



From the Protocol to the Windsor Framework

C R G Murray

University of Newcastle

Niall Robb*

Queen's University Belfast

Correspondence email: colin.murray@newcastle.ac.uk; nrobb03@qub.ac.uk

ABSTRACT

The Windsor Framework, the new package of measures agreed by the United Kingdom (UK) and European Union (EU) as well as the new name for the Protocol on Ireland/Northern Ireland, was presented in February 2023 amidst considerable fanfare. This article examines the rationale for the new Framework amongst the negotiators and how some of its headline provisions impact upon those most exposed to the out-workings of any deal – those living and doing business in Northern Ireland. We investigate the possible implications for Northern Ireland of the new minimalist regulatory alignment in the trade in goods and the possibility of a ‘cooperation dividend’ stemming from warmer UK–EU relations. In particular, we examine the operation and possible limitations upon the ‘Stormont Brake’ mechanism. This article ultimately assesses whether Sunak’s Windsor Framework will be any more successful than the May Backstop and Johnson Protocol before it at ‘getting Brexit done’.

Keywords: Windsor Framework; Brexit; Northern Ireland; trade; regulation.

TOWARDS FIXING THE PROTOCOL

It takes a long time for the fury and animosity generated by an upheaval like Brexit to subside, especially after seven years of repeatedly traversing the infeasibility of imposing a customs and regulatory border across the island of Ireland and attempting multiple variations of an alternative to doing so. The Windsor Framework, met with widespread acclaim at Westminster and evident bonhomie between Rishi Sunak and Ursula von der Leyen, could nonetheless

* Respectively, Professor of Law and Democracy, Newcastle University, and PhD Candidate, Queen’s University Belfast. Our thanks to Steve Peers (University of Essex) for his advice on this article, which has been adapted from C Murray, ‘The Protocol deal: a “just like that” moment seven years in the making’ (*DCU Brexit Blog* 28 February 2023). Article updated and hyperlinks last accessed on 17 April 2023. This article builds upon the content of the 2022 special issue of the *Northern Ireland Legal Quarterly*, ‘Northern Ireland’s Legal Order after Brexit’.

mark the point at which we move into a genuinely post-Brexit phase of relations between the European Union (EU) and the United Kingdom (UK). This leaves the question, beyond the prominent rebranding, of whether Sunak's Windsor Framework will prove any more successful than the May Backstop and the Johnson Protocol before it.

In headline terms, under the Windsor Framework Northern Ireland remains aligned with the EU Single Market rules for goods, and as a result the role of the Court of Justice of the European Union (CJEU) in the oversight of those rules also remains. Although the Windsor Framework may not present a new model for the goods arrangements covering Northern Ireland, it nonetheless provides for a significant reworking of the Protocol, primarily effected through Joint Committee action and mutually agreed unilateral measures by the UK and the EU. For Sunak, this overhaul of the Protocol is so comprehensive that it has 'removed the border in the Irish sea'.¹ In assessing the Windsor Framework, this article explores why the interested parties might regard these prominent elements of the new deal as attractive and proceeds to explore some of the most significant claims made about the new deal in depth. These include the changes to the goods rules applicable to Northern Ireland, the position of Northern Ireland with regard to new trade agreements concluded by the UK, the new Northern Ireland Assembly mechanism for objecting to dynamic alignment with aspects of EU law (the 'Stormont Brake'), and the deal's impact on Northern Ireland's participation in the Withdrawal Agreement's committee structures.

These changes are brought about by a complex combination of legal mechanisms using variation provisions contained in the Withdrawal Agreement itself. Using article 164 as their legal basis, the UK and EU have made full use of the considerable leeway this provision provides them to 'address omissions or other deficiencies, or to address situations unforeseen when this Agreement was signed'² during the first four years following the conclusion of the Withdrawal Agreement's transition period. These terms do not, however, allow the Joint Committee to 'amend the essential elements of the Agreement', and the Commission has found itself at the edges of its negotiating mandate in concluding the Windsor Framework. The deal has therefore required a combination of unilateral commitments by the UK and the EU (the latter providing carve-outs for Northern Ireland from aspects of EU law hitherto operative under the Protocol, modelled upon the EU's

1 R Sunak, HC Deb 27 February 2023, vol 728, col 572.

2 Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union (30 January 2020), art 164(5)(d).

unilateral reforms to medicines regulations implemented in 2022)³ and Joint Committee decisions and declarations.

DOES BETTER MEAN BETTER FOR EVERYONE?

The Windsor Framework provides a policy victory for many of the key stakeholders involved in determining Northern Ireland's post-Brexit arrangements. From the perspective of the UK Government, Rishi Sunak needs a major achievement to convince voters of his effectiveness as leader if he intends to claw back the Conservatives' position in the polls following Liz Truss's short and turbulent premiership. Having evidently concluded that he could not risk a trade war with the EU amid a cost-of-living crisis, he was willing to gamble that, for all the manoeuvrings ahead of the deal announcement, all but the most stalwart European Research Group (ERG) members within his parliamentary party would balk at the prospect of bringing down his Government at a time when the polls suggested that a general election would be disastrous for the Conservative Party. Sunak's Government can credibly argue that its more constructive approach to UK–EU relations, after the turbulence of the Johnson era, has led the EU to make concessions over several controversial aspects of the Protocol.

For the Democratic Unionist Party (DUP), whose opposition to the Protocol provided the pretext for the UK Government's refusal to fully implement its terms, the Prime Minister will hope that it will ultimately accept the EU's tangible movement on issues including pet movements, medicines, regulation, customs and value-added tax (VAT) (all of which directly address consistent DUP talking points) and restore power-sharing. It is unlikely that holding out will yield further concessions, and prolonging Northern Ireland's instability is not going to strengthen its place in the Union in the long term. Even the deal's title has been calibrated to apply the soothing balm of monarchism to the DUP's wounded sensibilities.⁴ Moreover, now that the UK Government has made arrangements to manage the governance of Northern Ireland pretty much indefinitely by a form of quasi direct rule, the DUP's future leverage is uncertain.⁵ Rather, by returning to

3 Directive 2022/642/EU amending Directives 2001/20/EC and 2001/83/EC as regards derogations from certain obligations concerning certain medicinal products for human use made available in the United Kingdom in respect of Northern Ireland and in Cyprus, Ireland and Malta.

4 The deal was concluded at a hotel near Windsor Great Park; E Ng, 'Fairmont Windsor Park Hotel delighted to be part of "historic occasion"' *The Independent* (27 February 2023).

5 Northern Ireland (Executive Formation etc) Act 2022 and Northern Ireland (Executive Formation and Organ and Tissue Donation) Act 2023.

power-sharing, the DUP can employ the Windsor Framework's new mechanisms to resolve issues – the Framework being a mechanism for managing the UK–EU relationship with regard to Northern Ireland as much as a solution for particular issues. Only through taking its place within the Northern Ireland Executive will the DUP secure its say in the Withdrawal Agreement's committee structures and only through a functioning Assembly can the new 'Stormont Brake' operate.

The Windsor Framework, however, remains a reformulation of the Protocol rather than a new model, which does not address the party's persistent complaint that article VI of the Act of Union had been undermined.⁶ This 'constitutional' objection might possess much less traction at Westminster since the UK Supreme Court comprehensively dismissed the *Allister* challenge to the constitutionality of the existing Protocol arrangements,⁷ but it has become very difficult for the DUP's leadership to disavow.⁸ Any effort to set aside these concerns and back the deal risks exacerbating the party's internal divisions over the shape of Brexit and could enable some of the voices that the party has encouraged within Loyalism, in order to reinforce opposition to the Protocol, to achieve even greater prominence within Unionist discourse. A further challenge for Sir Jeffrey Donaldson, if he were to attempt to change tack, is finding a window between successive looming elections to make any *volte face*. These circumstances saw the DUP vote against the statutory instrument implementing the UK's Windsor Framework commitments when it came before Parliament in March 2023, but, in the absence of a major Eurosceptic push against Sunak, this did not disrupt the measure becoming law (discussed below). The door remains open for the DUP to agree, however grudgingly, to participate under the Framework, and thereby attempt to use the deal's new mechanisms to challenge aspects of Northern Ireland's alignment with EU law.

On the other side of the table, the European Commission might well simply be questioning the point of continuing interminable struggles over the precise rules applicable to Northern Ireland, unimportant as it is in the context of the size of the EU Single Market. Michel Barnier's memoirs attest to the grip of Brexit 'fatigue' as early as 2019.⁹ Having secured improved data-sharing from the UK Government, allowing it to conduct a managed-risk approach to the Protocol, the Commission may feel secure enough to accept mitigations to the Protocol's terms. Ireland, however, seems to have conceded most through this deal

6 J Donaldson, HC Deb 27 February 2023, vol 728, col 581.

7 *In re Allister* [2023] UKSC 5, [66]–[68] (Lord Stephens).

8 J Webber, 'Northern Ireland unionist leader demands "change" to Windsor Framework' *Financial Times* (London 14 March 2023).

9 M Barnier, *My Secret Brexit Diary: A Glorious Illusion* (Polity Press 2022) 217–222.

(even if it was not directly at the table). The trade dislocations inherent in the Protocol led traders to explore North–South opportunities due to Brexit barriers to trade.¹⁰ Mitigate those barriers and much of this new business will likely fail to materialise. Perhaps the calculation is that the deal does enough to protect existing trade and that damage to North–South co-operation and UK–Ireland relations at a political level meant that attempting to hold onto these potential benefits was no longer worth the effort. The requirement of distinct labelling for some products to be sold in Northern Ireland, as ‘Not for EU’, could nonetheless generate ongoing difficulties for businesses which regard a small market as not being worth differentiated packaging,¹¹ and it will be difficult to assess the impact of this factor upon supply chains until the system is operative.

The conclusion of the Windsor Framework is thus a function of the most significant actors having finally exhausted their energy around this most intractable aspect of Brexit and seeking to reset relations. This is not to say that the substance of the deal is unimportant; Northern Ireland is a small, peripheral and underdeveloped economy.¹² Anything in the Windsor Framework that helps to alleviate barriers to trade and stimulate economic regeneration is therefore particularly important in light of these pressures, but there was no obvious way to reach these new arrangements without having gone through the fraught negotiations to date. A Protocol which established the basic parameters for trade in goods and regulation with regard to Northern Ireland had to be introduced and tested before it could be mitigated, even if that left people and businesses in Northern Ireland feeling like the subject of an experiment. All the tortured steps and missteps of recent years have involved the UK and EU working out what they can accept as a tolerable post-Brexit relationship; when Northern Ireland required prominent and complex accommodations, repeated recalibration of these arrangements was an inevitability.

10 S Lowe, ‘Six sides to every story: trade in goods and the Northern Ireland Protocol’ (2022) 17 *Journal of Cross Border Studies in Ireland* 77, 87.

11 The UK Government has rebuffed concerns with statements that these new requirements amount to ‘[p]roportionate’ and ‘phased’ arrangements: L Docherty, HC Deb 20 March 2023, WA 164046.

12 See G Brownlow, ‘Northern Ireland and the Economic Consequences of Brexit: taking back control or perpetuating underperformance?’ (2023) *Contemporary Social Science* (Advanced Access).

A MINIMALIST TAKE ON NORTHERN IRELAND—EU REGULATORY ALIGNMENT

For Sunak, the most pressing issue with the Protocol has been how it ‘treated goods moving from Great Britain to Northern Ireland as if they were crossing an international customs border’.¹³ The Windsor Framework offers an alternative to the Protocol’s previous model of alignment in light of the concerns raised by politicians, business and civil society in Northern Ireland. Most notably, the Windsor Framework permits the partial disapplication of EU rules for goods, provided their final destination is in Northern Ireland. This is highlighted in the Joint Committee decision amending article 6(2) of the Protocol. It includes the following text, which recognises specific implications of Northern Ireland’s place in the UK’s internal market:

This includes specific arrangements for the movement of goods within the United Kingdom’s internal market, consistent with Northern Ireland’s position as part of the customs territory of the United Kingdom in accordance with this Protocol, where the goods are destined for final consumption or final use in Northern Ireland and where the necessary safeguards are in place to protect the integrity of the Union’s internal market and customs union.

This acknowledgment enables a reworking and streamlining of the applicable EU rules under the Protocol and facilitates the creation of a ‘green lane’ through which goods travelling to Northern Ireland are moved with greater ease than those which are at risk of onward movement into the EU.¹⁴ The latter will transit the Irish Sea on the basis of ‘red lane’ arrangements, to be applied at the Irish Sea border as if the goods were entering the Single Market from an external country.

The development of a differentiated regime for goods moving between Great Britain and Northern Ireland, dependent on their end destination, has been the most obvious overlap between the UK and EU plans for Protocol reform since the Commission published its proposals in October 2021.¹⁵ The difficulty has been defining what goods are covered by the green lane arrangements and establishing the necessary safeguards. The new arrangements, in the form of a new Joint Committee determination of goods at risk of onward movement, are focused in large part on goods subject to sanitary and phytosanitary (SPS) checks, alongside products to be used in construction in Northern Ireland.¹⁶ In doing so, the EU has agreed

13 Sunak (n 1 above) col 570.

14 Joint Committee Decision 1/2023, art 7.

15 C Murray, ‘From oven-ready to indigestible: the Protocol on Ireland/Northern Ireland’ (2022) 73(S2) Northern Ireland Legal Quarterly 8, 31.

16 Joint Committee Decision 1/2023, arts 6 and 7.

to a risk-based approach to checks on goods and the UK has accepted the data-sharing procedures, labelling requirements and the border infrastructure necessary to facilitate this.¹⁷ The new arrangements provide what Sunak describes as:

[A] new, permanent, legally binding approach to food. We will expand the green lane to food retailers, and not just supermarkets but wholesalers and hospitality, too. Instead of hundreds of certificates, lorries will make one simple, digital declaration to confirm that goods will remain in Northern Ireland.¹⁸

SPS checks are particularly extensive under EU law and have generated some of the most persistent concerns over the eventual implementation of the Protocol, leading the UK Government to unilaterally extend the relevant grace periods throughout its operation to date.¹⁹ With issues like gene editing being a prominent part of the UK Government's policy agenda, the agrifood context is likely to be subject to significant standards divergence.²⁰ The Windsor Framework does not do away with these challenges, instead it substitutes packaging requirements and trade-flow oversight for systematic compliance checks. This arguably substitutes one non-tariff barrier to trade for another, with the new arrangements being less onerous for hauliers but imposing more on businesses in Great Britain making food products for retailers in the small Northern Ireland market.

The tailoring of the green lane to address this specific issue, moreover, narrows its operation. These new arrangements do not, for example, apply to manufactured goods. But accompanying the specific rules applicable to SPS checks, there is a general green-lane exception for Northern Ireland businesses with turnovers of under £2 million bringing goods from Great Britain into Northern Ireland, which the UK Government has presented as 'meaning four-fifths of manufacturing and processing companies in Northern Ireland who trade with Great Britain will automatically be in scope'.²¹ These new arrangements therefore address some of the established frictions at the sea border, but do so in a way that channels trade through business entities, in an effort to constrain abuses. As some have noted, this business-centred

17 Ibid arts 9–12

18 Sunak (n 1 above) col 571.

19 C Barnard, 'The status of the Withdrawal Agreement in UK Law' in C McCrudden (ed), *The Law and Practice of the Ireland–Northern Ireland Protocol* (Cambridge University Press 2022) 107, 113.

20 Protocol on Ireland/Northern Ireland Sub-Committee, 'Oral Evidence: The Windsor Framework' (22 March 2023) Q5 (Jess Sargeant).

21 HM Government, *The Windsor Framework: A New Way Forward* (2023) CP 806, para 12.

approach does little for consumers seeking to buy products direct from businesses in Great Britain.²²

The Windsor Framework does not therefore so much ‘remove’ the Irish Sea border, as Sunak has claimed, as address a series of problems with its operation which had already been identified and which have generated concerns within Northern Ireland. Its green-lane provisions do not, of themselves, prevent those problems re-emerging, particularly for larger companies, should the UK Government seek to put in place product standards which diverge from those applicable under the EU Single Market.²³ The expansion of the scope of the general ‘by turnover’ exemption will nonetheless mean that any such burdens will not fall heaviest on businesses least able to deal with the associated costs. These risk-based arrangements, moreover, place a new focus on the land border between Ireland and Northern Ireland in circumstances where risks are identified. As the UK Government’s Command Paper explains, ‘checks North–South on the island of Ireland will ... operate on a risk and intelligence-led basis’.²⁴

This new approach has also seen UK Government ministers insist that the deal enables ‘free-flowing trade within the whole United Kingdom’, including Northern Ireland’s full participation in new UK trade agreements.²⁵ Under the Protocol, for all that Northern Ireland was stated to be part of the UK’s customs territory, the arrangement carried with it the obligation to apply EU customs and regulatory rules for goods, and in some cases EU tariffs, at ports of entry into Northern Ireland. Under the Windsor Framework, goods can be moved into Northern Ireland (as an end destination) using the green lane process under the conditions discussed above, but with the additional proviso, relevant to UK trade agreements, that ‘the duty payable according to the Union Common Customs Tariff is equal to zero’.²⁶ Given the scope of the Trade and Co-operation Agreement, tariffs are zero for goods moving between Great Britain and the EU where either is the point of origin of the goods. This is not, however, the case where the UK enters a trade agreement with a third country with more generous terms for certain goods than the EU. There are, however, exceptions to this requirement for trusted traders moving goods for final use in Northern Ireland and parcels. The extent to which these exceptions will be effective in allowing Northern Ireland businesses with turnovers of

22 See S McBride, ‘Buying GB plants online seems set to be banned under EU deal ... and NI Secretary misled public’ *Belfast Telegraph* (18 March 2023).

23 A McCormick, ‘The Windsor Framework: a quick evaluation’ (*UK in a Changing Europe* 28 February 2023).

24 HM Government (n 21 above) para 46.

25 Sunak (n 1 above) col 570.

26 Draft Joint Committee Decision 1/2023, art 7(1)(a)(i).

under £2 million to participate in new UK trade deals thus depends on whether the Commission is concerned about leakage of goods into the Single Market using the green lane and seeks that checks be imposed as a result.

Other significant changes to the Protocol relate to VAT and excise and a range of unilateral EU measures on parcels, agri-food, plants and pets, and medicines. Under the Windsor Framework, VAT rates on some products remaining in Northern Ireland can now be varied and a process is foreseen which will expand the areas to which this applies. The special arrangements for agri-food, plants, pets, and medicines are implemented through carve-outs to EU legislation in terms of goods movements to Northern Ireland or sale there, which further cements Northern Ireland's unique status with regard to the EU legal order. Indeed, the UK Government went so far as to claim that 1700 pages of EU law will no longer apply to Northern Ireland as a result of the deal, but this has been a headline that ministers have struggled to elaborate upon, and which only applies to the specific application of these rules to certain trading arrangements.²⁷ These elements of the deal have been designed to cut the amount of EU law required for goods regulation in Northern Ireland to the minimum required 'to maintain the unique ability for Northern Ireland firms to sell their goods into the EU market'.²⁸ This enables the UK Government to trumpet a reduced role for the CJEU in Northern Ireland as part of the Windsor Framework,²⁹ even though the nature of its role remains unchanged because there will be less applicable EU law to require its input.

The impetus behind the deal is addressing specific, identified problems with the Protocol, rather than attempting to reconsider its overarching operation. This is not unimportant; the EU has long been presented by the UK Government as rigid and doctrinaire in its application of Single Market rules. It therefore appears to be prioritising 'pragmatic' solutions to the problems generated by the Protocol.³⁰ This makes it impossible to quantify, as a bald figure, the amount of EU law that no longer applies in Northern Ireland as a result of the Windsor Framework; different amounts apply depending on whether the green lane, the red lane or rules applicable to production in Northern Ireland are invoked, as one minister has been obliged to acknowledge:

27 HM Government (n 21 above) para 8. The Secretary of State for Northern Ireland has struggled to account for this and related claims: European Scrutiny Committee, 'Oral Evidence: Government Northern Ireland Protocol negotiations' (2023) HC 1101, Q104–109, Q119 (Chris Heaton-Harris).

28 Ibid para 57.

29 Ibid para 29.

30 S Peers, 'The Windsor Framework: limiting the scope of EU law in Northern Ireland in practice, though not in theory' (*EU Law Analysis* 4 March 2023).

I am not an expert in EU law, and I have no intention of becoming one, but my understanding is that the situation is somewhat more complex than just adding together a list. There will of course be some directives that are in part still applied, in respect, for example, of the red channel, and disapplied in respect of the green channel.³¹

The problem, however, is that Single Market rules are much less coherent when hedged with exceptions. In its eagerness to highlight how the deal addresses problems affecting trade across the Irish Sea, the UK Government's account of the Windsor Framework presents Northern Ireland as akin to an outsized Freeport, and not as a space in which goods are produced and consumed.³² As a result, Northern Ireland is left with a somewhat moth-eaten set of EU rules applicable to trade in goods from Great Britain (provided the goods' ultimate destination is Northern Ireland) and a rather more extensive list of EU rules applicable to the production or processing of goods in Northern Ireland. This could see goods in Northern Ireland being produced to higher standards than those required in Great Britain, and facing competitive disadvantages within Great Britain as a market as a result.³³ The Assembly and Executive, if reconstituted following this deal, will be presented with the challenge of making these complex sets of rules work amid any push for divergence of rules by the current UK Government. All of which will put considerable pressure on how Northern Ireland's institutions approach alignment with EU law.

THE 'STORMONT BRAKE'

If the red and green lane system was an expected element of the 'landing zone' for a deal, and the UK Government has accepted a continued role for the CJEU, the Windsor Framework's attempt to address the Protocol's democratic deficit³⁴ – the 'Stormont Brake' – is the major flourish within Sunak's offering. He presented this to Parliament as a means by which the Northern Ireland Assembly can 'block' dynamic alignment, and that, if this mechanism were to be employed, 'the UK Government will have a veto' ending 'the automatic ratchet of EU law'.³⁵ These claims require some unpacking, not least because of the slippage in Sunak's pledges between an Assembly 'block' and a UK

31 Lord Caine, HL Deb 7 March 2023, vol 828, col 686.

32 V Gravey and L C Whitten, 'The Windsor Framework and the environment' (*Brexit and Environment* 7 March 2023).

33 See A Bounds and J Webber, 'New EU arsenic rules catch Northern Ireland between Brussels and London' *Financial Times* (London 9 March 2023).

34 See A Deb, 'Parliamentary sovereignty and the protocol pincer' (2023) 43 *Legal Studies* 47, 63–64.

35 Sunak (n 1 above) col 574.

Government ‘veto’. There is further complication in the Command Paper, accompanying the Windsor Framework, presenting these measures as requiring cross-community consent.³⁶

The arrangements, incorporated into a new article 13(3a) of the Protocol as amended by the Windsor Framework, with further details set out in a Unilateral Declaration by the UK (and in subsequent enacting legislation, discussed below),³⁷ are subject to several conditions. The first relates to the new EU law in question. The Brake does not apply to changes in all EU law applicable in Northern Ireland under the Protocol, but only to measures covered in parts of annex 2 of the Protocol (relating to the single market in goods). This means that automatic dynamic alignment will still, for example, apply to the EU Equality Directives listed in annex 1, which underpin much of the operation of article 2 of the Protocol.³⁸ Where an applicable EU law development is at issue, its content or scope must ‘significantly’ differ from the measure it is replacing or amending, generating ‘significant impact’ for everyday life in Northern Ireland.

The second condition relates to Northern Ireland’s power-sharing institutions. The Executive and Assembly must be functioning; no Stormont, no Stormont Brake. This is not just a carrot to tempt the DUP back into power-sharing, rather it is a further precondition of the Brake being used that the Assembly and the Executive have consulted on the measures with the public in Northern Ireland and also availed of the consultative mechanisms in place with the EU and the UK Government. If this has been done, the operative part of the Brake draws upon part of the Petition of Concern mechanism, as modified following the *New Decade, New Approach* deal to restore power-sharing in 2020.³⁹ It allows a group of 30 of Stormont’s 90 Members of the Legislative Assembly (MLAs) from two parties to notify the UK Government of their desire that the Brake be applied. The Stormont Brake is not necessarily, therefore, a DUP veto; no party has won 30 or more seats since the Assembly was reduced in size from 108 to 90 MLAs.⁴⁰ To meet the requirements for the Brake therefore, the DUP, currently with 25 MLAs, would have to cooperate with the Ulster Unionist Party. Other partnerships would either fall short of 30 MLAs or would be unlikely to share the DUP’s concerns with regard to particular EU laws.

36 HM Government (n 21) para 64.

37 Draft Joint Committee Decision 1/2023, annex I Unilateral Declaration by the United Kingdom: Involvement of the Institutions of the 1998 Agreement.

38 Draft Joint Committee Decision 1/2023, art 2.

39 *New Decade, New Approach* (8 January 2020), para 12.

40 Northern Ireland (Miscellaneous Provisions) Act 2014, s 6.

Under the terms of article 13(3a), however, this is not a cross-community measure, but rather a simple counter-majoritarian measure; indeed, given Sinn Féin's historic reticence towards EU law, there might in future be common (majoritarian) cause over the impact of particular EU law developments upon Northern Ireland. The UK Government has, however, suggested additional cross-community requirements in its enactment of domestic measures to give effect to the Brake, reflecting some of the language found in the Command Paper but not in the Windsor Framework documents relating to the Brake.⁴¹ This suggests that there may have been different understandings of how the Brake works and its interaction with the Petition of Concern mechanism within the UK Government, and the implementation legislation (discussed below) is being viewed as a means of smoothing out these discrepancies. Any such finessing, however, is difficult to square with the terms of the UK's Unilateral Declaration, which opens with a commitment to 'adopt the following procedure to operate the emergency brake mechanism in Article 13(3a) of the Windsor Framework'.⁴²

A third condition relates to the timing of the Brake's employment. All of these processes must take place 'within two months of the publication of the specific Union act' within the Official Journal of the European Union. This will normally be early in the measure's transposition period (where relevant) and poses a challenge given the consultation requirements which must be followed to use the Stormont Brake. The Assembly parties will thus have to carefully assess EU measures during the EU legislative process and be ready in advance of a new measure's publication to engage the Brake. This will, of course, be easier if they are fully engaged in the Withdrawal Agreement's consultative mechanisms, and the expectation is likely that this engagement will head off disputes, potentially with Northern Ireland-specific adjustments being made to EU law as it is drafted. Careful collaboration between the Northern Ireland Executive, the European Commission and the UK Government will be required to enable Northern Ireland's institutions to stay abreast of developments and consider emerging EU law under the scope of the Brake. The good functioning of the new Windsor Framework Democratic Scrutiny Committee to be formed in the Assembly pursuant to the implementing Statutory Instrument (discussed below) will be vital to monitoring and scrutinising this legislation.⁴³ Otherwise, the risk is that the full

41 Lord Caine, HL Deb 2 March 2023, vol 828, col 381.

42 Draft Joint Committee Decision 1/2023, annex I (n 37 above) para 1.

43 Windsor Framework (Democratic Scrutiny) Regulations 2023 (SI 2023/XX) para 2.

implications of an EU measure might not be recognised until too late into the transposition process to prevent it coming into force.

Having triggered the Brake, the Stormont parties taking issue with a new EU law will have to convince the UK Government that they have met all conditions and of their substantive case as to the problems generated by the EU measure in question. Even then, the Brake can only be invoked with regard to the specific parts of the EU law over which the problems are demonstrated; if only parts of the measure cause significant identifiable difficulties in Northern Ireland, the application of the Brake must be targeted to those parts. Once the UK Government is convinced that the Brake has been justifiably initiated, it must notify the Commission that it intends to prevent the operation of the EU law in question and make a detailed explanation of how the conditions for the Brake have been fulfilled. At this point the new article 13(3a) process dovetails into the existing article 13(4) process, which applies to the inclusion of new EU goods rules within annex 2, allowing for a six-week window for the exchange of views between the UK Government and the Commission. This can then generate a Joint Committee response if both agree to a means of addressing the issue, or to the Commission taking remedial action if it concludes that the Brake has been misapplied. Uses of the Brake therefore come with attendant risks to Northern Ireland's access to the EU Single Market. Either the decision to invoke the Brake or any EU counter-measures can thereafter be the subject of the Withdrawal Agreement's arbitration arrangements, which would aim to determine if all of the requirements for using the mechanism have been fulfilled.⁴⁴

The new feature works alongside the existing article 13(4) process by which the UK Government can prevent new EU law measures from being added to the scope of the Protocol, giving a new route to achieve this outcome where an annex 2 provision is being amended or replaced. In summary, where there is a significant change to a relevant EU law relating to goods, which is subject to objection under this mechanism, the UK Government will be able to notify the EU and block the operation of this measure in Northern Ireland, or at least those parts which can be demonstrated to be causing 'significant impact' to society in Northern Ireland. This creates divergences in how the two Brake processes apply: article 13(4) covers any new measure within the scope of the Protocol, whereas article 13(3a) covers amendments to existing EU law within the scope of annex 2. If the Brake is misapplied, as with the existing article 13(4) process and the introduction of safeguard measures

44 UK-EU Withdrawal Agreement (n 2 above) art 175.

under article 16,⁴⁵ there is scope for arbitration. The new process is, however, more constrained than article 16. The UK Government cannot simply assert some general lack of cross-community support to prevent the amendment or replacement of an aspect of EU law relevant to goods, as it has repeatedly threatened to do in recent years when discussing article 16 (although these suggestions that article 16 has a particularly broad scope have not been formally tested and have been subject to criticism).⁴⁶ There is now an expectation that such concerns will be channelled through the Stormont Brake mechanism and meet its procedural requirements.

The Stormont Brake is, as noted above, restricted to EU rules on customs, goods and agriculture, which allows rules applicable to electricity to continue to apply under the Protocol's protections of the all-island Single Electricity Market,⁴⁷ as well as leaving the rights and equalities provisions untouched. The limited scope of the Stormont Brake, however, raises interesting questions over how it will apply to complex EU measures; for example, how future EU rules such as the Carbon Border Adjustment Mechanism, which apply to both electricity and goods, will be treated.⁴⁸ Such complex and multifaceted measures call into question the bald terms of Sunak's assurance that '[i]f the veto is used, the European courts can never overturn our decision',⁴⁹ for there are many questions of EU law which could be left to be determined as part of the Stormont Brake process. Even the concept of 'significant impact' could turn upon conflicting accounts of how an amended EU law will operate, and the CJEU will not relinquish the determination of such questions to an arbitration panel.

45 See B Melo Araujo, 'An analysis of the UK Government's defence of the Northern Ireland Protocol Bill under international law' (2022) 73(S2) *Northern Ireland Legal Quarterly* 89.

46 See R Howse, 'Safeguards' in Federico Fabbrini (ed), *The Law and Politics of Brexit: Volume IV The Protocol on Ireland/Northern Ireland* (Oxford University Press 2022) 253.

47 For more on the Single Electricity Market, see N Robb, 'What does the Windsor Framework mean for the Single Electricity Market?' (*Brexit and Environment* 14 March 2023).

48 The Command Paper accompanying the Framework, moreover, generated an expectation that the same arrangements for Stormont input would apply to the art 13(4) process with regard to new EU law: HM Government (n 21 above) paras 67–68. There was, however, no legal obligation upon the UK Government to extend the mechanism to art 13(4); S Peers, 'Just say no? The new "Stormont Brake" in the Windsor Framework' (*EU Law Analysis* 5 March 2023).

49 Sunak (n 1 above) col 574.

THE CO-OPERATION DIVIDEND

The Protocol Bill, with which the UK Government had threatened to unilaterally disapply parts of the Protocol, has been swiftly waved off the stage. In the UK Government's own legal assessment, 'given the terms of the Windsor Framework and the clear availability of a durable negotiated solution, there would now be no legal justification for enacting the Northern Ireland Protocol Bill'.⁵⁰ With it goes the spectre of its underdeveloped dual regulatory arrangements and the uncertainties of its impact on the Protocol's rights and equality arrangements.⁵¹ Perhaps it did its job as a piece of theatre, enabling Sunak, in his visible reluctance to take forward the legislation, to differentiate himself from his predecessor. Johnson's efforts to cast himself as the Conservative Party's once-and-future King have also shaped this deal. The EU has been eager to avoid any return of his bombast and has thus been willing to shore up Sunak with this extensive package of mitigations in the expectation of a better era of relations.

The degree of the shift from the EU's October 2021 proposals is therefore a marker of how much the Commission is willing to invest in this new relationship, and of its willingness to promote the image that technocratic dealing yields results over table thumping, much as Johnson sought to present the Protocol Bill as having 'brought the EU to negotiate seriously'.⁵² Even though the ERG and Johnson would eventually announce their opposition to the deal, perhaps in the hope of exploiting any resultant turbulence around its implementation, doing so only served to expose their current parliamentary weakness. The Commission can, moreover, be confident that, given the polls ahead of the looming UK general election, this deal could potentially provide a bridge to further strengthening of cooperation under a Keir Starmer-led Labour Government; one which might see more extensive UK-wide alignment with the EU, and thereby prevent and negate some of the most pressing potential and emerging divergences between Great Britain and Northern Ireland.⁵³

Does this mean that the Protocol problem has been solved? When the wheels came off the deal in early 2021, following the eruption over Covid vaccines and the possibility of the EU triggering article 16, it was a scant few days after Boris Johnson had lauded the Joint Committee clarifications on the Protocol's workings. The difference

50 UK Government, 'UK Government legal position: the Windsor Framework' (27 February 2023).

51 See Murray (n 15 above) 28–30.

52 P Walker and L O'Carroll, 'Boris Johnson says he will find it "very difficult" to vote for Northern Ireland deal' *The Guardian* (London 2 March 2023).

53 K Starmer, 'Speech at Queen's University Belfast on the Northern Ireland Protocol' (13 January 2023).

this time round is that the press conference announcing the Windsor Framework was so ebullient; the Sunak Government will struggle to claim that it did not understand the terms it was signing up to, as Boris Johnson attempted to do. This pushes it towards cooperating over the response. Perhaps the most important facet of the Windsor Framework is therefore the accompanying reset in relations. The deal establishes a process for managing the Protocol which will bring the two sides together through extant and new mechanisms which create a dense institutional architecture. Crucially, these structures are inclusive of the Northern Ireland institutions as well as business and civil society.

To the existing institutions, the Joint Committee, Specialised Committee and Joint Consultative Working Group (JCWG), are added a new Special Body on Goods operating as part of the Specialised Committee to provide for exchanges of views on future UK legislation on goods regulation and sub-groups on goods and electricity under the JCWG. Inclusion of both business and civil society responds to requests from those in Northern Ireland and widens the aperture beyond the narrow business-focused structures previously proposed.⁵⁴ Crucially, this would allow stakeholders to speak to both the UK and EU at the same time, hopefully bringing a higher quality of understanding to both sides of the negotiation and ensuring that each side is hearing the same testimony. There also remain some outstanding issues, such as on veterinary medicines and the implementation of the Framework which cooperation should facilitate resolution on, as well as on unknown unknowns which arise.

Improved relations should also facilitate movement on other areas of UK–EU cooperation including under the Trade and Cooperation Agreement (TCA). The Commission has already announced that it will begin work on the UK's re-entry to the Horizon Europe programme, a development welcomed by business, charities and universities across the UK and Ireland. Perhaps seeking to save some good news for a future news cycle, the UK Government has, however, been slow to commit itself to the programme.⁵⁵ Cooperation in other areas under the TCA which have been stalled, such as in electricity trading and energy security, could be unlocked by more cooperative relationships between the UK and the EU. Sunak's aim must be to present these developments as evidence of the success of his Government's reset in relations with the EU ahead of the next general election.

54 See European Economic and Social Committee, 'The implementation of the EU–UK Withdrawal Agreement, including the Protocol on Ireland and Northern Ireland' (25 January 2023) REX/563-EESC-2022.

55 G Parker, B Staton and A Bounds, 'Rishi Sunak holds back on rejoining Horizon after Brexit breakthrough' *Financial Times* (London 3 March 2023).

IMPLEMENTING THE WINDSOR FRAMEWORK

The nature of the Windsor Framework, being built upon the Protocol's terms and requiring the EU to modify the implementation of EU law in Northern Ireland, negated the need for much active parliamentary engagement at Westminster.⁵⁶ The most important implementation activity took place at the EU institutions or in the Joint Committee meeting on 24 March 2023. There have not, after all, been Westminster votes to approve previous Joint Committee decisions, and therefore all that was left for the UK Parliament to vote on was the implementation of the Stormont Brake, which could be achieved using the broad powers to make regulations under the Withdrawal legislation, even where it involves the amendment of primary legislation.⁵⁷ In terms of Parliament's involvement in the process, the Stormont Brake became not so much the rabbit out of the hat within the deal, as the whole performance; 'it is a debate and vote on the statutory instrument, but as No 10 has said, that will be taken as an overall say on the Windsor framework itself'.⁵⁸ The lack of meaningful parliamentary debate around the deal as a whole, and the publication of the specific Stormont Brake regulations only days before the vote on them, compounded the impression that the UK Government was eager to avoid substantive parliamentary scrutiny of the deal.⁵⁹ That the vote on the regulations took place on the same day that Boris Johnson appeared before the Standards Committee with regard to accusations of misleading Parliament over breaches of Covid rules and guidelines, moreover, helped to deflect public attention from the meagre parliamentary opposition the Framework faced. That rebellion, however, when it came, was noteworthy only in how limited it was, serving to underscore this loose coalition's current lack of parliamentary leverage. The Windsor Framework (Democratic Scrutiny) Regulations 2023 passed by 515 votes to 29, with little debate or drama.

These regulations represent an effort to iron out inconsistencies between the UK Government's stated position on the Stormont Brake

56 In addition to the headline-grabbing vote on the Stormont Brake, other regulations have been promulgated which take steps which are now permitted under the deal, including with regard to VAT in Northern Ireland: The Value Added Tax (Installation of Energy-Saving Materials) Order 2023 (SI 2023/376).

57 European Union (Withdrawal) Act 2018, s 8C(1).

58 European Scrutiny Committee (n 27 above) Q116 (Brendan Threlfall, Acting Director General, Cabinet Office).

59 The Lords' Select Committee responsible for reviewing secondary legislation found its scrutiny curtailed by this push to complete the parliamentary process: Secondary Legislation Scrutiny Committee, *34th Report of Session 2022–23* (HL 2023) para 14.

and the legal terms of the Windsor Framework deal, by inserting a new schedule 6B into the Northern Ireland Act 1998.⁶⁰ The new schedule pulls off something of a sleight of hand, merging the Stormont arrangements applicable to the (new) articles 13(3a) and (existing) article 13(4) of the Protocol and introducing into both the cross-community voting requirements which were missing from the UK–EU agreement on the Stormont Brake, but were prominent within the UK Government’s Command Paper on the deal. The addition of this requirement into the article 13(4) process, for the adoption of new EU law which is within the scope of the Protocol, is not particularly controversial. This amounts to the UK Government adding a new trigger for its absolute power under article 13(4) of the original Protocol to object to the application of new EU law to Northern Ireland. The same cannot, however, be said of the extension of this process to article 13(3a), regarding the modification of existing annex 2 measures. These Stormont Brake processes were carefully agreed by the UK and the EU, and the EU might well have objected on good-faith implementation grounds to this belated addition of a process which makes the Brake rather closer to a Unionist veto than the terms of article 13(3a) allow.⁶¹ Nonetheless, the UK Government will have calculated that the EU will not want to rock the boat on a deal which promises to curtail the melodrama surrounding the Protocol. The cross-community vote, moreover, comes late in the Stormont Brake process, and the EU will have some confidence that it can troubleshoot problems in Committee ahead of the Brake being employed, warn UK ministers off its use by publishing potential retaliatory measures or challenge any misuse through arbitration. The domestic functioning of the provisions of the Protocol remains a matter for the UK Government, provided that it continues to meet its treaty obligations, including good-faith implementation.

These arrangements also foresee the possibility of judicial review challenges to the UK Government’s approach to the Brake and are presented as efforts to tie the Government into following up on objections from the Assembly, asserting in particular that ‘the possibility of the European Union taking remedial measures in accordance with Article 13(4) of the Framework is not a relevant consideration’.⁶² This, of course, is easier to assert than to establish, for the potential of a triggering of the Brake to cause difficulties for UK–EU relations will never be fully excluded from ministerial thinking, even if it does not make it into the (required) public reasons for a UK

60 Windsor Framework (Democratic Scrutiny) Regulations 2023 (n 43 above).

61 UK–EU Withdrawal Agreement (n 2 above) art 5.

62 Northern Ireland Act 1998, sch 6B, para 14(2).

Government decision not to employ the Brake.⁶³ It remains open for ministers to say that they do not believe that the broadly framed ‘significant impact’ conditions for using the Brake have been met. The UK Government is seeking to present these arrangements to Unionists as imposing considerable strictures upon ministerial discretion,⁶⁴ thereby making it appear that the Government will be required to follow Stormont’s lead if sufficient MLAs object, but the courts can be expected to accord ministers considerable latitude in such decision-making.

The resultant Stormont Brake arrangements are not, as their critics would portray them, ‘useless in practice’.⁶⁵ It is not designed for general operation, but to respond to particular measures where Northern Ireland’s representatives can demonstrate that significant issues on the ground in Northern Ireland have not been properly taken into account in the development of EU law. Notwithstanding the Brake’s complexity, it operates alongside the existing article 18 Stormont Lock to give the Northern Ireland Assembly a meaningful say over both the overarching nature of the trade arrangements applicable to Northern Ireland under the Withdrawal Agreement and the implementation of specific EU law which adds to or amends those arrangements. It operates in a way which builds upon the Petition of Concern processes instantiated in the 1998 Agreement, and subject to subsequent refinement,⁶⁶ and it is this close attention to this special feature of Northern Ireland’s governance order which generates much of the complexity in its terms.

The expectation is that the Brake becomes a channel for Unionist concerns over the development of EU law, and thereby dissuade the Unionist parties, if power-sharing is functioning, from reaching for other tools like the ‘St Andrews veto’, which involves Northern Ireland Ministers seeking the Executive Committee’s approval for ‘significant or controversial matters’, and could thereby be employed to prevent them from proceeding with aspects of EU law which require transposition.⁶⁷ The Northern Ireland High Court has looked askance at efforts by the DUP’s Agriculture Minister Edwin Poots to use this mechanism to attempt to block the commencement of port infrastructure as required by the Protocol,⁶⁸ but the Windsor Framework offers a preferable

63 Ibid para 16.

64 See European Scrutiny Committee (n 27 above) Q87 (Mark Davies, Director, Windsor Framework Taskforce).

65 M Howe and B Reynolds, ‘The European Research Group’s Legal Advisory Committee Review and Assessment of the “The Windsor Framework”’ (22 March 2023) para 8.

66 Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022, s 6.

67 Northern Ireland Act 1998, s 20(4).

68 *In re Rooney* [2022] NIKB 34, [198] (Colton J).

alternative to such obstructionist tools, which in this instance ultimately saw the UK Parliament legislate in Stormont's stead.⁶⁹ These options nonetheless remain on the table if power-sharing is restored, and with many Unionist representatives unreconciled to Northern Ireland's post-Brexit trade arrangements, they might be employed in concert to stymie those arrangements. Should that occur, much will depend on how indulgent the UK Government is towards such efforts, given that Westminster has overlapping powers to implement the Protocol as amended by the Windsor Framework,⁷⁰ against the risk of appropriate 'remedial action' by the EU.

THE BEST OF BOTH WORLDS: PART II?

The Windsor Framework mitigates some of the most pressing difficulties with the operation of Protocol's trade rules, and the arrangements put in place thus more plausibly support claims that Northern Ireland-based businesses will be able to benefit from the access they will enjoy to the EU Single Market (in terms of goods) and the UK internal market. But it does so in a way which generates a much more complex picture of the applicable legal rules, and one which could be subject to rival interpretations. As the EU's post-Brexit relationship with the UK continues to develop, the arrangements will, moreover, require careful ongoing management against the backdrop of the heightened fragility of Northern Ireland's constitutional politics; there will undoubtedly be other difficulties down the line which will need to be navigated. If the power-sharing institutions are restored, there will come a point when the 'Stormont Brake' will be on the table and, perhaps sooner, when the EU identifies a particular risk to the Single Market and makes efforts to have checks expanded. These looming flashpoints mean that the world's 'most exciting economic zone'⁷¹ remains, in some ways, potentially too exciting.

The deal does not, moreover, mitigate all of the challenges of potential divergence in product standards for manufactured goods between Great Britain and Northern Ireland, particularly if the Retained EU Law (Revocation and Reform) Bill is enacted in its current form. For the UK Government, any post-Brexit divergences in these product standards will generate potential challenges for Northern Ireland, and it might

69 The Official Controls (Northern Ireland) Regulations 2023 (SI 2023/17).

70 The UK Government cannot neglect its duties to implement the Withdrawal Agreement as a result of difficulties securing implementation in the Northern Ireland Assembly: Vienna Convention on the Law of Treaties 1969 (1980) 1155 UNTS 331, art 27.

71 A Forrest, 'Rishi Sunak mocked for calling Northern Ireland "world's most exciting economic zone"' *The Independent* (London 28 February 2023).

become more predictable for law in Great Britain to track many EU developments applicable to Northern Ireland than attempt to cajole Unionist parties in the Assembly into using the Stormont Brake.⁷² In contrast to the scope for post-Brexit divergence from EU law in Great Britain, every time the Stormont Brake is used to prevent developments in EU law relating to goods taking effect in Northern Ireland law, the pre-existing EU law will continue to apply. Goods rules operative in Northern Ireland which look neither like the rules in place in Great Britain nor the EU would likely become very difficult for businesses to manage.⁷³ That practical issue might ultimately constrain the Brake's use, as much as its convoluted procedural requirements.

Notwithstanding those shortcomings, progress under the Windsor Framework comes in the form of process. Many of the changes will be phased in over the next two years, giving businesses an extended period to adapt to the new requirements (in a marked change from the short grace periods provided in early 2021, when businesses were still struggling to unpack the relationship between the Protocol and the TCA). Moreover, the UK Government and EU appear to have jointly accepted the invidious consequences of using Northern Ireland as leverage in redrawing their post-Brexit relationship and to be committed to managing challenges through the Withdrawal Agreement's technocratic committee systems. Northern Ireland's stability rests on these issues being kept out of the headlines.

72 The significance of international standards for exporters (the impact of the 'Brussels effect') and the UK's TCA commitments regarding these standards also impacts upon the potential for divergence with regard to manufactured goods: HM Government (n 21 above) para 58.

73 This is analogous to the application of non-diminution rules under art 2 of the Protocol, which requires Northern Ireland law to continue to apply EU law as it existed at the point in time the UK withdrew from the EU; see C Murray and C Rice, 'Beyond trade: implementing the Ireland/Northern Ireland Protocol's human rights and equalities provisions' (2021) 72 *Northern Ireland Legal Quarterly* 1, 28.