HOUSE OF LORDS

Constitution Select Committee

Uncorrected oral evidence: UK Internal Market Bill

Thursday 24 September 2020

10.20 am

Watch the meeting

Members present: Baroness Taylor of Bolton (The Chair); Lord Beith; Baroness Corston; Baroness Drake: Lord Dunlop; Lord Faulks; Baroness Fookes; Lord Hennessy of Nympsfield; Lord Howarth of Newport; Lord Howell of Guildford; Lord Pannick; Lord Sherbourne of Didsbury; Lord Wallace of Tankerness.

Evidence Session No. 3 Virtual Proceeding Questions 20 - 27

Witnesses

I: Professor Katy Hayward, Professor of Social Divisions and Conflict, Queen's University, Belfast; Professor Nicola McEwen, Professor of Territorial Politics, University of Edinburgh; Professor Joanne Hunt, Professor in Law, Cardiff University.

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Examination of witnesses

Professor Katy Hayward, Professor Nicola McEwen and Professor Joanne Hunt.

Q20 **The Chair:** The House of Lords Select Committee on the Constitution is taking evidence on the UK Internal Market Bill. Our witnesses this morning are Professor Katy Hayward, Professor Joanne Hunt and Professor Nicola McEwen.

Welcome to you all and thank you for giving us your time this morning. Certain aspects of the Bill have had quite a lot of attention, in particular aspects of international law. Were it not for that, devolution would probably have been the central issue that people were discussing.

Can we start by asking for your general view on how the Bill affects devolved legislative and executive competence, and indeed the functions of the devolved Administrations? We can come on to some of the detail, but if you would like to give an overview it would be a helpful start.

Professor Joanne Hunt: Thank you for the invitation to give evidence this morning. As you indicate, the devolution aspects have been somewhat sidelined in the furore around the Bill so far.

On the face of the Bill there are some explicit changes to devolved competence. It designates state aid as a reserved area of competence. Currently, there is dispute around that, although there is a concordat about co-operation on financial assistance, as part of the memorandum of understanding on devolution, that acknowledges that that is a devolved field. That aside, this is an attempt to clearly reserve that area, and that is done in Clause 48. The internal market legislation adds the Bill to the list of protected enactments in each of the devolution settlements that will pre-empt subsequent devolved legislation or executive action that amends, modifies or seeks to repeal this legislation in any way. On the face of it, there are some clear restrictions and changes to existing competence.

Beyond that, the UK Government maintain that there is no restriction on devolved competence introduced by the Bill because the Governments and legislatures can continue to regulate economic activity for their territories and within their fields of competence. The Bill prevents the application of those regulations to products, service providers and workers from outside that immediate territory. It has a very real and significant impact on what the devolved Administrations and legislatures are able to do, and the effects that their policy choices are able to have within the field of devolved competence. That limitation is expressly acknowledged in the impact assessment alongside the Bill, which talks about how the public benefit of local measures might not be fully realised and that societal benefits will be forgone because of the exercise of these new rules. There are considerable changes.

Professor Katy Hayward: I shall speak particularly about the impact on Northern Ireland. The Explanatory Notes accompanying the internal market Bill say very clearly that it will place "a new limit on the effect of

legislation made in exercise of devolved legislative or executive competence". This relates to powers that will be handed back, in theory, to the devolved Administrations.

We have a very particular situation in Northern Ireland, given that we will have to continue to follow EU rules and the acquis in certain areas, obviously relating to the protocol. This puts Northern Ireland in a very distinct position in the UK internal market, regardless of whether it has an integral place within it. It is very much in a distinct position, which means that the market access commitment, particularly with regard to mutual recognition and non-discrimination, does not really apply for goods coming into Northern Ireland from GB.

In effect, the devolved competence that Northern Ireland has, and the enhancement of the powers of the Executive and legislature of Northern Ireland, is quite limited, because we will continue to have to fulfil EU standards. More to the point, we will not place on the market in Northern Ireland goods that do not meet those standards.

The Chair: We might come back to some of those issues in more detail later.

Professor Nicola McEwen: I have very little to add. I agree very much with my colleagues. We have heard lots of claims and counterclaims about the Bill, including the claim that it strengthens devolution and enhances devolved powers. I find that quite difficult to see in this particular Bill. There is a case to make that other bits of legislation have enhanced powers that were previously under the authority of the European Union, but not this Bill. This Bill, quite explicitly in some cases, adds to areas of reserved competence. While it does not take away much of what the devolved legislatures and devolved Administrations can do, it limits their scope, and quite explicitly.

I find the acknowledgements in the impact assessment document in particular quite extraordinary for growing societal benefits. In a sense, that is a challenge to one of the motivations for devolution in the first place. There were many reasons of course, but one was to establish institutions within the devolved territories that could design policy; that could deliver services; that could intervene in the market, to an extent, in ways that produced societal benefits and provided solutions that were deemed appropriate to the needs of those communities and to reflect on the preferences of those communities. In some senses, the scope of the mutual recognition principles and non-discrimination principles is a challenge to that, and much more so than is the case in the equivalent EU internal market legislation.

The Chair: I will ask our engineers if they can try to improve the sound. We just about followed what you were saying, but there were times when it was breaking up a little.

Q21 **Lord Dunlop:** Picking up on Professor McEwen's last point, during the UK's membership of the EU the devolved Administrations' freedom to

regulate and legislate as they saw fit in devolved areas was constrained by EU regulations. The Government's argument, as I understand it, is that outside the EU, to protect the operation of our own domestic market, there needs to be an equivalent UK regime. Do you think that is right, and are the measures in the UK Internal Market Bill equivalent to the EU constraint? If not, in what ways are they not equivalent?

Professor Nicola McEwen: The EU regulatory umbrella poses a challenge. The extent of the challenge is difficult to foresee in advance of things emerging, but there is potentially an issue if we thought that all the Administrations would introduce divergent regulation. One has to question whether that is likely, given what would be my starting assumption, which is that all the Administrations, whatever their political persuasion, are interested in facilitating free movement, business access and mobility for professionals—all the things that the Bill attempts to address.

Is it an equivalent constraint? No, I do not think it is, because the array of exemptions permitted within this legislation is much narrower than we have seen in the EU internal market. Perhaps Professor Hunt, as the lawyer on the panel, might fill in a bit more there. Clearly, some of the principles in EU internal market law around proportionality and subsidiarity are not present in this Bill. Some of the exemptions around public policy, environmental and consumer aims and goals are not within the array of exemptions permitted within the Bill, which is much more narrowly defined.

I do not think it is an equivalent measure, but I accept that there may be a need for something, although my preference would have been to explore that in the intergovernmental arena in the first instance, rather than what seems to be attempting to have a legal backstop to support all these arrangements.

The Chair: Professor Hunt, do you want to add to that?

Professor Joanne Hunt: I agree absolutely with what Professor McEwen said. In the EU context, we have enforceable free movement principles and ideas of market access, but they operate secondary to an agreed body of common legislative standards. There are harmonised legislative minimum standards. Our common frameworks agenda was meant to fill that space.

The EU model is harmonisation first, and then, where there are spaces or gaps, the horizontal principle fills the gap. This piece of legislation rather looks as though it is turning those things on their head. It appears as though we have reached the end of the line on the common frameworks, as far as this legislation goes, and it becomes the primary means of achieving the internal market objective within the UK.

It is not clear from the Bill what the place of the common frameworks is. They are not excluded, it appears, from the reach of the principles. There are problems running through that. The emphasis on the market access

principle is very much greater now in the UK context. As Nicola said, it is in a much more robust and absolute form than we find in the EU context.

We have experience. I do not think the case has been made that we need this piece of legislation at all. We have not let the common frameworks have space to see what works there. If we need some sort of residual fallback principle, why are we not taking more from what we already experience, and what our courts are already used to giving effect to, in relation to EU free movement principles?

We have experience of case law and legislation regulations adopted by the devolveds that have been challenged on free movement principles, whether that is minimum alcohol pricing, the use of vending machines for selling tobacco products or, in Wales, the use of electronic dog collars as a training aid. All those things have been tested for their compatibility with the internal market and have survived the test; they were able to be maintained under an EU regime. What is not clear is how they would be interpreted under this regime. It rather looks as though a number of them would not survive under the new rules, because they take a rather different and more absolute form as far as the market access principle is concerned.

Professor Katy Hayward: On the point about the EU environment and how different that was, it is worth remembering that Northern Ireland will be following EU rules, but outside the EU and with no means of shaping decisions. There is a different type of concern about devolved competence vis-à-vis what it all means from the Northern Ireland perspective. I think that is worth noting.

Lord Dunlop: Could I follow up what Professor Hunt said about common frameworks? Obviously, the whole common frameworks process is collaborative. Could you say something about what progress you think is being made with those common frameworks? Why do you think the Government have concluded that on their own they will be inadequate to protect the UK internal market?

A second, or maybe third, question is about the delegated powers in the Bill. Are the requirements in the Bill for devolved consent to the use of these powers appropriate, and how, if at all, do they affect the balance of power between the UK Government and the devolved legislatures?

Professor Joanne Hunt: Where are we with the common frameworks? My understanding is that good progress was being made, but that space has been taken since the pandemic, and perhaps things have not been proceeding at the pace they needed to. With the end of the transition period looming, the concern that that might open up the opportunity for divergence has obviously pushed the Government into introducing this piece of legislation now, in a hasty way.

There are other means that could be used to maintain consistency and to hold the line while the common frameworks are being developed. There are powers in the withdrawal agreement that were introduced explicitly to

ensure consistency across the UK. There was a political agreement on the part of the UK Parliament legislating for England not to legislate contrary to what was already in EU law. There was a commitment on the face of the legislation that Wales, at least, gave its legislative consent to under that agreement. If that regulatory power was used under the withdrawal agreement to freeze existing EU law, it could be used to hold the line until the common framework was agreed. That does not seem to have been canvassed as an option. The Bill rather overtakes that, whether or not because the UK Government want the flexibility to be able to move from the existing EU standards, which they would not have under the provisions of the withdrawal Act if they brought in regulations there.

The common frameworks have not been given the opportunity to demonstrate that they would provide what is needed for the UK's internal market. As Professor McEwen said, there would be space intergovernmentally to work out if gaps emerged around that, but that, again, has not been given the opportunity. It is very much a hastily conceived piece of legislation to try to fill gaps that have not yet emerged.

You pointed to the collaboration that has been seen, Lord Dunlop. We have had reports of effective collaboration in the process of common framework creation at officials level and beyond. This piece of legislation does not have collaboration written through it by any means. You referenced consent aspects. There are no consent aspects in this legislation. There is, now and again, the odd provision for consultation, but nothing to do with devolved consent in any of it, and on some very significant aspects.

In Schedule 2, there are areas that are currently reserved from the reach of the legislation, which include the health service and social care services. The Secretary of State has the power to change that list, but there is no input written into the legislation for the devolveds at all, let alone consent. There is not even consultation around it. At a very minimum level, we should be looking at the consent procedures that were written into the withdrawal agreement. Why are they not equally on show in a piece of legislation with such constitutional significance?

Professor Nicola McEwen: I agree very strongly with Professor Hunt's comments with regard to consent. It is for the Committee and others to judge what is appropriate, but there are no provisions for consent for the very extensive delegated powers within the Bill. On areas where there is an obligation to consult, it is not at all clear what that means.

There are references to the need to consult before making regulations, but what process is envisaged? What does consult mean? Does it mean a meeting? Does it mean legislative scrutiny? Does it provide a timeframe that would allow for that, or is it, as was the case with the Bill, I understand, sharing the content of the legislation the day before its publication? Having some sort of robust procedure in the measure would seem to me the very minimum that was advisable.

It is not just about consulting Ministers. There are important scrutiny issues for your own Parliament and for the devolved legislatures to be brought into the picture when it comes to the potential to change aspects of the legislation in very significant ways that could have a significant impact on devolved competence.

Lord Beith: It seems to be a common thread in your analysis that the United Kingdom Government get a good deal of power in the structures proposed by the Bill, relative to devolved legislatures. I am intrigued as to how you think that power is exercised. To what purpose would it be exercised?

Would it be exercised to act as a referee when there were disputes that needed to be resolved between the devolved legislatures and England, or would it be to advance English interests, either on grounds of the economic effects of some proposal from one of the devolved Governments or because there was a political difference about whether something was desirable that would cut straight across the devolution settlement? Do you anticipate that the UK Government's powers are to be used for the pursuit of the interests of England or more as a referee role?

Professor Nicola McEwen: I do not think it is either of those. Perhaps the most explicit area is in the spending power that the legislation provides to the UK Government to spend in areas of devolved competence. We do not know very much about that. There is not very much detail about that in the legislation or in the surrounding documents. There are references in the Explanatory Notes—for example, that it is in part about levelling up for the whole of the UK and investing in things that would represent UK values.

I think it is in part a reflection of the UK Government moving away from what might have been labelled as a devolve and forget policy to a devolve and intervene policy. It is not at all clear the extent to which that would be in partnership with the devolved Administrations or whether it would bypass the devolved Administrations to enforce the role and status of the UK Government in those territories, in a bid to strengthen union, one assumes.

On the market access principles, I am not sure that there is a deliberate intention to advance English interests, but the sheer size of England within the UK and the sheer size of the English market could have the consequence of an inherent advantage for English-based producers. I am not sure that is the motivation behind that. I think it is just one of the consequences of the asymmetry in the United Kingdom and there are no protections built into the legislation to adapt to that or modify it.

I do not see that dispute resolution would come into it. There are issues about dispute resolution and intergovernmental relations, and my understanding is that there has been progress on those sorts of issues, but I do not see that they would come into this legislation, with the UK Government having a role as a referee, because of the way it is intended

to be implemented. In a way, it removes the UK Government from the process because a lot of authority is put on businesses and officials simply to disapply regulations that would be seen as being in contravention of market access principles.

Professor Joanne Hunt: Intentionally or otherwise, the measure clearly has the effect of recentralising. It provides very little in the way of counters to recentralisation, should that be what is desired. What it does, of course, is allow the UK to enter into international agreements and make commitments on various regulatory standards that it can guarantee would be able to be then moved around the UK; they would not be blocked from any part of the UK necessarily. That has something to do with the timing of the piece of legislation now.

Nicola alluded to dispute resolution. There is very little that we know from the Bill about how disputes are meant to be resolved; whether it is to be intergovernmentally, or whether there is to be a role for the courts. The market access principles and the discrimination principles are referred to as having direct legal effect. The impact assessment makes reference to businesses using them before the courts. It is unclear who the final referee will be when they are making those assessments. There is so much that is unknown around the legislation that it makes it a very problematic Bill.

Q22 **Lord Wallace of Tankerness:** The Government say that the aim of the Bill is to support frictionless trade among all parts of the United Kingdom. Can I ask the witnesses whether, and if so to what extent, you think the Bill achieves that aim? As a supplementary, if we did not have the Bill at all, in the present architecture of devolution would trade be frictionless? If we did not have the Bill at all, what do you think would happen to trade among all parts of the United Kingdom?

Professor Katy Hayward: No, the Bill does not achieve frictionless trade. I will repeat myself a lot. Because of what the Northern Ireland protocol means, it is impossible for any domestic legislation to allow for frictionless trade within the UK as a whole. Because Northern Ireland will be following EU rules, there will be restrictions on goods coming into Northern Ireland from GB.

The extent of those frictions, of course, depends on the future UK-EU relationship and the way the protocol is implemented. It also depends on the future deals that the UK has. Primarily, the question here is about the lowering of standards, which is of great concern. There is no minimum standard. Basically, it is the race to the bottom that the devolveds are very concerned about. It will not be possible in Northern Ireland because we will be maintaining certain standards, but that is not to say that it cannot happen in Great Britain, and the Bill does not prevent it. As a result, if we have lowering of standards, even just in England, there will be increased friction in trade between GB and NI.

The Chair: Do you think that was clear from the beginning when the agreement was signed in January?

Professor Katy Hayward: Yes, absolutely, it was. It was quite clear that in order to avoid the hard Irish land border you would have the potential of those controls being moved to the Irish Sea. The extent of that friction depends on the closeness or otherwise of the UK and the EU, and the divergence that happens between the UK and the EU. It is worth noting that for Northern Ireland we are committed to dynamic alignment. It is not the case that the standards that apply today will necessarily continue to apply. They may go up, depending on whether legislation at EU level is enhanced. Again, we will have no say over that.

The possibility of divergence between GB and NI can go two ways. It can be a lowering of standards anywhere in GB, as might be attached to a UK free trade agreement with a third country. Or it can also be an increase in standards by the EU that Northern Ireland has to follow.

Professor Joanne Hunt: On whether it achieves frictionless trade, the starting point might be to ask why we have decided that that is a value above all others that we want to pursue. Completely frictionless trade negates the devolution of power, which in itself suggests that things will be done differently. Those things will carry costs, but that is because they reflect the particular values that local legislatures support. Frictionless trade has not been agreed across the UK by the legislatures of the UK as something that needs to be pursued above all other things.

On the legislation generally, a number of hypothetical cases have been identified as causing frictions and problems, but the examples that have been given are where we are supposed to have common frameworks. Labelling, pesticides and animal foods are identified as causing problems and frictions if there is divergence, but there is supposed to be a space for common frameworks coming through there. Again we come back to the question at the start: is this legislation necessary and appropriate?

Professor Nicola McEwen: I agree with all of that. Even in the case of Scotland and Wales, the Bill does not achieve frictionless trade because it is forward looking. It accepts any frictions that are within existing regulatory divergence, but it is only about what might happen in the future. It is not clear to me why existing frictions are seen to be okay, and not problematic for mobility and so on, but that some hypothetical differences in the future would be more problematic, sufficient to merit something quite significant.

One of the consequences of that is that it discourages innovation. It may on policy grounds seem appropriate to revisit a regulation, to refresh it, to change it or adapt in light of experience and learning. If doing so brings the legislation within the scope of the internal market constraints, the devolved legislatures may be reluctant to do that. That does not seem advantageous on policy grounds.

Lord Wallace asked about the architecture. It is clear, as many of us have been saying for a very long time, that the existing machinery of intergovernmental relations is simply not fit for purpose, but there has been progress in the discussions behind the scenes on how to resolve it.

It has taken a very long time, as Members will be well aware, but my understanding is that there has been some progress. The introduction of this legislation will now make it very difficult to get the compromises that will be needed to finalise that process. We are moving rapidly towards the end of transition without the appropriate machinery in place to support the kind of co-ordination that will be necessary, more so than ever before in devolution conflicts.

Lord Howell of Guildford: It seems to me that all three of our witnesses are telling us extremely clearly that this is centralised union legislation in a union that is no longer centralised. That is the point. I can see no comparison with the larger EU single market, which began from completely different origins and is underpinned by a completely different philosophy from the attempt to maintain the UK internal market.

Although I cannot compare it with federations—a dangerous word—and it is obviously hugely lopsided, as Professor McEwen pointed out, it can only work with the devolved nations being totally in support of the union. In the case of Wales, I think that is so. In the case of Northern Ireland at present, although it is controversial, that is very much so; but in the case of Scotland, not so.

Professor McEwen has just emphasised that the pattern of trade is changing anyway in a revolutionary way. There is a vast shift towards knowledge projects, digital fabrication and all sorts of other things that change the whole picture of goods travelling across borders. In that situation, one has to ask whether the Bill is not absolutely fundamentally flawed if Scotland is not in the mood to be a strong supporter of the union, which at present it certainly is not and it looks as though it will become even less so.

Professor Nicola McEwen: I caution against making an assumption that there is a consensus position within Scotland on those issues. I feel obliged to say that. Equally, there is a big difference, it seems to me, from being a supporter of the union, as the current Administration in Wales are, and being supportive of this legislation, which they have indicated they are clearly opposed to.

There are some interesting descriptions of the state of the United Kingdom in the White Paper in particular and in some of the surrounding documentation, where the United Kingdom was described as a unitary state. That surprised many of us who have been observing the changes to the United Kingdom in the last few decades. That is quite a different conception of the United Kingdom constitutionally from one that embraces its multi-level nature. We are not a federation, of course. Nevertheless, multi-level government created by devolution has changed the United Kingdom. In a way, that seems to be lost in the legislation.

On the broader point about whether you would need to support the union in order to support an internal market, I am not sure that that is the case. The Scottish Government's White Paper on independence, ahead of the 2014 referendum, was implicitly supportive of free trade across the

Anglo-Scottish border. There would clearly be an incentive to have some sort of arrangements that still permitted access for businesses and professionals under any constitutional scenario that we lived with in these islands. It seems to me that there was a way to do that, and to meet the challenges, which could have depoliticised them and taken out some of the heat. I am afraid to say that this legislation is clearly not that.

Lord Dunlop: I want to go back to the specific point about spending powers, which Professor McEwen has already mentioned. In the White Paper that preceded the Bill, the Government talked about the additional spending powers necessary to support the internal market. The powers in the Bill to spend directly in devolved areas appear, on the face of it, to go much wider. In reality, do you think the UK Government will be able effectively to exercise the power to spend directly in devolved areas without close collaboration with the devolved Administrations? Do they have the necessary on-the-ground delivery mechanisms to achieve that?

Professor Nicola McEwen: That is a really interesting question. I suppose it would depend on the particular projects they had in mind. Clearly, if we were talking about big infrastructure projects, that would suggest a need for co-operation with planning authorities and the devolved Administrations for other areas of policy that would be involved beyond simply spending money.

The Explanatory Notes talk about different types of projects—for example, sporting or cultural events. There may be opportunities to invest in those sorts of projects without the need for co-operation. I think that speaks to a desire to have a more visible presence in the devolved territories, perhaps for nation-building purposes or perhaps to strengthen the profile of the UK Government in those areas to nurture a sense of loyalty. We see that in many other cases.

In Canada, which I am very familiar with, you often find that the federal Government compete with the Government of Quebec to try to invest. In some ways, from the population's perspective, if that competition means increased investment, it does not really matter. If it means more money, it means more money, but there is an issue around competence and whose responsibility and whose authority it is to set the priorities for investment in particular schemes.

Q23 **Baroness Fookes:** May we turn to a previous stage—the preparations before the Bill was actually published? The memorandum of understanding between the UK Government and the three devolved Administrations makes great play of good communication, consultation and co-operation. How much of that actually took place? How far were those worthy aspirations made a matter of practice?

Professor Nicola McEwen: The principles in the current memorandum of understanding are so vague as to be open to very broad interpretations. Even allowing for that, there are differences between the Scottish Government and the Welsh Government. I will leave Katy to talk about the Northern Ireland Executive.

The Scottish Government chose not to engage in the internal market work that was led by BEIS, whereas the Welsh Government did in the early stages. Even there, engagement became much more difficult for the Welsh Government earlier this year, and not just because of Covid; it was since the general election. That was not for the want of trying to get information and to have engagement.

The Chair: Want of trying on whose part—the Welsh Government?

Professor Nicola McEwen: On the part of the Welsh Government. You might wonder why the Scottish Government did not engage. I think it is an issue of trust.

The other relevant contrast is that the approach taken over internal market proposals was very different from the approach taken with regard to common frameworks. With common frameworks, where all the Administrations participated, it was very much a co-owned process. They explored the problem together and investigated the areas where they felt there was a need to replace EU frameworks with something, whether legislative or non-legislative, for the UK. It was a co-operative process from the outset.

With the UK internal market proposals, it was much more top down, and the understanding of the problem was defined at the outset in UK Government terms. It was a different type of process. The engagement was not wholly satisfactory.

Professor Joanne Hunt: Particularly given the significance of this piece of legislation's constitutional implications for devolution, the lack of engagement seems particularly egregious.

Professor McEwen referred earlier to the experience that we had had in the 20 years of devolution as a devolve and forget approach. Rather than moving now to a position of more shared governance that we might see as a counterpoint to devolve and forget, it seems that a very much more top-down approach is being taken. The common frameworks were different. It seems that the work around the common frameworks was different, but this fits with a different approach—very much so.

Baroness Fookes: It seems to me that there was a fundamental misunderstanding or wrong approach right from the outset, and that it was not seen as a co-operative venture, but top down. I think that is what one of our witnesses said. Do you think that is why we now see problems coming out with the Bill itself?

Professor Joanne Hunt: Very much so. It might lead us to think about how Parliaments may be involved as well. This piece of legislation absolutely has not given space for proper engagement ahead of the introduction of the Bill to try to iron out the devolution aspects that we know will lead to Parliaments refusing to give their legislative consent. More collaboration earlier on can assist the passage of a piece of legislation, particularly one of this constitutional significance.

The Chair: Thank you. Shall we move on to Northern Ireland?

Q24 **Lord Pannick:** Could I ask our witnesses, particularly Professor Hayward, how the Bill will affect, if at all, the terms of the Good Friday agreement and the power-sharing arrangements in Northern Ireland?

Professor Katy Hayward: That is a very pertinent question. If I might, I will mention something in follow-up to the previous question first. A good indicator of the situation in which we find ourselves is the fact that, in the discussion about the creation of the common frameworks, Northern Ireland's input has been, until recently, fairly limited, given that the representation was from civil servants feeding in information rather than through negotiation. We know that the Northern Ireland Executive submitted a response to the consultation on the United Kingdom Internal Market White Paper, but it is not known among all the parties of the Executive. It has not been published, nor has it been seen by the Committee for the Economy in the Northern Ireland Assembly. That shows that there are grave political and procedural concerns about the process of developing the Bill and the reactions to it.

In relation to the Good Friday Belfast agreement, there are several points. The first is about the fact that obviously the Bill affects devolved competence and the status of devolution. We have heard a lot of concerns expressed between Northern Ireland parties about the fact that devolution is undermined by it. Fundamental to the whole Good Friday Belfast agreement is Strand One, which centres on devolution functioning properly in Northern Ireland, with knock-on effects for the other strands of north/south and British/Irish.

The Northern Ireland Assembly held a vote on Tuesday in which a clear majority of people objected to the UK Internal Market Bill. There was particular concern that it was going forward without the consent of the Assembly. There are grave concerns.

Turning to the detail of the Bill, and whether it challenges the agreement itself, there are two dimensions. The broader question relates to an earlier point about whether it is really some means of trying to strengthen or enhance the union. A clause that has been overlooked in the Bill is Clause 40, which is about the protocol. It talks about movement from Great Britain into Northern Ireland; it is very vaguely expressed, but essentially it says that in implementing the protocol, and exercising functions relating to implementing the protocol, UK authorities should do so in such a way that they show "special regard" to "the need to facilitate the free flow of goods between Great Britain and Northern Ireland with the aim of … maintaining and strengthening the integrity and smooth operation of the internal market in the United Kingdom".

The point about strengthening the integrity of the United Kingdom could cause some concern. That is partly in relation to the fact that the Good Friday Belfast agreement says that "the power of the sovereign government with jurisdiction" over Northern Ireland "shall be exercised with rigorous impartiality on behalf of all the people in the diversity of

their identities and traditions", and founded on "just and equal treatment for the identity, ethos, and aspirations of both communities". You can see that there is a difficulty for Northern Ireland-based authorities to be asked to exercise the protocol in such a way that strengthens the integrity of the United Kingdom. That is a potential concern.

The final point is about Clauses 42 and 43, which we may discuss in more detail. In essence, the first is about unfettered access and the second is about state aid. Neither of those things guarantees frictionless trade for Northern Ireland by any means; they do not fall within the competence of the Northern Ireland Assembly anyway. The question is about how those powers to disapply the elements of the protocol come into play. They are obviously outside the hands of the Assembly, but even with the Neill amendment, there is no means by which Northern Ireland elected representatives can shape the use or exercise of those powers. At every level, there are concerns about the nature of representation from Northern Ireland and the ability to shape decisions that are being made that have such direct effect here.

Lord Pannick: Would it assist, from a constitutional point of view, to include a provision in the Bill to the effect that none of the powers granted under the Bill shall affect or contradict the Good Friday agreement, or would that just introduce confusion?

Professor Katy Hayward: It is a good question, because it is difficult to point to a particular article in the agreement that it would contradict, other than the fundamental principles around the importance of devolved competence.

An alternative approach would be to have explicit recognition of the purpose of the protocol to begin with, which has been present in UK Government publications relating to the protocol and business in Northern Ireland around it after the end of transition. That is the full scope of the protocol, which is obviously about unique circumstances in the island of Ireland, avoiding a hard border and protecting the 1998 agreement in all its dimensions. That would be a useful way of underlining the importance of the agreement to the future of Northern Ireland.

Lord Howarth of Newport: Professor Hayward, could you share your thinking a little further on the differences of view within Northern Ireland? You referred to power sharing. There are, I imagine, quite strongly felt differences of view about the interaction of this legislation with the protocol and with the Good Friday agreement. What is your assessment of the strength of feeling as to the potential irreconcilability of views and the practical problems that may ensue from the impact of the legislation?

Professor Katy Hayward: It is difficult to differentiate. Most of the reaction has been around the statement that it breaks international law, and, of course, that has given rise to immediate concerns about the status of the agreement, given that the Good Friday agreement does not have the kind of dispute settlement mechanisms that the withdrawal

agreement has; nor does it have recourse to international courts, such as the withdrawal agreement has.

There is a sudden sense of the vulnerability, I think, of the Good Friday agreement, and that has given rise to many expressions of concern, not just from political representatives but from civic groups and leaders. An open letter was published recently from human rights and equality organisations stating their opposition to the UK Internal Market Bill precisely because of the risks posed to the protocol, and the statement about breaking international law.

About the specifics of the Bill, it is difficult to say, because it has become inseparable from the protocol. It is striking how different the Bill is compared with what we would have anticipated on the basis of the White Paper on the internal market. The White Paper explicitly said that the proposals that would come forward on the UK internal market would bear in mind the obligations of the UK in relation to the protocol.

As to the reactions, clearly, the DUP and the Ulster Unionist Party welcome the Bill to some degree, but they do so not on the grounds of what it means for market access for NI goods into GB, necessarily; they are doing so primarily as a result of their opposition to the protocol. They see the powers contained in the Bill, or given to Ministers of the Crown, as a means of exerting some leverage over the EU in the current negotiations. They also see it as a means of offering safeguards for Northern Ireland, and for NI-GB relations, after the end of the transition period in the case of no deal, in case of a breakdown of UK-EU relations.

Unfortunately, I do not see in the Bill anything that would necessarily grant them the grounds for such assurance, because, as I say, those two clauses are very particular, and in and of themselves do not go as far as maybe some people would like when it comes to securing frictionless trade across the UK, including Northern Ireland.

Lord Howell of Guildford: I have a short additional thought. What do our witnesses think about the American interest that has been reignited in the Ireland situation by the debate around this Bill? Bear in mind that, in the past, American intervention has been very mixed in its results; it certainly added to raising tensions back in the 1970s and 1980s, although George Mitchell was a great peacemaker later on. Generally, American-Irish involvement in the delicacies and sensitivities of Irish politics has been a pretty good disaster. Does it worry you that somehow this debate is inflaming American interest again?

The Chair: I am not sure whether that is more a question for politicians, but if people want to comment they can.

Professor Katy Hayward: It is remarkable quite how outspoken American leaders have been in relation to this. I thought the statement from Mick Mulvaney, who is a special envoy to Northern Ireland, was quite astute in some ways. He said, basically: "We want to avoid the

emergence of a hard border on the island of Ireland by accident", as an inadvertent consequence of what is happening.

There is a strong sense of ownership of the peace process and of concern towards it, for obvious reasons. There are two dimensions: the sense that the UK is approaching all this in a way that might stir up tensions and destabilise the peace process, with particular anxieties among the nationalist community; and the sense of the reliability of the UK as a potential partner in an FTA. Those two things cannot be separated.

The Chair: Shall we move back to more general things about all the devolved legislatures?

Q25 **Baroness Drake:** We have been addressing the impact of the Bill on the integrity of the existing devolution arrangements, and Lord Pannick posed a specific question about an amendment in relation to the Northern Ireland protocol. If I could ask a more general question, what amendments to the UK Internal Market Bill, in your collective view, are necessary to protect the integrity of the existing devolution arrangements in the UK?

Professor Joanne Hunt: I go back to the original point that we are not yet convinced that this piece of legislation is necessary, but if we take the position that we are working with this piece of legislation, it needs to make clear the relationship between the Bill and the common frameworks. If we are to have a free movement principle, we need to make clear why we are moving from the status quo of the EU principle operating across the UK at the moment. That free movement principle, as we know, has far greater grounds for justification; concerns for subsidiarity and recognition of local choices are built into the assessment of the proportionality and appropriateness of a measure. I think we want those things replicated in any UK free movement principle.

We need to know more about how disputes will be resolved, and the role of Governments, or any other referee body, in that process. We need to shore up the very obvious gaps around consultation and consent. Our starting point needs to go to what has been achieved in the past in pieces of legislation such as the EU withdrawal Act and the consent requirements that are written into that; we need something equivalent to that, rather than where this piece of legislation starts from, which is far back from there. Those are some obvious things that could be written in to improve it.

Professor Nicola McEwen: I agree very much with all the points that Professor Hunt made. It is not at all clear to me why there is a need for a greater set of constraints in the UK internal market than those provided for the EU internal market. I have not seen a case made for that, and it seems particularly odd when we are starting from a completely different place. The Government's documents indicate that the UK is already a very integrated market. There is an interesting comparison with Germany, which is much more loosely integrated than the UK. Whereas the EU internal market is trying to facilitate integration, the starting point

here is completely different; it is trying to avoid anything that would move in the other direction. It is not at all clear to me why that needs more extensive constraints than in the EU case.

I agree that for consultation and consent we might, at the very minimum, expect something similar to the consent arrangements in the Section 12 regulations of the EU withdrawal Act, but we should bear in mind that those were very controversial, particularly in Scotland, where they were not seen as giving sufficient guarantees to enable the devolved legislature to grant consent to that Bill, and they were time limited. The delegated powers, the regulatory powers, provided in that Bill to introduce regulations subject to a much more elaborate consent decision process were time limited for a period of two years. The delegated powers in this Bill are much more extensive and have no time limits at all, yet the process for securing consent, or even for seeking it in some cases, seems to be much more minimal.

I share Professor Hunt's view; I am not convinced that there is a need for this legislation at all. I would much rather see a pause. I am concerned about the rush to put it into statute. It is obviously conditioned by the deadline of the end of transition, but there are guarantees around continuity already provided by retained EU law, and common frameworks can be given scope to work. Some of those can be given the space to develop more fully because of retained EU law; some of them cannot. Some of them are day one issues—emissions trading, for example—but the Governments are alert to that and have been prioritising those more urgent areas. I am not saying that there is no need for some legal backstop, but the case for it has not been made yet, in my view. I would much rather see other things being given an opportunity to work.

Baroness Drake: Referring to the sense of trust in Scotland, if there was a pause on the Bill, Professor McEwen, do you think you could quite quickly get to an effective system post the withdrawal or post 31 December? Do you think there is an interim alternative that could operate given the sense of the relationships at the moment?

Professor Nicola McEwen: Some of your Members may be closer to this than I am, but my understanding is that the joint review on intergovernmental relations has been making significant progress towards completion. That progress has been disrupted by the capacity demands of Covid, but, more recently, by the introduction of this legislation and the effect it has had on trust and faith in the process. The sentiments that are expressed in the context of that joint review seem to be at odds with the direction of travel in the Bill.

If you do not have legislative underpinning, you need something else, and the something else, it seems to me, has to be in the intergovernmental space. A pause would create the space and the incentive for all the parties around the table to finalise the process. Without a pause, without at least something different from what we have here, I see things being quite difficult and that will not help relations at all.

Q26 **Baroness Corston:** What additional steps or safeguards ought to be prioritised to protect the integrity of the existing devolution arrangements, specifically in the context of the UK's departure from the European Union?

Professor Joanne Hunt: As Professor McEwen said on the previous question, the work on intergovernmental relations needs to be prioritised. Its critical significance cannot be underplayed. As well as that, there is a need for greater space for inter-parliamentary relations and for the Parliaments to work together to scrutinise intergovernmental work. It becomes even more pertinent if we are to be in a position where legislation is being made in other parts of the UK over which the local Parliament has no control. Opportunities for engagement between the Parliaments become very important.

What we lose by moving from the context of EU membership are principles that we have already referred to in this session. One is the subsidiarity that is written through EU governance. We see it through the legislative process, and in the ways the courts function and in their assessments. Devolution has taken place in a context where subsidiarity had constitutional status as a matter of EU law, and there is nothing comparable in the UK context that would support that. We need to be attuned to what is potentially being lost and the principles that we might want to bring in to try to shore that up. Again, this legislation certainly does not go in that direction. There are definitely some general governance things about moving towards a more effective system of shared governance for the UK—steps that could be undertaken.

Professor Nicola McEwen: There has been some concern in the debates that this could lead to a race to the bottom. To try to prevent that, we want enhancement of the parallel work on developing minimum standards, or common standards, where appropriate. That presumably would be in the common frameworks workstream.

Specifically on intergovernmental relations, what do we need? We need a committee of some kind, an intergovernmental committee, to oversee the internal market after transition. We have already lost the only intergovernmental committee that worked from the origins of devolution, and that was JMC Europe; that has gone now. We had intensive working around JMC (EN), but presumably that will fall away at the end of the negotiation process, and all we will have left in the absence of any alternative is the JMC (P), which has periodically got together. It is high profile, but it is not necessarily the space for doing the kind of collaborative working that I think would be necessary. The internal market is one area where I think there needs to be some kind of standing committee to bring the Governments together to support that work. There are other areas as well.

What I hope to see as part of this process is recognition that, while unfettered access for business is a legitimate policy goal, it is not the only one. It has long been recognised in this country that there are appropriate ways to intervene in the market to achieve other policy goals,

and that is rather downplayed in this legislation. There needs to be something to protect the authority of the devolved legislatures to legislate in areas that achieve the policy goals that they think or deem appropriate for their attention.

The Chair: We are having a slight problem with your sound again, Professor McEwen.

Lord Wallace of Tankerness: I was reflecting on what was being said about common frameworks, which I think we all thought were a way forward, and the need to avoid a race to the bottom. Have you any thoughts as to dispute resolution in the event of Ministers from the UK Government and the devolved Administrations not being able to agree within a common framework? It inevitably must happen from time to time, and some might say that it would not be appropriate if, as it were, the UK Government had a veto over everything. Do you have any thoughts on how you might get a dispute resolution?

Professor Nicola McEwen: Yes, I think there is a role for an impartial mediator. It is not altogether clear to me that the role envisaged for the CMA in this legislation would be able to provide that in the same way, but there could be some sort of analytical function to evaluate the claims and counterclaims and weigh up the evidence, although not to decide. It is appropriate for the Governments still to have that role, and to try to work through their differences where they can, but to do so with much more light on the process and with some sort of independent evaluation of the claims that are being made.

Ultimately, it is for the Governments to decide and to live with the consequences of a failure to agree. That links to one of the other issues that we have had with the intergovernmental process, which is the lack of parliamentary scrutiny and oversight of that process. That would have to go hand in hand with additional reforms to ensure accountability. There has been some discussion about whether, if you introduce a decision-making function to intergovernmental relations, which was not what they were designed for, you have to have a voting procedure, something similar to qualified majority voting in the European Council. I am not favourable towards that; I think it would lead to further diminution of trust if a Government were seen to be compelled to do something and adopt something against the will of their Parliament, but there are ways around that.

Talking it through is what normally happens in federal countries and other multi-level countries, finding compromises and instilling the kind of culture that leads you towards compromises. Other ways to do it are to allow for a looser arrangement, and allow for one territory to do something that is a bit different, that links to what the others are doing but has a kind of opt-out built into it. There are ways around it. I do not think it is impossible, but it certainly would be challenging.

Lord Howell of Guildford: Do our witnesses think that this Bill was really conceived in the belief that it is necessary for the UK as a whole to

negotiate as a whole, not just on Brexit but on all the other free trade agreements that we hope for or are currently negotiating?

My second question sounds different but is related. Does the Bill raise again the totally unresolved and long-standing West Lothian question?

The Chair: That is a big one. I am not pushing our witnesses to answer that, but who would like to say a word about Lord Howell's first point?

Professor Joanne Hunt: The timing at this stage perhaps suggests, or leads us to understand, that that is the purpose of this Bill. If shoring up internal domestic trade is the primary purpose, it would not need to be now and it would not need to be in this form. We have other things in place to achieve that; we have the common frameworks.

The Bill puts the UK Government in a position where they can go into negotiations saying that they can guarantee, or more or less guarantee, that meeting a particular regulatory standard in one part of the UK will give those products access across the UK generally, except on very limited grounds. It puts the UK in that position. It is a consequence of the Bill, certainly.

The Chair: When you say at this stage, do you mean that there could be an independence referendum that pushed it in a different direction?

Professor Joanne Hunt: No, I was thinking simply from the perspective of wanting it to be in place as swiftly as possible ahead of the end of the transition period for the negotiation of new international trade deals. It would need to be in place as soon as possible. If the primary concern was simply the internal domestic market, it would not have the same urgency. Other processes have been under way that would meet the internal domestic market aim, although they would have consequences internationally. That may be a reading that seems credible.

Professor Nicola McEwen: I think the Bill is explicitly about that, as well as about the internal dimensions. The surrounding documents make quite clear that it would empower the UK Government to negotiate trade deals that included areas of devolved competence and be confident that they would not face barriers in the implementation. That is acknowledged in the surrounding documents.

On the West Lothian question, I do not see that there are any provisions in the Bill that address that particular issue.

Lord Howell of Guildford: I did not ask whether there were provisions in the Bill. I asked whether it raises it. The Westminster Parliament and 87% of the JMC (P) is English and has Scottish MPs legislating on English issues, whereas the Scottish Parliament does not have English MPs legislating on Scottish issues. It is the old argument.

Professor Nicola McEwen: It would not in this case either. It would simply be that the consequences of how it legislated on English issues would have ramifications in Scotland, Wales and Northern Ireland.

Professor Katy Hayward: I want to underline the point that Professor McEwen made earlier about minimum standards. There was a suggestion in the White Paper that has since been dropped that the monitoring authority might be a place where you could make recommendations for minimum standards. That would meet the point about the monitoring authority being seen to be as independent as possible. There are concerns that that is not the case with the CMA being so close to BEIS. That notwithstanding, the point about minimum standards would address several concerns about market access across the UK, including GB to NI, as well as concerns about trade deals that the UK might be negotiating and the downward pressures arising from those.

Lord Hennessy of Nympsfield: Can I seek your wisdom on a big-picture question? It could be that once we are through Covid and have achieved Brexit, either squishy or hard, that the question of the decade of the 2020s will be the union question; you might call it the kingdom to come question.

I recall a debate in our Chamber after the Scottish referendum of 2014 when Ian Lang, former Chairman of this Committee and former Secretary of State for Scotland, said that we have to find ways of doing things together again. I think he meant big things as a union, to raise us up from the—my phrase, not his—endless drizzle of complaint in which we live. Do you have any ideas?

The Chair: That is a big question.

Professor Joanne Hunt: We have already covered a number of things that we would hope to see in a system of collaborative, shared governance for the United Kingdom, which recognises that a top-down approach is not suitable for a union that has now known experience of devolution and respects the devolved powers that are there. We need a stronger system of intergovernmental relations and a system of inter-parliamentary responsibility and government responsibility to the Parliaments within that. We need a statement of, or a commitment to, a set of shared constitutional principles. The approach we see from this Government is not one of bringing the union along and finding a way of doing things in a shared, collaborative, co-operative way. Once the ground is clear, there is urgency around those debates, clearly.

Professor Katy Hayward: If there is a hard Brexit, it would put great strain on the union from the point of view of Northern Ireland, given that the hard Brexit effects would be such that nationalists would feel increasingly unrepresented and at odds with the approach being taken by the UK Government. The sense of betrayal among unionists in Northern Ireland would also be very acute in consequence of a hard Brexit because it would mean that the Irish Sea border, for want of a better term, would be that much harder.

The very fragile balance that we have with the Good Friday Belfast agreement and the sense that we had, before the Brexit referendum and all that has happened since then, of nationalists and unionists feeling

relatively comfortable in Northern Ireland and willing to accept things more or less as they are, with no great drive or momentum towards Irish unity, has completely changed. There are questions of trust in the Government from devolved legislatures, plus the British-Irish relationship is under much strain. All those things are putting the situation in Northern Ireland very much at risk of further friction and tensions and, therefore, placing strain on the union itself.

Professor Nicola McEwen: We are living through an example of the sort of thing that works better when there is some co-ordination. Even despite the very difficult politics of the day, the Governments were able to come together, to a degree, to co-ordinate Covid-related matters, but it was striking that when they tried to do that there was no machinery to facilitate it. The devolved Governments had to be brought into Whitehall emergency committees. There was nothing in place that could facilitate engagement between the Governments as Governments themselves.

That is obviously exceptional, but there are other big things that may from come along time to time. The climate change conference next year in Glasgow would be an example. What we saw early on, when it was originally scheduled for this year, was competition between the Administrations as to who would have a profile, who would be included.

If you open avenues for the Governments to co-operate and to recognise the authority that each have, there might be—I forget the phrase you mentioned that Lord Lang uttered—some deviation from the kind of endless constitutional battle that takes place. I would not want to delegitimise the constitutional issue, which is very important for a lot of people. Particularly in Scotland, it is about the status of Scotland within the United Kingdom and its relationships with the other parts of the UK, particularly its largest part. That has been a long-running issue in the union.

I suggest that the UK Government might look inwards a little. It is the part of the UK that changed least when we introduced devolution. Devolution changed the UK fundamentally, in my view, but the machinery at the centre did not adapt to that changed reality, and sometimes there seems to be almost a reluctance to accept the consequences of devolution and to reify uniformity over diversity, but diversity has its own value in what we can do separately sometimes and do together sometimes, and in what we can learn from the other Administrations. That sounds awfully idealistic in these heated political times. None the less, there is merit in sometimes coming together but recognising the authority of the institutions to do things on their own terms.

Q27 **Lord Sherbourne of Didsbury:** Lord Hennessy asked his big-picture question. I would like to ask a small-picture question, a very specific one about the Sewel convention. I wonder what the views of our witnesses are. Given the absence of consent from the devolved legislatures to this Bill, and indeed to other Brexit-related measures, do you think that the operation of the Sewel convention needs to be re-examined?

Professor Nicola McEwen: Yes. I remember being before this Committee and others at the time we were debating its inclusion in the devolution legislation, the 2016 Act in Scotland. I was of the view then that including the clause in that legislation gave at least symbolic significance that the convention would matter politically, but that does not seem to be the case any more.

The convention mattered most when its limits were not tested. Each time, it seems to me, that consent is withheld yet legislation passes anyway, it diminishes the status, the power and the leverage of the convention ever more. So, yes, I think there is a need to revisit it.

There are some things that might help. There could be something like the consent decision process in the EU withdrawal Act, although some would argue that it is a very peculiar definition of consent when a consent decision could be taken that disagrees; a position that disagrees, that withholds consent, is in itself seen as a consent decision under that legislation, but at least a process is spelled out there.

There is a role for the Government to be more transparent about the engagement that takes place alongside their seeking consent from the devolved legislatures. There is also a role for Parliament. It is ultimately for the Westminster Parliament to determine whether or not the withholding of consent should lead to changes in the legislation. Perhaps there is something that Parliament itself can do in exploring some of the ways it might be reformed.

The Institute for Government report that Akash Paun and his colleagues published, today or yesterday, is specifically on this topic and comes up with a number of practical recommendations, most of which I would agree with. The Committee might want to have a look at that.

Professor Joanne Hunt: On the Sewel convention, and to follow on from what Nicola was saying, we need a more transparent and clearly staged process. At the moment, there is no agreement around the basic terms of the Sewel convention. We come back to what is "not normally". Both the Institute for Government paper and the Welsh Government paper last year, *Reforming Our Union*, suggest that we form a definition of what not normally means. It will be recognised that there will be situations where it is appropriate for the UK Parliament to legislate without consent, but that "not normally" needs to be more clearly defined and needs to be generally owned by all parts of the UK in order to determine what it means.

The Chair: Thank you all. It has been a very interesting session and, as I said at the beginning, had it not been for the international law issue, there would have been a great deal more attention on that particular aspect of the Bill. We have looked at various parts of it already, and we will reach some conclusions before too long. Your evidence has been extremely helpful, so we thank you all.