

Submissions from the Democratic Unionist Party (DUP) on the Windsor Framework instruments laid in August and September 2023 - Table of Contents

Submission 1: DUP on the Windsor Framework (Retail Movement Scheme)

Regulations 2023 ([SI 2023/896](#)), [p. 2](#)

- Response from Department for Environment, Food and Rural Affairs, p. 9

Submission 2: DUP on the [Draft](#) Windsor Framework (Enforcement etc.)

Regulations 2023, [p. 11](#)

Submission 3: DUP on the Windsor Framework (Plant Health) Regulations 2023

([SI 2023/957](#)), [p. 19](#)

Submission 4: The Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions)

Regulations 2023, ([SI 2023/959](#)), [p. 24](#)

Submission 1: DUP on the Windsor Framework (Retail Movement Scheme) Regulations 2023 (SI 2023/896)

We write to express serious concerns about the Windsor Framework (Retail Movement Scheme) Regulations 2023 which were laid on 8 August and partly come into effect on 1 September and fully from 1 October.

We understand that as the regulations were laid during recess that the Secondary Legislation Scrutiny Committee won't consider the regulations until after the House returns in September.

We set out our concerns on the basis of your terms of reference, making particular reference to grounds, 4 a, b, c and d.

(4) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

The Windsor Framework (Retail Movement Scheme) Regulations 2023 are of great political and indeed constitutional importance. We set out the bases for this not necessarily in the expectation that the Committee will seek to adjudicate on them but in order to demonstrate why these regulations are politically and legally important and likely to be of interest and concern to the House. In explaining the basis for the political importance of the provisions some of the arguments set out below are of direct relevance to the points we make further down under 4 (b) and 4 (c), referring you back to our answer to 4 (a) rather than simply repeating what has already been set out in 4 a.

In the first instance, while the Regulations give effect to the Windsor Framework, which is supposed to make provision for unfettered access between GB and NI, and thereby effect the full and proper integration of Northern Ireland in the UK single market, it is clear from the Regulations that that is not their effect. Traders operating according to the alternative arrangements to which the regulations open the door, are still required to have an export number and have to complete customs and SPS paperwork and go through a border control post where they will be subject to up to 10% identity checks. This is not unfettered access within the UK single market because if it was there would be no need for export numbers, no need for customs forms, no need for SPS forms, no need to apply to join the Retail Movement Scheme, just as is the case in moving goods from London to Cardiff, or Cardiff to Edinburgh today and just as was the case moving goods for the previous 200 years from London to Belfast.

In the second instance, these regulations enable those whose applications to join the Retail Movement Scheme are successful, and who comply with all its requirements, including 'Not for EU' labels, to access alternative border arrangements that are actually defined by Regulation (EU) 2023/1231. It is completely impossible to assess the Windsor Framework (Retail Movement Scheme) Regulations 2023 apart from Regulation (EU) 2023/1231 because their purpose is to serve as a means to a very particular end, that end being to enable traders to access the different set of border arrangements that are defined by Regulation (EU) 2023/1231. Assessing the effect of the Windsor Framework (Retail Movement Scheme) Regulations 2023 is thus only possible if one simultaneously assesses the effect of Regulation (EU) 2023/1231. Two critical consequences flow from the Windsor Framework (Retail Movement Scheme) Regulations 2023 giving Regulation (EU) 2023/1231 a felt, practical legislative effect.

First, while the border requirements defined by Regulation (EU) 2023/1231 are less demanding than the alternative EU border requirements, they are still affecting an international border, the terms for the crossing of which are set not by the UK but by the EU. The movement of goods from London to Belfast is thus quite unlike that encountered moving goods between London, Edinburgh or Cardiff, within the remaining UK internal market, or indeed that encountered when moving goods between London and Belfast from the Act of Union on 1 January 1801 until 31st December 2020.

Second, Regulation (EU) 2023/1231 which it is the purpose of the Windsor Framework (Retail Movement Scheme) Regulations 2023 to give full legislative effect (in the sense that one can only access the alternative border arrangement by first getting on the Retail Movement Scheme), makes it absolutely clear in Article 14 that the alternative border arrangements that are on offer, are on offer subject to the EU and the EU can withdraw them should it wish.¹ Thus, the basic default reality that it is the purpose of the Windsor Framework (Retail Movement Scheme) Regulations 2023 to affect is not the alternative border arrangements, which are provided at the EU's pleasure, but the fundamental right that they jealously guard and protect, to remove the alternative arrangement which means defaulting to the full manifestation of the international border against which they claim the right to divide the United Kingdom of Great Britain and Northern Ireland through the imposition of a full international customs and SPS border. In giving effect to this default protection of EU sovereignty to disrespect the territorial integrity of the United Kingdom and UK sovereignty, and without any kind of offsetting right with respect to the UK, the Windsor Framework (Retail Movement Scheme) Regulations 2023 formalise the United Kingdom's relation with the EU as that of a supplicant vassal state.

In as much as there was a sense of provisionality attending the initial manifestation of the Protocol and border in the sense that the controversy of what it created generated an expectation that it would be replaced, these regulations are of huge constitutional importance because they reveal that, despite months of UK Government talks and negotiations with the EU, ultimately, when it comes to the border, very little has changed. Anyone voting for these Regulations that supposedly represent our best efforts to secure Northern Ireland's place in the UK, will be voting for an arrangement that formally authenticates a foundational reality wherein Northern Ireland is cut off from the rest of the UK by a default full international border.

In the third instance, these regulations are particularly problematic because unlike most forms of legislation that don't have an impact until they formally come into effect, businesses have been busily restructuring in preparation for the regulations, first announced as the green lane in February, for some months and ASDA has already started to use 'Not for EU labels.' This means that, unusually, we can already see something of the effect of the regulations.

What we see is that many businesses have made it clear that the Retail Movement Scheme provisions are too complicated and too expensive for them to simply take over from the old very light touch STAMNI scheme that they replace,² such that supermarkets can continue to function on the basis of the old GB-NI supply chains that attended and defined what was the UK single market for goods until the end of 31 December 2020, and which helped give effect to UK economic nationality. In this context big supermarkets like Tesco's have been restructuring their supply chains to move as much as possible of what previously came from GB to NI so that after 1 October it comes from ROI to NI.

¹ See Article 14 of Regulation (EU) 2023/1231 in the Appendix.

² <https://www.daera-ni.gov.uk/publications/stamni-compliance-declaration>

This was brought home with particular clarity in the case of Tesco through a slide at a recent presentation to retailers. The heading was 'Packaged Food approach. **For products currently moving from GB to NI:**' Of this they said that under the Retail Movement Scheme it would be important to restructure to get as many of these goods as possible from ROI to avoid the Green Lane and Red Lane. Under the heading 'Ireland Supply Routes' the slide says:

- 'More Direct from the EU
- Move all common products from the ROI DC to NI stores
- Align some range with the ROI range'

This is not to suggest that there will be no use of the Green Lane but rather that, together with the Red Lane, the Green Lane as defined in the Windsor Framework (Retail Movement Scheme) Regulations 2023, is already driving trade diversion. The fact that one can already see that trade diversion is the straight-forward result of replacing the STAMNI Scheme with the Retail Movement Scheme provided for by these Windsor Framework (Retail Movement Scheme) Regulations 2023, even before it formally comes into effect, demonstrates that rather than fixing the problem with the Northern Ireland Protocol/Windsor Framework, these Windsor Framework Regulations have actually helped call it out and in terms that were always recognised as fatally problematic by the drafters of the Protocol/Windsor Framework, such that they justify derogation from it.

Article 16 of the Protocol, which is directly effective in UK law, and which many members of the House of Lords criticised the Government for not triggering ahead of introducing the Northern Ireland Protocol Bill, represents the mechanism to use if the Protocol is failing and failure is defined by Article 16 in the following terms:

'If the application of this Protocol leads to serious economic, societal or environmental difficulties that are liable to persist, **or to diversion of trade, the Union or the United Kingdom may unilaterally take appropriate safeguard measures.** Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Protocol.'

The interesting thing about the form of words employed here by the drafters is that the diversion of trade is recognised to be such a serious matter that even if it does not lead to 'serious economic, societal or environmental difficulties that are liable to persist', Article 16 can still be triggered just because it results in a diversion of trade. That is not at all surprising because trade flows that are definitive of a single market are definitive of the economic nationality that underpins the modern nation state (and are, as such, of an entirely different constitutional effect to trade flows between economies) and which could not be cut away without shaking the very foundations of the polity in question.

The trade diversionary implications of the Retail Movement Scheme, as evidenced through the Tesco's presentation, have had a clear impact on the haulage sector, which has experienced a significant reduction in goods travelling from GB to NI since the announcement of Windsor and the replacement of the STAMNI Scheme with the Retail Movement Scheme that it is the purpose of these regulations to implement. The recent announcement that the Northern Ireland wing of Culina, the largest UK wide haulier of chilled and ambient products, called Morgan McLernon (the business of which is defined in UK terms³) is to be closed, which management blamed specifically on the

³ 'Morgan McLernon are specialists in providing first class chilled distribution and warehousing services predominantly in Northern Ireland with services to and from the UK.' <https://www.culina.co.uk/chilled-logistics-solutions/#morgan>

implications of Brexit⁴, (following the reduction in the operations of another haulage company servicing the UK market, Americold), provide a real life demonstration of the reality of trade diversion which the announcement of the replacement of the STAMNI Scheme with the Retail Movement Scheme through these regulations has accelerated. A July report also referenced a '8% reduction in loads brought in from GB to NI.'⁵ If the Government persists with these Regulations, then the trade diversion they are creating will make it very difficult for them not to Trigger Article 16. The Government should abandon the Regulations and keep the STAMNI Scheme in place.

In the fourth instance, these regulations are of huge political and constitutional significance because in affirming the basic division of Northern Ireland from the UK into an all-island economy they also affirm, as the explanatory notes repeatedly make clear, that Northern Ireland's biosecurity rests with that of the Republic of Ireland and the wider EU.

It has long been understood that the most basic and most fundamental role played by the state is that of defence which used to be understood narrowly in terms of the existential threat posed by military attack, but today there is a broader sense of potential existential threat that also includes threats to biosecurity and cyber-security. Providing security is the most basic and elementary responsibility of a sovereign state, because the security of the people, the political demos, that informs it does not relate to a particular project, to 'a means', but rather to a community that must be protected as 'an end' in itself. While one might argue that perhaps the UK facing bit of this arrangement, the regulations we are considering today, are more UK affirming than the EU Regulations it is their purpose to connect successful Retail Movement Scheme applicants to, one of the odd things about these regulations is the manner in which they do not seek to even give that impression when it comes to biosecurity but instead fairly transparently cede Northern Ireland to the rest of the island of Ireland.

The deconstruction of the United Kingdom of Great Britain and Northern Ireland as a polity whose government has responsibility for its security, so an aspect of this is ceded to the EU/the Republic of Ireland, is extraordinary. Implicit in the deconstruction of this essential state function is the reframing of questions of security and risk so that they no longer pertain to the United Kingdom of Great Britain and Northern Ireland but rather ask Great Britain to view risk and biosecurity separately and independently from Northern Ireland whose risk and security questions are now set at a Republic of Ireland/EU level. Indeed, crucially this separation is not simply a process of *separation* but crucially a process of *separation against* each other, such that one does not simply cease viewing Northern Ireland within one's biosecurity but are actually asked to assess one's biosecurity against that of Northern Ireland. The disciplines imposed by the Protocol in terms of biosecurity risk assessment do not just give rise to an 'othering process', in the context of which Northern Ireland is no longer part of the same 'political we', but also to the pathologizing of Great Britain as an 'other' that is also the source of a threat. This is completely destructive of the UK body politic and UK political demos.

Regulation 2 defines a relevant potential risk as:

*'any potential biosecurity risk to the island of Ireland or any IUU risk, arising from the movement of the specified retail goods into Northern Ireland;'*⁶

⁴ <https://trans.info/morgan-mclernon-357518>

<https://www.belfasttelegraph.co.uk/business/northern-ireland/up-to-500-jobs-at-risk-as-co-armagh-haulage-company-suffering-brexit-hit/a1533161909.html>

⁵ <https://centreforbrexitpolicy.org.uk/wp-content/uploads/2023/07/MUTUAL-ENFORCEMENT-The-Key-to-Restoring-Government-in-Stormont.pdf>

⁶ <https://www.legislation.gov.uk/ukxi/2023/896/part/1/made>

The Explanatory Notes, meanwhile, contain numerous references defining the *raison d'être* of the regulations around the biosecurity of the island of Ireland, without any reference to the biosecurity of the United Kingdom of Great Britain and Northern Ireland:

'It is intended that the Scheme will support trade between Northern Ireland ("NI") and Great Britain ("GB") whilst protecting biosecurity on the island of Ireland, following the agreement of the Windsor Framework.'

'Any traders who want to move goods under the Scheme will be required to do so in compliance with the Scheme's terms and conditions. When applying for membership, traders will supply specific information to the competent authority and potentially be subject to checks to confirm that they will move goods in accordance with the scheme and not pose risks to the biosecurity of the island of Ireland.'

*The regulations will allow relevant public authorities to intervene 'where an increased risk has been identified, to enter retail premises to carry out checks and to remove goods from sale which pose a risk to the biosecurity of the island of Ireland or of the goods entering the EU, using a comparable approach to current checks relating to food hygiene.'*⁷

In the fifth instance, these regulations, in confirming: i) a full default international border within the United Kingdom of Great Britain and Northern Ireland that is controlled by the EU, ii) trade divergence that unbundles the economic nationality upon which the United Kingdom of Great Britain and Northern Ireland resides, iii) the unbundling of the biosecurity identity on which the United Kingdom of Great Britain and Northern Ireland depends and iv) the unbundling of essential state functions pertaining to one's own territory, borders and biosecurity, demonstrate that the operational effect, certainly of Articles 5 to 10 of the Windsor Framework, violate the territorial integrity of the United Kingdom and to that extent are not applied consistently with Article 1 (2) of the Protocol/does not achieve the objectives of Article 1 (2) which is directly effective in UK law. Article 1 (2) states: 'This Protocol respects the essential State functions and territorial integrity of the United Kingdom.'

(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;

The Regulation making powers that have laid the foundation for the Windsor Framework (Retail Movement Scheme) Regulations 2023 were made at the same time that the Protocol was made directly effective in UK Law, both through the EU Withdrawal Agreement Act 2018, as amended by the Act of the same name 2020. An important change has taken place between the parent legislation being passed and the introduction of the Windsor Framework (Retail Movement Scheme) Regulations 2023 in that since the announcement of the legislation on 27 February 2023 and now, the trade diversionary implications of aligning with the implications of the legislation have become apparent, for all the reasons set out in detail above. In this context, given that the parent legislation is for the purpose of giving effect to the Northern Ireland Protocol/Windsor Framework, the question arises as to whether it is appropriate to continue given that it has already begun to have effect and in terms that afford the UK Government the right to derogate. It is one thing for legislation to have a consequence that generates circumstances in which it is appropriate to derogate as an unanticipated consequence of the legislation after it comes into effect, but it is quite another to pass legislation that has not yet become law, but in relation to which the consequences of preparation already give grounds for derogation. The appropriateness of this must surely be called into question by the fact that Article 16 of the Windsor Framework (the undergirding agreement that stands both in

⁷ https://www.legislation.gov.uk/uksi/2023/896/pdfs/ukxiem_20230896_en_001.pdf

international law and as directly effective in UK law) highlights the fact that trade diversion is not acceptable.

(c) that it may imperfectly achieve its policy objectives;

To the extent that rather than furthering the Windsor Framework, the Windsor Framework (Retail Movement Scheme) Regulations 2023 are already, even before formally taking effect, contributing to the development of grounds for derogating from the treaty for the reasons set out above, this legislation, rather than furthering the interests of the Windsor Framework, is instead undermining it by strengthening the basis for the UK derogating from it through Article 16. The terms of failure are such that they must even beg questions about the vires of the legislation under S 8C of the Withdrawal Agreement Act, in that it results from a regulation making power that is supposed to give effect to the Windsor Framework, rather than giving new grounds for derogating from it.

(e) that there appear to be inadequacies in the consultation process which relates to the instrument;

We don't doubt that the government has talked to people in developing these regulations. On a matter of such importance, however, there would have been benefit in having an open public consultation to which anyone can respond, not just those Government chooses to talk to.

Appendix

Regulation (EU) 2023/1231

'Article 14

Suspension of the specific rules laid down in Chapters 2, 3 and 4

1. The Commission shall closely monitor the application of the specific rules laid down in Chapters 2, 3 and 4 and Article 13, and in particular whether:
 - (a) official controls are carried out on consignments of retail goods, plants for planting other than seed potatoes, machinery and vehicles which have been operated for agricultural or forestry purposes before entry into Northern Ireland, and of seed potatoes, and on pet animals falling within the scope of this Regulation;
 - (b) adequate official controls and monitoring in accordance with the requirements set out in Annex III are in place covering the movements of retail goods from the SPS Inspection Facilities of first arrival in Northern Ireland to the listed establishment of destination to ensure that the retail goods are solely intended for listed establishments in Northern Ireland and will not be subsequently moved to a Member State;
 - (c) the specific rules laid down in this Regulation, and in particular Articles 6 and 9, are complied with.

2. The Commission shall monitor whether:
 - (a) the SPS Inspection Facilities of first arrival in Northern Ireland comply with Annex II;
 - (b) the Union representatives have ongoing and continuous access to the relevant databases used by the competent authorities of the United Kingdom in Northern Ireland for the purpose of official controls and monitoring required by this Regulation, including the Common Health Entry document (CHED) Inspection Platform and other relevant databases and exchange of information, and whether the competent authorities of the United Kingdom in Northern Ireland comply with their obligation to use Traces as provided for in Regulation (EU) 2017/625.

3. Where the Commission finds that there is a systemic failure by the United Kingdom to comply with the specific rules referred to in paragraph 1, or that the United Kingdom does not comply with one of the conditions referred to in paragraph 2, the Commission shall, within a period of seven days, notify the United Kingdom in writing of that finding and of the detailed reasons for it.

4. For a period of four weeks following the date of the written notification referred to in paragraph 3, the Commission shall enter into consultations with the United Kingdom with a view to remedying the situation giving rise to the written notification.

5. If the situation giving rise to the written notification referred to in paragraph 3 of this Article is not remedied within the period of four weeks referred to in paragraph 4 of this Article or where relevant provisions of Section 2 (Determination of goods not at risk and repeal of Decision No 4/2020) of Joint Committee Decision No 1/2023 (16) have been suspended in accordance with Article 15(2) thereof on grounds relevant for the matters falling within the scope of this Regulation, the Commission is empowered to adopt within a further period of four weeks a delegated act in accordance with Article 17 to supplement this Regulation, by determining the specific rules laid down in this Regulation whose application shall be suspended.

If the United Kingdom fails to comply with the conditions laid down in paragraph 1, point (c), or in paragraph 2, point (a) or (b), of this Article, the Commission shall adopt a delegated act in accordance with Article 17 to supplement this Regulation by suspending the application of Articles 4, 5, 6 and 9 to 12.

6. Where the situation giving rise to the adoption of the delegated act referred to in paragraph 5 has been remedied by the United Kingdom, the Commission shall adopt a delegated act in accordance with Article 17 to supplement this Regulation by determining which of the suspended specific rules shall apply again.'

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023R1231&qid=1693403745927>

1 September 2023

Response by the Department for Environment, Food and Rural Affairs

Legislative context

The Windsor Framework (Retail Movement Scheme) Regulations 2023 is a statutory instrument that gives effect to the arrangements agreed under the Windsor Framework. It establishes the Northern Ireland Retail Movement Scheme (the Scheme), a new sustainable framework for trade between Great Britain (GB) and Northern Ireland (NI).

The Regulations detail the requirements for membership of the scheme, the arrangements in place as goods move into NI under the Scheme, and ensures the scheme can be administered in practice, including to deal with cases of abuse of the Scheme.

These Regulations are made under section 8C of the European Union (Withdrawal) Act 2018, which are well-established powers to implement international obligations flowing from the Withdrawal Agreement. This is the exact intended purpose of these Regulations, which is exactly what the Windsor Framework constitutes.

As noted in the original Explanatory Memorandum, just as we have brought forward legislative measures in our domestic legal order, so too has the EU adopted Regulation 2023/1231 of the European Parliament and of the Council⁸ (“the SPS Regulation”). This Regulation sets out specific rules relating to the entry into NI from other parts of the United Kingdom of certain consignments of retail goods, plants for planting, seed potatoes, machinery and certain vehicles operated for agricultural or forestry purposes, as well as non-commercial movements of certain pet animals into NI. The SPS Regulation also disapplies more than 60 provisions of EU law in respect of retail agri-food goods moving into NI under the Scheme, with UK standards to apply in their place, ensuring that the same products available on the shelves in Great Britain can be sold in Northern Ireland. The regulations subject to disapplication are set out in Annex I of the SPS Regulation.

The Windsor Framework and the Northern Ireland Retail Movement Scheme

The Windsor Framework achieves a longstanding UK Government objective to provide for an effective set of trading arrangements for goods remaining within the United Kingdom, as part of supporting the UK internal market. Through its arrangements, it supports the smooth flow of trade within the UK internal market, freeing movements of unnecessary paperwork, checks and complex certification requirements.

Instead, the Northern Ireland Retail Movement Scheme will enable consignments to move using a single remotely approved digital certificate, rather than individual certification at product level with inspections required for each certificate under the original Northern Ireland Protocol. Goods will be able to move without any routine physical checks and will be able to be made to GB public health, marketing and organics standards rather than EU standards. The Scheme will also allow for the movement of goods which are currently prohibited under EU regulations, such as certain chilled meat products. The Scheme will be open to retailers, wholesalers, caterers, and those providing food

⁸ [Regulation \(EU\) 2023/ of the European Parliament and of the Council of 14 June 2023 on specific rules relating to the entry into Northern Ireland from other parts of the United Kingdom of certain consignments of retail goods, plants for planting, seed potatoes, machinery and certain vehicles operated for agricultural or forestry purposes, as well as non-commercial movements of certain pet animals into Northern Ireland \(europa.eu\)](https://eur-lex.europa.eu/eli/reg/2023/1231/oj)

to public institutions like schools and hospitals. Businesses will be able to join and leave the Scheme as their supply chains evolve.

Without the new Scheme, Northern Ireland would face significant trade impacts associated with full compliance with the old Northern Ireland Protocol. Traders would be obliged to comply with full EU third-country controls, which would increase costs, reduce the shelf life of goods (as certification and sign-off adds to transit times) and certain banned goods (like chilled sausages and chicken nuggets) would be excluded from the market. All of this could result in negative impacts for consumers if traders were to increase the cost of goods, exit the market, or withdraw products to avoid the complexities of compliance. The Scheme removes these unnecessary burdens and will allow those goods which are currently prohibited by EU regulations to once again move to NI. As such we do not recognise at all the suggestion that these arrangements represent little change compared to the burdens of the original Protocol, and are indeed a significant shift away from them.

While the response refers to the current grace periods, as the Committee will be aware these were explicitly temporary and were the subject of an ongoing UK-EU dispute, and were not the basis for stable, long-term arrangements. In addition, those existing arrangements relied entirely on EU standards, precluding a range of goods from being able to move; and also involved more extensive paperwork on goods, like chilled meats, that were subject to prohibitions and restrictions in the EU system. In addition, the grace period scheme was a closed shop and could not be expanded, whereas under these arrangements a whole range of new retailers will be able to join the scheme and enjoy its benefits. So we are clear that these new arrangements are the right, sustainable and durable basis on which to support internal UK trade now and in the future.

At the same time, we have been open in recognising that these arrangements rightly protect the biosecurity of the island of Ireland, which has long been treated as a single epidemiological unit.

As to industry engagement, Defra has engaged extensively to ensure that the Scheme fits with various business models and routinely considers how goods currently move across the supply chain. It is not unusual for preparations to take place in advance of legislative change. Defra continues to work with industry to make the Scheme work as well as possible for different sectors, including the haulage sector.

Consultation

The UK Government has put engagement with stakeholders at the forefront of its efforts, including with organisations moving goods between GB and NI, in drafting these Regulations. Defra has engaged with businesses through regular forums, including the weekly GB-NI Supply Chain Forum – frequently attended by over 200 representatives of organisations across the supply chain – alongside ad hoc engagement. Defra continue to take on board stakeholder feedback, which is why we are now delivering weekly webinars on the end-to-end journey for products travelling under the Scheme, alongside training sessions on the systems that underpin the Scheme, a new FAQ, and further opportunities for co-design.

8 September 2023

Submission 2: DUP on The Draft Windsor Framework (Enforcement) Regulations 2023

We write to express serious concerns about the Windsor Framework (Enforcement) Regulations 2023 which were laid on 4 September.

We set out our concerns on the basis of your terms of reference, making particular reference to grounds, 4 a, b, c and d.

(4) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

The Windsor Framework (Enforcement) Regulations 2023 are of great political and indeed constitutional importance. We set out the bases for this not necessarily in the expectation that the Committee will seek to adjudicate on them but in order to demonstrate why these regulations are politically and legally important and likely to be of interest and concern to the House.

The Explanatory Memorandum on the Windsor Framework (Enforcement) Regulations 2023 states:

Windsor Framework (Enforcement) Regulations 2023 states at para 2 (1)

‘The purpose of this instrument is to support trade between Great Britain (“GB”) and Northern Ireland (“NI”) whilst protecting biosecurity on the island of Ireland, following the agreement of the Windsor Framework. The Windsor Framework will see the creation of a new scheme, the Northern Ireland Retail Movement Scheme, which establishes a new sustainable, long-term legal framework for that trade. The new scheme will allow traders moving agri-food goods for the final consumer in NI to benefit from a unique set of arrangements which enables consignments to move on the basis of a single certificate, without routine physical checks, and on the basis of GB public health, marketing and organics standards. This will be available to all such traders, including retailers, wholesalers, caterers and those providing food to public institutions like schools and hospitals.’

In other words, the Windsor Framework (Enforcement) Regulations constitute a key part of the enforcement regime of the Retail Movement Scheme. To this end the EM further states at para 2 (4) that the effect of the regulations is to:

‘Ensure that appropriate enforcement powers are in place for retail agri-food goods moved from GB to NI under the Northern Ireland Retail Movement Scheme, which meet GB public health and marketing standards (including those provisions related to fisheries regulations), catch documentation requirements for certain species of fish, and organics standards (referred to as “relevant GB standards”) and are placed on the NI market. This will ensure that NI consumers benefit from equivalent protections in respect of such goods, as is the case in GB.

Ensure that, for certain plants and other objects (vehicles and machinery which have been operated for agricultural or forestry purposes) moving from GB to NI under the NIPHL scheme, sufficient, pragmatic and proportionate enforcement powers are available in GB and NI (ensuring equivalent protections are in place to those provided for under the existing UK Plant Passport regime).’

In this context some of the serious political concerns that we raised with the Committee in relation to the Windsor Framework (Retail Movement Scheme) Regulations apply in relation to these enforcement regulations, **but we also raise new and different points.**

1) EU Regulation 2023/1231

In the first instance, these regulations hang on EU Regulation 2023/1231 of the European Union, otherwise known as ‘the SPS regulation’ which was passed on the 14th of June this year, without which none of them makes sense.

Regulation 2 (1) of the Windsor Framework (Enforcement) Regulations 2023 states that in the Regulations, ‘reference to “the SPS Regulation” is a reference to EU Regulation 2023/1231.’

Regulation 9 (b), of these enforcement regulations, meanwhile, defines where the enforcement provisions fall which is, subject to *‘Article 1 (2) of the SPS Regulation and Annex I to the SPS Regulation.’*

Moreover, most of these enforcement regulations reference ‘Northern Ireland Plant Health labels.’ Indeed, the term is used 42 times in these enforcement regulations. The regulations, however, define the term on basis that takes us in two steps to EU Regulation 2023/1231. Step 1: Regulation 2 of the Windsor Framework (Enforcement) Regulations 2023 states: *““Northern Ireland plant health label” has the meaning given in regulation 2 of the Windsor Framework (Plant Health) Regulations 2023(6);”*. Step 2: Regulation 2 of the Windsor Framework (Plant Health) Regulations 2023(6); in turn defines Northern Ireland plant health label in turn by EU Regulation 2023/1231, stating: *“Northern Ireland plant health label” has the meaning given to “plant health label” in Article 2(22) of the SPS Regulation;*

Thus, central to the task of understanding the Windsor Framework (Enforcement) Regulations 2023 before us today, is understanding the SPS Regulation, namely EU Regulation 2023/1231.

EU Regulation 2023/1231 makes provision for some goods to be subject to less exacting SPS border requirements than would otherwise obtain if traders submit to certain restrictions. Specifically, if those in the wider UK bringing goods to Northern Ireland have an export number (EORI), are moving SPS retail goods to a confirmed Northern Ireland consumer with an address in Northern Ireland, and if those goods bare ‘Not for EU’ labels (which are being phased in across a number of stages) and are subject to 10% to 5 % identity checks at Border Control Posts, and if the retailers in question have applied to join the trusted trader scheme and successfully obtained and kept trusted trader status, then, and only then, will they benefit from a simplified single SPS certificate.

The implications flowing from this are far reaching.

First, this is not unfettered access, which is the term used for free movement within a single market which, by definition, encounters neither a customs nor an SPS border, nor Border Control Posts. So, the first thing we must be clear about is that the alternative border arrangements that the Windsor Framework (Enforcement) Regulations 2023 help effect, do not remove, in the words of the Prime Minister, ‘any sense of border in the Irish Sea.’ What they do is facilitate an alternative border experience in which the regulations before us today play an enforcement role, **but it is still a border experience**, a border whose function it is to uphold the integrity of the separate legal regime that now exists in Northern Ireland, which is the result of our partial disenfranchisement.

Second, the alternative arrangements that it is the purpose of the Windsor Framework (Enforcement) Regulations 2023 to enforce are not transferred to us so that we can hold and claim them for ourselves. They are only offered by the EU subject to certain EU conditions which the EU polices and enforces. In this regard the most important Article of EU Regulation 2023/1231, without which one cannot understand the Windsor Framework (Enforcement) Regulations 2023, is Article 14. In Article 14, sub paragraph 5, the EU reserves the right to remove the alternative arrangements and

press for a conventional border experience at which point the Windsor Framework (Enforcement) Regulations 2023 will become irrelevant. It states: *'If the United Kingdom fails to comply with the conditions laid down in paragraph 1, point (c), or in paragraph 2, point (a) or (b), of this Article, the Commission shall adopt a delegated act in accordance with Article 17 to supplement this Regulation by suspending the application of Articles 4, 5, 6 and 9 to 12.'*

In that sense anyone voting for the Windsor Framework (Enforcement) Regulations 2023 would effectively be saying: we will ask for alternative border arrangements even though we know that in doing so, we not only accept the reality of the border in the alternative border arrangements, rather than the removal of any sense of border in the Irish Sea, BUT we also consent to an arrangement that has at its heart the right of the EU to, in the final analysis, press for the most intrusive and disruptive border experience and their ability to operate politically on the basis of their ability to call into being that default reality.

2) GB Rather than UK Standards

In the second instance, one way in which the constitutional importance of the Windsor Framework (Enforcement) Regulation before us today is evidenced is in the curious decision to describe the alternative standards that are, in some cases, to be enforced in Northern Ireland as 'GB standards' rather than 'UK standards'. The UK is a single country. If standards are applied across all of it then they become UK standards, not GB standards applied to Northern Ireland, that would be like calling GB standards English standards rather than GB standards in the event that they were extended to Scotland and Wales. Calling UK wide standards GB standards is extraordinary unless one's purpose is to apply a division between Northern Ireland and Great Britain contrary to the name of our polity which is defined in terms of the negation of that division, the United Kingdom of Great Britain and Northern Ireland but the Explanatory Memorandum state that the purpose of the regulations is to:

*'Ensure that appropriate enforcement powers are in place for retail agri-food goods moved from GB to NI under the Northern Ireland Retail Movement Scheme, **which meet GB public health and marketing standards** ... catch documentation requirements for certain species of fish, and organics standards (referred to as "relevant GB standards") and are placed on the NI market..*

This might provide presentational benefits in terms of justifying the construction of Border Control Posts at Belfast, Warrenpoint, Larne and Foyle. If the standards were described as UK standards, then the use of Border Control Posts for 10 to 5% identity checks, and other risk-based checks, would be as absurd as using border control posts within any other part of the UK. By contrast, defining the relevant standards as GB standards makes the deployment of Border Control Posts seem less controversial because it will enable the Government to claim that these Border Control Posts should not be understood as Border Control Posts in the normal sense because their purpose is actually to give effect to, UK government by simply imposing standards that arise from within the UK to government within the borders of the UK, but this is absurd and completely unacceptable for all the reasons set out above.

Moreover, this approach lays the foundation for other difficulties.

First, the Government's attempt to justify its approach begs a disturbing question.

Their Explanatory Memorandum states as follows: *'Part 3 of this instrument ensures that appropriate enforcement powers are also available in NI to protect NI consumers in cases where retail agri-food goods, moving from GB to NI under the Northern Ireland Retail Movement Scheme and placed on the NI market, do not comply with the relevant GB standards.'*

This logic, however, necessarily creates the basis for a biosecurity scare within Great Britain because it implies that even while the goods have either been created in Great Britain or have come into Great Britain, we cannot be confident that they are to Great Britain standards. In making this assertion the Government is admitting that the UK it is failing its citizens living in GB in a most basic way - with respect to their biosecurity.

The second difficulty arising from the Explanatory Memorandum is that if it is so important that we uphold GB biosecurity standards in Northern Ireland that taxpayer's money should be used to construct Border Control Posts within the UK, why is it acceptable to have a completely open border to the south of Northern Ireland with another country entirely?? Given the decision to avoid a hard border across the island of Ireland, and the need to protect biosecurity, why did the UK Government not fight for the right of its citizens to the same extent that the EU did, which is not even a state? Specifically, the EU said to the UK: 'In a context where we cannot have a hard border across the island of Ireland, we must have checks on goods coming to the island of Ireland through Northern Ireland ports to EU standards, (or standards that we are prepared to tolerate), in order to protect our biosecurity.' Why then did the UK not say: 'OK, but you must understand that if we are to accept that, we must obviously make equal and opposite demands so that all goods entering the island of Ireland from ports in the Republic are checked to UK standards?'

If it is important to check goods coming into NI from GB, to GB standards, where those standards should have already been enforced, why is it not equally important to protect the people of Northern Ireland from goods coming in from elsewhere to the same standard? The people living in Northern Ireland are the same people. They won't be damaged by a good that fails to meet GB standards if it comes from GB, but completely immune to the dangers arising from the same good travelling from somewhere else into Northern Ireland, failing to meet GB standards, because they come from somewhere else.

3) Trade Diversion

Third, the Windsor Framework (Enforcement) Regulations are problematic because unlike most forms of legislation that don't have an impact until they formally come into effect, businesses have been busily restructuring in preparation for the regulations as part of the Retail Movement Scheme (see para 2.1 EM), first announced as the green lane in February, for some months and ASDA has already started to use 'Not for EU labels.' This means that, unusually, we can already see something of the effect of the regulations. Moreover, although we are now only considering the effect of SPS Green Lane Windsor SI's on their publication now, their actual consequence has been plain to see since 14 June, if not before, when the EU Regulation 2023/1231 to which they all relate, and without which none of them make sense, has been there for anyone to read for some months.

What we see is that many businesses have made it clear that relying on the Retail Movement Scheme, and therein its enforcement mechanism as set out in these regulations, is too complicated and too expensive for the Retail Movement Scheme to simply take over from the old very light touch STAMNI scheme that they replace,¹ such that supermarkets can continue to function on the basis of the old GB-NI supply chains that attended and defined what was the UK single market for goods until the end of 31 December 2020, and which helped give effect to UK economic nationality. In this context big supermarkets like Tescos have been restructuring their supply chains to move as much as possible of what previously came from GB to NI so that after 1 October it comes from ROI to NI.

¹ <https://www.daera-ni.gov.uk/publications/stamni-compliance-declaration>

One might respond to this by arguing that, to the extent that these regulations apply GB regulations, the enforcement component of them cannot have a trade diversionary effect. There are two difficulties with this assertion. In the first instance, to the extent that the deployment of these standards is through an SPS certificate in relation to which one must have an export number and have got membership of and kept membership of the trusted trader scheme and negotiated a Border Control Post and provided Not for EU labels this amounts to a cost that does not apply to goods movements in other parts of the UK and an increased cost compared to STAMNI. In the second instance, the impact of the Retail Movement Scheme in terms of enforcement regulations does not simply determine where GB regulations apply but also determines, by implication, where they cannot apply, and where EU regulations, the presence of which was obscured by STAMNI, will now take effect.

The trade diversionary implications of preparing for the Windsor Framework (Enforcement) Regulations 2023, and thus EU Regulation 2023/1231, without which it, and the other Retail Movement Scheme legislation makes no sense, was brought home with particular clarity in the case of Tesco through a slide at a recent presentation to retailers. The heading was 'Packaged Food approach. **For products currently moving from GB to NI:**' Of this they said that under the Retail Movement Scheme it would be important to restructure to get as many of these goods as possible from ROI to avoid the Green Lane and Red Lane. Under the heading 'Ireland Supply Routes' the slide says:

- 'More Direct from the EU
- Move all common products from the ROI DC to NI stores
- Align some range with the ROI range'

This is not to suggest that there will be no use of the Green Lane but rather that, together with the Red Lane, the Green Lane as defined by various SIs published since August, including the Windsor Framework (Enforcement) Regulations are already driving trade diversion. The fact that one can already see that trade diversion is the straight-forward result of replacing the STAMNI Scheme with the Retail Movement Scheme facilitated by the Windsor Framework (Enforcement) Regulations among other Windsor SIs, even before it formally comes into effect, demonstrates that rather than fixing the problem with the Northern Ireland Protocol/Windsor Framework, these Windsor Framework Regulations have actually helped call it out and in terms that were always recognised as fatally problematic by the drafters of the Protocol/Windsor Framework, such that they justify derogation from it.

Article 16 of the Protocol, which is directly effective in UK law, and which many members of the House of Lords criticised the Government for not triggering ahead of introducing the Northern Ireland Protocol Bill, represents the mechanism to use if the Protocol is failing and failure is defined by Article 16 in the following terms:

'If the application of this Protocol leads to serious economic, societal or environmental difficulties that are liable to persist, **or to diversion of trade, the Union or the United Kingdom may unilaterally take appropriate safeguard measures.** Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Protocol.'

The interesting thing about the form of words employed here by the drafters is that the diversion of trade is recognised to be such a serious matter that even if it does not lead to 'serious economic,

societal or environmental difficulties that are liable to persist', Article 16 can still be triggered just because it results in a diversion of trade. That is not at all surprising because trade flows that are definitive of a single market are definitive of the economic nationality that underpins the modern nation state (and are, as such, of an entirely different constitutional effect to trade flows between economies) and which could not be cut away without shaking the very foundations of the polity in question.

The trade diversionary implications of the Retail Movement Scheme, as evidenced through the Tesco's presentation, have had a clear impact on the haulage sector, which has experienced a significant reduction in goods travelling from GB to NI since the announcement of Windsor and the replacement of the STAMNI Scheme with the Retail Movement Scheme that it is the purpose of these regulations to implement. The recent announcement that the Northern Ireland wing of Culina, the largest UK wide haulier of chilled and ambient products, called Morgan McLernon (the business of which is defined in UK terms²) is to be closed, which management blamed specifically on the implications of Brexit³, (following the reduction in the operations of another haulage company servicing the UK market, Americold), provide a real life demonstration of the reality of trade diversion which the announcement of the replacement of the STAMNI Scheme with the Retail Movement Scheme through these regulations has accelerated. A July report also referenced a '8% reduction in loads brought in from GB to NI.'⁴ If the Government persists with these Regulations, then the trade diversion they are creating will make it very difficult for them not to Trigger Article 16. The Government should abandon the Regulations and keep the STAMNI Scheme in place.

(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;

The Regulation making powers that have laid the foundation for the Windsor Framework (Enforcement) Regulations 2023 were made at the same time that the Protocol was made directly effective in UK Law, both through the EU Withdrawal Agreement Act 2018, as amended by the Act of the same name 2020. An important change has taken place between the parent legislation being passed and the introduction of the Windsor Framework (Enforcement) Regulations 2023 in that since the announcement of the legislation on 27 February 2023 and now, the trade diversionary implications of aligning with the implications of the legislation have become apparent, for all the reasons set out in detail above. In this context, given that the parent legislation is for the purpose of giving effect to the Northern Ireland Protocol/Windsor Framework, the question arises as to whether it is appropriate to continue given that it has already begun to have effect and in terms that afford the UK Government the right to derogate. It is one thing for legislation to have a consequence that generates circumstances in which it is appropriate to derogate as an unanticipated consequence of the legislation after it comes into effect, but it is quite another to pass legislation that has not yet become law, but in relation to which the consequences of preparation already give grounds for derogation. The appropriateness of this must surely be called into question by the fact that Article 16

² 'Morgan McLernon are specialists in providing first class chilled distribution and warehousing services predominantly in Northern Ireland with services to and from the UK.' <https://www.culina.co.uk/chilled-logistics-solutions/#morgan>

³ <https://trans.info/morgan-mclernon-357518>
<https://www.belfasttelegraph.co.uk/business/northern-ireland/up-to-500-jobs-at-risk-as-co-armagh-haulage-company-suffering-brexit-hit/a1533161909.html>

⁴ <https://centreforbrexitpolicy.org.uk/wp-content/uploads/2023/07/MUTUAL-ENFORCEMENT-The-Key-to-Restoring-Government-in-Stormont.pdf>

of the Windsor Framework (the undergirding agreement that stands both in international law and as directly effective in UK law) highlights the fact that trade diversion is not acceptable.

(c) that it may imperfectly achieve its policy objectives;

To the extent that rather than furthering the Windsor Framework, the Windsor Framework (Enforcement) Regulations 2023 are already, even before formally taking effect, contributing to the development of grounds for derogating from the treaty for the reasons set out above, this legislation, rather than furthering the interests of the Windsor Framework, is instead undermining it by strengthening the basis for the UK derogating from it through Article 16. The terms of failure are such that they must even beg questions about the vires of the legislation under S 8C of the Withdrawal Agreement Act, in that it results from a regulation making power that is supposed to give effect to the Windsor Framework, rather than giving new grounds for derogating from it.

Moreover, the Regulations also get into difficulty in terms of achieving their policy objectives because they make no sense apart from EU Regulation 2023/1231 which neither respects the territorial integrity of the United Kingdom nor the essential state functions of the United Kingdom in terms of the economic governance of the UK and in terms of the biosecurity of the UK. This is a problem because the Windsor Framework (Enforcement) Regulations are defined by reference to the Windsor Framework, Article 1(2) of which is defined in terms of respecting the territorial integrity of the UK and respecting the essential state functions of the UK.

In the first instance, for the reasons set out above, the Regulations effect a system that has at its heart EU Regulation 2023/1231, which rather than removing any sense of border in the Irish Sea, offers an alternative border experience but one that requires an export number, and SPS border certificate, membership of a trusted trader scheme, negotiating border control posts etc, and this arrangement still involves foreign countries interfering in the governance of the UK and seeking to effect its division. Moreover, Article 14 of EU Regulation 2023/1231 asserts an EU right to default to a fully conventional border experience that is both deeply intrusive and disruptive.

In the second instance, it has long been understood that the most basic and most fundamental role played by the state is that of defence which used to be understood narrowly in terms of the existential threat posed by military attack, but today there is a broader sense of potential existential threat that also includes threats to biosecurity and cyber-security. Providing security is the most basic and elementary responsibility of a sovereign state, because the security of the people, the political demos, that informs it does not relate to a particular project, to 'a means', but rather to a community that must be protected as 'an end' in itself.

The deconstruction of the United Kingdom of Great Britain and Northern Ireland as a polity whose government has responsibility for its security, so an aspect of this is ceded to the EU/the Republic of Ireland, is extraordinary and yet this is the implication of the para 2.1 of the EM:

'The purpose of this instrument is to support trade between Great Britain ("GB") and Northern Ireland ("NI") whilst protecting biosecurity on the island of Ireland, following the agreement of the Windsor Framework.'

The UK Government is not only responsible for protecting the completely unfettered free movement of goods within itself, but also the biosecurity of its people. Of course, it is not wrong to have regard to the biosecurity of neighbours, but this must be a secondary obligation to its own citizens who pay taxes and may be asked to make the ultimate sacrifice in time of war. In this context while it is good to have regard to the biosecurity of the island of island as a whole, this must necessarily come

second to the biosecurity of the United Kingdom and yet neither this EM nor any other Windsor Framework SI or EM mentions the need to protect the biosecurity of the United Kingdom and only expresses concern for the biosecurity of the island of Ireland.

Implicit in the deconstruction of this essential state function is the reframing of questions of security and risk so that they no longer pertain to the United Kingdom of Great Britain and Northern Ireland but rather ask Great Britain to view risk and biosecurity separately and independently from Northern Ireland whose risk and security questions are now set at a Republic of Ireland/EU level. Indeed, crucially this separation is not simply a process of *separation* but crucially a process of *separation against* each other, such that one does not simply cease viewing Northern Ireland within one's biosecurity but are actually asked to assess one's biosecurity against that of Northern Ireland. The disciplines imposed by the Protocol in terms of biosecurity risk assessment do not just give rise to an 'othering process', in the context of which Northern Ireland is no longer part of the same 'political we', but also to the pathologizing of Great Britain as an 'other' that is also the source of a threat. This is completely destructive of the UK body politic and UK political demos.

The failure of these Windsor Framework regulations to respect the territorial integrity of the UK and the essential state functions of the UK both with respect to economic governance and biosecurity would make these regulations mean that they do not achieve their policy objectives which is to give effect to the Windsor Framework. Article 1 (2) of the Windsor Framework states: *'This Protocol respects the essential State functions and territorial integrity of the United Kingdom.'* And it is made directly effective in UK law by S 7A (1)(a) of the European Withdrawal Agreement Act requiring that *"all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement."* It is not possible for regulations that actively disrespect the territorial integrity of the UK and the essential state functions of the UK to be deployed as an outworking of the Windsor Framework as a whole, including Article 1.2. That creates a problem to the extent that these enforcement regulations are made on the basis of a regulation making power for the purpose of implementing the Protocol rather than any particular part of it which must mean that resulting regulations must give effect to the Protocol as a whole and therefore cannot violate any part of it.

(e) that there appear to be inadequacies in the consultation process which relates to the instrument;

Para 10.1 of the EM states: '10.1 There has been no formal consultation on this specific instrument. While there is a legal obligation under retained EU law to consult on changes to food law (which this instrument will amend), there is an exception where the urgency of the matter does not allow it. The exemption applies in these circumstances, given the requirement to meet legal commitments made with the EU.' We don't doubt that the government has talked to people it wanted to talk to in developing these regulations. Given the huge controversy surrounding these regulations, though, the decision not to have a public consultation in developing them is very concerning.

Submission 3: DUP on the Windsor Framework (Plant Health) Regulations 2023

We write to express serious concerns about the Windsor Framework (Plant Health) Regulations 2023 which were laid on 4 September.

We set out our concerns on the basis of your terms of reference, making particular reference to grounds, 4 a, b, c and d.

(4) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

The Windsor Framework (Plant Health) Regulations 2023 are of great political and indeed constitutional importance. We set out the bases for this not necessarily in the expectation that the Committee will seek to adjudicate on them but in order to demonstrate why these regulations are politically and legally important and likely to be of interest and concern to the House.

The Explanatory Memorandum on the Windsor Framework (Plant Health) Regulations 2023 makes it clear that their purpose is to implement the elements of the Windsor Framework related to the movement of those goods from GB to NI, enabling:

- 1) The removal of a prohibition on seed potatoes entering NI,
- 2) Facilitating the movement of plants for planting including previously prohibited high risk plants,
- 3) The removal of a requirement for a phytosanitary certificate – replacing this with a Northern Ireland plant health label (“NI PH label

The Regulations set out how the NI Plant Health Label will work. In this context some of the serious political concerns that we raised with the Committee in relation to the Windsor Framework (Retail Movement Scheme) Regulations apply in relation to these Plant Health regulations, **but we also raise new and different points.**

1) EU Regulation 2023/1231

In the first instance, these regulations hang on EU Regulation 2023/1231 of the European Union, otherwise known as ‘the SPS regulation’ which was passed on the 14th of June this year, without which none of them makes sense.

Regulation 2 of the Windsor Framework (Plant Health) Regulation 2023 states that ‘the SPS Regulation’ means Regulation (EU) 2023/1231 of the European Parliament and of the Council of 14 June 2023 on specific rules relating to the entry into Northern Ireland from other parts of the United Kingdom of certain consignments of retail goods, plants for planting, seed potatoes, machinery and certain vehicles operated for agricultural or forestry purposes, as well as non-commercial movements of certain pet animals into Northern Ireland(6);’

The Windsor Framework (Plant Health) Regulations 2023 contains ten references to ‘the SPS Regulation.’

One of these is in Regulation 12 which states.

12. An authorised operator or a competent authority must not issue a Northern Ireland plant health label unless the plants and other objects concerned meet the applicable requirements for entry to Northern Ireland referred to in Article 10(1)(c) or Article 11(1)(c) of the SPS Regulation.”

Regulation 12 is, in turn references a further 11 times by The Windsor Framework (Plant Health) Regulations 2023.

Regulation (EU) 2023/1231, moreover, predating the Windsor Framework (Plant Health) Regulations 2023 which introduces the NI Plant Health Label to the UK, actually first comes up with the Label which it references on 26 occasions.

The whole Regulation is set around the SPS Regulation and its requirements, wherein the provision of alternative arrangements is umbilically tied to the submitting to Article 14 of the SPS Regulations which clearly sets out the default to a full international border at the EU’s pleasure.

Anyone signing up to these regulations must be alive to the fact that central to the act of embracing any perceived benefit associated with the alternative border arrangements is the EU’s clearly stated right in these amendments to withdraw those alternative arrangements and demand its full pound of flesh against the reality of a default full international border, and the rights arising from it, that the SPS Regulation jealously guards and defends.

Thus, central to the task of understanding the Windsor Framework (Plant Health) Regulations 2023 before us today, is understanding the SPS Regulation, namely EU Regulation 2023/1231.

EU Regulation 2023/1231 makes provision for some goods to be subject to less exacting SPS border requirements than would otherwise obtain if traders submit to certain restrictions. Specifically, if those in the wider UK bringing goods to Northern Ireland have an export number (EORI), are moving SPS retail goods to a confirmed Northern Ireland consumer with an address in Northern Ireland, and if those goods bare ‘Not for EU’ labels (which are being phased in across a number of stages) and are subject to 10% to 5 % identity checks at Border Control Posts, and if the retailers in question have applied to join the trusted trader scheme and successfully obtained and kept trusted trader status, then, and only then, will they benefit from a simplified single SPS certificate.

The implications flowing from this are far reaching.

First, this is not unfettered access, which is the term used for free movement within a single market which, by definition, encounters neither a customs nor an SPS border, nor Border Control Posts. So, the first thing we must be clear about is that the alternative border arrangements that the Windsor Framework (Plant Health) Regulations 2023 help effect, do not remove, in the words of the Prime Minister, ‘any sense of border in the Irish Sea.’ What they do is facilitate an alternative border experience in which the regulations before us today regulate in terms of plant health, **but it is still a border experience**, a border whose function it is to uphold the integrity of the separate legal regime that now exists in Northern Ireland, which is the result of our partial disenfranchisement.

Second, the alternative arrangements that it is the purpose of the Windsor Framework (Plant Health) Regulations 2023 to enforce are not transferred to us so that we can hold and claim them for ourselves. They are only offered by the EU subject to certain EU conditions which the EU polices and enforces. In this regard the most important Article of EU Regulation 2023/1231, without which one

cannot understand the Windsor Framework (Plant Health) Regulations 2023, is Article 14. In Article 14, sub paragraph 5, the EU reserves the right to remove the alternative arrangements and press for a conventional border experience at which point the Windsor Framework (Plant Health) Regulations 2023 will become irrelevant. It states: *'If the United Kingdom fails to comply with the conditions laid down in paragraph 1, point (c), or in paragraph 2, point (a) or (b), of this Article, the Commission shall adopt a delegated act in accordance with Article 17 to supplement this Regulation by suspending the application of Articles 4, 5, 6 and 9 to 12.'*

In that sense anyone voting for the Windsor Framework (Plant Health) Regulations 2023 would effectively be saying: we will ask for alternative border arrangements even though we know that in doing so, we not only accept the reality of the border in the alternative border arrangements, rather than the removal of any sense of border in the Irish Sea, BUT we also consent to an arrangement that has at its heart the right of the EU to, in the final analysis, press for the most intrusive and disruptive border experience and their ability to operate politically on the basis of their ability to call into being that default reality.

2) No Solution

The Government plans do not solve the presenting problem for reasons set out by the House of Lords Committee on the Protocol in June:

*'the movement from Great Britain to Northern Ireland for planting of a large number of species, including several of key importance to the ecosystem, remains prohibited, and called for the process for approvals to be expedited. We also note concerns that plants and trees will only be available via registered operators such as garden centres, and not via online shopping. We invite the Government to confirm whether this is the case, and to set out how it will address concerns that many important species remain prohibited. We also invite the Government to provide an update on the mechanism for removal of the ban on 11 further species by the next planting season, and to set out how the process for such approvals can be expedited.'*¹

(c) that it may imperfectly achieve its policy objectives;

The Regulations get into difficulty in terms of achieving their policy objectives because they make no sense apart from EU Regulation 2023/1231 which neither respects the territorial integrity of the United Kingdom nor the essential state functions of the United Kingdom in terms of the economic governance of the UK and in terms of the biosecurity of the UK. This is a problem because the Windsor Framework (Plant Health) Regulations are defined by reference to the Windsor Framework, Article 1(2) of which is in turn defined in terms of respecting the territorial integrity of the UK and respecting the essential state functions of the UK.

In the first instance, for the reasons set out above, the Regulations effect a system that has at its heart EU Regulation 2023/1231, which rather than removing any sense of border in the Irish Sea, offers an alternative border experience but one that requires an export number, and SPS border certificate, membership of a trusted trader scheme, negotiating border control posts etc, and this arrangement still involves foreign countries interfering in the governance of the UK and seeking to effect its division. Moreover, Article 14 of EU Regulation 2023/1231 asserts an EU right to default to a fully conventional border experience that is both deeply intrusive and disruptive.

¹ <https://committees.parliament.uk/publications/41064/documents/199962/default/>

In the second instance, it has long been understood that the most basic and most fundamental role played by the state is that of defence which used to be understood narrowly in terms of the existential threat posed by military attack, but today there is a broader sense of potential existential threat that also includes threats to biosecurity and cyber-security. Providing security is the most basic and elementary responsibility of a sovereign state, because the security of the people, the political demos, that informs it does not relate to a particular project, to 'a means', but rather to a community that must be protected as 'an end' in itself.

The deconstruction of the United Kingdom of Great Britain and Northern Ireland as a polity whose government has responsibility for its security, so an aspect of this is ceded to the EU/the Republic of Ireland, is extraordinary and yet this is the implication of the para 2.1 of the EM:

'The purpose of this instrument is to support trade between Great Britain ("GB") and Northern Ireland ("NI") whilst protecting biosecurity on the island of Ireland, following the agreement of the Windsor Framework.'

The UK Government is not only responsible for protecting the completely unfettered free movement of goods within itself, but also the biosecurity of its people. Of course, it is not wrong to have regard to the biosecurity of neighbours, but this must be a secondary obligation to its own citizens who pay taxes and may be asked to make the ultimate sacrifice in time of war. In this context while it is good to have regard to the biosecurity of the island of Ireland as a whole, this must necessarily come second to the biosecurity of the United Kingdom and yet neither this EM nor any other Windsor Framework SI or EM mentions the need to protect the biosecurity of the United Kingdom and only expresses concern for the biosecurity of the island of Ireland.

Implicit in the deconstruction of this essential state function is the reframing of questions of security and risk so that they no longer pertain to the United Kingdom of Great Britain and Northern Ireland but rather ask Great Britain to view risk and biosecurity separately and independently from Northern Ireland whose risk and security questions are now set at a Republic of Ireland/EU level. Indeed, crucially this separation is not simply a process of *separation* but crucially a process of *separation against* each other, such that one does not simply cease viewing Northern Ireland within one's biosecurity but are actually asked to assess one's biosecurity against that of Northern Ireland. The disciplines imposed by the Protocol in terms of biosecurity risk assessment do not just give rise to an 'othering process', in the context of which Northern Ireland is no longer part of the same 'political we', but also to the pathologizing of Great Britain as an 'other' that is also the source of a threat. This is completely destructive of the UK body politic and UK political demos.

The failure of these Windsor Framework regulations to respect the territorial integrity of the UK and the essential state functions of the UK both with respect to economic governance and biosecurity would make these regulations mean that they do not achieve their policy objectives which is to give effect to the Windsor Framework. Article 1 (2) of the Windsor Framework states: *'This Protocol respects the essential State functions and territorial integrity of the United Kingdom.'* And it is made directly effective in UK law by S 7A (1)(a) of the European Withdrawal Agreement Act requiring that *"all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement."* It is not possible for regulations that actively disrespect the territorial integrity of the UK and the essential state functions of the UK to be deployed as an outworking of the Windsor Framework as a whole, including Article 1.2. That creates a problem to the extent that these Plant Health regulations are made on the basis of a regulation making power for the purpose of implementing the Protocol rather than any particular part of it which must means

that resulting regulations must give effect to the Protocol as a whole and therefore cannot violate any part of it.

(e) that there appear to be inadequacies in the consultation process which relates to the instrument;

Para 10.1 of the EM states: 'The UK Government has considered and reflected engagement with interested stakeholders, including organisations moving goods between GB and NI, in drafting these Regulations.' This does not sound like a public consultation. Possibly if they had conducted a public consultation they might have realised that a 'solution' that is as restrictive as that envisaged in this case is no solution at all.

Yours sincerely,

Dr Dan Boucher
DUP Director of Policy and Research
07979591407

Submission on The Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulations 2023

We write to express serious concerns about the Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulations 2023 which were laid on 5 September.

We set out our concerns on the basis of your terms of reference, making particular reference to grounds, 4 a, b, c and d.

(4) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

The Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulations 2023 are of great political and indeed constitutional importance. We set out the bases for this not necessarily in the expectation that the Committee will seek to adjudicate on them but in order to demonstrate why these regulations are politically and legally important and likely to be of interest and concern to the House.

The Explanatory Memorandum on the Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulations 2023 explains, at para 7.2 that the Regulations will disapply some 60 EU instruments in favour of GB regulations.

1) EU Regulation 2023/1231

In the first instance, these regulations hang on EU Regulation 2023/1231 of the European Union, otherwise known as ‘the SPS regulation’ which was passed on the 14th of June this year, without which none of them makes sense.

Regulation 2 (1) of the Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulations 2023 states:

‘the SPS Regulation’ means Regulation (EU) 2023/1231 of the European Parliament and of the Council of 14 June 2023 on specific rules relating to the entry into Northern Ireland from other parts of the United Kingdom of certain consignments of retail goods, plants for planting, seed potatoes, machinery and certain vehicles operated for agricultural or forestry purposes, as well as non-commercial movements of certain pet animals into Northern Ireland(3);

The Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulations 2023 mention ‘the SPS Regulation’, no fewer than twenty times, such that the Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulations 2023 make no sense without the prior existence of the SPS Regulation.

Central to the task of understanding the Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulations 2023 before us today, is understanding the SPS Regulation, namely EU Regulation 2023/1231.

EU Regulation 2023/1231 makes provision for some goods to be subject to less exacting SPS border requirements than would otherwise obtain if traders submit to certain restrictions. Specifically, if those in the wider UK bringing goods to Northern Ireland have an export number (EORI), are moving SPS retail goods to a confirmed Northern Ireland consumer with an address in Northern Ireland, and if those goods bare 'Not for EU' labels (which are being phased in across a number of stages) and are subject to 10% to 5 % identity checks at Border Control Posts, and if the retailers in question have applied to join the trusted trader scheme and successfully obtained and kept trusted trader status, then, and only then, will they benefit from a simplified single SPS certificate.

The implications flowing from this are far reaching.

First, this is not unfettered access, which is the term used for free movement within a single market which, by definition, encounters neither a customs nor an SPS border, nor Border Control Posts. So, the first thing we must be clear about is that the alternative border arrangements that the Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulations 2023 help effect, do not remove, in the words of the Prime Minister, 'any sense of border in the Irish Sea.' What they do is facilitate an alternative border experience **but it is still a border experience**, a border whose function it is to uphold the integrity of the separate legal regime that now exists in Northern Ireland, which is the result of our partial disenfranchisement.

Second, the alternative arrangements involving the suspension of 60 EU instruments affected by the Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulations 2023 are not transferred to us so that we can hold and claim them for ourselves. They are only offered by the EU subject to certain EU conditions which the EU polices and enforces. In this regard the most important Article of EU Regulation 2023/1231, without which one cannot understand the Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulations 2023, is Article 14. In Article 14, sub paragraph 5, the EU reserves the right to remove the alternative arrangements and press for a conventional border experience at which point the Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulations 2023 will become irrelevant. It states: *'If the United Kingdom fails to comply with the conditions laid down in paragraph 1, point (c), or in paragraph 2, point (a) or (b), of this Article, the Commission shall adopt a delegated act in accordance with Article 17 to supplement this Regulation by suspending the application of Articles 4, 5, 6 and 9 to 12.'*

In that sense anyone voting for the Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulations 2023 would effectively be saying: we will ask for alternative border arrangements even though we know that in doing so, we not only accept the reality of the border in the alternative border arrangements, rather than the removal of any sense of border in the Irish Sea, BUT we also consent to an arrangement that has at its heart the right of the EU to, in the final analysis, press for the most intrusive and disruptive border experience and their ability to operate politically on the basis of their ability to call into being as the default reality.

2) Very Partial Suspension of EU Rules

Second, regulation 4 of Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulations 2023 sets out the

disapplication of the 60 instruments in terms that seem to highlight the fact that even in the context of the Green Lane, some EU laws continue to apply:

I] Provisions listed in Column 2 of Schedule 1 are treated as applying to the extent that the corresponding EU instrument in Column 1 does not apply by virtue of Article 1(2) and chapter 2 of the SPS Regulation.

That would mean the increased use of GB Standards if Column 1 listed EU legislation and Column 2 listed different GB legislation, but the two columns are to a very large degree the same.

II] Provisions listed in Column 2 of Schedule 2 are treated as applying to the extent that the corresponding EU instrument in Column 1 does not apply by virtue of Article 1(2) and chapter 2 of the SPS Regulation.

Here the columns do seem to differ more often than not, suggesting that GB standards take over.

In short, this way of presenting the potential suspension of the 60 laws, (a suspension that can, of course, be terminated by the EU if they deploy their Article 14 rights in the SPS Regulation upon which the Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulations 2023 depends), would appear to serve to highlight the extent to which even under the Green Lane we remain subject to EU laws. In that sense the story would seem to be as much about the extent to which the Green Lane is subject to ongoing EU standards, as about replacing them with GB Standards. And, of course, Article 14 of the SPS Regulation means that in the final analysis we remain completely subject to EU standards in any event.

3) GB Standards??

One way in which the constitutional importance of the Windsor Framework Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulation before us today is evidenced is in the curious decision to describe the alternative standards that are, in some cases, to be enforced in Northern Ireland as 'GB standards' rather than 'UK standards'. The UK is a single country. If standards are applied across all of it then they become UK standards, not GB standards applied to Northern Ireland, that would be like calling GB standards English standards rather than GB standards in the event that they were extended to Scotland and Wales. Calling UK wide standards GB standards is extraordinary unless one's purpose is to apply a division between Northern Ireland and Great Britain contrary to the name of our polity which is defined in terms of the negation of that division, the United Kingdom of Great Britain and Northern Ireland.

However, the Explanatory Memorandum says that the purpose of the Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulations 2023 is to:

'Extend GB rules for public health, marketing and organics standards to NI so that goods moved from GB to NI via the Northern Ireland Retail Movement Scheme can meet GB standards, following the disapplication of EU rules in these areas.'

This might provide presentational benefits in terms of justifying the construction of Border Control Posts at Belfast, Warrenpoint, Larne and Foyle. If the standards were described as UK standards, then the use of Border Control Posts for 10 to 5% identity checks, and other risk-based checks, would be as absurd as using border control posts within any other part of the UK. By contrast, defining the

relevant standards as GB standards makes the deployment of Border Control Posts seem less controversial because it will enable the Government to claim that these Border Control Posts should not be understood as Border Control Posts in the normal sense because their purpose is actually to give effect to, UK government by simply imposing standards that arise from within the UK to government within the borders of the UK, but this is absurd and completely unacceptable for all the reasons set out above.

4) Trade Diversion

Third, the Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulations are problematic because unlike most forms of legislation that don't have an impact until they formally come into effect, businesses have been busily restructuring in preparation for the regulations as part of the Retail Movement Scheme (see para 7.9 EM), first announced as the green lane in February, for some months and ASDA has already started to use 'Not for EU labels.' This means that, unusually, we can already see something of the effect of the regulations. Moreover, although we are now only considering the effect of SPS Green Lane Windsor SI's on their publication now, their actual consequence has been plain to see since 14 June, if not before, when the EU Regulation 2023/1231 to which they all relate, and without which none of them make sense, has been there for anyone to read for some months.

What we see is that many businesses have made it clear that relying on the Retail Movement Scheme is too complicated and too expensive for the Retail Movement Scheme to simply take over from the old very light touch STAMNI scheme that they replace,¹ such that supermarkets can continue to function on the basis of the old GB-NI supply chains that attended and defined what was the UK single market for goods until the end of 31 December 2020, and which helped give effect to UK economic nationality. In this context big supermarkets like Tesco have been restructuring their supply chains to move as much as possible of what previously came from GB to NI so that after 1 October it comes from ROI to NI.

One might respond to this by arguing that, to the extent that these particular regulations apply GB regulations in favour of 60 EU instruments, they cannot have a trade diversionary effect. There are two difficulties with this assertion. In the first instance, to the extent that the deployment of these standards is through an SPS certificate in relation to which one must have an export number and have got membership of and kept membership of the trusted trader scheme and negotiated a Border Control Post and provided Not for EU labels this amounts to a cost that does not apply to goods movements in other parts of the UK and an increased cost compared to STAMNI. In the second instance, the impact of the Retail Movement Scheme in terms of these regulations does not simply determine where GB regulations apply but also determines, by implication see point 2 above, where they cannot apply, and where EU regulations, the presence of which was obscured by STAMNI, will now take effect.

The trade diversionary implications of preparing for the Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulations 2023, and thus EU Regulation 2023/1231, without which it, and the other Retail Movement Scheme legislation makes no sense, was brought home with particular clarity in the case of Tesco through a slide at a recent presentation to retailers. The heading was 'Packaged Food approach. **For products currently moving from GB to NI:**' Of this they said that under the Retail Movement Scheme it would be important to restructure to get as many of these goods as possible

¹ <https://www.daera-ni.gov.uk/publications/stamni-compliance-declaration>

from ROI to avoid the Green Lane and Red Lane. Under the heading 'Ireland Supply Routes' the slide says:

- 'More Direct from the EU
- Move all common products from the ROI DC to NI stores
- Align some range with the ROI range'

This is not to suggest that there will be no use of the Green Lane but rather that, together with the Red Lane, the Green Lane as defined by various SIs published since August, including the Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulations are already driving trade diversion. The fact that one can already see that trade diversion is the straight-forward result of replacing the STAMNI Scheme with the Retail Movement Scheme facilitated by the Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulations among other Windsor SIs, even before it formally comes into effect, demonstrates that rather than fixing the problem with the Northern Ireland Protocol/Windsor Framework, these Windsor Framework Regulations have actually helped call it out and in terms that were always recognised as fatally problematic by the drafters of the Protocol/Windsor Framework, such that they justify derogation from it.

Article 16 of the Protocol, which is directly effective in UK law, and which many members of the House of Lords criticised the Government for not triggering ahead of introducing the Northern Ireland Protocol Bill, represents the mechanism to use if the Protocol is failing and failure is defined by Article 16 in the following terms:

'If the application of this Protocol leads to serious economic, societal or environmental difficulties that are liable to persist, **or to diversion of trade, the Union or the United Kingdom may unilaterally take appropriate safeguard measures.** Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Protocol.'

The interesting thing about the form of words employed here by the drafters is that the diversion of trade is recognised to be such a serious matter that even if it does not lead to 'serious economic, societal or environmental difficulties that are liable to persist', Article 16 can still be triggered just because it results in a diversion of trade. That is not at all surprising because trade flows that are definitive of a single market are definitive of the economic nationality that underpins the modern nation state (and are, as such, of an entirely different constitutional effect to trade flows between economies) and which could not be cut away without shaking the very foundations of the polity in question.

The trade diversionary implications of the Retail Movement Scheme, as evidenced through the Tesco's presentation, have had a clear impact on the haulage sector, which has experienced a significant reduction in goods travelling from GB to NI since the announcement of Windsor and the replacement of the STAMNI Scheme with the Retail Movement Scheme that it is the purpose of these regulations to implement. The recent announcement that the Northern Ireland wing of Culina, the largest UK wide haulier of chilled and ambient products, called Morgan McLernon (the business

of which is defined in UK terms²) is to be closed, which management blamed specifically on the implications of Brexit³, (following the reduction in the operations of another haulage company servicing the UK market, Americold), provide a real life demonstration of the reality of trade diversion which the announcement of the replacement of the STAMNI Scheme with the Retail Movement Scheme through these regulations has accelerated. A July report also referenced a '8% reduction in loads brought in from GB to NI.'⁴ If the Government persists with these Regulations, then the trade diversion they are creating will make it very difficult for them not to Trigger Article 16. The Government should abandon the Regulations and keep the STAMNI Scheme in place.

(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;

The Regulation making powers that have laid the foundation for the Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulations 2023 were made at the same time that the Protocol was made directly effective in UK Law, both through the EU Withdrawal Agreement Act 2018, as amended by the Act of the same name 2020. An important change has taken place between the parent legislation being passed and the introduction of the Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulations 2023 in that since the announcement of the legislation on 27 February 2023 and now, the trade diversionary implications of aligning with the implications of the legislation have become apparent, for all the reasons set out in detail above. In this context, given that the parent legislation is for the purpose of giving effect to the Northern Ireland Protocol/Windsor Framework, the question arises as to whether it is appropriate to continue given that it has already begun to have effect and in terms that afford the UK Government the right to derogate. It is one thing for legislation to have a consequence that generates circumstances in which it is appropriate to derogate as an unanticipated consequence of the legislation after it comes into effect, but it is quite another to pass legislation that has not yet become law, but in relation to which the consequences of preparation already give grounds for derogation. The appropriateness of this must surely be called into question by the fact that Article 16 of the Windsor Framework (the undergirding agreement that stands both in international law and as directly effective in UK law) highlights the fact that trade diversion is not acceptable.

(c) that it may imperfectly achieve its policy objectives;

To the extent that rather than furthering the Windsor Framework, the Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulations 2023 are already, even before formally taking effect, contributing to the development of grounds for derogating from the treaty for the reasons set out above, this legislation, rather than furthering the interests of the Windsor Framework, is instead undermining it by strengthening the basis for the UK derogating from it through Article 16. The terms of failure are such that they must even beg questions about the vires of the legislation under S 8C of the Withdrawal

² 'Morgan McLernon are specialists in providing first class chilled distribution and warehousing services predominantly in Northern Ireland with services to and from the UK.' <https://www.culina.co.uk/chilled-logistics-solutions/#morgan>

³ <https://trans.info/morgan-mclernon-357518>
<https://www.belfasttelegraph.co.uk/business/northern-ireland/up-to-500-jobs-at-risk-as-co-armagh-haulage-company-suffering-brexit-hit/a1533161909.html>

⁴ <https://centreforbrexitpolicy.org.uk/wp-content/uploads/2023/07/MUTUAL-ENFORCEMENT-The-Key-to-Restoring-Government-in-Stormont.pdf>

Agreement Act, in that it results from a regulation making power that is supposed to give effect to the Windsor Framework, rather than giving new grounds for derogating from it.

Moreover, the Regulations also get into difficulty in terms of achieving their policy objectives because they make no sense apart from EU Regulation 2023/1231 which neither respects the territorial integrity of the United Kingdom nor the essential state functions of the United Kingdom in terms of the economic governance of the UK and in terms of the biosecurity of the UK. This is a problem because the Windsor Framework (Retail Movement Scheme: Public Health, Marketing and Organic Product Standards and Miscellaneous Provisions) Regulations are defined by reference to the Windsor Framework, Article 1(2) of which is defined in terms of respecting the territorial integrity of the UK and respecting the essential state functions of the UK.

In the first instance, for the reasons set out above, the Regulations effect a system that has at its heart EU Regulation 2023/1231, which rather than removing any sense of border in the Irish Sea, offers an alternative border experience but one that requires an export number, and SPS border certificate, membership of a trusted trader scheme, negotiating border control posts etc, and this arrangement still involves foreign countries interfering in the governance of the UK and seeking to effect its division. Moreover, Article 14 of EU Regulation 2023/1231 asserts an EU right to default to a fully conventional border experience that is both deeply intrusive and disruptive.

In the second instance, it has long been understood that the most basic and most fundamental role played by the state is that of defence which used to be understood narrowly in terms of the existential threat posed by military attack, but today there is a broader sense of potential existential threat that also includes threats to biosecurity and cyber-security. Providing security is the most basic and elementary responsibility of a sovereign state, because the security of the people, the political demos, that informs it does not relate to a particular project, to 'a means', but rather to a community that must be protected as 'an end' in itself.

The deconstruction of the United Kingdom of Great Britain and Northern Ireland as a polity whose government has responsibility for its security, so an aspect of this is ceded to the EU/the Republic of Ireland, is extraordinary and yet this is the implication of the para 2.1 of the EM:

*'The purpose of this instrument is to support trade between Great Britain ("GB") and Northern Ireland ("NI") **whilst protecting biosecurity on the island of Ireland**, following the agreement of the Windsor Framework.'*

The UK Government is not only responsible for protecting the completely unfettered free movement of goods within itself, but also the biosecurity of its people. Of course, it is not wrong to have regard to the biosecurity of neighbours, but this must be a secondary obligation to its own citizens who pay taxes and may be asked to make the ultimate sacrifice in time of war. In this context while it is good to have regard to the biosecurity of the island of Ireland as a whole, this must necessarily come second to the biosecurity of the United Kingdom and yet neither this EM nor any other Windsor Framework SI or EM mentions the need to protect the biosecurity of the United Kingdom and only expresses concern for the biosecurity of the island of Ireland.

Implicit in the deconstruction of this essential state function is the reframing of questions of security and risk so that they no longer pertain to the United Kingdom of Great Britain and Northern Ireland but rather ask Great Britain to view risk and biosecurity separately and independently from Northern Ireland whose risk and security questions are now set at a Republic of Ireland/EU level. Indeed, crucially this separation is not simply a process of *separation* but crucially a process of *separation against* each other, such that one does not simply cease viewing Northern Ireland within one's

biosecurity but are actually asked to assess one's biosecurity against that of Northern Ireland. The disciplines imposed by the Protocol in terms of biosecurity risk assessment do not just give rise to an 'othering process', in the context of which Northern Ireland is no longer part of the same 'political we', but also to the pathologizing of Great Britain as an 'other' that is also the source of a threat. This is completely destructive of the UK body politic and UK political demos.

The failure of these Windsor Framework regulations to respect the territorial integrity of the UK and the essential state functions of the UK both with respect to economic governance and biosecurity would make these regulations mean that they do not achieve their policy objectives which is to give effect to the Windsor Framework. Article 1 (2) of the Windsor Framework states: *'This Protocol respects the essential State functions and territorial integrity of the United Kingdom.'* And it is made directly effective in UK law by S 7A (1)(a) of the European Withdrawal Agreement Act requiring that *"all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement."* It is not possible for regulations that actively disrespect the territorial integrity of the UK and the essential state functions of the UK to be deployed as an outworking of the Windsor Framework as a whole, including Article 1.2. That creates a problem to the extent that these regulations are made on the basis of a regulation making power for the purpose of implementing the Protocol rather than any particular part of it which must mean that resulting regulations must give effect to the Protocol as a whole and therefore cannot violate any part of it.

(e) that there appear to be inadequacies in the consultation process which relates to the instrument;

Para 10.1 of the EM states: 10.1 'There has been no formal consultation on this specific instrument. While there is a legal obligation under retained EU law to consult on changes to food law (which this instrument will amend), there is an exception where the urgency of the matter does not allow it. The exemption applies in these circumstances, given the requirement to meet legal commitments made with the EU.' Given the huge controversy surrounding these regulations, the decision not to have a public consultation in developing them is very concerning.