

## **Professor Katy Hayward - Written evidence (IWF0003)**

### **The draft Windsor Framework Democratic Scrutiny Regulations 2023. An initial analysis**

**Professor Katy Hayward, Queen's University Belfast, 21 March 2023**

1. This brief paper outlines some features and consequences of the *Windsor Framework Democratic Scrutiny Regulations 2023* (published 20 March 2023).
  - 1.1. It is not intended to be a comprehensive consideration of democratic governance of Northern Ireland in relation to the Windsor Framework, nor is it to cover in detail matters of procedure or process.
  - 1.2. The purpose of this paper is to assess the degree to which the joint objectives of the Windsor Framework are met in the draft SI and to highlight some potential ramifications. It presumes a good level of knowledge of the Windsor Framework, the draft SI and Article 13 of the Protocol on Ireland/Northern Ireland as was.

#### ***The purpose of the Democratic Scrutiny Regulations***

2. The Joint Committee decision laying down arrangements for the Windsor Framework sees related changes to the Protocol on Ireland/Northern Ireland under Article 13.
  - 2.1. Article 13(3) amends the process of 'dynamic alignment' under the Protocol with the addition of '13(3a)', which states that an amendment or replacement to an EU act under the Protocol can be stopped from applying in NI by the use of an 'emergency brake mechanism'.
  - 2.2. The UK Unilateral Declaration that sets this out says that the Stormont brake 'is without prejudice to the status of cross-community voting and safeguards in the 1998 Agreement, which apply solely and exclusively to devolved matters.' Beyond that, no mention is made of cross-community safeguards or voting in any of the documentation that constitutes the Windsor Framework.
  - 2.3. The Unilateral Declaration also commits the UK Government to 'intensive consultations in the Joint Committee' as provided for by Article 13(4) of the Protocol if the triggering of the emergency brake leads to the UK giving notification to the EU that the replacement/ amendment to EU law will not apply in NI.
3. According to the UK Command Paper (CP806) the Windsor Framework (WF) is intended to 'create 'a new legal framework of democratic consent and control' to 'address the democratic deficit' (para i).
  - 3.1. It states that the UK Government will 'underpin this new framework through amendments to the Northern Ireland Act 1998 *to provide constitutional and democratic guarantees for the people* of Northern

Ireland' (para.i). As per the 1998 Agreement, the 'people of Northern Ireland' are known to be, and accepted as, 'British, Irish and both'.

3.2. The Command paper states: 'The consent mechanism is clear that [sic] our objective is to achieve *as broad a consensus across all communities* as is possible.' (para. 60). As such, it is reasonable to say that the mechanism should be as fairly balanced, well-considered and sensitively applied as possible, without the potential to deepen resentments or polarisation.

4. There were details that were missing from the Windsor Framework documents regarding the enhancement of democratic scrutiny. There was expectation that the statutory instrument would clarify many of these.

4.1. This was expected to include the nature and scope of the work of any NI Assembly committee, how the work of the committee would interact with the structures for engagement and UK-EU bodies overseeing the Protocol (including the new Joint Consultative Working Group sub-groups), and the way in which the UK Government would apply and assess the criteria under Article 13(3a, para 1c) following use of the Stormont Brake.

4.2. In the Command Paper, the Government commits to 'consult with the parties in Northern Ireland on how to codify domestically this defined process of scrutiny, *consultation with businesses and others affected by the EU act in question*, as well as providing time to identify any other routes to resolution, *ensuring that the Brake is only deployed as the last mechanism* available to deal with the concerns' (para 62).

4.2.1. As such there were expectations that the SI would include details on how consultation with stakeholders would feed into the process (not least given the joint commitments in the Windsor Framework for establishing 'regular engagement' with NI stakeholders 'at each level of the Withdrawal Agreement structures' [see joint Political Declaration])

4.2.2. It was also expected to establish how it might only be used as a last resort.

5. The draft Statutory Instrument for Windsor Framework Democratic Scrutiny shows that the promised 'democratic guarantees' are intended to come through three means: (i) a new Democratic Scrutiny Committee in the Assembly, (ii) the 'Stormont Brake' on amendments/replacements to EU acts under the Protocol, and (iii) the 'applicability motion', namely the requirement for cross-community consent of MLAs before a new EU law is added.

5.1.1. There is no detail on how evidence from and engagement with business and other stakeholders will be formally considered.

5.1.2. \*Indeed, it is possible for the evidence taken by MLAs wishing to use the Stormont Brake as an alternative to the inquiry of the

Committee may have more of an airing (in the form of the detailed explanation given for the use of the Brake) than that given to the Committee in the course of its inquiry (see 6.2 below).

- 5.2. The 'applicability motion' constitutes an adjustment to the UK's domestic process behind the approach it takes to the Joint Committee in its role under Article 13(4) of the Protocol.
  - 5.2.1. The draft Explanatory Memorandum states that the process is a 'wholly internal one' (para 7.5). However, it has international implications, specifically relating to the 1998 Agreement (see 16.2 below)
- 5.3. Overall this draft SI has potential ramifications for the legislative landscape in NI, for tensions between the parties in the Assembly and its functioning, for the effective operation of the institutions of the Assembly and their public accountability, and for relations across all three Strands of the Agreement, as well as UK-EU relations.
  - 5.3.1. I will focus here on specific issues that require clarification, with key ones asterisked.

### ***The Windsor Framework Democratic Scrutiny Committee***

6. If the Committee decides to hold an inquiry on an EU act, it 'must seek substantive discussion and engagement' (para 9.2) with the Government, NI Ministers/departments, and stakeholders/others.
  - 6.1. \*Why is it described thus rather than as a much more typical process of 'taking evidence'? The use of the phrase '*discussion and engagement*' implies that this is primarily a process to happen in private rather than in public. This is cause for concern, not least given the potential for disputes over the decision of the Committee and the potential for that to destabilise the Assembly itself.
  - 6.2. \*The fact that the committee may decide to redact or omit from minutes of meetings, evidence, engagement 'as it considers appropriate' (para 10.3.4) underscores the possibility of these processes being far from transparent and preventing proper accountability or wider public understanding of the reasons for the Committee's conclusions.
7. There is no clear role for the Committee with respect to the pulling of the Stormont Brake.
  - 7.1. The Committee has to make its report 5 working days before the deadline to pull the Stormont Brake but it could be triggered before then – potentially more than once.
  - 7.2. Although the draft Explanatory Memorandum (7.12) says that the work of the Committee 'is intended to support MLAs in deciding whether to use the brake', MLAs can draw on 'other information, assessments or evidence' to that end.
  - 7.3. \*As such, although 'any use of the Brake would *ordinarily* follow the Committee's work', there is nothing to prevent MLAs from pre-empting it.

- 7.4. Were they to do so, even if the ultimate decision by the Secretary of State is that the criteria for Article 13(3a) have not been met, it would not only discredit and disrupt the proper process of the Committee, it would introduce tensions in the Assembly more generally.
8. There is a lack of clarity as to the role to be played by the Committee vis-à-vis a new EU act.
- 8.1. We know that it can 'examine and consider' new as well as replacement EU acts (para 3.2a)
- 8.2. According to paragraph 7 it may hold an inquiry on a new EU act but not according to paragraphs 3.2b or 8.1.
9. There is ambiguity about the scope and purpose of the role of the Committee in 'dealing with other matters' (para 3.2.g)
- 9.1. This is left open but it could potentially be important, e.g. in interaction with the work of the sub-groups of the Joint Consultative Working Group. This would have been an ideal point to address the commitment in the Command Paper to set out the place for stakeholder consultation, for example.
10. Why is the Committee to engage with either NI Ministers *or* NI departments? (para 9.2b)
- 10.1. Presumably it should be possible for the committee to take evidence from both, and, if the Executive is functioning, not only from Ministers.
- 10.2. \*This is particularly important given that officials in NI departments will have the most direct engagement in the prior consultation over the amendments/replacements of EU acts (through the JCWG sub-groups).

### **The Stormont Brake**

11. The Political Declaration of the European Commission and UK Government of 27 February describe the Stormont Brake as 'an emergency brake mechanism' which 'would be triggered under specific circumstances in a very well-defined process.'
- 11.1. Most of the definition of that process was expected to come in this secondary legislation to be put forward by the UK Government. However, there are some major gaps remaining that have potentially significant consequences.
12. There is no clarification on the process by which the Government would decide whether the tests of Article 13.3a (para 1c) are met for the use of the Stormont Brake. Instead this is ultimately a decision for the Secretary of State. The only constraints here are in terms of a tight timeframe.
- 12.1. There is no requirement on the Secretary of State to refer to the report of the Democratic Scrutiny Committee (if it conducted an inquiry).
- 12.2. \*If the Secretary of State rejects the notification, (s)he must

provide written reasons for doing so. There is no similar commitment in the SI to provide written reasons for accepting the notification.

- 12.3. The Joint Committee may request further information, but there is no specification or commitment as to detail merely a constraint in terms of timeframe.
13. Once the Assembly has been initially restored, there is no requirement for the Assembly to be fully functioning for the Stormont Brake to be operationalised.
  - 13.1. The draft Explanatory Memorandum states that 'the Brake will not become available until the Northern Ireland Executive is restored and is operational...Thereafter, MLAs wishing to operate the Brake must be individually and collectively seeking in good faith to fully operate the institutions' (para 7.16). This implies that the Brake can be operational even without a fully-functioning Assembly and/or Executive.
  - 13.2. This poses a disconnection between participation in the democratic institutions and a means of operating 'democratic control'. The intention may be to incentivise participation in the Assembly, but it is doubling down on a precedent set by the Democratic Consent Vote itself (which allows the vote to happen without the Assembly sitting).
  - 13.3. \*More than this, how can it be wise to allow for the persistence of just one element (particularly this one) of the powers of the Assembly to be exercised by a minority of MLAs, while other functions of the Assembly and/or Executive are suspended?
14. This Brake allows a third of MLAs to block updates to EU laws that could have serious and complex consequences for Northern Ireland. Where will the consideration of impact arise?
  - 14.1. If the brake couldn't be exercised unless the replacement act constitutes a significant change, then it could be assumed that non-inclusion of it would have serious effect.
  - 14.2. As [outlined by my colleagues](#) Dr Viviane Gravey and Dr Lisa Claire Whitten, Northern Ireland would be operating a form of law that does not align with either rUK (including law in Scotland and Wales) or EU law.
  - 14.3. \*Furthermore, the use of the Stormont Brake could potentially sit at odds with Article 11 of the Protocol which requires it to 'be implemented and applied so as to maintain the necessary conditions for continued North-South cooperation' on the island of Ireland.

### **The Applicability Motion**

15. The Command Paper includes a commitment that 'the Government would not be able to proceed to add any new rule under Article 13(4) without cross-community support' (para 68). This is not referred to in any other WF documentation.

- 15.1. Unlike the Brake, it seems this can only be used if the Assembly is properly functioning, given the definition of 'exceptional circumstances' in which a minister can accept new EU law.
16. The applicability motion amends the operation of Article 13(4) of the Protocol which previously allowed a UK government veto without any consultation with Northern Ireland. However, the existence of the applicability motion should not be seen as unequivocally handing decision-making capacity here to the NI Assembly.
  - 16.1. While attention has been given to the means by which a Minister could still accept the new law even without cross-community support, it would also be possible for a Minister to override a NI Assembly vote in a different way, i.e. to reject the addition even if it has cross- community support.
  - 16.2. \*The applicability motion is potentially a constraint from a minority of MLAs on a Minister accepting a new act, but not on them rejecting it.
17. A new EU law could be seen as applicable for the Protocol that relates to an area of North-South cooperation, but it may be rejected through an applicability motion, by it not meeting cross- community support.
  - 17.1. As noted in para. 55 of the Command Paper, there are already considerable areas in which North and South are diverging and which are not protected by the Protocol.
18. The very possibility of a veto by one community over this process by definition makes the matter one of community identity and division. This is not necessarily the best or only means of finding stability.
  - 18.1. Northern Ireland needs procedures for evidence-giving, transparency, accountability and rigorous democratic scrutiny upheld and adhered to under the Windsor Framework, not traversed.

**21 March 2023**