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The Windsor Framework

Written evidence submitted to the House of Lords European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland

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This evidence is submitted as part of three-year academic research project on *Governance for 'a place between': the Multilevel Dynamics of Implementing the Protocol on Ireland/Northern Ireland* funded by the Economic and Social Research Council. It considers a selection of questions raised by the Sub-Committee, with a particular focus on the topic of governance, representation and engagement.¹

Q1. 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. The Windsor Framework sets out an agreed way forward for implementing some elements of the Protocol on Ireland/Northern Ireland that have proved procedurally and politically problematic.
2. The majority of respondents (65%) in our special 'Testing the Temperature' poll on the Windsor Framework (March 2023) agreed that it represents 'a genuine attempt by the European Union and the United Kingdom to address a range of issues and concerns'.² There is a difference of opinion between strong unionists and others, however (see Figure 1). The data indicates that the Windsor Framework has been largely welcomed as a progressive step by softer unionists (and others and nationalists), but not so by strong unionists.

¹ See www.qub.ac.uk/sites/post-brexit-governance-ni. As part of a three-year ESRC-funded research project, we have commissioned regular polls since April 2021 to 'temperature test' voter attitudes in Northern Ireland on issues relating to Brexit, the Protocol, and their implications for Northern Ireland.

² 'Testing the Temperature – Extra: What do voters in Northern Ireland think about the Windsor framework?', Poll conducted by LucidTalk for Queen's University Belfast, 18-20 March 2023. Weighted sample: 1,498. Available via: <https://www.qub.ac.uk/sites/post-brexit-governance-ni/ProjectPublications/OpinionPolling/>

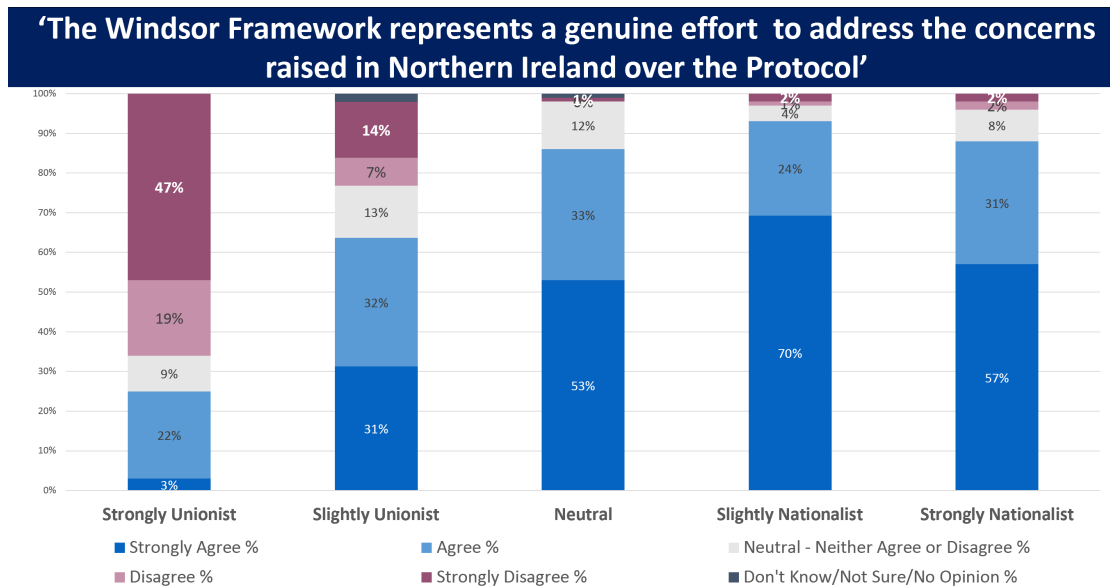


Figure 1. 'Testing the Temperature – Extra': Views on the nature of the Windsor Framework (March 2023).

3. What the European Union (EU) and the United Kingdom (UK) have agreed is a 'framework' and needs to be implemented as agreed and in good faith. Taking lessons from the past few years, the Windsor Framework should be reviewed in due course to ensure that both the obligations it sets out and the agreed objectives contained in the Protocol (as per Article 1) are being met.
4. A fundamentally important feature of the Windsor Framework is the commitment that the UK and the EU have made to return to the use of the now expanded institutional framework provided for in the Withdrawal Agreement 'to address and jointly resolve any relevant future issues that may emerge' regarding the Protocol. The Protocol's novel arrangements – the subject of ongoing contestation – need to be effectively managed through regular, institutionalised, and substantive engagement of all relevant parties. A return to regularised engagement through the agreed institutional structures is both welcome and necessary.
5. On implementation, relevant lessons from the 1998 Belfast (Good Friday) Agreement may be drawn. Three were noted by participants from the negotiations in their reflections at an #Agreement25 event in Queen's University Belfast on 18 April.³ The first was the observation from Lord Alderdice (then Alliance Party) that the assumption of an 'automatic momentum' towards implementation of the Agreement after its conclusion was misplaced. The second was Dawn Purvis' (then Progressive Unionist Party) regret that there had not been an 'Implementation Committee' established to oversee the roll-out of the Agreement and to monitor its operation as a whole. And a third relevant point was made by Mark Durkan (Social Democratic and Labour Party), who noted that even slight differences between the text of the Agreement and the implementing legislation (for example on the petition of concern mechanism in the Northern Ireland Act [1998]) proved very significant and disrupted the functioning and effects of the Agreement as originally envisaged. Such analysis shows that agreeing the Windsor Framework may be an achievement in itself, but the details of

³ <https://www.youtube.com/watch?v=8AN6sLjaBSM&t=2666s>

how it is implemented could potentially introduce new problems if not handled with equal care, good faith, attention, and adhesion to what was agreed.

Q14. 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 whom?

6. Anticipating and managing the potential for regulatory divergence involves appreciation of the various post-Brexit obligations and arrangements that apply to and in Northern Ireland. These include not only changes in domestic UK legislation and in EU law applicable under the Protocol, but also changes in devolved legislation in Northern Ireland (and the rest of the UK), plus obligations arising out of trade agreements the UK concludes.
7. A key shortcoming of the pre-Windsor Framework UK-EU relationship was the absence of any formalised mechanism for identifying and managing actual and potential regulatory divergence that could affect Northern Ireland's position in either the UK internal market or the EU internal market for goods.
8. The new Special Body on Goods (to be formed by the Specialised Committee on the Windsor Framework) has the potential to be an effective forum for considering the implications for Northern Ireland of relevant developments in EU legislation [potentially] applicable under the Protocol. However, its effectiveness depends on several things. First, the extent to which the UK and the EU deliver on their intention to make use of the Special Body on Goods. Second, the extent to which there is systematic and effective monitoring of, and reporting on, actual and potential divergence on both sides. Third, the quality and timing of information shared by both the EU and the UK. Fourth, the extent to which workable solutions to issues can be identified. And, finally, whether the Joint Committee acts on recommendations in good time.
9. Thus, for the potential of the Special Body on Goods to be realised, both the UK and the EU will need to ensure that they have in place effective processes for monitoring and reviewing legislative changes that give rise to the actual and potential regulatory divergence. We note that to date, there is no obligation within the UK for Whitehall or devolved departments – or indeed the Office for the Internal Market – to consider or report on the divergence implications under the Protocol of any planned or forthcoming changes to domestic legislation. This matters, as any unmanaged intra-UK divergence regarding goods could have implications for Northern Ireland's position in the UK internal market and the operation of the 'green lane' for GB-NI movement of goods.

Q15. 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?

10. The Windsor Framework has limited impact on the extent of EU law applicable in Northern Ireland. Under its terms, there is only some narrowing

of the application of some of those EU laws that apply in Northern Ireland. This concerns, for example, VAT (Council Directive 2006/112/EC and Regulation (EU) No 904/2010), Excise (Council Directive 92/83/EEC), and plant protection measures (Regulation (EU) 2016/2031).

11. The Windsor Framework does, however, reduce in practice the amount of EU law with which producers in Great Britain and registered as trusted traders need to comply when supplying goods into Northern Ireland (provided the goods supplied are for end use there). It should be noted that the non-application of the EU acts concerned is contingent on agreed enhanced market surveillance and enforcement mechanisms being implemented, with the 'green lane' arrangements being subject to review and potential suspension or cessation.
12. Under a proposed Regulation on rules relating to GB-NI movements of retail goods moving through the Windsor Framework's 'green lane', 65 EU acts listed in Annex 2 to the Protocol will not apply and 2 EU acts will only partially apply to those goods movements. Other EU acts listed in Annex 2 to the Protocol will continue to apply.⁴

Q16. What is your assessment of the proposed Stormont Brake and the conditions for its use, including that an EU act "would have a significant 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?

13. The Stormont Brake provided for in the Windsor Framework via Article 13(3a) Protocol is a unique arrangement. Its use may be fairly limited given the conditions that apply to it, the technical nature of changes to which it could potentially be applied, and the potential that exists for addressing issues through effective UK-EU engagement prior to the adoption of updates to applicable EU law.
14. As such, the Stormont Brake should be considered as a mechanism available only at the end of a longer process of regular EU-UK consultation. If that consultation and engagement functions effectively, the use of the Stormont Brake would be as a measure of last resort. The aim of the UK and the EU should be to have the Stormont Brake regarded and used as such, so as to minimise the uncertainty and disruption, as well as political tension, that could arise from its frequent use.
15. In political terms, however, it is possible that the Stormont Brake exacerbates rather than mitigates concerns about the Protocol/Windsor Framework. For if it is triggered and the UK Government deems such exercise to be justified, this would imply that prior UK-EU consultation and the UK-EU bodies failed to satisfactorily address the issue. As such, cause

⁴ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on specific rules relating to the entry into Northern Ireland from other parts of the United Kingdom of certain consignments of retail goods, plants for planting, seed potatoes, machinery and certain vehicles operated for agricultural or forestry purposes, as well as non-commercial movements of certain pet animals into Northern Ireland*, COM/2023/124 final, 27 February 2023, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52023PC0124>

would potentially exist for more frequent use of the mechanism. Yet if the Brake is exercised and the Government sees its use as *not* valid, then some could potentially see it as a futile mechanism and as cause for further suspicion of the Windsor Framework and distrust of all its governance mechanisms.

Q17. How would you assess the Framework's enhanced mechanisms for UK-EU cooperation, including the Special Body on Goods, the Enhanced Coordination Mechanism on VAT and excise, and sub-groups to the Joint Consultative Working Group?

16. The new mechanisms are an enhancement of the existing institutional framework for managing the implementation of the Protocol and offer the means of institutional responsiveness to Northern Ireland's unique position. The potential of these mechanisms to bring benefit will depend on their specific design and operation, the frequency of meetings, the quality of information they can draw upon, and the willingness of both the UK and EU to invest necessary time and resources in them.
17. The Specialised Committee will now meet additionally in two new 'specific compositions': the Enhanced Coordination Mechanism on VAT and Excise (ECMVE) and the Special Body on Goods. The ECMVE will primarily, it seems, function through the work of two 'lead experts' appointed by the UK and EU. These lead experts can exchange views and meet informally (though minutes are to be taken of their meetings). The Joint Committee Decision 2023/1 notes that representatives of 'third parties' or 'other experts' 'may be invited to talk on particular matters' (Article 19(4));⁵ the fact that the names of such invitees will be made known to the co-chairs of the Specialised Committee suggests that it is expected that their input will be to the two lead experts rather than to members of the Specialised Committee itself. Whilst we recognise the value of even informal engagement, we would see the work of the ECMVE as potentially very significant, not least given planned changes in UK Excise duties.
18. The Special Body on Goods does have provision for 'representatives from business' to be invited to attend its meetings, which will be convened 'as necessary'. This will be an important body given that, according to the European Commission's *Questions and Answers* on the Windsor Framework,⁶ it could provide for 'exchanges of views' on any future UK legislation regarding goods of relevance to the Protocol, including 'assessing the potential divergence between UK and EU rules'. It is noted by the European Commission that the Specialised Committee can adopt recommendations for measures to be taken by the Joint Committee. This suggests that the work of the Special Body is potentially very significant.

⁵ *Decision No 1/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 laying down arrangements relating to the Windsor Framework*, OJ L102, 17 April 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2023:102:TOC>

⁶ *European Commission, Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland/Northern Ireland*, QANDA/23/1271, Brussels, 27 February 2023, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/qanda_23_1271/QANDA_23_1271_EN.pdf

19. The establishment of sub-groups to the Joint Consultative Working Group (JCWG) will provide opportunities for wider specialised input into the work of this important body. At the moment, the adjustment made to the JCWG Rules of Procedure provides for these sub-groups to include UK and EU officials only.⁷ UK officials must include those from the Northern Ireland Civil Service if this work is to be as useful and effective as possible.
20. There is also potential for these JCWG sub-groups to include experts drawn from industry as well as stakeholders. Any non-officials involved in and/or with the sub-groups should be engaged and engage as independent experts. The politicisation of any appointments needs to be avoided.
21. It is necessary to note too that the resourcing of such sub-groups will not only require time of officials and others, but also specialised technical and up-to-date knowledge. The Northern Ireland Civil Service in particular, as well as industry and other stakeholder sectors, will need to be equipped to address this requirement.
22. We note that the new arrangements involving the ECMVE, the Special Body for Goods and the JCWG sub-groups are focused on interactions between officials with inputs from stakeholders. As in most policy-making systems, such interactions generally lack transparency. For the revised institutional framework to contribute to a reduction in the real and perceived 'democratic deficit' under the Protocol, transparency is needed. This should come around the activities of each of the joint UK-EU bodies and the operation of the mechanisms that link them.
23. Addressing the democratic deficit will also depend on the extent to which expertise and experience from Northern Ireland is heard and can be seen to be heard in the decisions that are made, either directly through representation or through stakeholder engagement.
24. It is imperative that there is timely, visible and accessible reporting on the planned and actual activities of the various joint bodies and mechanisms, e.g. explaining who is involved and how further information can be obtained. Consideration needs therefore to be given to how activities are reported to and can be scrutinised by interested parties, most notably elected representatives particularly in the Northern Ireland Assembly but also at Westminster. There is also a need for the Northern Ireland Assembly to have effective scrutiny arrangements in place.

Q18. What is your assessment of the Commission's proposals for enhanced engagement with Northern Ireland stakeholders, including dedicated annual presentations, information sessions, workshops, and mechanisms for engagement with public consultations and impact assessments?

25. Polling carried out as part of our three-year research project has consistently revealed public support for direct UK-EU engagement with Northern Ireland regarding the Protocol. In February 2023, before the Windsor Framework was announced, almost three quarters (73%) of respondents agreed that the UK and the EU should commit to regular consultation with Northern

⁷ European Commission, *Proposal for a Council Decision on the position to be taken on behalf of the European Union in the Joint Consultative Working Group established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community as regards the amendment of its rules of procedure*, COM/2023/120 final, Brussels, 27 February 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023PC0120>

Ireland stakeholders and political representatives on how the Protocol is implemented. This included majorities from supporters of the main Northern Ireland political parties, except for the Traditional Unionist Voice (TUV).

26. In our most recent polling (March 2023), more than three quarters (77%) of respondents agreed that commitments in the Windsor Framework for increased UK Government and EU engagement with Northern Ireland stakeholders and political representatives regarding the implementation of the Protocol are 'welcome and important'. Significantly, this included the majority of respondents from across the political spectrum, with 56% of those identifying as 'strongly unionist' and 72% of 'slightly unionist' respondents welcoming these commitments (see Figure 2). It also includes the majority of supporters from each of the five main political parties in Northern Ireland, plus the plurality of TUV supporters.

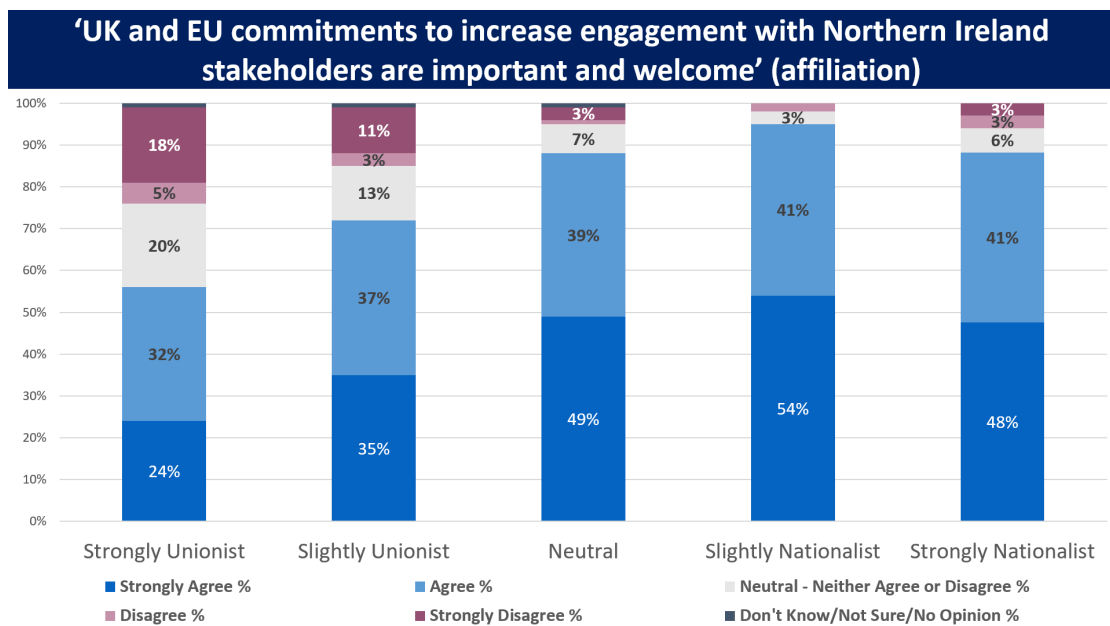


Figure 2. 'Testing the Temperature – Extra', Views on stakeholder engagement (March 2023).

27. The European Commission's 'enhanced measures' are novel and provide a privileged form of consultative engagement that goes beyond arrangements the EU has as part of its relations with non-member states. Essential to the success overall of the measures will be the extent to which they provide meaningful opportunities for stakeholder input into Protocol-relevant European Commission proposals and for relevant interests and concerns to be reflected in part, at least, in the substance of those proposals and the decisions ultimately adopted by the EU and, as appropriate, the EU-UK Joint Committee.

28. Stakeholder engagement needs effective resourcing. While the extent of the envisaged engagement is substantial, it is open to question the extent to which stakeholders across Northern Ireland will have the capacity to engage on an ongoing basis in meaningful consultations. To this end, consideration needs to be given to how best the UK Government and the European Commission can facilitate the engagement of stakeholders through (a) appropriate resourcing and support and (b) the design of mechanisms. Co-design with stakeholders should be encouraged.

29.If stakeholder engagement is to contribute to a reduction in the 'democratic deficit' under the Protocol, it will be important for evidence of engagement and the associated outcomes to be fully documented and made public. It is recommended that, once evidence is available, examples are produced of how stakeholder engagement has shaped EU decisions with relevance to the Protocol.

30.We note that while the European Commission has adopted 'enhanced measures', there is no corresponding statement from the UK Government as to the measures it will take, as per the Windsor Political Declaration it issued with the European Commission, to contribute to 'regular engagement with Northern Ireland stakeholders including citizens and businesses, at each level of the Withdrawal Agreement's structures and with the co-chairs of the Joint Committee'.⁸

⁸ *Political Declaration by the European Commission and the Government of the United Kingdom*, 27 February 2023, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1139420/Political_Declaration_by_the_European_Commission_and_the_Government_of_the_United_Kingdom.pdf