



Committee for Finance

# OFFICIAL REPORT (Hansard)

Protocol on Ireland/Northern Ireland:  
Professor Katy Hayward; Mr David Henig; Mr  
Martin Howe QC; Dr Anna Jerzewska

30 June 2021

# NORTHERN IRELAND ASSEMBLY

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### **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 Philip McGuigan  
Mr Maolíosa McHugh  
Mr Matthew O'Toole

### **Witnesses:**

Mr David Henig	European Centre for International Political Economy
Mr Martin Howe QC	
Professor Katy Hayward	Queen's University Belfast
Dr Anna Jerzewska	Trade and Borders

**The Chairperson (Dr Aiken):** We are welcoming Professor Katy Hayward, professor of political sociology, Queen's University Belfast. She will address a wide range of issues, including a sea border and public opinion, and she has highlighted the area of scrutiny and governance in her written submission. Martin Howe QC will bring legal expertise to the Committee's discussions on the protocol and the United Kingdom Internal Market Act 2020. Dr Anna Jerzewska, as a customs expert specialising in the movement of goods, can advise the Committee on the experience on the ground. David Henig is going to focus on goods regulations and checks.

The session is being recorded by Hansard. I am going to ask each of you to make an opening statement for five to 10 minutes, and then we will come back to questions. We have had quite a lot of information about the protocol, so feel free not to explain some of the more arcane things. Just feel happy to talk about it as you go. Most of us are now fairly up to speed on the minutiae, and there will be probably be quite a few questions on the minutiae.

Professor Hayward — it gives me an enormous of pleasure to use that official designation at a Committee — please make your opening remarks.

**Professor Katy Hayward (Queen's University Belfast):** Thank you very much, Chair. It is a great pleasure to appear before you this afternoon. I will just make very brief remarks. As you may be aware, we published just today the latest findings from a poll that was conducted by LucidTalk on our behalf at Queen's. I am happy to discuss some of the details of those, but for my opening remarks, I really just want to put things in context.

The current situation with respect to the protocol was entirely predictable in many ways. I was looking earlier at a piece that I wrote with Tony Smith, a former head of the UK Border Force. We published this in May last year on the London School of Economics blog. We were advising on what needed to be done in order to minimise the disruption associated with the protocol, bearing in mind its implications for the movement of goods across the Irish Sea. We asked for three principles to be borne in mind and acted upon. The first was the principle of partnership, recognising that implementing any border or change in a border management system requires a wide spectrum of actors to be involved. It requires care and caution with respect to the design of the system used to manage that border. Importantly, it involves trust and respect between government agencies and industry, that is, those tasked with using this system. Bearing in mind that COVID complicated the conditions within which this border management system was going to be developed and the new arrangements enacted, we can still recognise that there were serious failures with respect to the partnership that we had hoped to see in 2020.

Another principle that we talked about was cross-border cooperation, and the need for collaboration and good communication between those involved. In the protocol case, we have an unusual situation in that the UK authorities are the ones implementing the EU's border, so to speak. Collaboration and communication as being essential between the UK and the EU is severely lacking, particularly with respect to the transfer of relevant information. Just on that last principle, the principle of preparation, part of the preparation that was needed was adequate access to relevant information. That was not present at the time, and there is still a long way to go until there is adequate information on the movement of goods across the Irish Sea to enable intelligence to be used to minimise checks.

In practice, none of those principles was enacted, despite my best efforts with Tony Smith and others appearing before you as witnesses. The practical implementation of the protocol and preparation for its implementation were very much caught up in the political negotiations last year. The use of the UK Internal Market Act 2020, and of certain clauses in that, added to the political pressure and, indeed, distracted from the requirements of the protocol and the necessary preparation for implementing it. By the time that you had those decisions, on 17 December, they were temporary measures. They were not what businesses from Northern Ireland were asking for, not least the need for certain mitigations and a clear amount of information in advancing preparation for the protocol. By the time that it came to it, we had the disruption and the paperwork burden, which is definitely the most consequential impact of the protocol so far for businesses, and there was also that context of uncertainty.

We have seen good movements today with the announcement of the extension of the grace period on chilled meats, but, in many ways, that just adds to uncertainty because it is not a long-term resolution. With respect to the long-term resolution of these major issues, like sanitary and phytosanitary (SPS) controls, this is an ideologically significant decision. In effect, it is only significant because the UK Government decided that, although they are currently not prepared to allow GB to align dynamically with EU rules, they are prepared to allow that to happen for Northern Ireland, and all the discussions around the veterinary agreement etc come in that context.

To conclude, this is now inevitably a wider concern for politics in Northern Ireland and a wider concern for society. We see that in the latest results from the LucidTalk/Queen's poll. Notably, the majority of concerns are about political stability, governance and scrutiny of decision-making around the protocol. We saw a good step in that direction earlier this week in the Assembly, with Šefčovič appearing before the Committee for the Executive Office. I know that Lord Frost has been extended an invitation as well, and I hope that he takes that up, because a clear majority of our respondents suggested that they would like to see such accountability and scrutiny in practice.

**The Chairperson (Dr Aiken):** Thanks, Katy. Before I bring Martin in, what was the margin of error in the LucidTalk poll?

**Professor Hayward:** It was plus or minus 2% — 2.5%.

**The Chairperson (Dr Aiken):** What was the sample size?

**Professor Hayward:** The sample size that was used for the weighted analysis was 1,500.

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

**Mr Martin Howe QC:** My focus is on, in effect, the legal and constitutional aspects of the protocol and the way it works. I have sought to summarise that in a short paper that I produced, and I apologise for

the late stage of it. The main point in that paper is that the legal status of the protocol — the status that it has been given by the Act of the UK Parliament that implemented it, namely the European Union (Withdrawal Agreement) Act 2020 — is akin to the legal status that was given to the European treaties and to instruments underneath them, such as European Union secondary legislation and laws, during our period of membership of the European Union. The consequence of that is that all the same doctrines, such as supremacy of EU law and the fact that EU law will override all laws of national origin, continue to apply within the scope of the protocol, particularly in Northern Ireland, although, in the case of the state aid provisions, there is an overreach to the whole of Great Britain.

The consequence of that is that, although the UK Internal Market Act can be regarded as providing modern-day implementation of the principles that were originally put into the articles of union of 1800 and, indeed, the earlier articles of union between England and Scotland for the free movement of goods throughout the United Kingdom without being held up by barriers between different parts of the United Kingdom or different legislative provisions. Unfortunately, the legal position, as I analyse it, is that the protocol prevails over and, indeed, contradicts the principles in the UK Internal Market Act, even though that Act was passed later in time than the withdrawal agreement Act. That is by application of a very well known principle in the Factortame case, which is quite an old case where it was held that an Act of the UK Parliament was overridden and had to be rendered ineffective in the UK courts as a consequence of a conflict with provisions of the Treaty of Rome. That case was in the context of fishing and quota-hopping. That still applies, so we have a scenario where the protocol is a sort of superior form of law to Acts in the UK Parliament or, indeed, Assembly measures and will override them. Indeed, any secondary European Union measures that are given force in Northern Ireland by the protocol also override domestic law.

The question of checks at the Irish Sea border is, of course, very important, and the adverse impact that checks have on businesses in Northern Ireland is in the public spotlight. However, that is not the fundamental source of the problem. The source of the problem is that Northern Ireland is obliged to accept different laws from those applying in the rest of the United Kingdom, with no possibility, as long as the protocol remains in anything like its present form, of those laws being adapted, altered or opted out of. That means that, as time goes on and as, inevitably, more and more divergences occur between European Union and United Kingdom laws, Northern Ireland will be left stuck within the EU system without any choice in the matter. At the moment, we are talking about chilled meats, sausages and things, and unfortunately, serious as it is, there is a slightly comic potential in that, harking back to the 'Yes, Minister' series and the speech about the European Union's "sausage directives". It is serious enough, but the more fundamental problem can be explained by the example of medicines regulation. One aspect of the protocol is to import European medicines laws into Northern Ireland: the regulation that governs marketing authorisations, granted centrally by the European Medicines Agency (EMA), and the directive that regulates the conduct of national authorities within the member states and, in respect of Northern Ireland, binds the actions of the Medicines and Healthcare products Regulatory Agency (MHRA). The consequence of that will be that, as time goes on, there will increasingly be medicines — sometimes, important medicines — which will be licensed for use in the United Kingdom but will not be available in Northern Ireland because of conflict with the European Union medicines system.

I produce that as an example; you could make similar points, although perhaps not with such serious consequences, across the board of the huge area of European Union laws that are applied to Northern Ireland by the protocol. My conclusion is that the problems with the protocol are real democratic and constitutional problems that are so fundamental that, whatever you do to try to ease border controls, they are not going to be solved. Something more radical will therefore have to be done with the protocol.

**The Chairperson (Dr Aiken):** OK. Thank you, Martin.

**Dr Anna Jerzewska (Trade and Borders):** Thank you very much. I will use these opening remarks to provide an overview of where we are with customs and the border, the impacts on traders and why this is still very much a moving picture and subject to change. This will be very high-level, so, obviously, I am more than happy to discuss these points in detail when we get to questions.

We know that the protocol was a high-level agreement, and it was quite obvious from the beginning that it would be all around how it is implemented. When it came to customs and movement of goods, the area that I work in, article 5 and its implementation were left to the Joint Committee, and the crucial decisions around article 5 were postponed to the second half or the final quarter of 2020. In January, we ended up with a multilayered solution that allowed various ways for NI traders to avoid paying EU tariffs. You have the end-use option with the traders' scheme, the option based on tariffs

and the waivers, so there are three ways to avoid paying tariffs. That system is incredibly complex. It used to take me about seven to 10 minutes to provide a very brief high-level overview of this solution to companies, and, very often, it was not sufficient for them to understand what they needed to do.

At the same time, it is important to point out that in similar situations — by "similar situations", I do not mean a unique border such as the one that we have now — questions around goods arriving at the border without certainty as to what is going to happen with them later on are normally addressed by customs through options or solutions that are much more burdensome in additional admin for companies. I appreciate that this might sound like a contradiction, because it is a complex solution but, in a way, it is also pragmatic and flexible and provides various options for companies to avoid paying tariffs. It is quite important to mention that.

The second point is that this is very much still subject to change. Since January, we have had some clarification and some guidance on changes that were incredibly helpful, like the apportionment system, which means that, if you are a trader and under the UK trader system, you can tell customs, "Look, 80% of these goods are going to stay in NI, and 20% might enter the EU market." This is a helpful simplification. However, we are also going to have some changes that might impact how companies operate at the moment. For example, the trader scheme, at the moment, is open also to companies that are not established in NI. From November onwards, that will be narrowed down to companies that are established in NI. It might sound like something that is beneficial for NI companies but, under some scenarios and under certain circumstances, this will actually be more difficult for NI companies. I am happy to come back to this.

**The Chairperson (Dr Aiken):** Anna, can I just ask a quick question there? Just to get this clear in my mind, is it only companies that are registered in Northern Ireland, or is it companies that have their business base primarily in Northern Ireland? Obviously, an awful lot of Northern Ireland companies are registered in GB.

**Dr Jerzewska:** In the guidance on this, it is obviously companies that are established in NI and companies that have their principal operations and customs operations in NI. So it is not just simply companies that are established. That is the first condition, and then there is an option of companies that are not established in NI, but they are also supplying NI clients, companies that are established and have their principal customs functions in NI, and so on and so forth. There are other conditions. There are several conditions. From November onwards, that will be narrowed down to companies that are either established or meet — I have forgotten the actual term for it — but they meet the principal operations in NI criteria. So there is again a set of criteria that companies need to meet, before November, in order to continue to be eligible to take advantage of the trader scheme.

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

**Dr Jerzewska:** That is one of the changes that is upcoming, and every change, obviously, potentially brings additional disruptions and confusion. The IT system that NI companies use to trade with the rest of the world was supposed to change this month. We are not entirely sure when that is going to happen, but it is another change.

One of the most important aspects is that the definition of "unfettered access" will be narrowed down. Unfettered access from NI to GB is one of the key parts of the protocol, yet we have known for the past six months that, at some point this year, we will get an updated definition of who can benefit from that unfettered access. The point is to make sure that only NI companies or companies that are located in NI can benefit to prevent a scenario where, for example, a German company could move something to the Republic, from the Republic to NI and from NI to GB to avoid customs formalities and the tariffs, if tariffs are due. Depending on how that is done, it could have a significant impact on some of the companies that are located in NI.

Finally, on the impact on traders and the impact on trade —.

**The Chairperson (Dr Aiken):** Sorry, Anna. I am going to ask you a quick question, because that is an important point about the definition of "unfettered access" being narrowed. For example, Tesco and Sainsbury's, particularly Sainsbury's, have a large distribution system coming into Northern Ireland that only deals in Northern Ireland, but they are obviously not Northern Ireland companies in any shape or form. Would the definition would not apply to them?

**Dr Jerzewska:** We do not know yet. We do not know the definition or have any visibility of how it is shaping up. There is a sentence or two in one of the HMRC guidance documents, which says that, at some point in 2021, we will get a proper definition of which companies are eligible. We have heard that that is to make sure that only companies that are located or working in Northern Ireland benefit, but we do not have visibility of what it will look like. I imagine that companies like that will be taken into account, but that is just an opinion.

**The Chairperson (Dr Aiken):** OK, thanks.

**Dr Jerzewska:** OK. To finish off the opening remarks, on the impact on traders, what Martin mentioned about checks is incredibly important, but it is also important to remember that, very often, checks, especially when it comes to customs but perhaps slightly differently for SPS issues, are not where the main problem is. The main problem is the work that companies need to do before or after the goods arrive at the border: the formalities, the additional work, the additional compliance and the additional knowledge that companies need to have to be able to get their goods to the border. Many solutions that are proposed to "solve" the border issue focus on mutual enforcement and the removal of checks, but checks are not the only problem. They completely forget how much work is involved in the formalities.

I am happy to continue talking about that, or the trade diversion that occurred and that we have seen with companies, but I will stop there for now.

**The Chairperson (Dr Aiken):** Thank you very much indeed. Sorry for interrupting as you went through, but there were a couple of important points that I wanted to bring out while I was fresh on them.

**Dr Jerzewska:** Absolutely.

**The Chairperson (Dr Aiken):** David, over to you.

**Mr David Henig (European Centre for International Political Economy):** Thank you very much, Chair. This is another occasion on which I would like to be with you in Northern Ireland but cannot be. I am hopeful that I will be able to join you soon.

I want to make five brief points that explain my point of view on the protocol. The first one is that modern business and trade is complex. I think that you have already got that from Anna and Martin, but I emphasise that virtually every product and service is regulated and subject to taxes and duties, and not only national regulation but international regulation, whether it is through the World Trade Organization in trade agreements or international voluntary standards and so on. That creates barriers between countries and, in many cases, within countries where regulations can be made at state or provincial level. For example, Canada has a free trade agreement with itself — between the national Government and the provinces. Barrier-free trade within a country is not actually the norm; not even within the UK before 2016. It does not have to be a constitutional issue, but it may be a constitutional issue. Barrier-free trade to multiple markets ought to be a very good position.

My second point is that it is only within the EU that borders have been removed, which is due to extensive regulatory harmonisation. It is just as likely that that will be reversed in the future, than other countries moving towards having no checks or borders. The EU is particularly concerned about the purity of its single market. That is predominantly to keep its internal barriers down. It is worried that, unless it can trust what comes into the EU as a whole, countries will not trust each other enough to keep their barriers down, and then the single market will disappear. The reality is that a border is the place where the paperwork, the product and the driver come together. It is the one place where everything comes together. The nature of ensuring safe food, in particular, leads to that conclusion. Technology can reduce burdens and make things easier. For many vehicles, the most high-tech borders can feel relatively straightforward, but there is always a risk of delays, and there is always paperwork.

My third point is that the protocol is an attempt to manage the interaction of border and regulation in the context of Brexit. The implication of checks of products on entry to Northern Ireland was immediately obvious. I think that I saw Nigel Dodds say, earlier this week, that he and the Democratic Unionist Party warned the Government of that within days or hours of hearing about the protocol. It does not just apply from Great Britain to Northern Ireland, either; the same is likely to apply from Northern Ireland to Great Britain in the future, unless the UK Government voluntarily accept that all EU

products are inevitably safe to enter, and unless we do not wish to diverge or to have higher standards. If we introduce new regulations that are more onerous than in the EU, how will we enforce them if there are no checks on products entering? I do not think that the UK Government have addressed that point, except in the vaguest terms. Under the protocol, there are likely to be checks — potentially both ways — into the foreseeable future. International norms suggest that that does not make Northern Ireland any less a part of the United Kingdom, but I accept that there are different views on that.

My fourth point, which picks up on similar points that Martin made, is that the heart of the protocol is in the 300-plus EU regulations that it requires Northern Ireland to follow, according to the annexes. My belief is that the UK Government have carried out a detailed assessment of those and of their implications, which they have never shared publicly or, indeed, [*Inaudible owing to poor sound quality*] privately. I will be surprised if they have not done that more detailed investigation. That would be really quite irresponsible. A huge amount of detail has to be followed in Northern Ireland on a huge number of regulations, and that detail has to be kept updated. I agree with Martin that the fact that, in effect, Northern Ireland has no say in the implementation of those under the protocol is an absolutely clear democratic deficit. That was obvious at the time of signing and at the time of ratification, and that issue still needs to be addressed.

**The Chairperson (Dr Aiken):** Can I interject, David? I should have made a declaration of interest that I used to be the chief executive of the British Irish Chamber of Commerce. Before Brexit, I was very much involved in a scheme, led by the Foreign and Commonwealth Office and whatever we called the Department for Business, Energy and Industrial Strategy that day, which looked at the potential implications of Brexit and where it would lie, particularly with regard to trade between Britain and Ireland. There were something like 186 primary sections, with three or four subsections in each, mapping it out. One of the key questions that we asked was where we would be with regards to the applicability of EU rules and regulations going forward and the ability for any part of the UK to absorb those if there were any separate rules. I know that you alluded to this bit — I think that you said it — but I want to home in on it. Do you feel as though the UK Government have done the detailed research and analysis into those regulations, or did they skim across them? It would be a slightly unfair question to ask anybody else, but I know that you have looked at that.

**Mr Henig:** My best judgement is that the UK Government have done at least some work on the regulations and what Northern Ireland will be required to sign up to. I think that it is unlikely that they have done a detailed assessment of all 300 or so and of everything that they entail, but, at the very least, I expect them to have understood where, for example, in that 300, checks are required, the kind of checks that are required and other things that have particular significance to Northern Ireland.

Maybe that leads naturally to my final point. Treaties and regulations are difficult to understand and interpret. They are typically frameworks for both sides to jointly implement in the case of treaties, or, in the case of regulations, for whoever has to implement them. They are very rarely so prescriptive that you understand immediately and in absolute detail what you have to do. That is left to those who are doing the implementation.

In my opinion, that does not extend to the suggestion that "any checks" is the same as "legal purism". It is fairly clear to me that the net effect of 300 regulations is that there have to be checks, but what those checks are, how often they are carried out and detail such as who does them is, in my opinion, open to interpretation and agreement in many cases. That allows for the fact that the general basis of the protocol is clear that, short of alignment, there will always be checks. How they are implemented is not so clear, and what the overall implications are for Northern Ireland — obviously we are having this discussion now — is still very much a live issue.

**The Chairperson (Dr Aiken):** Thank you all very much for your excellent analysis and talk to the Committee. I have a few questions before I open it up to the rest of the group. First, I have a general issue to raise. In the news today are the push for new rules on state aid and the discussion about how the rules are likely to be applied and how the United Kingdom looks at state aid. Does anybody have any indication of how that is likely to work for Northern Ireland and whether we are going to be in a differential position when it comes to state aid? I think that I already know the answer, but I would like to have your perspectives on it.

My second question for everybody is about VAT and excise issues. One of the issues that we are dealing with on this island is differential VAT in areas such as hospitality. What ability would we have,

in that context, to set VAT in a way that would be seen to be competitive with our friends down South but not to be hauled in front of the European Court of Justice (ECJ) every time we do it?

The final question is for Katy. Thank you very much indeed for the LucidTalk poll and for your work on it. We have seen from that poll and other recent polling that Northern Ireland has become very polarised. It is a polarised place at the best of times, but we are now incredibly polarised over the protocol. It seems, from looking at your figures from LucidTalk and comparing them with some other things, that there has been a hardening of positions. Maybe you could come in at the end, Katy, and answer on that point. Over to you, panel.

**Mr Martin Howe QC:** Who would you like to start?

**The Chairperson (Dr Aiken):** Sorry. That is the classic position of a Northern Ireland chair. He just throws it open to see who fights for it and comes up with the answer. Martin, you could go first and Katy could come in last. Martin, David, Anna and then Katy, please.

**Mr Martin Howe QC:** Rather than covering everything that you have asked, I will focus on where I think that I can contribute most.

On the state aid question, there will undoubtedly be a differential in the state aid rules between Great Britain and Northern Ireland. At the moment, the whole United Kingdom is still, in effect, carrying on with the EU system of state aid control, but it was announced, as expected, that the UK will create its own state aid control system. However, in Northern Ireland, the state aid rules are governed by the protocol or, rather, the protocol imports the EU state aid rules, with, for example, European Commission oversight, so the system will stay very much unchanged.

A particular pinch point is the extent to which the state aid rules in the protocol extend into and apply to businesses in Great Britain. The reason for that is that, unlike, say, article 5(2), which applies the EU regulations:

*"to the United Kingdom in respect of Northern Ireland",*

the state aid provision contains no such limitation. Instead, the limitation on the scope of the EU state aid rules is functional rather than by reference to geography. It is whether the aid will affect trade under the protocol. That is analogous to the current situation in which the rules apply to subsidies that may affect trade between member states. Based on European Court jurisprudence, that is a very low threshold test. For example, subsidising a car plant in England that, *inter alia*, exports goods into Northern Ireland would lead to an effect on trade in the protocol because that could impact on the sale of competing cars travelling from Germany into Northern Ireland. That could well be caught within it.

As far as activities within Northern Ireland are concerned, under the protocol, it is completely held in the EU state aid system, as I said, with oversight by the European Commission.

**Mr Henig:** I will briefly add to that. I am sure that that is absolutely right on state aid, but I have an ongoing question about whether the enforcement regime is quite the same as it would be for an EU member. I do not believe that it can be. We signed up in a treaty to, in effect, ECJ oversight, but I am not sure that that quite works. We already know what has happened with the UK's alleged breaches, which went to the ECJ, but we are not a member any more. Although we are bound to it in treaty terms, it almost seems to be more of a discussion.

As with much of the regulatory interpretation, state aid is ultimately open to interpretation. Martin may shake his head, but, in the way that it is implemented, I am just not sure that it is going to be able to work. The UK has agreed to it working in that way, but I just do not see how that works. I am sure that the legality is there. I am just not sure that the implementation can be done in quite that way.

I am absolutely not a VAT expert, and I am afraid that you would need a VAT expert to answer your question on VAT. I would merely add that, if Northern Ireland is polarised, according to opinion polling in Great Britain, we are also polarised, not on the protocol so much as on Brexit as a whole. I fear that we are all quite polarised.

**Dr Jerzewska:** I do not think that these questions are necessarily for me.

On VAT, yes, the dual alignment or dual VAT system is quite complex. Like any other area of tax, VAT, in general, is complex, but having a dual system does not help. Obviously, that needs to be viewed through the substantial changes to VAT accounting that come into force in the EU tomorrow and will definitely impact on SMEs, online sales, B2C sales and so on. Whether it is possible and how to do that are more legal questions, and I would defer to Martin on those. They are not about how we implement them, but how we would do it from a legal perspective.

**Professor Hayward:** To answer those questions on polling, I do not want to confuse matters, but, at the end of last year, we conducted the Northern Ireland life and times survey, which is, obviously, a different type of survey. It is notable that half of our respondents pretty much were saying that the protocol is a mixed bag, with about 18% or 19% on either side saying that it is good or it is bad. Definitely, in the first few months of 2021, we have seen a polarisation that was not there before the protocol came into play and, perhaps, before January 29 and the flirtation with the idea of triggering article 16. We all know that that was very significant.

Another point is that, when we had the first round of this poll in mid-March, the positions that we are seeing now were there already. So, essentially, what we have seen by June is a further entrenchment rather than an exacerbation of that polarisation. We see that polarisation from people who say that the protocol is appropriate or not. Essentially, 47% on either side say that it is appropriate or not appropriate, and, when it comes to the question of how people want their MLAs to vote on articles 5 to 10 at the end of 2024, it is pretty much an even split as to whether they want them to vote for or against the continuation of articles 5 to 10.

It is also important to recognise what people do agree on, at least for a considerable part. They do agree that specific arrangements are necessary for Northern Ireland coming out of Brexit. The majority agrees that there are economic opportunities for Northern Ireland from the protocol. As I mentioned, the majority agrees that scrutiny of decision-making around the protocol needs to be improved. They are very clear that they want more information and better information. There are concerns from the majority around the potential impact of Brexit and the protocol in economic terms, and the majority agrees that the UK should align with the EU's rules to reduce trade frictions across the Irish Sea.

It is possible to focus on what divides people, and, unsurprisingly, if you dig down into the data, you see strong differences between unionists, nationalists and neither vis-à-vis the protocol. However, perhaps it is also useful to concentrate on what people do agree on because, potentially, that helps us to see a way forward from this point.

**Mr Allister:** Thanks very much, panel. Martin Howe, I think that you put your finger on a number of very important issues in identifying that the key, lasting, defining effect of the protocol is the constitutional impact and import of it. I want, in that context, to take you to article 13(3) of the protocol, which seems to necessitate absolute alignment to the EU acquis on anything that touches upon the matters covered by the protocol. If those various identified regulations are subsequently amended by the EU or new regulations within that ambit are made, are they automatically applicable to Northern Ireland? The Northern Ireland statute book, in that sense, would then have to be automatically updated, and they cannot be blocked by the United Kingdom. Is that correct?

**Mr Howe QC:** It is different depending on different aspects. Where an existing measure is amended by the European Union, the amended measure, as amended, applies automatically to Northern Ireland. There is a slight distinction here between regulations and directives. An EU regulation is just like an Act of Parliament. It applies directly to citizens and businesses as part of the law, so, if a regulation is amended, it will apply, as amended, within Northern Ireland without any intervening process. If a directive is amended, that creates an obligation on the United Kingdom to change internal law to comply with the directive, and there is machinery for carrying that out by statutory instrument in section 8(c) of the European Union (Withdrawal) Act 2018. Of course, as you appreciate, the Assembly also has a role in statutory instruments in that field, but there are only limited discretions allowed by the directive.

**Mr Allister:** If the EU changes a directive that is in annex 2 to the protocol, then, no matter what the United Kingdom Parliament and the Northern Ireland Assembly think of it, does it apply directly and unalterably to Northern Ireland?

**Mr Howe QC:** Yes. It creates a legal obligation on the United Kingdom, and there is no choice but to implement it.

The third area that you mentioned related to a new EU measure adopted within the scope of the fields covered by annex 2 to the protocol. That is slightly different. It does not apply directly; it has to be agreed in the Joint Committee to apply it to Northern Ireland. However, that mechanism is very similar to or identical to the mechanism under the European Economic Area (EEA) agreement, under which Norway and the other EEA countries apply EU single market laws. That technically gives them the right not to apply them, but, if they do not apply them, the European Union is then able to take countervailing or retaliatory measures to suspend the EEA agreement or aspects of it. In practice, I think, there has been no occasion where Norway or the other EEA states have held out against implementing new European Union directives. Norway tried to hold out — for a couple of years, I think — on the postal services directive but was induced to give way in the end. A directive does not apply automatically. There are mechanisms for applying pressure to, in effect, push Northern Ireland into accepting it.

**Mr Allister:** It is de facto EU rule through that. Let us stay for a moment on a regulation which is varied by the EU. In the United Kingdom, Parliament cannot change it, and the Assembly cannot change it, so it effectively is regulation without representation. It is hard to think of that as anything other than putting Northern Ireland in a state of vassalage, is it not?

**Mr Howe QC:** That is your word, and I do not disagree with it, because it is the application of laws on which citizens in Northern Ireland cannot vote by any route. You cannot vote in the Assembly elections to get rid of it, because the Assembly has no power to do it. You cannot vote in Westminster elections to get rid of it, because the Westminster Parliament has no power to do it.

**Mr Allister:** Does anyone on the panel think that, by the standards of democracy that we expect in 2021, that is acceptable? Does any panel member think that that is an acceptable imposition on Northern Ireland?

**Mr Henig:** I will join the conversation. I mentioned that there is a democratic deficit, but I do not believe that it is as stark as that. In reality, regulations are made on specific subjects. What are the options available to the UK Government? That depends on exactly what the regulation states, but there may be the opportunity to pass alternate regulations. There may be the opportunity, as we have already seen, to say to the EU, "That is unacceptable, we cannot go with that" —

**Mr Allister:** Sorry —

**Mr Henig:** You are putting it as though it were a one-way street in which, if the EU rules tomorrow, that is it, and everything falls into play. In reality, with the ways that laws are made, that is not quite the case. I say that having already accepted, fully in agreement, that there is a democratic deficit, but it is not quite —.

**Mr Allister:** So are you —?

**Mr Henig:** You can make it more blunt than it really is.

**Mr Allister:** Are you disagreeing with Martin Howe when he says that the United Kingdom cannot do anything about a regulation currently applicable under the protocol if that is changed solely by Brussels, as it would be? If so, where in the protocol does that provision exist? With respect, you are wrong.

**Mr Henig:** Number one, it is in the implementation of individual regulations. Number two, there is always the opportunity, as we have already seen, for discussion between the UK and the EU. I am not arguing that we have much of a choice, but I am saying that it does not have to be the case that we bluntly say, "The EU rules on this today, and tomorrow we implement".

**Mr Allister:** With respect, it is —.

**Mr Henig:** There is greater complexity to the implementation of regulation than simply, "They rule, we follow".

**The Chairperson (Dr Aiken):** Just —.

**Mr Allister:** You are doing your best, but with respect —

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

**Mr Allister:** — it is clear under the protocol —

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

**Mr Allister:** — that it is the EU writ that runs —

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

**Mr Allister:** — in respect of these matters.

**The Chairperson (Dr Aiken):** Jim, it is hard enough to do this through Zoom. Please, through the Chair.

**Mr Allister:** Yes, Chair.

I am suggesting that, no matter how you dress this up, the plain fact is that, on the issues that have been identified in respect of the regulations that the EU alone can change, it is the EU's writ, exclusively, that runs in Northern Ireland.

**Mr Henig:** I will disagree with you on that. That is not how I interpret the way in which the regulations are made. Yes, the EU has a very strong power. No, you do not have the democratic influence over what the EU does, but there is still room for the UK Government and for the Northern Ireland Assembly to make decisions. On exactly what those are, we have to look at the specifics of the individual regulation. It is not possible to make a generic statement that all regulations are immediately implemented in that way.

**Mr Allister:** Martin Howe, do you wish to vary or change what you have said, given that your colleague disagrees with you, or do you stand by what you said?

**Mr Howe QC:** No. If we specifically take the case of European Union regulations — not directives but regulations — we see that they are directly applicable inside member states and are, under the protocol, directly applicable inside Northern Ireland. That means that you can go to court and enforce them without the legislature or the Government doing anything to bring them into force. If we take the example of the European Union regulation on centrally authorised medicines by the European Medicines Agency, we see that that regulation is directly applicable. If that is amended by the EU legislature, it will apply as amended in Northern Ireland, with no intervening process of negotiation or otherwise. Of course, the British Government could go to the EU and say, "Please, please, please amend it in its application to Northern Ireland" and plead for that, but there would be no precursor negotiating step before it came into force and was directly effective in the courts.

**Mr Allister:** Thank you.

**Mr K Buchanan:** Thank you, panel, for your points so far. I have a couple of points that follow on from those made by Jim. Martin, you referred — this is the same point that Jim made — to the fact that Northern Ireland is to accept laws not relevant to other parts of the United Kingdom due to the protocol. You then went on to say that it is democratically and constitutionally affecting Northern Ireland and:

*"Something more radical will therefore have to be done with the protocol."*

In your learned opinion, Martin, what do you mean by "something more radical"?

**Mr Howe QC:** The protocol is basically flawed. Anna has talked about the customs side where, at least, there is a system that says that if goods are not at risk of going across the border, you do not have to pay tariffs on their importation into Northern Ireland from Great Britain — or, at least, you can get them back if they have been paid. There is no such let-out as regards regulations on goods. The EU single market laws on goods apply completely and entirely to goods that are made and consumed

in Northern Ireland, or made in Great Britain and imported to and consumed in Northern Ireland, even if there is no risk at all of them crossing the border.

That is a fundamental flaw in the construction of the protocol. It goes back to the way in which Theresa May negotiated it with, I think, motives of trying to, in her vision, get the whole United Kingdom stuck permanently in the European Union regulatory sphere rather than negotiating it from the point of view of an independent country. It is still there, and I think that it will have to go. The way that I would like to do it would be for Parliament to pass an Act that says that the United Kingdom Internal Market Act 2020 prevails over the protocol, so that goods that are lawfully on the market in other parts of the United Kingdom can be freely imported into Northern Ireland.

**Mr K Buchanan:** Thank you for that. I have one final question to ask, if I may. I would like everyone on the panel to answer it. There are three aspects to it. Are you all aware that Northern Ireland is part of the United Kingdom? Are you aware that when we voted to leave, we voted to leave the European Union — "we" being members of the United Kingdom? What do I now tell the thousands of my constituents who voted to leave?

**The Chairperson (Dr Aiken):** Do you want to kick off on that one, Katy? It has Northern Ireland political nuance, so you can handle it.

**Professor Hayward:** I do not know that there was too much nuance there. Yes, Northern Ireland is part of the United Kingdom. Yes, the UK, as a whole, voted to leave, but Northern Ireland voted to remain, by a majority of 56% —

**Mr K Buchanan:** Yes, but —.

**Professor Hayward:** — and, as for your constituents, Northern Ireland is outside of the European Union.

**Mr K Buchanan:** We are part of the United Kingdom. Irrespective of how many people voted to leave or voted to stay, we are part of the United Kingdom. Whenever the United Kingdom voted to leave, we voted to leave. It did not say anything different on my ballot paper. I am sure that the ballot papers of the rest of the people in this room said the same thing, unless mine was different. We voted to leave. The United Kingdom voted to leave.

**Professor Hayward:** Northern Ireland is outside of the European Union.

**The Chairperson (Dr Aiken):** OK, thank you. David?

**Mr Henig:** In all the discussions that I have had about Northern Ireland, I do not think that there has ever been a question, for me or for those whom I have been engaging with, as to which way the vote went in different places or what the status of Northern Ireland is within the UK. The points that I have been making are about the fact that you can be within a country where there are trade barriers, and that those are actually common within countries. It is also fairly common that you end up following the regulations of another country. Those are political issues and choices that have to be made.

I have made my position clear. A Conservative Government — oddly enough, not one led by Theresa May — signed a deal that I regard as flawed, and that I regarded as flawed at the time. However, that was what the Government signed up to. A serious political discussion is required, because there is no simple answer as to how to reconcile the question of regulations and borders. There has never been a simple answer to that since 2016, and there still is not a simple answer to that. We need a proper political discussion. I saw that the treaty was passed after seven hours of discussion in Parliament today. That is, clearly, not sufficient.

**The Chairperson (Dr Aiken):** OK, thanks. Martin?

**Mr Howe QC:** The way that I put it — I hope accurately — is that Northern Ireland is only partly out of the European Union and remains partly inside it.

**Mr Catney:** Good.

**Mr Howe QC:** It is out completely in the sense that Northern Ireland's voters no longer have the right to influence the policies and laws of the European Union by participating, nor can its Government representatives participate in the making and shaping of those laws. In another sense, it is out partly in that large areas of EU law no longer apply; for example, single market rules on services. However, single market rules and laws on goods, and the associated treaty positions — for example, on the free movement of goods — continue to apply to and within Northern Ireland. They apply as though Northern Ireland were still a member state. The legal mechanisms are identical in that the courts of Northern Ireland, when interpreting those laws, make preliminary references to the Luxembourg court on points of difficulty or doubt, and the ruling of the Luxembourg court is binding in the same way as it would be if we were still a member state. Therefore, whatever the reasons why we have got here, Northern Ireland has not yet completed the process of leaving the European Union. It is still in partially, and in important respects.

**Dr Jerzewska:** While I will not address the political side of the question, I will say that the protocol states very clearly that Northern Ireland is an integral part of the UK customs territory, although, as we well know, other provisions of the protocol give it dual status. Since 2016, it has been clear that, if there was divergence, which we wanted from the beginning to be free to strike our own trade deals and so on, there were only three places, or a variation of those three places, where the border could be placed. The border needs to be somewhere. I very much stress what David said: there were no easy, clear, simple solutions here. There was always going to be an imperfect solution, because there are no off-the-shelf models or simple solutions. We have ended up with a protocol, and we are trying to see how we can make the provisions and implementation of that protocol more flexible. However, this was never going to be, in any way, easy. There was never going to be a solution that satisfied everyone. That was just not possible.

**Ms Dolan:** Thanks to the panel. I note that Keith is concerned about what to tell his constituents. I am concerned about what to tell mine, because the majority of them voted to remain. I have one question for Katy. It is notable in your survey that most respondents think that there are economic opportunities for the North in the protocol. How do you think that we can start to build on that?

**Professor Hayward:** This is the question of whether Northern Ireland can have the best of both worlds. It is worth bearing in mind that — I do not think that it is too controversial to say it — if the majority of businesses in the UK as a whole could have no trade frictions on the movement of goods with the EU, they would be very glad of that. That is what Northern Ireland has with respect to goods as a result of the protocol. However, of course, it is more complicated than that. The fundamental necessity, before the full economic opportunities of the protocol, such as they exist, can be seized upon, is the question of stability and certainty. You have heard how often that request is made by businesses. It has been made for a long time. It is having to be repeated. The degree to which the UK/EU relationship is currently one of distrust, with quite a lot of bargaining and politicking still going on in that relationship, is really not conducive to creating the kind of environment for business and, indeed, politics in which those economic opportunities can be seized.

**Ms Dolan:** Thank you, Katy.

**Mr McGuigan:** I want to elaborate on Anna's remarks about this not being easy and never having been done before. Even though it may be repetitive, it is important just to put on the record that this discussion about the protocol is because of Brexit and, in particular, the hard Brexit that was forced upon us by the Tories and the DUP. In all the discussion about the democratic deficit, it is important to remember that the majority of people in the North did not vote for or support Brexit. Just because you make your argument forcefully, loudly or arrogantly, as some Committee members have done, that does not mean, as it was proved in a court case earlier today, that your argument is right or stacks up. Those points are important.

I have not looked through all the survey, only the headline points. Katy, how would more input from stakeholders into the operation of the protocol change people's opinions on it? When they are talking about the protocol, most people support businesses over other groups. Do you think that the vast majority of business representatives want to make the protocol work?

Separately, maybe to David and/or Anna, how would the Swiss-style SPS equivalence deal help with the problems that we are experiencing? Why are the British Government actively blocking it?

I also sit on the Committee for Agriculture, Environment and Rural Affairs, which is particularly worried about the impact on farmers of the Australian free trade agreement. What damage could that deal do

to farmers here, in potentially pushing them out of the British market? Future free trade agreements are likely to cause more damage to local exports

**Professor Hayward:** I do not want to say things for which I do not have evidence. In the poll, we did not ask people what type of input they want to see. I can refer to a report that I published with my colleague David Phinnemore and others last year on meeting Northern Ireland's governance challenges post Brexit and post protocol. One element that is relevant and could still be exploited is a joint consultative working group (JCWG) as a new UK/EU institution for operating the protocol. It is being developed through a sort of minimalist model. It is basically involving UK and EU officials, although there is an invitation to NI officials. There is plenty of scope to be more imaginative around how Northern Ireland officials, business, elected representatives and civic leaders feed into the JCWG.

It is important that the advice that goes from that group, which meets weekly, into the Specialised Committee is the type of thing that informs the recommendations that are made by the Specialised Committee. This comes back to the point that Mr Allister made: i.e. the degree to which they are even aware of the possible implications of these regulations and directives for Northern Ireland. There is plenty of scope. In that large report, I make 80 recommendations as to what else might be done, but that is just one little thing to note.

As for your question about the majority of businesses, I do not have evidence that the majority of businesses are supportive of the protocol. However, as I mentioned before, it is very clear that, overwhelmingly, they are looking for stability and certainty, for agreements, for clarity and for information. Anna will attest to that as well.

This is possibly a good point at which to mention article 6 of the protocol, which charges the Joint Committee with responsibility for ensuring that both the UK and the EU use best endeavours to respect Northern Ireland's integral place in the internal market of the UK. Of course, in the UK Internal Market Act, which has also been mentioned here, section 46 charges the UK Government to act with special regard to Northern Ireland's place in the internal market. If they did that, we could have a situation that we know from polling evidence over the past few years that the majority of people in Northern Ireland want: minimal friction on either the Irish land border or the Irish Sea border. It is only through working to that end, avoiding a hard Irish land border and minimising the impact of the protocol and movement of goods across the Irish Sea, that we can get the best position for Northern Ireland's businesses.

**Dr Jerzewska:** A Swiss-style SPS agreement would eliminate a number of checks. According to EU estimates, SPS checks account for about 80% of checks required. It would simplify things. You would not have border checks for a lot of the products. You would not necessarily need to provide the certificate. Some of the products that we are talking about that are banned, or could be banned, would not be banned. However, there is also the other side of the Swiss-style agreement, which is that Switzerland follows EU rules. As far as I understand it, it can have only a very limited impact on those rules once the EU has passed them. The Swiss are aligned with EU rules on that. One of the difficulties that we keep having, with not only the protocol but Brexit in general, is these hard choices and trade-offs. Yes, you have a solution here, but this is the consequence there.

That is why we keep struggling with these issues. It would solve some problems, but it would potentially create another level of problems. One of the solutions, which is maybe not on this table but on the table adjacent, is a Swiss-style agreement with an opt-out clause, meaning that, at the point at which the UK wants to diverge from rules and regulations because it is signing an agreement with someone else or for some other reason, it could opt out from that Swiss-style agreement. However, that still means accepting EU rules for the duration of this agreement's being in place. That is a trade-off. Unfortunately, it is not a discussion about technical solutions and what is possible from a technical perspective; it is a discussion about where we want to be politically, which makes it incredibly difficult and incredibly challenging.

On the Australian one — I am sure that David will add to this — I will say that we are still waiting to fully understand how imports from countries with which the UK has signed a trade agreement will enter Northern Ireland if they are not going through GB. We have some guidance, but that guidance is not entirely clear. There is a typo in that guidance, which makes me feel that it is potentially not the final version. We are still trying to understand how it will work if, for example, the UK has an agreement with Australia but the EU does not yet. If there is a gap, how will these imports be treated in Northern Ireland? That is a very important question to which we do not yet have a full answer.

**Mr McHugh:** Tá fáilte romhaibh uilig. You are all very welcome here this afternoon, and it is very interesting to listen to your comments. It always intrigues me when I hear people commenting on democracy or the lack of democracy. We are well used to that on the island of Ireland, whether we go back to the Act of Union of 1801 or the division of Ireland in the first place. Democracy was always ignored. They never had the permission of the Irish people to do that, and they did not have it to leave the EU this time. The majority not only of people who live in the North of Ireland but, without doubt, of people who live on the island of Ireland wish to remain in the EU. That is quite clear.

Notwithstanding that, given the rules as they are, the UK voted to leave the EU. The UK also elected the present British Government, which, on behalf of those same people, negotiated an agreement with the EU. The British Government were given that permission, and, that agreement having been negotiated, we now have to deal with a protocol. The Government who negotiated it have totally dragged their feet on its implementation. I ask all the panel members this: to what extent is the Government's reluctance to implement the protocol creating problems for people, right down to the issue of identity politics?

From what I see and understand, businesses are coping with the problems and dealing with them very successfully. There is a lot of evidence that people are now identifying suppliers on the island of Ireland. Only yesterday, I heard about a flour production company in the North of Ireland that is supplying its flour to bakeries in the Twenty-six Counties. The protocol, therefore, has positives for us. To what extent has the British Government's reluctance to implement an agreement that they made on behalf of all the people of the UK given rise to many of the problems that we are faced with?

**Mr Henig:** I have said fairly frequently that there is a major problem with the UK Government signing a treaty that implies checks and, then, not being honest about what they signed up to and being quite obstructive in its implementation. I pay tribute to Northern Ireland business associations, which have had to bear the brunt. They have done a fantastic job and worked ceaselessly. They have not received much help from the UK Government, which are trying to have it all ways. On the one hand, they say that they do not want the protocol; on the other hand, when push comes to shove and because of the relationship that they want to have with the United States in particular, they do want it. It is quite dangerous behaviour to suggest, on the one hand, that you might walk away from the protocol and, on the other hand, in your actions, suggest that you will not do so. That is very difficult to work with. We will struggle to make progress unless the UK Government can be more open about how they intend to take the protocol forward and work with all concerned.

There are numerous issues. Yes, many of those apply to east-west ties, but there are also issues with North/South business ties. There are issues with services, and we rarely talk about services. There are issues even in areas like free trade agreements, which is a bit of a holdover from last time. If Australia sends a lot more beef and lamb to Great Britain, there is a strong chance that Northern Ireland businesses and farmers will be among those who lose out. I know that the Northern Ireland Agriculture Minister recently sent a letter on that subject. The UK Government need to do a lot to help to put things right. It is about being open and honest about what they signed and what the implications are. Without that, it will be very difficult to resolve it, but I hope that we can resolve it, for the sake of the businesses and the communities who have worked so hard to make the arrangements work.

**Mr McHugh:** Thank you, David. Do you think that there is any alternative to a protocol?

**Mr Henig:** As Anna said, this is very difficult. We are in uncharted territory in that there need to be checks. Either we have to align in some ways, and we could do that in food and drink, or we will have to have checks somewhere. We can, over time, perhaps, build up more trust, but, ultimately, there has to be something. There is going to have to be an agreement for how trade between Northern Ireland and the rest of the EU and the movement of goods between Great Britain and Northern Ireland operate under Brexit. There has to be something that looks a little bit like the protocol. It could be varied in different ways, but there is going to have to be almost certainly some form of treaty and some form of supporting political agreement. Personally, I think that one of the issues is that there was no form of political agreement running alongside the protocol to explain to everybody what the protocol meant and what its implications were and to make sure that more people were comfortable with it.

**The Chairperson (Dr Aiken):** Matthew, can you come in? I do not want to foreshorten you, but we have some more people to listen to after this session.

**Mr O'Toole:** OK, but Mr Allister had a very long time to expound on his very particular views, so I will ask —

**The Chairperson (Dr Aiken):** "For my indulgence" — is that what you were going to say, Matthew?

**Mr O'Toole:** — my questions as pithily as I can, Chair. Thank you for your indulgence.

**The Chairperson (Dr Aiken):** Mind you, Mr Allister was here at the beginning of the session.

**Mr O'Toole:** I see that he has left now.

Martin Howe QC, you wrote a number of pieces in late 2019, when the withdrawal agreement was updated by Boris Johnson, saying that the deal was "tolerable". What changed?

**Mr Howe QC:** The words that I used were very carefully chosen. I thought that it was tolerable, when you looked at the alternatives in the political situation. I can say, personally, that I have never liked this deal, and, indeed, the Northern Ireland protocol is the worst aspect of it, in my view. The alternative would perhaps be a complete collapse of the entire Brexit, and that is why I wrote those articles. The Government chose to go down the route of doing this deal, with the Northern Ireland protocol, and that, in effect, became the only route, however imperfect, out of the European Union. That is my personal answer to that question.

**Mr O'Toole:** OK. Fair enough. Having said that it was imperfect but better than the alternatives, could you please elaborate on your alternative, as of now, to the provisions in the Northern Ireland protocol?

**Mr Howe QC:** The fundamental problem with the Northern Ireland protocol, as I have explained, is the application of European Union law inside Northern Ireland. That is the feature that should be removed. You then come to the question of how you control the flow of goods across the land border, which, of course, is the root of the whole problem. There are other ways of doing it. Let us take medicines as an example. Medicines are entirely controlled in their distribution channels. They can be stocked only by authorised pharmaceutical wholesalers, retail pharmacists and so forth. You are not going to get people with barrel loads of prescription medicines carrying them across the border and infecting the European single market with drugs that they do not want. You can have other systems of control on businesses that can result in preventing the flow of nonconforming goods across the border without the need for physical infrastructure on the border. The idea that a man in a peaked cap can put a pole across the road as some sort of effective control on the movement of goods is rather fantastical in current conditions and the way that customs and regulatory controls are, in fact, implemented.

**Mr O'Toole:** Are you saying that, for the purposes of regulating the movement of goods or, indeed, for customs control, Northern Ireland should be in precisely the same position as the rest of the United Kingdom?

**Mr Howe QC:** Indeed. I would like to see that. However, what you could say is that one could assist, if you like, the European Union in its desire to prevent the importation of goods that have not paid proper tariffs or goods that do not comply with its laws by having obligations on businesses in Northern Ireland not to export south of the border unless the goods are compliant with EU law and Irish Republic law.

**Mr O'Toole:** OK. What you have just said is that there should be a legal obligation on economic actors in Northern Ireland, and that seems to contradict the first part of your answer, which is that Northern Ireland has to be in precisely the same position as the rest of the UK. If you think that there should be a legal obligation on economic operators in Northern Ireland around how they export goods on the island of Ireland, does that not mean that they are going to be treated differently?

**Mr Howe QC:** Only if they choose to export goods across the border. If businesses in Great Britain send goods across the land border into the Irish Republic, you could have the same obligation on them. You only become subject to the obligation if you choose to become involved in exporting goods. That is the important point. Internal manufacture, production, marketing and consumption of goods is outside the ambit of EU law.

**Mr O'Toole:** OK. I am not sure that that makes sense to me, to be honest. If we go back to your earlier statement that Northern Ireland remains in part in the European Union, do you accept that Northern Ireland's constitutional position, as confirmed today in the High Court here, is that Northern Ireland remains in the United Kingdom unless and until the majority votes for it to leave the United Kingdom?

**Mr Howe QC:** I have seen news reports of today's judgement, but I am not sure whether the transcript of the full reasoning is available. I have not seen it, so I can make only limited comments on it. In one sense, it confirmed what I thought to be the position, which is that the articles in the Act of Union of 1800 are overridden by the 2020 withdrawal agreement Act and the Northern Ireland protocol.

Northern Ireland is part of the United Kingdom and will remain part of the United Kingdom. However, it seems to me that its constitutional status in the United Kingdom is altered by the protocol, because its previous constitutional status under the Acts of Union involved the free movement of goods, without customs controls and regulatory barriers, to and from other parts of the United Kingdom. I believe that it is a constitutional matter, because an important aspect of the Acts of Union between England and Scotland and with Great Britain and Ireland is to achieve an internal market and have a single external customs system without internal barriers. That aspect of the constitution has been altered.

**Mr O'Toole:** You just said "regulatory barriers" between Great Britain and Northern Ireland. Therefore, is it your view that checks for sanitary and phytosanitary products between Great Britain and Northern Ireland that have existed for the entire history and for as long as those checks have been mandated were also a constitutional violation of Northern Ireland's place in the UK?

**Mr Howe QC:** No, I do not think so. I have written on the subject in some depth. Checks on, for example, infected cattle passing from the island of Great Britain to the island of Ireland are a rational means of preventing the flow of infections. If such checks are imposed — sometimes they are, if there is a foot and mouth outbreak — between England and the Isle of Wight, that does not affect the constitutional position of the Isle of Wight as part of England.

**Mr O'Toole:** You just said that checks for animal health purposes are rational and do not affect constitutional status. Is that not literally what the protocol is?

**Mr Howe QC:** No. That is sleight of hand. What the protocol talks about, on things like SPS checks and sausages, is nothing like live infection control. In fact, the powers of the original Stormont Parliament, while generally restricting it from imposing prohibitions on imports from Great Britain, specifically included health powers. It was allowed to do that, so that has, constitutionally, been accepted for a long time.

However, controls on chilled meat have got nothing to do with preventing cattle diseases flowing from one island to another. They are there for economic purposes to provide a restriction that largely allows EU producers, who do not face such barriers, an economic advantage. I do not regard those as being in the protocol legitimately. I think that introducing them affects the constitutional place of Northern Ireland within the United Kingdom.

**Mr O'Toole:** Since those checks already existed, I am not sure that I agree. You have talked about the Act of Union and you have been party to applications to the courts on various issues, most of which, I believe, were rejected. Article 3 of the Act of Union specifies:

*"the said united kingdom be represented in one and the same parliament, to be stiled 'The parliament of the united kingdom of Great Britain and Ireland.'"*

If article 3 of the Act of Union provides for one Parliament alone, did not the creation of the Northern Ireland Parliament in 1921, the Scottish Parliament in 1999 and other devolved Assemblies violate the Act of Union, too? Does that not imply that the Act of Union is one of a number of constitutional statutes that evolves over time?

**Mr Howe QC:** Perhaps we are talking at slightly different purposes. I do not think that the establishment of the Parliament of Northern Ireland or the Scottish Parliament or the Welsh Assembly violated the Acts of Union. My comment is about whether the Northern Ireland protocol effects a constitutional change in the position of Northern Ireland. It definitely overrides the Act of Union, and, in my view, it results in a constitutional change.

**The Chairperson (Dr Aiken):** A short one, Matthew.

**Mr O'Toole:** My point to you was not about article 3 itself. It was about the idea that the Act of Union is totally unamendable and that amending it changes the substantive constitutional position of the United

Kingdom. Given that that has happened multiple times, as was said in court today, surely the idea is something of a straw man.

**Mr Howe QC:** With respect, there are different points there. The Act of Union is amendable; that is clearly the case. If it is amended, and depending on how it is amended, it may result in a constitutional change, because it is a constitutional document.

**Mr Catney:** Chair, you will be pleased to know that my contribution will be short. I thank everyone for the information that they have given.

We have to look for the protocol's good points as well as at its problems. I do not think that anyone in Northern Ireland would have wanted any sort of protocol, but, as has been stated, the majority of people here did not vote for Brexit. However, we have what we have, and we have to look at it.

Can the panel members comment on how they believe that the UK Government could or should apply the financial assistance powers that are provided and that were mentioned earlier? Does section 46 of the UK Internal Market Act 2020 contradict the provisions of the protocol? Last but not least, the Northern Ireland protocol is here, and we are fooling people if we tell them that we will be able to change it. It is an international agreement. Can the panel tell me how we can make it work to the benefit of everyone in Northern Ireland? Let us speak about the benefits and not the negatives, please.

**The Chairperson (Dr Aiken):** Can anybody put forward some of the benefits that they see from the Northern Ireland protocol that they can evidence? [Pause.] Anybody? Please. [Laughter.]

**Mr K Buchanan:** There is your answer, Pat: there are none.

**Mr Henig:** I am happy to go first, Chair.

**The Chairperson (Dr Aiken):** Yes, please, David.

**Mr Henig:** I have been contacted by businesses to discuss issues about Brexit, and Northern Ireland has come up in several of those conversations. Questions included, "If I move to Northern Ireland, will many of my problems be resolved?", and I have been able to say yes. If companies that, for example, were using a warehouse in Great Britain to supply the EU moved said warehouse into Northern Ireland, as things stand, they would be able to supply the EU and Great Britain. The problem, as, I think, somebody mentioned, is that not being sure whether all that may change next week is not a great basis for an investment decision.

That opportunity is there, and I can assure you that businesses are interested in that opportunity, if they believe that there is stability. It comes back to the first part of the question about whether we can make the Northern Ireland protocol better. That would require new dialogue in Northern Ireland and with the UK Government to look at some of the problems. It is not about coming up with fantasy solutions in which the EU will suddenly trust us not to have any borders. That will not happen, but some things can be done, if there is an open and honest discussion. Maybe it is not so much of a problem to align with the EU in some areas. Doing that in some food and drink areas would remove a lot of the checks, and I think that the arrangements on medicines are close to being resolved. A lot can be resolved, but it needs proper political discussion. You can then potentially see a business benefit for those who might want to see it.

I was thinking about it earlier. If businesses from Manchester or London started to set up in Belfast, you might find that it would strengthen their support for the Union of Great Britain and Northern Ireland. However, with the way that the UK Government are approaching it, things are too unstable for that at the moment. There are opportunities, but there are undoubtedly huge challenges as well.

**Dr Jerzewska:** I will add one point. I agree 100% about the need for stability and certainty. Investment decisions are made well in advance, and not knowing what will happen in Northern Ireland next year is not helpful.

Apart from providing stability and certainty, one thing that the Government can do to maximise the opportunities — I say that, but I am not sure that it is the right term — is to provide more and clearer guidance on how things operate under the protocol. The devil is very much in the detail, and it is still

so much more difficult to find information about how things work in practice in Northern Ireland than is the case for GB. Clearer guidance and more availability of guidance would be helpful. You have a [*Inaudible owing to poor sound quality*] Trader Support Service (TSS), but you cannot get answers about what is happening on customs in Northern Ireland from HMRC, because HMRC refers you to TSS and does not necessarily want to take questions on Northern Ireland. That is not helpful. More guidance and information would help.

**Professor Hayward:** I will underscore what Anna said. That is a pressing concern for business. The question of the benefits of the protocol is difficult, because you have to think of what the counterfactual is. Is it that there is no Brexit at all? In that case, we would continue to have free movement of goods, services, people and capital across all our borders. Obviously, as with Brexit, the protocol brings restrictions. Alternatively, is the counterfactual the possibility of an Irish land border? If, at the very least, we recognise what a customs and regulatory border means, that surely underscores the difficulties that we would face if we were to try to manage that across a land border, given the seriousness with which the EU enforces its laws and wants to see those rules applied.

One small question is about which of those 300 legislative instruments Northern Ireland does not want to follow, or which of them it wishes to diverge from —

**A Member:** All of them.

**The Chairperson (Dr Aiken):** Address remarks through the Chair.

**Professor Hayward:** — if you were in a different situation outside of the protocol.

You would expect me, as political sociologist, to say this, but I stress that there are questions around democratic deficit, scrutiny and governance. Those questions will become increasingly significant if and when the practical concerns around the operation of the protocol are addressed.

**The Chairperson (Dr Aiken):** Thank you, Katy. It is Martin to finish up.

**Mr Howe QC:** You have invited me to say what the good things about the protocol are. Frankly, I cannot see much in it that is good. Obviously, the ability of businesses in Northern Ireland to export into the EU single market without barriers is touted as its principal benefit. That is an aspect of the protocol, but even that is inhibited. I will come back to the example that I gave of medicines regulation. Although the protocol applies the European Union's medicines regulation and medicines directive to Northern Ireland, annex 2 contains a couple of very specific exclusions that do not permit businesses in Northern Ireland to act as though they were in the European Union. In other words, if you were to set up a pharmaceutical company in Northern Ireland, it would be excluded from being treated as if it were in the European Union for the purposes of those regulations. You cannot apply for a European Union central authorisation from an address in Northern Ireland. For the purposes of those regulations, you cannot be a qualified person if you are resident in Northern Ireland. It is, therefore, flawed, even in that respect. I agree with the point that David made that, for businesses to take advantage of the system, they would have to have confidence in the stability of the scenario, and my feeling is that it is a very long way from being a stable situation.

**The Chairperson (Dr Aiken):** That was quite a long evidence session. I thank you all very much for your forbearance. Thank you for giving those full answers. Finally, on behalf of the Committee, I thank Katy, Anna, David and Martin. There is no doubt that we still have a long way to go on this.

Sorry if you saw me looking down at my screen, but I just saw David Frost's comment about the chilled meats piece. I have not yet seen Maroš Šefčovič's piece. We continue with the great sausage war.

Thank you very much indeed for your evidence. Thank you, everybody.