



HOUSE OF LORDS

European Affairs Sub-Committee on
The Windsor Framework

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The Rt Hon. the Lord Cameron of Chipping Norton
Secretary of State for Foreign, Commonwealth
and Development Affairs
Foreign, Commonwealth and Development Office
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19 December 2023

Dear Foreign Secretary,

REGULATORY DIVERGENCE AND THE WINDSOR FRAMEWORK

1. On 15 November 2023, the House of Lords European Affairs Committee Sub-Committee on the Windsor Framework launched an inquiry into regulatory divergence and the Windsor Framework.
2. As part of its enquiry, the Sub-Committee received written evidence from several stakeholders and undertook evidence sessions with a range of expert witnesses on the subject of regulatory divergence in the context of the Windsor Framework.
3. On 15 November we heard evidence from Dr Lisa Claire Whitten, Research Fellow, Post-Brexit Governance NI, Queen's University Belfast; Dr Esmond Birnie, Senior Economist, University of Ulster; Joël Reland, Research Associate, UK in a Changing Europe; Anton Spisak, Head of Political Leadership, Tony Blair Institute for Global Change; and James Webber, Partner, Shearman & Sterling. On 22 November we heard from Stephen Kelly, Chief Executive, Manufacturing NI; Nichola Mallon, Head of Trade and Devolution, Logistics UK; Anjulie Patel, ADS Aerospace Programme Manager, ADS Group Ltd; and Alexander Kinnear, Parliamentary Officer, Ulster Farmers Union (UFU). We also received seven pieces of written evidence. We are grateful to all our witnesses for their assistance.
4. The following paragraphs reflect the findings of our inquiry, which we draw to your attention in the context of the ongoing implementation of the Windsor Framework, on the merits of which we make no comment. Nor do all of us endorse all the points made in the evidence we heard.

The impact of regulatory divergence

Causes and types of divergence

5. Witnesses expressed different views on the potential for regulatory divergence. It is important to establish from the outset that the risk of regulatory divergence does not apply to the whole economy of Northern Ireland. The Minister highlighted the fact that “the Framework concerns only a narrow set of areas in Northern Ireland’s economic life, in terms of the movement and trade in goods. Northern Ireland, as with the rest of the United Kingdom, will not contribute to the EU’s budget; is not in the scope of freedom of movement; or of services, environmental, labour or procurement rules; and is outside both the Common Agricultural and Common Fisheries Policies.” Dr Graham Gudgin told us that “It is important not to over-estimate the dangers of UK divergence from EU regulations since the EU regulations on production apply to less than 20% of the NI economy, are largely replicated in the UK, and will be adopted by many firms irrespective of UK regulation.” As the Framework predominantly concerns the trade in goods (rather than services), this is the area most potentially affected by regulatory divergence.¹
6. At the same time, as Dr Lisa Claire Whitten, Research Fellow, Post-Brexit Governance NI at Queen’s University Belfast, told us: “The extent to which that potential for divergence is realised dually depends on the degree to which policymakers in the UK or GB ought to move away from EU standards and the extent to which relevant sections of the EU *acquis* evolve.”
7. Some witnesses argued that there is “a default arrangement” for regulatory divergence between Great Britain and Northern Ireland and that it is a “fact of life” for the areas covered by the Protocol on Ireland/Northern Ireland and amended by the Windsor Framework. This is due to the continued application of some EU law in Northern Ireland as a means of managing the implications of Brexit.
8. Dr Esmond Birnie set out the comparative importance of Northern Ireland’s trade flows: “Great Britain is Northern Ireland’s main external trading partner. Official stats from 2021, the most up-to-date figures we have, show £12.3 billion of goods purchased from Great Britain, compared to £2.8 billion from the Republic of Ireland and another £2.2 billion from the rest of the European Union. The east-west trading relationship, or external economic relationship—the one most affected by regulatory divergence—is by far the biggest external trading relationship of the Northern Ireland region.”
9. Witnesses also told us that there are several types of possible divergence in the context of the Windsor Framework, both in terms of how divergence arises and the substantive content of divergence. On the sources of divergence, Anton Spisak, Head of Political Leadership at the Tony Blair Institute for Global Change, said that one

¹ By number of businesses, the service sector is the largest in Northern Ireland, with 56% of all businesses. Measured by the value of sales, the total sale of good represented 66.6% of total sales in 2021 and the total sale of services represented 33.4% of total sales in 2021. <https://www.northernireland.gov.uk/news/northern-ireland-business-activity-size-location-and-ownership-2022> and <https://www.nisra.gov.uk/statistics/business-statistics/broad-economy-sales-and-exports-statistics>.

source of divergence “is when the EU continues to legislate in areas where the UK had previously aligned with the EU rulebook.” This he described as “passive divergence” and compared it to “a slow puncture; it simply happens over time organically. It is very difficult to manage, it is much more difficult to control, and the kind of cost it imposes on businesses is gradual.” Another source of divergence “is when the UK proactively decides to change the rules that it had by virtue of EU membership.” This, Spisak said, “is a more active type of divergence, when the UK Government decide to proactively change the rules that are already in place from the time when it was a member state.” He stated that this type of divergence “is a bit more like a flat tyre, in that it introduces a one-off cost to business because the rules and legislation change all of a sudden.” Dr Graham Gudgin suggested that the UK may be losing interest in actively diverging from the EU and cited a number of examples where it has chosen to align with the EU instead.

10. Regarding the substance of divergence, Joël Reland, Research Associate at UK in a Changing Europe, drew a distinction between what he called, “procedural divergence” and “regulatory divergence”. “Procedural divergence”, he said, “is where, in effect, new bureaucracy is introduced because you have to navigate two separate regimes”, giving the example of “declarations at the border when you are exporting goods from the UK into the EU, and the checks which have been placed on those goods.” He compared this with “regulatory divergence”, by which is meant “separate rules that change the way you have to behave or forbid goods crossing” into Northern Ireland in the first place. Under the Windsor Framework, both forms of divergence “apply equally to GB-NI and the trade there, because...Northern Ireland follows a significant amount of EU legislation and therefore there are different regulatory spheres in many cases between GB and NI.” Both forms of divergence, he added, “have created trade disruption.”

Opportunities

11. Several witnesses emphasised that regulatory divergence is not necessarily a negative phenomenon and could provide opportunities. As Anton Spisak told us, divergence can “encourage innovation in how things are regulated and in how different sectors and different regulators approach their regulation.” Nichola Mallon, Head of Trade and Devolution at Logistics UK, agreed that “there are opportunities for the UK to develop its own regulatory regimes that encourage innovation and are more responsive to the needs of the UK economy and a growth agenda.” However, she qualified this by stating that “that there needs to be constant review and assessment of the impact of any changes on the movement of goods from GB to NI, and how that may impact the use of the UK internal market schemes by traders.” Dr Lisa Claire Whitten agreed, emphasising that the “processes of developing policy and regulation must be managed” and if this does not happen, there is an increased risk “that any divergence that occurs will be of the unmanaged variety” with potentially negative or unintended consequences.
12. Witnesses also pointed to potential opportunities created because of the specific regulatory arrangements for Northern Ireland provided for by the Windsor Framework. Dr Lisa Claire Whitten told us that the Windsor Framework “gives Northern Ireland a unique position, arising from retained access to the EU market for goods, together with its access to the UK internal market, and, to a lesser degree, but none the less present, integration with the Irish market under the common travel

area.” She added that: “There is a unique economic selling point there,” although the arrangements are still in their early stages. Nichola Mallon agreed.

13. Expanding on this point, Stephen Kelly, Chief Executive at Manufacturing NI, highlighted work being conducted by the Northern Ireland Department of the Economy and the University of Sussex UK Trade Policy Observatory to explore the potential benefits of dual market access for Northern Ireland. He said that once this analysis is complete, “we will have a clear understanding of who the foreign direct investors are that should be coming to Northern Ireland in terms of market access” and resources for “our own entrepreneurs to take to their potential customers in Europe and elsewhere to demonstrate that Northern Ireland has this unique opportunity to trade.”
14. Dr Graham Gudgin added that Northern Irish producers “now have an advantage over GB-based producers in this respect and this may confer some competitive advantage.” He said Northern Ireland’s continued access to EU markets “could in theory induce some GB firms to relocate production into NI for this reason or persuade foreign firms to consider a location in the UK to prefer NI over GB.”
15. **We note the potential opportunities highlighted by witnesses in relation to Northern Ireland’s access to both Great Britain and EU markets, afforded by the Windsor Framework. How will the Government remain mindful of Northern Ireland’s unique position in this regard when developing policy and regulations so that these benefits and opportunities can be fully realised for the people of Northern Ireland?**

Benefits of the Windsor Framework relating to regulatory divergence

16. Several witnesses said that the Windsor Framework has had a potentially beneficial impact on the issue of regulatory divergence. Joël Reland, Dr Lisa Claire Whitten, Nichola Mallon and Anton Spisak highlighted the impact of the Windsor Framework’s “green lane” provisions in reducing trade friction in the trade of agri-food retail goods between Great Britain and Northern Ireland, with Mr Spisak telling us that the Framework has “had quite a substantial effect on minimising the effects of regulatory divergence.” Dr Lisa Claire Whitten agreed, adding that: “The degree to which supermarket shelves in Great Britain and Northern Ireland will look different has reduced as a consequence of the Windsor Framework and the green lane process, albeit subject to the extent of use of that green lane procedure.”
17. Nichola Mallon also highlighted some positive changes that the Windsor Framework has already had. She said that the removal of titanium dioxide “was a real concern for retailers given that the compound appears in so many products” but that the issue was resolved as a result of the Windsor Framework.
18. Stephen Kelly also said that “a practical example of where the Windsor Framework has been helpful” was in relation to the EU changing its approach to tariff rate quotes on steel in the wake of Russia’s invasion of Ukraine. Mr Kelly said that Manufacturing NI was “very critical of that move at the time because there was no engagement at all with Northern Ireland” and that the “potential economic impact in Northern Ireland was that some categories of steel product would have been subject to a 25% safeguarding

duty.” He said that this issue was “resolved as part of the Windsor Framework,” which was “a good outcome.”

19. The Minister for Europe, in his written evidence, also highlighted the example of wine, telling us that new regulatory reforms “will reduce administrative burdens on importers, expand customer choice through allowing new wine production processes, and reduce unnecessary waste and packaging costs. Under the old ‘grace periods’ in the Protocol, no bottle of wine labelled and packaged in this way would have moved from GB to NI. Instead they would have been prohibited from being placed on the market. Yet under the Windsor Framework, Northern Irish businesses can freely move wine packaged in this way from GB using the Northern Ireland Retail Movement Scheme, or continue to buy wine subject to EU labelling and packaging rules from the EU.”
20. Nichola Mallon and Stephen Kelly both highlighted the potential benefits of the new “structures and commitments on both the EU and the UK side...to monitor and assess the impact” of divergence, which are explored in more detail below at paras 68-90.
21. Stephen Kelly also pointed to the “improvement in the relationship between the UK and the EU” in connection with the Windsor Framework. He said that “with the better relationship between the UK and the EU, and with further engagement with business, civic society, traders and others, we believe that the framework offers a great opportunity to fix and repair what may have already existed but also to avoid any potential future harm.” Anjolie Patel, ADS Aerospace Programme Manager at ADS Group Ltd., agreed, highlighting “the recent announcement of the UK’s association with the Horizon Europe and Copernicus schemes”, which were welcomed by the aerospace, security, defence and space industries she represents.
22. **We note the benefits that the Windsor Framework has brought in relation to titanium oxide, tariff rate quotas for certain types of steel and, in particular, the “green lane” for agri-food retail goods. We also acknowledge and welcome the improved relationship between the UK and the EU and the favourable conditions it creates for resolving outstanding issues and avoiding future harms. How does the Government intend to capitalise on these opportunities for Northern Ireland?**

Risks

23. Witnesses, however, also highlighted a range of current or potential risks relating to regulatory divergence in the context of the Windsor Framework, including some which are not mitigated by the agreement’s new “green lane” provisions. These, they said, will require careful monitoring and management to avoid negative or unintended consequences.

Impact on trade between Great Britain and Northern Ireland

24. Some witnesses told us that the risks posed by regulatory divergence are more theoretical or potential. Stephen Kelly told us that regulatory divergence is “theoretically an issue” but businesses have “not flagged it as being a massive issue for

them.” Stephen Kelly and Nichola Mallon both agreed that this was because the UK has largely retained EU law so far. Dr Graham Gudgin’s assessment was that “There has been relatively little regulatory divergence between NI and GB since the Protocol was introduced at the start of 2021 and little more is now expected. The Northern Ireland economy has continued to perform in line with the UK average, and it seems unlikely that anything to do with regulation in NI is likely to change this.” Nichola Mallon stated, however, that “be it active or passive, regulatory divergence will come” and “it is not possible to predict its extent, which is why it needs to be constantly monitored, reviewed and assessed for both its intended and unintended consequences.”

25. While James Webber, Partner at Shearman & Sterling, agreed that “the Windsor Framework operates to ameliorate some of the harm that the protocol caused in respect of east-west trade flows for certain products, especially retail food products, plants and medicines”, he emphasised that there “are no equivalent changes...for manufactured goods. Any GB producer of manufactured products,” he said, “would still need to comply with EU rules in order to place them on the market in Northern Ireland and even for final consumption within Northern Ireland.” He also told us that “Northern Ireland will now permanently be caught in a trap. In this no man’s land—which I think is the right phrase—we have changes to UK laws that will not apply to NI and so divergence in that dimension on areas that affect the protocol; changes to EU law that do not apply to GB ... and changes to UK law that apply to NI because they are outside the current scope of the Windsor Framework, and therefore increase the level of divergence that exists between Northern Ireland and the single market.”
26. Joël Reland agreed on the position of manufactured goods and argued that “as the EU updates its regulations—it is quite an active regulator—there will be more and more regulatory divergence between Great Britain and Northern Ireland over manufactured goods,” giving the examples of the EU Eco-Design Regulations. “Over time,” he said, those divergences could build up and complicate trade somewhat.” Dr Esmond Birnie, Senior Economist at the University of Ulster, agreed, stating that it is “overwhelmingly likely” that there would be increased “trade frictions in the Irish Sea, at the ports of Larne and Belfast” as a result of further divergence “between Great Britain and the European Union in the future.”
27. Some witnesses told us that divergence was already having an impact. Nichola Mallon told us that some of her members are telling her that “meeting the different requirements for GB-NI in relation to movements has reduced their flexibility, added cost and impacted their workload, staffing and resources.” Dr Esmond Birnie, too, argued that “there is already some evidence, even from the first year of the operation of the protocol, of so-called trade diversion”, giving the example of GB suppliers will simply cease to supply into the Northern Ireland.
28. Joël Reland told us that the impact would vary, depending for example on whether or not businesses in Great Britain wish to export into the EU and have an interest in aligning with developing EU regulations. In some scenarios, he said, “even though there is a regulatory gap, businesses will often adapt anyway and conform to new EU regulations because they want to export to the EU market.” He gave the example of new EU vehicle regulations, which Great Britain-based manufacturers might follow “because they need those EU exports.” Stephen Kelly also argued that there may be

pressure from “lawyers and insurers” to ensure that the UK keeps pace with particular consumer protections.

29. Joël Reland also stated, however, that for “GB-based manufacturers” that trade into Northern Ireland but have no EU market “the incentive to adapt to updated EU regulations is less strong, because NI is likely to be a much smaller part of their market than if they were also exporting to the EU.” Alexander Kinnear, Parliamentary Officer at the Ulster Farmers Union (UFU), agreed with respect to the supply of seeds to Northern Ireland farmers, adding that “Northern Ireland’s marketplace is too small for a lot of GB businesses to be bothered with” and that increased hurdles, exacerbated by divergence, “will damage supply and a whole host of things.”
30. **We acknowledge witnesses’ views that the Windsor Framework effectively mitigates some of the issues arising from regulatory divergence in relation to agri-food retail goods, through the new “green lane” arrangements. However, we also note the potential risk of divergence to manufactured goods which cannot avail of the “green lane”, including through increased costs to business.**
31. **In addition, we note the impact of regulatory divergence will vary across sectors and that Northern Ireland may be particularly impacted in the case of Great Britain-based producers with small Northern Ireland markets and little incentive, therefore, to voluntarily align with developing EU standards.**
32. **While some witnesses emphasised that the risks of regulatory divergence remain “theoretical” until decisions are taken on new regulations (in either the UK or the EU), future divergence is a likely possibility. Will the Government work to monitor, review and carefully assess its implications for Northern Ireland? What is your expectation of regulatory divergence under the Windsor Framework in the future?**
33. **What is the Government’s response to our witnesses’ suggestion that the Windsor Framework more effectively mitigates the effect of divergence on sectors able to use the “green lane” than those who are not? Does the Government agree with suggestions that the effects of divergence will increase over time, as a result of regulatory developments either in Great Britain or the EU and, if so, how is it planning to manage this? How does the Government respond to the concern from witnesses that some Great Britain-based businesses may stop selling into Northern Ireland in cases where there is little incentive on them to voluntarily align with EU standards?**

Competitiveness of the Northern Ireland economy

34. Dr Esmond Birnie also suggested that there could be a range of potential impacts on the Northern Ireland economy if there is “a growing gap between Great Britain and the European Union with respect to regulations, and Northern Ireland is left somewhere in between.” Dr Esmond Birnie and Anton Spisak both agreed that this could affect the competitiveness of the Northern Ireland economy “in instances where GB producers are able to comply with standards that are different from those

on the NI market, simply because NI producers are under an obligation to follow European standards.” This could lead either to businesses in Northern Ireland selling at less competitive prices or “some lower level of business profits, which would cause issues of longer-term sustainability” or both. Dr Lisa Claire Whitten also agreed, saying, there is a “risk of undercutting created for Northern Ireland traders and producers who want to trade on local markets and are subject to the full remit of EU law, whereas the GB to NI movements, and GB producers trading potentially the same goods, are not subject to the same level of rules, presuming that EU rules and standards are more burdensome than UK rules and standards. That is a new potential regulatory risk created by the Windsor Framework.”

35. What is the Government’s response to these concerns about the impact of regulatory divergence on the competitiveness of Northern Ireland producers?

North-South divergence

36. Dr Lisa Claire Whitten also raised the issue of growing divergence north-south on the island of Ireland. She said that though this was “hypothetical”, she pointed to the Government Command Paper’s view that “inherent” in the Windsor Framework “is the prospect of significant divergence between the two distinct economies on the island of Ireland - from food and drink to plants and pets...”² She said that “the extent to which that is realised and the nature of its realisation, particularly as experienced in border communities or by those who live cross-border lives, is yet to be seen, but that is one to watch in the wake of the Windsor Framework.”

37. The Equality Commission for Northern Ireland (ECNI) wrote about the divergence in rights on the island of Ireland. They told us that “there is already divergence in some key areas of substantive equality rights between Great Britain and NI and Ireland and NI. This includes in the areas of gender pay gap reporting, single equality legislation and age discrimination in access to goods, facilities and services.”

38. The Minister for Europe acknowledged the growing divergence between Northern Ireland and Ireland, telling us “This legal and practical divergence between Northern Ireland and Ireland is likely to increase over time and builds on pre-existing capacity for divergence in the vast majority of areas outside the old Protocol...Divergence under the Windsor Framework remains sensible, justified and consistent with the status of Northern Ireland and Ireland as two distinct economies, one fully within the UK’s internal market and the other within the EU’s single market.”

39. How does the Government intend to manage the implications of growing North-South divergence, which it states is “inherent” in the Windsor Framework, including its impact on border communities or those who regularly cross the border between Ireland and Northern Ireland? How does the Government plan to address the divergence of rights between Ireland and Northern Ireland?

² HM Government, *The Windsor Framework: A new way forward*, CP 806, February 2023: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1138989/The_Windsor_Framework_a_new_way_forward.pdf

Risk of complexity and uncertainty

40. Several witnesses pointed to the sheer complexity of the regulatory situation in Northern Ireland and suggested that this was a risk in itself. Alexander Kinnear said: “Divergence is like an assassin: we do not know when it will strike under the current set of rules.” As Dr Lisa Claire Whitten told us: “The regulatory system post Brexit is inherently complex; rules and laws that apply in any given area of policy or aspect of market activity are challenging to discern at times, and that makes it difficult to manage and therefore increases the risk that any divergence that occurs will be of the unmanaged variety.”
41. Such complexity, we were told, could lead to uncertainty. Anton Spisak said that from a business point of view, “the real risk is that of uncertainty and difficulty in navigating the regulatory environment.” He predicted that most regulatory divergence “will be passive divergence that will organically arise over time” and that therefore, “[it] will be very difficult for businesses to keep navigating the changing regulatory landscape.”

42. What is the Government’s response to these concerns?

Small and medium-sized enterprises and the Trader Support Scheme

43. Mr Spisak said that keeping track of new regulations will be “a particular problem for “small and medium-sized businesses” (which make up the majority of the Northern Ireland economy) and called for greater support from the Government.³ Nichola Mallon agreed and emphasised that many small businesses are reliant on the support of the Trade Support Service (TSS) “to move goods across from GB to NI.” The TSS, she said, is due to be funded until December 2024 and that Logistics UK is “keen that a free, high-quality service continues so that it can support businesses.”
44. The Federation of Small Businesses (FSB) reported that divergence has already begun to affect SMEs in Northern Ireland in the form of “non-tariff barriers or regulations on raw materials and finished products”. They told us it “has had a chilling effect on choice or a re-routing of GB-NI supply chains” and that they do not consider that the full effect of divergence on SMEs has yet been felt.

45. Will the Government commit to funding the TSS beyond December 2024?

State aid

46. James Webber told us that the problem of Northern Ireland remaining under EU state aid rules “not just for goods but in respect of the entire economy”, is that, “under the Windsor Framework for Northern Ireland, divergence is almost always going to be a net negative, because if the UK diverges and regulates in a characteristically different way, you will increase the complexity of running a business in NI where you have to manage trade flows between GB and NI and between NI and the rest of the world.”

³ In March 2022, the majority of businesses (89 per cent, 70,510) in Northern Ireland were micro-businesses, with fewer than 10 employees. Just over 2 per cent (1,640) of businesses had 50 or more employees.
<https://www.northernireland.gov.uk/news/northern-ireland-business-activity-size-location-and-ownership-2022>.

47. What assessment has the Government made of the impact of Article 10 of the Windsor Framework and (potentially) divergent standards on state aid and subsidy control on the Northern Ireland economy and more widely?

Sector specific risks

Agri-food sector

48. In addition, witnesses also identified several sector-specific issues. Alexander Kinnear told us that “divergence has so far been negative for the agri-food sector.” He gave a list of issues of concern for the sector, including “glyphosate renewal from the EU, animal welfare proposals, deforestation regulations, the carbon border adjustment mechanism..., the EU animal health law and the breakfast directives” and said that regulatory divergence was a “very worrying prospect for us.”
49. In particular, Alexander Kinnear said that two issues were causing particular concern. The first was glyphosate renewal, referring to the substance commonly used “for weed control, and in particular for Northern Ireland’s arable farmers and wider cereal sector pre-harvest desiccation.” Recently, the EU has begun the process for approving glyphosate for a further 10 years, with the caveat that it cannot be used “for the purposes of pre-harvest desiccation.” Alexander Kinnear said that if it cannot be used for that purpose then “the viability of the cereal sector in Northern Ireland comes into question, which should get alarm bells ringing.” While some EU member states, including Ireland, are exploring possible derogations, he said that “Northern Ireland is not a member state and neither is the UK, so we are completely at a loss in how we channel our efforts into a lobbying campaign or indeed request government to do that on our behalf.”
50. The second issue raised by Alexander Kinnear was “the organic egg sector in Northern Ireland.” He said that there are “about 35 organic egg farmers in Northern Ireland” and the sector is “worth about £5 million to the Northern Ireland agri-food sector”, supplying “15% of GB’s organic eggs.” A specific derogation was put in place in the wake of the Russian invasion of Ukraine, which made it difficult to obtain 100% organic feed for hens, allowing farmers to use 95% organic feed and top up with 5% conventional feed. Europe has decided, and the Republic of Ireland is putting in place, that it has to go with the full 100% organic feed. The derogation will expire towards the end of 2023, meaning that Northern Ireland farmers will have to use 100% organic feed “while GB farmers will continue to feed their hens on the lesser rate.” Once this happens, “the viability of that sector comes into question because we cannot compete with GB farmers on that tariff, and that major cost disparity is critical.”
51. Alexander Kinnear also highlighted a problem with “used agricultural machinery” which, if not resolved, “will get out of hand pretty quickly.” It was assumed, following the publication of the Windsor Framework, “that used agricultural machinery could flow freely from GB to Northern Ireland under the green lane.” However, he continued, “significant concerns have arisen” from dealerships and farmers that this is not the case and that “businesses will have to go under the red lane with huge costs associated with that, and a lot of their product will not even end up in the Republic of Ireland.” Alexander Kinnear said that he is aware the Government and the Northern Ireland Department of Agriculture, Environment and Rural Affairs (DAERA) are working on this issue and that the UFU and the Federation of Small Businesses has

“put forward a solution where Northern Ireland can grant its own phytosanitary certificates” which “ensures that machinery can move into Northern Ireland under the green lane.”

52. On the other hand, the Minister for Europe cited agri-foods as a sector in which insisting on alignment between Northern Ireland and England would be wrong for Northern Ireland. He told us “The Animal Welfare (Livestock Exports) Bill currently before Parliament provides a case study. Northern Ireland does diverge in this case, because the Government has chosen to exempt Northern Ireland from the Bill, which applies to Great Britain only. We believe that this is the right approach because it is unacceptable in practice to seek to restrict this trade either between GB and NI or between Northern Ireland and Ireland/the EU. There are extremely strong practical, economic and social reasons why the movement of livestock in both directions for Northern Ireland is essential, even though some would seek to criticise this as ‘NI-GB divergence’.”
53. **Is the Government aware of the issues raised regarding glyphosate and organic eggs and, if so, is the Government planning to discuss possible derogations for Northern Ireland with the EU? Can the Government provide an update on progress in relation to the issues raised around the movement of used agricultural machinery from Great Britain to Northern Ireland?**

Aerospace

54. Anjulie Patel told us that ADS Group Ltd, which represents the UK’s aerospace, defence, security and space industries “is keen to foster regulatory alignment wherever possible, especially in such a highly regulated sector as aerospace.” She said that an example of “the impact the sector is already starting to see is in the differences between UK and EU REACH—the chemicals regime.”
55. Anjulie Patel also raised a future risk of divergence “between the Civil Aviation Authority in the UK and the European Union Aviation Safety Agency.” She told us that: “Aviation safety regulations in the future will be really important and any differences there will cause a risk and other frictions with movement between GB and Northern Ireland.”
56. Anjulie Patel also told us that “the fundamental issue for us remains the operational and customs challenges that could be eased by aerospace or aeroparts being allowed access to the green lane and being declared ‘not at risk’, because a lot of the movements for aerospace in particular between GB and NI are movements for processing.”
57. **What is the Government’s response to the concerns raised about the potential impact of regulatory divergence as a result of the EU REACH regulation and possible future divergence in aviation safety standards?**

Haulage

58. Nichola Mallon also said that in relation to hauliers, “the big test will come in October 2024 when the custom changes take effect and the green lane is expanded to include freight and parcels.” She appealed “to UK officials to continue to work meaningfully with the logistics sector so that we can road-test proposals.”

59. Can the Government update the Committee on its planned engagement with the haulage sector ahead of the October 2024?

Rest of world movements

60. Nichola Mallon also raised the issue of the movement of “of rest-of-world goods from GB into NI since the Windsor Framework.” We were informed that New Zealand raw material, for example, cannot currently move into Northern Ireland from GB unless it has been further processed. As a result, she said that Logistics UK has “members that have New Zealand stock sitting in a cold store in GB, but they cannot get a business to move it across to a facility in Northern Ireland.”

61. What progress is the Government making on resolving this issue?

Automotives

62. We also received evidence from engineering company Gray & Adams that regulatory divergence could have a future impact on the automotive sector. They gave the example of the EU’s General Safety Regulation 2 (GSR2) which “will mandate a number of features such as tyre pressure monitoring systems, lane departure systems, various camera systems etc.” If the UK decides “to adopt different elements or not adopt the EU elements, the resulting specification differences between otherwise similar vehicles will result in an additional level of complexity and thereby cost.” This, they said, could have an impact on NI vehicles if they have to include GSR2 elements which “may make them more expensive than that of a similar vehicle registered in GB, which may not have to conform to GSR2.” Gray & Adams called for “further legal clarity” on the issue of commercial vehicle bodywork “prior to compulsory implementation of the GB Type Approval scheme on 1st February 2024.”

63. What is the Government’s response to these concerns? Can you provide clarity on whether the new UK vehicle safety regulations will be designed to mitigate the degree of regulatory divergence?

Emerging technologies

64. Dr Graham Gudgin explained that the UK and the EU have increasingly different approaches towards emerging technologies, with the EU prioritising “safeguarding against the threats of AI” and the UK favouring a more “flexible regime...making it a more attractive environment for investment in AI development.” He explained that this could, in time, have significant implications for Northern Ireland if “NI entrepreneurs prefer to operate under UK rules this could establish an incentive for them to relocate their businesses to GB” unless any future Government prefers to align UK regulations with the EU.

65. What is the Government's response to these concerns?

Carbon Border Adjustment Mechanisms (CBAMs)

66. Dr Esmond Birnie highlighted that “the UK and the European Union have had broadly similar, and therefore interconnected, carbon emission trading systems. Obviously, that is particularly important in the whole net-zero policy agenda, but the EU is considering its own approach to carbon border adjustment mechanisms, CBAMs. Again, if a gap opens up, it will have an implication for NI relative to GB.”
- 67. What assessment has the Government made of the risks relating to divergence in approaches to CBAMs?**

Mechanisms for managing divergence

68. Dr Lisa Claire Whitten said that “one of the beneficial aspects of the Windsor Framework is that there are now reinforced structures to identify, at least in theory, and deal with issues before they come to be implemented and have a negative effect. That is positive, particularly in view of the sense that the regulatory impacts GB to NI are more likely to be on specific sectors in specific areas, and therefore could be candidates to find derogations, amendments or fixes to address those issues.” One of those mechanisms, once Stormont is restored, will be the Windsor Framework Democratic Scrutiny Committee, which has not yet had a chance to commence its work. The other mechanisms are explored below.
- 69. What assessment has the Government made of the restoration of Stormont for the management of regulatory divergence under the Windsor Framework?**

Office for the Internal Market

70. The Government has previously set out, both in oral evidence to this Committee during our last inquiry and in its Command Paper, *The Windsor Framework: A New Way Forward*⁴, mechanisms to manage divergence. In particular, the previous Foreign Secretary told us that “the monitoring, assessing, and reporting of regulatory divergence within the UK Internal Market” is within the remit of the Office for the Internal Market (OIM). He said that the Government would “work with the OIM on how to facilitate that work as the new arrangements come into effect.”
71. The OIM set out their position in their written submission to this inquiry. They described their role as providing “expert reports and advice to the governments across the UK, in particular about the impact of certain regulatory provisions on the UK internal market. This may include regulatory measures affecting trade in goods and services”. They explained that “It is important to note that the OIM's role is advisory and not decision-making: decisions about legislation or the functioning of the UK internal market are for the governments and legislatures of the UK.”

⁴https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1138989/The_Windsor_Framework_a_new_way_forward.pdf

72. Some of our witnesses were sceptical about the impact of the OIM on the issue of divergence. Joël Reland described the processes so far as “relatively weak” and Dr Lisa Claire Whitten told us that “the commitments made on the Office for the Internal Market are welcome, but they are specific to regulatory change within the UK. That is good, but one of the challenges for Northern Ireland is the fact that the regulatory divergence it faces is not just within the UK”.

73. Anton Spisak spoke about his main concern in relation to divergence and his hopes for how the OIM could minimise those risks:

“what happens in circumstances where GB regulations in a particular sector—for example, in manufactured goods or the agri-food sector—depart from EU standards in a substantial way, such that Northern Irish producers face a far greater threshold for meeting regulatory standards and that allows GB producers to place products on the NI market based on lower regulatory requirements. That is a practical risk that can happen. It can be minimised, if not managed completely, if the Office for the Internal Market takes a greater role in monitoring those developments as they happen and mitigates those circumstances.

What we have not seen so far from government is a lot of clarity on the mandate of the Office for the Internal Market in managing those circumstances, in particular in setting out very clear criteria against which the office would respond to those circumstances arising in the future.”

74. Stephen Kelly told us that Manufacturing NI met with the people with board level responsibility for the OIM and the team covering Northern Ireland at the OIM. He said, “It is quite a small team, and I suggest that there is probably an opportunity there for that team to be bolstered...I would make the pitch for that OIM team to be based in Northern Ireland”.

75. The FSB said they would support “a considerable increase in the resource for OIM to ensure adequate scanning of the UKIM in real time.” Regarding the uncertainty about the exact remit of the OIM in relation to the Windsor Framework, the FSB told us “It is important that future periodic and annual reports act as an independent, accurate evidence base on the UKIM vis-à-vis implementation of the Windsor framework, and divergence with EU. If the legislative remit of the OIM does not permit this, UKG should legislate and resource accordingly.” The FSB suggested, however, that provisions in Part 4 of the UK Internal Market Act may be sufficient and that the OIM might not be “fully dispensing duties in this regard.”

76. We believe there is a clear opportunity for the Office for the Internal Market to monitor and mitigate some of the risks arising from regulatory divergence in Northern Ireland. However, it is clear that currently there is little certainty about the role of the OIM and their mandate. Will the Government commit to reviewing the role of the OIM with a view to setting out clearly how the OIM would intervene to mitigate any negative effects of regulatory divergence between Northern Ireland and Great Britain?

Special Goods Body

77. In his evidence to us earlier this year, the former Foreign Secretary told us that the newly established Special Goods Body (SGB) will enable “us to engage early where any rule changes could inadvertently lead to new regulatory barriers, to find appropriate solutions through the Joint Committee”.
78. Witnesses welcomed the establishment of the SGB but many said it was too soon to say whether it would have the intended effect. Dr Lisa Claire Whitten described it as “quite a top-down arrangement, so attendance of NI stakeholders would be by invitation only.” James Webber said that “For the Special Goods Body to be useful, the parties would have to use it quite systematically. The monitoring that the Special Goods Body needs to do to have foresight as to divergent change needs to be effective and regular. The quality and timing of information shared by both parties as to potential divergence needs to be of high quality and timely.”
79. Nichola Mallon said that, in relation to the SGB, “it would be important for our industry and others to have a clear and meaningful pathway to input into that process, but that requires that Northern Ireland stakeholders have enough information about the legislation, be it primary or secondary legislation, at a sufficiently early stage to assess its impact, and importantly to have the resource to devote the time and the expertise required.”
80. **The Special Goods Body has the potential to identify and mitigate the risks of divergence if it is used systematically and engages with stakeholders. Will the Government provide an update on the work of the SGB and commit to engaging with relevant stakeholders?**

Joint Consultative Working Group

81. The Joint Consultative Working Group, a group of officials from the UK and the EU working on Windsor Framework issues, is made up of a number of subgroups. The Minister for Europe cited these subgroups as a means “to consider the impact of new EU rules, and enable early engagement to ensure the impacts are fully understood and addressed”.
82. Alexander Kinnear was critical of the agri-food subgroup which had met recently but which the Ulster Farmers’ Union had not been informed about or consulted on. He said its agendas are not published and stakeholders are there by invitation only which is a cause of concern for the sector.
83. **We are concerned by the lack of transparency and the lack of involvement of key stakeholders in the meetings of at least some of the JCWG subgroups. How many meetings of the sub-groups have taken place so far? Will the Government commit to engaging key stakeholders in the work of these subgroups going forward to provide a forum for them to raise issues around divergence?**

Stormont Brake

84. The Minister for Europe cited the Stormont Brake as an example of a “new democratic safeguard” allowing MLAs to veto changes from the EU “where it would pose genuine risks to Northern Ireland’s economic or social life.”
85. We asked our witnesses whether the Stormont Brake could be effective in dealing with instances of potential divergence. They emphasised that it was still theoretical at this point but Joël Reland was not optimistic about its usefulness as a tool for managing divergence. He told us “It needs quite a high threshold and you need to be able to prove a significant and persistent impact on everyday life. In a way, it comes back to the point about capacity. Currently, the UK Government seem to have almost no capacity to track divergence, so how is the Northern Ireland Assembly going to prove the everyday impact and even pick up on cases in the first place?”
86. Dr Lisa Claire Whitten explained that if the Stormont Brake was successfully applied, it could actually lead to Northern Ireland being placed in a position of dual divergence. She said, “If we follow the thought experiment of its being triggered hypothetically successfully in the future, the effect can be expected to create a sense of dual divergence, whereby Northern Ireland would be following a version of EU law in the relevant area of policy but with the smallest bit of the EU law that had been changed in the context of the wider EU market not applying in Northern Ireland. It would be a sort of historical version of that EU law, while at the same time the same requirement would not apply in the rest of the UK, so Northern Ireland would be in a situation of dual divergence.”
87. Business representatives were unclear about how the Stormont Brake would operate in practice and Stephen Kelly emphasised that “people in business would prefer much more stability as to what our longer-term trading relationships will be. The risk of Stormont intervening and causing some disruption in the middle of that is not necessarily appealing.”
88. Alexander Kinnear also expressed reservations about the application of the Stormont Brake. He told us, “we still have to trade in the single market. We want that. That was a red line for us, and it is a lifeline to the dairy sector and the sheep sector. Our issue is this. Albeit on the current trajectory it is not being thrashed out, in an ideal world we would like it to be before we even get to the Stormont brake stage. A policy that is affected by divergence needs an answer as opposed to slamming a brake on it.”
89. The ECNI informed the Committee that the Stormont Brake, if applied, could result in “increasing divergence of equality and human rights on the island of Ireland post Brexit” and said that it is “vital that equality and human rights considerations are built into all key stages of the ‘Stormont Brake’ mechanism”.
90. **How will the Government mitigate the effects of dual divergence if the Stormont Brake is applied? How will the Government support sectors that rely on trading in the single market if the Stormont Brake is applied? How will the Government address concerns about the threshold at which the Stormont Brake’s trigger is set?**

Information about divergence

Divergence strategy

91. Joël Reland said that the Government should focus on having a “system and strategy for thinking about divergence and addressing it...If you had principles that civil servants across different departments could work towards...you would have a much more joined-up and co-ordinated way of dealing with divergence.”
92. Dr Lisa Claire Whitten agreed, explaining that the process of dealing with regulatory divergence “Has been reactive rather than strategic. To date, the UK approach is piecemeal and ad hoc, particularly in how it is being dealt with from a Northern Ireland perspective.”
93. **Will the Government commit to designing and implementing a strategy for handling divergence?**

Tracking/logging divergence

94. We asked witnesses whether they were aware of any Government attempts to track or log instances of regulatory divergence arising from the Windsor Framework. Joël Reland told us that where it is being done, it is not systematic and it is siloed within departments. The result, he said, is that “the internal market or the Northern Ireland aspects are overlooked.”
95. Most witnesses felt that a log of divergence would be useful, especially from a business perspective. Anton Spisak explained that “One of the problems in this context from a business perspective...is the fact that, as a business, you would need to go out and look up change after change on the government websites and documents to be able to identify how particular regulatory requirements may differ for you.” Anjulie Patel made a similar point, saying “the Government have a role to play in making it as easy as possible, especially for small and medium-sized enterprises, to understand the rate of regulatory divergence, and possible mitigations or management of what may be happening, and how those are going to impact their businesses. We think it would be helpful for our member companies to have a single portal to access that information and some detail and guidance for them to be able to digest that information.” Stephen Kelly and Nichola Mallon agreed and emphasised the need for the information to be made “digestible for your ordinary trader”.
96. The Northern Ireland Food and Drink Association (NIFDA) wrote that not only would their members welcome a central log of regulatory divergence, but that log should “identify the competent authority responsible for each subject area in the different jurisdictions. For example, in NI food labelling falls under the responsibility of the FSA, however in England it is Defra.”
97. The FSB told us that “The Food Standards Agency (FSA) is the first statutory organisation we understand has begun to track and share instances of upcoming or possible divergence. This information...is useful, but does not represent a ‘central log’.”

- 98. Businesses adjusting to new ways of working under the Windsor Framework should not be additionally burdened by the need to search for the ways in which new or existing legislation is creating regulatory divergence which may have an impact on the way they conduct their business. It is incumbent on the Government to provide somewhere for stakeholders to go to find out this information in an easily accessible and digestible format. Will the Government commit to providing this information as a matter of urgency, both as one central portal of divergence and sector-specific logs?**

Engagement between the Government, EU and businesses

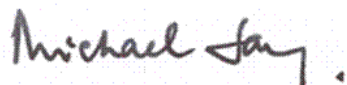
99. Businesses told us that it is important for the Government and the EU to engage with them at an early stage about new regulations in the pipeline and coming into force. Nichola Mallon explained that “divergence could have a big impact on the movement of goods in terms of trading routes, where companies locate and which markets grow” and they need prior warning so that plans can be made. Stephen Kelly told us that while the GOV.UK website is helpful for learning about regulations coming into force in the UK, the same can not be said for EU regulations. He explained that when the EU CBAM came into force, Irish businesses were contacting Northern Irish businesses about it and they did not know anything about it: “We looked on the Revenue Commissioners’ site. There was no detail there. We looked on the EU site. There was no detail there. We contacted the Department of Foreign Affairs and asked it, ‘What advice do you give me to give to businesses in Northern Ireland?’ It said, ‘We don’t know. We’re waiting for the EU to advise us’. We contacted the UK Government and they said, ‘CBAM is an EU issue. It’s not a UK issue. It’s not our problem. It’s their problem to resolve this for you.’ So everyone is going around in circles.”
100. This seemed to be a common theme across businesses. Alexander Kinnear said, “Even if we had official pathways and channels to put our information in and get information back out, it would be something. Do we go to the Foreign Office with this stuff? Do we go to Defra (Department for Environment, Food & Rural Affairs) or to the CRD (Chemicals Regulation Division)? Do we go to DAERA (Department of Agriculture, Environment and Rural Affairs) to tell Defra to tell the UK mission? Those pathways are far from clear.”
101. The FSB summed up the lack of engagement thus far, saying, “In our view the overall engagement – structures, resource and communications – are insufficient.”
- 102. Stakeholders are unclear who they should contact about issues arising from regulatory divergence. Will the Government provide clear updated guidance to all stakeholders about lines of responsibility and who they should contact for help and advice?**

The Committee would be grateful if you could respond to this letter by 15 March 2024.

I am copying this letter to Rt Hon Chris Heaton-Harris MP, Secretary of State for Northern Ireland; Baroness Neville-Rolfe, Minister of State (Cabinet Office); Sir William Cash MP, Chair of the Commons European Scrutiny Committee; George Wilson, Clerk of the Commons European Scrutiny Committee; Sir Robert Buckland MP, Chair of the Commons Northern

Ireland Affairs Committee; Rizgar Kiyak, Parliamentary Unit, Foreign Commonwealth and Development Office; and the Secretariat of the Northern Ireland Assembly Committee for the Executive Office.

Yours sincerely,

A handwritten signature in black ink that reads "Michael Jay". The signature is written in a cursive style with a period at the end.

Lord Jay of Ewelme
Chair of the Sub-Committee on The Windsor Framework