

Written evidence submitted by Prof. David Phinnemore and Prof. Katy Hayward, relating to the operation of The Windsor Framework

[OWF0008]

This evidence is drawn on work conducted as part of a four-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 (see www.qub.ac.uk/sites/post-brexite-governance-ni).

It considers a range of issues concerning the operation of the Windsor Framework's institutional governance framework and addresses the specific question of the operation of the Stormont Brake and applicability motion procedures under Articles 13(3a) and 13(4) of the Windsor Framework.

The Governance Framework of the Windsor Framework: Assessment to date

1. A novel and multi-dimensional institutional governance framework exists to manage the Windsor Framework. Compared to governance frameworks in place to manage European Union (EU) relationships with the non-member states, it is among the most developed and contains various features not found in any other arrangements.
2. Much of the framework was established by the original Protocol on Ireland/Northern Ireland and other terms of the UK-EU Withdrawal Agreement (2019). It involves joint UK-EU bodies as well as opportunities for the engagement of institutions and bodies established by the 1998 Belfast (Good Friday) Agreement.
3. With the adoption of the Windsor Framework (2023), the EU and the UK agreed to some new arrangements to increase the involvement of the Northern Ireland Assembly, to formalize and enhance existing stakeholder engagement activities, and to introduce more specialised joint bodies to manage implementation.
4. The governance arrangements comprise:
 - a) The EU-UK Joint Committee
 - b) The EU-UK Specialised Committee on the Implementation of the Windsor Framework including specialised formations for Goods and for VAT and Excise
 - c) The EU-UK Joint Consultative Working Group (JCWG) plus five specialised Sub-Groups to the JCWG
 - d) A Democratic Consent Mechanism providing an opportunity for members of the Northern Ireland Assembly to vote on the continued application of core elements of the Windsor Framework potentially every four years
 - e) A Stormont Brake mechanism that, subject to conditions being met, allows for the non-application of amendments/replacements to certain EU laws applicable in Northern Ireland
 - f) Mechanisms for the North-South Ministerial Council and the North-South Implementation bodies established under the 1998 Agreement to submit proposals to the Specialised Committee concerning the implementation and application of the Windsor Framework
 - g) A mechanism for the Specialised Committee to consider any matter of relevance regarding the individual rights provisions of the Windsor Framework raised by the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland
 - h) A Dedicated Mechanism established by the UK Government to implement its obligations arising from the individual rights provisions of the Windsor Framework
 - i) Joint EU-UK engagement with Northern Ireland stakeholders 'at all levels'

- j) European Commission engagement with Northern Ireland stakeholders on its annual Work Programme
 - k) Dispute settlement via the Court of Justice of the European Union or via a dedicated bilateral mechanism, depending on the issue
5. An overview of the means by which elected representatives, officials from the Northern Ireland Civil Service, experts and stakeholders from Northern Ireland can engage directly with the EU-UK joint bodies implementing the Windsor Framework is set out in Figure 1.

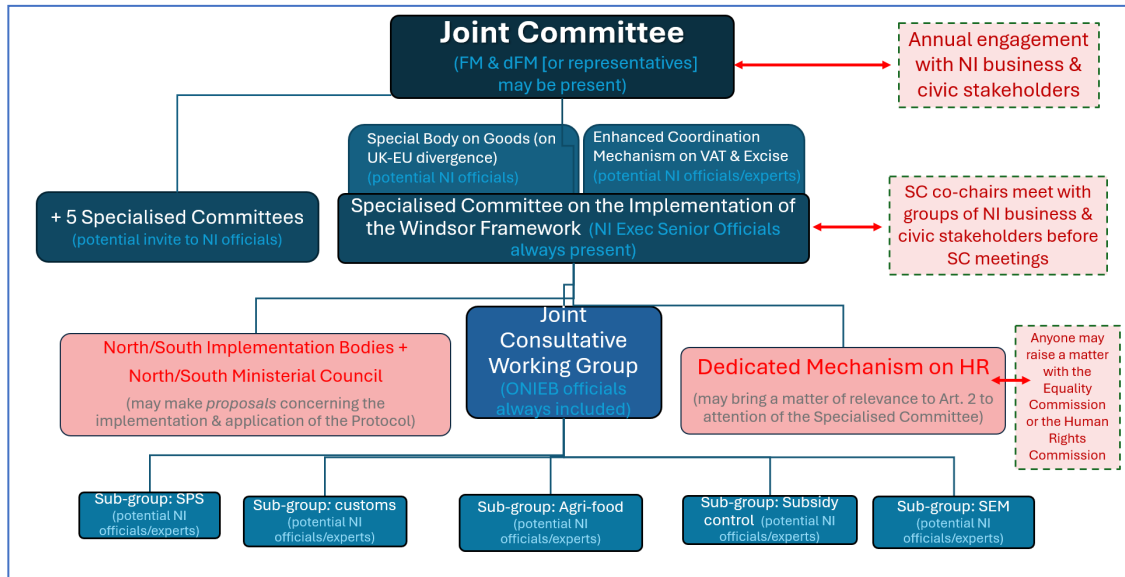


Figure 1. Means of direct engagement from Northern Ireland with joint EU-UK bodies implementing the Windsor Framework

6. In addition, the UK Government has established further arrangements for domestic governance of the implementation of the Windsor Framework. These take two main forms.

The first is participation of representatives and officials in the operation of some of the bodies outlined in paragraph 4 (and some of which is reflected in Figure 1):

- a) Participation of representatives of the Northern Ireland Executive in the UK Delegation to the EU-UK Joint Committee
- b) Participation of representatives of the Northern Ireland Executive in the UK Delegation to the EU-UK Specialised Committee on the Implementation of the Windsor Framework and its additional formations (Goods, VAT and Excise)
- c) Participation of officials from the Northern Ireland Civil Service in the UK Delegation to the JCWG and to relevant Sub-Groups

The second form of such governance comes in the form of monitoring and assessment:

- d) A default requirement for cross-community support in the Northern Ireland Assembly (via an Applicability Motion) before the UK Government can agree to the addition of a new EU act to the scope of Windsor Framework
 - e) A Windsor Framework Democratic Scrutiny Committee in the Northern Ireland Assembly 'to assist with the observation and implementation' of the Stormont Brake and Applicability Motions mechanism
 - f) An Independent Monitoring Panel to monitor and report on the implementation of the Windsor Framework
 - g) An Independent Review in 2025 of the operation of the Windsor Framework
7. The governance arrangements are therefore extensive. They are also complex and evolving. Moreover, not all elements are fully operational as yet, nor is there much publicity and transparency concerning their activities. Awareness and understanding of the governance arrangements tends to be limited to

individual elements without a holistic appreciation of how they interact and complement each other. *There is scope for the potential connectivity and complementarity of such mechanisms and activities to be highlighted.*

8. The introduction, notably with the Windsor Framework (2023), of new elements to the governance arrangements for the original Protocol – now Windsor Framework – is a welcome reflection on the willingness of the UK and the EU to acknowledge deficiencies in the original governance arrangements and seek to remedy these through, for example, greater engagement of voices from Northern Ireland.
9. In introducing some new elements, the UK Government at the time often overstated their effects. For example, the so-called ‘Stormont Brake’ allows MLAs to make a case to the UK Government for specific amendments or replacements to EU acts applicable in Northern Ireland not to be applied. The decision to apply the brake rests with the UK Government and then only if a set of demanding criteria are met. One consequence of over-stating the effects or scope of such mechanisms has been to further undermine trust in the UK Government regarding the original Protocol and the Windsor Framework. Regular polling that we undertook during 2021-24 showed that at no point did more than 8% of voters in Northern Ireland trust the UK Government to manage the interests of Northern Ireland in the implementation of the Windsor Framework. As the UK Government’s response in January 2025 to the first notification to use the Stormont Brake shows (e.g. in setting out the requirements for its application), *a more open and informative approach is now being adopted by the UK Government regarding mechanisms for Windsor Framework governance.* This is welcome.
10. A major challenge for the UK – and to a degree the EU – remains the ongoing minority contestation of the arrangements for Northern Ireland established by the Windsor Framework and the essentially unionist objections to what they mean – or are perceived to mean – for Northern Ireland’s position in the United Kingdom. Our polling has, since autumn 2021, shown that at least half of voters in Northern Ireland think the Protocol/Windsor Framework is ‘on balance’ a ‘good thing’ for Northern Ireland; more than a third disagree, however. *Any potential reduction in that contestation requires evidence that the governance arrangements can work to accommodate Northern Ireland voices and interests in the operation of the Windsor Framework.*
11. Improved understanding of the governance arrangements and how they operate in principle goes hand in hand *with greater transparency regarding the actual activities of the various joint bodies and other governance mechanisms,* ideally with examples of how the arrangements have delivered accommodation of Northern Ireland interests. *There are already clear means of achieving this.* For example, joint statements produced following meetings of the EU-UK Joint Committee and EU-UK Specialised Committee on the Implementation of the Windsor Framework could be more detailed in terms of who participated, the matters discussed, and the decisions reached. At present, the work of the JCWG and its Subgroups is not publicised beyond the Annual Report of the Joint Committee. Greater transparency should be introduced. To this end, the Rules of Procedure for these joint EU-UK bodies should be revised to allow for at least comparable levels of transparency and detail concerning their activities as exists regarding joint EU-UK bodies established under the EU-UK Trade and Cooperation Agreement.
12. Since the Windsor Framework was adopted in 2023, the joint EU-UK bodies have been meeting regularly in line with requirements. Meetings have been focused on monitoring the implementation of the trade-focused elements of the Windsor Framework. As yet, there is limited evidence that any significant attention has been paid to the non-trade aspects of the original Protocol, for example the no diminution of rights provision in Article 2. This is despite concerns regarding the extent to which the no diminution of rights commitment is being upheld, as reflected in interventions in several cases that have been brought before the High Court and Court of Appeal in Northern Ireland. There has been no reported use of the mechanism (see paragraph 4(g)) for engagement between the EU-UK joint bodies and the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland.
13. There has also been no reported review of the extent to which the implementation of the Windsor Framework ‘maintains the necessary conditions for North-South cooperation’ (Article 11). The EU-UK

Joint Committee is obliged to keep implementation to this end ‘under constant review’ and may make appropriate recommendations to the EU and UK in this respect, including on a recommendation from the EU-UK Specialised Committee. It is unclear whether the Specialised Committee has considered whether the implementation of the Windsor Framework ‘maintains the necessary conditions for North-South cooperation’. There has been no reported use of the mechanisms (see paragraph 4(f)) for the North-South Ministerial Council, or the North-South Implementation bodies established under the 1998 Agreement to submit proposals concerning the implementation and application of the Windsor Framework.

14. For the first two years following its entry into force on 1 January 2021, implementation of the original Protocol was incomplete and contested to such an extent that with the exception of the JCWG, the institutional governance framework for the Protocol ceased to function. With the Windsor Framework (2023) and agreement on ‘practical and sustainable measures... necessary to address, in a definitive way, unforeseen circumstances or deficiencies that have emerged since the start of the Protocol’, the institutional framework began operating again. The initial focus was on implementing the recently agreed measures aimed primarily at facilitating the east-west movement of goods from Great Britain (GB) to Northern Ireland. While that focus was understandable, as implementation progresses and both the UK and the EU deliver on commitments to implement obligations in a relationship of relative positivity and increasing trust, scope exists to revert attention to the wider purpose of the Protocol, now Windsor Framework, i.e. ‘to address to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions’ (Article 1(3) Windsor Framework).

The Operation of the Stormont Brake (Article 13(3a) Windsor Framework): Assessment to date

15. The Stormont Brake is a unique arrangement designed to allow for the non-application of amendments or replacements to certain EU acts applicable under the Windsor Framework where those amendments or replacements will have ‘a significant impact specific to everyday life of communities in Northern Ireland in a way that is liable to persist’.
16. The limits on the use of the Stormont Brake are not universally appreciated. It does not exist, for example, so that opponents of the Windsor Framework or of the differentiated treatment of Northern Ireland in the UK-EU relationship can block the application of EU law in Northern Ireland. Nor can the Stormont Brake be applied to EU acts already applying in Northern Ireland under the Windsor Framework. The UK has agreed with the EU that those EU acts will apply in Northern Ireland.
17. The Stormont Brake can only be applied in respect of *amendments or replacements* to certain EU acts already applicable in Northern Ireland under the Windsor Framework. Those acts concern the movement of goods. And not all amendments/replacements fall within the scope of the Stormont Brake’s use. The content or scope of the EU act as amended or replaced needs to ‘significantly’ differ ‘in whole or in part’ to the act as it was before being amended or replaced. Key here is not only whether there is a difference between the existing EU act and the act as amended/replaced, but that any difference is ‘significant’.
18. The Stormont Brake is designed as a mechanism of last resort that will only be applied if no other means exist to avoid the changes to legislation in question having ‘a significant impact specific to everyday life of communities in Northern Ireland in a way that is liable to persist’.
19. Opportunities to use the Stormont Brake are therefore likely to be limited given the stringent scope and impact conditions that apply to its use.
20. Only one attempt has been made to date to trigger the Stormont Brake. The required notification was presented on 20 December 2024 and had the backing of all 35 unionist MLAs. It concerned *Regulation (EU) 2024/2865 of the European Parliament and of the Council of 23 October 2024 amending Regulation (EC) No 1272/2008 on classification, labelling and packaging of substances and mixtures*. The notification was considered by the Secretary of State for Northern Ireland who concluded that the threshold for triggering the Stormont Brake and not applying the amendments contained in Regulation (EU) 2024/2865 had not been met.

21. The Secretary of State gave four reasons for rejecting the notification: there is already existing divergence between the labelling regimes in Northern Ireland and Great Britain and this has never been raised as an issue previously; the UK Government expects that businesses within the UK internal market will likely be adopting the new labelling requirements so they can trade with the EU market; Regulation (EU) 2024/2865 includes transition periods for businesses to adapt to the new requirements; the UK Government will be taking steps necessary to avoid new barriers arising from the classification, labelling and packaging regimes in place in Northern Ireland and the rest of the UK, resulting from the amending Regulation.
22. The Secretary of State's reasoning did not engage with some significant weaknesses in the notification made in December 2024. Three in particular stand out. First, the notification took a broadbrush approach and sought the non-application of the entire amending Regulation rather than specifying the provisions that would meet the criteria for triggering the brake. Second, the notification did not engage systematically with the scope and impact criteria for triggering the Stormont such that a recognisable case was made. It was not clear from the notification what the 'significant impact' would be, how it would be 'specific to everyday life of communities in Northern Ireland' and whether the impact would be 'liable to persist'. Third, the evidence presented in support of the notification was essentially limited to claims made in a single submission from the Chemicals Industry Association to the Windsor Framework Democratic Scrutiny that claimed that new labelling requirements 'may lead to withdrawal of product supply from the NI market' or suppliers passing on the associated responsibility to 'the NI recipient, who would be legally bound to reformat and relabel to maintain compliance with EU CLP'. Thus, evidence could not be deemed to support the contention that application of Regulation (EU) 2024/2865 in Northern Ireland 'would have a significant impact specific to everyday life of communities in Northern Ireland in a way that is liable to persist'.
23. This third weakness reflects important challenges regarding the operation of the Stormont Brake specifically and the work of the Windsor Framework Democratic Scrutiny Committee generally. This falls in two places: (i) *the capacity of MLAs to gather sufficient relevant evidence to support their case that the Stormont Brake should be triggered*; and (ii) *the capacity of stakeholders to engage with scrutiny processes and evidence calls such that a detailed and substantive appreciation of the implications of legislative changes can be identified and understood*. Given the range of other demands on their time and their limited resources, stakeholders in Northern Ireland are not in a position to respond regularly and fully to calls for evidence, particularly given the very tight timeframes that generally apply for the submission of evidence. The time constraints are also an issue for stakeholders in Great Britain, notably those involved in supplying the Northern Ireland market. For GB stakeholders, there is also the issue of how much time they have to dedicate resources to consider the impact of legislation only applicable in Northern Ireland when the Northern Ireland market may be a non-essential market for them.
24. A further lesson from the first notification is that *any assessment of the likely impact of an EU act within scope of the Stormont Brake mechanism on Northern Ireland will depend not just on the content of the act itself by also the extent to which the UK intends to take or has taken action that would mitigate the impact*. Of note here is the UK Government's commitment to 'to protect the UK internal market, while reducing barriers to trade between the UK and EU' and 'to avoid new regulatory barriers arising from our classification, labelling and packaging regimes for chemicals that would undermine supplies into Northern Ireland'. If a similar approach is adopted in response to other EU acts amending or replacing EU acts applicable in Northern Ireland under the Windsor Framework, then the UK Government is unlikely to see in any notification convincing evidence that the amending or replacement EU act 'would have a significant impact specific to everyday life of communities in Northern Ireland in a way that is liable to persist'.
25. Also of note is the reference in the Secretary of State's response to the EU's ban on the use of dental amalgam and its application in Northern Ireland under the Windsor Framework. In this case, which could have led to a first notification for the use of the Stormont Brake, dialogue allowed genuine concerns to be identified and then addressed through a temporary derogation agreed by the European Commission. The outcome reinforced the point that where genuine concerns are raised then

mitigations can be agreed. The Stormont Brake is – and has to be accepted as – a mechanism of last resort.

26. It cannot be ruled out that a notification to use the Stormont Brake may be motivated primarily by a political need to be seen to be seeking to disrupt the implementation of the Windsor Framework rather than by an evidence-based assessment of the potential impact of an EU regulation. After all, the inclusion of the Stormont Brake mechanism in the Windsor Framework was intended to address some political concerns about the democratic deficit of the existing Protocol arrangements. Nevertheless, *the act of regularly seeking to have the Stormont Brake triggered on political grounds arguably exacerbates rather than mitigates concerns about the Windsor Framework*. For if a notification is made and the UK Government agrees that the triggering of the Stormont Brake is justified, this would imply that prior UK-EU consultation and the EU-UK joint bodies have failed to satisfactorily address the issue. As such, cause would potentially exist for more frequent use of the mechanism. Yet if a notification is made to use the Brake and the UK Government rejects the case, then some could potentially see the Stormont Brake as a futile mechanism and as cause for further suspicion of the Windsor Framework and distrust of all its governance mechanisms. *It is therefore important that there is among MLAs a clear understanding of the scope and impact criteria that need to be met if the UK Government is to be convinced that the use of the Stormont Brake is justified*.

The Operation of the Applicability Motion Procedure: Assessment to date

27. The Applicability Motion procedure is not part of the Windsor Framework as agreed by the UK with the EU. It is a domestic UK procedure that establishes as a default position the requirement for the Northern Ireland Assembly to adopt a motion with cross-community support in favour of a new EU act being added to the scope of Windsor Framework before the UK in EU-UK Joint Committee agrees to the EU act being added.
28. To note is that the UK Government may proceed to agree to the EU act's addition *without* an Applicability Motion being passed where the addition of the new EU act 'would not create a new regulatory border between Great Britain and Northern Ireland'. The applicable definition of 'a new regulatory border' is 'regulatory requirements relating to the movement of goods that would – (a) materially divert trade, or (b) materially impact the free flow of goods'. The use of 'materially' (i.e. to a significant extent, considerably) is important here. The UK Government may also proceed without an applicability motion being passed where there are re "exceptional circumstances".
29. During 2024, the Northern Ireland Assembly twice considered whether the UK Government should agree to add a new EU act to the scope of the Windsor Framework. An Applicability Motion for the addition of a new EU regulation governing the organic content of pet food was approved with a cross-community support.
30. However, an Applicability Motion to add a new EU regulation on protections on geographical indications for craft and industrial products did not gain cross-community support. As yet, the UK Government has not informed the EU of its position in the light of the Northern Ireland Assembly's vote. Procedurally, it could decide that no 'new regulatory border' between Great Britain and Northern Ireland will be established and so agree to the addition of the new EU act to the Windsor Framework. Important here is the definition of 'new regulatory border' noted (see paragraph 28), particularly if current or anticipated legislation applying in the Great Britain is close to or aligns with that of the EU. Politically, however, taking such a position would run the risk of invoking the ire of some if not all unionists who voted against the applicability motion. Much would depend on how convinced unionists would be of a UK Government case for no 'new regulatory border' being established. This returns us to the point made above (see paragraph 9) concerning the importance of openness and information when it comes to UK Government decision-making in the operation of the governance mechanisms of and for the Windsor Framework.

