

**EUROPEAN AFFAIRS SUB-COMMITTEE ON
THE PROTOCOL ON IRELAND/NORTHERN IRELAND**

**INQUIRY INTO THE WINDSOR FRAMEWORK: VIRTUAL SEMINAR ON THE
DEMOCRATIC DEFICIT IN RELATION TO THE PROTOCOL ON
IRELAND/NORTHERN IRELAND, WEDNESDAY 1 MARCH 2023**

NOTE OF DISCUSSION

1. At its meeting on Wednesday 1 March, the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland held a virtual seminar on the democratic deficit in relation to the Protocol on Ireland/Northern Ireland. The seminar included discussion of the Windsor Framework announced by the UK and EU on 27 February, including its proposals for a 'Stormont Brake' and mechanisms to enhance engagement with Northern Ireland stakeholders.
2. The participants in the seminar were as follows:
 - Stuart Anderson, Head of Public Affairs, Northern Ireland Chamber of Commerce/Northern Ireland Business Brexit Working Group
 - Professor Catherine Barnard, Professor of European & Employment Law University of Cambridge
 - Professor Vernon Bogdanor, Research Professor at the Centre for British Politics and Government, King's College London
 - Dr Maire Braniff, Senior Lecturer, Ulster University
 - Roderick Crawford, Senior Research Fellow, Policy Exchange
 - Professor Federico Fabbrini, Principal, Brexit Institute & Director, Law Research Centre, Dublin City University (DCU)
 - Dr Graham Gudgin, Chief Economic Adviser at Policy Exchange; and Honorary Research Associate, Centre for Business Research, University of Cambridge
 - Mary Madden, former Northern Ireland Office official
 - Dr Sylvia de Mars, Senior Lecturer in Law, Newcastle University
 - Professor Duncan Morrow, Lecturer in Politics, Ulster University
 - Dr Mary C Murphy, Senior Lecturer in Politics, University College Cork
 - Professor Rory O'Connell, Research Director for Law, Ulster University
 - Professor David Phinnemore, Professor of European Politics, Queen's University Belfast
 - Thomas Sharpe KC, Barrister, One Essex Court
 - Professor Peter Shirlow, Director, Institute of Irish Studies, University of Liverpool
 - Dr Anthony Soares, Director, Centre for Cross Border Studies
 - Peter Summerton, Managing Director, McCulla Transport
3. A note of the discussion follows.

Lord Jay of Ewelme: What is your initial assessment of the Windsor Framework and to what extent will it resolve the democratic deficit under the Protocol on Ireland/Northern Ireland?

Professor Federico Fabbrini: The Windsor Framework is a very positive development in terms of rebuilding trust between the UK and EU and in de-mining some of the issues surrounding the Protocol. However, I do not believe there was a democratic deficit in the Protocol in the first place, and the EU never conceded that there was one. The technical changes are politically significant but do not fundamentally overhaul the structure and content of the Protocol from a legal perspective. The 'Stormont Brake' is the main novelty but has been over-emphasised in the journalistic responses. It is a very specific mechanism that will only apply to new EU legislation and is subject to a number of substantive and procedural provisions, most importantly the fact that the Stormont Executive must be in place.

Thomas Sharpe KC: Of course there has been a democratic deficit and on one level it will remain. The status quo is what was agreed in the Protocol and enshrined in the Trade and Cooperation Agreement. What is unique about the Windsor Framework is that it allows a carve-out for a Member State from the application of new EU laws. It provides the means by which new laws can be opposed. It is an extraordinary development in the context of the development of EU laws and could set a precedent for Catalonia or parts of Denmark. Due credit must go to the people who negotiated this. It is extraordinary but also limited because the circumstances must be quite extreme, but that is to be expected given how much of an innovation it is in terms of the development and application of EU law. Questions remain over the role of the CJEU and how arbitration will work.

Dr Anthony Soares: I am advocating for improved co-operation, either on a North-South or East-West basis. I would stress that the Windsor Framework represents a remarkable achievement. That we have got to this point is something to be welcomed and it is hoped that it represents a more positive relationship between the UK and EU going forward. On the democratic deficit, what the UK Government and Northern Ireland Executive must do is to build those relationships with Brussels to look at EU law coming down the track and avoid crisis points. The 'Stormont Brake' is a remarkable thing but we must look at how this new provision will impact North-South relations, economically and in terms of the peace process. We must also look at legislation coming from Westminster and its impact on North-South and East-West relations.

Professor David Phinnemore: A lot of the issues that have been flagged over the last few years have been addressed, which is to the credit of the negotiators. On the 'Stormont Brake' there has been a significant shift in the engagement with Northern Ireland. Under the current arrangements, changes or replacements to EU law apply automatically to Northern Ireland. Now they are subject to the 'Stormont Brake', which is significant. Another issue is the substructure of the governance arrangements for the Protocol. There has been a significant expansion of the opportunities for stakeholders to engage more formally through the Working Group and the Specialised Committee. This will help to recognise the issues that continuing divergence throws up, so that concerns can be fed into the development of legislation before

the decisions are taken. That means contestation can be kept to a minimum and there would be fewer instances in which the Assembly would want to trigger the 'Stormont Brake'.

Lord Thomas of Gresford: I have been concerned as to how Northern Ireland could have a voice in European Directives before they are made and I notice that paragraph 69 of the Government's Command Paper focuses on stakeholder engagement. How can the Northern Ireland Executive, its elected politicians and officials, be included in these new structures?

Roderick Crawford: The democratic deficit is a matter for British constitutional traditions and not the EU and we are entitled to make our own decisions on that. It has taken months for people to understand the details of the Protocol and we are only 48 hours in so there are no experts on the Windsor Framework yet. The biggest impact on the democratic deficit is that Northern Ireland consumers will now operate within the UK internal market. The pushing back of EU law has pushed back the experience of the democratic deficit, even with measures such as the 'Stormont Brake'.

Professor Vernon Bogdanor: There is a democratic deficit because Northern Ireland is subject to taxation and laws without representation, which was a complaint made by the American colonists in the 18th century. Having a say is not the same as being represented. The only other example I can think of a border between two parts of one state is between Denmark and the Faroe Islands. Also, Northern Ireland is subject to the Court of another jurisdiction and it is more difficult to export to Northern Ireland than it is to another part of the United Kingdom. The referendum asked if the United Kingdom should leave the EU, not just Great Britain. Logically, you cannot be a member of both the UK and EU internal markets unless the rules are exactly the same, in which case you can ask what is the point of leaving the EU Single Market. The democratic deficit is inherent in the Protocol, which is a breach of principle in terms of our constitutional practice.

Baroness Ritchie of Downpatrick: The Government says that the 'Stormont Brake' will not be available for 'trivial reasons', there must be something 'significantly different' in the content or scope of new EU legislations and MLAs must be able to demonstrate a significant impact on everyday life. How will this mechanism work in practice in terms of the processes to be followed and the tests to be met?

Professor Catherine Barnard: There are four cumulative criteria, making the 'Stormont Brake' something of a nuclear option, to be threatened but not used. Something similar is in the Norway agreement. In addition to the fourth criteria that Baroness Ritchie outlined, the EU emphasise that it must be used in the most extreme circumstances and as a last resort, as well as being triggered by 30 MLAs. That suggests it will very rarely be used. However, more positively there is much emphasis on consultation which may make it less necessary. Remarkably, there is little in the Command Paper about the CJEU and much more emphasis on it in the Commission's statements. That is because not much has changed. What the EU has seemed to commit to is not rushing to infringement proceedings. I think it probably was provocative when the UK unilaterally extended the grace periods that the EU immediately

resorted to starting infringement proceedings; but the EU has now withdrawn the remaining infringement proceedings. Despite all the talk about the CJEU, it is a backstop and has not actually had a say on anything to do with the Protocol. On Lord Thomas's point, I can see something positive coming out of this, which is engagement through UK-EU structures, meaning the UK will have to engage with new EU rules. This will be a way that the UK will be forced to keep an eye on new developments in EU law concerning goods.

Dr Graham Gudgin: The normal definition of a democratic deficit is that laws are imposed, on which Northern Ireland electors have had no say. Consultation is neither here nor there. It was possible to petition medieval monarchies and no one would argue those were democracies. In the new Framework, all the existing EU Regulations still apply and EU law still applies to trade, though it has been made simpler through removals and derogations. It is difficult to see where the UK gets its figure of 1700 pages of EU law when lorries still require certificates and the EU says that it can remove derogations if it is not satisfied with the UK's safeguards. Having said that, the practical experience for everyday traders has been much improved. Customs declarations are still there but will be filled in by the Trader Support Scheme. That is much improved for the traders but as the customs rules are still there it means that the democratic deficit remains.

Lord Hain: I think there definitely is a democratic deficit. My understanding is that Norway is quite satisfied with its process of giving input into new EU laws and it is analogous to Northern Ireland in being outside the EU but inside the Single Market. On the pre-legislative consultation, it could mean that Northern Ireland politicians, officials and stakeholders could be consulted. Isn't there an arbitration system in the Framework involving UK judges too, before escalating to the CJEU? I raised in the House of Lords yesterday that some are saying that they want nothing to do with any EU law in Northern Ireland. Aren't they effectively saying that they do not want Northern Ireland to be in the Single Market?

Peter Summerton: I am involved in the mechanics of how trade works and what we can see from the Framework is that Northern Ireland does remain in a free movement of goods area with the EU but not with the UK. If you look at the criteria for the Trader Support Scheme and the maintenance of customs declarations, inspections, surveillance and new labelling requirements, Northern Ireland clearly has a disadvantage with its main trading partner, the rest of the UK. That is just the green lane and it is only for finished products. There is still friction and supply chains will re-align. Why would you bring frozen foods into Great Britain to supply to Northern Ireland with the new requirements? You would move them in via the Republic of Ireland. And that was previously a more expensive supply chain, otherwise it would have been used more extensively before.

Stuart Anderson: The starting point has to be the status quo and are we in a better position under the Windsor Framework? The broad position of our members is that we are in a better position. If we listen to the retailers, they are cautiously optimistic and this response should be encouraged. On the discussion around EU law, I would ask the same question as Lord Hain and also ask what the disapplication of EU law would mean for the Single Electricity Market. My

members think we are in a better position with the green lane and the red lane. This is a Framework and legal changes are required so we have not seen the detail of how this will work operationally. We must be careful not to give strong views on technical details when the operational detail is absent. We have limited capacity to manage these changes and we should upskill and resource the business community to adapt to them.

Professor David Phinnemore: The UK should include Northern Ireland officials as part of its delegations to the structures. It is also worth thinking through the structures for monitoring what comes through from the EU. We need effective mechanisms for input from Northern Ireland civil servants and politicians and for taking that forward as part of the position the UK takes in its engagement with the EU. There is a Commission Statement as part of the package which speaks of enhanced engagement with Northern Ireland stakeholders on EU legislation and its impact. What the UK says in the Joint Consultative Working Group about the impact on Northern Ireland must be communicated to the Member States. What is also important is that the Special Body on Goods will look not just at divergence from EU law but also how new developments in UK law impact on the operation of the Protocol. Really interesting structures are being created to improve the dialogue around the impact of new proposals on Northern Ireland and opportunities for Northern Ireland to feed into that dialogue.

Lord Jay of Ewelme: You spoke of the potential burden of some of the Framework's proposals on the Northern Ireland Civil Service. Does this mean that reform or more resources for the NICS is needed?

Dr Anthony Soares: The structures do include Northern Ireland stakeholders and the UK, but it is incumbent the UK side to maximise Northern Ireland input as part of its own engagement. I would hope that consultation today has gone some way beyond medieval times and it is absolutely crucial in determining when to use the 'Stormont Brake'. It is important to look at how that consultation is done, who it consults and how that evidence is used, so that not just a narrow range of people are consulted. I think that this Framework is testament to where consultation has brought us. I think the Northern Ireland Business Brexit Working Group is an absolute testament to the work that consultation can do and has to be commended. Consultation has to be both North-South and East-West and not just one of those poles. Resourcing is key. Consultation has taken a lot of our time and resources and it takes away from what organisations are actually funded to do. The duplication of consultation, meeting both sides separately, also takes resources. It is very rare that we have been able to be involved in a consultation process with both sides present. Finally, I absolutely agree on Lord Jay's point. The Northern Ireland Assembly and Civil Service all need more resources and expertise, otherwise the Assembly's attention will be diverted from the other matters it needs to attend to.

Professor Peter Shirlow: One issue on stakeholder consultation has been the lack of consultation on what this all means for the Northern Ireland economy and how to operate in two different customs areas. Without an Assembly, there is no way of planning a post-Windsor Framework economy, in terms of either Belfast overheating or Derry/Londonderry being

nowhere near Belfast in terms of productivity. Without political leadership, due to the contentious nature of the constitutional issues, we have not been planning for this. There have been a lot of vox pops in the Sandy Row and deprived loyalist working-class areas but most Protestants do not live in deprived working-class communities and there has been a much wider range of views coming out in surveys. Over 80% of unionists overall agreed that derogations and mitigations on medicines produced good outcomes. The media is not highlighting this evidence that the unionist community is perhaps not as oppositional as is sometimes portrayed. At a societal level, it is clear that the heat on social media is in the 'No' camp because there is more passion associated with that sort of politics. It is important that the UK sells this agreement and its potential benefits. We don't have the energy we had at the same time of the Belfast/Good Friday and a lot of the big issues about the future, economic development and the next generation of the peace process are not being discussed.

Mary Madden: I agree with Peter Shirlow's comments. At the press conference, I was delighted to hear of all the advancements announced by the Prime Minister, especially in relation to medicines. This issue impacted right across the community. I disagree with Federico Fabbrini that there is no democratic deficit. In Northern Ireland we very much feel that there is one. The Stormont Brake is a unique way for the EU to address this and it is to be welcomed, although the devil is in the detail. We need clarity on the red and green lanes and how the Stormont Brake will work in practice. I struggle to understand how this is going to work. We are a very divided community and it needs a lot of work to get consensus. In order for the Stormont Brake to be seen as addressing the democratic deficit, pre-consultation and structures for that will assist in getting a better understanding of views on EU laws coming into force. These are important preliminary steps. There is a real resource issue around machinery of government. I am not sure the necessary expertise exists within the current civil service in Northern Ireland, so they would need to be geared up and schooled up. That means working very closely with colleagues in the UK Government to get those skills in place so we don't put too much energy and resource into one issue to the detriment of other key issues for citizens such as healthcare and education. The reaction to the Framework in civic unionism is much more positive than some voxpops and social media would suggest. The Government, the Prime Minister and others should be pushing out strong communication as to what the benefits are and where more work is needed to make it work more seamlessly. Politicians are looking at their electorate and their communities. We need to give our communities the strength and understanding of what is proposed so they can inform and support our politicians who we require to give us the political leadership. We would not have got devolution of policing without community representatives saying they could work with it. We need public opinion behind the deal so that politicians can come on board.

Professor Federico Fabbrini: Coming back to the democratic deficit, I appreciate it raises passions and emotions but we need to create conceptual clarity so as not to have unrealistic expectations. I respectfully dissent from those arguing there is a democratic deficit. There is no such thing for three reasons. First, EU internal market legislation applying to Northern Ireland by virtue of the Protocol was approved when the UK was a Member State, so Northern Ireland had a say as the UK was represented in the Council of Ministers and the European Parliament

at the time of adoption. Secondly, the Protocol and the Withdrawal Agreement, which foresee the application of some EU laws in Northern Ireland, were democratically approved by the UK Parliament, in which Northern Ireland is represented. Thirdly, Article 18 of the Protocol itself sets out a consent mechanism whereby democratically elected representatives of the Northern Ireland Assembly vote every four or eight years on whether to retain internal market laws. For these reasons, it is improper to argue that the Protocol had any democratic deficit, and arguments to that end usually conceal something different, which is the desire to give Northern Ireland (or the UK) a right to veto the application of EU law, which is something no other country (much less sub-national government) has in the EU. With that said, the Stormont Brake enhances the democratic voice of Northern Ireland, with a retail instrument beyond the whole instrument provided by Article 18 Protocol. The Stormont Brake only addresses this issue in connection to new EU laws applying to Northern Ireland: it is not a retroactive power. It is not a veto power for the past, it only applies to the future. Instances when the EU will fundamentally revise its internal market rules are pretty minimal. We should not raise expectations. It does something helpful by complementing Article 18 with a tailor-made way for Northern Ireland to object to future internal market laws. In effect, the Article 18 mechanism is a wholesale mechanism whereas the Stormont Brake is a retail mechanism.

Thomas Sharpe KC: Recollections may differ in regard to parliamentary approval of EU Regulations when the UK was a Member State. No EU Regulation has been approved by the UK Parliament. Rather, the Council of Ministers has a role in the way laws are made in the EU. The Protocol ought in theory to work smoothly. Many say it is a wonderful sweet spot in terms of access to the UK and EU markets and should be a prosperous zone for Northern Ireland. It has done this to some extent but not to the extent promised. Businesses are concerned about the extra burdens of labelling. The Committee should hear from Archie Norman and Lord Wolfson about practical issues regarding labelling. We have heard more than once that the Stormont Brake is a last resort. Of course this is the case, and the Commission has emphasised this. There is no surprise there, nor in the fact that the UK does not emphasise this. It is not the case that the qualifications in the document mean that it can never be invoked lawfully. All it says is that the UK must have a detailed explanation of its position, and establish that there has been a significant impact on the status quo and on everyday life that is likely to persist. This is a description of a large number of EU Regulations and Directives. Some are trivial but some go to the heart of trade. I find it hard to believe that Northern Ireland and the UK more generally could be sufficiently powerful and influential to persuade the Commission not to advance a Regulation or a Directive. This creates a carve out for Northern Ireland due to lobbying from stakeholders. This doesn't happen in Norway where EU laws are faxed and implemented there. The Stormont Brake could easily be invoked more frequently than we envisage, so we need to understand how it will be dealt with by arbitration, and the role that the CJEU will play. It is unclear if it will play any role: on its face there is no obvious difference between the arbitration process here and in the Withdrawal Agreement.¹

¹ After the meeting, Mr Sharpe provided the following additional written comments: "One point which the Committee might explore with the government is the role of the ECJ in the event of a dispute about the Brake."

Lord Godson: I declare my interest as Director of Policy Exchange. At this inflection point, where does the Windsor Agreement leave the all-island economy.

Dr Graham Gudgin: I can respond as an economist. In reality, Belfast is not a particularly prosperous city by UK or European standards. What are we to expect economically from the new arrangements? Northern Ireland's access to export markets and import sources is a little worse than when we were EU members. Then it had customs-free access to UK and EU markets and unimpeded imports from both. In future it will have customs free access to the EU but imports from the UK will still be somewhat constrained. The impact will not be as costly but it is still there. Northern Ireland will be a little worse off than when we were in the EU. It will be better off in the sense of advantage over UK producers who do face customs costs when trading into the EU. If we look at the data, there has been very little impact on total exports from the UK to the EU and it is hard to imagine UK firms moving to Northern Ireland. Also, Northern Ireland firms continue to be subject to EU Regulations on production. Northern Ireland firms may find themselves at a competitive disadvantage compared to British counterparts, for instance in relation to GM products or manufacturing. There are pros and cons and it is hard to imagine many firms will choose to move location as a result of this. It is a bit like the Belfast/Good Friday Agreement, which was greeted by expectations that the Northern Ireland economy would improve, when in fact performance relative to GDP worsened over the next decade. This was because the Troubles had a smaller economic impact than many realised, and partly because of the economic impact of subsidies to Northern Ireland to compensate for the difficulties it faced. These new arrangements will make no noticeable difference to the Northern Ireland economy, which is not doing too badly in the UK context.

Roderick Crawford: The democratic deficit becomes more important the more salient the issue is, for instance taxation. The key issue will be how smoothly the UK and the EU make it work. It is early days, but there is a certain Heath Robinson element to the workings of this. If, despite this, the UK and the EU can deliver their promises regarding Northern Ireland's seamless participation in the UK internal market for goods and depoliticise it, the issues around the democratic deficit, which are difficult to master, will become less important on the ground. You can tackle the democratic deficit by tackling the salience of the issues that make it an issue.

One participant said today that the ECJ would be able to opine on matters of EU law going to 'independent arbitration'. Under Art 174 of the Withdrawal Agreement disputes are resolved by a special arbitration panel, with EU law points capable of being referred to the ECJ. I can see no express reference linking Art 174 to the revised Protocol and Art 174 is part of a dispute resolution provision relating to 'this' (scil. The Withdrawal Agreement). On its face, therefore, the ECJ has no role and that is consistent with the Command Paper, which refers to international law, whatever that may be. Now, this may not matter as the sort of issue likely to go to the panel might simply be whether the conditions in new Article 13(3a) are satisfied but I can easily see a situation where there may be doubts about the scope of a proposed EU regulation, directive or even ECJ judgment. If the arbitration was to be conducted under 'international law' it would be well advised to seek expert evidence of the EU impact."

Professor Duncan Morrow: I want to go back to issues about the Stormont Brake. Integrating this into the Petition of Concern has included it in the most contentious element of the Assembly's rules, suggesting that the veto power of the Assembly is being enhanced when this has previously been a significant and contentious issue for both sides. Anything that strengthens the Petition of Concern without explaining what it looks like will change the constitutional powers of the Northern Ireland Assembly. In the new version of Petition of Concern under the Stormont Brake, it will be referred for arbitration. The Government may find itself arbitrating between a majority and a minority point of view, and choosing between two diametrically opposed perspectives in the Assembly, so involving them in the local politics, what democracy means in Northern Ireland, and what the democratic deficit looks like. If the Government backs a minority Petition of Concern against a majority view in the Assembly, this could have complex and unintended consequences in the Assembly. This raises a set of complexities we haven't thought through, including what we mean by democracy. We need more detail on what pre-consultation will look like for the Assembly. If we rely entirely on this mechanism to meet the democratic deficit, it will be a nuclear option which doesn't resolve the issue but rather pushes it into a new realm of complexity.

Professor Vernon Bogdanor: I would like to respond to Lord Hain's question regarding Norway's experience. Norway has found the arrangement satisfactory but second best. The Norwegian elite wanted the country to join the EU, but membership was twice defeated in referendums. As a second best Norway stayed in the Single Market, which the UK did not do because it would have meant outsourcing regulation of the financial services industry to Brussels. Students in Oxford, the women's suffrage movement and the leaders of the American Revolution in the 18th century all wanted more than consultation: they wanted representation. We should not exaggerate the benefits of consultation. Norway is regularly consulted by the EU on internal market rules. But there are few, if any, examples of Norwegian influence. For this reason, Norway is known as a fax democracy, since the rules are faxed to her for comments. Whether Northern Ireland should be in the EU Single Market is a political question. It cannot be in both the UK internal market and the EU Single Market unless their rules align. If they do, that raises the question of what was the point of leaving the EU. It also undermines, for good or ill, a basic point of the British constitution, because the referendum asked if the UK, not Great Britain, should leave the EU. The Prime Minister has done the best he can within that constitutional framework.

Dr Mary C Murphy said that the all-island economy is a work in progress, and is not heavily established or particularly sophisticated. In Cork, it is not heavily integrated and remains under-developed, but it is more developed in the Dublin-Belfast corridor and border areas, based on complex cross-border supply chains. The Command Paper talks about the possibility of future North-South divergence. That may become problematic practically, symbolically, politically and economically. This needs to be monitored quite closely. On implementation of the Framework, the agreement is based on a compromise. It is also very complex and cumbersome in places. There are areas that are yet to be agreed. It speaks of new arrangements for new and existing bodies, monitoring and enhanced market surveillance. There is much still to be agreed and established. I agree that the design of processes and institutions should be sensitive to

Northern Ireland's particular needs. In the 25th year of the Belfast/Good Friday Agreement, reflecting back on those negotiations, inclusiveness was one of the key principles to its establishment. Inclusiveness makes the process of implementation all the more legitimate. You need to bring key civic society actors into that process. The issue of resources is absolutely critical here. The new roles envisaged are onerous for civic society, the civil service and politicians. Northern Ireland does not have an established culture of scrutiny of EU issues. There is a need for significant upskilling to help those key actors contribute effectively. Northern Ireland remains a divided society and a post-conflict society in transition. This requires the high-level attention of the British Government. I compliment the Prime Minister for his sensitive handling of the issue. On communication, I agree with Peter Shirlow that significant work needs to be done about communicating the terms of the agreement to Northern Ireland society as a whole, in order to create a critical mass of understanding.

Baroness Ritchie of Downpatrick: I agree with Mary C Murphy regarding the importance of inclusion and respect for political difference ahead of the agreement of the Good Friday Agreement. The political actors need to get back to that situation. Both the UK and Irish Governments need to be directly involved with politicians on both a North-South and East-West dimension. There is a need to copper-fasten this dialogue, which is difficult when the institutions aren't functioning. In terms of cumbersome arrangements, how will the Stormont Brake reflect itself in legislation, or is it too early to say?

Dr Sylvia de Mars: I want to speak about the role of CJEU. I have been puzzling over it for the last 12-24 hours. All parties are trying to downplay its role and are not addressing how it interacts with the Stormont Brake. What if there is a disagreement over whether the conditions for triggering the Stormont Brake have been met? The EU may say that the conditions haven't been met, which then goes to arbitration under the Withdrawal Agreement. Will that arbitration involve the CJEU? I can imagine situations where it would or would not be involved. To qualify for the Brake, the amending or replacing EU law acts in question have to be significantly different and shown to be having an impact on everyday life. The arbitration panel would have to address the evidence the UK was presented with in light of those conditions. Depending on the nature of the changing EU law, the evidence may rely on its content. In one example, if the law was changed in ways that were not entirely clear, there may be a question of the interpretation of EU law which would have to go to the CJEU. But if the change was very straight-forward, that wouldn't be required. If the use of the Brake goes to arbitration, I don't see how that would not regularly involve the CJEU in interpreting EU law. That is being downplayed because it doesn't fit with the goals of the negotiation to minimise the role of the CJEU. I am with the cautiously optimistic side of the room. The Framework is not perfect and there is still a democratic deficit, but given the constraints of EU law and the situation Northern Ireland finds itself in, it represents progress and politicians will have to work hard not to escalate issues in the new Framework.

Professor Peter Shirlow: I would like to reply to Mary C Murphy regarding Northern Ireland being a post-conflict society. Concerns over the threat of violence and a return to a hard border had an impact on the Protocol talks. But Northern Ireland is a more peaceful

society, as a comparison of statistics on seizing of explosives and shooting incidents between the 1970s and now demonstrates. On issues like trade, shopping, consumption and welfare, there is not a massive difference between the views of unionists and nationalists. There is now much more integration in housing and schools, and we don't factor in the 90% reduction in violence as a result of the peace process. Northern Ireland is far removed from the worst times. We need to acknowledge the positive developments that have taken place. If we forget that, we give power to those who threaten violence. We need to recognise how far our society has come. The reaction to the recent shooting of a police officer in Omagh shows societal opposition to such acts of violence.

Dr Graham Gudgin asked for Mary C Murphy's reaction to the Prime Minister's comment in his press conference that there is no such thing as an all-island economy, but rather two distinct economies which he hoped would collaborate.

Dr Mary C Murphy: My previous comments were a response to a question from the Committee. In 1992, Sir George Quigley talked about a regional space and an economic zone. An economic union is not the same thing as a political union.

Dr Anthony Soares: We need to remember that Northern Ireland is only in part of the EU Single Market. It is not in the Single Market for services, and this has severe and crucial implications for North-South and East-West cooperation. We are starting to see the practical effects of this. For instance, cross-border insurance is now an extremely complicated issue. Article 11 of the Protocol talks about the UK and the EU ensuring maintenance of the necessary conditions for North-South cooperation. This is very difficult to do when there is potential for further divergence, as paragraph 55 of the Command Paper makes clear. The UK is within its rights to diverge in terms of Brexit, but as it does so it needs to consider the implications when it has committed to maintaining the necessary conditions for North-South cooperation. It is about protecting the Belfast/Good Friday Agreement in all its parts and the totality of relationships across these islands. This has become incredibly difficult since 2016.²

Baroness O'Loan: Is there anything positive to say about how we can take the implementation process forward? There is no sitting Assembly. If we consider the frailty of the democratic institutions in Northern Ireland, is there anything that can be done in setting up bodies and processes to facilitate the end game of the Belfast/Good Friday Agreement, which is peace?

Mary Madden: I am not disagreeing with Peter Shirlow, but the absence of violence is not the same as peace and we need to keep working on that. There is a lot to welcome in the Windsor Framework but the devil is in the detail. It is crucial that the UK Government doesn't take its eye off the ball. It needs to get all the detail thrashed out in consultation with people in

² Subsequent to the meeting, Dr Soares drew attention to the Centre for Cross Border Studies' quarterly reports on North-South and East-West cooperation. See [2021 Quarterly Surveys on the conditions for North-South and East-West cooperation \(crossborder.ie\)](#) and [Briefing Papers - The Centre for Cross Border Studies](#)

Northern Ireland and the Commission. The communication from the Government is critical to the success of getting this to where we want it to be. As George Mitchell said, we have an agreement, but the work begins.

Professor David Phinnemore: One of the assumptions of the research project being undertaken by Queen's University Belfast is that when looking at legitimacy, we need to think about influence on decisions and the effect of decisions. There is also throughput legitimacy. The crucial requirements are clarity about what is happening, the need for information to be available about Northern Ireland, and some voice in the process about what is actually happening. There has been a perception that what is happening under the Protocol is done to Northern Ireland not with Northern Ireland. That engagement can take a variety of forms, including the democratic consent mechanism, the Stormont Brake, engagement with civil servants, consultation, the role of MLAs, and stakeholder engagement. We need clear transparency about these arrangements and clear evidence of Northern Ireland participation in these processes. The outcome and the process may not be perfect, but at the moment the feeling is that Northern Ireland is not listened to. Under the Windsor Framework, it is crucial that Northern Ireland is listened to. We need clarity on how those processes will work. Enhancing the legitimacy of the agreement requires engagement with Northern Ireland throughout, not at the end of a UK-EU process.

Lord Thomas of Gresford: What is needed is more transparency. The Joint Consultative Working Group should include representatives of the Northern Ireland Executive and civil service, but this is not laid down in a transparent way. It would be preferable for the voice of Northern Ireland to be heard more clearly and openly than under these arrangements.

Professor Federico Fabbrini: I have three concluding points. First, the Stormont Brake creates huge pressure for the Northern Ireland Executive to be restored because the mechanism can only be applied if the First Minister and deputy First Minister are in place. This creates a huge imperative for them to be in place. Secondly, it is very interesting that this agreement will be operationalised by a simple decision of the Joint Committee, which is entitled under Article 164 of the Withdrawal Agreement to make changes to the Withdrawal Agreement itself. As such, we are not really looking at a new treaty but rather internal revisions. That process is simpler, although it will require UK and EU implementing measures. Finally, the DCU Brexit Institute has already produced some legal analysis of the Windsor Framework and I commend that work to the Committee.³

Dr Graham Gudgin: One thing we haven't discussed is the role of the DUP in all of this. The EU was brought to the table because of the DUP veto over the Northern Ireland Assembly and the power-sharing institutions. The veto has become increasingly controversial, and it would have been interesting to hear about the continuing legitimacy of that veto.

³ See <https://dcubrexitinstitute.eu/blog/>

Lord Jay of Ewelme: Unfortunately we have run out of time to explore that now. We would welcome any follow-up written comments. Thank you all for your contributions. This discussion has shown that this is a highly complex agreement in which details really matter, and it may take some time to get under the surface of the agreement. The Committee will do that over the coming weeks and months. This is not the end, but the beginning of a highly complex process. We need continuing UK Government involvement in the process as opposed to the assumption they have now done the hard bit.