



Northern Ireland  
Assembly

Committee for Finance

# OFFICIAL REPORT (Hansard)

Protocol on Ireland/Northern Ireland: Dr  
Graham Gudgin; Professor Ronan McCrea;  
Professor David Phinnemore

23 June 2021

# NORTHERN IRELAND ASSEMBLY

## Committee for Finance

Protocol on Ireland/Northern Ireland: Dr Graham Gudgin; Professor Ronan McCrea;  
Professor David Phinnemore

23 June 2021

**Members present for all or part of the proceedings:**

Dr Steve Aiken (Chairperson)  
Mr Keith Buchanan (Deputy Chairperson)  
Mr Jim Allister  
Mr Pat Catney  
Ms Jemma Dolan  
Mr Maolíosa McHugh  
Mr Matthew O'Toole

**Witnesses:**

Professor David Phinnemore	Queen's University Belfast
Professor Ronan McCrea	University College London
Dr Graham Gudgin	University of Cambridge

**The Chairperson (Dr Aiken):** Can we bring David, Graham and Ronan into the spotlight? Hi, David.

**Professor David Phinnemore (Queen's University Belfast):** Good afternoon.

**The Chairperson (Dr Aiken):** Hi, Graham.

**Dr Graham Gudgin (University of Cambridge):** Hello.

**The Chairperson (Dr Aiken):** Hi, Ronan.

**Professor Ronan McCrea (University College London):** How are you doing?

**The Chairperson (Dr Aiken):** Apologies for doing that, but we have had a few spotlight issues today. I wanted to make sure that everyone is in tune and ready to roll. We are receiving joint oral evidence from a panel of expert advisers on the Northern Ireland protocol. The session is being reported by Hansard. Members will find relevant papers in their packs.

Each of the witnesses may speak for five minutes. Following that, we will get stuck into a Q & A, if you are content. David, you may kick off. I declare an interest as knowing David and Graham quite well. I have not yet had the opportunity to get to know Ronan. I think that we can work out how the conversation is going to go. Over to you, David.

**Professor Phinnemore:** Thank you very much, Chairperson, for the invitation to speak to you today. I have submitted a piece of written evidence and I am happy to answer any questions arising out of that. For those of you who do not know me, I am a professor of European politics at Queen's University Belfast, with a background in European integration and the politics of the European Union, particularly in terms of treaty reform, enlargement and its external relations. Certainly, since the mid-point of the last decade, I have been following the UK-EU relationship, the Brexit process and, more recently, the arrangements for the protocol. I view that very much as something in the context of the EU's external relations [*Inaudible owing to poor sound quality.*]

**The Committee Clerk:** We lost you for a second there. Can you hear us OK?

**Professor Phinnemore:** Yes, I can hear you now.

I am coordinating a three-year academic study into the protocol and its implications for governance in Northern Ireland. As part of that project, we are monitoring the implementation of the protocol, tracking public opinion, engaging with stakeholders in trying to develop understanding of the issues that they are facing and, potentially, looking at ways to approach some of the problems that are being raised. We are also trying to promote informed public debate on the protocol, mindful of the fact that there will be a consent vote in 2024.

As I indicated, I have set out some comments in response to the focus of today's discussion in the written evidence that I have submitted. The general point that I want to make is that even though we are focusing very much on the protocol here, the implications are not simply due to the protocol per se but the context in which it is being operated. That is, particularly, the nature of the UK's withdrawal from the EU and the various choices that have been made around the relationship that the UK, beyond the protocol, is pursuing with the European Union. Therefore, where there are particular challenges around the protocol per se, a lot of the challenges have to do with the wider UK-EU relationship and the fact that the UK has decided not to remain in a customs union with the EU or in the internal market.

I am happy to pick up on any of the issues that I have raised in the paper and to respond to any questions that you may have.

**Dr Gudgin:** Thanks for the invitation. I thought that I had been asked to speak for 10 minutes, so I will try to cut down to five.

**The Chairperson (Dr Aiken):** No, Graham, you can speak for as long as you need. We are not pressed for time, and it is important that we hear the evidence.

**Dr Gudgin:** OK, thank you very much. The UK Government under Boris Johnson now views the protocol as what the Chinese call an "unequal treaty", and, in my view, they are correct to do so. The protocol was accepted by the present Government in October 2019 under conditions of acute political disarray, in what we might call a parliamentary civil war, culminating in the Benn Act which, essentially, gave the EU carte blanche to name its own terms.

Not surprisingly, the EU, egged on by Dublin, took full advantage of that disarray and imposed terms for a UK-EU trade agreement, which was maximally advantageous to themselves and to the Republic of Ireland and maximally unfavourable to the integrity of the UK and to Northern Ireland unionists. It is that agreement that the UK Government would now like to renegotiate and, at a minimum, to agree major reforms.

It is unclear whether the Government fully understood the consequences of the protocol that it signed in 2019. Lord Frost has recently said that no one could have anticipated the chill effects on GB firms that supply Northern Ireland businesses and consumers. The refusal of a range of firms in GB to continue their previous business arrangements in supplying Northern Ireland customers is a key part of the negative impact of the protocol on the Northern Ireland economy, alongside either EU rules banning the imports of certain foods and medicines or the imposition of costly requirements for veterinary and other checks and certificates.

It is not obvious, to many people, that the protocol, as it currently operates, is consistent with several of the aims listed in the preamble to the protocol. Those include a:

*"shared aim of avoiding controls at the ports and airports of Northern Ireland, to the extent possible in accordance with applicable legislation".*

The second aim is that it should:

*"impact as little as possible on the everyday life of communities in ... Northern Ireland".*

The third is that it should have:

*"regard to the importance of maintaining the integral place of Northern Ireland in the United Kingdom's internal market".*

Although the protocol came into operation last January, it soon became obvious that those statements mean rather little in practice. Although there is an allowance for an Assembly vote on the protocol after four years, most unionists do not regard that as an adequate realisation of two other statements in the preamble. The first statement is that there:

*"should be a process to ensure democratic consent in Northern Ireland to the application of Union law under this Protocol"*

and the second is:

*"reaffirming that the achievements, benefits and commitments of the peace process will remain of paramount importance to peace, stability and reconciliation there",*

with "there" being Northern Ireland.

The key rules on customs and trade regulations are contained in article 5 of the protocol. That article is critical. Many people initially read the rules relating to customs and regulatory barriers as applying only to goods that are "at risk" of entering the EU via Northern Ireland. Article 5 mentions the "at risk" concept four times in its two pages. Only a very careful reading reveals that that concept applies only to tariffs and not to technical or sanitary and phytosanitary (SPS) regulations. Since the trade and cooperation agreement from December 2020 rules out most tariffs and quotas, the "at risk" concept largely drops out. It remains only for goods that do not meet the EU rules of origin.

The protocol also stipulates that NI producers should observe EU regulations, including customs rules, on goods entering Northern Ireland. All of that is pretty obscure in the protocol, to say the least. In fact, nearly all of that comes from two sentences, both of which are pretty obscure. The first sentence, from article 5(3), states

:

*"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".*

That means that the entire EU customs code applies to Northern Ireland. That single, obscure sentence establishes the outer border of the EU at the coast of Northern Ireland, although it does not explicitly say that.

The second obscure sentence is:

*"The provisions of Union law listed in Annex 2 to this Protocol shall ... apply ... to ... the United Kingdom in respect of Northern Ireland".*

Annex 2 lists 288 EU regulations covering a whole range of goods including chemicals, medicines, food, agriculture and many other things.

The important thing is that those customs rules and product regulations are nowhere applied to goods that are "at risk". Instead, they apply to all goods, which is what is causing the problem. That does not seem to have been widely realised in Northern Ireland until after the protocol came into operation.

Promises were made, which have broadly been kept, that Northern Ireland businesses would have unfettered access to the wider UK market. Little effort was made to point out that those promises referred to Northern Ireland businesses having unfettered access to sell to GB markets but not to GB

markets having access to Northern Ireland. The access referred to is only to sales made by Northern Ireland businesses and not to their purchases from GB. That is not unfettered.

Unionists have been strongly criticised for not realising that their support for Brexit implied a border in the Irish Sea. The border in the Irish Sea was not a necessary consequence of Brexit. There are at least three other options, even if we accept no physical infrastructure at the land border in Northern Ireland.

The first option is alternative technology. Prosperity UK published a major report on alternative arrangements for the Irish border. It was authored by a commission that is chaired by Greg Hands MP and Nicky Morgan MP. The report advocated the use of trusted trader status and checks away from the border, supported by tracking technology on cross-border consignments. That is technology that Fujitsu, which is part of the commission, said was available.

The second alternative is a border in the Celtic Sea. It would be possible to have a sea border between Ireland and the rest of the EU so that illicit goods could be prevented from entering the continental EU by checks at ports in the Republic of Ireland. That would obviously cause political problems, but whether those political problems would be any larger than those already caused in Northern Ireland by the sea border is a matter for debate.

The third option — mutual enforcement — is of most practical interest. Mutual enforcement entails each side — the UK and the EU — making a reciprocal legal commitment to enforce the rules of the other side with respect to trade across the border, and only to trade across the border. Each side maintains autonomy but commits to the enforcement of whatever rules the other seeks to impose in respect of goods crossing the land border. It would be unlawful, perhaps even a criminal offence, for a trader in Ireland to export a good to Northern Ireland, or vice versa, without complying with the latter's rules and duties. HMRC would collect the duties in Northern Ireland for the benefit of the Irish customs authorities, for instance, and regulatory compliance for exports would be enforced in Northern Ireland and, indeed, in the South for goods coming the other way.

Where do we go now? In my view, the EU should recognise that the protocol is too controversial and damaging to the economy and politics in Northern Ireland to survive in its present form. Its need to protect the single market can be achieved with much lighter arrangements than in the current protocol. First, it should allow the at-risk principle to be applied to SPS regulations as well as to tariffs. Secondly, it should recognise UK food and medicines regulations as being equivalent to its own — they are exactly the same as its own because they were its own — and maintain that equivalence for as long as broad regulatory alignment remains in place.

In the past week, there have been signs of moves towards some compromise, but not enough. If the EU refuses to go further and cooperate in reaching a reasonable compromise, what should the UK Government do? There are three steps in ratcheting up the pressure. First, extend grace periods further, unilaterally or otherwise. Secondly, invoke article 16 of the protocol, which allows either side to take measures to avoid difficulties with societal disruption or the diversion of trade, until a further compromise is reached. Clearly, there has been a diversion of trade. Thirdly, in extremis, replace the protocol with a scheme of mutual enforcement, at least on the UK side of the border. We could not force the EU or the Irish to do that on the other side, unless they wanted to. It is recognised that any or all of those steps could trigger a trade war. Careful diplomacy and transparency should limit that danger, but, in any case, the imbalance in trade between the UK and the EU means that the EU is well placed to ride out a trade war if it comes to that. Talk about trade wars should be only rhetorical threats as a means of negotiation. It is time for grown-up politics. The UK can agree reasonable measures to protect the EU single market, but, in turn, the EU should not turn a molehill into a mountain. It should respect the preamble in the protocol on making any measures as painless as possible for Northern Ireland.

**The Chairperson (Dr Aiken):** Cheers. Thanks very much indeed, Graham.

**Professor McCrea:** I, too, thought I had 10 minutes, but I will try to go quickly.

**The Chairperson (Dr Aiken):** Ronan, take your time. It is too important, so please take your time.

**Professor McCrea:** Thank you. I want to talk about three things. I want to look at how the protocol is operating, how it operates more generally and how it fits into a bigger picture.

The first thing I want to talk about is the idea of visible and invisible barriers under the protocol and in Brexit. Secondly, I want to look at three vulnerabilities of the protocol system, and then I will look at possible changes and how they fit into the broader scheme of things in Northern Ireland.

My name is Ronan McCrea. I teach and research EU and constitutional law at University College London. I will be looking at EU law and constitutional aspects.

Given the sensitivity of constitutional issues in Northern Ireland, it is not surprising that the need for checks under the protocol on goods coming from GB to Northern Ireland is controversial. You can see why unionists might feel that this is moving Northern Ireland into the economic orbit of the Republic, possibly easing towards a united Ireland. I would be quite sceptical about whether that is actually the case. The protocol, whether obscure or not, was jointly drafted by lawyers on both sides.

In relation to goods, it is true that the alignment that there was between Northern Ireland and the Republic pre-Brexit has been maintained at the cost of some greater economic distance between Northern Ireland and the rest of the UK. However, in relation to services, which are a bigger part of the economy, barriers between the Republic of Ireland and Northern Ireland have increased. Because services are not physical objects, those barriers are often invisible, but that does not mean that they are any less real. Pre-Brexit, EU law on the freedom to provide services provided great limitations on the degree to which obstacles could be placed in the way of firms from the UK and the North operating in the Republic and vice versa. Those guarantees no longer apply.

In addition, rules around the free movement of people and the changes to those mean that, for instance, the very large population of non-Irish EU nationals living and working in the Republic used to enjoy fairly unfettered freedom to come and live and work in the North. That is no longer the case. That could make life more complicated for cross-border employers.

That is in addition to the broader loosening of administrative, economic and legal ties between the Republic and the UK that Brexit entails and the consequent increase in the distance in ties in some areas between the North and the Republic. As an example of that, under the case law of the European Court of Justice (ECJ) all national law has to be interpreted in the light of the objective of EU law. As the UK will diverge legally, over time, from the EU, this means that Irish courts in the Republic and Irish law will be subject to different interpretative influences from UK law. Previously, Irish courts generally cited and often relied on British cases. That will no longer be the case.

The same is true of broader administrative structures. The gap between Irish and British regulatory standards will grow. The previous default option between the UK and the Republic of Ireland was often that administrative structures were pretty similar. Irish authorities often cut and pasted into their legislation British ways of doing things. That will be increasingly difficult to have as a default option.

It is important to recognise that while increased visible economic barriers between the North and GB have attracted a lot of attention, the arrangements established by the protocol involve a series of steps, some of which create greater distance between Northern Ireland and the rest of the UK and some of which create greater economic and regulatory distance between the North and the Republic.

I will talk quickly about three vulnerabilities of the system. The first vulnerability of the protocol is the need for cooperation. Definition of which goods are "at risk" is done by the Joint Committee of EU and UK officials. Above all, the key thing is to realise how sensitive this issue also is for the EU.

UK officials implement the protocol; UK officials guard the border of the EU single market. That is a massive concession by the EU. The European Union and a lot of member states in particular that are not that invested in the situation in Northern Ireland are really worried about the integrity of the single market. Remember that the single market is the core function of the EU. It is its most important activity. The EU has arrangements with a series of countries that have partial or conditional access to the single market, but none of those arrangements involves letting the officials of a third country police the border of the single market, which is what the EU has conceded in the protocol.

Law has always been central to the European integration project. All the academic studies talk about integration through law as the European Union's model. The fact that the European Union has a single legal system with law that is directly effective turns the EU from what would be an international talking shop into quite a powerful body. Any approaches that seem to say to the EU, "Forget about law; we will do it all on trust" are not going to get very far. The Union is very sensitive about the centrality of law and the integrity of the single market.

If you try to imagine an analogy, you will see that it is like the UK outsourcing one of its core functions, such as the NHS or the status of the Royal Family, to the officials of a third country. The UK would be extremely sensitive about monitoring how those officials carried out their task. I do not think that just saying, "Take it on trust" is going to work for the EU.

The second vulnerability of the system is enforcement. Enforcement of the protocol is EU-centric and very strong; you can take cases to the Court of Justice, and those rulings are directly implemented. However, if article 16 is invoked in order to withdraw from parts of the protocol, the enforcement mechanisms are much weaker. They are about arbitration and potential for both sides to impose financial penalties or take retaliatory steps. That is a lot weaker. The enforcement of the protocol has an Achilles heel in the form of article 16. I think that what Graham said about that is probably true.

The third vulnerability is that we are not clear on how the protocol is going to work in the long term. It could be a golden opportunity for Northern Ireland — a lot of people say that — with free, or almost free, access to the UK market for selling and very privileged access for goods to the EU market. It is possible to see benefit. One thing to watch out for is that you could fall between two stools. Northern Irish goods law will be EU law, made by the EU legislature. Northern Ireland's services law will be made by a combination of Stormont and Westminster. Goods law and services law are often designed to dovetail. You can imagine that you might sell a computer and a service for taking care of the computer if it breaks down. You have to think of clever ways to ensure that Northern Irish interests are represented in the EU legislative process and that the laws on services and goods in Northern Ireland dovetail properly.

The last thing that I will say is about the nature of any potential changes to the protocol. Some people have said that some elements of the protocol, particularly the fact that the vote of the Assembly on whether to exit the protocol is by a simple majority rather than cross-community consensus, are in tension with the Good Friday Agreement and the need in that agreement for cross-community consent on divisive matters. However, I am not sure that that is justified. The Good Friday Agreement instituted a regime in which controversial changes could only occur with cross-community consent, but, as we all know, those who wrote the Good Friday Agreement never envisaged the UK leaving the EU.

Brexit meant that controversial change in the status quo was inevitable. In the absence of cross-community consent on what form that change would take, but with the change being inevitable, action had to be taken and compromises had to be made. Had Brexit had to wait for cross-community agreement in the Assembly on what form it would take, it would not have happened. The protocol put in a series of intricate compromises. The UK Government compromised on the economic unity of the United Kingdom to get a meaningful Brexit. The EU compromised on the integrity of the single market to stop border infrastructure on the border with the Republic.

Unionists find themselves living with Northern Ireland-GB barriers in relation to goods and customs matters; nationalists find themselves living with new invisible economic and regulatory barriers between Northern Ireland and the Republic that will grow over time. Nobody got everything that they wanted. There is limited utility in pointing to the one part of the protocol that you dislike in isolation and demanding its removal. As a compromise package, changing one element of the protocol will inevitably mean rebalancing in other areas. A useful critique requires recognising the compromises made by each side and balanced solutions that recognise the legitimacy of each sides' interests. Brexit was always going to mean large-scale change in British-Irish and North/South relationships. If you recognise the legitimacy of both identities in Northern Ireland, change in one direction was always going to be balanced by change in the other direction.

The system that was established by the protocol is only one part of the wider EU-UK post-Brexit relationship. The protocol will need a lot of cooperation and good faith to function. It involves a really complicated interaction of Administrations and judicial bodies, with UK officials applying EU rules and enforcement provisions that mix the European Court of Justice and the European Court of Arbitration. The underlying need to make North/South and EU relationships work will not go away. If there is not good faith or if the protocol ceases to function, some deal that takes account of both sides' priorities will be required. I will leave it at that.

**The Chairperson (Dr Aiken):** Thank you very much. Before I open it up to the team, I will say that I realise that the protocol creates a considerable degree of heat as well as light. I ask that everyone respects that in their questions.

I have a question for all three of you. Bearing in mind what has been said, the protocol as it sits and how things may evolve if there are not substantial changes to it, what monitoring role do you see for

the Northern Ireland Assembly? As Ronan spoke about, we have already seen a juxtaposition of laws on services, which will be made by Westminster and Stormont, and laws on goods, which will be made by Brussels. Where do you see a role for the Northern Ireland Assembly and the Northern Ireland Executive? Where can we, as elected representatives, show accountability and responsibility to Northern Ireland and the Northern Ireland economy?

**Professor Phinnemore:** Chair, you have hit on a really important question, which is not necessarily sufficiently developed in the protocol. The one role that we know that the Assembly and MLAs will play is when the democratic consent vote is called. Ultimately, it will be for MLAs to decide whether articles 5 to 10 continue to apply. What happens before then is not really developed in the protocol, and, from what I can see, it has not really been developed in how the UK Government intend scrutiny to operate and the Assembly to be involved. There is quite an important piece of work to be done to ensure that, come 2024, MLAs are in a position to vote on articles 5 to 10 of the protocol in an informed manner.

It is really important that, when engaging with the various bodies associated with the withdrawal agreement and monitoring the implementation of the protocol, Northern Ireland officials and Executive members take on board and reflect the Assembly's views in what they present at those meetings. There is role for the Assembly in scrutinising the legal development of the protocol, because it is dynamic. The Assembly may also be able to play a role in monitoring the activities of the Withdrawal Agreement Joint Committee, the Specialised Committee on the implementation of the Protocol on Ireland and Northern Ireland, and the Joint Consultative Working Group.

There is scope to work out what arrangements need to be put in place. For example, should Assembly Committees be able to call David Frost, as the UK co-chair of the Joint Committee, to attend them? What sort of reporting mechanism should there be from the Joint Committee to the Assembly on its activities? The Joint Committee recently signed off on an annual report; will that be presented to the Committee there? There is also a role to be played in monitoring what is going on with the proposals coming forward for new EU legislation or amendments to EU legislation that either could, in the first case, or will apply to Northern Ireland under the protocol, and ensuring that the Assembly has sight of those. I am not aware that the mechanisms have been put in place to arrange for that.

**Dr Gudgin:** I agree very much with what David has just said about calling David Frost. David Frost is essentially negotiating on behalf of Northern Ireland, and the Assembly should have the power or the ability to call him and question him. More generally, there must be a clear role for monitoring both public opinion and the economic consequences of the protocol, so that both the Assembly and the public in Northern Ireland are well informed about what is happening. On public opinion, unfortunately, there is a huge gap between different polls on key controversial questions, and that needs to be dealt with. There is a difference between the LucidTalk poll and the Northern Ireland life and times survey in particular.

On economic consequences, we need more and timely data on trade diversion. Is trade being diverted? Are Northern Ireland firms and consumers being greatly disadvantaged? For instance, we have recent data that shows a very large increase in trade across the land border. We do not know so much about what is happening across the sea border. The data on trade across the land border seems to be contradicted by the traffic statistics. There is no increase in lorry traffic across the border, but the Southern trade statistics show a big increase in the value of trade.

Services trade, which Ronan mentioned, is very important. We do not really know what is happening there. Before the protocol was signed, the Department for the Economy commissioned a study on the potential impact on services trade in Northern Ireland. That said that, if there was no deal — and, essentially, there is no deal on services — there would be quite dramatic reductions in service-sector trade in things like *[Inaudible owing to poor sound quality]* legal sector, accountancy and other things. Has that happened? Is it happening? I have certainly read nothing and seen no figures on this. There is quite a big monitoring job to be done, which the Assembly and the Executive could well be getting on with quickly.

**Professor McCrea:** I agree with a lot of what has been said. In the Brexit process in general, devolved bodies have had a kind of rude awakening. Many of the areas that were governed by EU law in the past, such as agriculture, were devolved. However, negotiation between the UK and the EU is a reserved matter, which tends to cut the devolved bodies out of the equation. That has been difficult, and we have seen litigation by the Scottish Parliament and the Welsh Assembly on Brexit matters because of it. That does raise problems. Northern Ireland is in this ongoing situation where, unless the protocol is abandoned, its goods law will be determined by the EU legislature.

The Office of the Northern Ireland Executive in Brussels probably needs to be monitoring developments in goods law. It probably needs to upscale the representation of people working on that. It needs to be very carefully monitoring what is being proposed. There is a problem in that you can monitor but only member states' Ministers will be sitting in the Council, which is the most important part of the legislature. It is easy to lobby the European Parliament — any lobby group can do that, and the Northern Ireland Assembly could do it — but needing a voice on the Council is different. I imagine that the North/South Ministerial Council and Civil Service contacts could be used to ask the Irish Government to put forward Northern Irish views, but I can understand that that option may not appeal to all communities in Northern Ireland. With the protocol, there is definitely an ongoing issue of making sure that Northern Ireland's voice is heard in relation to an important section of legislation. However, it is not insuperable. A lot of regions have offices in Brussels. They are very active. The European Commission is interested in the Northern Irish situation, so I think that Brussels will listen.

The higher up the news agenda this story goes, the less helpful it is for Northern Ireland, because most member states are not that involved. They are already frustrated at the amount of time that this has taken up, and they are worried more about the integrity of the single market. When the protocol is bubbling along on page 20 and nothing much is happening, they turn a blind eye to it. When their attention is drawn to it, they are worried about the threat to the integrity of the single market increase. Keeping the situation calm is not a bad idea for all sides.

I have two final points. Some change in trade patterns is inevitable. That is what Brexit means. If you change the rules and leave a trading block, it will have consequences. The most difficult point is now, when the supply chains are changing to adapt. It may be that *[Inaudible owing to poor sound quality.]* The Irish Government, in some areas, can unilaterally make the changes easier. For instance, it could recognise the right of Northern Irish lawyers, or English or Welsh lawyers, to practise in the Republic, but the Law Society of Ireland is now requiring British legal firms to have a physical presence in the Republic, which it did not do beforehand. There are ways to ease the difficulties, but that may not be done. The issue is that EU law will no longer prevent the imposition of those kind of regulatory barriers.

**The Chairperson (Dr Aiken):** This is my final question before I open it up to members. The Northern Ireland Assembly has a huge issue with openness and transparency. There is a definite feeling that there is a lack of democratic accountability. What you have just outlined significantly decreases the opportunities for openness, transparency and democratic accountability. We have not really discussed the role of the ECJ either. We have heard about Northern Ireland Assembly Committees having greater interest in what is going on. Can you envisage any stage at which there would be an opportunity for the Northern Ireland Executive to have a physical seat at the table so that, when we are dealing with issues that affect Northern Ireland solely — that is what we are here to do — we have a voice, with either the European Union or, indeed, the UK?

**Professor Phinnemore:** I will come in on that initially. There are two points to make. The first relates to the Joint Consultative Working Group, which is a unique arrangement that was put in place as part of the institutional arrangements for the implementation of the protocol. It seems quite bland on paper, but it provides information exchange and consultation. There is quite an important opportunity there for, at least, officials who are involved in the implementation of the protocol to liaise on a very regular basis with EU officials to identify what issues are coming down the line that affect the protocol, and to report back on the realities of the implementation on the ground and how those might be taken into consideration by the EU. As part of that body, the European Commission is obliged to refer all the UK's comments about Northern Ireland to the relevant bodies of the European Union. There is a mechanism of sorts. I am not saying that it is perfect, but there is a mechanism, and that needs to be exploited.

The second point is that, in the very first draft of the withdrawal agreement, the European Commission envisaged a provision that would have allowed the United Kingdom, in respect of Northern Ireland, to attend, albeit at invitation and on an ad hoc basis, meetings of groups in the Commission, potentially in the Council and in the various agencies and bodies of the European Union, when those bodies were discussing matters of relevance to the implementation of the protocol. That proposal, which was in the original draft version, was eventually dropped in favour of the Joint Consultative Working Group. Given the precedent of countries in the European Economic Area having such access rights, I would certainly argue that the UK should be pushing for something similar. There are obviously concerns on the EU side about providing UK officials to represent Northern Ireland because they may use it to promote wider UK interests, but is there an arrangement whereby you could have observer status for officials from Northern Ireland to attend those various meetings?

**Dr Gudgin:** I very much agree with what David said. It is unfortunate that we often get our best information on what is going on from people like Tony Connelly of RTÉ, who seems to have very good contacts in the EU diplomatic service. It perhaps comes back to our earlier point about being able to grill David Frost or, perhaps, other British officials. The Assembly ought to be in direct receipt of much better information on what is going on day-to-day. We should not have to get it through 'The Irish Times' or RTÉ. That is the only point that I will make in addition to what David said.

**Professor McCrea:** I also agree with what David said. There are channels that can be used. Obviously, those are not as good as having a veto in certain areas, but non-member states will never have a veto, so it is as good as we can get.

I will say one other thing. One of the features of the protocol that some people dislike is the fact that legal disputes over the areas that are covered by the protocol are covered by all the normal mechanisms of EU law, which means that local and national courts can make direct references to the European Court of Justice in Luxembourg, and those rulings are directly effective. If something is done in an area that is covered by the protocol that the Northern Ireland Executive think breaches EU law in some way, those provisions could be quite useful, because you could take court cases directly from the High Court in Belfast to the European Court of Justice to challenge the legality of any acts that impinge unlawfully on areas that are covered by the protocol.

**The Chairperson (Dr Aiken):** OK. Thanks.

**Mr K Buchanan:** David, Graham and Ronan, thanks for your information. Graham, I am looking at the summary in the briefing paper that you provided. This first line of it is very telling:

*"The Irish Protocol has proved damaging to the NI economy and to political stability in NI."*

Those are your words, Graham, not mine. David and Ronan, what are your thoughts on the first line of Graham's summary?

**Professor McCrea:** Brexit was always going to unsettle the situation in Northern Ireland to some degree. Northern Ireland is linked economically to the rest of the UK and to the Republic of Ireland. Brexit changed and upended —

**Mr K Buchanan:** Ronan, sorry. It does not say "Brexit"; it says "Protocol". I will repeat it:

*"The Irish Protocol has proved damaging to the NI economy and to political stability in NI."*

It does not say "Brexit"; it says "Protocol". My question is this: do you agree with Graham's opinion?

**Professor McCrea:** Actually, no. Well, here is an academic answer: yes and no. *[Laughter.]*

**The Chairperson (Dr Aiken):** He is an academic. He is allowed. *[Laughter.]*

**Professor McCrea:** Brexit created a large degree of political and economic disruption and damage in Northern Ireland. The Northern Ireland protocol mitigates some of that damage. As I said in my presentation, some of the changes in the protocol bring Northern Ireland closer to the Republic and some bring it further from the Republic and closer to GB. The protocol is a way of managing the inevitable disruptions that Brexit would cause. There was no cost-free Brexit available for Northern Ireland.

**Professor Phinnemore:** I have a not dissimilar position. There has been disruption. There was always going to be disruption. That disruption is probably greater than we ever anticipated for two reasons. The first is because of the thinness of the trading cooperation agreement, in which the UK Government did not mitigate some of the potential impacts of the protocol for Northern Ireland. For example, no SPS regulatory alignment is one of the issues. The second reason for a lot of the disruption was because so much of the reality of what would be needed on 1 January was not known until Christmas Eve. That is not to say that the protocol has not caused disruption: clearly, it was going to because with its provisions, alongside the trade and cooperation agreement (TCA), there would be new checks and controls on the movement of goods from Great Britain into Northern Ireland. I do not think that we can say, by any means, that any or all of that damage is due to the protocol alone. It is all the Brexit process, of which the protocol is one part.

Moreover, as part of the changes in supply routes for various goods coming into Northern Ireland, some businesses may have benefited; it is too early to say. We have the COVID situation as well. These are early days, but we cannot get away from the fact that Brexit, by its nature, was going to mean disruption. The disruption is probably far greater than any of us ever anticipated because of the nature of the Brexit that the UK Government chose to pursue.

**Mr K Buchanan:** David, you mentioned the "impacts", and Graham used the phrase:

*"impact as little as possible on ... communities in ... Northern Ireland".*

I hear politicians in other parties speaking, and I do not know what constituency they are in or even whether they have been out in the constituency. The majority of people in my constituency are being impacted by the protocol day and daily. For example, a constituent texted me the other day to tell me that the delivery costs for sofas and beds that he purchases from mainland UK have increased by 100%. Those delivery costs will not be reduced because of the protocol. There is a list: Amazon deliveries, haulage of goods, animals, dogs, medicines. The protocol is affecting not a minimum number of people in Northern Ireland but a maximum number.

We talked about the protocol being too damaging to politics to survive. The protocol is destroying politics. The British Government are not listening: it is destroying politics. This is a question for David, Graham and Ronan: from what you hear on the ground, is it only a small number of people who are being affected by the protocol, or have I got it wrong? I only live here and only listen to people every minute of every day.

**Professor Phinmore:** I would say that a large number of people are being affected by Brexit. We were all going to be affected by Brexit because of the fundamental change in the relationship between the UK and the EU. There was never going to be a disruption-free Brexit. As I have said, yes, the protocol will have caused a number of difficulties, but the nature and extent of that impact is highly conditioned by the wider UK-EU relationship.

We do not necessarily want to go back to the historical discussions, but the Theresa May version of the protocol, which would have seen the United Kingdom remain in a customs union with the EU and the UK Government commit to regulatory alignment in an extensive number of areas followed by a very close trade relationship with the EU, possibly involving alignment on SPS regulations etc, would have resulted in significantly less disruption of the movement of goods from Great Britain into Northern Ireland.

I reiterate that any implications of the protocol that we are seeing today have to be seen as the implementation of the protocol in the context of Brexit and the chosen relationship that the UK has adopted with the EU.

**Dr Gudgin:** I will just come back very briefly on a couple of points. First, Ronan made the point that the diversion of trade was always going to happen with this arrangement. I agree with that but it does not sit very well with article 16, which says that if there is a diversion of trade, either party can take measures to counter that. It is not obvious that the people who drafted the protocol had such a clear view of this as Ronan might suggest.

Turning to what David said, of course, had we not had Brexit, we would not have this problem. If there had been a half-hearted Brexit or a very different sort of Brexit, the problems would have been mitigated. However, we are where we are. This was a national, democratic vote and the UK voted to leave the EU.

The point that I was trying to make in my initial presentation is that there were clear alternatives but those were rejected. The UK was in too weak a political position to fight its corner on this, and it is now having to fight a rearguard action. That will remain the position unless it is significantly changed. It looks as if the UK Government will significantly change the protocol, perhaps unilaterally.

**Professor McCrea:** Graham, I keep coming back to the fact that you cannot excise the protocol from the broader Brexit and say, "Everything will be fine if that one piece in the wider machine is removed", because the wider machine cannot operate without all its parts. Article 16 talks about serious societal disruption, but it does not cover any diversion of trade. The point of Brexit, in some ways, is to change trading patterns.

**Dr Gudgin:** Why does it say that, Ronan? Why does it say, specifically, a "diversion of trade"? It does not say "serious diversion"; it just says a "diversion of trade".

**Professor McCrea:** You cannot interpret the argument as saying that trading patterns will be frozen in perpetuity and cannot change at all. It is also the case that a general provision like that is politically qualified by very specific provisions for maintaining alignment for goods in order to avoid Northern Ireland/Republic of Ireland border infrastructure. The agreement that we got came from the divergent priorities of each party. The EU made it a priority to avoid North/South infrastructure at the border at the cost of some compromise on the integrity of the single market. The UK Government made breaking free of the regulatory orbit of the EU their top priority, and they placed a higher priority on that than the economic unity of the United Kingdom in relation to goods. That was a political decision. I can see why people criticise that decision. However, once that decision was made, certain consequences inevitably flow from it. I understand why people are frustrated that that political decision was taken. However, you cannot retain the political decision to have maximum divergence in regulation between the UK and the EU and not have the protocol, unless you are willing to have the North/South border infrastructure, which all parties accepted that they would not have.

**Mr K Buchanan:** Thank you, gentlemen.

**Mr Allister:** *[Inaudible owing to poor sound quality]* one Eurosceptic; that seems to be where we are today. I want to ask Dr Gudgin something, because he seems to be the only one of our witnesses who comes to this in solution-seeking mode. Would mutual enforcement remove the obscenity of regulation without representation?

**Dr Gudgin:** That is an interesting but difficult question, especially since I am an economist and not a lawyer. Mutual enforcement means that the UK and Northern Ireland enforce their own rules. That is only on exports. It is only enforcing a WTO rule. Everybody has to observe the rules of the market of the country to which they sell their goods. If we sell goods to China, Indonesia or anywhere else, we have to observe the rules and regulations of those countries. It is just a way of saying, "Look, we will do this on behalf of the EU instead of having a complex border in the Irish Sea and having to check everything that comes into Northern Ireland, whether it is likely to go into the Republic or not. Of course, we will accept the EU's rules on anything exported into the EU, and we will enforce those rules". Since the UK would be doing it, and it would be part of UK law, that situation strikes me as being reasonably democratic. That would be very different from the situation where we have EU regulations in Northern Ireland that are decided in Brussels without any democratic input or real influence from Northern Ireland. The answer to your question, therefore, is yes, it would be very different.

**Mr Allister:** That brings us to the real heart of the constitutional objection to the protocol, in which the two professors seem so disinterested. That is namely the fact that a vast quantity of law that shapes matters pertaining to our economy is no longer made in our own country but made in a foreign jurisdiction overseen by foreign courts. Can either of the professors give me an example of another region of any country in the world where, without the consent of the people so governed, laws that affect a great proportion of their economy, which that region cannot amend and which can be enforced even against its will, are made not in their own country but in a foreign jurisdiction over which they have no say? Is there another example of that tyranny anywhere?

**Professor Phinnemore:** Do you want to go first, Ronan, or shall I?

**Professor McCrea:** Go ahead.

**Professor Phinnemore:** OK.

**The Chairperson (Dr Aiken):** Is David frozen?

**Professor Phinnemore:** Sorry, no. There are other examples. There are European Economic Area arrangements whereby Norway, Liechtenstein and Iceland are committed to following the EU rules regarding —

**Mr Allister:** That is by consent of those so governed. I am asking for an example —

**Professor Phinnemore:** No, *[Inaudible owing to poor sound quality]* —.

**Mr Allister:** — of whether there is a region anywhere —

**The Chairperson (Dr Aiken):** Sorry, gentlemen —.

**Mr Allister:** — where people are governed by foreign laws without their consent.

**The Chairperson (Dr Aiken):** Speak through the Chair, Jim and David. Let us keep this nice and academically civilised. David, you can give your answer, and Jim can wait until David is finished speaking.

**Professor Phinnemore:** The European Union has a number of relationships with non-member states. There are often arrangements, particularly those within Europe with European non-member states, whereby there is regulatory alignment with European Union law, and there are also some cases of harmonisation with EU law. Those commitments see those countries take on, in a dynamic manner, either existing examples of EU law or future EU law, without those countries having a say in the adoption of those laws at a European level. We see that in the European Economic Area in relation to the full extent of the single market. With the Northern Ireland protocol, it is only the *acquis* related to the free movement of goods and some of the *acquis* related to the single electricity market. We see that in Turkey in relation to elements of the customs *acquis*. Switzerland has an autonomous adoption process whereby it decides to take that on. I would not say that the protocol is unique in that sense. There are other examples, and we also see it in agreements between the EU and countries seeking to come into the European Union.

**Mr Allister:** Will you kindly address my question? Is there an example, anywhere in the world, of a region that is governed by laws that it does not make itself, and where it has not consented to being subject to foreign laws?

**Professor Phinnemore:** Are you saying that —?

**Mr Allister:** All the examples that you gave from within the European Economic Area — Norway and others — are in situations where they assent to that. Northern Ireland is now governed by laws that it has not assented to and that it cannot change or vary. Is there another example of that anywhere in the world? How do you, as a professor of politics, begin to reconcile that to the fundamental democratic principles?

**Professor Phinnemore:** I have not sought to reconcile it, but I will try to answer your question.

If you are getting to the point that Northern Ireland *per se* has not given its consent to the protocol, you are correct —

**Mr Allister:** Thank you.

**Professor Phinnemore:** — but the UK Government and the UK Parliament gave their consent to the arrangements within the withdrawal agreement and the protocol.

**Mr Allister:** The people governed by those laws have not.

**Professor Phinnemore:** I take that point that —.

**Mr Allister:** Is that not fundamentally in conflict with basic democratic principles that you should not have regulation without representation and should not be subject to laws that other people make in which you have no say? Surely that is so elementary that anyone should be red-faced to embrace such a concept in the 21st century.

**The Chairperson (Dr Aiken):** Jim, that is moving beyond asking a question of an academic witness. To use a refrain that I have used on occasion, I say that that is so noted. Do you wish to ask another question, Jim?

**Mr Allister:** I am disappointed that I am not allowed to ask that question. However, there is another question. I want to explore an issue that pertains to Northern Ireland's position when the UK makes a

trade deal, and its position when the EU makes a trade deal. It is clear that, when the UK makes a trade deal, article 4 allows participation:

*"provided that those agreements do not prejudice the application of this Protocol."*

When the EU makes commercial arrangements, Northern Ireland would not have access to the trade preferences that are contained in EU third-country agreements. Is that correct? If so, is that not a lose-lose situation for Northern Ireland?

**Professor Phinnemore:** My understanding is that that is the correct interpretation of what we have with the protocol: Northern Ireland's producers will have access to the trade preferences that the UK secures in trade deals, but Northern Ireland does not necessarily have automatic access to products that come in from those countries. It depends on the extent to which the arrangements align with those that are provided for in the protocol. In the case of Northern Ireland's getting access to EU trade preferences, the understanding was that, during the negotiations, it was an option, but it was not necessarily pursued. It is one of those things that, if the protocol is to survive, could ameliorate the situation, whereby Northern Ireland has access to EU trade preferences. However, the UK Government would have to seek that from the EU.

**Mr Allister:** So it is a lose-lose situation?

**Professor Phinnemore:** It is not guaranteed that Northern Ireland will have access to goods that come in from third countries. Access to third-country markets that is secured through UK trade deals is open to Northern Ireland. It is a question of imports.

**Mr Catney:** Thanks to the expert panel for the briefing papers. I have a question for the panel. I also have one specifically for Professor Ronan McCrea at the end, if that is possible, Chair. The panel may have heard that, according to the now former DUP leader, the Secretary of State for Northern Ireland assured him that the UK Government would bring forward significant changes to the Northern Ireland protocol. Can any of you speculate as to what those changes might be?

**Dr Gudgin:** What I read on that is that Mr Poots was not offered anything that was not already in the public domain. I do not think that there is anything secret or extra, as far as I understand it, but I am obviously not privy to private conversations.

**Professor Phinnemore:** May I come in there, Chair? We need to differentiate here between changes to the protocol per se and changes to the way in which it may be implemented. At the moment, I cannot see anybody proposing changes to the protocol: their focus seems to be on how the protocol is interpreted with regard to how it is implemented. We know that there has been a range of ongoing discussions on how the protocol may be implemented and how some of its provisions may be interpreted, whether that relates to the medicines question, the end of grace periods, how SPS rules are applied, and what the expectations are around the risk principle that the EU follows. Yes, we probably will see some changes in expectations about implementation. However, at the moment, we are not seeing anything that will actually change the protocol itself.

**Mr Catney:** So it will be nothing significant?

**Professor Phinnemore:** That is difficult to say because one could argue that, if the UK gets the concession that it is looking for out of the EU and the EU gets the SPS concession out of the UK, it could be significant. We are not privy to where those negotiations are at the moment.

**Professor McCrea:** I say this without any inside information. We have had a lot of trouble, but there have been concessions and flexibilities in medicines and SPS, and it looks as if the grace period relating to the sausage issue will be extended. There has been flexibility when things have come to the crunch. More broadly, the protocol is part of the broader, new UK relationship, and it is in the interests of both to make the relationship work. The EU can make life a lot harder for the UK than the UK can for the EU, and the EU is seeking to negotiate a lot of other trade deals at the moment, so unilateral changes and walking away could involve a high price for the UK. I suspect that it will avoid doing that, if at all possible.

**Mr Catney:** Thank you. May I come back in, Chair?

**The Chairperson (Dr Aiken):** Yes.

**Mr Catney:** Professor Ronan, before the meeting, I watched one of your older interviews in which you said that the UK's choice was a "pointless" Brexit or a disastrous economic impact if the UK did not have access to the single market. Where do you think that the UK Government have ended up? What do you think about what Graham said earlier about that?

**Professor McCrea:** *[Inaudible owing to poor sound quality]* They have definitely not gone for a pointless Brexit. A pointless Brexit would have been following the EU rules but not having a vote on them. They did not go for that. They went for a fairly hardcore Brexit, with very little on services. There will probably be some negative economic impact in the long term. It is hard to know how things are going because COVID has messed things up so much, and it is not clear what has been caused by COVID and what has been caused by Brexit. The rigour and strength of the Brexit that the UK went for has caused the issues that have meant that some kind of protocol is required for Northern Ireland. That is causing issues in Northern Ireland. The political decision was made to go for a hard Brexit. That is tough for the people who are exporting to the EU, and it is tough on Northern Ireland because it upsets the established relationships that were in place. In a sense, a situation change can irritate both sides.

**Mr Catney:** I will come back. Jim said to you earlier *[Inaudible owing to poor sound quality.]* That is OK. Thanks very much.

**Mr O'Toole:** Thank you, experts. You are here today, a timely five years on from the referendum. First, Dr Gudgin, you have written at several points about alternative arrangements, and you touched on them today. Is it still your view that mobile phone technology could be used to track movements across the land border?

**Dr Gudgin:** Yes, I think, it is. I am not an expert on technology; I have to be guided by other people. The people whom I met and talked to while on the Alternative Arrangements Commission were convincing. One of them was a representative of Fujitsu, for instance. He said that they already have the technology. Among the others was Lars Karlsson, who, previously, was head of the World Customs Organization. He wrote the main initial report for the EU on the land border in Ireland — a report that the EU decided to ignore. Senior customs officials whom we talked to argued that the technology that is used for customs checks in the EU and across much of the world is out of date. It is 40 years old. Their interest in Northern Ireland was to apply what they thought were modern methods and technology on the Northern Ireland border. They wanted that to be an example that could then be applied much more widely in the EU. People of that level of eminence and with that level of knowledge thought that it was quite possible, but it was clear that the EU and Dublin did not want to know about it, and the UK Government under Theresa May surrendered the point very early on.

I agree with what Rory Montgomery of the Irish Government wrote in 'Fortnight' magazine: the whole thing was settled by 2017, as essentially the British had, at that stage, given away most of their negotiating cards and conceded most of the things that inevitably led to a sea border. The short answer to your question is that it was possible, but, because the British Government did not take it seriously at that point, it was never properly investigated.

**Mr O'Toole:** That would have largely been on the customs side and meant that, by January past, there would have been such technology on about 170,000 HGV crossings a month. Would it have been achievable, by January of this year, for all those 170,000 heavy goods vehicle and about 200,000 light-goods vehicle crossings along the border to have had mobile technology with an app and full traceability?

**Dr Gudgin:** The answer to that question is that it depends how early you start. It is kind of an Irish answer: it depends where you start from. Had it been agreed in 2017, there would have been quite a lot of time to do it. If it was not possible in that timescale, the timescale could have been extended. There was always the option of exemptions for small traders who whiz backwards and forwards across the border daily. It was all possible, but it was ruled out politically. The EU and Dublin won this argument because they decided very clearly and very early what they wanted, and they got it because they were clear and determined about it. I do not know if you were in Whitehall at that time —

**Mr O'Toole:** I was there for some of it, for my sins.

**Dr Gudgin:** — but the British Government were all over the place and the negotiations were very poor. Even at the time, the documents read to me as though they had been drafted in Brussels or Dublin and been annotated by the British rather than originating from the British. It was a national fiasco, in many ways, for Britain, and the present British Government are trying to claw back what they can from a very bad episode.

**Mr O'Toole:** If I understand the points that you and others have made in the past, that technology would have been for the customs borders. In the summer of 2018, you said in a Policy Exchange paper that the Northern Ireland authorities would need to retain regulatory equivalence with the EU on a range of products, including on animal health and safety. You also said that some controls on the Irish Sea would be necessary to control the import of animals, food etc. Does that mean that, even with technology on the border to manage customs, if the UK were to diverge from EU animal health standards, it would be necessary for Northern Ireland to diverge from GB, because logistically it would be next to impossible to manage a divergent SPS border on the island of Ireland?

**Dr Gudgin:** The main reason for that is that the island of Ireland has always been a single epidemiological area, and there is great sense in that, as we remember well from incidents such as with mad cow disease. If you want to keep animal disease off the island, it is best to keep it off the whole island and not to let it into bits of the island. That has always been the case. It is my understanding that the washing of soil off tractor wheels has always been done.

**Mr O'Toole:** And agreed.

**Dr Gudgin:** What has happened under the protocol, and this may be because of over-zealous British officials rather than anything that the EU did, is that they seemed to decide that you virtually had to dismantle the tractor to get the soil off rather than just have a sensible level of washing that had been done for decades.

**Mr O'Toole:** About 85% of the checks at Larne and Belfast are related to SPS as opposed to customs. The grace periods that generally still pertain are for food. There is also a medicines grace period on which we are hoping for progress, and we need that. Am I to understand that the principle of having SPS divergence is, in a sense, inevitable? If GB is going to diverge, the UK and EU can find solutions to managing that down via the Joint Committee. Would that be the right approach?

**Dr Gudgin:** That sounds a reasonable direction of travel in many ways. At present, my understanding is that we have no problem at all. All the regulations are exactly the same, so the single market is in absolutely no danger today, and there is no need to check anything today. The EU has equivalence with at least some foods coming in from New Zealand but has been unwilling to do the same for GB. That sounds to me vindictive and difficult.

There are plenty of compromises and ways forward here. If we do diverge, even if we allow GM foods into GB, it can be handled. GM food, on my understanding, gets into Switzerland, for instance, and the whole thing is managed there. It is really nowhere near as difficult as the protocol makes it appear.

**Mr O'Toole:** The principle of closer engagement is an important one for solving things, perhaps, as Ronan said, on page 20 rather than page 1.

Most economies in the developed world involve trade in services. None of us is trading in goods at the minute. We are not moving goods around by sitting here talking about Brexit. We are part of the services economy, although the value of that service is debatable.

David, how much work is going on in scoping the economic impact of North/South divergence in services, the impact on North/South cooperation writ large and — I know that you are not an economist — the broader economic impact?

**Professor Phinnemore:** I probably do not have much to say about what scoping is going on at the moment. What we do know is that, during the negotiations, the UK and the EU did sit down and work out how North/South cooperation may be affected by the UK leaving the EU [*Inaudible owing to poor sound quality*] areas where there would need to be some degree of continued regulatory alignment. My understanding is that most of that has already been covered in the protocol.

Certainly, there is a concern that the UK being outside the single market of the EU and outside the free movement of services will impact at some point on the relationship of the UK, as a whole, with the EU and, more specifically, locally, on cross-border services here. It is difficult to see how you might address that. I would point out that there is an arrangement whereby, in the EU Council decision on implementing the withdrawal agreement, it is possible for the UK and Ireland to negotiate bilateral arrangements to try to address some of the issues that are arising out of the implementation of the protocol. There may be scope to pursue something there, once we identify the effects of Brexit on the trade in services on the island. We will have to see, but I am not aware yet of what analysis has been done on the impact. We are still in relatively early days of seeing the impact of the UK withdrawing from the single market and the customs union.

**Mr O'Toole:** Sadly, the UK and Ireland cannot negotiate the UK's accepting free movement for EU citizens and things like that. There are some quite big systemic changes to the economic relationship, outwith goods, that cannot be resolved on a bilateral basis.

**Professor Phinnemore:** The Council's decision allows the other member states to authorise Ireland to pursue negotiations in areas of exclusive EU competence. We do not know how that can be interpreted, but I suppose that one interpretation is that that may provide some flexibility to do some local arrangements. I think that some discussion has already been had about how you might have mutual recognition of qualifications, for example. That might be done under the common travel area (CTA) arrangements, or it may be done in the context of something at EU level, but, at the moment, it is difficult to know what scope there might be within that. Yes, we are probably looking at quite significant changes coming along as a consequence of that big systemic change with the UK no longer being part of the internal market.

**Mr O'Toole:** Ronan, do you want to add anything to that?

**Professor McCrea:** The EU single market for services is much less complete than that for goods. Goods are more intensely integrated. The size of the economy for services that is impacted is greater, but the impact is less, because the exclusion from the single market is, in some ways, less grave. That said, there is also scope for unilateral measures. As David outlined, the Irish Government have been friendly, and, certainly on the legal profession, they have been relatively flexible so far. However, where the EU has integrated more intensely and the greater the potential impact on other member states of Irish unilateral measures, the less scope there is to soften the impact. With financial services, the banking union has been completed. Member states will be very wary of letting any kind of British back-door access to the single market via a unilateral or bilateral arrangement with Ireland. We do not know how it is going to work, but I can imagine that, certainly in an area like finance, which is quite important to the UK, there will be quite limited scope to soften impact.

For services, a lot of the important things are really treaty provisions. If a business from the UK [*Inaudible owing to poor sound quality*] member state, and the member state had rules that sought to exclude foreign competitors from competing for business or to make it difficult, you could always challenge those rules in the Court of Justice. Now, that will not be possible. British companies and companies in Northern Ireland that are trading into the EU will no longer be able to challenge sneaky domestic practices in other member states that seek to exclude them from the market. That protection is now gone.

**Mr O'Toole:** At times, I have struggled to communicate and talk about some of the impacts on services; for example, the fact that regulators in Amsterdam and Luxembourg keep a gimlet eye on how the City of London is leveraging or is attempting to parlay continued access to financial services. That is, in a sense, connected. The EU's desire to avoid the UK getting a preferential back door into the financial services part of the single market has a direct relationship with the Bank of Ireland's ability to employ client managers in Belfast to do work for customers in Dundalk or Dublin. Is that a fair way of putting it?

**Professor McCrea:** Yes, that is a fair way of putting it. The EU will take a dim view of the Bank of Ireland employing people in Belfast to do transactions in Dundalk and, possibly, then in Vienna, Budapest and wherever. Yes, it would be fair to say that.

**Mr O'Toole:** You said that the impact on the all-Ireland services economy is invisible and subtle but very extensive. Does Graham want to add to that point?

**Dr Gudgin:** I will just add that I do not think that there is an all-Ireland economy except in one or two areas such as Derry — production, for instance — so I tend not to like the use of that word, which always sounds rather propagandist to me.

**Mr O'Toole:** OK. OK.

**Dr Gudgin:** On services —

**The Chairperson (Dr Aiken):** Be careful what you ask for, Matthew.

**Dr Gudgin:** — I feel that we know far too little about what is actually happening. I think that it would be quite a service if the Committee could get more information out of the Department for the Economy or from the various trade associations.

**Mr O'Toole:** Graham, I am duty-bound to say, with respect, that anyone doing business — for example, in Derry — whose fundamental business model is cross-border will of course take profound exception to that statement about the all-island economy. Given that it is one of the most obvious areas for economic growth for Northern Ireland and that that does not mean sacrificing east-west, your saying that you see it that way is a bit of a giveaway.

My final question is on two points: how we deal with the challenges — clearly, they exist — and the opportunities of the protocol. This is a question for any of the experts: what is your top tip on making the Joint Committee work for Northern Ireland? What one thing do you think could improve our engagement with the Joint Committee?

**Dr Gudgin:** The key thing is to apply the at-risk principle to a wider set of goods and then *[Inaudible owing to poor sound quality]* so that the only thing *[Inaudible owing to poor sound quality]* try to cut down the number of *[Inaudible owing to poor sound quality]* goods that are either destined to go straight across the border or are very likely to do so and to cut everything else out. The famous example is that anything brought in by Sainsbury's and sold in Sainsbury's supermarkets in Northern Ireland should not need to be covered by any of this.

**Mr O'Toole:** OK.

**The Chairperson (Dr Aiken):** Thank you very much.

**Mr O'Toole:** Does anyone else wish to come in on that question about improvements? I had the same question, Chair, to ask David and Ronan for any quick suggestions for improvement and engagement.

**Professor McCrea:** I have three very quick ones. First, if we can keep this issue out of the headlines, there will be more flexibility from the EU.

**Mr O'Toole:** Agreed.

**Professor McCrea:** The less heat, the better and the more flexibility there will be. The more heat and attention that there is, the more the EU member states will worry about the integrity of the single market. Secondly, engage in the long run with Brussels having a long *[Inaudible owing to poor sound quality]* presence to monitor goods laws and make sure that Northern Ireland's voice is heard. Thirdly, sell the dual access for goods to UK and EU markets as a real plus. Northern Ireland will be the only place in the EU where you can sell goods to the EU and to the rest of the UK. That is a big plus, so I would highlight the good bits as well as the difficulties.

**Mr O'Toole:** David, briefly?

**Professor Phinnemore:** Ronan took two of the three points that I was going to make. Essentially, it is about building up trust — focusing on implementation — by coming to the Joint Committee and all the discussions with ideas and solutions to problems and trying to depoliticise as far as possible. There is a will on both sides to make this work, provided some of the politicking can be taken out of it.

**Mr O'Toole:** Thank you.

**Ms Dolan:** Thanks to our panel. I have a number of questions. Graham, I will start with you. You have a number of solutions. If they are viable, why have they not been taken on by trade experts, the British Government or the Europeans?

**Dr Gudgin:** The EU won a tremendous victory on this. The EU managed to get a protocol agreed that met all EU and Irish concerns and pushed the whole problem onto the UK, splitting Northern Ireland in some ways from the rest of the UK and inconveniencing and discombobulating unionists to a great degree.

The EU won that battle, and it has been very reluctant to give any ground at all. In a sense, it is a case of what we have, we hold. David Frost keeps complaining that, in the current negotiations with Maroš Šefčovič, the UK side puts in papers and there is no reply whatsoever from the EU. It is not that the EU disagrees; the UK just does not get anything back. First, he said that there were 20 areas of disagreement and there was very little comeback. The latest statement was there are 36 areas of disagreement, and still there has been very little comeback, although that changed a little in the last week.

My interpretation is that the EU is pretty afraid of communal trouble from loyalists and others, and it would really like to push it past the marching season. For that reason, it is quite keen on extending the grace periods. It is giving a bit. I think that the EU also realises that stopping drugs from GB from reaching the NHS in Northern Ireland would be very bad PR across the world. It is likely to give a bit on that, although we have not seen the paper.

By and large, the EU is trying to hold on to a tremendous victory, and, of course, the UK side is trying to find ways to change the protocol to make it much more balanced and get it back to where it should have been in the first place.

**The Chairperson (Dr Aiken):** Sorry, Jemma. I need to declare an interest. I have been involved in the discussions with our Minister of Health to try to get some clarity from the EU on medicines, particularly as we will be in a situation in six months in which many of the medicines that we use in Northern Ireland will not be available. In making that declaration of interest, I have to make it quite clear that we had no response whatsoever from the EU. I just want to make sure that people are aware of that.

Sorry, Jemma. Crack on.

**Ms Dolan:** OK. Thanks, Chair. Graham, the protocol also guarantees the retention of basic human rights for people in the North. If, as you call for in your paper, the protocol is binned, how do you propose that we would protect those rights?

**Dr Gudgin:** I am not a lawyer, and especially not a human rights lawyer, but I thought that those human rights were protected under British law. It was not obvious that the protocol did anything to those.

**Ms Dolan:** As far as I am aware, they are not all protected under British law. That is OK. If you cannot answer it, that is all right.

Ronan, you are next. You have already touched on it a wee bit, but can you elaborate on the North/South barriers that you mentioned? Do you agree that they are not getting as much media attention as the so-called empty supermarket shelves?

**Professor McCrea:** It is partly because they are more of a slow-growing phenomenon. There are two main ways in which I think that Brexit will push Northern Ireland and the Republic further apart. The first is services. Over time, there will be additional barriers for Northern Irish companies that are seeking to do business in the Republic. It will get harder to do that, in the same way that, on balance, it is harder now to send a good from Great Britain to Northern Ireland. As I said, the protocol pushes in two different ways. Northern Irish businesses that are looking to do business in the EU, which includes the Republic, will also no longer be protected by the freedom of establishment. If they face a barrier that unfairly excludes them from the market, they can no longer challenge it in court, so they will be more vulnerable to regulatory tricks by local authorities that will exclude them from competing with local firms. The free movement of people changing also makes it harder. If you are a Polish person living and working in Dundalk, you could easily have moved to Newry, or, previously, your employer could have moved you to Newry with almost no hassle. That has become much more difficult. There is then a broader divergence. Irish law and UK law have been pretty similar, but they will become less

similar over time because EU law has *[Inaudible owing to poor sound quality]* effect on how law is interpreted. The Irish court will be interpreting all of Irish law in the light of EU law, and the British courts will not. The greater the degree to which the UK diverges from EU law, the greater the legal differences will be between North and South, the more different regulatory and administrative matters will be, and the harder it will be to line up and cooperate North/South because there will be more legal and administrative differences than there used to be. Brexit will, in some ways, make the Republic of Ireland more distant from Northern Ireland over time.

**Ms Dolan:** Thanks, Ronan. I have one more question. You say that the protocol does not make anybody happy, and that is a good point. Nobody sees it as perfect, but do you see it as vastly superior to the so-called solutions that others have come up with?

**Professor McCrea:** The EU hates the protocol. It hates allowing the citizens of a third country to police the border of the single market, which is very precious to the EU. I do not want to talk too much about the merits, but the protocol is the inevitable outcome of the priorities of each side. The British Government made the decision that it is more important to have the absolute freedom to diverge from EU regulations and things like services, and they made that more of a priority than the economic unity of the UK as related to goods. If those are your policy choices, there is no alternative to the protocol. The protocol is a way to manage the issues that came from Brexit, and, because Northern Ireland is, in a sense, in a *[Inaudible owing to poor sound quality]* position, changes one way *[Inaudible owing to poor sound quality]* on services and legal changes were always going to have to be managed in some other way. You cannot say, "I do not like the protocol. Let us get rid of it and leave Brexit to operate in *[Inaudible owing to poor sound quality]*". The protocol is part of the composite Brexit deal that takes account of the need to balance changes in Northern Ireland and the need to balance change in one direction with changes in another direction.

**Ms Dolan:** Thanks, Ronan. I completely understand. David, you will be glad to know that I do not have any questions for you. Those are my questions, Chair. Thank you.

**Mr McHugh:** Tá fáilte romhaibh uilig. Tá an díospóireacht iontach suimiúil. The whole discussion is very interesting in many respects. At this stage, we have probably covered nearly every area, but I would still like to make some contribution to the discussion.

We are constantly using the word "democracy" in the context of the North of Ireland being taken out of the European Union. We see that as anti-democratic because a majority of people here voted to stay in the European Union. By the same token, we are reminded that this is democracy at work because it was a UK vote. The UK also elected representatives to sit on its Parliament. In turn, the majority party was allowed to appoint a Government on behalf of all UK citizens, and they in turn negotiated a treaty with Europe in relation to Brexit. We have to accept that that is the situation rather than listening to statements about how that in itself was totally and absolutely anti-democratic or using that as a defence for our having to live within the single market, which I am very positive about. That is a very weak argument that has been presented today as being a reason that the people of the North of Ireland have in some ways been disadvantaged in having to deal with the protocol. The protocol is a result of Brexit; it is not the other way round.

In the event that the protocol did not exist, you would have to invent one. At the end of the day, there are now, in a sense, two different economic blocs: the UK and the European Union. If we had to invent a protocol, would it not be similar in nature to what we have at present? That is the question that I will ask once again.

It is also the case that, as the result of the protocol and Brexit, the Northern Irish economy finds itself within the European Union and the UK at the same time. While there have been many difficulties since the inception of Brexit, it has not manifested itself in empty shelves in supermarkets, nor in a lack of medical equipment or anything else. At the same time, this is where we are at with it. Is that in itself not a really good thing for the people in the North of Ireland?

That was a very long tirade *[Inaudible owing to poor sound quality.]*

**The Chairperson (Dr Aiken):** Have you got a question?

**Mr McHugh:** The question is this: is it a fact that, as a result of the protocol, we find ourselves with access to the European and the UK markets, which places businesses in the North of Ireland at an

advantage? That is beginning to manifest itself as well, but we are also very attractive now for international investment, and it is time for the Northern Irish economy to avail itself of that.

**Dr Gudgin:** I will make a couple of points. On the question of democracy, there is certainly a point to be made that trade is not a transferred matter. It is a UK-wide matter and the UK negotiated on behalf of Northern Ireland [*Inaudible owing to poor sound quality*] lots of people in Northern Ireland very unhappy about it.

Others may correct me, but a lot of the regulations are transferred matters that would normally have been decided on in the Assembly and not in Brussels. There is a derogation — a taking-away of democracy — in that particular case.

Mr McHugh made the point about being in both markets. There is some advantage there, but we should not overemphasise it. There are no tariffs, for instance. *Anybody [Inaudible owing to poor sound quality] can export into the EU, tariff-free.* All that we are talking about is an absence of border checks. Very few things are checked into the EU, anyway; I think that 2% or 3% of things are checked, usually on an intelligence basis. They are usually looking for drugs or things like that; that is why things are checked. The speed of border crossings is not a great issue. It really comes down to regulatory alignment, and we are all aligned at present. All British companies are still observing EU regulations because they have not been changed since we left. That advantage may grow over time and become of some importance if GM crops and other things become an issue. At present, I think that the amount of advantage is small.

In the early months of this year, Invest NI was saying that it had had quite an upsurge in enquiries about investing in Northern Ireland but it has gone pretty quiet since then. I do not know whether those enquiries have been turned into investments in Northern Ireland or whether the level of enquiries has remained the same as it was earlier. I have heard through the grapevine that Invest NI is deliberately keeping quiet because the subject is regarded as politically fraught. The Assembly and your Committee could try to get the information out of Invest NI about what is happening.

**Mr McHugh:** Dr Gudgin, you mentioned not particularly liking the phrase "all-Ireland economy". When I look in my wallet, half of the notes in it are sterling and the other half are in euros. I live on the border, and we live in an all-Ireland economy day and daily. I am not a businessman; I am just a resident, like many other people in this area of west Tyrone. We go back and forward across the border day and daily. We use our currency quite freely and we change it quite easily. We are very much aware of the fact that we have an all-Ireland economy in that respect. In addition to that, in the last while, I think that there has been a fourfold increase in businesses interacting North/South and South/North. Is that not a reflection of how businesses will cope with the difficulties and the problems in the same way that we as residents cope with the difficulty of a border day and daily?

**Dr Gudgin:** I agree with both you and Mr O'Toole. Of course, the reality is that there is a great deal of cross-border activity, especially local activity from cities like Londonderry or Newry. There are something like 300 border crossings and a great deal of daily activity. That is border activity. I take the term "all-Ireland economy" to mean something much grander than that. As an economist, I just observe what happens. For instance, only 7% of the value of Northern Ireland's sales of goods and services crosses the border and is sold into the Republic. Clearly, we have two differently functioning economies, and, as you pointed out, there are different currencies on either side of the border. There are different excise rules, which is why we have tobacco and fuel smuggling. There are differences in social security and health systems, in company law and in all sorts of things. We have two different economies on the island of Ireland, but there is quite a bit of cross-border activity. Both things are true. It is true that we have two economies on the island and not a single economy. It is also true that there is quite a bit of cross-border activity, which we know about and encourage.

**Mr McHugh:** I have a final point, and I hope that the other witnesses can comment on it too. We all like to avoid or skirt around political issues. Rather than its being a difficulty of economics or business in itself, the issue has more to do with what is often argued as identity politics. It all depends on the extent to which political parties want to prop up opposition to a particular issue. They exploit opportunities like that.

There has been a border on the island of Ireland for 100 years. It has not affected the Irishness in my own identity. I am as Irish today as I would be if the border were not there. Is going down that line not an exploitation of an issue that will become emotional and an attempt to move it up the agenda as a

result? As other contributors commented earlier, the higher up the agenda that that issue goes, the more difficult it becomes for Europe. I would much rather avoid that situation.

**Dr Gudgin:** You raise an important point. On the unionist side, I think that a lot of the objection is based on a feeling that the protocol will facilitate or accelerate a move towards a united Ireland. If we could take that off the table, the practicalities of the protocol could be dealt with much more easily.

**Mr McHugh:** Quite easily; I agree. Do the other contributors want to say anything on my general comments?

**Professor McCrea:** I agree with a lot of what Graham said. It is a bit of both for Northern Ireland businesses plus access to the UK market. If you are a European business that buys a lot in Northern Ireland, there are some difficulties at the moment.

The issue of *[Inaudible owing to poor sound quality]* the Assembly has the ability to leave the protocol if it wishes, and that is quite an exceptional thing. As you already note, international trade is a reserved matter. The Scottish and Welsh Assemblies have no ability to design their own Brexit to the degree that the Northern Ireland Assembly has. That probably should be recognised.

It is one thing to have the same rules. At the moment, British rules and EU rules are fairly similar. However, the key thing is to recognise *[Inaudible owing to poor sound quality]* and EU law requires mutual recognition of the regulatory decisions of other member states. Outside the EU, you do not benefit from that. Whether, de facto, you have the same rules is not the end of the story; you have to be recognised by the EU as having the same rules. That will not be the case for Northern Ireland in relation to goods.

On the issue of symbols, of course, everything is often viewed by everybody as their emotional and identity commitments, and we view often seemingly banal things through those commitments. The EU is worried about symbols and appearances too. The EU has other fish to fry and a lot of other relationships. It has countries with partial or conditional access to the single market. There is a limit to the degree to which the EU can publicly give exceptional arrangements to Northern Irish businesses, because other countries will say, "Well, what about us too?". That is something to bear in mind.

**Dr Gudgin:** And why not? Why should they not say, "What about us too"?

**Professor McCrea:** The EU would not like having Ukrainian civil servants policing the eastern border of the single market. It would not like Belarus or any other third country to do that. The EU views the single market as a historic achievement and is very worried about anything that would undermine that.

**The Chairperson (Dr Aiken):** I will come in at that point and say thank you very much —

**Mr McHugh:** Chair, what about David? Has he any comments to make on what I said?

**Professor Phinmore:** If the Chair will allow me, I will say that the protocol falls short of the "best of both worlds" narrative that some people claim that it delivers. Going back to Ronan's point, it is an attempt to mitigate the disruption of Brexit for Northern Ireland. It does that in a minimalist fashion, being a scaled-down version of what some people thought that a protocol might do in providing a position for Northern Ireland. We are stuck with it. I cannot see it moving far away for the next four years at least, if not longer. The challenges are about making it work.

Going back to the identity politics question, one of the key challenges is to ensure that the protocol works with Northern Ireland, that it is done with Northern Ireland and not necessarily to Northern Ireland, which seems to be a dominant narrative at the moment. That requires engagement on the part of all parties and due recognition and understanding of the situations that we have on the ground.

**Mr McHugh:** Thank you.

**The Chairperson (Dr Aiken):** Thank you. I will use my Chairman's prerogative, because time is marching on. Thank you very much indeed, David, Graham and Ronan. I agree with you that what might not necessarily be on page 2 of 'Der Spiegel' or 'Le Monde' always tends, unfortunately, to be on page 1 of the 'Belfast Telegraph' and 'The Irish News'. We need to get to the point where it is on page 20 of everybody's newspapers and media, and we would like to do that. Thank you very much indeed

for your evidence and for answering our questions. I know that it raised quite a few emotions among Committee members, but I was glad to see that we kept it on track. I thank you and the members for your forbearance.