

Dr Viviane Gravey, Dr Billy Melo Araujo, Dr Lisa-Claire Whitten – Written evidence (IWF0022)

Protocol on Ireland/Northern Ireland Sub-Committee – Lords Select Committee

Windsor Framework Inquiry

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This evidence does not address all questions posed by the Sub-Committee but focuses instead on issues pertaining to the Windsor Framework and trade-related matters.

Overview

What is your overall assessment of the Windsor Framework? How far does it go to resolve the problems that have arisen with the Protocol? Does it leave any issues unresolved?

1. From a trade perspective, the WF envisages a number of proposals which should have the effect of reducing barriers to trade in goods that are moved from Great Britain to Northern Ireland. Many of the envisaged reforms seek to address concerns that have been consistently voiced by businesses involved in GB-NI trade.
2. For example, the establishment of a green/red lane system should reduce the instances where goods brought into NI are subject to EU tariffs as well as the customs requirements imposed on such goods. The changes proposed regarding treatment of agri-food trade should also lead to a reduction of regulatory compliance checks on GB goods moving to NI. In the same vein, the reforms proposed in relation to trade in medicines are crucially important as they should ensure that GB medicines (which account for 80% of the NI market) can access NI without being subject to checks.
3. Whilst the proposed reforms are significant and positive, they do not solve all trade-related issues associated with GB-NI trade. Firstly, the WF will not lead to the complete removal of GB-NI barriers to trade. In some cases, the barriers to trade will increase as planned reduction of customs and regulatory compliance checks relate to trade that is currently covered by the so-called grace periods. Secondly, some of the proposed reforms also create new problems. For example, the new regime whereby only GB-authorized medicines can be lawfully marketed in NI arguably creates a regulatory border within the island of Ireland. Additionally, by removing key GB-NI trade

barriers at a time where there is a push for deregulation in GB (Retained EU law Revocation and Reform Bill), the WF risks creating situation where more loosely regulated GB producers may undercut NI producers on their own market Thirdly, there are number of problematic aspects of the Protocol that are not addressed in WF. For example, the WF only addresses the inability of NI to access tariff rate quotas in the specific area of trade in steel. Another remaining issue is, as detailed below, NI consumers access to the EU Single Market for goods.

4. It is also important to note that publication of much of the operational detail regarding trade-related aspects of the WF – notably the green/red lane system – is still pending. The efficacy of the envisaged reduction of barriers to GB-NI trade under the WF reforms is therefore yet to be seen and will be contingent on the nature of implementation.

How would you assess the Windsor Framework against the UK and EU’s joint commitment to protect the Belfast/Good Friday Agreement, “including its subsequent implementation agreements and arrangements, in all its dimensions and in all its strands”?

5. The Windsor Framework focuses primarily on a subset of ‘East/West relations’ – it addresses trade between GB/NI, not ROI/UK which is the understanding of East/West in the Belfast/Good Friday Agreement. Notwithstanding its GB-NI focus, the agreement of the WF and assuming its effective implementation going forward may open the door to some easing of barriers on the Dublin/Holyhead trade route which has, more traditionally, been understood as representing East/West relations as regards trade.
6. On North/South cooperation, the Windsor Framework command paper is clear that the direction of travel expected by the UK government is one of deepening divergence:

‘Inherent in this new way forward is the prospect of significant divergence between the two distinct economies on the island of Ireland - from food and drink to plants and pets, building on the existing differences in every area of economic and political life such as services, migration, currency and taxation.’¹

While this stands strongly (but perhaps not surprisingly) at odds with the current Irish Government push for greater cooperation with the Shared Island Initiative, it also arguably sits in some tension with the objective of the Protocol/Framework regarding the ‘maintenance of conditions’ for North/South cooperation (Article 1(3)) as well as in regard to longstanding UK government policy under the 1998 Agreement to broadly support the development of N/S and, more recently, to protect it in the context of Brexit (see for example section 10 of EU Withdrawal Act 2018).

¹ HM Government The Windsor Framework: a new way forward , p5
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1138989/The_Windsor_Framework_a_new_way_forward.pdf

7. In terms of current areas of cooperation, such as the environment, the Windsor Framework, even more so than the Protocol before it, takes a very narrow view of what degree of regulatory alignment is required to maintain cooperation: most areas of North/South cooperation identified by UK and ROI governments and the European Commission during the Brexit negotiation process are *not* covered by the NI Protocol or the Windsor Framework. What this means is that, in regulatory terms, these areas of established N/S cooperation are much less secure post-Brexit than they were pre-Brexit, moreover, by effectively introducing dual regulation in certain areas (i.e., human medicines, agri-food products and to lesser but significant degree in retail goods) alongside the Stormont Brake procedures, the WF increases the potential for N/S divergence in future.²

To what extent will the Windsor Framework protect both “Northern Ireland’s integral place in the United Kingdom’s internal market” and its “unique access” to the EU Single Market?

8. The WF enhanced NI’s position in the UK internal market by putting forward a number of reforms that would reduce customs and regulatory checks on GB goods that are being moved into NI. However, it does not entirely remove all such checks. The upshot is that whilst NI businesses can move goods to GB without being subject to any significant restrictions, most GB goods moved to NI remain subject to some level of customs or regulatory compliance requirements.
9. The removal of some of the trade barriers applied to GB goods moved to NI may potentially affect NI’s position in the EU internal market. In principle, NI’s ability to access the EU internal market is not affected by the WF as NI remains subject to EU customs and internal market rules listed in the Protocol. However, by allowing certain GB goods that do not comply with EU rules to access NI, the WF may lead to the establishment of a regulatory border between NI and the Republic of Ireland.
10. Furthermore, the WF does not resolve pre-existing issues in delivering NI’s “unique access” to the EU Single Market. While NI goods can access the EU Single Market, NI consumers shopping online will frequently face EU retailers which ceased to deliver to the UK (including NI) after Brexit.

How significant is the difference of emphasis in the UK and EU publications accompanying the Windsor Framework? Are there any factual inconsistencies in their description of the agreement?

² For further discussion see: Gravey, V. and Whitten, L, C. 2023, March 8. ‘New Governance for Dynamic Alignment under the Windsor Framework’ Available: <https://www.brexitenvironment.co.uk/2023/03/08/windsor-governance/>

11. There is some discrepancy between the UK and EU accounts of what these customs simplifications will consist of in relation to the red/green lane system. For example, whilst the UK has expressly stated that the WF signals an end to supplementary customs declarations, this is not mentioned in any of the documentations released by the EU to date.

Customs procedures and the movement of goods

What is your assessment of the Windsor Framework's provisions in relation to customs procedures and the movement of goods between Great Britain and Northern Ireland, including the arrangements for 'green' and 'red' lanes, an enhanced Trusted Trader Scheme, handling of Tariff Rate Quotas and the system of commercial data-sharing?

12. Currently, under the Protocol, goods moved into NI (either from GB or the rest of the world) are subject to EU tariffs unless they are shown not to be at risk of being subsequently moved on to the EU. The WF seeks to replace this "at risk regime" with a green/red lane system.

13. There were two important criticisms levelled at the "at risk" regime. Firstly, that the criteria used for the qualification of a good as being "at risk" of being moved on to the EU was too wide. This led to complaints from businesses involved in GB-NI trade that many goods that were moved into NI and which presented a very limited risk of subsequently being moved on to the EU remained subject to EU tariffs. Secondly, even where goods were deemed not at risk of being subsequently moved on to the EU – and therefore not subject to EU tariffs – such goods remained subject to EU customs procedures.

14. The green/red lane system proposed under the WF is an attempt to address these concerns. Its goal is to narrow the concept of "goods at risk" and reduce the customs requirements imposed on goods moved into NI when such goods are not deemed at risk.

15. The main change brought about by the WF is to increase the number of instances where goods being moved into NI are not deemed at risk of being subsequently moved on to the EU (See Table 1). Firstly, this is achieved by increasing the turnover threshold for those sector specific businesses that benefit from a carve out from £500,000 to £2,000,000. Secondly, the WF proposals provide that both NI and GB based businesses can now participate in the Trusted Trader Scheme subject to compliance with certain conditions.

Table 1

TARIFFS AND CUSTOMS REQUIREMENTS

Protocol regime			Windsor Framework Proposal		
‘At Risk’ Regime: Avoiding Circumvention of EU tariffs			‘At Risk’ Regime: Avoiding Circumvention of EU tariffs and Customs Processes		
Not subject to commercial processing	JC Decision Criteria	Treatment	Not subject to commercial processing	JC Decision Criteria	Treatment
<ul style="list-style-type: none"> Max annual turnover of £500,000 Sectoral carve-outs <ul style="list-style-type: none"> the sale of food to an end-consumer in the United Kingdom; construction, where the processed goods form a permanent part of a structure that is constructed and located in Northern Ireland by the importer; direct provision to the recipient of health or care services by the importer in Northern Ireland; not-for-profit activities in Northern Ireland, where there is no subsequent sale of the processed good by the importer; or the final use of animal feed on premises located in Northern Ireland by the importer 	<ul style="list-style-type: none"> Tariff Differential <ul style="list-style-type: none"> GB goods: EU tariff zero rated RoW goods: EU tariff equal or lower than UK tariff Trusted Trader Scheme <ul style="list-style-type: none"> Only available for GB-based businesses Excludes RoW goods where EU tariff is 3% or more than UK tariff Excludes imports subject to EU trade defence measures 	<ul style="list-style-type: none"> GB goods: no tariff Row goods: Applicable UK tariff All other imports: EU tariff and full EU customs requirements 	<ul style="list-style-type: none"> Max annual turnover of £2,000,000 Sectoral carve-outs <ul style="list-style-type: none"> the sale of food to an end consumer in the United Kingdom; construction, where the processed goods are to form a permanent part of a structure that is constructed and located in Northern Ireland by the importer or one subsequent entity; direct provision to the recipient of health or care services in Northern Ireland by the importer or one subsequent entity; not for profit activities in Northern Ireland by the importer or one subsequent entity where there is no subsequent sale of the processed good; or the final use of animal feed on premises located in Northern Ireland by the importer or one subsequent entity 	<ul style="list-style-type: none"> Tariff Differential <ul style="list-style-type: none"> GB goods: EU tariff zero rated RoW goods: EU tariff equal or lower than UK tariff Trusted Trader Scheme <ul style="list-style-type: none"> Available for NI and GB-based businesses Excludes RoW goods where EU tariff is 3% or more than UK tariff Excludes imports subject to EU trade defence measures Parcels <ul style="list-style-type: none"> C2C B2C via ‘authorised economic carrier’ 	<ul style="list-style-type: none"> GB goods: no tariff RoW goods: applicable UK tariff For ‘trusted traders’: simplified customs processes to be set via in UCC amendment For parcels (according to EU): <ul style="list-style-type: none"> C2C: waiver of ‘essentially’ all customs requirements B2C: simplification of data fields provided by carriers B2B: facilitations for Trusted senders All other imports: EU tariff and full EU customs requirements

16. With respect to customs requirements applicable to goods brought into NI that are not “at risk”, the WF indicates that goods brought into NI by trusted traders will benefit from simplified customs processes. These simplifications will be set out in amendments to EU’s Union Customs Code. It is worth noting that there is some discrepancy between the UK and EU accounts of what these customs simplifications will consist of. For example, whilst the UK has expressly stated that the WF signals an end to supplementary customs declarations, this is not mentioned in any of the documentations released by the EU to date.

17. The green/red lane system put forward under the WF represents an improvement it does not, signal a radical shift away from the Protocol’s “at risk” regime. The green lane is a revised version of the current regime that applies to goods not at risk of being moved into the EU. It expands the number of goods brought into NI which are deemed not at risk and are therefore no subject to EU tariffs. Further, goods brought in by trusted traders are subject to potentially lower customs requirements. It is also worth noting that goods that are deemed “at risk” of being moved on to the EU remain subject to EU tariffs and EU customs rules and procedures.

Parcels

What is your response to the Framework’s arrangements concerning parcel deliveries between Northern Ireland and the EU and UK?

18. The WF allows for the reduction of customs requirements applicable on GB parcels moved into NI. The new customs requirements envisaged in relation to the movement of parcels are to be defined under EU law. Therefore, it is unclear what these reduced customs requirements will consist of in practice. However, it is clear that the customs requirements applicable to parcels will fluctuate depending on the nature of the movement. According to public statements made by the EU, business-to consumer parcels are subject to simplified customs requirements provide that the parcels are being moved via registered Authorised Economic Carriers (AECs). The conditions that must be met by economic operators in order to be registered as AECs are set out under Article 12 of the Joint Committee Decision. Business-to-business parcels can benefit from customs facilitations if sent by trusted senders. According to the EU, consumer-to-consumer parcels will be subject to “essentially no requirements”.
19. It is worth noting that, currently, the UK is not applying customs checks that are mandated under the Protocol to most parcels being moved to NI from GB. In other words, whilst the WF proposals represent a potential reduction in customs checks required under the Protocol they represent an increase on the customs checks that are currently being applied in practice.
20. There has been no change to parcel deliveries between NI and the EU under the WF. This means pre-existing concerns – NI parcels not being differentiated when entering the EU from GB parcels and thus expected to meet different requirements; NI not being systematically differentiated from GB when sending a parcel from the EU.

Medicines

What is your assessment of the Windsor Framework’s provisions on the supply of human medicines to Northern Ireland? Do they deal sufficiently with the issues previously raised by industry in relation to the Protocol?

21. The WF represents an important shift in the approach to the regulation of trade in medicines between GB and NI. Since the entry into force of the Ireland/Northern Ireland Protocol, GB-BI trade in medicines has been covered by a grace period, meaning that medicines brought into NI from GB are not subject to trade barriers. In the absence of the grace period, such medicines would be subject to a number of barriers (e.g., authorisation requirements, batch testing and labelling requirements).
22. To avoid this outcome, following the negotiation of the WF, the European Commission published a Proposal for a Regulation on specific rules relating to medicinal products for human use intended to be placed on the market of Northern Ireland (Proposal). The Proposal provides that medicinal products authorised by the Medicines and Healthcare products Regulatory Agency

(MHRA) can be marketed in NI. However, the packaging for these medicines must include a "UK only" label and the UK must ensure the "effective monitoring, enforcement and controls".

23. The key benefit of the Proposal is that it removes most of the important barriers to trade faced by human medicines that are moved into NI from GB. However, this new regime creates new challenges. It creates a regulatory border within the island of Ireland as human medicines in NI (imported from GB) will be subject to a separate regime to those of authorised in the Republic of Ireland.

Regulatory divergence

What is the significance of the Windsor Framework for regulatory divergence a) East-West, between Northern Ireland and Great Britain and b) North-South, on the island of Ireland? What is your assessment of the mechanisms to manage divergence, including the new Special Goods Body and the role of the Office of the Internal Market? Should a record be kept of such divergence, and if so, by who?

24. The Windsor Framework creates an interesting situation where EU producers and NI producers will be bound by EU rules in the NI market, but GB producers, especially regarding agri-food will be bound by fewer EU rules and to a large extent existing GB rules (on food safety notably). What this situation will mean in practice for regulatory divergence is difficult to tell as yet. Beyond the creation of Retained EU Law which saw a numerous instances of divergence EU/UK and, pending the adoption (or not) of the Retained EU Law Bill, there has been so far quite limited divergence between the UK and the EU, and limited additional intra-UK divergence too. This is due to both the need to provide regulatory certainty at a time of profound change, the pressures on the civil service throughout the delivery of Brexit compounded by the Covid19 pandemic and the need to create new institutional arrangements (e.g., Office of the Internal Market, Office for Environmental Protection).

25. The mechanisms to manage divergence across the UK Internal Market are working on a case-by-case basis (as evidenced, for example, in regard to the regulation of single use plastics with devolved governments different regulatory approaches being exempted from the UK internal 'market access principles' under section 10 of the UK Internal Market Act 2020 following UK government consenting to as much). These intra-UK mechanisms for management would be sorely tested in the face of wide and abrupt divergence as was (and may still be) planned under the Retained EU law Bill.

26. A record of such divergence should be kept, for at least two different purposes: first, to take stock of evolving barriers to trade within the UK (which would be of particular interest to the OIM) and/or across the island of Ireland; second to compare policy responses to shared challenges and learn

from each other. A third purpose for keeping track is to fulfil political commitments – such as the Scottish Government’s pledge to keep pace with EU law (at least in principle and to the extent of relevance under section 1 of the UK Withdrawal from the EU (Continuity) (Scotland) Act 2021). This third purpose explains why currently the Scottish Parliament is one of the rare actors commissioning research on keeping track of divergence.³ Other examples of divergence mapping include IEEP UK (on the environment),⁴ and UK in Changing Europe.⁵

The application of EU rules in Northern Ireland

In the context of the Government’s reference to the removal of 1,700 pages of EU law, what is your assessment of the Windsor Framework’s impact on the scale of the application of EU law to Northern Ireland? What are the political, constitutional and economic implications of this?

27. Assessing the UKG’s claim regarding removal of 1,700 pages of EU law depends on the definition of ‘removal’ as well as the context or legal person in question. Under the WF, there has been *some* narrowing of the application of *some* of those laws that still apply in Northern Ireland (for example VAT related Council Directive 2006/112/EC; Regulation (EU) No 904/2010, Excise related Council Directive 92/83/EEC; and plant protection measures Regulation (EU) 2016/2031). Alongside this, there has been a change in the scope of application of some other EU laws that apply under the WF/Protocol in the form of (in effect) conditional derogations to goods moving GB-NI introduced via the ‘green lane’ processes.

28. It is also important to note that reference to ‘1700 pages of EU law’ being ‘removed’ primarily concerns GB goods (including food and medicine) moving into NI – and only in certain circumstances, as discussed above regarding operation of green and red lanes – but not *produced* into NI where those pages of EU law remain. Those pages of EU law largely remain applicable in NI and are only disapplied for GB goods meeting certain requirements. This does create a possibility that NI producers may be undercut by GB exporters into NI – but this depends on the magnitude of GB/EU divergence in the coming years. The continued role of EU law in NI is the basis for the new and reinforced structures for NI influence into EU decision-making.

The democratic deficit and the ‘Stormont Brake’

What is your assessment of the proposed Stormont Brake and the conditions for its use, including that an EU act “would have a significant

³ See: https://www.parliament.scot/about/news/news-listing/new-eu-law-research-commissioned?utm_source=twitter&utm_medium=sp_eeac&utm_term=&utm_content=76299d21-4ae6-473b-9115-77bc68c32691&utm_campaign=ongoing

⁴ See: <https://ieep.uk/work-streams/divergence-in-uk-eu-environment-policy/>

⁵ <https://ukandeu.ac.uk/research-papers/uk-eu-regulatory-divergence-tracker-sixth-edition/>

impact specific to everyday life of communities in Northern Ireland in a way that is liable to persist”? To what extent will this address the democratic deficit under the Protocol? What practical, political and legal factors need to be borne in mind in terms of its use and operation, including the Government’s commitment to bring forward legislation to give effect to the Stormont Brake, and the EU’s ability to take “appropriate remedial measures” in response to a UK veto?

29. The proposed ‘Stormont Brake’ provided for in Article 13(3)(a) of the WF is a constitutionally innovative arrangement from both an EU and UK perspective. The threshold for its legitimate use (as regards ‘significant impact on NI communities’) is high and the conditions surrounding its exercise (e.g., timeline requirements for notification within 2 months of EU publication; requirement for MLAs to have engaged in consultation processes on the relevant change) are stringent. This means that use in practice of the Article 13(3)(a) Stormont Brake process may be limited.

30. The provisions in UK law for the operation of the ‘Stormont Brake’ – laid down in The Windsor Framework (Democratic Scrutiny) Regulations 2023 – raise some questions about its implementation and impact. Given the substance of those EU laws that are in scope of both the Article 13(3)(a) strand (regarding changes or updates to most EU laws made applicable under Article 5 and Annex 2 of the WF) and also in relation to any Article 13(4) strand of the Stormont Brake procedure (regarding any additions to EU laws that apply under the WF) the potential scope of the work to be carried out by the NI Assembly Windsor Framework Democratic Scrutiny Committee is extremely wide. While somewhat contingent on the degree of NI representatives’ interest in doing so, operating the Stormont Brake processes is very likely to put a strain on NI officials and politicians’ capacity and resource. In this regard, it is worth noting that those EU laws that are in potential scope of both Article 13(3)(a) and Article 13(4) go beyond NI devolved competence, yet the NI Assembly and MLAs have opportunity/obligation under the Stormont Brake processes to express a view on them.