HOUSE OF LORDS
European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland

House of Lords
London
SW1A 0PW

Tel: 020 7219 5864
Fax: 020 7219 6715
hlprotocol@parliament.uk
www.parliament.uk/lords

Rt Hon Elizabeth Truss MP
Secretary of State for Foreign,
Commonwealth and Development Affairs
Foreign, Commonwealth and Development Office
King Charles Street
London SW1A 2AH

11 February 2022

Dear Foreign Secretary,

THE ROLE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION (CJEU) IN RELATION TO THE PROTOCOL ON IRELAND/NORTHERN IRELAND

Introduction

1. I am writing to you today to summarise the findings of the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland, following its short inquiry into the role of the Court of Justice of the European Union (CJEU) in relation to the Protocol.

2. On 20 January 2022, the Committee held an evidence session on the role of the CJEU in relation to the Protocol with leading legal and political experts Professor Catherine Barnard, Professor of European and Employment Law, University of Cambridge; Martin Howe QC, 8 New Square, and Chair of Lawyers for Britain; and Anton Spisak, Policy Lead for Trade and Productivity, Tony Blair Institute. The Committee also discussed the role of the CJEU during its evidence session on the safeguarding mechanism set out in Article 16 of the Protocol, held on 1 December 2021, with Dr Sylvia de Mars, Newcastle Law School, Newcastle University; George Peretz QC, Monckton Chambers; and James Webber, Shearman and Sterling LLP. We subsequently received written evidence on the role of the CJEU from Dr de Mars.

3. I have attached to this letter an appendix setting out in full the evidence that the Committee received on this important issue, and the Committee's assessment. I encourage you to refer to this material, which reflects the Committee's full findings on this matter. The Committee's key conclusions and questions as set out in that document can be summarised as follows.

The role of the CJEU in relation to the Protocol

4. Do you concur with our witnesses' analysis set out in the accompanying detailed letter of the potential role of the CJEU in relation to the Protocol? Do you perceive the CJEU having any other function concerning the Protocol? How often would you expect the jurisdiction of the CJEU under the terms of the Protocol to be exercised, either directly or indirectly?

The likely approach of the CJEU to cases relating to the Protocol

5. What is your response to the evidence we have received on the likely approach of the CJEU in cases relating to the Protocol? What assessment has the Government made of the CJEU's likely position in such circumstances? How does the Government believe that the Polydor principle would apply in respect of cases relevant to the Protocol?

The UK and EU positions

6. Do you agree with our witnesses that the fundamental issue underlying concerns about the role and jurisdiction of the CJEU is the direct application of significant areas of EU law to Northern Ireland under the Protocol? Yet this is the foundation principle of the Protocol as negotiated by the UK and the EU. In view of this, and in view of the UK and EU's respective positions on the role of the CJEU, is it possible to address concerns about the jurisdiction of the CJEU without first addressing this fundamental issue? If so, how? In view of the long-established doctrine of the autonomy of EU law, is there a risk that amendments to the text of the Protocol or the Withdrawal Agreement removing the CJEU's jurisdiction are challenged on the grounds of incompatibility with the Treaties?

Invoking Article 16 over the role of the CJEU

7. Our witnesses agreed that concerns around the CJEU's jurisdiction would not be appropriate grounds to invoke Article 16. What is the Government's response?

Potential mitigations and solutions

The EFTA Court model

8. Does the EFTA Court offer any kind of lessons that could be applied in the context of the jurisdiction of the CJEU under the Protocol? Alternatively, do you agree with our witnesses that the differing contexts of the EEA Agreement and post-Brexit arrangements for Northern Ireland limit the relevance of the EFTA Court as a potential model?

Extending the Trade and Cooperation Agreement dispute resolution procedure to the Protocol

9. Does it remain the Government's position to seek to agree revised alternative dispute settlement arrangements for the Protocol similar to those contained in the Trade and Cooperation Agreement? How would this work in practice in the context of the Protocol? How would you respond to arguments that the TCA model could not be applied in the context of the Protocol (and would not secure the agreement of the EU) while significant areas of EU law apply directly to Northern Ireland?

Extending the dispute resolution mechanism under the Withdrawal Agreement to the Protocol

10. The majority of the witnesses from whom we received evidence argued that, short of discontinuing the application of EU law to Northern Ireland, the extension of the dispute settlement provisions in Part 6 of the Withdrawal Agreement to the Protocol provides the only viable compromise between the UK and EU positions. Do Government pronouncements since the publication of the Command Paper, including your own recent statements stressing the need for "independent arbitration" and for ending the CJEU's role as "the final arbiter of disputes", indicate the Government's support for such a proposal? Do you perceive any disadvantages of such a model, whether on the one hand retaining a significant role for the CJEU in interpreting EU law, or on the other removing the right of businesses or individuals affected by the EU law directly applied to Northern Ireland through the Protocol to challenge the operation or interpretation of those rules in the CJEU via national courts and the preliminary reference procedure?

An enhanced role for the Northern Ireland Executive

11. Do you agree that, for disputes arising in relation to the Protocol, consultations within the Joint Committee (as well as the Ireland-Northern Ireland Specialised Committee) should include an explicit role for the Northern Ireland Executive? Will you seek to secure agreement with the EU to that end?

12. We note that under the Rules of Procedure for arbitration annexed to the Withdrawal Agreement the parties that are deemed subject to the process are clearly defined as either the "Union" or the "United Kingdom". If the arbitration process were expanded to include all aspects of the Protocol, would it be possible within the current rules to confer standing on the Northern Ireland Executive to allow it, or its representatives, to be a formal party to arbitration proceedings concerning Northern Ireland? If it is not possible within the existing rules, and the Government is successful in expanding the role of arbitration, does the Government intend to secure amendments to the Withdrawal Agreement to that end?

A balancing provision for the Supreme Court

13. Do you see merit in a balancing provision in the text of the Protocol requiring interpretation of relevant matters of domestic UK law to be referred to the Supreme Court? Can you envisage any circumstances when such a provision may be relevant?

Removing Article 10 of the Protocol (State aid)

14. We note the arguments put to us in favour of removing Article 10 of the Protocol, on State aid, following the agreement of the Trade and Cooperation Agreement and in view of the Subsidy Control Bill currently before the House. Would its removal alleviate the Government's concerns around the jurisdiction of the CJEU over UK State aid decisions? What update can you give on the current state of discussions with the EU on this matter, following Lord Frost's statement on 17 December that there had been limited discussions thus far?

State of play of the UK-EU discussions

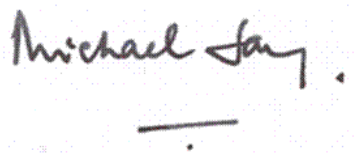
15. What update can you provide on the UK-EU discussions concerning the jurisdiction of the CJEU in relation to the Protocol? Has the Commission given any indication that it is willing to discuss these issues? How is the Government seeking to take these discussions forward, and on what timetable?

16. Finally, we reiterate our view that identifying and agreeing solutions to these and other problems under the Protocol will only be possible in an atmosphere of trust and cooperation between the UK and the EU. What steps are you taking to rebuild this trust, and to identify solutions on this and other issues arising under the Protocol, to the benefit of the people, businesses and communities of Northern Ireland?

17. We would be grateful for a response to our questions by 4 March 2022.

18. I have copied this letter to Maroš Šefčovič, Vice-President, European Commission; HE João Vale de Almeida, EU Ambassador to the UK; James Cleverly MP, Minister of State for Europe; Simon Hoare MP, Chair of the House of Commons Northern Ireland Affairs Committee; Sinead McLaughlin MLA, Chair of the Northern Ireland Assembly Committee for the Executive Office; and Mervyn Storey MLA, Chair of the Northern Ireland Assembly Committee for Justice.

Yours sincerely,



Lord Jay of Ewelme
Chair of the Protocol on Ireland/Northern Ireland Sub-Committee

APPENDIX TO THE LETTER FROM LORD JAY OF EWELME TO THE FOREIGN SECRETARY, DATED 11 FEBRUARY

THE ROLE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION (CJEU) IN RELATION TO THE PROTOCOL ON IRELAND/NORTHERN IRELAND

FINDINGS OF THE HOUSE OF LORDS SUB-COMMITTEE ON THE PROTOCOL ON IRELAND/NORTHERN IRELAND

Introduction

1. This document summarises the findings of the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland, following its short inquiry into the role of the Court of Justice of the European Union (CJEU) in relation to the Protocol.

2. We wrote to Lord Frost on 16 December 2021, on the democratic deficit under the Protocol and ways to enhance Northern Ireland's voice and influence. We look forward to your reply following the transfer of ministerial responsibility for the Protocol to you. In that letter, we stated:

> "Although we acknowledge their importance and relevance, in view of the discrete and legally complex issues that they give rise to, this letter does not reflect on the Government's broader proposals regarding governance and the jurisdiction of the CJEU in Northern Ireland, as set out in its [July 2021] Command Paper. We will return to these issues separately."

3. Accordingly, on 20 January 2022, the Committee held an evidence session on the role of the CJEU in relation to the Protocol with leading legal and political experts Professor Catherine Barnard, Professor of European and Employment Law, University of Cambridge; Martin Howe QC, 8 New Square, and Chair of Lawyers for Britain; and Anton Spisak, Policy Lead for Trade and Productivity, Tony Blair Institute. The Committee also discussed the role of the CJEU during its evidence session on the safeguarding mechanism set out in Article 16 of the Protocol, held on 1 December 2021, with Dr Sylvia de Mars, Newcastle Law School, Newcastle University; George Peretz QC, Monckton Chambers; and James Webber, Shearman and Sterling LLP. We subsequently received written evidence on the role of the CJEU from Dr de Mars.

4. This document summarises this evidence and seeks your views on the following topics:
    - The Government's understanding and interpretation of the role of the CJEU in relation to the Protocol, and how often it would expect the jurisdiction of the CJEU under the terms of the Protocol to be exercised, either directly or indirectly.
    - The CJEU's likely approach to cases relating to the Protocol, including how the Polydor principle would apply in such circumstances.
    - The UK and EU positions on the role of the CJEU, and whether, in view of the doctrine of the autonomy of EU law, it is possible to address concerns about the jurisdiction of the CJEU without first addressing this fundamental issue of direct application of significant aspects of EU law to Northern Ireland.

- The Government's response to witnesses' arguments that the role of the CJEU would not be appropriate grounds for an invocation of Article 16.
- Whether the Government shares the view of the majority of the witnesses from whom we received evidence that the extension of the dispute settlement provisions in Part 6 of the Withdrawal Agreement to the Protocol provides the only viable compromise between the UK and EU positions.
- Other possible mitigations and solutions, including the model of the EFTA Court, application of the dispute settlement mechanism under the Trade and Cooperation Agreement, and removal of Article 10 of the Protocol (on State aid).
- The latest state of play of the UK-EU discussions on these matters.

The role of the CJEU in relation to the Protocol

5. Our witnesses drew attention to Article 12 of the Protocol, which sets out the role of the CJEU. Article 12(4) states:

   "As regards the second subparagraph of paragraph 2 of this Article, Article 5 and Articles 7 to 10, the institutions, bodies, offices, and agencies of the Union shall in relation to the United Kingdom and natural and legal persons residing or established in the territory of the United Kingdom have the powers conferred upon them by Union law. In particular, the Court of Justice of the European Union shall have the jurisdiction provided for in the treaties in this respect. The second and third paragraphs of Article 267 TFEU shall apply to and in the United Kingdom in this respect."

6. Our witnesses explained what this meant in practice. Professor Barnard stated that the CJEU is potentially involved in relation to the Protocol in three ways:
   - Under Article 12(4) of the Protocol, which provides for the possibility of Northern Ireland courts making references to the CJEU under Article 267 of the Treaty on the Functioning of the EU (TFEU), the Commission bringing enforcement proceedings against the UK in respect of breaches under the Protocol, and firms in Northern Ireland challenging EU provisions.
   - Under Article 131 of the Withdrawal Agreement, which gives the Commission the power to start enforcement proceedings in respect of any breaches committed by the UK under the transition period.
   - Under the dispute resolution mechanism in Part 6 of the Withdrawal Agreement. If political consultation between the UK and the EU does not resolve the dispute, the matter is referred to an arbitration panel, which must refer matters to the CJEU if a point of EU law is at stake.

7. Professor Barnard added that, following the Government's unilateral extension of the grace periods, the EU had already commenced enforcement proceedings against the UK using the powers under Article 12(4), and proceedings under the dispute resolution mechanism under Part 6 of the Withdrawal Agreement on the grounds of a breach in the duty of good faith. She noted that those proceedings are on hold while the UK-EU discussions continue on the future of the Protocol. Likewise, the Commission had started proceedings under Article 131 in relation to Part 5 of the Internal Market Bill, but these were stopped when those provisions were removed from the Bill.

8. Anton Spisak said that there are two possible scenarios in which the Commission could launch infringement proceedings against the UK in respect of the Protocol: either an incorrect application of EU law within the scope of the Protocol, or the incorrect transposition of EU law. However, "there is a degree of discretion about whether or not the Commission decides to use the procedure. It depends on the atmosphere, the trust in the relationship and how quickly potential issues can be resolved through more diplomatic or political channels."

9. Dr de Mars distinguished between the CJEU's "direct" and "indirect" jurisdiction. In terms of direct jurisdiction, she stated that, where the Commission finds that the UK, in respect of Northern Ireland, has breached one of the provisions that apply EU law in the Protocol (as set out in Articles 5 or 7-10), it can take the UK before the CJEU. If the CJEU were to find in favour of the Commission, the UK would be expected to remedy its "failure to fulfil an obligation" under the Protocol. If the UK does not do so, the CJEU could impose a financial penalty as the culmination of enforcement proceedings referenced above. Furthermore, in any dispute in relation to the Protocol that raises issues of EU law, where a domestic UK court finds it is not clear on the meaning of EU law in that dispute, it can (or must in the case of the Supreme Court, as the court of last resort) ask the CJEU for an interpretation of the EU law in question. Dr de Mars noted that, while such disputes are most likely to be raised before the courts in Northern Ireland, there is nothing precluding businesses in any other part of the UK from starting a case where they are located if they experience difficulties in moving goods to or from Northern Ireland (the Article 267 TFEU preliminary reference procedure referenced above).

10. In terms of indirect jurisdiction, Dr de Mars noted that "any disputes the UK and the EU have about the Protocol with an EU law component will involve the CJEU in an interpretative function". Furthermore, the Protocol's requirement that any interpretation of the Protocol's provisions of EU law is in conformity with all relevant case law of the CJEU "requires UK courts and legislatures to be indefinitely aware of CJEU jurisprudence as it related to the Protocol."

11. **Do you concur with our witnesses' analysis of the potential role of the CJEU in relation to the Protocol? Do you perceive the CJEU having any other function concerning the Protocol? How often would you expect the jurisdiction of the CJEU under the terms of the Protocol to be exercised, either directly or indirectly?**

The likely approach of the CJEU to cases relating to the Protocol

12. Our witnesses set out what approach the CJEU was likely to take in cases relating to the Protocol. Professor Barnard highlighted the relevance to Northern Ireland of the 'Polydor principle' (set out in case C270/80, *Polydor Limited and RSO Records Inc. v Harlequin Records Shops Limited and Simons Records Limited*), under which, in the context of the EEA Agreement, "you do not necessarily get the same outcome, according to the Court of Justice, when there is an interpretation under one of those agreements that is not part of EU law, because the whole purpose of EU law does not apply to those

agreements" Professor Barnard said that it was uncertain in respect of any cases under the Protocol "whether the Court of Justice will apply—hook, line and sinker—all the Court of Justice case law on a point raised under the customs union or the free movement of goods, or whether the Court of Justice will say, following Polydor, that Northern Ireland is in a different position from a Member State of the EU because it is not part of an ever closer union; it is in the unique situation of just being bound by the rules on goods and the customs union, so it has nothing on services and the free movement of people."

13. Dr de Mars noted that, "while it is unusual to have one party's court in charge of an international agreement, there is no reason to assume that the CJEU, in its Article 12(4) role, would be biased against the UK. … An added point is that the CJEU's jurisdiction under Article 12 is limited to the specific provisions of the Protocol that deal with references to EU law—and these relate primarily to the Single Market in goods. This is not an area of EU law that draws significant attention from the Commission in terms of infringement proceedings under Article 258 TFEU; and, specifically, research done in 2017 reveals that not a single Commission complaint about the UK regarding free movement of goods actually made it to the CJEU between 2003 and 2016. It is thus not only the case that the CJEU has not yet been involved in any dispute settlement under Article 12(4)—but it is unlikely to *become* involved if the UK applies the EU law in the Protocol."

14. On the other hand, Martin Howe QC perceived "mission creep" in the CJEU's decision-making processes: "defenders of it would, I suppose, call it policy driven. I would call it political in the way it goes around interpreting what should be legally objective rules in order to further political ends and interests. I am particularly concerned at the prospect of a court whose mission statement—its mission function—is expanding the powers of European Union institutions and acting in the interests of the European Union as it sees them, having powers over interpreting the Northern Ireland protocol and the Withdrawal Agreement. That raises a serious risk that decisions will be taken that are policy or politically driven."

15. **What is your response to the evidence we have received on the likely approach of the CJEU in cases relating to the Protocol? What assessment has the Government made of the CJEU's likely position in such circumstances? How does the Government believe that the Polydor principle would apply in respect of cases relevant to the Protocol?**

The UK and EU positions

16. Our witnesses reflected on the Government's arguments for addressing the role of the CJEU as set out in the July 2021 Command Paper, and the EU's response. They agreed that the fundamental issue which made the issue so difficult to resolve was the direct application of EU law to Northern Ireland under the Protocol. Martin Howe QC said that "the problem of a foreign court ruling over part of the United Kingdom arises because the provisions of the Protocol apply EU law to part of the United Kingdom in a way that does not apply in other parts of the United Kingdom. The fundamental political, constitutional and legal problem of the Protocol is not so much the border checks,

serious as they are; it is the more fundamental question of the internal application of EU laws within Northern Ireland. … That gives rise to the constitutional democratic deficit. That is what needs to be tackled more fundamentally than the issue of arbitration."

17. George Peretz QC said that the CJEU's role "is absolutely baked into the whole structure of the Protocol. … the basic message is that, if you have EU law, you have the European Court of Justice, and there is simply no way of getting around that. Either you have it directly as you do now, or you have it indirectly via the arbitration panel."

18. James Webber told us that "the key is removing EU law. There is no way to cleave the [CJEU] away from EU law, so if you want to get rid of the [CJEU], you have to get rid of EU law." He and Martin Howe QC both advocated a "mutual enforcement" model, whereby the UK "would enforce European Union rules against exporters in our territory who want to export across the land border, and they and the Irish Republic equally would enforce UK rules on businesses that want to export across the land border northwards." While Professor Barnard saw the appeal of such a mechanism, she said that the only relevant example was "what is called parallel marketability of goods between Switzerland and Liechtenstein, but we are talking about such a different context that it is hard to imagine the EU would agree to extending that to the Northern Ireland situation, given the huge sensitivity of Northern Ireland in all its dimensions."

19. Professor Barnard said that the Commission's October 'non-paper' (on which we wrote to Lord Frost in December) "did not go far enough towards addressing that very fundamental issue" concerning the democratic deficit under the Protocol. She said that "the EU's perspective is that these are EU rules, so it is the EU court which rules on them. It is quite hard to get away from that argument as long as so much of the EU body of law is in the [Protocol] … you may not like what is in the [Protocol], for understandable reasons, but the fact is that that is the text we have, and the text we have relies on large tracts of EU law. The EU Court of Justice jealously guards the autonomy of EU law and would say—it has been saying it for at least 20 years but much more vociferously in the last decade, such as in decisions like Achmea … Opinion 1/91, and Opinion 2/13 on the accession to the ECHR—that only its court, the Court of Justice, can have the final say on the interpretation of that."

20. Dr de Mars explained that this was due to the CJEU's "doctrine of the autonomy of EU law":

    "There is long-standing CJEU case law, starting with the CJEU's rejection of the original EEA agreement because of its involvement of an EEA Court that would offer binding interpretations of the EU law in the EEA agreement, that sets out that in international agreements that are binding on the EU and/or its Member States, the CJEU can be the *only* body to interpret the EU law in those agreements, in order to ensure that only a single interpretation of EU law applies to the EU Member States and bodies. The EU would not negotiate an agreement that a) applied to the EU, or its Member States, or both; and b) contains references to EU law; that c) would not be ultimately interpreted by the CJEU. If it did, the CJEU is likely to declare that entire agreement contrary to EU law, as it did the original EEA agreement. There is as such no room for compromise on the basic point for the other EU institutions:

where an agreement involving the EU contains references to EU law, that EU law must be interpreted by the CJEU."

21. Dr de Mars drew attention to Lord Frost's evidence to the House of Lords European Affairs Committee on 26 October 2021, when he stated:

> "The position is simplified by talking about the Court, but the Court is simply at the apex of a system that imposes EU law in Northern Ireland without consent. … We do not think it is right, or likely to contribute to stability, that the Court of Justice should resolve disputes between the two sides. We cannot do anything about the fact that the EU makes this very expansive claim for the interpretive powers of the Court. … We cannot do anything about that reality, and that raises the question of where EU law applies. Therefore, it takes us back to the beginning of that argument, which is that the problem is that far too much EU law applies directly in Northern Ireland. That is the core of the problem. We do not see that so much of it should apply, and therefore the interpretive role of the CJEU is also limited in that respect."[1]

22. **Do you agree with our witnesses that the fundamental issue underlying concerns about the role and jurisdiction of the CJEU is the direct application of significant areas of EU law to Northern Ireland under the Protocol? Yet this is the foundation principle of the Protocol as negotiated by the UK and the EU. In view of this, and in view of the UK and EU's respective positions on the role of the CJEU, is it possible to address concerns about the jurisdiction of the CJEU without first addressing this fundamental issue? If so, how? In view of the long-established doctrine of the autonomy of EU law, is there a risk that amendments to the text of the Protocol or the Withdrawal Agreement removing the CJEU's jurisdiction are challenged on the grounds of incompatibility with the Treaties?**

Invoking Article 16 over the role of the CJEU

23. Our witnesses agreed that concerns around the CJEU were not appropriate grounds to justify triggering the safeguarding mechanism in Article 16 of the Protocol. Martin Howe QC said that "it is very hard to see how the issue of the Court of Justice's jurisdiction as such could give rise to an invocation of Article 16. Article 16 would need to be invoked on other grounds". Dr de Mars argued that "the problem with relying on Article 16 in light of the CJEU's role under the Protocol is that that role has not actually been, as the Protocol puts it, *applied*—the CJEU has not issued any judgments on the EU law applicable under the Protocol, or under any alleged violation of Articles 5 or 7-10 of the Protocol by the UK."

24. Professor Barnard said that seeking to use Article 16 to remove the role of the CJEU would be an inappropriate use of Article 16, "not least because the Court has had no role, as yet, in deciding any matter under the [Protocol], so it is hard to argue that the Court's role has led to a distortion in trade." She also said that any use of Article 16 on these grounds could be subject to challenge in the domestic courts. George Peretz QC said that invoking Article 16 on this basis would be "using a particular article of the Protocol to undermine a basic element of its whole structure. … It is very difficult to

[1] https://committees.parliament.uk/oralevidence/2904/pdf/

defend that sort of interpretation of a provision like Article 16. Any court or tribunal will lean very strongly against an interpretation of a provision like that in a way that allows a party fundamentally to revise what it agreed to, and what it clearly agreed to, in the original agreement." He agreed that domestic challenge to any such invocation was therefore likely.

25. **Our witnesses agreed that concerns around the CJEU's jurisdiction would not be appropriate grounds to invoke Article 16. What is the Government's response?**

Potential mitigations and solutions

26. We asked our witnesses whether, in the absence of a fundamental re-writing of the Protocol addressing the direct application of EU law to Northern Ireland, there was a "landing zone" for a mutually agreeable compromise between the UK and the EU. Our witnesses discussed several proposals.

The EFTA Court model

27. George Peretz QC told us:

> "The most obvious example of an area where there is free trade to an enormous extent with the EU, but with countries that are not subject to the jurisdiction of the European Court of Justice, is with Norway, Liechtenstein and Iceland in the EEA. They have their own separate court, which is the EFTA Court. The EFTA Court is compatible with the line of case law … where the Court of Justice says, 'We cannot have any other court or arbitration panel being the final arbiter of questions of EU law'. The EFTA Court works because it is technically not interpreting EU law. It is applying EEA law, but in doing so it has an obligation of homogeneity, as it is called in the jargon, that effectively pulls EEA law towards the EU. Very occasionally, it is pulled the other way and the EU is pulled towards the EEA. Given the size of the jurisdictions, it is inevitable which way the major pull will go. Whether one could imagine something like that for Northern Ireland, I do not know. … This is fairly blue-sky thinking in terms of the [Protocol]."

28. Anton Spisak said that the EFTA Court was formed in very specific circumstances of the EEA Agreement, and could not easily be applied to the UK in respect of Northern Ireland given the different legal status of the Protocol. Martin Howe QC noted that the EFTA Court was "still a multinational court … I am not sure that that is a particularly fruitful route to go down if one is thinking of reforming the … Protocol."

29. **Does the EFTA Court offer any kind of lessons that could be applied in the context of the jurisdiction of the CJEU under the Protocol? Alternatively, do you agree with our witnesses that the differing contexts of the EEA Agreement and post-Brexit arrangements for Northern Ireland limit the relevance of the EFTA Court as a potential model?**

Extending the Trade and Cooperation Agreement dispute resolution procedure to the Protocol

30. The Government's July 2021 Command Paper stated:

> "It is highly unusual in international affairs for one party to a treaty to subject itself to the jurisdiction of the institutions of the other, all the more so when the arrangements concerned are designed to mediate the *sui generis* relationship between the EU and its Member States. The UK refused to accept this in the negotiations on the Trade and Cooperation Agreement, and only agreed to it in the Protocol because of the very specific circumstances of that negotiation. … In devising alternative dispute settlement arrangements, our starting point should be to return to a normal treaty framework, similar to other international agreements including our Trade and Cooperation Agreement, in which governance and disputes are managed collectively and ultimately through international arbitration. It may be desirable to also put in place enhanced consultative processes to provide a framework for effective discussion and resolution of issues that arise."

31. While there is no single dispute resolution procedure in the TCA, the various systems within it have common elements: informal consultation between the parties (the UK Government and the EU); no role for the individual; recourse to an arbitration panel (drawn from an agreed list of arbitrators) if the informal consultations fail; followed by enforcement of the arbitration tribunal's final ruling. The Government thereby broadly achieved its negotiating aim of bringing to an end the direct jurisdiction of the CJEU over the UK, at least in the context of the TCA's provisions.

32. Martin Howe QC agreed that "the way forward to normalising our future relationship with the European Union is to take the TCA template and say, 'That applies to relations between the EU and Great Britain. Why shouldn't it apply to relations between the European Union and Northern Ireland?'" He argued that the arbitration panel, rather than the Court of Justice, should determine a point of EU law if it arose.

33. However, Professor Barnard said "there is a difference between the [Protocol] aspect of the Withdrawal Agreement and the Trade and Cooperation Agreement. The Trade and Cooperation Agreement is a free trade agreement that is not borrowing large tracts of EU law and putting it in the Trade and Cooperation Agreement; it is much more of an international agreement, so there is no role for the European Court of Justice. … It is very difficult to see, certainly at this moment in time, that the TCA mechanism could be applied to the [Protocol], given the volume of EU law that is at issue under the [Protocol]."

34. **Does it remain the Government's position to seek to agree revised alternative dispute settlement arrangements for the Protocol similar to those contained in the Trade and Cooperation Agreement? How would this work in practice in the context of the Protocol? How would you respond to arguments that the TCA model could not be applied in the context of the Protocol (and would not secure the agreement of the EU) while significant areas of EU law apply directly to Northern Ireland?**

Extending the dispute resolution mechanism under the Withdrawal Agreement to the Protocol

35. An alternative approach put forward by our witnesses was to extend the provisions of the dispute resolution mechanism in Part 6 of the UK-EU Withdrawal Agreement to the Protocol. Article 170 of the Withdrawal Agreement sets out an arbitration procedure, which can be instituted by the UK or EU in circumstances where no mutually agreed solution to a dispute has been reached within three months of a written notice being provided to the Withdrawal Agreement Joint Committee (or earlier if agreed by the parties). Leaving aside those areas in the Withdrawal Agreement where the CJEU's direct jurisdiction is retained in certain circumstances, for example, in relation to Citizens' rights, this procedure preserves a limited, but nonetheless important role for the CJEU. Article 174 provides that where a dispute raises a question of interpretation of EU law, including of a provision of EU law referred to in the Withdrawal Agreement, or a question of whether the UK has complied with its obligations under Article 89(2), the arbitration panel should "request the Court of Justice of the European Union to give a ruling on the question". Any such ruling will be binding on the arbitration panel.

36. Professor Barnard perceived movement by the Government towards this position since the publication of its Command Paper. She noted that, in his 17 December 2021 statement providing an update on the UK-EU discussions, Lord Frost stated that it was not "reasonable or fair for disputes between the UK and the EU relating to the Protocol to be settled in the EU Court of Justice, the court of one of the parties. The Withdrawal Agreement already provides for the use of an independent arbitration mechanism instead, and the simplest and most durable way forward would be to agree that this should be the sole route for settling disputes in future." She said that this "appears to be suggesting that the Part 6 dispute resolution mechanism of the Withdrawal Agreement should be extended to the [Protocol] and thus Article 12(4) of the [Protocol]—the provision that applies all the EU remedies— should be replaced by the application of Part 6."

37. Professor Barnard explained that, under such a model, "the arbitration panel must refer any point of EU law to the Court of Justice, but the case is decided by the arbitration panel, not the Court of Justice". She noted that this model was consistent with your own recent statements stressing the need for "independent arbitration" and for ending the CJEU's role as "the final arbiter of disputes". However, she stressed that the structure of the Protocol, and its provisions in relation to upholding a "single market for goods and a customs union", meant that there would still be a regular reference to the CJEU if the case gets as far as an arbitration panel. She also pointed out that such a solution would require a mandate from the EU, "and there is no evidence that the European Commission has been given the mandate to make an offer, to make such a radical change".

38. Professor Barnard also argued that having access to the CJEU may be beneficial for Northern Ireland businesses "because if they are being bound … by all these EU rules, they should be able to have access to some mechanism to challenge those rules if they do not like them, and that is what Article 12(4) of the Protocol gives them. Conversely,

if the rules are not being properly applied, it does not create a level playing field, and they should be able to challenge that too. Of course, Article 12(4) delivers on that too."

39. Nevertheless, Professor Barnard argued that in terms of a viable compromise between the UK and EU positions, "the only way forward—it is still a big ask—is to apply the Part 6 dispute resolution mechanism to the Withdrawal Agreement as a whole and include the [Protocol]. … Optically, you could say that it works for both sides, because it would mean that the [CJEU] is not the final arbiter from the UK perspective … From the EU point of view, it would still ensure a role for the Court of Justice because any point of EU law would still have to be referred to the [CJEU]."

40. Anton Spisak agreed that the extension of the Part 6 dispute resolution mechanism "is the simplest way forward—and probably the only way forward, given the circumstances—without changing the fundamental nature of the Protocol, which is to apply some EU legislation to Northern Ireland. … That would mean that the arbitration panel was the final arbiter of disputes, but there would be a role for the Court of Justice in offering interpretation of EU law where that question arose."

41. Mr Spisak said that the Government's emphasis in its public statements on arbitration was significant, because "the arbitration panel is a quasi-judicial body, and there is clear EU case law about what that means for a potential role for the [CJEU] if there are aspects of EU law involved. People who drafted the word 'arbitration' in the Command Paper and who maintained that public line must have known that if there are aspects of EU law in the Protocol or the withdrawal treaty, there must be some role for the [CJEU] in offering its interpretation of what that EU law means." He agreed with Professor Barnard that your own recent statements suggested that "the Government might be happy to live with something like a more limited role for the European Court of Justice in offering interpretation of what EU law in the Protocol means, as long as it is the arbitration panel that makes the binding decision and it is the decision of the arbitration panel that is binding on the parties to the agreement—the UK and the EU."

42. Mr Spisak also noted the significance of the EU's agreement to such a model, both in the UK-EU Withdrawal Agreement and with other third countries:

    "Not only does it suggest the EU sees that as an acceptable model for its third-country relationships when they apply EU law, but also because that does not involve a full direct jurisdiction of the CJEU as per Article 12 of the Protocol. That alternative involves the use of an arbitration panel and a role for the European Court of Justice when it is involved in interpreting EU law, but it is not the final arbiter of those disputes."

43. Nevertheless, Mr Spisak acknowledged that "the question of how to get there is much more difficult, because it would mean amending the text of the Protocol in some way to limit Article 12 and what it means, or at least agreeing with the EU some common interpretation of when Article 12 can and cannot be used." He thought this could be achieved "through some kind of creative solution that would not amend the text of the Protocol itself but would involve a joint interpretive instrument that clarified that the arbitration under the Withdrawal Agreement should be applied to all disputes under the Treaty, including those under the [Protocol]." He said that this may overcome some of

the difficulties with the lack of mandate and political will on the EU side, "while achieving broadly the same outcome for the UK, which is to limit the scope for the Court of Justice to get involved." He did acknowledge that this was suboptimal compared to setting out a clear legal text in the Protocol.

44. Dr de Mars also viewed the extension of the Part 6 provisions as a potential "middle ground", by guaranteeing both dispute resolution by an independent court of tribunal, and the autonomy of EU law. She added that "the end effects of arbitration are ultimately not dissimilar from findings by the CJEU that a failure to fulfil obligations under EU law has taken place under Article 258 TFEU: financial penalties can be applied via a binding decision. There is, as such, nothing visible for the EU to lose here, and so such a compromise seems entirely within reach—provided the EU is willing to reopen negotiations of the Protocol."

45. However, Martin Howe QC argued that "to say that the arbitration panel is the final arbiter in a case where an issue of EU law is involved is, I think, a sophistic statement, because the arbitration panel in those circumstances merely acts as a postbox and rubber stamp for the substantive decision-maker, which would be the Court of Justice at Luxembourg." He argued that it had been an "egregious failure on the part of those negotiating the agreement" to retain the Part 6 provisions in the Withdrawal Agreement, as "it is wholly contrary to international treaty practice for one party to an international treaty to have its own domestic courts creating binding rulings for the other sovereign. The argument that for some reason the European Union is special and only its courts are allowed to interpret its own laws is, I consider, a completely unjustified attempt to make the EU exceptional and different from any other sovereign that negotiates international treaties."

46. **The majority of the witnesses from whom we received evidence argued that, short of discontinuing the application of EU law to Northern Ireland, the extension of the dispute settlement provisions in Part 6 of the Withdrawal Agreement to the Protocol provides the only viable compromise between the UK and EU positions. Do Government pronouncements since the publication of the Command Paper, including your own recent statements stressing the need for "independent arbitration" and for ending the CJEU's role as "the final arbiter of disputes", indicate the Government's support for such a proposal? Do you perceive any disadvantages of such a model, whether on the one hand retaining a significant role for the CJEU in interpreting EU law, or on the other removing the right of businesses or individuals affected by the EU law directly applied to Northern Ireland through the Protocol to challenge the operation or interpretation of those rules in the CJEU via national courts and the preliminary reference procedure?**

An enhanced role for the Northern Ireland Executive

47. In view of the concerns we have expressed over the democratic deficit under the Protocol, there is a strong case for giving the Northern Ireland Executive an enhanced and explicit role in any dispute settlement process. Professor Barnard told us: "That is the interesting issue going forward: whether Northern Ireland or the UK Government

will say that there is a possibility of intervention by the Northern Ireland Executive, and they start saying that Northern Ireland is in a unique situation".

48. Article 169 of the Withdrawal Agreement, on 'Consultations and communications within the Joint Committee', states that, prior to the initiation of the formal arbitration procedure, "the Union and the United Kingdom shall endeavour to resolve any dispute regarding the interpretation and application of the provisions of this Agreement by entering into consultations in the Joint Committee in good faith, with the aim of reaching a mutually agreed solution. A party wishing to commence consultations shall provide written notice to the Joint Committee."

49. **Do you agree that, for disputes arising in relation to the Protocol, these consultations within the Joint Committee (as well as the Ireland-Northern Ireland Specialised Committee) should include an explicit role for the Northern Ireland Executive? Will you seek to secure agreement with the EU to that end?**

50. **We note that under the Rules of Procedure for arbitration annexed to the Withdrawal Agreement the parties that are deemed subject to the process are clearly defined as either the "Union" or the "United Kingdom". If the arbitration process were expanded to include all aspects of the Protocol, would it be possible within the current rules to confer standing on the Northern Ireland Executive to allow it, or its representatives, to be a formal party to arbitration proceedings concerning Northern Ireland? If it is not possible within the existing rules, and the Government is successful in expanding the role of arbitration, does the Government intend to secure amendments to the Withdrawal Agreement to that end?**

A balancing provision for the Supreme Court

51. We asked our witnesses if extension of the Withdrawal Agreement arbitration mechanism to apply to the Protocol would be more palatable to the UK if there were a balancing provision requiring interpretation of relevant matters of domestic UK law to be referred to the UK Supreme Court. Martin Howe QC said that, while there was no international precedent for such a provision, "if it were mutual, it would make it more balanced". Professor Barnard agreed that at one level "it would make sense and it would have a pleasing equilibrium, which at the moment does not exist under the [Protocol]. At the moment, we are focused so extensively on EU law, the EU rules and the 300 or so regulations and directives that apply that it is difficult to see when there would be a role for the Supreme Court. … It would balance, although, in reality, because the substance is EU law it seems likely that the [CJEU] would be more troubled with workload than the Supreme Court."

52. **Do you see merit in a balancing provision in the text of the Protocol requiring interpretation of relevant matters of domestic UK law to be referred to the Supreme Court? Can you envisage any circumstances when such a provision may be relevant?**

Removing Article 10 of the Protocol (State aid)

53. Our witnesses also drew attention to specific concerns regarding the extent of the CJEU's jurisdiction under Article 10 of the Protocol, on State aid. In that context, we note that the Government's July 2021 Command Paper argued that the subsidy control provisions of the Trade and Cooperation Agreement, together with the Subsidy Control Bill currently before Parliament, made "the existing provisions in Article 10 redundant in their current form".

54. Martin Howe QC pointed out that, whereas most of the Articles in the Protocol under which the CJEU has jurisdiction apply to the UK in respect to Northern Ireland, "in other words, to Northern Ireland territory … on the face of it, [Article 10] applies across the whole of the United Kingdom geographically … 'in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol'". He added that "commercial interests, including commercial interests in Great Britain-based businesses, will be interested in invoking the State aid provisions. … For example, if you give a subsidy to a plant in Great Britain that supplies goods into Northern Ireland, that functional effect could well be met." He therefore foresaw a risk of the CJEU, were a State aid matter to be referred to it, "taking a very expansive line on what is within the scope of Article 10 in order to bring wide-ranging measures under the control of the European Commission, including measures that were given to entities in mainland Britain." Mr Howe argued that Article 10 of the Protocol should be removed, and the subsidy control provisions of the TCA should instead be rolled across to Northern Ireland.

55. George Peretz QC told us that "it is in the way Article 10 is framed. This is not a hidden problem. … Article 10 applies to any measure … that has an effect on trade in goods between Northern Ireland and the EU. The problem is that that is an extremely low threshold indeed". This was exacerbated by differing UK and EU guidance on the application of Article 10, creating the potential for uncertainty. James Webber also argued that the provisions of Article 10 have been superseded by the TCA, and that Article 10 should therefore be removed in its entirety. Doing so would be a "nice example of removing the Court of Justice by solving the problem without using EU law".

56. **We note the arguments put to us in favour of removing Article 10 of the Protocol, on State aid, following the agreement of the Trade and Cooperation Agreement and in view of the Subsidy Control Bill currently before the House. Would its removal alleviate the Government's concerns around the jurisdiction of the CJEU over UK State aid decisions? What update can you give on the current state of discussions with the EU on this matter, following Lord Frost's statement on 17 December that there had been limited discussions thus far?**

State of play of the UK-EU discussions

57. The Commission has hitherto been unable (or unwilling) formally to discuss the jurisdiction of the CJEU, on the grounds that it has no mandate from EU Member States to do so. However, Martin Howe QC said that there was a tension of a "formal legal

process under which the Commission is given a mandate by the Member States to negotiate external agreements, and the political reality, which is that if the EU collectively, including the Member States, is convinced that it is in its interests to renegotiate, it will." Anton Spisak added that "it is fundamentally … a question of political trust in the relationship".

58. **What update can you provide on the UK-EU discussions concerning the jurisdiction of the CJEU in relation to the Protocol? Has the Commission given any indication that it is willing to discuss these issues? How is the Government seeking to take these discussions forward, and on what timetable?**

59. **Finally, we reiterate our view that identifying and agreeing solutions to these and other problems under the Protocol will only be possible in an atmosphere of trust and cooperation between the UK and the EU. What steps are you taking to rebuild this trust, and to identify solutions on this and other issues arising under the Protocol, to the benefit of the people, businesses and communities of Northern Ireland?**