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My expertise is in the law of the European Union rather than British constitutional law and politics, and my choice of questions to answer reflects that.

A. Effective Parliamentary scrutiny of the Joint Committee during transition and in relation to the Protocol

1. How important is the role of the Joint Committee in terms of decisions that need to be taken during the transition period? How can Parliament effectively scrutinise these?
2. How important is the role of the Joint Committee in terms of the application of the Protocol? In addition to the general powers of the Joint Committee set out in Article 164 of the Withdrawal Agreement, we note its specific powers in relation to the Protocol, provided in Articles 5, 6, 8, 10(2), 11, 12(3) and 13(4) of the Protocol.
3. Do you have any suggestions for how Government can facilitate effective Parliamentary scrutiny of the activities of the Joint Committee as regards Northern Ireland? For information, this letter was sent by eight Select Committee Chairs to the Chancellor of the Duchy of Lancaster on 24 March 2020.
4. How can Parliament effectively scrutinise the application of the following provisions relevant to the Protocol:
> Article 164(5)(d) of the Withdrawal Agreement allows the Joint Committee to amend the Protocol, if such amendments are necessary to "correct errors, or to address omissions or other deficiencies". Suggestions should go beyond the established powers of this Committee to scrutinise the EU position in the Joint Committee (see this letter from the Committee to Mr Gove of 18 June 2020).
> Article 13(3) of the Protocol provides for dynamic alignment with EU law applying under the Protocol, when it is amended or replaced. Article 13(4) provides for the Joint Committee to decide whether new EU law which falls within the scope of the Protocol applies in NI.

B. Application of EU Law

5. What is the extent of the application of EU law to Northern Ireland (NI) under the Protocol? What are the implications of this for UK Sovereignty?

The bargain which explains the shape and content of the Protocol is that the UK has committed to ensure the application in Northern Ireland (NI) – but not in Great Britain (GB) - of a substantial body of EU law in return for which the EU has agreed that the border between NI and Ireland, though converted into the external border of the EU as a result of the UK's withdrawal from the EU, will remain as soft or invisible as it is now.

The Protocol locks NI (but not GB) into regulatory alignment with an extensive body of EU rules governing manufactured and agricultural goods. The detail is found in Annex 2 to the Protocol to which deceptively brief reference is made in Article 5(4) Protocol. 287 EU legislative instruments are listed in Annex 2, all of which are to be applied in NI, in order to ensure it is sufficiently aligned to the EU's internal market acquis for the EU to be prepared

to treat the NI - Ireland border as soft in the same way that borders found internally within the EU are soft.

The Annex 2 list is not static. The obligations are of a dynamic nature. Article 13(3) Protocol provides that EU acts listed in the Protocol shall refer to acts as amended or replaced over time, so in this sense the list exists in a state of continual up-dating. Furthermore Article 164(5)(d) of the Withdrawal Agreement (WA) provides the Joint Committee with a limited power to adopt decisions amending the WA where amendment is necessary to correct errors, to address omissions or other deficiencies, or to address situations unforeseen when the WA was signed. This could conceivably lead to amendment of the list in Annex 2, although not so far: in Council Decision 2020/769 the EU proposed some technical adjustments to the WA along with amendments and additions to Annex 2, but the latter were rejected by the UK at the Joint Committee meeting of 12 June 2020. Article 13(4) Protocol also provides for a procedure managed by the Joint Committee in the event of the adoption of an EU act which falls within the scope of the Protocol but is neither an amendment of nor a replacement for an existing act. There may be disputes about whether such an act should be added to the list of rules to which NI is bound, which may lead to arbitration as foreseen by the WA. However, this is unlikely to be common since the EU's legislative *acquis* on goods is already relatively mature and comprehensive (though attention might usefully be paid in future to the legislative impetus behind the EU's emerging Digital Single Market).

The NI-EU alignment is extended by the Protocol also to cover key trade rules including those concerning the EU's customs regime (Article 5), VAT and excise rules (Article 8), those governing the single electricity market (Article 9) and state aid rules in respect of measures which affect the trade between Northern Ireland and the EU which is subject to the Protocol (Article 10). The Protocol also touches on particular aspects of individual rights to equal treatment (Article 2) and the preservation of the Common Travel Area covering the UK and Ireland (Article 3).

A series of Annexes contain precise and intricate detail on exactly which EU measures are to be applied by the UK in NI. Article 19 Protocol stipulates that 'Annexes 1 to 7 shall form an integral part of this Protocol'.

It should be appreciated that both sides, the EU and the UK, have made significant compromises in order to address what are recognised in Article 1(3) Protocol as 'the unique circumstances on the island of Ireland'. The EU has agreed that (i) its de jure external border, between NI and Ireland, shall remain soft or invisible, (ii) that its de facto external border shall be located within the territory of, and policed by, a non-Member State and that (iii) its economic freedoms in particular and its internal market legislative acquis in general shall be divided: in NI an important package of EU rules shall be applied but a significant number, such as the Treaty rules governing free movement of persons and services and legislative provisions on consumer and environmental protection and on labour market regulation, shall not. The EU has in these three respects been willing to depart from its orthodox approaches. For its part the UK, in order to maintain a soft or invisible border between NI and Ireland and also to provide room for GB to pursue a different regulatory course from that of the EU, has accepted a separation between NI and GB, in the sense that the rules governing the matters covered by the Protocol will be different in NI on the one hand and in GB on the other, which entails also that the border between NI and GB acquires a higher legal, economic and political significance than it held in the past. In this vein the UK government's May 2020 Cabinet Office document entitled 'The UK's approach to the Northern Ireland Protocol',

which asserts at para 16 that there is not an international border between NI and GB, is disingenuous. It has never been suggested that there will be an international border in the Irish Sea created by the WA, but the point of the Protocol is that the UK has agreed that the Irish Sea shall acquire a political, legal and economic significance as a border – albeit not an international border – which it did not possess previously. It now counts as the border between a jurisdiction, NI, which shares the regulatory features mandated by the Protocol with the EU and a jurisdiction, GB, which has largely (but see state aid, Qs 13, 14 below) separated itself from the EU's rules. That border, though in formal terms internal to the UK, must become harder.

There are voices on both the EU and the UK side which are unhappy with the compromises made: it is important to grasp that the Protocol provides a delicate balance which is the result of departures from orthodox approaches made on *both* sides. Accordingly any attempt to craft an alternative solution must take the aspirations of both sides seriously.

On the second question: it is difficult to identify implications for UK sovereignty in the absence of a definition of the much abused word sovereignty. The correct starting point is that the UK's ratification of the Withdrawal Agreement with the EU, an international treaty, is simply an exercise of UK sovereignty, just as ratification of the Treaty of Accession to the European Communities in 1972 and of the several subsequent EU amending Treaties was simply an exercise of UK sovereignty. The UK is no more and no less a sovereign state now under the Withdrawal Agreement than it was as a Member State of the EU or than it was before it joined what is now the EU in 1973. If the question is whether the Withdrawal Agreement constrains the UK's freedom of unilateral action (sometimes unhelpfully described as 'sovereignty'), then of course it does – as does the acceptance of any kind of binding international norm.

6. Can you give examples of where EU law could also apply to Great Britain (GB) under the Protocol (see also the specific question in the State Aid section below)?

State Aid is the main issue.

7. How will EU law apply under the Protocol, taking account both of Article 4 of the Withdrawal Agreement and the question of dynamic alignment with EU law?

In short, EU law will apply under the Protocol in the same way that EU law applied generally throughout the period of the UK's membership of the EU and in the same way that it applies currently within the 27 Member States of the EU. I am unsure of the intended relationship between this question and Q10, and have chosen to explain the issues more fully below in answer to Q10.

8. To what extent, if any, does the application of EU law under the Protocol constrain the legislative freedom of the UK after the transition period?

It constrains it significantly, albeit largely in relation to NI not GB (but see below on state aid) in the sense that the UK has committed to ensure the application of the EU rules which are mandated by the Protocol, and the methods of enforcement mentioned in answer to Q10

below are designed to ensure that those commitments are met. As explained in answer to Q5 this is the price paid by the UK in return for the EU's exceptional readiness to permit maintenance of a soft or invisible border between NI and Ireland and also to provide room for GB to pursue a different regulatory course from that of the EU.

9. To what extent, if any, does the application of EU law to NI under the Protocol constrain the freedom of the UK to negotiate whatever trade deals it wants with other countries or how these deals will apply in NI?

In principle it does not constrain the UK's freedom. The Protocol goes out of its way to state in its Article 4 that 'nothing in this Protocol shall prevent the United Kingdom from including Northern Ireland in the territorial scope of any agreements it may conclude with third countries, provided that those agreements do not prejudice the application of this Protocol.'

However, the key issue is not principle but rather practice. The UK's offer to third countries will be access to two distinctly regulated markets – GB and NI. The question will be whether third countries will be prepared to enter into a deal with the UK which treats the UK as a single market or whether instead they will insist on a separation or at least on concessions that reflect the disadvantageous consequences to them of that separation. For example, a third country may be reluctant to enter into a free trade agreement which treats the UK as a single market for fear that EU-made products freely marketed in NI may in the absence of effective checks on trade moving from NI to GB reach that third country's market in a form which makes it impossible to distinguish them from UK-made goods: so it may wish to confine the coverage of the agreement to goods made in GB and/ or to seek other forms of protection. Or that third country may wish to exclude NI-made goods from its agreement with the UK because they are, pursuant to the Protocol, made according to different regulatory standards from those which prevail in GB. Of course the UK remains free to refuse to enter into any arrangement which does not treat the UK as a single market, and that will doubtless be its first offer, but the price will be failure to conclude deals with third countries unwilling to accept that stance. The more powerful the third country, the more likely that it will be able to resist the UK's first offer, and the bigger will be the price should the UK refuse to change its stance on preservation of its single market and thereby lose the deal.

10. What are the EU mechanisms for enforcement and supervision of the UK's obligation to apply the provisions of EU law applying to NI under the Protocol? How strictly do you expect them to be exercised?

The methods of enforcement applicable under the Protocol are far more closely aligned to those which prevail under orthodox EU law than those associated with the dispute resolution mechanisms based on arbitration found in the Withdrawal Agreement. In short, EU law will apply under the Protocol in the same way that EU law applied generally throughout the period of UK membership of the EU. That means that EU law is enforced through two distinct routes – both through the supervisory jurisdiction conferred on the Commission backed up by the role of the Court of Justice and through enforcement by private parties before national courts relying on (inter alia) the direct effect and primacy of EU law, which extends also to the Protocol.

Article 12 of the Protocol provides that for the key provisions concerning trade regulation in the Protocol the Commission retains its capacity to pursue infringement proceedings against the UK. The Court of Justice too has the jurisdiction provided for in the Treaties, which includes the possibility that the Commission may bring cases before the Court claiming that the UK has failed to comply with the Protocol. This may ultimately lead to the imposition of fines and/ or penalty payments on the UK. The Court's jurisdiction also includes the preliminary reference procedure, which is the channel between the Court of Justice and national courts asked to address questions arising under the Protocol as under EU law generally. Article 13(2) adds that 'the provisions of this Protocol referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union'.

Article 4 of the Withdrawal Agreement ensures that the domestic courts of the UK may be called on to hold the UK government to the binding promises it has made: it declares that 'The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States', which embraces the legal principles of the direct effect and primacy of EU law. This is imported into the UK's domestic legal order by the European Union (Withdrawal Agreement) Act 2020. A private party could therefore bring proceedings before UK courts in order to protect the arrangements made under the Protocol. An obvious example would be a trader based in Ireland who believes its business is harmed by misapplication of the Protocol by the public authorities in the UK bringing an action before courts in Northern Ireland seeking an order that the Protocol be applied correctly and/ or seeking damages for loss caused by the Protocol's misapplication.

So here the familiar features of EU law and the familiar institutional arrangements involving the Commission and the CJEU live on in the UK.

I would expect enforcement to be strict. From the EU perspective the arrangements are unique and tailored to the particular sensitivities that arise on the island of Ireland. They involve the de facto placement of the EU's external border inside the territory of a third country, the UK, and its policing by that third country pursuant to Article 12 Protocol, and the EU is understandably determined that its rules shall be applied in principle and as far as possible in practice with as much rigour as occurs at any other point on its external frontiers. If not, the integrity of its internal market and customs union will be in peril. This is clearly and anxiously understood on the EU side. Its request – rejected by the UK government – to establish a physical presence in Belfast demonstrates its intended attentiveness. My sense is that the discovery of non-complying goods on the EU's internal market which have reached it from GB via NI will be incendiary, whether the goods are lawfully placed on the GB market by GB producers or importers from third countries where GB's rules are different from the EU's or whether the goods in question are in compliance with neither EU nor GB rules. In the first instance, two words - chlorinated chicken; in the second instance, scandals of this type are known within the EU (one word - horsemeat), but there would be much less tolerance for such malpractice where the source is a non-Member State. In these circumstances the anxieties that the EU has conceded too much under the Protocol, to the detriment of the integrity of its internal market, would be sharpened. The Commission will not rush to initiate infringement proceedings against the UK while the rough edges of the Protocol are being developed in good faith, but the more flagrant the breach, the quicker the resort to formal

legal action. (The current Prime Minister's repeated refusal to acknowledge the reality of the Protocol should be seen in this light).

Equally traders and consumers in the EU will be watchful for fear that non-compliant goods might find their way onto the EU market via the GB/ NI route, and the route of private enforcement to uphold the bargain enshrined in the Protocol is therefore also likely to be realistic.

It is a familiar feature of EU law that private enforcement before national courts is often quicker and less constrained by political sensitivities than enforcement initiated by the Commission, and that lives on under the Protocol, but both routes are important and I would not expect the Commission to be hesitant in challenging UK malpractice under the Protocol, given the Protocol's important yet unorthodox job in protecting the EU's internal market and customs union.

11. What is nature and extent of the jurisdiction of the Court of Justice (CJEU) under the Protocol?

In short the intent is that the Court's role under the Protocol shall mirror its role generally in EU law.

Article 12(4) Protocol provides that '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'. This is adequate to cover the Court as one of the EU's institutions, but to place the matter beyond doubt Article 12(4) adds by way of confirmation that 'In particular, the Court of Justice of the European Union shall have the jurisdiction provided for in the Treaties in this respect; and that 'The second and third paragraphs of Article 267 TFEU [concerning preliminary references] shall apply to and in the United Kingdom in this respect'.

Article 12(5) Protocol provides that 'Acts of the institutions, bodies, offices, and agencies of the Union adopted in accordance with paragraph 4 shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States'. Here the position of the Court is not spelled out, but this is apt to cover it and its rulings concerning the constitutional character of EU law – direct effect, primacy, liability in damages, etc. Article 12(5) is a Protocol-specific version of Article 4(1) of the Withdrawal Agreement.

Article 12(7) provides that:

> 'In cases brought before the Court of Justice of the European Union pursuant to paragraph 4:
> (a) the United Kingdom may participate in the proceedings before the Court of Justice of the European Union in the same way as a Member State;
> (b) lawyers authorised to practise before the courts or tribunals of the United Kingdom may represent or assist a party before the Court of Justice of the European Union in such proceedings and shall in every respect be treated as lawyers authorised

to practise before courts or tribunals of Member States representing or assisting a party before the Court of Justice of the European Union.'

This seems perfectly logical. The intent is to align practice under the Protocol with practice under EU law generally.

Article 13(2) provides that 'Notwithstanding Article 4(4) and (5) of the Withdrawal Agreement, the provisions of this Protocol referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union'. This similarly aligns the Protocol with practice under EU law generally. This is the subject of Q12 below.

So, overall, Articles 5, 7 to 10, and the second subparagraph of Article 12(2) of the Protocol are as firmly subject to the involvement of the Court of Justice as is EU primary and secondary law generally. This is not surprising. It is the bargain struck. As already mentioned (Q10) the EU has accepted the de facto placement of its external border inside the territory of a third country, the UK, and the EU is understandably anxious that within NI and at the NI/GB border its rules on trade are applied with as much rigour as occurs anywhere else within its territory. If not, the integrity of its internal market and customs union will be in peril. It follows that the EU requires not simply the acceptance of its rules of market regulation but also the associated constitutional and institutional disciplines, including the role of the Commission, the Court of Justice, its interpretative methodology and the legal principles of direct effect and primacy.

12. How well-understood is the extent of Article 13(2) requirement to interpret EU law-based provisions or concepts in conformity with case law of the CJEU, including judgments delivered after the end of transition?

I don't know how well-understood it is generally, but I think it is not difficult to understand.

Article 13(2) provides that 'Notwithstanding Article 4(4) and (5) of the Withdrawal Agreement, the provisions of this Protocol referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union'.

What is at stake here under the Protocol is a much longer-term and firmer obligation of compliance with the case law of the Court of Justice than is imposed by Article 4 WA.

Article 4(4) WA requires that the provisions of the WA referring to Union law or to concepts or provisions thereof 'shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union' but limits that obligation to case law handed down before the end of the transition period, currently likely to be the end of 2020. Article 13(2) Protocol contains no such temporal limitation. Article 4(5) WA has no temporal limitation and reaches beyond the end of the transition period, but the obligation is softer: it requires only that the United Kingdom's judicial and administrative authorities shall in the interpretation and application of the WA 'have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period'. Article 13(2) Protocol requires not merely due regard for but rather interpretation in conformity with the Court of Justice's case law.

The governing concept is that the Protocol shall be interpreted and applied in the same way as EU law generally, and Article 13(2) ensures this in one specific area, that involving the case law of the Court. The preliminary reference procedure permits and in some circumstances requires national courts to seek the interpretative guidance of the Court of Justice, and this applies under the Protocol as under EU law generally, but Article 13(2) emphasises that in everyday practice provisions of the Protocol referring to EU law (which is defined very broadly in Article 2(a) WA: see also Art 6 WA) shall be implemented and applied with reference to and in conformity with the Court of Justice's case law.

C. State aid in the Protocol

13. What is the nature and extent of the application of EU laws on state aid to NI under the Protocol?

Article 10 declares that 'The provisions of Union law listed in Annex 5 to this Protocol shall apply to the United Kingdom, including with regard to measures supporting the production of and trade in agricultural products in Northern Ireland, in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol'. Annex 5 contains all the key instruments of primary and secondary EU law on state aid.

The intent is to lock control of aid covered by the Protocol into the wider network of control exercised across the territory of the 27 Member States. It affects the scope of the opportunity to reimburse traders for duties levied on goods pursuant to the provisions of EU law made applicable by the Protocol envisaged by Article 5(6) but it goes much further than that. Aid within the meaning of Article 107 TFEU which falls within the scope of the Protocol is subject to EU control. This does not mean it is automatically unlawful. It means that it must comply with EU law – it must be compatible with the internal market. This entails supervision by the Commission according to the terms set by the Treaty and secondary legislation (especially but not only the Block Exemption Regulations), and it engages also the role of the Court of Justice and of national courts charged with applying EU law.

The only exception is in Article 10(2) Protocol, which carves out a limited exception applicable to the agricultural sector. It reads:

> 'Notwithstanding paragraph 1, the provisions of Union law referred to in that paragraph shall not apply with respect to measures taken by the United Kingdom authorities to support the production of and trade in agricultural products in Northern Ireland up to a determined maximum overall annual level of support, and provided that a determined minimum percentage of that exempted support complies with the provisions of Annex 2 to the WTO Agreement on Agriculture. The determination of the maximum exempted overall annual level of support and the minimum percentage shall be governed by the procedures set out in Annex 6'.

14. Article 10 of the Protocol applies EU laws on state aid to UK measures which "affect trade" between NI and EU which is subject to the Protocol. To what extent could

EU state aid laws also apply to GB, particularly considering the role of the CJEU in interpreting that concept?

Article 10 Protocol's direction that measures are caught only where they 'affect that trade between Northern Ireland and the Union which is subject to this Protocol' is plainly inspired by Article 107 TFEU, the key EU Treaty provision on state aid, which subjects to control any aid granted by a Member State which distorts or threatens to distort competition 'in so far as it affects trade between Member States'. It creates a jurisdictionally significant threshold. The point applicable to Article 107 TFEU is that aid which does *not* affect trade between Member States is not subject to EU law and is instead a matter of purely national concern, and in the same way under Article 10 Protocol aid which does *not* affect trade between Northern Ireland and the EU which is subject to the Protocol is not subject to the Protocol and is instead purely a matter for the UK. However, this jurisdictionally significant threshold is low and easily crossed. For example in Case C-518/13 *Eventech* the Court of Justice explained that:

> '… for the purpose of categorising a national measure as State aid, it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition … In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid … In that regard, it is not necessary that the beneficiary undertakings are themselves involved in intra-Community trade. Where a Member State grants aid to undertakings, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are thereby reduced … The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected'.

The threshold is of jurisdictional significance. Crossing it does not mean the aid is unlawful, it means only that the aid falls within the scope of EU supervision. There is room to permit aid under EU law – but if it is aid within the meaning of EU law, it is the EU's terms which dictate whether it is compatible with its internal market. Making that judgement is one of the Commission's more important tasks, and the exercise of its discretion is structured by the Treaty and secondary legislation (especially but not only the Block Exemption Regulations). The key point, however, is that the jurisdictionally significant threshold which triggers EU competence is low, and showing that it has been crossed does not require presentation of detailed proof.

It is, in short, relatively easy to find that aid affects inter-State trade, relatively rare to find something so small and localised that it does not. This is not surprising – one of the EU's principal activities is to ensure that political borders lose economic significance in the development of the EU's internal market, and so one would readily expect the provision of aid by the public authorities in a Member State to have economic effects that spill over national borders.

The same comments apply to Article 10 Protocol. It is likely to be fairly easy to find that aid affects the trade (in goods, principally, also electricity) between Northern Ireland and the EU which is subject to the Protocol. Probably the grant of aid to small businesses in, say, East Anglia or North East England would not, but the grant of aid to firms which are based in GB

but have some presence in NI is likely to fall within the scope of Article 10. This could cover direct subsidies, it could cover tax concessions – the notion of an 'aid' under EU law is widely defined. It would readily cover aid designed to boost the economy in the wake of COVID-19. It would also in principle cover support granted to firms coping with new administrative obstacles to trade between GB and NI. The logic of the reasoning extracted in the quote from the *Eventech* case above is that once aid is being used in the NI market (even if it is mainly being used in GB) that may help the recipient to expand its activities into Ireland (and beyond) and/ or it may deter Irish (or other EU) firms from entering the NI market because any competitive advantage they enjoy is eroded by the aid provided by the UK. The effect on inter-State trade which is jurisdictionally necessary to trigger Article 10 Protocol is then present. The larger the scale of the aid, the more likely it is fall within the scope of Article 10 Protocol with the consequence that Commission supervision, and the role of the Court of Justice and of national courts, are engaged in the same way as under EU law generally. The aid is not automatically unlawful but it must be compatible with EU law.

The single most important point to grasp is that Article 10 Protocol is not limited to aid granted directly to firms based in NI. It is *much* wider than that.

15. How, if at all, could the state aid provisions in the Protocol be renegotiated or superseded as part of the future relationship negotiations (see Article 13(3)). Could alternative arrangements for NI-Ireland trade replace the Protocol?

There are two questions here: the second is a great deal wider than the first.

Renegotiation of the state aid provisions is in principle possible. They are, however, the product of tough negotiation reflecting firmly held positions on both the UK and the EU side. The EU was plainly determined to go as far as it could to prevent the UK granting aid which affects trade on the EU's internal market in a way which does not comply with its requirements. This is central to understanding the bargain enshrined in the Protocol: the EU has agreed to leave one of its external borders soft or invisible but in return for this it has insisted on the application of some of its key market rules by the UK in order to protect the good functioning of its internal market. Control of state aid is one part of this package. It does not seem likely to me that a different model could be agreed, unless at least one party changes its priorities significantly. I suspect that on the EU side a minimum requirement for altering the current scheme would be that (i) the UK shall apply a regime on state aid which is at least as substantively and institutionally robust as the EU's and (ii) that the UK shall provide the EU with a binding commitment to maintain such a regime.

The second question is much broader, since it invites reflection on replacing the Protocol in its entirety or at least replacing the provisions of it which govern trade. However, similar considerations come immediately to mind. The Protocol is the product of tough negotiation reflecting firmly held positions on both the UK and the EU side, and I do not think it can be replaced in the absence of radically changed priorities on the part of at least one side.

In thinking about alternatives, it should be grasped that the shape of the Protocol is dictated by the fact that three objectives pursued by the UK are unachievable in combination. The three objectives are: (i) that the UK shall enjoy regulatory autonomy in shaping its trade policy both internally and in relation to third countries; (ii) that the border between Northern Ireland and Ireland shall be soft or invisible; and (iii) that the border between Northern

Ireland and Great Britain shall be soft or invisible. These three objectives are incompatible. The UK's desire for regulatory autonomy inevitably entails a visible border *somewhere* as a means to demarcate the UK from the EU as jurisdictions with divergent rules. Nowhere on the planet are there soft or invisible borders between countries with different rules on customs, product standards, etc. Maybe one day technological advance will provide fresh solutions but it is as fanciful as it is unhelpful to imagine that such options are realistic today. The simple truth is that there have to be visible borders between different jurisdictions if there is not joint commitment to the same market rules. The deal brokered with the EU by Mrs May in 2018 achieved objectives (ii) and (iii) at the expense of objective (i), and was rejected by Parliament. The deal brokered by Mr Johnson in 2019 and now found in the Protocol achieved objectives (i) and (ii) at the expense of objective (iii), albeit that the regulatory autonomy within objective (i) is enjoyed by the GB part of the UK, not the whole UK.

It would be possible in principle to choose different trade-offs. One could, for example, prefer to achieve objectives (i) and (iii) but that would necessarily come at the expense of objective (ii). They key point, however, is that there must be trade-offs. The UK cannot achieve all its three objectives, and any attempt to re-design the matters covered by the Protocol needs to be realistic about that.

A future Free Trade Agreement between the EU and the UK may help, and, depending on its terms, would be capable of eliminating tariffs and reducing (but not eliminating) checks. However, the more that the UK clings to objective (i) in negotiating such an Agreement, the more serious will be the subversion of objective (iii). This is the real world of negotiation: there are always trade-offs.

16. What, if any, flexibility will there be for UK state aid measures which may still need to be introduced in the wake of the COVID-19 crisis and which are caught by the Protocol?

The same flexibility which is applied to any measure adopted within the EU will be available. The Commission has been active in 2020 in applying the state aid rules with awareness of and sensitivity to the impact of COVID-19.

It is worth emphasising – as already explained in answer to Q14 – that aid which falls within the scope of EU law, including via the Protocol, is not automatically unlawful. Rather it must be shown to be compatible with the internal market.

D. Legal certainty and potential disputes arising from the Protocol

17. What, if any, legal difficulties are created by the Protocol providing for NI being part of the UK customs territory, yet applying EU customs and goods-related law to NI?

The Protocol provides in its Article 4 that NI is part of the UK customs territory, but the effect of the Protocol is that NI is de facto part of the EU's customs territory for the purposes which are covered by the Protocol. This is the consequence of Article 5(3) Protocol: 'Legislation as defined in point (2) of Article 5 of Regulation (EU) No 952/2013 shall apply to and in the United Kingdom in respect of Northern Ireland'. There is a great deal more to

this than meets the eye: 'Legislation as defined in point (2) of Article 5 of Regulation (EU) No 952/2013' covers an extensive field. The intent and effect of Article 5(3) Protocol is to lock Northern Ireland into the entirety of the EU's Customs Code, the Common Customs Tariff, legislation setting up a Union system of relief from customs duty, and international agreements containing customs provisions in so far as they are applicable in the EU (subject only to a reservation to the Joint Committee of the job of establishing the conditions applicable to certain fishery and aquaculture products) and via its Article 5(4) also a number of other customs-related measures, among them the EU's trade defence instruments covering inter alia anti-dumping and anti-subsidy measures.

Artfully located five pages distant from Article 4's claim that NI is part of the UK customs territory is Article 13(1) which declares that: 'Notwithstanding any other provisions of this Protocol, any reference to the territory defined in Article 4 of Regulation (EU) No 952/2013 [which is the EU customs territory] in the applicable provisions of the Withdrawal Agreement and of this Protocol, as well as in the provisions of Union law made applicable to and in the United Kingdom in respect of Northern Ireland by this Protocol, shall be read as including the part of the territory of the United Kingdom to which Regulation (EU) No 952/2013 applies by virtue of Article 5(3) of this Protocol'.

So the Protocol *says* that Northern Ireland is part of the customs territory of the United Kingdom (Article 4) but that is not what it *does*. De facto Northern Ireland is part of the EU's customs territory. Once it is appreciated that the Protocol contains misleading advertising it is easier to understand.

18. What, if any, legal difficulties are created by the Protocol providing for protection of the UK internal market (unfettered market access for goods moving from NI to GB), yet allowing for regulatory divergence between NI and the rest of GB?

As with Q17, the key to understanding this is that the Protocol is written to mislead. The Protocol asserts that trade from NI to GB shall be unfettered, and more generally it asserts an intent to protect the UK's internal market (Article 6). But the reality is different.

Article 5(3) Protocol requires that the normal formalities applicable to goods leaving the EU's customs territory shall apply to goods leaving NI for GB. This is covered by Title VIII, Articles 263 – 277, of Regulation 952/2013 on the EU Customs Code. This entails that a pre-departure declaration be lodged, which shall take the form of a customs declaration, a re-export declaration or an exit summary declaration in accordance with Article 271 of the Regulation.

Article 6 also envisages impediments to trade between NI and GB 'to the extent strictly required by any international obligations of the Union' and requires that 'The United Kingdom shall ensure full protection under international requirements and commitments that are relevant to the prohibitions and restrictions on the exportation of goods from the Union to third countries'. I know of no exhaustive list of what obligations may be at stake here. One example that springs to mind is those imposed by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) which concern controls including export permits applicable to trade in endangered species. Probably there are not many obligations of the type envisaged by Article 6, but even if they are applied with a light touch they introduce a friction to NI to GB trade that is new.

I find it hard to understand how the UK could live up to a promise to carry out no further checks on goods moving from NI to GB. That would prevent it making a distinction between goods made in NI, to which no duties would be applicable, and goods made in the EU which have been moved to NI, on which duties are applicable. Two points trouble me about this, one legal, one practical. The legal point is that if the UK does choose to waive payment of tariffs on goods entering its territory from the EU and then reaching GB via NI while applying controls and levying payment at all its other external borders (and on goods imported into NI from third countries), it seems to be in violation of the 'most favoured nation' rules under WTO law. The practical point is that if it is cheaper to reach the GB market via NI, then in so far as the cost reduction exceeds additional transport costs this is likely to lead to significant levels of diversion of trade, as traders will have an incentive to abandon other routes (Ireland to GB, for example) in favour of the Ireland/ NI/ GB route.

In the May 2020 Cabinet Office document entitled 'The UK's approach to the Northern Ireland Protocol' the UK government has stated that it does not intend to check conformity with its regulatory standards where goods move from NI to GB. The same intention is expressed in the Cabinet Office paper of 7 August 2020, 'Moving goods under the Northern Ireland Protocol'. If this promise is kept, similarly motivated patterns of trade diversion are likely to emerge.

So the claim that trade in goods from NI to GB is 'unfettered' is correct only if one takes a very narrow view of what 'unfettered' means: such trade will, as a result of the Protocol, not be as simple as it has been in the past. There will be new obstacles to trade between NI and GB (west to east trade), and it is possible that those new obstacles will need to be significant. The UK may persuade the EU to grant it waivers from some of these formalities, and some of the obstacles which flow from the UK's decision to withdraw from the EU may be relieved if there is successful negotiation with the EU on a future relationship, but not all will be, and in the absence of successful negotiation none will be.

However, awkward though the changes to west to east trade will be, there will be far more new obstacles to trade between GB and NI (east to west trade). This is not only because of the need for new arrangements to address the need to collect customs duties where applicable (Q19 below) but also because of the need to (i) comply with the requirements of the EU Customs Code in matters such as entry summary declarations and customs declarations as mandated by Title IV, Articles 127 - 152, of Regulation 952/2013 and (ii) carry out checks on goods in order to ensure they comply with the EU rules which are applicable in NI but not in GB. Customs duties are not always payable, and some limited flexibility is envisaged for goods that are not at risk of movement beyond NI (see in detail, Q19 below); by contrast customs formalities and regulatory checks will always be required even for goods targeted exclusively at the NI market. Compliance with EU rules on the many matters covered by the Protocol such as product composition, safety, technical standards and sanitary and phytosanitary requirements will need to be checked according to the normal rules and procedures governing entry to the EU's territory, because GB will no longer be bound by these rules. The required intensity, location and nature of such checks is not defined by the Protocol, and reference sector-by-sector to applicable EU procedures will be required to identify precisely what is at stake. The Cabinet Office paper of 7 August 2020, 'Moving goods under the Northern Ireland Protocol', starts to put flesh on these bones. Probably the most significant checks will concern live animals and products of animal origin which must pass through checks defined laboriously under EU law at a designated Border Inspection

Point: some procedures of this nature applicable to live animals always occurred at the GB/NI border but under the Protocol they must become a great deal more wide-ranging, intrusive and expensive. All this follows unavoidably from the UK's decision to leave the EU on the terms of the Withdrawal Agreement. The greater the regulatory divergence that develops between GB and NI, the greater the incentives to use the GB – NI - Ireland trade route, and the more important and presumably the more onerous will be the checks on GB to NI trade.

So the Protocol claims to protect the UK's internal market but in truth it makes very significant changes to it, and it establishes the Irish Sea as a politically, legally and economically significant frontier within it. As noted in answer to Q5, the UK government's May 2020 Cabinet Office document entitled 'The UK's approach to the Northern Ireland Protocol', which asserts at para 16 that there is not an international border between NI and GB, is disingenuous, because the point of the Protocol is not that an international border is created in the Irish Sea, but rather that the Irish Sea becomes a border with high customs and regulatory significance. It separates a jurisdiction, NI, which shares the regulatory features mandated by the Protocol with the EU, and a jurisdiction, GB, which has largely (but see state aid, Qs 13, 14 above) separated itself from the EU's rules. Keeping the border between Ireland and NI soft entails that the border between NI and GB, though in formal terms internal to the UK, must become harder.

Article 6(2) Protocol directs the EU and the UK to 'use their best endeavours to facilitate the trade between Northern Ireland and other parts of the United Kingdom' but this is explicitly stated to occur 'in accordance with applicable legislation and taking into account their respective regulatory regimes as well as the implementation thereof' and so offers no legal basis for mitigating the obligations arising under the Protocol. A reduction in, but not elimination of, these burdens may be achieved through UK requests for waivers from required conformity with some of these formalities and a broader reduction may be achieved if there is successful negotiation with the EU on a future relationship, but as already mentioned in answer to Q15 above the further the UK insists on distancing its regulatory regime from that of the EU, the greater will be the need for persisting checks on trade in goods between GB and NI.

So the Protocol *says* that it is dedicated to the protection of the UK internal market (Article 6) and that nothing shall prevent the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the United Kingdom's internal market (Article 6(1)). But that is not what the Protocol *does*.

This is the bargain struck under the Protocol – as mentioned above (Q5) it is unorthodox and it is viewed with distaste by some on both sides. But the Protocol provides a delicate balance which is the result of departures from orthodox approaches made on *both* sides. Most of all if the UK wants to maintain a soft or invisible border between NI and Ireland and also to provide room for GB to pursue a different regulatory course from that of the EU it has to accept, and has accepted, a separation between NI and GB, in the sense that the rules governing the matters covered by the Protocol will be different in NI on the one hand and in GB on the other, which entails also that the border between NI and GB acquires a higher legal, economic and political significance than it held in the past. That border must become harder. This was recognised last Autumn as the WA was debated. The UK government's own impact assessment, published on 21 October 2019 (https://www.gov.uk/government/publications/eu-withdrawal-agreement-bill), was open about the prospect of increases in costs as a result of an obligation to submit to processes and

regulatory checks and to complete declarations, both West-East and East-West, albeit that it felt unable to place precise figures on the consequent costs pending detailed policy decisions to be taken (and still not taken) by both the UK and the EU.

It surprises me that prominent politicians, including the Prime Minister, have made public statements to the effect that trade between NI and GB and between GB and NI will be unchanged as a result of the withdrawal of the UK from the EU on the terms agreed in late 2019. It surprises me too that it was as late as May 2020 before the government that took office in December 2019 set out clearly its acceptance of the need to introduce changes at the border between GB and NI (Michael Gove, evidence of 5 May 2020 to the H.L. Select Committee on the EU; Cabinet Office document entitled 'The UK's approach to the Northern Ireland Protocol', May 2020). It is clear from the Protocol, and as the October 2019 impact assessment shows it was clearly understood on the UK side before the approval of the WA in Parliament, that the (oven-ready) deal struck with the EU entails that the border between NI and GB shall acquire a higher legal, economic and political significance than it held in the past.

19. The UK and EU are taking different approaches to the question of when goods moving from GB to NI are "at risk" of onwards movement into the EU and therefore liable to tariffs. This also involves interpretation of the concept of "processing".
> What are the respective legal merits of those approaches?
> The Joint Committee is tasked with deciding what are the "at risk" criteria. How easily can it reconcile the two conflicting approaches?

This is a further example of the Protocol's slippery drafting.

Article 5(1) Protocol provides that no customs duties shall be payable for a good brought into Northern Ireland from another part of the United Kingdom by direct transport unless that good is at risk of subsequently being moved into the Union, whether by itself or forming part of another good following processing. So – it seems – the norm is no duties on GB to NI trade, while the exception – where the good is at risk of onward movement to the EU – is payment of duties. Not so. Article 5(2) Protocol reverses the presumption expressed in Article 5(1). Article 5(2) provides that a good brought into Northern Ireland from GB is considered to be at risk of subsequently being moved into the Union unless it is established that that good will not be subject to commercial processing in NI and fulfils criteria to be established in due course by the Joint Committee. The shaping of the governing criteria by the Joint Committee will plainly be important. Those criteria, if adopted, may provide operationally helpful guidance on how to import goods from GB to NI in circumstances where the obligation to pay duties is disabled as envisaged by Article 5(2): conversely if the Joint Committee fails to agree such criteria then their fulfilment in accordance with Article 5(2) will not be possible, with the consequence that all goods will be treated as at risk of onward movement to the EU and duties will be payable. The key point is that under the Protocol goods are deemed to be at risk of onward movement and so attract an obligation to pay duties – unless it is shown they are not. The burden is on the trader to show that the relatively tightly drawn exception for goods only destined for Northern Ireland and not for processing applies.

The starting point, then, is that duties are payable. The starting point, then, is that in the matter of duties exports from GB to NI are treated in the same way as exports from GB to the

EU generally. Exceptions are few and limited – for UK residents' personal property (Article 5(1)), for goods shown to be not at risk of onward movement (Article 5(2)), for consignments of negligible value, consignments sent by one individual to another and goods contained in travellers' personal baggage (Article 5(7)); and there is tightly drawn scope for reimbursing duties paid according to Article 5(6). This confirms that what the Protocol says is not what it does – what it does is *not* to treat Northern Ireland as part of the customs territory of the UK. It treats Northern Ireland as part of the EU's customs territory.

The UK government's May 2020 Cabinet Office document entitled 'The UK's approach to the Northern Ireland Protocol' states that tariffs will be charged only if there is a 'genuine and substantial risk' goods will end up in or beyond Ireland (para 25). That, however, is to introduce language which is not found in the Protocol. Moreover it is not a plausible paraphrase of the Protocol. It is instead an attempt to place a significantly higher threshold to the obligation to pay duties than is imposed by the Protocol.

The May 2020 document is, I fear, tainted by an attempt to underplay the scope of the obligations which the UK has undertaken pursuant to the Protocol. For example its paragraph 8 refers to the application in NI of 'certain aspects of EU law'. I do not think this is a fair reflection of the weight of the commitments undertaken as explained above in answer to Q5. Moreover paragraph 16's assertion that no international border is created in the Irish Sea between GB and NI is, as already explained in answer to Qs 5 and 18, true but disingenuous because, presumably in order to downplay the transformative impact of the Protocol, it ignores the fact that under the Protocol the Irish Sea acquires an elevated status as a border for customs and regulatory purposes.

I suspect the Joint Committee will choose to remain faithful to the text of the Protocol which does not go so far as to add the words 'genuine and substantial' to the 'at risk' proviso.

A final point: in elaborating governing criteria under Article 5(3) Protocol the Joint Committee is invited to take consideration of incentives for undeclared onward movement. It is worth noting that that further the UK chooses to move away from the EU model by reducing tariffs, the greater the incentives to use the GB – NI – Ireland route to reach the EU's internal market rather than other routes insofar as there is a real possibility of not being required to pay the full EU tariff. So the more the UK departs from the EU level of tariff, the more likely that goods will be treated as 'at risk' of onward movement and so liable to the levy of tariffs. There are always trade-offs.

20. The UK and the EU are taking different approaches to the need for export/exit summary declarations for the movement of goods from the NI to GB. What are the respective legal merits of those approaches?

Article 5(3) Protocol requires that the normal formalities applicable to goods leaving the EU's customs territory shall apply to goods leaving NI for GB. This is covered by Title VIII, Articles 263 – 277, of Regulation 952/2013 on the EU Customs Code. This entails that a pre-departure declaration be lodged, which shall take the form of a customs declaration, a re-export declaration or an exit summary declaration in accordance with Article 271 of the Regulation.

21. Is it clear whether "services" are caught by the Protocol at all and if so, to what extent? For example, where EU law applicable to NI under the Protocol applies not only to goods but also to services? Is there any difference in the EU and UK positions on this?

It is well known under primary EU law that the margin between goods and services is sometimes hard to define with precision. Case law of the Court illustrates what is at stake. The organisation of lotteries does not constitute an activity relating to goods but rather concerns the provision of services, even though the activity includes the distribution of advertising material and lottery tickets (Case C-275/92 *Schindler*); the grant of fishing rights and the issue of fishing permits is treated as provision of services not goods even where those rights or permits are set down in documents (Case C-97/98 *Jägerskiöld*). There is no hierarchy between the freedoms (Case C-452/04 *Fidium Finanz*), and no principled basis for distinguishing between them. When determining whether a matter falls for consideration in the light of the provisions on goods or services the Court seems concerned to identify the primary focus of the activity. Sometimes it applies both sets of Treaty provisions; a restriction on the advertising of alcoholic beverages has been treated as a restriction of the movement of both goods and services (C-405/98 *Gourmet International*).

Distinguishing goods from services frequently does not matter in EU law because the Treaty rules governing the free movement of goods run largely in parallel with the rules governing the free movement of services. The Protocol is different. There are some EU legislative provisions on the list in Annex 2 which have as their legal base Treaty provisions which address not only goods but also services. I have not conducted an exhaustive search, but one example of such a measure is Directive 2014/40 concerning the manufacture, presentation and sale of tobacco and related products. Directive 2014/40 harmonises labelling, maximum tar yield and other rules governing the composition of tobacco products and so is chiefly concerned with goods, but its relatively strict rules stipulating the type of health warnings that shall be displayed on packaging could conceivably affect the market for advertising services. So although the Protocol is concerned with goods rather than services the margin may be elusive in some cases and in particular pieces of EU legislation it may be ignored. Therefore it may be that some services markets will be tangentially affected by the obligations accepted under the Protocol.

The Protocol's separation between goods and services will in most instances be easy to grasp, but it will create some obvious peculiarities. Goods should enjoy a frictionless crossing of the NI – Ireland border, but that may not be true of the associated transport services.

22. Can you give other examples of where there is a lack of legal certainty in the Protocol?

23. To what extent are any of these issues specifically identified as a matter for the Joint Committee to determine under the Protocol?

E. Constitutional implications of the Protocol for the status of Northern Ireland

24. What is the potential for divergence between laws in NI and GB as a result of the Protocol and what implications does divergence have for the legal and constitutional coherence of the UK?

25. What implications do the differences in supervisory and enforcement systems as between the NI and GB have for the legal and constitutional coherence of the UK?

26. What are the implications of customs or regulatory checks on goods moving in either direction between the GB and NI for the legal and constitutional coherence of the UK?

I do not have any expertise in measuring the legal and constitutional coherence of the UK, but I think the answers to several of the questions above show that the consequence of the Protocol is that the regulatory environments of NI and GB will immediately become different, and will diverge still further insofar as the UK chooses a different regulatory model for the GB from that which prevailed in the past (both in areas covered by EU law and more generally) and that moreover the border between NI and GB shall acquire a higher legal, economic and political significance than it held in the past. This is the nature of the bargain struck under the Protocol.