movement rights, which have effects beyond the physical border.

Lady Hermon: Absolutely. I am really quite alarmed.

Dr Hayward: This relates to the question of who we are monitoring and why and, again, it depends on what the UK decides to do vis-à-vis EU citizens. The role of individuals, be it landlords or employers or what have you, in saying that these people are present or they have the right to work, whatever it might be, is the enforcement of border management in some ways. It does depend a lot on what the UK decides to do vis-à-vis in Britain who has the right to work and reside.

We need to think about the purpose of all this data gathering and monitoring, and passenger records: who is being affected and who is being excluded and included, and how the enforcement of these measures is put into place, whether it is deportations or homelessness—people not being able to get a job and not being able to reside. There are severe implications, and we need to strongly think about the evidence basis for these kinds of decisions about who is included and who is excluded and why.

Professor Schiek: That sounds so daunting. Can't we take a bit more of a proactive approach? You have talked about the special status of Northern Ireland, and if we talk about special status, all these aspects need to be taken into account.

Lady Hermon: Absolutely. I agree entirely, yes. Sorry, Alasdair, I did not mean to interrupt you.



Dr McDonnell: I am very happy to defer to you.

Q77 **Lady Hermon:** Just to come back, in fact there was something that you said about Schengen—that of course the Republic of Ireland could now, I think you said or hinted, join the Schengen arrangement.

Professor Schiek: I do not think they are thinking about it, but they could.

Chair: But they always could, couldn't they?

Q78 **Lady Hermon:** Of course they could, bearing in mind we have come through the appalling years of the Troubles in Northern Ireland and the very good relationships on all sorts of levels between the Republic of Ireland and Northern Ireland particularly, but also the UK generally, and we cannot lose that; we cannot go backwards. Would it be helpful and is it desirable even to have something akin to a Schengen arrangement—a mini Schengen, as I think I have heard it described—in relation to criminal justice issues? Would it be an alternative for the Republic of Ireland and the UK Government to have that sort of intelligence sharing on criminal justice issues? Would that be feasible and desirable?

Professor McCall: I cannot imagine how that would not be possible. This could be done under the auspices of Interpol. Any sort of international agreement can be entered into on criminal type activity, and it does not seem to me that that affects the four freedoms of the European Union—although Dagmar is not looking too happy about this.

Professor Schiek: I am the type of lawyer who tries to find solutions but we must not underestimate the barriers as well. The European Union is no longer limited to the internal market. It does have a competence in migration policies, of which the UK and Ireland have opted out at the moment. Any future international relations between the UK and Ireland will have to take account of the external interests of the European Union. It is possible to have such an international agreement, but I do not think it can be done without Ireland consulting with the European Union. That is not only getting a Commission statement, as was done earlier, because these are things that are negotiated more closely through the Council, so it would probably be wise to get a European Union position on this.

Dr Hayward: It is a good question vis-à-vis justice and it is worth bearing in mind that at the moment of course the European Union is important for collaboration north and south, as you have already heard in evidence before. There is some disparity; there are some issues. For example, there is not hot pursuit across the border. We need to think about why you would have enhanced co-operation between Garda Síochána and the PSNI vis-à-vis crime and justice outside the EU at the same time as clamping down on freedom of movement for ordinary citizens or for businesses. You need to be careful about what we would be prioritising here, I think, in terms of what we allow in terms of co-



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operation and what we disallow. I know that is not what you were implying.

- Q79 **Lady Hermon:** Absolutely not. We are just exploring these avenues, because they have not been discussed before. We have you in front of us, which is wonderful, so we are taking advantage of the opportunity of having the expertise in front of us. Why would we not ask you? When you said we have to be careful, do you mean the Governments have to be careful? I mean, the UK Government would have to be careful. I think the UK Government has to be sensitive to the agreement achieved in 1998, and what we have heard today has serious consequences, I think, is what they are saying.

Professor Schiek: We have been saying all along that the Belfast agreement is to be watched carefully in the process of negotiating the withdrawal of the UK from the EU. That is one of the reasons why a special status for Northern Ireland might be so important.

- Q80 **Lady Hermon:** Did you get any sense from the statements from the Brexit Secretary of State, or from the Prime Minister or from any of those key players involved in those negotiations that there is a recognition that they need to be careful and sensitive to what was achieved? It was a huge, major achievement in 1998 with the Belfast agreement. Do you get a sense that there is an awareness of that? The silence speaks volumes.

Professor Schiek: You have more access to the Government than we as non-Members of Parliament. But what I see in the public utterances is it is often seen and treated as a bilateral agreement: the Belfast agreement between the Republic of Ireland and the United Kingdom, and the embeddedness in the European Union as a political entity but also in European Union law is not always reflected upon sufficiently.

- Q81 **Chair:** Before time ticks, we should talk a little bit about goods, but just to wrap up on people, could each of you give me a prediction for what the border for people will look like? Are you all thinking no border stations, no fences, free movement across the border in effect and checks done remotely, or are you thinking something stronger than that? Professor Schiek, you are a lawyer who likes to give us solutions.

Professor Schiek: Yes, but it is difficult to give solutions if you do not know what the hypothetical interest is. That means we need to deal in different scenarios, so the worst-case scenario would be that there is no special status for Northern Ireland and that free movement of persons for economic and non-economic reasons is limited at the internal border. That is the worst-case scenario.

- Q82 **Chair:** What is the percentage chance of that happening—less than five?

Professor Schiek: There is always a good chance to avoid the worst-case scenario but it is good to know what it is. The best-case scenario would of course be what has been indicated in the letter of the First



Minister and Deputy First Minister, which is that the free movement of goods, services and persons within the island of Ireland as a whole remains intact. I cannot see how this can be achieved other than by giving Northern Ireland a special status that equates to EU membership of that part. That will be, as I said in my evidence, the demand at very high levels of treaty craftsmanship, but I would not say at the moment it is excluded. It will be very difficult. That is the best scenario.

Probably the reality will be somewhere in the middle. In considering the future of having relaxed relations between both communities in Northern Ireland but also between Ireland and Northern Ireland, it would be best to approximate the best scenario in the best way we can achieve. I cannot be more specific at the moment, because that would be prophecy.

Q83 **Chair:** Dr Hayward, what is your prediction on border controls?

Dr Hayward: I would not offer a prediction, for the reasons Professor Schiek has already outlined, but I would say that it is important to bear in mind that technology will not be sufficient in and of itself, so you do need a follow-up, whether the follow-up in terms of person enforcement happens on the border itself, which is highly problematic for several reasons, including political reasons, or happens in the workplace, or in the hospital, or in the health centre—those are the kinds of options we are looking at—or if it happens on the ferry or at the airport terminal. Nonetheless, the basis of that decision-making needs to be scrutinised.

I would make the point that, on some of the issues around the border and the impact of the EU and leaving the EU, we tend to concentrate on the practicalities of it, but it is important to recognise that the EU has been an enabling influence. The peace process enabled us to realise the benefits on the island of European integration of the single market, so what normal cross-border relations within the EU can be like. That has been facilitated not least by the better British/Irish relationship and by a healthier north/south relationship. We do see the link between the peace processes and European integration put into question, and that does raise several issues, many of which are intangible and symbolic as well as being very pragmatic.

Q84 **Chair:** Professor McCall, do you have a prediction or are you going to tell me it is difficult?

Professor McCall: I do not really like to predict, but what I will say is that if the focus of border control falls on the Irish border, I predict that there will not be watchtowers—there is a safe prediction—in the Ring of Gullion, South Armagh. There will not be the sangers at Aughnacloy, but there will have to be some form of border control checkpoint.

Then the key problem is where to put these checkpoints—where to basically visualise this border for border control on the Irish border. It will be on key arterial routes. The problem then is that if you put them on key arterial route 6, say, there are still over 100 cross-border roads.



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What are you going to do? Are you going to start putting bollards in? If that happens, that is seriously symbolic and detrimental to the Irish peace process, I would predict.

Lady Hermon: We do not want to go there.

Q85 **Chair:** Can we quickly talk about goods before we have to go and do the Autumn Statement? We have talked a lot about the movement of people. How do you think, if we leave the customs union, as an example, the cross-border flow of goods will work? How difficult do you think it will be for a farmer in Northern Ireland to export their milk into the Republic? What do you think they will have to do practically and how hard will that be?

Professor Schiek: You heard a lot of evidence on 16 November on that. I have read the protocol and that is why I did not feel bad that we lingered so much on the free movement of persons, because that was very exhaustive.

I see three categories of problems there. Starting with the most positive element, there is a lot of co-operation, especially in the agricultural sector, where you have common products—where you have goods processed on one side of the border produced on the other side of the border. You can also have combined goods: milk from one side, grain from the other or whatever. These will be the most problematic parts of operating the end of the customs union, because the product will have to be classified as a mixed product, and the classification is usually honoured on business.

I did start printing the customs code, and then I said, "Okay, I will just do the new thing here—the decisions on implementing decision 2016/578, which is about electronic controls." That is very instructive. It is a work programme, a work in progress, which says how electronic custom goods controls will be issued. If you read through that, you will see that business will have a large role in categorising their own goods and in monitoring production processes, and that will impose costs on anything that ends up in a combined good from one side of the customs border and the other side of the customs border, which may be an economic deterrent to continuing that co-operation.

Q86 **Chair:** But do not businesses already categorise their own goods? I thought when they imported something as a business they had to categorise it and declare the right duty. That is not new.

Professor Schiek: That is right. You have to categorise it yourself.

Q87 **Chair:** That is not new, is it?

Professor Schiek: It is not new, but what will be new is that products from Northern Ireland will be outside the customs union. That means that a Northern Irish farmer will have to have much more categorisation. Now if you get an agricultural product from beyond the European Union



you will also have to categorise your goods as mixed, but the number of goods that will have to be categorised as mixed will increase exponentially if Northern Ireland is out of the customs union.

Q88 Chair: In terms of the process, every day I send a truckload of milk across the border. Presumably I will have some kind of electronic declaration I have to do for VAT anyway. I will know what button or code I have to put in on the form for customs, and I will just do the same form and it will not get stopped at the border and I will pay it every quarter or something. Is that how you envisage a modern border working, or are we expecting queues at the border and paperwork being checked and milk being sampled and God knows what?

Professor Schiek: The electronic border you are speaking of, as I said, is still a work in progress. I was just citing the Commission implementing decision 2016/578, which envisages the development of the electronic checks. I know you are filling in those forms as an active farmer at the moment, but it is going to be perfected. The question then, which is probably something that Katy is more capable of answering, is how do we check that everybody is doing this properly? How do we find the black sheep? That is increasing controls, I think.

Q89 Chair: Dr Hayward, do you have anything to add?

Dr Hayward: Smuggling is already a major issue around the border, particularly fuel smuggling, of course, and tobacco smuggling more broadly in the EU. These are issues that are faced, and it is just a problem that is bound to expand. Technology, I repeat, is only going to be effective in as far as we have intelligence to follow up on, the use of profiling and the like, which is concerning in its own way.

One thing too to note outside the single market is that common technical standards are critical in enabling trade and freeing up trade. Without those, we could see greater impediments to trade that would affect farmers and other businesses, of course.

Q90 Chair: One last question from me: which EU external border, do you think, is most comparable to what the UK/Ireland border will look like? Which one is perhaps the best example for us?

Dr McDonnell: They will all be different.

Chair: I asked for best, not perfect.

Dr McDonnell: They will all be different. The arrangements will be different.

Professor Schiek: That is really difficult to answer, because the UK will always be a special case. It is a very large economy. It was an economy that was largely integrated with the European Union market but it will dis-integrate. That is what the decision of Brexit is about. It is not comparable with Ukraine, which is rather lower developed. It is not comparable with Canada, because there is no land border, although the



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level of development is much more comparable. It makes it difficult to answer that question. I do not think there is any border in the EU that will be comparable with that border between the UK and the rest of the EU.

Professor McCall: Yes, the geopolitical position is so unique that it is very difficult to compare this border with continental European borders.

Lady Hermon: Yes, and that is before we mention Lough Foyle or Carlingford Lough.

Professor McCall: Disputes raise their heads after decades and events.

Lady Hermon: Yes, but that is what we are looking at. That is the reality of what we are looking at. Sorry, Chairman, we do have an issue about Lough Foyle and Carlingford Lough. It is on the border. It is a significant problem that both the Governments are going to have to look at and resolve—amicably, of course.

Chair: Okay. That is the meeting closed. Thank you very much for your attendance.