



HOUSE OF LORDS

# European Affairs Committee

## The Windsor Framework Sub-Committee

### Corrected oral evidence: Regulatory divergence and the Windsor Framework

Wednesday 15 November 2023

3.15 pm

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Members present: Lord Jay of Ewelme (The Chair); Lord Dodds of Duncairn; Lord Empey; Lord Godson; Baroness Goudie; Baroness O'Loan; Baroness Ritchie of Downpatrick.

Evidence Session No. 1

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Questions 1 - 8

#### Witnesses

I: Dr Lisa Claire Whitten, Research Fellow, Post-Brexit Governance NI, Queen's University Belfast; Dr Esmond Birnie, Senior Economist, University of Ulster; Joël Reland, Research Associate, UK in a Changing Europe.

## Examination of witnesses

Dr Lisa Claire Whitten, Dr Esmond Birnie and Joël Reland.

Q1 **The Chair:** Good afternoon, and welcome to this public meeting of the Sub-Committee on the Windsor Framework. Today we are holding our first evidence session for a new inquiry into regulatory divergence, with academic, legal and policy experts. A targeted call for written evidence is being undertaken alongside these oral evidence sessions. We are very glad today to welcome Dr Lisa Claire Whitten, research fellow in post-Brexit governance at Queen's University Belfast, and Dr Esmond Birnie, senior economist at the University of Ulster, who are both joining us remotely. Joël Reland, research associate at UK in a Changing Europe, joins us in person. You are all very welcome.

It would be very helpful if you introduce yourselves the first time you speak, so that those listening now or later can identify you. Today's meeting is being broadcast and a transcript will be taken for subsequent publication, which we will send to you all to check for accuracy. I also refer to the Members' interests as published on the committee's website.

I will begin with the first question. How would you describe the issue of regulatory divergence in the context of the Windsor Framework? Since Mr Reland is with us, perhaps he could start.

**Joël Reland:** Thank you, Chair. I am a research associate at UK in a Changing Europe. One of the main things I do is track UK-EU regulatory divergence through a quarterly series of trackers that go back just over two years. Perhaps this is my bias, but to understand NI-GB divergence, you need to understand UK-EU divergence. In very simple terms, that is where the UK and the EU rulebooks have moved away from one another as a result of Brexit. A lot of that happened in the TCA—for example, the separate veterinary areas as a result of the agreement—and some of it has happened since, when policy changes happened on either side.

Based on the research, the main consequence of regulatory divergence is trade disruption. Because there are two separate regimes, there are two types of trade disruption that affect business. The first is what we call procedural divergence, which is where, in effect, new bureaucracy is introduced because you have to navigate two separate regimes. The classic example would be declarations at the border when you are exporting goods from the UK into the EU, and the checks which have been placed on those goods.

The second is regulatory divergence: separate rules that change the way you have to behave or forbid goods crossing the border in the first place. Those two forms of divergence apply equally to GB-NI and the trade there, because, as you know, as a result of the protocol, Northern Ireland follows a significant amount of EU legislation and therefore there are different regulatory spheres in many cases between GB and NI. Those two forms of divergence have created trade disruption.

To an extent, the Windsor Framework addresses both those forms of divergence. On the procedural side, the checks and paperwork, and the introduction of the green lane, clearly diminish the trade bureaucracy when you move goods across the Irish Sea from GB into NI. In my view, that is probably the most significant effect of the Windsor Framework. There is also the regulatory divergence element—the different rulebooks—which is slightly amended by the framework. More goods can now be exported according to UK rather than EU rules into Northern Ireland. Sausages is the classic example, and seeds and medicines are other examples.

Those are the key twin divergence effects that the framework has addressed, to some extent.

**The Chair:** That is very clear and helpful as a start—thank you very much. Dr Whitten, would you like to follow?

**Dr Lisa Claire Whitten:** Thank you, Chair. I am thankful to the committee for the invitation to be here.

To follow on from what Joël outlined so articulately, I would frame the issue of regulatory divergence in the context of the Windsor Framework as being, at least in some form, an unavoidable consequence, particularly when we read it together with the terms and scope of the wider UK-EU relationship under the trade and co-operation agreement. Under the protocol/Windsor Framework, there is a requirement for Northern Ireland to remain aligned with aspects of EU law, and to do so dynamically, primarily but not exclusively relating to the trade in and standards of goods. Where that same requirement does not apply to the rest of the UK, it can be expected to result in divergence between the rules and standards that apply in Northern Ireland and in the GB market respectively.

There is, therefore, a default arrangement for divergence between Northern Ireland and Great Britain in policy areas covered by the terms of the protocol and framework. The extent to which that potential for divergence is realised dually depends on the degree to which policymakers in the UK (or GB) opt to move away from EU standards and the extent to which relevant sections of the EU acquis evolve.

At the same time, I would also flag that, for areas outside the scope of the protocol/Windsor Framework where Northern Ireland, either as a devolved constituency or as part of the UK-wide initiative, opts to move away from what were pre-Brexit EU rules and standards, we can also expect to see some degree of regulatory or procedural divergence—primarily regulatory—manifesting on a north-south basis on the island of Ireland, albeit subject to the scope of EU competence and/or decisions made by policymakers in Dublin. That is part of why I think regulatory divergence, as an issue for post-Brexit Northern Ireland, can be said to be inevitable. But at the same time the form and nature of its manifestation is pretty uncertain and quite contingent on whether the impact of any given case is between Great Britain and Northern Ireland or

Northern Ireland and Ireland. Whether it proves to be beneficial or detrimental in economic or procedural terms will largely depend on the specific policy area in question and likely also the origin of divergence in terms of which entity – the UK or the EU – initiates. Those are my initial reflections.

**The Chair:** Thank you very much. We will come on to some of the more detailed issues a little later. I ask Dr Birnie to introduce himself and give some initial comments.

**Dr Esmond Birnie:** Thank you very much, Chair, and good afternoon. I am a senior economist at Ulster University.

I have a few points to make. The Windsor Framework represents a policy choice by both the UK Government and the EU together that Northern Ireland remains within the single market and the customs union of the European Union, and hence substantially subject to EU regulations. To put that into context, Great Britain is Northern Ireland's main external trading partner. Official stats from 2021, the most up-to-date figures we have, show £12.3 billion of goods purchased from Great Britain, compared to £2.8 billion from the Republic of Ireland and another £2.2 billion from the rest of the European Union. The east-west trading relationship, or external economic relationship—the one most affected by regulatory divergence—is by far the biggest external trading relationship of the Northern Ireland region.

The Windsor Framework, like the protocol before it, establishes some frictions, and therefore impacts, on business behaviour with respect to the movement of goods from Great Britain to Northern Ireland. If regulations diverge between Great Britain and the European Union in the future—indeed, even currently they are somewhat in divergence—it is overwhelmingly likely that trade frictions in the Irish Sea, at the ports of Larne and Belfast, et cetera, will increase. Thus, we are looking at a situation where, as a result of the choices made in the Windsor Framework by the two authorities, business costs in Northern Ireland will be pushed up, relative not to the theoretical full implementation of the protocol but to the protocol as it actually operated, with the extensive exemptions and grace periods.

If there is a growing gap between Great Britain and the European Union with respect to regulations, and Northern Ireland is left somewhere in between—although perhaps closer to the European Union end of that spectrum—it is unclear how businesses will respond to that. That is a detailed question of business behaviour and, even as an economist, I would be hesitant to make firm predictions. However, there are various scenarios that are troublesome.

First, businesses could choose to try to muddle through but, given that they face higher costs because of the frictions, which will escalate with divergence, we would see some combination of businesses in Northern Ireland selling at the higher price, which would obviously have implications for the competitiveness of our regional economy—already

struggling to be competitive with the rest of the UK and indeed the rest of the world—and/or some lower level of business profits, which would cause issues of longer-term sustainability. That is one scenario.

A second scenario is that Northern Ireland to Great Britain trade falls away. In the official stats—the 2021 data, which is the most up to date that we have—there is already some evidence, even from the first year of the operation of the protocol, of so-called trade diversion. For example, GB suppliers will simply cease to supply into the Northern Ireland market or Northern Ireland purchasers will switch away from their traditional, presumably previously efficient UK-oriented supply chains towards ROI or EU-based alternative suppliers. Those will not necessarily have been the lowest cost pre-protocol or pre-Windsor Framework.

A third scenario concerns businesses, of which we have a number, that operate across a range of UK regions—UK firms with branches in Northern Ireland, England, Scotland and Wales. They may well find, as a result of the frictions in the Windsor Framework, and frictions that escalate because of regulatory divergence, that their branch or subsidiary in Northern Ireland becomes more cost-disadvantaged relative to their branches in England, Scotland or Wales; hence the likelihood is that, eventually, the firm will scale back or even close that branch, and so we get negative impacts on Northern Ireland regional output, income, et cetera.

None of these is a scenario that promotes general economic well-being. Given the general instability and flux in the economy—we know there has been a lot of that, given all the shocks to the system, such as the cost of living, the Russian-Ukraine war, the Middle East situation and energy prices—it may well be that such macroeconomic negative effects from regulatory divergence and the cost impact on Northern Ireland businesses will be disguised as general flux and change in the economy. That is not to say that there is no problem; it is just that we will not be able to identify it specifically among all the other economic changes that are happening.

**The Chair:** Thank you very much indeed. Dr Whitten and Mr Reland both spoke about procedural and regulatory divergence. Is that division between the two generally accepted or is it used only by yourselves?

**Joël Reland:** It is a term I devised in the context of my own trackers. I find it analytically useful to distinguish between the things that you cannot do that are not permitted and process change that makes life more complicated. It is not the universal language of divergence.

**The Chair:** Thank you.

Q2 **Lord Dodds of Duncairn:** Welcome to our witnesses. What impact has the Windsor Framework had on regulatory divergence compared to the original protocol? What has been the difference between, on the one hand, the Windsor Framework and the original protocol as agreed, and, on the other, the original protocol as actually implemented? As Dr Birnie

mentioned, it has been subject to derogations, grace periods and so on. What is the difference between the Windsor Framework and the original protocol, in both those respects—as agreed and as implemented?

**Dr Esmond Birnie:** Thank you, Lord Dodds. That is an important question. To compare what we now have with the protocol as it was originally unveiled and what was there in black and white, you could make a case for saying that the Windsor Framework, including the green lane, represents a lower level of bureaucracy and frictions, albeit subject to the important caveat that a lot of the Windsor Framework has yet to roll out in operation; we do not know how it will affect the manufacturing sector, for example. What happened on 1 October, a month and a half ago, concentrated mainly on the food retail side.

However, if you compare the Windsor Framework, subject to the caveat that we do not know fully how it will work in all its detail, with the protocol as it actually operated, given UK unilateral grace periods, exemptions and so forth, there is a much greater likelihood that you would say that, from the business bureaucracy, cost and friction point of view—the Irish Sea border, et cetera—what we are now looking at could well be worse. But, as I said, a lot of the detail has still to be worked out operationally and time will tell.

**Lord Dodds of Duncairn:** Thank you.

**Dr Lisa Claire Whitten:** Thank you, Lord Dodds. I will make a couple of points to build on that. At least in theory, and with the caveat that it is yet to be fully implemented, some aspects of the Windsor Framework—the green lane process and procedure—allow for a mitigation of the extent of what was the potential level of divergence in the availability and standards of agri-food goods. The degree to which supermarket shelves in Great Britain and Northern Ireland will look different has reduced as a consequence of the Windsor Framework and the green lane process, albeit subject to the extent of use of that green lane procedure. It is my understanding that at least the first round of implementation has gone quite smoothly.

On the potentially less positive side, and on reducing the potential for regulatory divergence, because the Windsor Framework still requires all EU law to apply to Northern Ireland producers and traders. In areas where the Windsor Framework has lifted the level of EU obligations on eligible movements of green lane goods coming across from GB there is a risk of undercutting created for Northern Ireland traders and producers who want to trade on local markets and are subject to the full remit of EU law, whereas the GB to NI movements, and GB producers trading potentially the same goods, are not subject to the same level of rules, presuming that EU rules and standards are more burdensome than UK rules and standards. That is a new potential regulatory risk created by the Windsor Framework.

Another issue which is even more hypothetical, but also worth saying is that, with the focus on east-west movements—and the UK Government

Command Paper is quite explicit on this—there is somewhat of a shift towards embracing north-south divergence with the Windsor Framework. I looked it up and the Command Paper states that the prospect of significant divergence between the two distinct economies is inherent in this new way forward. Again, the extent to which that is realised and the nature of its realisation, particularly as experienced in border communities or by those who live cross-border lives, is yet to be seen, but that is one to watch in the wake of the Windsor Framework.

My last point on this is that, alongside its provisions for goods movements from GB to NI, the second category of provisions that the changes brought in under the Framework make related to Northern Ireland stakeholders' involvement in the process of implementation. If we think about that in the context of regulatory divergence, the aspiration at least seems to be to create structures that allow for upstreaming of potential issues so that Northern Ireland business representatives and official stakeholders have more of a foot in the door in order to mitigate or agree derogations as necessary to avoid really negative impacts of regulatory divergence down the line. That is one more for the positive side.

**Lord Dodds of Duncairn:** Thank you.

**Joël Reland:** I will return to my favoured duality between procedural and regulatory divergence. On the procedural side, I echo what the other two said: in theory, this should reduce the bureaucracy and administration at the border when you are exporting goods if you are using the green lane, but we are still more in the realm of theory than practice and we have to see how this goes. There are challenges around labelling goods as “not for EU” and so forth, so let us see. However, in principle, there is a lot of potential.

On the regulatory side, the impact will be far less significant because, while certain packaged food goods can now be exported according to UK rather than EU standards, most goods will still have to follow the EU rulebook. The really obvious example is manufactured goods. That means that, over time, as the EU updates its regulations—it is quite an active regulator—there will be more and more regulatory divergence between Great Britain and Northern Ireland over manufactured goods. There are numerous examples. One is eco-design, which is labelling around energy efficiency on IT goods, for example. It might require new testing and labelling on an IT product before it can cross the border. Over time, those divergences could build up and complicate trade somewhat.

A separate point, which I feel slightly out of place making here, as an English rather than a Northern Irish person, is that there is not just the economic impact but the political impact. Divergence as an economic impact is really strong UK to EU; there has been a significant disruption to trade. For GB to NI, certain sectors have been affected, such as food and supermarkets, but I do not think that the macroeconomic impact for Northern Ireland has necessarily been overwhelmingly negative.

A study from the University of Sussex says that Northern Ireland will be economically better off due to the protocol than had there not been Brexit, because it has integration into the single market and the GB market. According to polling by Queen's University Belfast, a majority of people think that the protocol has been positive economically for Northern Ireland. Where it is much more divisive is on the sense of Northern Ireland's place in the UK internal market; there was no clear majority for that. According to that polling, in February, 28% thought that the protocol had been positive for Northern Ireland's place in the internal market, and 48% thought it was negative. According to polling from November, I think, it is now evenly split at 32% each, so there is a sense that some people in Northern Ireland—by no means the majority—feel more integrated into that internal market than they did before.

**Lord Godson:** Is that November this year?

**Joël Reland:** I believe so. It is from Queen's University.

**Lord Godson:** Is there any sense that the Windsor Framework has played a part in that greater evening out of the numbers that you described?

**Joël Reland:** It cannot be said with 100% certainty, but it is a deduction that could be made.

**Lord Godson:** Thank you.

Q3 **Baroness O'Loan:** I have a slightly more complex question. What do you think are the main risks or opportunities in relation to regulatory divergence now and in the future? For businesses affected, how does the impact of regulatory divergence differ between Northern Ireland and Great Britain, between Great Britain and the European Union, and between Ireland and Northern Ireland? In those instances, which sectors of the economy are potentially most affected, negatively or positively, by regulatory divergence?

**Dr Lisa Claire Whitten:** Thank you, Baroness O'Loan. Because I was involved in the Queen's University polling that was mentioned, I should just say that the polling was at the end of October. It specifically asked respondents whether they agreed that the Windsor Framework was the best available compromise for addressing the issues with the original protocol, and 60% agreed, while 33% disagreed. So we did ask specifically about the Windsor Framework. Thanks, Joël, for the reference.

On the primary opportunity for Northern Ireland, I understand that there is evidence, specifically from conversations between Invest NI and clients it works with, that the arrangement gives Northern Ireland a unique position, arising from retained access to the EU market for goods, together with its access to the UK internal market, and, to a lesser degree, but none the less present, integration with the Irish market, for example, in relation to the common travel area. There is a unique economic selling point there, although we are still very much in the initial



stages of certainty over the arrangements and so it is all quite hypothetical in that regard at the moment.

On the primary risk, divergence is not necessarily negative—although, from a commercial perspective, divergence between markets that you trade with generally increases regulatory or procedural burdens and creates the potential for duplication, thus increasing costs to trade. At the same time, it stands that divergence can be the result of choices made to adapt to or reflect local or regional market requirements. In that respect, it can be positive, or at least intentional. Crucially, the decisive factor will be the degree of choice afforded to actors impacted. To achieve any autonomy or influence, the related processes of developing policy and regulation must be managed. That is at least partly why I think the situation in Northern Ireland at present is so challenging. The regulatory system post Brexit is inherently complex; rules and laws that apply in any given area of policy or aspect of market activity are challenging to discern at times, and that makes it difficult to manage and therefore increases the risk that any divergence that occurs will be of the unmanaged variety.

I think Joël is probably best placed to speak to the UK-wide and GB to EU axes of divergence, so I will hold my tongue there.

On Ireland and Northern Ireland and Northern Ireland and Great Britain, the potential policy scope for the sectors likely to be impacted is not difficult to set out, at least in theory, based on the legal texts. We can look at what is covered by the protocol/Windsor Framework and the extent to which Northern Ireland has to remain dynamically aligned to EU laws to find out where the Northern Ireland to GB tensions and regulatory divergence are likely to manifest. For areas outside the protocol/Windsor Framework laws, we can see where, pre-Brexit, there was an influence of EU law and an element of north-south cooperation. If we look at the Ireland to Northern Ireland axis—and, in broad terms, GB to NI—it is goods that we are likely to see. Everything else is more likely to manifest on an Ireland to Northern Ireland basis, albeit, as the point has already been articulately made, the existing economic relationships are different in substance between GB and NI and NI and Ireland. None the less, those are the two differences I would highlight.

**Dr Esmond Birnie:** It is a hard and long question, but I will take it in its different parts, starting first of all with the risks and opportunities. To a large extent, I agree with what Dr Whitten has just been saying. Almost inevitably, there is some degree of trade-off. Presumably, sometimes regulations are beneficial, and certainly they are intended by policymakers to bring benefits—otherwise, you might ask why they would be introduced. It is often argued that the trade-off is against a possible negative effect on businesses. Of course, in practice, not all regulations negatively affect businesses.

One of the complexities in all of this is that sometimes regulations are quite business-friendly with respect to existing, incumbent established businesses, particularly perhaps larger businesses, already operating in

the market, but de facto discriminate against potential new firms either being established or coming into the market from other countries.

Perhaps I would call that the Dyson effect because of the various arguments, including a failed case at the European Court between Dyson and the European Commission with respect to the testing of vacuum cleaners. The point Dyson was making was that the regulation favoured the existing manufacturers which used a very old, tried and established form of technology, whereas he felt that, for his company, as a newcomer, it was weighted against them.

Not everybody will agree with that point of view, but, along with other economists, I feel that one of the downsides of the European Union, and particularly its approach to regulation over the decades, is that it has perhaps tended in practice to favour large, established incumbent companies, and there could be an element of national championing in all of that. That is not necessarily beneficial to the consumer, and it may in part explain why businesses in the tech sector and digital, for new firms in particular, are less pronounced in the European Union as compared with the United States, which takes a very different approach to regulation. Applying all of that to Northern Ireland, given the Windsor Framework et al, and the extent to which we are throwing our lot in with EU regulation, we may be creating a bit of a drag anchor with respect to tech and digital development.

Moving on, the second part of the question was about the identification of gaps, even across various geographies. This is hard to answer given the limited data available at present. Joël will be able to say much more about this, given the tracker produced by his think tank, but we can identify existing regulatory gaps, such as the E171 cake colouring that the European Union prohibits—although the green lane can perhaps cover that—and the permission for genetic technology regarding crops in England. As an interesting aside, it is not Great Britain but rather it is England, because the situation certainly in Scotland is different. I am not sure about the Welsh legislative position on that form of technology.

There are potential and likely forthcoming gaps opening up—for example, the EU's general product safety regulations. As of April this year, the EU general safety regulation, GSR2, regarding some motor vehicles—for example, trailers, particularly those attached to large lorries—requires the installation of extra equipment: cameras, more intelligent tyre pressure management, lane indicators and so forth. The UK Government are consulting with the industry here, as there is obviously a Northern Ireland component, as to how far Great Britain might follow the EU. It looks likely that Northern Ireland will be obliged to follow the EU on this, as opposed to what might happen elsewhere in the UK, and this could cause problems for the industry.

Hitherto, the UK and the European Union have had broadly similar, and therefore interconnected, carbon emission trading systems. Obviously, that is particularly important in the whole net-zero policy agenda, but the EU is considering its own approach to carbon border adjustment

mechanisms, CBAMs. Again, if a gap opens up, it will have an implication for NI relative to GB.

The third part of the question was about which sectors of the economy are potentially most affected. They could be food products and plants and seeds. Incidentally, my reading of the evidence is that the Windsor Framework has not resolved the issues relating to plants and seeds. There has been a lot of commentary about that—for example, by Sam McBride in the *Belfast Telegraph*, and elsewhere. There are elements of motor vehicle manufacturing within Northern Ireland, so engineering could be affected, as could consumer products. The main drivers behind this are things such as SPS, or animal food and veterinary standards, consumer protection and environmental standards.

**The Chair:** I have to ask everybody to be a little brisker in answering questions, otherwise we will run out of time before getting to the end.

**Joël Reland:** I have three points, but they will be quick. I am going to flip your questions around, Baroness O’Loan. It is helpful to understand the difference between divergence in different parts of the UK and then explain the main risks and opportunities. The key difference is that, as for the divergence with respect to UK-EU, the impacts are quite macro. It is altogether a drag on the economy on exports. For GB to NI, it is slightly more sector-specific. There are sectors that are particularly exposed, and therefore it poses slightly different challenges in the GB to NI context. The area I would highlight is manufacturing, because EU regulations still apply and a lot is coming forward. Dr Birnie gave some salient examples of potential issues there. If you go away and look into those you will see that, potentially, they could be in quite critical sectors. I would cite medical devices as one area—for example, asthma pumps, which I think you have looked at before.

The second point is the Brussels effect, which is the second key difference. In UK-EU divergence, even though there is a regulatory gap, businesses will often adapt anyway and conform to new EU regulations because they want to export to the EU market. If, for example, the EU has new vehicle regulations, manufacturers will follow them because they need those EU exports. The Brussels effect does not really apply to GB to NI because Northern Ireland is not a lucrative market in the way that the EU single market is. I think that the risks lie for GB-based manufacturers that have an NI export market—whether you can use the word “export” is debatable—but no EU market. Therefore, the incentive to adapt to updated EU regulations is less strong, because NI is likely to be a much smaller part of their market than if they were also exporting to the EU. That is the second big challenge.

My third point, which I think is deeply underdiscussed in general, is the capacity of the Northern Irish state to align with Great Britain. Divergence does not just happen when the EU changes its rulebook; it will also happen when Britain changes and Northern Ireland does not follow. Currently, there is no Executive, which means that we are not really able to make any assessment of it. In Scotland, the Scottish Government said

that they would align systematically with EU regulation wherever it was in their power, because they were quite anti-Brexit from the start, but basically they have done nothing. In my view, that is because they do not have the capacity to do it. Devolved Governments were set up broadly as delivery units; they were implementers of pre-agreed legislation, but they did not devise much policy themselves.

Dr Birnie mentioned gene editing in Wales. I am not sure what is going on. My understanding is that Wales's gene-editing policy was set by one PhD student, because it simply does not have the policy capacity, institution, know-how or experience. When the Executive of Northern Ireland, at some point presumably, return to power, they will have to learn how to make policy if they want to maintain alignment with Great Britain, and that is a really hard thing to do.

**The Chair:** That is very helpful. Your last point is something that has bothered the committee quite a lot over the past few months. It is very good to hear you say that so clearly.

Q4 **Baroness Ritchie of Downpatrick:** I have two questions. First, in your view is divergence primarily an issue concerning trade in goods under the terms of the Windsor Framework, and to what extent does the issue have potentially wider impacts on individual rights and, if so, in what ways? I refer in that respect to Article 2 of the Windsor Framework and, beyond the scope of the Windsor Framework, with regard to services, for example. I turn first to you, Dr Whitten, as you mentioned north-south divergence.

**Dr Lisa Claire Whitten:** A straight and quick answer is that divergence is about more than trade in goods. Divergence that is directly linked to the Windsor Framework and that is internal to the UK, which we have primarily been focusing on, is likely to concern primarily trade in goods and standards of goods because of the nature of the Windsor Framework arrangements and the scope of the applicable EU law that continues in Northern Ireland.

Regarding divergence and the interaction with Article 2 and its commitments on individual rights, I think the relevant NI rights-commissions are probably better placed to speak. However, I am aware of some research they have commissioned, and which has been carried out, on the likelihood of divergence in rights and equality standards on the island of Ireland. In that regard, Article 2, because it is linked to the 1998 Belfast/Good Friday agreement, has inherent in it a north-south element, including through its engaging the joint committee on rights standards on the island of Ireland.

The research identified a number of areas that highlight the important but limited nature of the commitment under Article 2 for law in Northern Ireland to keep pace with some EU directives. Those Annex 1 directives do not comprehensively cover all areas of EU equality and human rights law. The research identified the work-life balance directive, the European Accessibility Act, and the pay transparency directive as potential

examples where it is likely there will be divergence from existing provisions and rights-related law in Northern Ireland and those that exist and apply in Ireland. Because of the nature of the land border, and particularly cross-border workers' rights, these issues will play out and might prove difficult down the line, at least from the perspective of the rights bodies under Article 2. Divergence in rights on the island of Ireland can be perceived, or at least framed, as a challenge to some of the commitments in the 1998 agreement regarding the equivalence of rights.

Beyond goods and specific Article 2 provisions, instances of divergence that relate to services can be expected given the post-Brexit arrangements and the default setting that we have across the UK and EU in that broader relationship. As to the substance of those areas, it is perhaps instructive to look at Article 11 of the protocol/Windsor Framework and the areas listed there of north-south co-operation that are not directly addressed elsewhere in the protocol and framework. Such areas include environmental policy, education provision and co-operation, and healthcare provision and co-operation. When you look at specific examples in those areas of potential divergence, you see that the issue of data comes through quite prominently—

**The Chair:** I am sorry to interrupt you, but we have to try to speed things up a little.

**Dr Lisa Claire Whitten:** I can finish there.

**Dr Esmond Birnie:** I will be brief. Logically, if we are addressing specifically the Windsor Framework and divergence, the primary focus would be on goods as opposed to services, the reason being that the attempts on the part of the UK Government and the EU are to protect Northern Ireland's membership de facto of the single market, and the European single market is about goods; in practice. It is not really about services; it was always much less well developed in service sector liberalisation and harmonisation. It is pretty obvious in practice that the remit of the European Court is there in service sector activities, even the recent penalty against the UK Government relating to the fuels being used in pleasure craft in waters in Northern Ireland. As an economist, it is not within my competence to deal with the rights issue. To an extent, Dr Whitten has already dealt with that, so I will leave it there.

**Joël Reland:** The rights stuff is totally beyond my competence. Even services, especially in the Northern Ireland context, are quite marginal to my research, so I will pass on this one, for the sake of time as well.

Q5 **Baroness Ritchie of Downpatrick:** I will move on to the next question and start with you, Joël. What is your assessment of the Windsor Framework's mechanisms to manage divergence, including the new special goods body and the role of the Office for the Internal Market, as described in the UK Government's Command Paper, *The Windsor Framework: A New Way Forward*, introduced in late February this year? Further to that, what might be the impact of the Stormont brake on regulatory divergence?

**Joël Reland:** Starting with the processes for managing internal divergence, it is quite early to say because it is only getting up and running, but we can draw on examples from the wider UK picture. There, I would say that the processes have been relatively weak so far. The key challenge is that previously the EU single market masked the potential for significant regulatory divergence within the UK's internal market because common standards were in place. Where we have seen divergence since, it has tended to blow up politically quite a lot. The Office for the Internal Market is not meant to arbitrate, but it is meant to advise. I do not believe it has been able to do very much to control that. In Scotland, we had the gender recognition Bill and a regulation on the deposit return scheme for the recycling of certain goods. In both cases, they have effectively been turned into political footballs. There has been briefing and counter-briefing in the press. As an observer, I have quite a strong sense that Governments on both sides have not shied away from doing that.

The Office for the Internal Market, which is meant to sit in between and work through that stuff, using the common framework processes as well, has done very little. Ultimately, its powers are to write reports. I do not know whether it is a body with a chair system, or whether the board members are all in place yet. Effectively, there is not much to control it and there is definitely a sense from the devolved Governments that, since Brexit, there has been a significant centralisation of power towards Westminster. When they have made requests—for example, to have exemptions from the internal market Act on single-use plastics in Wales—effectively it is a yes or no from Westminster; it is not a position commonly decided on but something that Westminster will sign off or reject. It does not feel very collaborative for devolved Governments. In the NI context, all those challenges risk coming up again when there are NI-specific issues.

There are potentially quite significant barriers to the Stormont brake being used. It needs quite a high threshold and you need to be able to prove a significant and persistent impact on everyday life. In a way, it comes back to the point about capacity. Currently, the UK Government seem to have almost no capacity to track divergence, so how is the Northern Ireland Assembly going to prove the everyday impact and even pick up on cases in the first place? I am not sure that it will have a very effective way of doing that. My suspicion would be that, if Westminster really did not want it to enact the brake on something, perhaps for political reasons and the wider UK-EU relationship, it would be able to put an awful lot of pressure on the Assembly not to enact the brake. We are still in the realm of theory, but I suspect its use might be quite limited.

**Dr Esmond Birnie:** I do not feel I have much to add to what Joël said. With respect to the special goods body, it is better to have such a body than not to have one at all, but it is too early to say or to be definitive. It remains to be seen just how well it will work in practice. As for the experience of the protocol and the joint committee set up to represent stakeholders during that period, I am not convinced that it worked

terribly well to represent the full range of views regarding the operation of the protocol. That might be a concerning precedent, but time will tell.

I agree with Joël's points on the so-called brake. It is very unlikely that in practice it would represent some sort of Northern Ireland veto on EU-wide developments in its regulations. The barrister, Martin Howe, who appeared before this committee as a witness on 3 May, said it was, "a very poor brake in theory and most unlikely to be of any practical effect". I agree with that.

**Dr Lisa Claire Whitten:** I think both the special goods body and the Office for the Internal Market, and the new powers and provisions and commitments made in that context, are very welcome, but on their own terms they are insufficient to comprehensively manage the risk of divergence, if that is the aim when it comes to Northern Ireland. The special goods body is a specific composition of a specialised committee set up under the protocol/Windsor Framework. The new provisions will allow, as appropriate, representatives from business and civic society in Northern Ireland to be invited to meetings of the Specialised Committee. It also allows for the new expert subgroups that are being set up under the joint consultative working group to potentially feed into the specialised body on goods. But it is worth noting that, at least based on the legal texts, that it is quite a top-down arrangement, so attendance of NI stakeholders would be by invitation only. By definition, this is in relation only to goods, rather than services or rights or some of the broader policy issues, such as environmental change, that may have an effect in Northern Ireland because of its unique arrangements under the Windsor Framework. Overall the special goods body is welcome but limited in that regard.

Similarly, the commitments made on the Office for the Internal Market are welcome, but they are specific to regulatory change within the UK. That is good, but one of the challenges for Northern Ireland is the fact that the regulatory divergence it faces is not just within the UK; it is the interaction between the arrangements it has and the requirements for it to follow aspects of EU law in the context of the changing nature of post-Brexit UK legislative development and regulatory change, and given its unique geographical situation in having a soft border with another EU member state. These bodies are good, and the initiative is welcome, but there is no place yet for regulatory divergence as a challenge across the board to be managed or taken into account in the new systems.

I reiterate that the Stormont brake has a very high threshold to trigger, particularly the Article 13(3a) aspect that relates to amendments and updates to existing applicable law under Article 5 and Annexe 2. If we follow the thought experiment of its being triggered hypothetically successfully in the future, the effect can be expected to create a situation of dual divergence, whereby Northern Ireland would be following a version of EU law in the relevant area of policy but with the smallest possible bit of the EU law that had been changed in the context of the wider EU market not applying in Northern Ireland. It would be a sort of

historical version of that EU law, while at the same time the same requirement would not apply in the rest of the UK, so Northern Ireland would be in a situation of dual divergence.

Similarly, on the second strand of the Stormont brake that came through in the draft Windsor Framework statutory instrument; this relates to additions of new EU laws. This is perhaps more likely to come to the fore if and when we get the NI institutions restored. There could be a similar effect down the line if there is a situation where the EU thinks something needs to be added and Northern Ireland votes against it. It would then be in a different position from both of the two big markets that it borders. It is worth noting that there is a provision for the EU to take appropriate remedial measures in the event of a successful implementation of this aspect of the Stormont Brake. We do not exactly know what that means, but it could have implications for Northern Ireland's competitiveness or exports.

**Q6 Lord Empey:** I declare an interest. Dr Birnie was, for his sins, my special adviser at the Northern Ireland Department for Employment between 2007 and 2010.

Are you aware of any government attempt to track instances of regulatory divergence of relevance to the Windsor Framework? If so, how would you assess them? Do you think that areas of regulatory divergence should be centrally logged by the Government or another body?

**Joël Reland:** The very simple answer is that, yes, the Government track divergence. There are two big caveats. The first is that it is not systematic. There is no perfect scientific way of passing through all the information and working out what you need to do; it is ad hoc. Secondly, it is siloed, which I think is the bigger problem. You have different departments looking at cases of divergence in their own specific contexts. What that means is that often, in my view, the internal market or the Northern Ireland aspects are overlooked. If you are the Department for Business and Trade or the Foreign Office, you are thinking with your business head or diplomatic head; you are not thinking necessarily from the internal market angle. Often, the internal market angle seems smaller—for example, the breakfast directives, where certain marmalade manufacturers in Northern Ireland might be slightly adversely affected and have to change their sugar content or something. You think you can probably get around this and, given the bigger picture, it is better just to let it happen. So Northern Ireland—the internal market—often risks being overlooked because of the way divergence is managed and looked at.

To address the second question, in an ideal world, divergence would be looked at systematically. It would be great if you could log everything, but that is almost impossible given the amount of EU legislation coming down the line. What I think is missing is not so much having an infinite database but having a real system and strategy for thinking about divergence and addressing it. There is no procedure in place for how you want to control it. If you had principles that civil servants across different departments could work towards, whereby you said, "When you look at a



piece of divergence you need to think about factors X, Y and Z and have those specific things in mind”, you would have a much more joined-up and co-ordinated way of dealing with divergence. It would be consistent across government and you would have clearer principles for civil servants to work towards, whereas at the moment they are flailing in the dark, having information thrown at them. They need to understand as much as they can and maybe talk to a few other departments about it and muddle their way through. Direction from the centre, which has been lacking ever since Brexit or the TCA came into effect, on what divergence means and how you manage it is the critical missing ingredient in the process.

**Lord Empey:** What is your assessment, Dr Birnie?

**Dr Esmond Birnie:** As Joël was saying, if the Government are making such measurements, the problem we have practically is that they are not being put into the public domain, so it is very hard to make any form of assessment.

I suppose there are grounds to be somewhat unsure about the robustness of the evidence on which the UK Government are basing their approach. For example, in October, the Northern Ireland Secretary of State was asked by Ulster Television about the impact of the special regulatory divergence. His answer to the journalist was, “You’re asking a very theoretical question”, and he added at the end of his response, “And we will diverge”. That does not inspire confidence that there is a robust battery of analysis underpinning the policymaking.

**Dr Lisa Claire Whitten:** I reiterate and agree with what has already been said, particularly as regards the pressing need for more strategy and joined-up thinking around how we manage divergence going forward. There is an important piece of work to be done to embed across the UK system an understanding of the new obligations Northern Ireland has and its position, particularly when we look at the scope of its alignment with aspects of EU law. It is not solely related to devolved competence; it is a mixture of competencies. That is challenging and raises issues of capacity for Northern Ireland and the Administration there, especially if and when we get the institutions restored. There is a requirement on the new committee to be set up in the NI Assembly to monitor EU legislation related to the Stormont brake. More generally, as a democratic scrutiny committee there is an ask for it to monitor divergence issues beyond the competence of Northern Ireland’s existing devolved set-up within the UK.

Across the board, when policy decisions are being made, as Joël articulated, there is perhaps not yet due consideration or understanding within the internal UK system of the implications of decisions being made where GB generally is moving away from the EU for NI. The lack of a central log of divergence, whatever that means or would look like—it would not necessarily need to be a very big Excel sheet—is an unanswered question. A cross-government strategy for divergence and monitoring regulatory change is really important, specifically when viewed from Northern Ireland.

**Q7 Lord Empey:** The next question flows from that. In your view, have the UK Government and the EU done enough to make information on regulatory divergence accessible? If you were advising businesses operating under the terms of the Windsor Framework, where would you suggest they go to discover the regulatory rules that apply to their specific sector?

**Joël Reland:** I would build on my previous answer about the lack of consideration given to divergence. Have the UK Government given enough information? No, in most cases. There are flagship pieces of divergence where they want to make a song and dance about the change, such as the new state aid or procurement regimes. In those cases, there has been a reasonable amount of engagement with businesses to help them understand the schemes because these are big, new Brexit opportunity deliveries, so to speak.

In more everyday policymaking when things are happening and there is a potential divergence element, I am not sure business is being consulted anything like as much as it should be. There are some obvious examples. These were not Brexit policies, but the border controls are repeatedly delayed because businesses keep warning that they are not prepared and are not getting the information they need and European businesses are not prepared. In the chemicals regime, REACH, deadlines have been delayed because businesses cannot keep up with the administrative requirements. That belies a lack of engagement with business at a really fundamental level and lack of understanding of what the impacts will be. Where would I advise businesses to go on Windsor? I do not know. I would probably say to Lisa Claire—she is about as insightful as you can get.

**Lord Empey:** Dr Birnie, where would you advise businesses to go to discover the regulatory rules that apply to their specific sector?

**Dr Esmond Birnie:** There is no obvious or easy answer to what is a very practical and necessary question. I would suggest, with credit to UK in a Changing Europe, that the tracker is certainly a useful start. To the extent that the special goods body and the Office for the Internal Market start operating and their agendas are in the public domain, that might give you some clue. Finally, although it is hardly a very user-friendly source, the retained EU law Act might indicate where the problems are occurring, but it is not the easiest thing to disentangle and digest.

**Lord Empey:** Dr Whitten, what is your formula for the solution?

**Dr Lisa Claire Whitten:** I am not sure there is one solution, and that is part of the problem. Advising businesses on where to go depends on the type of business, their location, and the nature of the trade they want to participate in. That, in itself, underlines the issue. If it is a business operating in SPS goods which wants to move them within the UK, you could send them to the UK Government's Northern Ireland retail movement scheme and the UK internal market scheme. If it is a goods-related business that wants to export across the EU and the UK, it will

need to go elsewhere for additional input. There are also advice services in InterTrade Ireland and Invest NI, where they could go.

The more fundamental challenge in the UK system is that even the examples that have been mentioned around a retained EU law dashboard are a good demonstration of the scale of the challenge. I suggest that part of the issue has been that the whole process of dealing with regulatory divergence comes back to a point previously made: it has been reactive rather than strategic. To date, the UK approach is piecemeal and ad hoc, particularly in how it is being dealt with from a Northern Ireland perspective. There is not even an official comprehensive record of what law is applicable under the protocol and framework to NI, because that is not a service that legislation.gov.uk provides, at least not at present. Even in that one specific area, there is a lack of monitoring, and therefore a lack of data available for stakeholders.

At the same time, to close, you can flip the negative and suggest that we are at a point now when we have relative legal certainty on the arrangements and the wider UK-EU relationship, so now is the time to develop the strategy and take forward monitoring as changes come in, through the Retained EU Law (Revocation and Reform) Act, for example. Now is the moment to address the issue so that it does not get worse, and there is a possibility of achieving that.

**Q8 Lord Godson:** Obviously, there is a lot of concern in Northern Ireland about regulatory divergence. First, I would like to ask all the witnesses what their view is about the realistic prospect of regulatory dealignment creating significant barriers to trade between NI and GB. Secondly, following on from what Mr Reland described—I do not want to put words into his mouth—as a degree of underdevelopment in policy in some of the devolved institutions, or the lack of minimum resources for that, what role might Whitehall play ad interim in this context in making good that shortfall for the collective good of the entirety of the United Kingdom? These are questions for all three panellists.

**Joël Reland:** On the first question about barriers to trade stemming from GB-NI divergence, I am really repeating what I said before. I do not think that, overall, they are likely to be overwhelming and too deeply damaging to GB-NI trade. However, there could be quite significant sector-specific impacts. In the most acute cases, the sectors could be quite critical—medical devices and so forth—where there is a serious dependency on GB in NI, so if there is disruption it could be quite concerning. It is about the targeted elements rather than the broad picture.

What role could Whitehall play in helping the devolveds? It is a very good question. This stretches slightly beyond my research base, but I think that, at a fundamental level, there has to be more listening to the needs of those Governments. Westminster has taken a very centralised approach. The management of a lot of funds that used to come from the EU development bank, structural funds and so forth, has come to Westminster, which now decides to what extent they are passed around the country. A more collaborative and co-operative engagement with the

devolved Governments would be the key first step to hear solutions that could be on the table. One caveat is that there is clear political friction between especially Scotland and Westminster. One would assume that, if the Northern Ireland Assembly came back, Westminster would have a greater vested interest in making it work, so you would hope that the starting point would be more constructive in that case.

**Dr Lisa Claire Whitten:** I agree with everything that has just been said and would wish to add regarding the GB to NI point, and reiterating earlier reflections, that one of the beneficial aspects of the Windsor Framework is that there are now reinforced structures to identify, at least in theory, and deal with issues before they come to be implemented and have a negative effect. That is positive, particularly in view of the sense that the regulatory impacts GB to NI are more likely to be on specific sectors in specific areas, and therefore could be candidates for finding derogations, amendments or fixes to address those specific issues. That is an optimistic reading, but I suggest that we are in a much better place in regards to problem solving approaches going forward as issues of regulatory divergence arise on the GB-NI axis.

On help from Whitehall, I would highlight that, at present, there is a distinct lack of co-ordination between the different committees that play a role in the general policymaking area and across the board dealing with EU and UK relationships. The new provisions around intergovernmental relations and the new system for standing committees operate largely separately from, for example, the trade and co-operation architecture, which also operates separately from the withdrawal agreement architecture and that which is specifically related to the protocol/Windsor Framework. From a central Whitehall and Westminster perspective, an initiative to join up what is already operating would be very beneficial.

**Dr Esmond Birnie:** I do not have much to add to what has been said by the other two witnesses. With respect to the question of divergence potentially being a threat to trade, in the earlier part of my comments this afternoon I indicated that I thought that was a real possibility. Of course, we are looking at the future, which is inherently uncertain. I agree with the point made by other witnesses about sector-specific areas, but I suppose a threat is most likely to an industry in Northern Ireland in a sector that is trying to sell some of its output to the European Union market but to a large degree is dependent on components, raw materials and so forth coming in from Great Britain. That sort of business will be hit and caught betwixt two stools if a gap opens up between GB and EU regulations.

I do not have much to add about the interaction between Whitehall and the devolved Administrations. I think there is an inherent problem across the board with respect to devolution. The devolved Administrations have an aspiration to do more and more complex things, and then the issue of regulatory divergence is added on top of that. The devolved Administrations, both on the political side and civil servant side, have limited bandwidth. Joël made the point very well with respect to the

limited capacity in Wales in research knowledge on genetic crops. That is just one case study among many. This will be a growing problem and I do not have an obvious solution to it.

**The Chair:** Thank you very much indeed, all three of you. That has given us a huge amount to think about and we are very grateful to you all. It is very good to see Lisa Claire Whitten and Esmond Birnie again, and good to see Joël Reland for the first time—I hope not the last time. Thank you very much indeed for appearing before us. With that, I bring this formal session to an end.