

Research Briefing

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By Library authors

Northern Ireland Protocol: The Windsor Framework



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Summary

Agreement reached

On 27 February 2023 the Prime Minister, Rishi Sunak, and the President of the European Commission, Ursula von der Leyen, [announced that a new agreement had been reached](#) to change the way the Northern Ireland Protocol operates. This agreement is called the Windsor Framework.

It comes after two years of negotiations between the EU and the UK since the Protocol came into force in January 2021.

The proposed changes to the Protocol are laid out in a UK Government Command Paper, [The Windsor Framework: A new way forward](#) (PDF), and [a political declaration](#) (PDF). The Prime Minister also made [a detailed statement to the House of Commons](#). The EU has [published materials explaining the agreement](#) as well.

The Framework will be implemented through a [series of legal instruments](#), some of which involve the EU-UK Joint Committee. The EU-UK Joint Committee is responsible for the implementation and application of the Withdrawal Agreement, of which the Protocol is a part.

These legal instruments include non-legally binding joint and unilateral declarations and Joint Committee recommendations, but also amendments to the Protocol itself made through a binding Joint Committee decision, as well as [proposals to change EU law](#).

Main changes to the Protocol

The most significant changes to the Protocol made by the Windsor Framework are:

- A new system of checks on goods moving from Great Britain to Northern Ireland:
 - Goods destined to stay in Northern Ireland will go through a “green lane” and have far fewer checks and controls.
 - Goods moving on to Ireland and/or the rest of the EU will have to go through a “red lane” and be subject to full controls and checks.
 - Checks and controls on agri-food (food and other agricultural products) have been simplified. UK public health standards will apply to agri-food goods moved to Northern Ireland. Products whose movement to Northern Ireland were technically prohibited by EU law under the Protocol, such as sausages, will now be permitted.

Lorries carrying agri-food products will need only a single certificate (plus a description of goods) in place of the many different certificates previously required for each product.

- Individuals sending parcels to Northern Ireland to other individuals will not require customs paperwork, and online businesses sending parcels to individuals will be subject to minimal customs processes.
- An EU limit on the number of reduced and zero rates of VAT that can be applied to certain goods is dis-applied in Northern Ireland. In addition, an exemption has been agreed so that zero rates of VAT on the installation of energy-saving materials in immovable property, such as heat pumps and solar panels, as implemented in Great Britain can apply there too.
- All medicines placed on the market in Northern Ireland will now be regulated by the UK regulator, the Medicines and Healthcare products Regulatory Agency (MHRA), rather than the EU's regulator, with all UK-approved medicines available for sale there.
- A new “Stormont Brake” mechanism:
 - 30 Members of the Northern Ireland Assembly from at least two political parties will be able to object to the application of some (but not all) updated or amended EU laws – mainly concerning goods – that would have applied automatically in Northern Ireland under the original Protocol. This will be the case where they are “significantly different” from existing rules and have a “significant impact specific to everyday life of communities” in a way that is “liable to persist”. Other conditions also apply.
 - The Stormont Brake mechanism does not apply to changes or amendments to EU laws on State aid, the Single Electricity Market or most of the EU's customs code.
 - This “Petition of Concern” would then give the UK Government the ability to block the adoption of the updated or amended EU laws in the Joint Committee. If the EU disagrees, there is a process of arbitration which could result in the law being applied in Northern Ireland. The UK Government further proposes (via draft Regulations) that this would only be the case if endorsed by a cross-community vote in the Assembly.
 - There is a separate (and existing) process for the introduction of completely new EU laws, which the UK can already block via the Joint Committee, subject to certain conditions and arbitration.
 - The EU will be able to take “appropriate remedial measures” if Northern Ireland begins to diverge from EU goods rules in a way that impacts their Single Market.

- The circumstances under which the EU can bring action against the UK for subsidies in Northern Ireland under the EU's State aid rules have been tightened.
- The UK Government has agreed to drop the Northern Ireland Protocol Bill that would have blocked the application of parts of the Protocol in UK law, and the EU has agreed to drop its legal actions against the UK for not implementing the Protocol in full.

What has the reaction been?

[Labour](#), the Scottish National Party and the [Liberal Democrats](#) have said they will support the Framework.

The pro-Brexit European Research Group (ERG) of Conservative MPs asked a group of lawyers to examine the Framework, and said [that this advice will inform their decision on whether to approve the deal](#). The lawyers' assessment was critical of the Framework, with its findings referring to the continuing supremacy of EU law in Northern Ireland and the Stormont brake as "[likely to be useless in practice](#)".

The Northern Ireland political parties Sinn Féin, Alliance, the Social Democratic and Labour Party, and the Ulster Unionists, have all said they broadly support the Framework, but [have questioned how the Stormont Brake will operate, and its desirability](#).

The Democratic Unionist Party (DUP) have previously said they will only support new arrangements for the Protocol if it [meets seven tests](#), including no border in the Irish Sea between Great Britain and Northern Ireland and no checks on goods going in either direction.

DUP leader Sir Jeffrey Donaldson says his party "[will not be rushed, will not be pushed into a hasty decision](#)" as to whether the Windsor Framework meets these seven tests. To examine the Windsor Framework, the DUP has [established a panel](#) including ex-First Ministers Arlene Foster and Peter Robinson. They are not expected to come to their conclusions until the end of March. In the interim, Sir Jeffrey says DUP MPs [will vote against draft Regulations](#) intended to implement the Stormont Brake in domestic law.

What happens next?

Rishi Sunak said that [there would be a House of Commons vote on the Framework](#) "at the appropriate time and that vote will be respected" but that it's important for everyone, particularly the Unionist community, to be given "the time and space they need to consider the detail of the Framework".

A vote on the Framework as a whole is not required by law but would demonstrate political support for the agreement. New UK legislation will be required to implement some of the Framework, for example amending the Northern Ireland Act 1998 to implement the "Stormont Brake".

The Government has announced that it will introduce [secondary legislation](#) to implement the Stormont Brake in the form of a Statutory Instrument (SI). A motion to approve the SI will be moved in the House of Commons on Wednesday 22 March, with a 90-minute debate beforehand. The Government has [said that this debate and vote on passing the SI will serve as the opportunity for Parliament to show approval for the Framework as a whole.](#)

The EU and UK-EU Joint Committee

The EU will also need to pass into law the proposed regulations in areas like medicines, checks on animals and plants, and medicines, which need to be adopted by the European Parliament and the Council of the EU.¹

The EU Council also [adopted two EU Council Decisions](#) on 21 March 2023:

- To give legal authority to the [position of the EU to be taken in the Joint Committee](#) when adopting the Decision and Recommendations that are necessary to give effect to the Windsor Framework.
- To agree changes to the [Joint Consultative Working Group's rules of procedure.](#)

The [EU-UK Joint Committee will meet on 24 March 2023](#) in order to adopt the recommendations and decision that will implement parts of the Framework.

¹ These include: European Commission, [Proposal for a Regulation of the European Parliament and of the Council – Sanitary and Phytosanitary measures](#), 27 February 2023; European Commission, [Proposal for a Regulation of the European Parliament and of the Council - Medicinal products for human use](#), 27 February 2023; and European Commission, [Proposal for a Regulation of the European Parliament and of the Council – Tariff Rate Quotas](#), 27 February 2023. See also European Commission, [Protocol on Ireland and Northern Ireland](#), Legal and other texts, accessed 13 March 2023.

1 Overview of Framework and negotiations

1.1 What is the Northern Ireland Protocol?

The Protocol sets out Northern Ireland's post-Brexit relationship with both the EU and Great Britain. It came into force on 1 January 2021.

Northern Ireland applies EU rules on the single market for goods

The Protocol ensures that Northern Ireland has free access to the EU's single market for goods,² so there are no checks on goods that move between Northern Ireland and Ireland (and the rest of the EU). The Protocol does this by applying the EU's Single Market rules for goods to Northern Ireland, and the EU's customs rules, as well as relevant EU laws on VAT and excise, wholesale electricity markets and State aid (set out in Articles 5-10 of the Protocol).

Northern Ireland is "dynamically aligned" to these EU laws, meaning if the EU introduces new laws that amend or replace those that already apply there under the Protocol, then Northern Ireland is required to adopt them automatically.

These rules require that goods coming into Northern Ireland from Great Britain must be checked and/or have paperwork to show they comply with the EU regulations.

It is this feature of having trade and regulatory barriers between Northern Ireland and Great Britain that has proven to be the most contentious. The Windsor Framework, a set of agreements made between the EU and UK at the end of February 2023, aims to remove or reduce many of these barriers.

² For goods moving from Northern Ireland to the EU there are no import duties, no customs formalities, no regulatory compliance checks or controls on goods and no Value Added Tax (VAT) is to be paid for movements of goods either. Northern Ireland/the UK does not pay the EU for this access.

How the Protocol is governed, and EU-UK disputes managed

The Protocol is part of the EU-UK Withdrawal Agreement, an international treaty between the UK and EU which sets out how the UK's exit from the EU would work. This is separate to the Trade and Cooperation Agreement (TCA) which is the agreement that governs trade and other cooperation between the UK and the EU.

There is an EU-UK Joint Committee, led by Co-Chairs from each side, which is responsible for the implementation and application of the Agreement, and is designed for the EU and UK to sort out disputes on the Agreement and Protocol through political talks in “good faith”.

Where talks in the Joint Committee fail, there is an independent arbitration system that result in an arbitration panel making binding rulings on disputes between the two sides.

The Court of Justice of the European Union (CJEU) maintains jurisdiction over the parts of the Protocol where Northern Ireland is implementing EU law (mainly Articles 5-10). Where a dispute submitted to arbitration raises a question of interpreting EU law, the arbitration panel must ask the CJEU to provide an interpretation which is binding on the panel.

Under what is known as the “consent mechanism”, Articles 5-10 of the Protocol will cease to operate if the Northern Ireland Assembly does not give its regular consent. Its first opportunity to do so will be in late 2024. If the consent motion is passed by cross-community support, then the next consent decision is not required for eight years. However, if the motion is only passed by a simple majority, then the next consent decision is required within four years.

1.2

Why did the Protocol need changes?

Some Unionists, and in particular the Democratic Unionist Party, were always opposed to any arrangement that meant there would be trade barriers between Northern Ireland and Great Britain. There has also been opposition to any agreement that would mean that Northern Ireland would still follow EU single market laws for goods, while Great Britain would be able to remove or amend these laws, meaning there would be divergence between these different parts of the UK.

Some details of how the Protocol would operate were not decided by the EU-UK Joint Committee until December 2020, a few weeks before the Protocol was due to come into force. The EU and UK recognised that this would give little time for businesses in Northern Ireland and Great Britain to prepare for the new regime.

The EU and UK therefore agreed to simplify some procedures for a short period and temporarily suspend the full application of EU law to Northern Ireland that mandated checks and controls in several parts of the Protocol. These became known as “grace periods”. Some of the most consequential of these were:

- a three-month grace period for supermarkets and their suppliers, for EU agri-food rules;
- a six-month grace period for supermarkets for EU rules on certain types of chilled meats, such as sausages;
- a one-year grace period for implementing in full the EU’s rules on testing and selling human and veterinary medicines.

Despite these grace periods, problems with moving goods between Great Britain and Northern Ireland emerged, and businesses were concerned that these issues would get worse when the grace periods ended, and the Protocol’s full application of EU laws started.³

1.3

What were the negotiating positions of the EU and UK?

Early negotiations and solutions⁴

Early in 2021, the UK started asking the EU for flexibility in several other areas not covered by the grace periods, such as steel quotas, the movement of livestock and the movement of pets. The UK unilaterally extended the three-month agri-food grace period in March 2021. In response the EU began an enforcement mechanism, raising tensions between the two sides. In June 2021, the UK asked the EU to extend the six-month grace period for fresh meats. The EU granted a further three months, while also announcing several proposals for new Protocol flexibilities.

The EU’s proposed solutions included flexibilities for the movement of guide dogs, the movement of livestock from Great Britain to Northern Ireland, and removing a requirement for UK drivers to show motor insurance green cards when driving in the EU, which would have been required for journeys from Northern Ireland across the border to Ireland.

³ See House of Lords, European Affairs Committee, [Report from the Sub-Committee on the Protocol on Ireland/Northern Ireland: Follow-up report](#) (PDF), HL Paper 57, 27 July 2022, see in particular Chapter 2: The economic impact of the Protocol.

⁴ The information in this section is taken from Commons Library briefing [Northern Ireland Protocol: Implementation, grace periods and EU-UK discussions \(2021-22\)](#), 1 June 2022.

The EU also agreed to change the application of EU law on medicines to deal with concerns that the Protocol regime was affecting the supply of medicines in Northern Ireland.

UK Government 2021 Command Paper

On 21 July 2021, the UK Government published a Command Paper [Northern Ireland Protocol: the way forward](#). It asked for a significant set of changes to the Protocol, including in areas it hadn't raised as issues before.

Specifically, it suggested the EU could use the “at risk goods” principle under the Protocol for applying tariffs on Great Britain to Northern Ireland trade to both customs and Sanitary and Phytosanitary (SPS) checks (checks on agri-food, plants and animals). This would differentiate the applicable trade formalities based on its destination.

The paper argued that goods that were destined for Northern Ireland should not require customs processes and most SPS checks (a so called “green lane”) while those moving to Ireland would have full customs and SPS formalities which the UK would enforce (a “red lane”).

It called for a “full dual regulatory regime in Northern Ireland”, whereby “goods, whether manufactured or SPS goods, should be able to circulate within Northern Ireland if they meet either UK or EU rules, as determined by UK or EU regulators, and should be labelled accordingly”.⁵

The Government asked for the grace periods to continue indefinitely and for the EU to halt its legal proceedings while the EU and UK negotiated.

The paper proposed some significant new changes to the Protocol, such as asking for the jurisdiction of the Court of Justice of the EU (CJEU) over the Protocol to be removed, as well as removing EU State aid rules from applying to Northern Ireland.

It also requested new flexibilities in areas such as setting VAT and excise duty rates, and for medicines to be removed from the scope of the Protocol entirely.

EU response to the 2021 Command Paper

On 1 October 2021, the EU [published a detailed response to the UK's Command Paper](#).

The bloc proposed some changes to simplify customs checks by expanding the definition of goods “not at risk” to cover more goods and reducing customs formalities, including declarations for those goods. It also proposed simplified SPS checks for retail goods. The EU said it would agree to chilled

⁵ HMG, [Northern Ireland Protocol: the way forward](#) (PDF), July 2021, Para 59.

meats and sausages from Great Britain being sold in Northern Ireland, but only if they met certification, production and labelling criteria.⁶

The EU also proposed more consultation with businesses and civil society in Northern Ireland in the UK introduces Northern Ireland Protocol Bill.

The EU did not address changes to the CJEU's jurisdiction in its documents, but it had already rejected changing the Court's role in the Protocol.⁷

The EU also did not respond to UK proposals on changing the Protocol's provisions on State aid and VAT.

Negotiations stall and UK introduces Northern Ireland Protocol Bill

Talks between the EU and UK failed to progress between the end of 2021 and the summer of 2022.

In June 2022 the UK introduced [the Northern Ireland Protocol Bill](#), which would have given the Government powers to disapply parts of the Protocol and relevant parts of the Withdrawal Agreement in UK law. It targeted areas of the Protocol the Government had raised in its 2021 Command Paper, such as the parts that governed CJEU jurisdiction, State aid rules, and checks on goods.

The Government said its [preference remained to reach a negotiated outcome with the EU](#), but that the EU's proposals for changing the agreement were not able to address the Government's "fundamental concerns" over the Protocol.⁸

The EU responded by [announcing it was moving forward with the legal action against the UK](#) it first launched in March 2021. The Commission also announced it was launching two new infringement proceedings against the UK for not supplying the EU with trade statistics data for Northern Ireland, as required under the Protocol, and for not applying the EU's SPS rules for goods entering Northern Ireland.⁹

In addition, the Commission published two new position papers on customs and SPS rules, that gave further details of its proposed solutions to

⁶ European Commission, [Protocol on Ireland/Northern Ireland: Commission proposes bespoke arrangements to benefit Northern Ireland](#), 13 October 2021.

⁷ The Newsletter, [Stripping the European Court of Justice of its oversight role in the Northern Ireland Protocol is "out of the question"](#), an EU official has warned, 15 June 2022.

⁸ FCDO, [Northern Ireland Protocol: Foreign Secretary's statement](#), 17 May 2022.

⁹ European Commission, [Commission launches infringement proceedings against the UK for breaking international law and provides further details on possible solutions to facilitate the movement of goods between Great Britain and Northern Ireland](#), 15 June 2022.

ease these checks in addition to the proposed changes to the Protocol that it had published in October 2021.¹⁰

UK and EU reach agreement

After Rishi Sunak became Prime Minister in October 2022, negotiations between the UK and the EU over the Protocol began to intensify, and the two sides started laying the ground for a compromise agreement.

On 27 February 2023, the UK and the EU announced they had reached an agreement in principle to change the way the Protocol works, called the Windsor Framework.

1.4

What was agreed?

In summary, below are some of the most significant new features of the Windsor Framework. Full details of these measures are available in Sections 2 to 8.

Movement of goods

- The Framework introduces ‘red’ and ‘green’ lanes for goods moving from Great Britain to Northern Ireland. Goods which are sold to end-users (and will therefore stay in Northern Ireland and not cross into Ireland) will use the green lane. These goods will face much fewer customs checks, although these will not be entirely eliminated. Businesses will need to be authorised to join an expanded trusted trader scheme to use the green lane. Goods which are destined for the EU single market will use the red lane and be subject to full checks.
- Checks and controls on agri-food going through the ‘green lane’ have been simplified. UK public health standards (eg on food additives) will apply to agri-food goods moved to Northern Ireland. Products, such as sausages, whose movement to Northern Ireland were technically prohibited by EU law under the Protocol (but were covered by a grace period) will be permitted. Lorries carrying agri-food products will need only a single certificate (plus a description of goods) in place of the many different certificates previously required for each product. Checks on agri-food products will be scaled back.
- These measures to make GB-NI trade easier are accompanied by measures to protect the single market:

¹⁰ European Commission, [Protocol on Ireland/Northern Ireland: Commission proposes bespoke arrangements to benefit Northern Ireland](#), 13 October 2021.

- The UK will share customs data with the EU. Unusual trade patterns, such as a large increase in movements of particular goods from Great Britain to Northern Ireland could indicate that the trade easements are being abused;
 - Companies using the trusted trader scheme can have their authorisation revoked or suspended if they are found to be abusing it, and they will be required to have good financial standing and a clear understanding of their obligations under the scheme; and
 - Agri-food products will be labelled “Not for EU” (this requirement will be phased in between 2023 and 2025). There will be enhanced surveillance and enforcement.
- Procedures for sending parcels to Northern Ireland will be simplified. Individuals in Great Britain sending parcels to other individuals in Northern Ireland (for non-commercial purposes), will not be required to fill out any customs paperwork. For online businesses sending parcels to individuals in Northern Ireland, most requirements will be removed including for customs declarations, pre-notification, and presentation of goods to customs authorities. Parcel delivery companies delivering parcels to Northern Ireland will need to be trusted traders under the green lane scheme, to benefit from these freedoms, and provide certain simplified customs data to UK and EU authorities. There is currently a grace period in place, so these changes are dealing with procedures that should have been implemented by the Protocol but weren't.

Movement of pets

- Pets moving from Great Britain to Northern Ireland (and not going onto Ireland/EU), will no longer require an animal health certificate for each trip. A simple pet travel document available online and issued for the lifetime of the pet, and a declaration by the owner that the pet will not go to the EU, is all that will be required.

Medicines

- Medicines moving from Great Britain to Northern Ireland, which are intended to stay within the UK, will benefit from the green lane arrangements outlined for other trade in goods.
- All medicines placed on the Northern Ireland market will now be regulated by the UK regulator, the Medicines and Healthcare products Regulatory Agency (MHRA), rather than the EU's regulator, addressing concerns about Northern Ireland having slower access to novel medicines (medicines authorised by the MHRA will need to bear a label indicating “UK only” to prevent their “leakage” into EU markets).

- Prescription medicines placed on the Northern Ireland market will not now need carry falsification features as required by the EU's Falsified Medicines Directive.
- The grace period for veterinary medicines was extended last year to the end of 2025, the Framework does not provide any permanent solutions for the supply of veterinary medicines to Northern Ireland.

VAT & excise

- An EU limit on the number of reduced and zero rates of VAT that can be applied to certain goods is dis-applied in Northern Ireland. In addition, an exemption has been agreed so that zero rates of VAT on the installation of energy-saving materials in immovable property, such as heat pumps and solar panels, as implemented in Great Britain can apply there too.
- On excise duties, two exemptions from EU excise laws will allow the UK to restructure alcohol duties on the basis of alcoholic strength, and introduce a reduced rate of duty on draught products in Northern Ireland.

Subsidies and State aid

- An [EU-UK Joint Declaration](#) clarifies the Parties' joint interpretation of the application of Article 10(1) of the Protocol on State aid, clarifying the circumstances in which EU State aid rules are likely to apply to subsidies granted in the United Kingdom. These rules do not just apply to subsidies in Northern Ireland, but to UK-wide measures that affect trade between Northern Ireland and the EU.
- For these UK subsidies to be covered by the Protocol's State aid provisions, the measures must have:
 - a genuine and direct link to Northern Ireland, and
 - real foreseeable effects on trade between Northern Ireland and the EU; and
 - these effects on trade should be material, and not merely hypothetical or presumed.

Governance and dispute settlement

- In a joint Political Declaration, the UK Government and European Commission commit "to taking all possible steps to address future disputes over the operation of these arrangements through engagement

in the Withdrawal Agreement Joint Committee before seeking dispute settlement”.¹¹

- Article 12(4) of the Protocol, which states that the CJEU has jurisdiction over the EU law that applies under Protocol (including provisions on customs and movement of goods; technical regulations, VAT and excise law, electricity markets, and State aid), is unchanged by the Framework.
- The UK Government argue that the Framework’s disapplication of EU law in areas such as some SPS regulations for the movement of goods through the green lane, and some VAT and excise duties rules, will reduce the potential for the CJEU to be involved in any legal action relating to EU law that applies under the Protocol.
- The UK Government also states that disputes over the Stormont Brake (see below), would be settled by the independent arbitration process, and that such disputes would not be subject to CJEU oversight, because the Brake is not an issue of EU law.¹² The legal academic, Professor Steve Peers, believes that the “potential role of the CJEU cannot be entirely excluded” if there are disputes over the Brake.¹³

Stormont Brake

- Under the [Windsor Framework](#), 30 Members of the Northern Ireland Assembly (MLAs) from at least two parties can raise a “petition” or “notification” of concern with the UK Government regarding the amendment or replacement of some (but not all) EU laws which apply in Northern Ireland under the original Protocol, mainly regarding goods rules. In order to notify the UK Government of their concerns, MLAs will be required to demonstrate that the amending or replacement act “significantly differs” in its content or scope from the original and would have a “significant impact specific to everyday life” of communities in Northern Ireland which is “liable to persist”. The Brake does not apply to amended or replaced EU laws in relation to State aid, the Single Electricity Market or most of the EU’s customs code.
- The UK Government will assess if these and other relevant conditions have been met,¹⁴ as well as those set out in Regulations and the UK’s Unilateral Declaration on the involvement of the institutions of the 1998 Belfast/Good Friday Agreement annexed to the Joint Committee Decision. If they have, it will be under a legal duty to notify the EU in

¹¹ HM Government, [Political Declaration by the European Commission and the Government of the United Kingdom](#) (PDF), 27 February 2023.

¹² HM Government, [The Windsor Framework: A new way forward](#), CP 806, February 2023, Para 63.

¹³ Steve Peers, [The Windsor Framework: limiting the scope of EU law in Northern Ireland in practice, though not in theory \(part 1\)](#), EU Law Analysis, 4 March 2023.

¹⁴ As set out the UK’s Unilateral Declaration on the involvement of the institutions of the 1998 Belfast/Good Friday Agreement, See Annex 1 of HMG, [Draft Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework](#) (PDF), 27 February 2023.

writing via the Joint Committee that the “Stormont Brake” has been pulled. At that point the relevant change will not apply in Northern Ireland. Subsequent application of the EU law could only happen with mutual UK and EU consent in the Joint Committee and would be applied via an existing process that can be used to add new EU laws to the Protocol.

- The UK Government also proposes (via draft Regulations) that the application of any amending or replacement EU law via the process discussed above, once the Stormont Brake has been triggered should be subject to approval via a cross-community vote in the Northern Ireland Assembly. Unless, that is, the UK Government determines the circumstances to be “exceptional” and agrees to apply the change via the Joint Committee regardless.
- As is already the case if the UK fails to implement new EU rules to Northern Ireland as required by the Protocol, the EU will be able to take “remedial measures” if the Stormont Brake means EU laws amending or replacing those in the Protocol are not applied to Northern Ireland, and this affects the functioning of its single market.

Protocol Bill to be scrapped

- The Government have stated in [a legal position paper](#) that the Northern Ireland Protocol Bill will no longer be needed. The EU has also confirmed that it will no longer pursue its [legal actions against the UK](#) for not implementing the Protocol.

1.5

What is the legal status of the Framework?

The Windsor Framework consists of different types of documents, each having different legal standing, and which serve a different purpose.

Overview of legal changes

The package includes draft proposals for **legal change** which include:

- textual treaty change (to be made by a decision of the Joint Committee); and
- related changes to EU law (to be made by the relevant EU institutions).

Supporting documents

The explicit legal changes mentioned above are reinforced by thirteen other documents of interpretive, political, or operational significance to the legally binding parts of the Windsor Framework:

- one **joint political declaration** (itself legally non-binding, but providing political context to undertakings made by the parties);
- five **joint declarations** (that shape the political and legal interpretation of the revised Agreement);
- two **Joint Committee recommendations** (forms of soft law that shape the application of the revised Agreement);
- four **unilateral declarations** (political undertakings by the UK Government about the operation of the revised agreement); and
- one **Joint Consultative Working Group decision** (amending procedural rules for that body).

Proposals for changes to EU law

The EU has proposed several texts either setting out decisions that need to be taken by the EU Council, or position papers of the Commission on implementing the substantive changes made under the Windsor Framework.

The European Commission has proposed two Decisions setting out the position to be taken by the EU in the EU/UK Joint Committee to implement parts of the Windsor Framework and in the official-level Joint Consultative Working Group. Both Decisions must be approved by Ministers from the 27 EU Member States. In its accompanying explanatory memorandum on the proposals, the Commission explains the reasons for the changes set out in the proposed Council Decisions, including why it believes these proposals to be compatible with the Withdrawal Agreement as it stands, and why it believes the changes are necessary.¹⁵

The EU's position papers are more technical in nature, outlining the possible methods of implementing the proposed customs, SPS, and other changes to the Northern Ireland Protocol.¹⁶ These are not legally binding, and the EU's position may change on how best to implement these.

Textual treaty change

A fundamental part of the Windsor Framework is that it makes textual amendments (ie legal changes) to the Withdrawal Agreement treaty. Textual

¹⁵ See, for example, European Commission, [Proposal for a Council Decision on the position to be taken on behalf of the European Union in 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 as regards a decision to be adopted, and recommendations and joint and unilateral declarations to be made](#), 27 February 2022.

¹⁶ See, for example, European Commission, [Protocol on Ireland/Northern Ireland: Position Paper on Simplifications in the Area Of Customs](#), 27 February 2023; European Commission, [Enhanced engagement with Northern Ireland stakeholders](#), 27 February 2023; European Commission, [Protocol on Ireland/Northern Ireland: Position paper on agri-food, plants and pet animals](#), 27 February 2023.

amendments to treaties can be achieved in several different ways (the most conventional being a further treaty).

However, the Windsor Framework changes are given effect by a different route. Treaty change is to be delivered by exercising powers under the Withdrawal Agreement itself, in Article 164.

Textual treaty changes and Article 164

[Article 164 of the Withdrawal Agreement](#) establishes the EU-UK Joint Committee. This body is responsible for the “implementation and application” of the Withdrawal Agreement. Article 164 paragraphs (4) and (5) respectively set out the functions and powers of the Joint Committee.

Article 164(5)(d) of the Withdrawal Agreement provides that:

The Joint Committee may except in relation to Parts One, Four and Six,¹⁷ until the end of the fourth year following the end of the transition period, adopt decisions amending this Agreement, provided that such amendments are necessary to correct errors, to address omissions or other deficiencies, or to address situations unforeseen when this Agreement was signed, and provided that such decisions may not amend the essential elements of this Agreement.¹⁸

Amendments to address ‘omissions or other deficiencies or unforeseen situations

Article 164(5)(d) of the Withdrawal Agreement makes clear that one of the reasons for amendments being made may be ‘to address omissions or other deficiencies’, or to address unforeseen situations when the Agreement was signed.

In the [Joint UK-EU Declaration](#) alongside the proposals for the Windsor Framework, the UK and EU have agreed that the changes the Framework implements are “necessary to address, in a definitive way, unforeseen circumstances or deficiencies that have emerged since the start of the Protocol”.¹⁹

This joint declaration is not legally binding, but its use of the same phrases from Article 164(5)(d) could be a significant example of subsequent practice between the parties, interpreting the content of the Withdrawal Agreement, and the scope of the powers of the Joint Committee to amend the Agreement (subsequent practice is how a treaty is applied after its conclusion, which

¹⁷ Part 1 of the Withdrawal Agreement concerns the “Common Provisions”, whereas Part 4 is concerned with the (now expired) post-Brexit transition period, and Part 6 is concerned with institutional arrangements and dispute resolution.

¹⁸ HMG, [Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community](#) (PDF), 19 October 2019.

¹⁹ [Windsor Political Declaration by the European Commission and the Government of the United Kingdom](#), 27 February 2023.

establishes the agreement of the parties regarding the interpretation of a treaty).²⁰

Previous amendments to the Withdrawal Agreement

There have been three decisions made by the Joint Committee, before now, to amend the text of the Withdrawal Agreement (one in June 2020, one in December 2020, and one in February 2022).

In none of these cases were the provisions of the Constitutional Reform and Governance Act 2010, which sets out how Parliament ratifies treaties, deemed to be engaged. There was no requirement for the UK Parliament to have the opportunity to scrutinise, and if relevant, object to, the treaty changes.

Parliament was informed by Ministerial statement that the changes had been agreed by the Joint Committee, but was given no opportunity to endorse these changes,²¹ (the Commons European Scrutiny Committee and the House of Lords European Affairs Committee did scrutinise these decisions, but in some cases after the event).

Decision No 1/2020 – 12 June 2020

In June 2020, the Joint Committee made its first set of changes to the Withdrawal Agreement text.²²

These changes partly reflected the fact that the Withdrawal Agreement entered into force at the end of January 2020. It had originally been intended that the Agreement would come into force at the end of October 2019 (shortly after its text was finalised).

Specific dates in the treaty were either changed or omitted, to reflect the fact that the transition period started three months later than its original text had anticipated.

There were also two notable omissions from the original Withdrawal Agreement text:

- Article 145 of the Withdrawal Agreement neglected to refer to the Research Fund for Coal and Steel, and the intended arrangements that would apply during the Brexit transition period in respect of it. This was corrected by adding in a paragraph about continuity of those arrangements.
- Two recent decisions of the Administrative Commission for the Coordination of Social Security Systems had been omitted from Part 1 of

²⁰ See International Law Commission, [Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties](#) (PDF), 2018.

²¹ [HCWS291 15 June 2020](#), [HCWS683 17 December 2020](#), and [HCWS620 22 February 2022](#).

²² [Decision No 1/2020 of the Joint Committee](#), 12 June 2020.

Annex 1 of the Withdrawal Agreement. The Joint Committee’s decision corrected these omissions by adding the decisions to the relevant list.

Decision No 3/2020 – 17 December 2020

In December 2020, the Joint Committee again used Article 164(5)(d) to make changes to the text of the Withdrawal Agreement. This time, it involved changes to the text of Annex 2 of the Protocol.²³

The changes to the text sought:

- to remove erroneous references to two EU regulations
- to add omitted references to three EU regulations and five EU directives
- to add three notes clarifying the application of acts to the Protocol

In all cases, the justification offered was to deal with “errors” or “omissions” or to “clarify” the operation of the Protocol, prior to its entry into force at the end of the Brexit transition period.²⁴

Decision No 1/2022 – 21 February 2022

Along similar lines to the decision of June 2020, further changes were made under the Article 164(5)(d) process in early 2022.²⁵

In the interests of “legal certainty” the list of decisions and recommendations, in Part 1 of Annex 1 of the Withdrawal Agreement, was further amended to add five decisions and two recommendations to the list, and to remove two other decisions. As with the changes in June 2020, this related to the Administrative Commission for the Coordination of Social Security Systems.

The Windsor Agreement’s proposed treaty changes

A draft decision of the Joint Committee has been published, with a view to it being agreed at a subsequent meeting. It would amend the text of:

- Article 6(2) of the Protocol (adding a further sentence)
- Article 13 of the Protocol (adding a new paragraph 3a)
- Adding new text to Annex 3 of the Protocol.

These changes are notably different from the previous ones made by the Joint Committee. They:

- substantively amend the Protocol (rather than simply add or remove items from its Annexes)

²³ [Decision No 3/2020 of the Joint Committee](#), 17 December 2020.

²⁴ See also Commons Library, [Joint Committee Decisions on the Northern Ireland Protocol](#)

²⁵ [Decision No 1/2022 of the Joint Committee](#), 21 February 2022.

- are not purely consequential on matters of timing or inadvertent omissions

The draft decision, unlike the previous decisions, proposes to make substantive and politically significant changes to the treaty text, in light of the experience of both parties of the Protocol's practical operation.

The “essential elements” of the Withdrawal Agreement

The Article 164(5)(d) power cannot be used to amend “the essential elements” of the Withdrawal Agreement. The term “essential elements” is not defined anywhere in the Withdrawal Agreement.

However, the international legal principles on the interpretation of a treaty, codified in the Vienna Convention, provide that a treaty must be interpreted in good faith, with the ordinary meaning given to the terms of the treaty in their context.²⁶ The context, according to [Article 31\(2\) VCLT](#), includes the treaty's preamble.

The preamble of the Withdrawal Agreement sheds some light on the “essential elements” of the treaty, when it says that, in order to guarantee the correct interpretation of the Agreement and compliance:

it is essential to establish provisions ensuring overall governance, in particular binding dispute-settlement and enforcement rules that fully respect the autonomy of the respective legal orders of the Union and of the United Kingdom as well as the United Kingdom's status as a third country²⁷

This may suggest that the governance, binding dispute settlement, and enforcement provisions of the Withdrawal Agreement are ‘essential elements’ that the Joint Commission cannot amend.

Further, the subsequent agreement and practice of states can be taken into account when interpreting a treaty, according to [Article 31\(3\)\(a-b\) VCLT](#).

Therefore, the very fact that the UK and EU have agreed to the Windsor Framework could be taken into account should any dispute arise over whether these amendments affect the “essential elements” of the Withdrawal Agreement.

The European Commission's proposal for a Council Decision authorising it to agree to the adoption of the Windsor Framework changes in the Joint Committee also sets out the reasons why the EU considers these amendments do **not** interfere with the “essential elements” of the Withdrawal Agreement.²⁸

²⁶ UN, [Vienna Convention on the Law of Treaties 1969](#) (PDF), accessed 17 March 2023.

²⁷ [Withdrawal Agreement](#), preambular paragraph 11.

²⁸ European Commission, [Proposal for a Council Decision on the position to be taken on behalf of the European Union in 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 as regards a decision to be adopted, and recommendations and joint and unilateral declarations to be made](#), 27 February 2022, sections 3.2.1, 3.5.1 and 3.8.1.

Future changes to the Protocol

It should be noted that the Withdrawal Agreement Article 164(5)(d) power to amend the treaty through Joint Committee decisions, can only be used until the “end of the fourth year following the end of the transition period”, this period would end on 31 December 2024.

After this time should the Protocol require further significant changes, the EU and UK would have to find a new way to amend the treaty, most likely by agreeing a new treaty to supplement or amend existing Protocol provisions. Article 13(8) of the Protocol states that any subsequent agreement between the EU and the UK “shall indicate the parts of this Protocol which it supersedes”, but does not include any provisions regulating how a new treaty should be made.

Relevance of the Vienna Convention on the Law of Treaties

When announcing the proposed Windsor Framework in Parliament, the Prime Minister emphasised that the EU had accepted an “important principle” in the political declaration that “the treaty [the Withdrawal Agreement] is subject to the Vienna convention”.²⁹ The Prime Minister also said this is a “significant development” that “reaffirms the international basis for the treaty”.³⁰

Specifically, the UK-EU joint political declaration said:

Both sides recall the importance they attach to the respect of international obligations (*pacta sunt servanda*), including those arising from the Vienna Convention on the Law of Treaties, done on 23 May 1969, which applies to all international agreements including the Withdrawal Agreement and its Protocol on Ireland / Northern Ireland.³¹

The Withdrawal Agreement is a treaty between the UK (a state) and the EU (an international organisation), whereas ‘treaty’ is defined in the VCLT as an agreement between states. While the Vienna Convention on treaties involving international organisations is not yet in force,³² many of its provisions are similar to the Vienna Convention on treaties between states, and are widely seen as reflecting customary international law.³³

The Government has not expanded on what principles from the Vienna Convention it believes to be significant. But the confirmation in the UK-EU Joint Declaration confirms the position view held by legal experts that the

²⁹ [HC Deb 27 February 2023 c574](#).

³⁰ [HC Deb 27 February 2023 c597](#).

³¹ [Windsor Political Declaration by the European Commission and the Government of the United Kingdom](#), 27 February 2023.

³² [Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986](#), not yet in force.

³³ Commons Library, [Could the Withdrawal Agreement be terminated under international law?](#), section 5.1.

rules and principles found in the Convention would apply to the Withdrawal Agreement.³⁴

In particular, this confirms that international law on the interpretation and termination of treaties, for example, applies to the Withdrawal Agreement. This is important when considering the legal implications of some political declarations that accompany the Windsor Framework, as discussed below.

1.6 What is Parliament's role in approving and implementing the Framework?

The treaty change proposed under the Windsor Framework is unlikely, as a matter of law, to require prior Parliamentary approval. Nor is it expected to engage the [treaty scrutiny provisions of the Constitutional Reform and Governance Act 2010 \(CRA\)](#) (CRA).

When the Prime Minister made his statement to the House of Commons on the Framework on 27 February, he indicated that there would be a debate and vote on the Windsor Framework proposals, but that “we need to do that at the appropriate time in order to give people the time and space to consider the detail”.³⁵

On 16 March in [the Business Statement](#), the Leader of the House of Commons announced that on Wednesday 22 March there would be 90-minute debate on a motion to approve a Statutory Instrument that will implement the “Stormont Brake” in UK law. The draft Statutory Instrument was laid on Monday 20 March and was expected to be debated on Wednesday 22 March. This is discussed in Section 8.6 below.

A spokesperson for the Prime Minister said that there would be no overall vote on the Framework, and the vote on the SI will be Parliament's opportunity to give its approval: “We said parliament would have its say on the framework”, and “This vote honours the prime minister's commitment to provide MPs with the opportunity to vote on the new arrangements”.³⁶

The spokesperson added that there could be other votes on parts of the framework, but the 22 March debate would be the main one because the government considered it to be the “most significant” part of the agreement.³⁷

³⁴ As above and Commons Library, [The United Kingdom Internal Market Bill 2019-21](#), p16; [Northern Ireland Protocol Bill 2022-23](#), p25;

³⁵ [HC Deb 27 February 2023 c583](#).

³⁶ Reuters, [UK PM Sunak's new Brexit deal faces parliamentary test next week](#), 16 March 2023.

³⁷ As above.

What does UK domestic law say about ratification?

Often, when the UK and another sovereign state (or international organisation) agree to the amendment of a treaty, this takes effect under an instrument that is itself a treaty.

Such a treaty may need to be **ratified** before it could bind the United Kingdom and its other signatories.

[Crag](#) provides a statutory opportunity for pre-ratification treaty scrutiny. If a treaty needs to be ratified:

- a copy of it must first be laid before Parliament;
- it must be published in a manner a Minister considers appropriate; and
- a statutory period (21 joint sitting days) must have elapsed without the House of Commons resolving against the treaty's ratification.

Under section 25 of Crag, a “treaty” is defined as:

- a written agreement between States or between States and international organisations; and
- binding under international law

Section 25(2) clarifies that a “treaty”:

does not include a regulation, rule, measure, decision or similar instrument made under a treaty (other than one that amends or replaces the treaty (in whole or in part)).³⁸

Superficially, this appears to suggest that a “decision” of the Joint Committee to amend the Withdrawal Agreement constitutes “a treaty” for the purposes of that Act, and that Crag’s scrutiny opportunities would be engaged. However, for reasons explained below, this is unlikely to be the case. What does international law say about ratification?

The law on ratification of treaties is not governed exclusively by domestic law, but also by the context and principles of international law. Ratification is a method of expressing an intention to be bound by a treaty, done either through depositing specific instruments or following the completion of domestic procedures, depending on the state concerned.

Ratifications of treaties are only required where the treaty itself explicitly provides for it, or where it is clear from agreements or negotiations between the parties that the need for ratification is intended by the parties.³⁹

³⁸ Constitutional Reform and Governance Act 2010, [Section 25\(2\)](#), accessed 17 March 2023.

³⁹ [Vienna Convention on the Law of Treaties \(VCLT\), Article 14](#)

Amendments to treaties work in the same way, and the need for ratification depends on the amendments or the treaties themselves.⁴⁰ While some treaties provide for specific procedures for amendments to be ratified before amendments come into force,⁴¹ the Withdrawal Agreement only required ratification for the UK and EU's original consent to the treaty – and does not explicitly require ratification for amendments made by the Joint Committee.

Will the Constitutional Reform and Governance Act's treaty scrutiny provisions apply?

Given the foregoing, it is unlikely that a decision of the Joint Committee, in exercise of Article 164(5)(d), requires “ratification”.

This means that the CRAG scrutiny period is unlikely to apply. **The CRAG treaty provisions also did not apply to the previous decisions of the Joint Committee to amend the Withdrawal Agreement.**

Even if CRAG did apply, section 22 of CRAG allows a Minister to dispense with the 21 joint sitting day scrutiny period in “exceptional” cases.

Therefore, Parliament has no direct mechanism by which it can prevent the Windsor Framework's treaty changes from coming into force.

Previous commitments on major treaty amendments

Previously, the UK Government has expressed its intention that “the majority of important treaty amendments will be subject to ratification and therefore will be submitted to Parliament for scrutiny”.⁴² But, where amendments do not require ratification, and do not trigger the CRAG process, the Government said it was working to ensure that “all amendments to treaties are published in the UK's Treaty Series, including those that are not subject to CRAG”.⁴³

The Government also indicated that this was done for previous technical amendments made by the Withdrawal Agreement Joint Committee in Decision 1/2020, and confirmed that these did not require ratification.⁴⁴

⁴⁰ [Vienna Convention on the Law of Treaties \(VCLT\), Article 39](#)

⁴¹ See, for example, the [Rome Statute of the International Criminal Court](#) (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, since amended, [Article 121](#).

⁴² International Agreements Sub-Committee, [Treaty Scrutiny, Working Practices – Government Response](#), HL 97 2019-21, 25 September 2020, p8

⁴³ International Agreements Sub-Committee, [Treaty Scrutiny, Working Practices – Government Response](#), HL 97 2019-21, 25 September 2020, p8; see also the Government's commitment in: Public Administration and Constitutional Affairs Committee, HC 214 2021-22, 26 October 2021, [SIT0010](#), para 17

⁴⁴ International Agreements Sub-Committee, [Treaty Scrutiny, Working Practices – Government Response](#), HL 97 2019-21, 25 September 2020, p8.

Implementation of treaty change

Whether or not changes to the Withdrawal Agreement’s text require **ratification** is principally a matter of international law obligations. Separate to that, however, is the domestic position: the UK’s **implementation** of treaty obligations in domestic (UK) law, including those arising under the Windsor Framework.

The two main statutes implementing the Withdrawal Agreement, the EU (Withdrawal) Act 2018 and the EU (Withdrawal Agreement) Act 2020, refer to “the withdrawal agreement” in a dynamic way. This means that domestic law, for most purposes, will automatically update to reflect textual changes to the Withdrawal Agreement treaty. It is therefore unlikely that primary legislation will be needed, at least so far as the treaty change component of the Windsor Agreement is concerned.

Ambulatory references to “the withdrawal agreement”

Section 36 of the EU (Withdrawal Agreement) Act 2020 defines (for domestic statutory purposes) “the withdrawal agreement” as (emphasis added):

the agreement between the United Kingdom and the EU under Article 50(2) of the Treaty on European Union which sets out the arrangements for the United Kingdom’s withdrawal from the EU (**as that agreement is modified from time to time in accordance with any provision of it**).

This is known as an **ambulatory reference**. Wherever UK statute refers to “the withdrawal agreement” it is taken to mean the **agreement in its current form** whatever that is. Section 36’s drafting appears to have anticipated that the Article 164(5)(d) power could be used to change the text of the treaty, and that the UK would need an effective domestic mechanism to keep pace with those developments.

Dynamic implementation of treaty obligations

In a similar vein, section 7A of the EU (Withdrawal) Act 2018 is drafted so as to give **dynamic** effect to Withdrawal Agreement obligations. It instructs domestic courts to give effect to “rights, powers, liabilities, obligations and restrictions” and “remedies and procedures” that are (emphasis added) “**from time to time created or arising under the withdrawal agreement**”.⁴⁵

Delegated powers beyond mere implementation for the Protocol

Further to section 7A, there are specific delegated powers related to Protocol implementation, contained in section 8C of the EU (Withdrawal) Act 2018.

The delegated powers allow Ministers to make “appropriate” provision to:

- **implement** the Protocol

⁴⁵ [European Union \(Withdrawal\) Act 2018, Section 7A](#).

- **supplement** section 7A of EUWA in relation to the Protocol
- **deal with matters arising out of, or related to** the Protocol

The powers in section 8C are also Henry VIII powers, meaning that they can amend UK primary legislation, including Acts of Parliament. Combined, these powers are very broad, and ought to be able to deal with matters arising out of textual amendment of the Protocol, which is part of the Withdrawal Agreement treaty.

UK implementation of other commitments in the Windsor Framework

There are commitments in the Windsor Framework that do not themselves involve treaty change, but which will require changes to the UK's domestic law. This includes changes to primary legislation. One such example is the "Stormont Brake", which the UK Government has indicated will require amendments to be made to the Northern Ireland Act 1998.⁴⁶

The Command Paper published by the Government did not specify whether the Stormont Brake would be delivered through a new Act of Parliament, or through delegated legislation to an existing Act of Parliament. The Government has now confirmed it will use delegated legislation.⁴⁷ For more on this, see Section 8.6 below.

The Protocol's original democratic consent mechanism, which remains in place under the Windsor Framework, similarly required changes to the Northern Ireland Act 1998. That mechanism is now contained in Schedule 6A of the 1998 Act.

However, primary legislation was not used to make those changes. The UK Government, in December 2020, relied on regulations made under section 8C of EUWA, and subject to the affirmative resolution procedure in Parliament.⁴⁸ While this gave both Houses the opportunity to veto the changes to the Northern Ireland Act, there was no opportunity to amend the text of the proposed changes.

In January 2023 the UK Government also [used regulations made under section 8C](#) to grant the Secretary of State at DEFRA powers to expand and enhance existing port facilities in Northern Ireland to conduct checks on goods entering from Great Britain.⁴⁹

In the Framework Command Paper, the Government said it would also amend the Internal Market Act to legislate to prevent export procedures being applied to goods moving from Northern Ireland to Great Britain. In September 2020 Boris Johnson's Government had [added similar provisions during the](#)

⁴⁶ HM Government, [The Windsor Framework: A new way forward](#), CP 806, February 2023, para 65.

⁴⁷ UK Parliament, [What's On, Debate 22 March 2023](#), accessed 17 March 2023.

⁴⁸ [The Protocol on Ireland/Northern Ireland \(Democratic Consent Process\) \(EU Exit\) Regulations 2020](#), SI 2020/1500.

⁴⁹ See House of Lords Secondary Legislation Scrutiny Committee, [26th Report of Session 2022-23](#), 26 January 2023, HL Paper 139, page 1, for more.

[Bill's original passage](#), though at that time they were incompatible with the UK's international legal obligations under the Protocol.⁵⁰

The UK Government in a [unilateral declaration on export procedures for goods moving from Northern Ireland to other parts of the United Kingdom](#) (PDF), states that in all but a few categories of goods, export declarations for goods moving from Northern Ireland to Great Britain will not be required.

This briefing paper will now consider aspects of the Windsor Framework in detail.

⁵⁰ See Commons Library briefing: [United Kingdom Internal Market Bill 2019-21](#), 14 September 2020, for more details.

2 Trade in goods

2.1 Summary

The Windsor Framework makes it easier to move goods from Great Britain to Northern Ireland while building in protections for the EU single market.

The UK wanted to renegotiate the Protocol to deal with problems moving goods, especially agri-foods, from Great Britain to Northern Ireland. These trade frictions had occurred despite grace periods which meant that the original Protocol had not been fully implemented. At the same time, the EU wished to protect its single market by ensuring that the relaxation of trading rules would not be abused.

A key part of the Windsor Framework is the introduction of red and green lanes for goods moving from Great Britain to Northern Ireland. Goods which are sold to end-users (and will therefore stay in Northern Ireland and not cross into Ireland) will use the green lane. These goods will face much fewer customs checks, although these will not be entirely eliminated. Businesses will need to be authorised to join an expanded trusted trader scheme to use the green lane. Goods which are destined for the EU single market will use the red lane and be subject to full checks.

Additional measures have been introduced for agri-food. UK public health standards (eg on food additives) will apply to agri-food goods moved to Northern Ireland. Products, such as sausages, whose movement to Northern Ireland were technically prohibited by EU law under the Protocol (albeit allowed under derogations) will be permitted. Lorries carrying agri-food products will need only a single certificate (plus a description of goods) in place of the many different certificates previously required for each product. Checks on agri-food products will be scaled back. It will now be possible to move seed potatoes to Northern Ireland subject to certain conditions.

These measures to make GB-NI trade easier are accompanied by measures to protect the single market. Fewer checks on GB-NI trade increase the risk to the EU single market, given the open Irish border. The Windsor Framework therefore contains measures to mitigate these risks.

The UK will share customs data with the EU. Unusual trade patterns, such as a large increase in movements of particular goods from Great Britain to Northern Ireland could indicate that the trade easements are being abused. The trusted trader scheme means that only authorised traders will be able to use the green lane. Agri-food products will be labelled “Not for EU” (this

requirement will be phased in between 2023 and 2025). There will be enhanced surveillance and enforcement.

2.2 Background: Problems with the original Protocol

The Government's view is that the original Protocol led to unacceptable trade frictions between Great Britain and Northern Ireland. Burdensome customs processes on goods moving from Great Britain to Northern Ireland are required. There are extensive customs processes and SPS checks⁵¹ on agri-food products entering Northern Ireland even if they will remain there and not move into the EU single market. There are outright bans on the movement of some products, such as seed potatoes.

These issues have emerged despite the original Protocol not being fully enforced due to [grace periods and other derogations](#).

The UK Government therefore sought to renegotiate the Protocol to address these trade frictions. The EU's objective was to ensure its single market is protected, given both the UK and EU agree that checks cannot take place at the Irish border.⁵²

2.3 Customs: Red and green lanes

Introduction

The original Protocol arrangements will be replaced by a system of red and green lanes. Goods moving from Great Britain to Northern Ireland, and which will remain in Northern Ireland, will pass through the green lane. Businesses will need to be authorised under an expanded trusted trader scheme to benefit from the green lane. Goods which are destined for the EU will use the red lane.

The Government claims that these arrangements mean:

we have removed the border in the Irish Sea for internal UK trade, protecting Northern Ireland's integral place in the UK internal market.⁵³

Customs formalities will be significantly reduced but not entirely eliminated.

⁵¹ Sanitary and Phytosanitary checks relating to food safety and animal and plant health

⁵² Such checks at the border also prohibited in UK law by Section 10 of the European Union (Withdrawal) Act 2018.

⁵³ HM Government, [The Windsor Framework: A new way forward](#), CP 806, 27 February 2023, para 10

Green lane

Goods moving through the green lane will be subject to “dramatically simplified procedures and drastically simplified declarations”.⁵⁴ According to the Government, this will use “only ordinary commercial information rather than customs processes or complex certification requirements for agrifood”.⁵⁵ The European Commission says these movements of goods “will benefit from an unprecedented reduction, although not a full eradication, of customs requirements”.⁵⁶ The Political Declaration agreed by the UK and EU states that “in most instances, controls would only be performed if a risk is assessed or abuse detected”.⁵⁷

Simplified procedures

To qualify for the green lane, businesses must be in the trusted trader scheme (the UK Trader Scheme) and the goods moved must stay in Northern Ireland. There will be a “radically simplified” customs procedure for these goods. These will be set out in EU law by means of a “Delegated Act” containing derogations for Northern Ireland under the EU Customs Code. The Command Paper sets out these simplified procedures:

- The movements will use ordinary commercial data, with information provided to TSS [the Trader Support Service] based on data from sales invoices and transport contracts;⁵⁸
- ... no requirement to provide the burdensome customs commodity code for every movement;
- Goods will automatically be treated as internal UK movements for tariff purposes, with no rules of origin requirements;
- There will be no customs checks, except for risk-based and intelligence-led operations targeting criminality and smuggling; and
- Once a good has moved, there is no further process involved - scrapping the requirement for businesses to provide the hugely burdensome, 80-field supplementary declaration, for every single goods movement, after goods had arrived in Northern Ireland.⁵⁹

Traders will be required to provide 21 data elements instead of more than 80 normally required for a standard customs declaration. These “are mostly

⁵⁴ European Commission Press Release, [A new way forward on the Protocol on Ireland/Northern Ireland: political agreement in principle on the Windsor Framework](#), 27 February 2023.

⁵⁵ HM Government, [The Windsor Framework: A new way forward](#), CP 806, 27 February 2023, para 10.

⁵⁶ European Commission, [Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland / Northern Ireland](#), 27 February 2023.

⁵⁷ HM Government, [Political Declaration by the European Commission and the Government of the United Kingdom](#), 27 February 2023.

⁵⁸ The [Trader Support Service](#) help businesses with customs declarations on goods moving between Great Britain and Northern Ireland.

⁵⁹ HM Government, [The Windsor Framework: A new way forward](#), CP 806, 27 February 2023, para 13.

based on commercial and transport data such as exporter, importer, means of transport, weight, goods description, item value”.⁶⁰

The EU customs code uses the [Combined Nomenclature](#) (CN) to classify goods. Traders using the green lane will be able to provide a list of goods they normally move to Northern Ireland when applying for the trusted trader scheme. UK authorities will assist in providing the CN code for each of these goods. When the trader moves the goods, they will be able to provide a description of the goods on the declaration rather than the CN code. UK authorities will then determine the relevant CN code and transmit this information to the EU.⁶¹ According to the Command Paper, this means businesses will face “no requirement to provide the burdensome customs commodity code for every movement”.⁶² It is not clear at this time the resources that will be required by the UK Government to provide this assistance to traders.

Trusted Trader Scheme

Firms authorised under an expanded UK Trader Scheme will be able to benefit from the green lane customs simplifications. The [original UK Trader Scheme](#) was established following the Joint Committee’s December 2020 agreement on “at risk” goods, to enable businesses to be exempt from any requirement to pay customs duties that would otherwise be applicable on goods moved from Great Britain to Northern Ireland under the terms of the Protocol⁶³

The UK Trader Scheme is a “trusted trader” arrangement. Firms must be authorised by the UK Government in line with certain criteria. These criteria cover a range of issues including mechanisms for monitoring and controlling movement of goods, record-keeping and that the applicant has not committed serious or repeated breaches of customs rules.⁶⁴

Authorised firms must commit to bring goods into Northern Ireland only for sale to end consumers in the UK (including where those goods have been subject to non-commercial processing before their sale to end consumers).⁶⁵

⁶⁰ European Commission, [Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland / Northern Ireland](#), 27 February 2023.

⁶¹ European Commission, [Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland / Northern Ireland](#), 27 February 2023.

⁶² HM Government, [The Windsor Framework: A new way forward](#), CP 806, 27 February 2023, para 13.

⁶³ See Commons Library briefing CBP-9102, [Joint Committee decisions on the Northern Ireland Protocol](#) and HM Government, [Decision of the Withdrawal Agreement Joint Committee on the determination of goods not at risk](#) [PDF], 17 December 2020.

⁶⁴ Authorisation requirements are set out in Articles 9-11 of HM Government, [Draft Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework](#) [PDF], 27 February 2023.

⁶⁵ Article 10(b) of HM Government, [Draft Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework](#) [PDF], 27 February 2023.

The European Commission said that the scheme would need to be made more “robust” than the original scheme in light of the customs simplifications available to its members:

... applicants will have to prove that they are of good financial standing, that they have a clear understanding of their obligations under the scheme and that they are able to correctly identify the goods they move to Northern Ireland, in particular as regards goods that need to be declared with a higher level of detail.⁶⁶

A trader’s authorisation may be revoked or suspended if the scheme is abused.

Existing scheme expanded

The Windsor Framework widens the number of businesses eligible for the scheme. Firstly, this designation will now be open to businesses throughout the UK – previously there was a requirement to have physical premises in Northern Ireland. A customs representative in Northern Ireland will be needed.⁶⁷

Secondly, the threshold below which companies involved in further processing can move goods under the scheme is increased from £0.5 million to £2.0 million (based on turnover). The Government says this means 80% of manufacturing and processing companies in Northern Ireland who trade with Great Britain will be in scope.

Third, firms with turnover above that threshold will be able to move goods under the scheme if they are for use in the animal feed, healthcare, construction and not-for-profit sectors.⁶⁸

Supervision and enforcement of the scheme

The scheme will be overseen by UK authorities to ensure that trusted traders adhere to its rules. This monitoring activity will be in line with arrangements agreed with the EU.⁶⁹

⁶⁶ European Commission, [Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland / Northern Ireland](#), 27 February 2023.

⁶⁷ European Commission, [Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland / Northern Ireland](#), 27 February 2023.

⁶⁸ HM Government, [The Windsor Framework: A new way forward](#), CP 806, 27 February 2023, para 12. Details are set out in Article 6 (Non-commercial processing) of HM Government, [Draft Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework](#) [PDF], 27 February 2023.

⁶⁹ European Commission, [Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland / Northern Ireland](#), 27 February 2023. For further detail, see Article 23 of HM Government, [Draft Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework](#) [PDF], 27 February 2023.

The scheme is expected to be in place by around September 2023, provided the EU has access to UK customs data and the UK has authorised existing traders in line with the new requirements.⁷⁰

The scheme may be suspended by the EU if:

- the UK fails to provide the EU with access to the relevant UK IT customs systems and databases
- the UK does not live up to the commitments it undertook when setting up the trusted trader scheme.

The UK can also suspend the scheme if the customs facilitations for the trusted traders are no longer in place under EU law.⁷¹

Red lane

Goods which are destined for the EU market will go through the red lane. These will face full customs processes, including payment of applicable customs duties, and checks on agri-food products.

Where businesses are unsure whether the final destination of their goods is Northern Ireland or the EU, they will go through the red lane. A new tariff reimbursement scheme will be developed “in the coming months” for businesses who can demonstrate that their goods remained in Northern Ireland.⁷²

Construction of SPS facilities in Northern Ireland

Both the red lane and the green lane will require an upgrade to the existing temporary facilities for SPS checks where goods enter Northern Ireland, although the level of checks for ‘green lane’ goods will be much reduced. This upgrade has not happened due to concerns about the old Protocol.⁷³ While responsibility for these facilities is devolved, the absence of a Northern Ireland Executive means that the UK Government has stepped in. A [Statutory Instrument](#) was laid in January 2023 granting the Secretary of State at DEFRA “powers to expand and enhance existing port facilities in NI and to direct recruitment and employment of staff”.⁷⁴ The EU has set out specific targets for

⁷⁰ European Commission, [Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland / Northern Ireland](#), 27 February 2023

⁷¹ European Commission, [Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland / Northern Ireland](#), 27 February 2023

⁷² HM Government, [The Windsor Framework: A new way forward](#), CP 806, 27 February 2023, para 15

⁷³ There was also a legal challenge related to former DUP Minister Edwin Poot’s direction to NI Department of Agriculture, Environment and Rural Affairs staff to not carry out checks on goods as directed by the Protocol. Mr Poots instruction was found to be unlawful. See ITV News, [Court rules Edwin Poots made 'politically motivated decision' to halt Irish Sea border checks](#), 15 December 2022.

⁷⁴ House of Lords Secondary Legislation Scrutiny Committee, [26th Report of Session 2022-23](#), 26 January 2023, HL Paper 139, page 1. See also BBC News, [NI Protocol: New port facilities needed for goods checks](#), 28 December 2022, [Letter from Lord Benyon to House of Lords Sub-Committee on Protocol on Ireland/Northern Ireland](#) [PDF], 28 December 2022

the phase-in of these SPS facilities, which must be fully operational in line with EU law by 1 July 2025.⁷⁵

Amendments to Protocol text

The customs measures include changes to the text of the Protocol. New text has been added to Article 6 (Protection of the UK internal market). The Command Paper says that this is “to establish and maintain specific arrangements for internal UK trade”. This will be subject to arbitration, rather than the jurisdiction of the CJEU.⁷⁶ The changes to the Protocol text are in the Draft Decision of the Joint Committee established under the Withdrawal Agreement.

The text to be added to article 6(2) is:

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.⁷⁷

Section 2 of the Draft Decision of the Joint Committee also contains measures on the definition of non-commercial processing, the criteria for goods to be considered not at risk of entering the EU market and the trader scheme. The Draft Decision also repeals the previous Joint Committee Decision of December 2020⁷⁸ on “at risk” goods and the trader scheme.⁷⁹ The details of the customs and SPS facilitations themselves will be set out in EU law, not the Protocol itself. The EU will legislate for simplified customs processes under its Union Customs Code. This will then apply to the UK in respect of Northern Ireland under Articles 5 and 13(3) of the Protocol.

2.4

Agri-food

Issues with the original Protocol

The original Protocol included particular checks on agri-food products moving from Great Britain to Northern Ireland. For example, a single lorry might need hundreds of certificates. The Protocol required movements of dairy, red meat, fish, poultry and fruit and vegetables to undergo physical

⁷⁵ European Commission, [Proposal for an SPS Regulation for Northern Ireland](#), Annex II.

⁷⁶ HM Government, [The Windsor Framework: A new way forward](#), CP 806, 27 February 2023, para 7

⁷⁷ HM Government, [Draft Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework](#) [PDF], 27 February 2023, p3

⁷⁸ HM Government, [Decision of the Withdrawal Agreement Joint Committee on the determination of goods not at risk](#) [PDF], 17 December 2020

⁷⁹ [Draft Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework](#) [PDF], 27 February 2023

checks in a certain proportion of cases. Certain foods, such as sausages, would have been banned.

Grace periods

Not all of the checks on agri-food products required by the Protocol have been implemented. This is due to agreement with the EU that there would be “grace periods” allowing some of the requirements to be phased in. These grace periods have been unilaterally extended by the UK Government.⁸⁰ For example, sausages have continued to be moved from Great Britain to Northern Ireland and grace periods have been extended for supermarkets and their suppliers.⁸¹ The Library briefing on [the grace periods](#) has more information.

The framework

The framework contains a number of measures on agri-foods. These make it easier to move agri-food from, or via, Great Britain for consumption in Northern Ireland:

- All businesses moving agri-food from, or via, Great Britain to the final consumer in Northern Ireland can take part in “the UK-run scheme”.⁸² This is presumably a reference to the expanded UK Trader Scheme but the Command Paper is not entirely clear. Businesses which may participate include retailers, wholesalers, caterers and businesses providing food to schools and hospitals.
- UK public health standards (eg level of additives in food) will apply to goods moved from, or via, Great Britain for end consumption in Northern Ireland. The movement of sausages from Great Britain to Northern Ireland, which would have been banned under the old Protocol but for a derogation, will now be permitted. The Government states that the agreement “will remove more than 60 EU food and drink rules in the original Protocol ...”⁸³, although those rules remain in the text of the Protocol and will still apply to goods manufactured in Northern Ireland or imported directly into Northern Ireland from the EU;⁸⁴
- Multiple certificates for a single lorry will be replaced by a single certificate stating that the goods are staying in Northern Ireland and comply with the UK internal market scheme (plus an additional description of goods).⁸⁵ The certificate will be processed electronically and remotely and will not be checked physically. On-site vets or plant inspectors will not be needed at supermarket distribution centres.

⁸⁰ HM Government, [The Windsor Framework: A new way forward](#), CP 806, 27 February 2023, para 18

⁸¹ Institute for Government, [The Windsor Framework](#), 28 February 2023

⁸² HM Government, [The Windsor Framework: A new way forward](#), CP 806, 27 February 2023, para 20

⁸³ HM Government, [The Windsor Framework: A new way forward](#), CP 806, 27 February 2023, para 21

⁸⁴ HM Government, [The Windsor Framework: A new way forward](#), CP 806, 27 February 2023, para 58

⁸⁵ Institute for Government, [The Windsor Framework](#), 28 February 2023

- The scheme will not be limited to goods originating in Great Britain. It will also apply to EU goods entering via Great Britain and to goods from other countries, subject to certain conditions.
- The use of physical checks will be based on risk and intelligence factors by UK authorities to tackle smuggling, criminality, abuse or specific risks to animal, plant or public health.⁸⁶ Identity checks at SPS facilities will be reduced to 5% of all consignments of retail agri-food goods by 1 July 2025.⁸⁷

As a result of these measures, the same food will be available in Northern Ireland supermarkets as in the rest of the UK.⁸⁸

The agreed mitigations to protect the EU's single market are set out in Section 2.6 below

The Government argues that the new agreement is an improvement on the old Protocol which required that agri-food goods should be produced to EU rather than UK standards. The Command Paper says:

This agreement locks in a durable internal UK market system for the long-term, providing resilience against future UK-EU rule changes in areas like food safety, organics requirements and marketing standards - including labelling and production rules for goods like wine. This will deal with the impacts of regulatory divergence for internal UK agrifood retail trade.⁸⁹

The Government recognises that, to maintain access to the EU single market, agri-food manufactured in Northern Ireland will need to comply with EU standards but says that “this reflects what we have heard time and again is the balance businesses want in order to prosper.”⁹⁰

The agri-food changes are set out in the [EU's Proposal for a Regulation on SPS formalities, pets and plants](#) [PDF] and the European Commission [Position Paper on agri-food, plants and pet animals](#) [PDF]. EU implementing legislation (not yet published) will also be required.

Plants, seeds, trees and used farm machinery

The old Protocol placed a number of barriers on the movement of plants from Great Britain to Northern Ireland. Movement of some products, such as seed potatoes and apple trees, was banned. The Government argues this was

⁸⁶ HM Government, [The Windsor Framework: A new way forward](#), CP 806, 27 February 2023, para 20, European Commission, [Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland / Northern Ireland](#), 27 February 2023

⁸⁷ European Commission, [Position Paper on agri-food, plants and pet animals](#), 27 February 2023, para 9(b)

⁸⁸ European Commission Press Release, [A new way forward on the Protocol on Ireland/Northern Ireland: political agreement in principle on the Windsor Framework](#), 27 February 2023

⁸⁹ HM Government, [The Windsor Framework: A new way forward](#), CP 806, 27 February 2023, para 22

⁹⁰ HM Government, [The Windsor Framework: A new way forward](#), CP 806, 27 February 2023, para 58

disproportionate to any threat to the EU market and harmed businesses and consumers in Northern Ireland.⁹¹

Under the new agreement:

- Seed potatoes can be moved from Great Britain to Northern Ireland, subject to conditions. For example, they must bear a plant health label, be dispatched by professional operators and received by professional operators and will be subject to inspections. They must remain in the UK market and not be moved into the EU.
- All plants and seeds will come under the existing UK-wide plant passport scheme, rather than requiring full EU certification. As a result, there will be an annual fee of £120 as opposed to a payment of £150 per movement.
- While the ban⁹² on imports of 35 high-risk plant genera or species for planting will remain in place⁹³, restrictions on 11 species will be removed⁹⁴ by the next planting season.
- To move from Great Britain to Northern Ireland, used agricultural and forestry machinery will require only a single plant health label, indicating that it will not move into the EU

The Belfast Telegraph has reported that online purchases by Northern Irish consumers of plants for planting from, or via, GB may not be covered by the new provisions as the plants must be received by professional operators in Northern Ireland.⁹⁵

The agri-food changes are set out in the [EU's Proposal for a Regulation on SPS formalities, pets and plants](#) [PDF] and the European Commission [Position Paper on agri-food, plants and pet animals](#) [PDF]. EU implementing legislation (not yet published) will also be required.

⁹¹ HM Government, [The Windsor Framework: A new way forward](#), CP 806, 27 February 2023, para 38.

⁹² [Commission Implementing Regulation \(EU\) 2018/2019](#), 18 December 2018, Annex I(1)

⁹³ Proposal for a Regulation 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](#), 27 February 2023, Article 10(1)(c).

⁹⁴ One genus can contain several species. The European Commission has already [proposed](#) the removal from the list of two species belonging to one genus (privet).

⁹⁵ [Buying GB plants online seems set to be banned under EU deal... and NI Secretary misled public](#) [online] Belfast Telegraph, 18 March 2023. See also [COM\(2023\) 124](#), 27 February 2023, Article 10(1)(a).

2.5

Goods moving from Northern Ireland to Great Britain

The significant issues arising from the original Protocol were mainly for goods moving from Great Britain to Northern Ireland. These were the main focus as goods moving to Northern Ireland pose more of a risk to the EU single market. There were, however, some concerns about goods moving in the opposite direction: from Northern Ireland to Great Britain.

The original Protocol required export declarations on goods moving from Northern Ireland to Great Britain. This had been a source of friction between the UK and EU.

Export declarations and controls will be applied only when strictly necessary to meet international obligations, such as movements of endangered species, hazardous chemicals or firearms. A draft unilateral declaration by the UK Government lists cases where EU export procedures will apply.⁹⁶ These checks will be carried out by UK officials.⁹⁷ The Government will amend the [UK Internal Market Act 2020](#) to this effect.

2.6

Protection of the EU single market

In addition to preventing a hard border in Ireland, the Protocol seeks to balance two more objectives – reducing trade friction between Great Britain and Northern Ireland while protecting the EU single market. The relaxation of customs and agri-food requirements are therefore accompanied by safeguards to protect the integrity of the single market.

Data sharing

The UK will share information with the EU on the movement of goods between Great Britain and Northern Ireland from customs databases and other IT systems on a near real-time basis. This information will be used for risk analysis.

EU access to UK data will allow it to monitor trade flows to ensure the new arrangements are not being abused. Large increases in the volume of particular goods moving from Great Britain to Northern Ireland might raise concerns. An article in the Financial Times quoted an unnamed EU diplomat

⁹⁶ [Draft unilateral declaration by the United Kingdom of Great Britain and Northern Ireland in the Withdrawal Agreement Joint Committee on export procedures for goods moving from Northern Ireland to other parts of the United Kingdom.](#)

⁹⁷ European Commission, [Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland / Northern Ireland](#), 27 February 2023

as saying “If the commission sees a vast increase in pork pies heading for Northern Ireland it can take action”.⁹⁸

Where risks are found, the EU will be able to request that UK customs officials stop and check goods. UK authorities will carry out these checks when so requested.⁹⁹

An agreement on EU access to UK IT systems had been announced in January.¹⁰⁰

Trusted trader scheme

The trusted trader scheme allows goods which stay in Northern Ireland to be moved under simplified customs processes. Businesses taking part in the trusted trader scheme will need to register and be authorised. If businesses do not stick to the rules, they can be suspended or removed from the scheme.

The trusted trader scheme can itself be suspended if the UK fails to provide the EU with access to the relevant UK customs data or if the UK does not meet the commitments it undertook when setting up the trusted trader scheme. Under these circumstances, it would not be possible to move goods using the customs simplifications – all goods would be subject to full checks through the ‘red lane’.¹⁰¹

Market surveillance and enforcement

The UK and EU will enhance co-operation relating to market surveillance. According to the European Commission, “the UK will further ensure robust enforcement ...”¹⁰² This enforcement action will not mean checks or controls at the Irish border.

Further details are in the Draft Decision of the Joint Committee and a Draft Unilateral Declaration by the UK.¹⁰³

⁹⁸ “[Freedoms versus safeguards — the Northern Ireland deal viewed from Brussels](#)” [online], Financial Times, 2 March 2023

⁹⁹ European Commission, [Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland / Northern Ireland](#)

¹⁰⁰ Foreign, Commonwealth and Development Office and Northern Ireland Office Press Release, [Northern Ireland Protocol meeting, 9 January 2023: joint statement from the Foreign Secretary and Vice President Šefčovič](#), 9 January 2023. See also: BBC News, [NI Protocol: UK and EU reach agreement on trade data sharing](#), 9 January 2023

¹⁰¹ European Commission, [Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland / Northern Ireland](#)

¹⁰² European Commission, [Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland / Northern Ireland](#)

¹⁰³ HM Government, [Draft Recommendation of the Withdrawal Agreement Joint Committee on market surveillance and enforcement](#), 27 February 2023, HM Government, [Draft unilateral declaration by the United Kingdom of Great Britain and Northern Ireland in the Withdrawal Agreement Joint Committee on market surveillance and enforcement](#), 27 February 2023

Protection of the single market for agri-food

Various steps have been put in place to protect the single market in agri-foods. These include requirements to label agri-food retail products going through the ‘green lane’ as “Not for EU”. As these requirements are phased in, the frequency of SPS checks on agri-food products will be correspondingly reduced.

The UK Government and the European Commission have agreed requirements for agri-food retail products to be labelled as “Not for EU”. Some high risk products, such as meat, dairy and composite products¹⁰⁴, will be labelled individually. These requirements will be phased in up to July 2025. Other products will be labelled at box level (rather than individually) and posters will need to be displayed in supermarkets.

The Commission’s Q&A document provides more detail:

For example, from 1 October 2023, prepacked meat and fresh milk will be individually labelled. Goods sold loose need only to be labelled at box level (eg apples) and easily visible signs would need to be placed next to the price tag on the shelves in the supermarkets. Posters would also be needed, placed in the supermarkets so that consumers know that the goods are not for EU. In order to minimise supply chains difficulties, it was agreed that labelling would be introduced gradually. As of 1 July 2025, all retail goods (other than goods sold loose) will be individually labelled except those not subjected to official controls at border control posts in the EU (eg: confectionery, chocolate, pasta, biscuits, coffee, tea, liqueurs, canned fruit and vegetables, ketchup and similar shelf-stable products).¹⁰⁵

The Government will provide “transitional reimbursement” for business for the first (October 2023) phase of the changes. It has said that these labelling requirements will be introduced on a UK-wide basis from 2024.¹⁰⁶

Identity checks will remain but will be scaled back dramatically. They will be reduced to 10% of all consignments of agri-food goods from 1 October 2023 to 5% from 1 July 2025. This reflects the phasing in of the labelling requirements.

Physical checks will be carried out in conjunction with identity checks using a risk-based and intelligence-led approach.

Documentary checks will be carried out on all the general certificates accompanying the consignments of retail goods. These checks can be performed remotely and electronically.¹⁰⁷

While agri-food products for end consumption in Northern Ireland will be subject to UK public health standards, EU requirements for checks on entry

¹⁰⁴ Foodstuffs containing both products of plant origin and processed products of animal origin.

¹⁰⁵ European Commission, [Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland / Northern Ireland](#), 27 February 2023.

¹⁰⁶ HM Government, [The Windsor Framework: A new way forward](#), CP 806, 27 February 2023, para 23.

¹⁰⁷ European Commission, [Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland / Northern Ireland](#), 27 February 2023.

into Northern Ireland for animal and plant health remain fully in place. This is to prevent the risk of diseases being transmitted to Ireland.

Other measures to protect the EU market for agri-food include:

- The construction of enhanced SPS facilities to check goods entering Northern Ireland (see above)
- Monitoring of the movement of retail goods, traceability and listing of the dispatching and receiving authorised establishments.
- Possibility of suspending (in part or in full) the facilitations to address specific problems or systematic failures of compliance with the new arrangements.¹⁰⁸

2.7 Parcels

The original Northern Ireland Protocol required that every consumer parcel moving from Great Britain to Northern Ireland needed a full customs declaration. The UK Government however, unilaterally implemented a grace period when the Protocol came into force, to suspend this obligation.¹⁰⁹

The EU and UK have now agreed in the Framework to remove all the requirements for both recipients and senders for individuals sending parcels to other individuals (for non-commercial means). For online businesses sending parcels to individuals in Northern Ireland, most requirements will be removed including for customs declarations, pre-notification, and presentation of goods to customs authorities.¹¹⁰

This change has been achieved through a Joint Committee decision amending the Joint Committee decision on what constitutes goods “not at risk” of entering the EU to include parcels (under certain conditions).¹¹¹ The technical details of the customs easements will be made by the EU through an amendment to the Union Customs Code as it applies in Northern Ireland, the text of which has not yet been published.

To mitigate the risks of goods being smuggled into the EU market because of these new freedoms the UK has agreed that “authorised parcel operators will manage a process of sharing data, in batches”, with UK and EU authorities.¹¹²

¹⁰⁸ European Commission, [Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland / Northern Ireland](#), 27 February 2023

¹⁰⁹ This was originally for three months, but then was extended to 1 October, then the UK extended all grace periods indefinitely while it negotiated with the UK, see Commons Library briefing: [Northern Ireland Protocol: Implementation, grace periods and EU-UK discussions \(2021-22\)](#), 1 June 2022.

¹¹⁰ HMG, [The Windsor Framework: A new way forward- Command Paper](#), CP 806, February 2023, P12.

¹¹¹ This is set out in Article 7 of the [Draft Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework](#) (PDF), 27 February 2023.

¹¹² HMG, [The Windsor Framework: A new way forward- Command Paper](#), CP 806, February 2023, P12.

These actions are set out in greater detail in UK Government unilateral declaration, where it also commits to enhance existing co-operation between UK customs authorities and the European Commission, and regularly update the Specialised Committee on these processes.¹¹³

Parcel companies delivering to Northern Ireland will need to be trusted traders under the green lane scheme to benefit from these freedoms.¹¹⁴

The Framework's new arrangements are scheduled to be in place by October 2024 but can take effect earlier if the UK's preparations for the scheme progress more rapidly. In the meantime, it's expected that the UK's grace period will continue to apply.

2.8

Commentary

Steve Peers, Professor of EU Law and Human Rights Law at the University of Essex, commented that the “Windsor Framework does not alter the fundamental legal framework of the Northern Ireland protocol”. It does, however, deal with practical implementation issues “notably by simplifying somewhat the movement of products between Great Britain and Northern Ireland”.¹¹⁵ He also pointed out that some of the changes come about through unilateral acts by the UK and EU. This requires trust between the two sides.

Peers also highlighted the pragmatic, practical approach taken to addressing the problems caused by the Protocol:

It is striking that the agreement is focussed very much on specific issues that have been the subject of day-to-day concern for businesses and consumers in Northern Ireland – the movement of plants such as trees and seed potatoes, pets, products for supermarkets, and parcels ...¹¹⁶

David Henig of the European Centre for International Political Economy (ECIPE) said “the compromises reached look like good, balanced results”. He argued that the EU had also been pragmatic and that its concessions on public health rules, parcels and movement of pets indicated that it accepted that complete protection of the EU was not politically sensible.¹¹⁷

¹¹³ HMG, [Draft unilateral declaration by the United Kingdom of Great Britain and Northern Ireland in the Withdrawal Agreement Joint Committee on strengthening enforcement action for goods moved in parcels from another part of the United Kingdom to Northern Ireland](#) (PDF), 27 February 2023.

¹¹⁴ [Draft Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework](#) (PDF), Article 7 (1)(a)(bb), 27 February 2023.

¹¹⁵ Steve Peers, [The Windsor Framework: limiting the scope of EU law in Northern Ireland in practice, though not in theory \(part 1\)](#), EU Law Analysis, 4 March 2023.

¹¹⁶ Steve Peers, [The Windsor Framework: limiting the scope of EU law in Northern Ireland in practice, though not in theory \(part 1\)](#), EU Law Analysis, 4 March 2023.

¹¹⁷ David Henig, [Ten aspects of the UK-EU deal on Northern Ireland](#), ECIPE, March 2023

A leader column in the Economist said: “the deal is good for Britain as a whole”.¹¹⁸ A further article said that the Windsor Framework was a clear improvement on the previous Protocol but that it was “misleading to claim, as Mr Sunak has, that “it removes any sense of an Irish sea border””.¹¹⁹

Writing on the Conservativehome website, barrister Harry Gillow argued that while the agreement was not perfect, it was a “genuinely impressive achievement” with the EU persuaded to be more pragmatic than might have been thought possible. He commented:

The Framework gives the UK a real opportunity to diverge from EU regulations without jeopardising the British internal market, the peace process, or the UK’s relationship with the EU.¹²⁰

Others were more critical of the agreement. Hugh Bennett, a former adviser to Boris Johnson and Liz Truss, argued that while the Windsor Framework contained some useful practical measures, it nevertheless did not change “the underlying legal architecture of the Protocol”.¹²¹

¹¹⁸ [“Take the deal \[leader\]”, Economist, 27 February 2023.](#)

¹¹⁹ [“Explaining what is in the Windsor framework”, Economist, 2 March 2023.](#)

¹²⁰ [Harry Gillow: No compromise is perfect, but Sunak’s deal provides the tools for making further progress on Northern Ireland, Conservativehome, 3 March 2023.](#)

¹²¹ [Hugh Bennett: The Windsor Framework is a masterclass in rebranding – not a decisive resolution to the problems of the Protocol, Conservativehome, 2 March 2023.](#)

3

Movements of pets and live animals

Pet travel

The Framework includes provisions to simplify the movement of pets between Northern Ireland and Great Britain.

Following Brexit, the UK is no longer part of the EU's pet passport scheme. As such requirements to travel to the EU, and Northern Ireland, with a pet now include an animal health certificate (AHC) signed by a vet. An AHC needs to be issued for each trip. The [price of an AHC varies](#) but can cost over £200. As a result, pets are also required to be microchipped and vaccinated against rabies to travel to and from Northern Ireland. Pets may also be subject to physical checks although these had not been implemented between Northern Ireland and GB to date. Further information can be found in the [Library Briefing on Pet Travel after Brexit](#).

The UK Government set out the changes that will reduce the requirements for pet owners in Northern Ireland and Great Britain travelling between the two:

- For Northern Ireland pet owners, there will be no new requirements of any kind. Pet owners can come and go from Great Britain without ever having to think about any paperwork or process. Northern Ireland pet owners will of course continue to be able to move their pet to Ireland and the rest of the EU with an EU pet passport, though unlike internal Great Britain-Northern Ireland movements this will continue to include a requirement for rabies vaccinations.
- For pet owners visiting Northern Ireland from Great Britain but not travelling on to Ireland, the only requirement will be to confirm that the pet is microchipped and will not move into the EU (where the same certificate and health requirements will remain). This will be in the form of a travel document issued for the lifetime of a pet, available online and electronically in a matter of minutes; or an equally seamless process built into the booking process for a flight or ferry.¹²²

The EU Commission has summarised the new proposals as follows:

People will be able to travel with their pets between Great Britain and Northern Ireland in an easier way. A simple pet travel document and a declaration by the owner that the pet will not go to the EU will suffice.¹²³

[The Institute for Government highlights](#) that resolving pet travel was a priority for the UK Government, but not something the EU had set out a position out

¹²² HM Government, [The Windsor Framework: A new way forwards](#), 27 February 2023 (p17)

¹²³ EU Commission, [A new way forward on the Protocol on Ireland/Northern Ireland: political agreement in principle on the Windsor Framework](#), 27 February 2023

on previously. However, as noted by [David Henig from the European Centre for International Political Economy \(EICPE\)](#) “pet movements and parcels are similar symbols that will matter to ordinary people, no matter the lengthy conditionality that is needed to deliver this”. This was also acknowledged by the president of the British Veterinary Association, who welcomed the agreement:

The new rules will be a particular relief to pet owners who regularly travel between Great Britain and Northern Ireland with their animals. The rules will mean less paperwork for vet practices, too, and will help reduce over-treatment. The British Veterinary Association welcomes the hard work of vets across governments that has got us to this stage.¹²⁴

Live farm animal movements

The framework does not include any specific measures on live farm animal movement between Northern Ireland and Great Britain.

However, there have already been a number of changes made by the EU to facilitate animal movements. These were summarised in an EU fact sheet [Movement of animals and animal products into Northern Ireland](#) published in February 2022. They include changes to requirements on tagging animals, movement to and from fairs, and risk control of scrapie.

¹²⁴ BVA, [BVA president welcomes Windsor Framework deal for Northern Ireland](#), February 2023

4 Medicines

The original Northern Ireland Protocol set out that EU law on pharmaceutical products would continue to apply in Northern Ireland. Effectively, the Northern Ireland medicines market would function under the same terms as the EU medicines market. The European Medicines Agency (EMA) would licence medicinal products in Northern Ireland, while Great Britain would be regulated by the Medicines and Healthcare products Agency (MHRA).

Medicinal products entering Northern Ireland would be subject to requirements for the import of medicines into the EU and these would apply when medicines were moved from Great Britain to Northern Ireland, including batch testing and certification. Medicines placed on the Northern Ireland market would also need to carry anti-falsification features.

The Protocol created several logistical challenges for the pharmaceutical industry. There were significant concerns that these would ultimately lead to operators leaving the Northern Ireland market due to concerns about viability and reduce the range of medicines on the Northern Ireland market.

A grace period has meant that many provisions under the Protocol have not been implemented yet.

4.1 Relaxed import requirements for medicines moving from GB to NI

Medicines moving from Great Britain to Northern Ireland, which are intended to stay within the UK, will benefit from the 'green lane' arrangements outlined for other trade. The required information for these medicines will be limited to simple commercial information. Only medicines intended for supply to the EU will undergo fuller checks under the 'red lane' (see Section 2.3 for more).

Background

Under the Protocol, the movement of medicines from Great Britain into Northern Ireland would have required medicines that had undergone batch testing in the EU to be re-tested when they arrived in Northern Ireland after transiting through Great Britain. It would also have required regulatory functions or testing facilities to be relocated from Great Britain to Northern Ireland.

In April 2022, the European Council implemented a Directive and Regulation which removed these requirements, among others. This was amidst concerns that the Protocol was placing medicines supply to Northern Ireland (and Cyprus, Ireland and Malta, who are dependent on the UK supply chain) at risk.¹²⁵

4.2

MHRA to approve all medicines across the UK; a solution for novel medicines and pack sizes

Under the Windsor Framework, the EMA will no longer be responsible for regulating medicines in Northern Ireland. All medicines placed on the Northern Ireland market will instead be subject to the MHRA, who will act across the UK. This will allow companies to apply solely to the MHRA, who will issue a single UK-wide marketing authorisation (MA).

Crucially, this addressed concerns about Northern Ireland having slower access to novel medicines, and concerns that manufacturers would simply withdraw their products from Northern Ireland in response to regulatory burdens.

Medicines approved by the EU/EMA will no longer be able to be placed on the Northern Ireland market although they can be manufactured in Northern Ireland for placement on the EU market.

Background

Under the Protocol, the MHRA was to regulate medicines for Great Britain, while the EMA would do so for Northern Ireland.

Licensing requirements under the Protocol Under the Protocol, manufacturers wishing to place their products on the NI medicines market have a choice of either:

- Obtaining a marketing authorisation (MA) from the EMA, allowing them to market that product anywhere in the EU as well as Northern Ireland.
- Obtaining an MA from the MHRA, allowing them to place it on the NI market only.

Under the Protocol, products authorised by the MHRA for the GB market would not be permitted to be placed on the NI market.

¹²⁵ European Council, [EU-UK relations: the Council adopts legislation to ensure continued supply of medicines](#), 12 April 2022.

Implications for medicines supply under the Protocol

Northern Ireland has historically gotten most of its medicines supply from the UK. If manufacturers were to comply with the Protocol, and ensure the supply of existing medicines to Northern Ireland, they would need to submit these products to the MHRA and apply for a Northern Ireland-only licence.

Manufacturers haven't considered this a commercially viable option owing to the small size of the Northern Ireland medicines market. Many have indicated that they would not seek a Northern Ireland-only licence for their products.

The effects of this problem have not yet been felt because the grace period is ongoing, and manufacturers are currently able to place Great Britain/MHRA licenced products on the Northern Ireland market. Once the grace period ends, the terms of the Protocol would be applied, and it would no longer be possible to do this.

If manufacturers (effectively) withdraw their products from the Northern Ireland market, as they have indicated, there is a real risk that Northern Ireland will have an inadequate range of medicines to meet demand.

EU adopts Directive and Regulation to address concerns

In April 2022, the Council adopted a Directive and Regulation enabling generic medicines (such as paracetamol) to be authorised under UK national procedures, in compliance with EU rules on medicinal products.¹²⁶ Manufacturers would be able to choose between the UK authorisation process or an EU process.

If they chose the UK process, they would be able to supply a single pack and leaflet for Great Britain and Northern Ireland.

Novel medicines

There were concerns that, with the EMA and MHRA operating independently of each other, Northern Irish patients would be left unable to access novel medicines in any interim period between the separate authorisations of each agency.

The Council's Directive and Regulation, adopted in April 2022, implemented a 'bridging solution' so that any new medicine authorised in the UK could also be supplied in Northern Ireland for six months, pending an EU decision.¹²⁷

¹²⁶ European Council, [EU-UK relations: the Council adopts legislation to ensure continued supply of medicines](#), 12 April 2022.

¹²⁷ European Council, [EU-UK relations: the Council adopts legislation to ensure continued supply of medicines](#), 12 April 2022.

4.3

No need for medicines placed on the NI market to comply with EU falsification features

The Framework recommends that prescription medicines placed on the Northern Ireland market should not carry falsification features. It also stipulates that medicines which are authorised by the MHRA should bear a label indicating “UK only” to prevent their “leakage” into EU markets.

Background

The Falsified Medicines Directive

The EU [Falsified Medicines Directive \(2011/62/EU\)](#) (FMD) was adopted in 2011 to ensure that medicines within the EU are safe and that the trade of medicines is secure. One part of the Directive, [Delegated Regulation \(EU\) 2016/161](#), came into force in February 2019. It required ‘safety features’ to be present on certain medicines:

- A unique code on packaging, enabling medicines to be scanned at certain points along the supply chain to verify authenticity.
- Some kind of anti-tampering feature on medicines packs – the exact type of feature could be decided by Member States.

Following the UK’s departure from the EU, the safety features requirement no longer applies in Great Britain. Given that the Protocol placed Northern Ireland under the EU regulatory framework, it was necessary for medicines placed on the NI market to carry FMD features, such as a barcode. The Framework recommends that prescription medicines placed on the Northern Ireland market should not carry these features.¹²⁸

Package labelling

The removal of EMA jurisdiction from the Northern Ireland medicines market creates implications for the integrity of the EU medicines market. Namely, ensuring that medicines authorised under the Great Britain regulatory framework/MHRA, didn’t “leak” over into EU Member States.

The Framework provides for this. Individual packs of medicines which are regulated by the MHRA will be required to bear labels indicating “UK only”.¹²⁹ The UK will be required to undertake continuous monitoring, and the EU reserves the right to unilaterally suspend the arrangement if the UK fails to comply with its obligations.

¹²⁸ European Commission, [Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland / Northern Ireland](#), 27 February 2023.

¹²⁹ European Commission, [Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland / Northern Ireland](#), 27 February 2023.

4.4 Stakeholder response

Alan Stout, Chair of the Northern Ireland British Medical Association’s General Practitioners Committee described the Framework as a “massive relief”.¹³⁰ Richard Torbett, Chief Executive of the Association of British Pharmaceutical Industry’s Chief Executive, said:

While we wait to see all the details, today’s agreement appears to bring a return to a single UK market for medicines, providing the permanent solution that our members have been calling for.¹³¹

Mark Dayan, Lead for the Nuffield Trust’s Brexit Programme said “this agreement, together with earlier EU actions, would resolve nearly every single source of concern”.¹³²

4.5 Veterinary medicines

Veterinary medicines entering Northern Ireland from Great Britain were covered by the [one-year grace period](#) (PDF) agreed by the EU and UK at the end of 2021 for both human and veterinary medicines. The EU announced in December 2022 that this would be extended for veterinary medicines alone until 2025. The decision was [welcomed by stakeholders](#).

The Framework does not include any further agreement on veterinary medicines, but the UK Government states in the Command Paper its intention of finding a long-term solution with the EU:

This [grace period] safeguards those supplies, while providing time to establish a long-term solution which maintains the uninterrupted flow of veterinary medicines into Northern Ireland from Great Britain as is the case now. In so doing the Government is clear that the only practical solution will be a solution, as with human medicines, to guarantee the existing and long-established flows of trade between Great Britain and Northern Ireland on which so many people and businesses rely.¹³³

The [Prime Minister has pointed to the agreement reached on the movement on human medicines](#) as reason to “have confidence that between now and three years’ time, in 2025, we will put a permanent footing for vet medicines on the table”.¹³⁴

¹³⁰ BMJ, [“Massive relief” as Northern Ireland’s health sector embraces Windsor framework](#), 1 March 2023.

¹³¹ ABPI, [ABPI respond to the new Northern Ireland Brexit deal](#), 27 February 2023.

¹³² Nuffield Trust, [Nuffield Trust response to Windsor Framework on Northern Ireland](#), 27 February 2023.

¹³³ HM Government, [The Windsor Framework: A new way forwards](#), 27 February 2023 (p17).

¹³⁴ HC Deb 27 February 2023 [c593](#).

5 VAT & excise

5.1 VAT & excise in the Protocol

Under Article 8 of the Protocol, while the UK remains responsible for the application and implementation of VAT and excise rules in Northern Ireland, and collects the duties, the EU's VAT and excise rules for goods continue to apply in Northern Ireland.¹³⁵ This includes the EU's rules on setting VAT rates, although Article 8 allows Northern Ireland to apply exemptions and reduced rates that are applicable in Ireland. The relevant provisions of EU law are set out in Annex 3 of the Protocol.¹³⁶

To help facilitate this arrangement, the UK in respect of Northern Ireland continues to be able to access the EU's VIES system (VAT Information Exchange System) to share data on cross-border sales of goods with Ireland and other Member States.¹³⁷

The UK Government's Command Paper on the Protocol, published in July 2021, addressed the operation of this part of the Protocol, noting "problems in some areas, such as the application of the VAT second-hand margin scheme and requirements for eCommerce traders".¹³⁸

In the first case, car dealers were being required to account for VAT on the full resale value of second-hand cars they had bought in Great Britain and imported to Northern Ireland for resale either in Northern Ireland or the EU. This was because they could no longer use the UK's 'margin' scheme, allowing dealers in second-hand goods to account for VAT on just the difference between the price they pay for these goods and what they sell them for.

To tackle this problem the Government included provisions in the Finance Act 2022 for a new VAT refund scheme for car dealers. The scheme is to be introduced in May 2023.¹³⁹ Temporary arrangements were made for the UK's

¹³⁵ For the text of Article 8 see, HM Government, [New Withdrawal Agreement](#), 19 October 2019 pp 308-9.

¹³⁶ For more details on the purpose of Article 8 see, European Scrutiny Committee, "[Northern Ireland Protocol: EU VAT identifier for businesses](#)", (PDF) Twenty-seventh Report of Session 2019-21, HC 229-xxiii, 10 November 2020 para 4.1-4.

¹³⁷ European Commission press notice, [Brexit: What did you agree with the UK today?: Questions and answers](#), 17 October 2019.

¹³⁸ HM Government, [Northern Ireland Protocol: the way forward](#), CP502, July 2021 para 54.

¹³⁹ For details see, HM Revenue & Customs (HMRC), [Claim a VAT-related payment if you buy second-hand motor vehicles in Great Britain and move them to Northern Ireland for resale](#), 25 January 2023.

departure from the EU.¹⁴⁰ This new scheme is not contingent on the EU's agreement and therefore not, strictly, part of the Windsor Framework.

The UK Government's Command Paper suggested that such problems might "multiply as UK and EU VAT and excise rules evolve". In turn it proposed "a more flexible settlement [...] with greater freedom to set VAT and excise rates and structures in Northern Ireland, but underpinned by clear safeguards where changes would introduce significant distortions on the island of Ireland; and enhanced consultative mechanisms to ensure that risks of double taxation and significant divergence within the UK internal market are avoided".¹⁴¹

There are two examples of recent changes to VAT and excise rates that have been made by the UK Government that cannot be extended to Northern Ireland at present as a consequence of the Protocol.

First, in the Spring Statement on 23 March 2022 the Chancellor announced a temporary zero rate on the installation of certain types of 'energy-saving materials' (ESMs), including solar panels, from 1 April 2022 to 31 March 2027.¹⁴² The zero rate replaces a reduced 5% rate on this type of supply which remains in force in Northern Ireland.¹⁴³ Member States face some restrictions on their discretion in setting VAT rates on individual goods and services as a consequence of EU law which harmonises VAT systems across the EU.¹⁴⁴ Prior to the UK leaving the EU Ministers often noted the obstacle this presented to any substantial extension of the range of the UK's zero rates.¹⁴⁵

Second, following a [consultation exercise on the structure of alcohol duties](#), in September 2022 the Government announced that it would make a series of changes to duty rates, moving to a system where all alcoholic drinks would be taxed by strength. As well as duty rate changes, two new reliefs are to be introduced: to allow for lower rates of duty to benefit smaller producers, and to charge a lower duty rate on draught drinks sold in pubs ('on-trade') as opposed to drinks sold in shops and supermarkets ('off-trade'). The new regime is to be introduced in August 2023.¹⁴⁶

One of the drivers for reform in Great Britain has been the fact that any changes to the UK's alcoholic duties would not need to comply with EU

¹⁴⁰ For details see, HMRC, [Northern Ireland second-hand margin scheme interim arrangement](#), 27 October 2021.

¹⁴¹ HM Government, [Northern Ireland Protocol: the way forward](#), CP502, July 2021 para 54.

¹⁴² For details see, HMRC, [The Value Added Tax \(Installation of Energy-Saving Materials\) Order 2022](#), 23 March 2022.

¹⁴³ HMRC, [Energy-saving materials and heating equipment \(VAT Notice 708/6\)](#), 6 April 2022.

¹⁴⁴ These provisions form part of the [VAT Directive \(2006/112/EC\)](#). The European Commission publishes [an overview of this legislation](#).

¹⁴⁵ Further details are given in Commons Library briefing CBP2683, [VAT: European law on VAT rates](#). The briefing was last updated in January 2019.

¹⁴⁶ HMRC, [Reform of Alcohol Duty and reliefs](#), 23 September 2022.

Alcohol Duty Directives.¹⁴⁷ However, that EU legislation precluded the approach taken by the Government from being applied in Northern Ireland. When the Government announced its plans for reform it noted that many aspects of the new regime would depart from the current EU provisions, and it would seek “to reach a negotiated outcome with the EU that allows the application of the reforms in Northern Ireland”.¹⁴⁸

In its detailed response to the Command Paper, published in November 2021, the EU did not address the UK Government’s proposal for amending Article 8.¹⁴⁹

5.2 Windsor Framework VAT & excise provisions?

The EU-UK Joint Committee Draft Decision provides for two amendments to Annex 3 of the Protocol, specifying certain exemptions to a series of EU Directives in the field of VAT and excise that the UK in respect of Northern Ireland would not otherwise be required to apply. These two ‘notes’ are set out in Article 3 of the Draft Decision. The Preamble to the Draft Decision notes that these amendments “should not lead to fiscal fraud risks or to any potential distortion of competition”. In addition they “should neither create risks to the Union’s internal market, and the UK’s internal market, nor create undue burdens for businesses operating in Northern Ireland”.¹⁵⁰

VAT

In the case of VAT, the Decision would add a note to Annex 3, specifying four exceptions where the UK in respect of Northern Ireland would not need to comply with EU law:

- The UK would be able to introduce a VAT rate under 5%, including a zero rate, on “goods supplied and installed in immovable property located in Northern Ireland”. Examples include a heat pump for a house or a wind turbine for a residential property.¹⁵¹
- The UK would face fewer restrictions when setting VAT rates on goods consumed in Northern Ireland than EU Member States.¹⁵² At present there is a limit on the number of goods that can be made subject to a reduced

¹⁴⁷ The Alcohol Structures Directives (92/83/EEC and 92/84/EEC) agreed in 1992. The Commission publishes [an overview of this legislation](#); see also, HM Treasury (HMT), [Alcohol Duty Review: call for evidence](#), October 2020 (Annex A: International comparisons).

¹⁴⁸ HMT, [The new alcohol duty system: response to consultation](#), (PDF), September 2022 para 1.18.

¹⁴⁹ European Commission press notice, [Commission proposes bespoke arrangements to benefit NI](#), 13 October 2021. See also, Commons Library briefing CBP-9333, [Northern Ireland Protocol: Implementation, grace periods and EU-UK discussions \(2021-22\)](#) (section 5.7).

¹⁵⁰ HMG, [Draft Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework](#), (PDF), 27 February 2023 (Note 8 to the Preamble).

¹⁵¹ European Commission, [Q&A: political agreement on the Windsor Framework](#), 27 February 2023.

¹⁵² HMG, [The Windsor Framework: a new way forward](#), CP806, 27 February 2023 para 32.

or zero rate of VAT in Northern Ireland because of EU law, even if a reduced or zero rate had been introduced in Great Britain. [VAT Directive 2006/112/EC](#) specifies a list of seven supplies to which Member States may apply a VAT rate under 5%, including a zero rate. It also specifies a list of 24 supplies to which Member States may apply a VAT rate as low as 5%. These categories are set out in Article 98 and Annex III of the Directive. Under the Windsor Framework, those numerical limits would not apply, meaning the UK could, if it wanted, introduce reduced or zero rates in Northern Ireland to all goods listed in Annex III. However, the UK would still be restricted from applying reduced or zero rates in Northern Ireland to goods not included on the list.

- The UK would not be required to ensure that Northern Ireland businesses comply with a new EU scheme for small businesses, which is to be implemented from 1 January 2025.¹⁵³ Legislation for the scheme was agreed in February 2020 ([Council Directive 2020/285](#), which amended the VAT Directive 2006/112/EC accordingly). This means, in particular, that the UK will not have to reduce its VAT registration threshold for smaller businesses in Northern Ireland below the current level of £85,000 in annual turnover.
- The UK would not be required to apply the EU’s “import One Stop Shop” scheme for Great Britain based businesses making distance sales of goods, for example products bought online, by consumers in Northern Ireland.¹⁵⁴ Legislation for this scheme was agreed in December 2017 ([Council Directive 2017/2455](#) which amended the VAT Directive 2006/112/EC accordingly).

Excise

In the case of excise, the Decision would add a note to Annex 3, specifying two exceptions where the UK in respect of Northern Ireland would not need to comply with EU law:

- The UK would be able to restructure alcohol duties on the basis of alcoholic strength, and introduce a reduced rate of duty on draught products. Duty rates could not be lower than the minimum rates set in the EU’s Alcohol Structures Directives, but typically exceed these by some margin already.
- The UK would be able to set lower duty rates for drinks produced by small producers, though again these rates could not be lower than EU minima rates.

There are no changes under the Windsor Framework to the continued application of current EU excise legislation on fuel duty and tobacco duty in Northern Ireland. Article 4 of the Draft Decision states that the Joint

¹⁵³ For details see, European Commission, [VAT scheme for Small Businesses](#), ret’d 9 March 2023.

¹⁵⁴ For details see, European Commission, [Import One-Stop Shop \(IOSS\)](#), ret’d 9 March 2023.

Committee may adopt further notes to add to Annex 3, either with regard to VAT or to excise. The purpose of these notes would be to avoid the risk of fiscal fraud or the distortion of competition from the application of the EU law set out in Annex 3. The Preamble to the Draft Decision notes that this would ensure any other notes could be added to Annex 3 “at any point in time”¹⁵⁵

New role for Specialised Committee

In addition, Articles 17 to 21 of the Draft Decision provide for the establishment of a new procedure for the discussion of Protocol-related VAT and excise issues: the ‘Enhanced Coordination Mechanisms on VAT and excise’. This is to take the form of meetings of the Specialised Committee, arranged by two lead experts in both VAT and excise, appointed by the Committee’s co-chairs. The Specialised Committee may propose decisions or recommendations for the Joint Committee, on the basis of reports prepared by the lead experts. Article 21 states this procedure should be regularly reviewed, with the first review to be done by 1 January 2027.

Potential for future VAT changes

Alongside the Draft Decision, a short Draft Joint Declaration has been published which relates to this part of the Windsor Framework.¹⁵⁶ This states that the EU and the UK will look at extending the provision in the amended Protocol covering the zero rate for ESM installations. It anticipates the EU and the UK considering a detailed list of other goods that could avoid EU limits on reduced or zero rates of VAT, provided those goods were not at risk of entering the EU. That would require a further Decision of the Joint Committee, subject to both EU and UK agreement, in the future. The list would be valid for five years, and subject to review. The Draft Joint Declaration also states the EU and the UK will review current VAT arrangements for cross-border refunds.

5.3 What are the implications of these changes?

In his statement to the House on the Framework the Prime Minister Rishi Sunak argued that the Protocol had prevented Northern Ireland from getting the “full benefit of being part of the United Kingdom in every respect.” In this context he discussed the relevant provisions in the Protocol regarding tax, and how the Framework would amend them:

When I was Chancellor, it frustrated me that when I cut VAT on solar panels or beer duty in pubs, those tax cuts did not apply in Northern Ireland. We have

¹⁵⁵ HMG, [Draft Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework](#), (PDF), 27 February 2023 (Note 9 to the Preamble).

¹⁵⁶ HMG, [Draft joint declaration by the United Kingdom of Great Britain and Northern Ireland and the European Union in the Withdrawal Agreement Joint Committee on the VAT regime for goods not being at risk for the Union’s internal market and on the VAT arrangements for cross border refunds](#), (PDF), 27 February 2023.

amended the legal text of the treaty so that critical VAT and excise changes will apply to the whole of the United Kingdom. That means zero rates of VAT on energy-saving materials will now apply in Northern Ireland.

Reforms to alcohol duty to cut the cost of a pint in pubs will now apply in Northern Ireland.

Because we now have control over VAT policy, we can make sure that the EU's plan to reduce the VAT threshold by £10,000 will not apply in Northern Ireland, nor will the SME VAT directive that would have brought huge amounts of EU red tape for small businesses.¹⁵⁷

In their questions to the Prime Minister following his statement MPs did not ask about this part of the Framework. Similarly, the changes proposed to the VAT and excise aspects of the Protocol have not been a major feature of commentary on the Framework to date.¹⁵⁸

The implications of the Framework for VAT and excise were summarised in a short explainer published by the Government,¹⁵⁹ and addressed at more length in both the UK Government's Command Paper,¹⁶⁰ and the European Commission's Questions and Answers document on the Framework.¹⁶¹

¹⁵⁷ [HC Deb 27 February 2023 c572](#).

¹⁵⁸ see, for example, "How the Windsor framework changes Northern Ireland's trading arrangements", *Financial Times*, 27 February 2023; "Businesses give Windsor Framework a cautious welcome", *Tax Journal*, 3 March 2023.

¹⁵⁹ HMG, [VAT and excise : sector explainer](#) (PDF), 27 February 2023 .

¹⁶⁰ HMG, [The Windsor Framework: a new way forward](#), CP806, 27 February 2023 para 30-33.

¹⁶¹ European Commission, [Q&A: political agreement on the Windsor Framework](#), 27 February 2023.

6 Subsidies and State aid

6.1 State aid in the Protocol

Under Article 10(1) of the Protocol, EU State aid rules apply to State aid – or subsidy measures¹⁶² – related to trade in goods and the wholesale electricity market, insofar as this can affect trade between Northern Ireland and the EU.¹⁶³

Article 10(2) of the Protocol contains an exemption for State aid to the production of and trade in agricultural products in Northern Ireland, provided this aid complies with the WTO rules. The exempted aid is limited to annual maximum levels agreed by the UK-EU Joint Committee.

State aid rules under the Protocol are enforced by the European Commission. This includes the requirement for the UK to notify the Commission before granting larger amounts of covered State aid. The Court of Justice of the EU (CJEU) has jurisdiction over the interpretation of the EU State aid rules. The Commission's decisions and conduct are subject to the Court's judicial review.

For further details see box 2 in section 2.4 of the Commons Library briefing, [Northern Ireland Protocol Bill 2022-2023](#) (PDF).

UK Government's concerns

In the UK Government's view, set out in the Command Paper, [The Windsor Framework: A new way forward](#) (PDF), the Protocol's State aid provisions have led to uncertainty regarding the breadth of their application. While "intended to apply narrowly", the Government says these provisions potentially risk being applied to support measures with only a theoretical and highly tangential link between a subsidy to a company in Great Britain and trade between Northern Ireland and the EU.¹⁶⁴

As an example of potential 'reach-back' of the Protocol's rules on State aid, a UK-wide tax measure benefitting a Northern Ireland business, could be caught by the EU enforcement regime as it could potentially affect trade

¹⁶² The EU law term "state aid" and the UK term "subsidy" both refer to a financial (or in kind) contribution such as a grant, a loan or a guarantee, provided through public resources by a public authority to an enterprise and conferring a specific benefit (an economic advantage) to the recipient not available on market terms, insofar this can distort competition and trade.

¹⁶³ The applicable EU regulations - effectively covering the main part of the EU State aid rules - are listed in Annex 5 of the Protocol. Annex 6 includes procedural rules for agricultural subsidies.

¹⁶⁴ HM Government, [The Windsor Framework: A new way forward](#), CP 806, February 2023, para 41.

between Northern Ireland and the EU. EU State aid rules would apply as far as a support measure would meet the EU State aid test.

State aid experts generally agree that the coverage of EU State aid rules is not geographically limited to those support measures provided by the devolved and local government bodies in Northern Ireland, or UK Government measures designed specifically for Northern Ireland.¹⁶⁵

The Government believes concerns about ‘reach-back’ could result in businesses and public authorities limiting the level of support granted in Northern Ireland and discouraging investment in or trade with Northern Ireland. However, it admits the Protocol has not prevented the Government from providing State aid to Northern Ireland during the pandemic and energy crisis.¹⁶⁶

The Government said in June 2022, the Protocol is also creating a “two-tiered” system for subsidy control in the UK. The UK Subsidy Control Act 2022, fully operational since January 2023, sets up a UK-wide subsidy control regime. However, the Act excludes subsidies covered by the Protocol from the scope of the UK regime. As a result, two subsidy control frameworks apply in relation to trade between Northern Ireland and the EU.¹⁶⁷

In the Command Paper of 21 July 2021, [Northern Ireland Protocol: the way forward](#), the Government argued that the UK-EU Trade and Cooperation Agreement and the UK subsidy control regime should give the EU enough certainty that UK subsidies would not distort NI-EU trade and competition, and so Article 10 was no longer necessary. Though given the sensitivity of the issue, the UK proposed in the 2021 paper additional reassurances to the EU such as enhanced control processes for any significant subsidies relating directly to Northern Ireland.¹⁶⁸ Various UK State aid and subsidy experts have offered comparable solutions. George Peretz QC and James Webber have said that the Government’s proposal was a “sensible basis for negotiations” with the EU.¹⁶⁹

[The Northern Ireland Protocol Bill](#) (Clause 12), introduced by the Government in June 2022, proposed to create a basis for a single UK-wide subsidy control

¹⁶⁵ G.Peretz QC in [“Boris Johnson’s efforts to escape EU state aid rules ‘mistaken’”](#), Financial Times, 9 February 2020; HL European Affairs Committee Protocol on Ireland/Northern Ireland Sub-Committee, [Corrected oral evidence: The role of the CJEU in relation to the Protocol on Ireland/Northern Ireland](#), 20 January 2022, Q10; George Peretz QC, Alfred Artley, [State aid under the Northern Ireland Protocol](#), Tax Journal, 15 May 2020.

¹⁶⁶ HM Government, [The Windsor Framework: A new way forward](#), CP 806, February 2023, para 41

¹⁶⁷ Foreign, Commonwealth and Development Office, [NI Protocol: The UK’s solution](#), 13 June 2022, p8; [HL Deb 7 February 2022 \[Subsidy Control Bill\], cc348-350GC](#).

¹⁶⁸ HM Government, Command Paper, [Northern Ireland protocol - next steps](#), CP 502, 21 July 2021, paras 41-42.

¹⁶⁹ James Webber, International Trade Committee, [Oral evidence: UK-EU trading relationship](#), HC 1206, 22 April 2021, Q119; Thomas Pope, Eleanor Shearer, Institute for Government, [Taking back control. Replacing EU State aid rules in the UK](#), May 2021, p43; George Pretz QC, James Webber, [The UK’s Proposed Revisions to Article 10 of the Northern Ireland Protocol: a Sensible Basis for Negotiation](#), UKSALA, 2 September 2021.

regime by giving the government power to unilaterally disapply the state aid provisions of the Protocol and bringing subsidies related to Northern Ireland trade fully within scope of the UK Subsidy Control Act 2022.¹⁷⁰ The Government has stated in [its legal position paper](#) (PDF) under the Windsor Framework that the Northern Ireland Protocol Bill will no longer be needed.

6.2 Windsor Framework State aid provisions

The Windsor Framework does not make legally binding changes to the State aid provisions included in Article 10 and Annexes 5 and 6 of the Northern Ireland Protocol. However, an [EU-UK Joint Declaration](#) (PDF) clarifies the Parties' joint interpretation of the application of Article 10(1) of the Protocol.

[The Joint Declaration](#) (PDF) sets out the circumstances in which EU State aid rules are likely to apply to subsidies granted in the United Kingdom. It builds upon the wording of the [EU Unilateral Declaration of December 2020](#) (PDF), which [sought to address UK's concerns](#) about the 'reach-back'.¹⁷¹

In the [new](#) Joint Declaration the UK and the EU affirm Northern Ireland's integral place in the United Kingdom's internal market. The parties clarify that for any support measure provided by a UK authority to have an effect on trade between Northern Ireland and the EU, and subsequently be covered by the Protocol's state aid provisions, the measure must have:

- a genuine and direct link to Northern Ireland, and
- real foreseeable effects on trade between Northern Ireland and the EU;
- these effects on trade should be material, and not merely hypothetical or presumed.¹⁷²

The Joint Declaration clarifies further that the "material effect" of a measure is determined by factors including the size of the beneficiary undertaking, the size of the subsidy, and whether the undertaking is active in the relevant market in Northern Ireland; mere selling of a good in Northern Ireland is not sufficient on its own. Subsidies granted to beneficiaries in Northern Ireland are more likely to have material effects on trade.¹⁷³

For EU State aid rules to apply to a subsidy granted to a beneficiary in Great Britain, this subsidy must have a material effect and a direct and genuine link

¹⁷⁰ [Northern Ireland Protocol Bill. Explanatory Notes, Bill 12](#), para 66.

¹⁷¹ [Unilateral declarations by the European Union and the United Kingdom of Great Britain and Northern Ireland in the Withdrawal Agreement Joint Committee on Article 10\(1\) of the Protocol](#) (PDF), 17 December 2020. See Library briefing: [Joint Committee decisions on the Northern Ireland Protocol](#), 23 December 2020 for further details.

¹⁷² [Draft joint declaration by the United Kingdom of Great Britain and Northern Ireland and the European Union in the Withdrawal Agreement Joint Committee on the application of Article 10\(1\)](#), 27 February 2023.

¹⁷³ As above.

to Northern Ireland. For this to be the case, it must be demonstrated that the economic benefit of the subsidy would be passed on to an undertaking in Northern Ireland, or through, for example, subsidised goods being sold in Northern Ireland under their market price.¹⁷⁴

The UK Government and the European Commission have agreed to provide further clarification and set out in their respective guidance how and to whom the state aid rules apply. The Political Declaration says guidance would also clarify under which conditions UK measures are not covered by the EU state aid framework.¹⁷⁵

UK Government and EU assessment

The Government and the Commission both agree that the clarification provided by the Windsor Framework gives certainty to businesses and public authorities about the application of EU state aid rules.

According to the Government’s Command Paper, the Windsor Framework removes the risk of ‘reach-back’ by setting out a “stringent set of tests” for the state aid rules to apply. In its view, the Protocol covers only the largest subsidies and subsidies where firms have material presence on the Northern Ireland market, that is cases where it’s necessary to prevent trade distortion. The Government concludes that the vast majority of subsidies in Great Britain are covered by the UK subsidy control regime.¹⁷⁶

The Government notes further that, judging by past trends, 98% of subsidies in Northern Ireland, which are covered by the Protocol, will be granted under simplified procedures, without prior notification or approval by the EU Commission. The European Commission says in a Q&A document that the Joint Declaration “neither modifies the substance of Article 10(1) nor restricts its application” and does not carve out any subsidies that previously fell under the Protocol.¹⁷⁷

6.3

Commentary

Legal commentators and state aid experts have generally welcomed the clarification but conclude that no significant changes have been made in relation to the EU state aid provisions and there would be scope for future amendments. Alexander Horne, visiting professor at Durham University and

¹⁷⁴ As above.

¹⁷⁵ [Political Declaration by the European Commission and the Government of the United Kingdom](#), 27 February 2023, p3.

¹⁷⁶ HM Government, [The Windsor Framework: A new way forward](#), CP 806, February 2023, paras 41-42.

¹⁷⁷ European Commission, [Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland / Northern Ireland](#), 27 February 2023.

barrister, has described this as an area which “remains potentially problematic”.¹⁷⁸

1 The role of the CJEU in state aid cases

Article 12(4) of the Northern Ireland Protocol provides for jurisdiction of the Court of Justice of the EU (CJEU), including over the interpretation of EU state aid law. Under EU State aid law, the European Commission has enforcement powers. All its decisions are subject to judicial review by the CJEU.

For example, the UK can bring an appeal before the CJEU against a state aid decision of the Commission regarding UK state aid covered by the Protocol. Private beneficiaries of state aid can challenge before the Court the Commission’s decisions directly addressed to them.¹⁷⁹

The Commission, on the other hand, can order suspension of unlawful state aid or recovery of the financial support from its beneficiary. The UK would be responsible for the recovery. In case of a failure to comply with a recovery decision, the Commission can refer the matter to the CJEU.

A procedure against the UK would be similar to a procedure against a Member State. The CJEU can ultimately impose a lump sum or a penalty payment in accordance with Article 260 TFEU.¹⁸⁰ UK courts can refer state aid cases to the CJEU asking for a preliminary ruling regarding the interpretation of EU state aid law.¹⁸¹

Professor Steve Peers of the University of Essex argues that there is little reason to retain the original State aid rules in the Protocol given the Trade and Cooperation Agreement contains subsidy control provisions and the UK has passed the Subsidy Control Act.¹⁸² Harry Gillow, a public and EU law barrister, states on Conservativehome.com there would be space for further compromise on State aid, adding:

Notably, though, the EU has not recognised the regime in the Subsidy Control Act 2022 as equivalent to the EU regime, such that changes could be made to Article 10 of the Protocol to allow the new UK regime to apply in Northern Ireland. There’s scope for more progress to be made here.¹⁸³

¹⁷⁸ Alexander Horne, [The Windsor Framework: a new hope or a great betrayal?](#) UKandEU, 2 March 2023

¹⁷⁹ Matthew Levitt, Hogan Lovells LLP, [Litigation before the EU Courts in competition and State aid cases](#), Practical Law - Competition, accessed 8 March 2023.

¹⁸⁰ [Council Regulation \(EU\) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union](#), OJ L 248, 24 September 2015, p9.

¹⁸¹ [Preliminary ruling proceedings – recommendations to national courts](#), EurLex, summaries of EU legislation, accessed 9 March 2023.

¹⁸² Steve Peers, [The Windsor Framework: limiting the scope of EU law in Northern Ireland in practice, though not in theory \(part 1\)](#), EU Law Analysis blog, 4 March 2023.

¹⁸³ Harry Gillow, [No compromise is perfect, but Sunak’s deal provides the tools for making further progress on Northern Ireland](#), Conservativehome.com, 3 March 2023.

John Larkin KC, former Attorney General of Northern Ireland, has provided [legal advice on the Windsor Framework for the think tank The Centre for the Union](#). According to his analysis, State aid granted to beneficiaries based in Northern Ireland is more likely to be restricted by EU State aid law than that granted to beneficiaries based in Great Britain. That is, “the arrangements contained in the Protocol (and now proposed) with respect to state aid offend the same footing protection in Article VI of the Acts of Union 1800”.¹⁸⁴

¹⁸⁴ [Windsor Framework Legal Advice](#), Centre for the Union website, 1 March 2023, p4.

7

Governance and dispute settlement

The Withdrawal Agreement set out a dispute settlement mechanism, involving possible recourse to independent arbitration for resolving differences between the UK and EU over how the Agreement is implemented (see below). This applies to the Northern Ireland Protocol as well as other parts of the Withdrawal Agreement (WA). However, the Northern Ireland Protocol also gives the EU institutions powers over its enforcement akin to those they have over EU Member States. This includes a power for the European Commission to take legal action, and a power of the Court of Justice of the EU (CJEU) to issue rulings on compliance.¹⁸⁵

The UK Government's Command Paper on the Northern Ireland Protocol in July 2021 described it as “highly unusual in international affairs for one party to a treaty to subject itself to the jurisdiction of the institutions of the other”. It said the starting point for reform of the governance arrangements should be a “return to a normal treaty framework, similar to other international agreements” including the UK-EU Trade and Cooperation Agreement “in which governance and disputes are managed collectively and ultimately through international arbitration”.¹⁸⁶

7.1

Enforcement of treaty obligations by the EU institutions

Article 12(4) of the Northern Ireland Protocol states that EU institutions and bodies shall have “the powers conferred upon them by Union law” in relation to Article 12 (2), Article 5 and Articles 7 to 10 of the Protocol. These cover exchange of information; the provisions on customs and movement of goods relating to Northern Ireland; technical regulations, VAT and excise law, electricity markets, and State aid law as applicable to Northern Ireland. Article 12 (4) specifies that, in particular, the CJEU shall have the jurisdiction provided for in the EU Treaties in relation to these provisions. Article 12 (5) specifies that EU acts adopted in relation to these provisions will have the same effect in relation to the UK as they would in the Member States of the EU.¹⁸⁷

¹⁸⁵ See Commons Library briefing paper 9016, [The UK-EU Withdrawal Agreement: dispute settlement and EU powers](#).

¹⁸⁶ UK Government, [Northern Ireland Protocol: the way forward](#), CP 502, July 2022 (PDF).

¹⁸⁷ See Section 4 of Commons Library briefing paper 9016, [The UK-EU Withdrawal Agreement: dispute settlement and EU powers](#).

Infringement procedure

These provisions mean that the European Commission can take legal action against the UK where it believes the UK is not correctly implementing Article 12 (2), Article 5 and Articles 7 to 10 of the Protocol. The European Commission can do this under the “infringement procedure” set out in [Article 258 of the Treaty on the Functioning of the EU \(TFEU\)](#) in the same way as it would if it considered that an EU Member State was not correctly implementing EU law.

The [different stages of the infringement procedure](#) involve a European Commission request for information (a formal notice), followed by a formal request to comply with EU law (a reasoned opinion). Where a state does not comply with this request, the Commission may decide to refer the matter to the CJEU. Under [Article 260 TFEU](#) where the CJEU finds that a Member State has failed to fulfil an obligation under the EU Treaties (or in the case of the UK, the relevant articles of the Northern Ireland Protocol), the State shall be required to take necessary measures to comply with the judgment of the Court. Where the Commission considers that the State has not complied with the judgment it can bring the case before the CJEU again. The CJEU can then impose [a lump sum fine and/or penalty payment](#) (an ongoing payment for periods of non-compliance calculated on the basis of a [daily rate](#)) on the non-complying State.¹⁸⁸

EU use of infringement procedure for UK breaches of Protocol obligations

The European Commission launched legal action against the UK using the procedure set out above in March 2021 over what it described as a breach by the UK of the substantive provisions of the Northern Ireland Protocol, as well as the good faith obligation under the Article 5 of the WA.¹⁸⁹ This was paused and then later relaunched in June 2022, alongside two new proceedings relating to UK implementation of the Protocol, following the UK’s publication of the Northern Ireland Protocol Bill.¹⁹⁰ Additional Commission proceedings relating to UK implementation of the Protocol were launched in July 2022.¹⁹¹

¹⁸⁸ See Box 1 in Section 3 of Commons Library briefing paper 9016, [The UK-EU Withdrawal Agreement: dispute settlement and EU powers](#) for a more detailed overview of the infringement procedures. See also.

¹⁸⁹ European Commission, [Withdrawal Agreement: Commission sends letter of formal notice to the United Kingdom for breach of its obligations under the Protocol on Ireland and Northern Ireland](#), 15 March 2021.

¹⁹⁰ European Commission, [Commission launches infringement proceedings against the UK for breaking international law and provides further details on possible solutions to facilitate the movement of goods between Great Britain and Northern Ireland](#), 15 June 2022.

¹⁹¹ European Commission, [Q&A: four new infringement procedures against the UK](#), 22 July 2022.

7.2

UK-EU Windsor Political Declaration commitment to resolving disputes

The UK-EU Windsor Political Declaration on 27 February 2023, stated that in recognition of the new arrangements set out in the Windsor Framework, the UK Government would be stopping the process of the Northern Ireland Protocol Bill. The new arrangements, when implemented, also meant “that there will no longer be grounds” for the existing Commission legal proceedings against the UK relating to the Protocol.¹⁹²

The Political Declaration also stated that the UK Government and European Commission commit “to taking all possible steps to address future disputes over the operation of these arrangements through engagement in the Withdrawal Agreement Joint Committee before seeking dispute settlement”.¹⁹³

In its Q&A on the Windsor Framework, the European Commission states that there is “no change” to the role of the CJEU and that it “remains the sole and ultimate arbiter of EU law”. However, it refers to the EU-UK commitment “to discuss any issues concerning the operation of the Protocol within the joint structures of the Withdrawal Agreement”, including the Joint Committee, the Specialised Committee on the Protocol and the Joint Consultative Working Group and states that they “will make every attempt, through dialogue, to arrive at mutually satisfactory resolutions of matters that may arise in the implementation of the Protocol”.¹⁹⁴

The UK Command Paper on the Windsor Framework emphasises that the new Framework “removes 1,700 pages of EU law”, and takes with it any ECJ interpretation and oversight in those areas” and stresses that both the UK and EU have been clear in the Political Declaration that the Protocol, as amended “will be subject to the general principles of public international law as set out under the Vienna Convention on the Law of Treaties”. It states that this “underlines that the fundamental underpinning of this arrangement is in international law, not EU law and the EU institutions” (paragraph 57).¹⁹⁵ It also states in relation to the “Stormont Brake” (see below) that its use “can only be challenged through independent arbitration mechanisms, not the [CJEU] - removing the ultimate authority of the [CJEU] in areas in which it would affect day-to-day lives”.¹⁹⁶

¹⁹² UK Government [Political Declaration by the European Commission and the Government of the United Kingdom](#), 27 February 2023 (PDF).

¹⁹³ As above.

¹⁹⁴ European Commission, [Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland / Northern Ireland](#), 27 February 2023.

¹⁹⁵ UK Government, [The Windsor Framework: A new way forward- Command Paper](#), CP 806, February 2023.

¹⁹⁶ See point i, in the summary of the Command Paper.

It is not clear how the Government’s figure of 1700 pages of EU law being removed from the Protocol that is stated above was reached. Some sections of relevant EU laws have been permanently disapplied within Northern Ireland. For example, the provisions of the VAT Directive on the VAT registration threshold for smaller businesses, and the “import one stop shop”, will be removed from the Protocol.¹⁹⁷

But some EU laws are only disapplied in certain specific circumstances and so will still form part of the relevant Annexes. For example, certain Sanitary and Phytosanitary regulations are disapplied for goods that move into NI from GB through the green lane but will still apply for those moving through the red lane, and to goods produced in Northern Ireland itself.¹⁹⁸

The Government appears to acknowledge that the 1700 pages of EU law it says are removed from the Protocol are only removed in certain circumstances. Lord Dodds, a DUP Peer, asked the Government “which EU laws will be disapplied as a result of the Windsor Framework?”, Lord Caine, from the Northern Ireland Office, replied that the Framework “disapplies swathes of EU law in Northern Ireland—too much to list here in full”. Lord Dodds repeated his request for a list of the laws and regulations that have been disapplied, stating:

If they know that it is 1,700 pages, and swathes, they must have the list of laws and regulations. In not publishing them, I fear that they are running into the danger of allowing people to think that the reason that they are not publishing the list is that the vast bulk of the laws in annexe 2 of the protocol, which apply the single market and customs union rules of the EU to Northern Ireland without consent, will remain, and that the Stormont brake—such as it is, with all of its defects—does not apply to them.¹⁹⁹

Lord Caine acknowledged that the situation was “complex”, and that “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”. He assured Lord Dodds, however, that “for example, with annexe 1 of the EU regulations covering SPS rules to accommodate Northern Ireland—I have it here—67 EU rules are now disapplied”.

Professor Steve Peers states that “while it is technically inaccurate for the UK government to claim that the agreement ‘scraps’ 1700 pages of EU law from applying to Northern Ireland, it is fair to say that in many cases that law will no longer apply de facto, even if it applies de jure”.²⁰⁰

¹⁹⁷ Respectively, elements of the VAT Directive 2006/112/EC introduced by Council Directive 2020/285 and by Council Directive 2017/2455. See Section 5.2 for further details.

¹⁹⁸ See Article 1(2) of the proposed SPS Regulation: European Commission, [Proposal for a Regulation of the European Parliament and of the Council – Sanitary and Phytosanitary measures](#), 27 February 2023.

¹⁹⁹ HL Deb, [Windsor Framework](#), Volume 828, C686, 7 March 2023.

²⁰⁰ EU law analysis, Steve Peers, [The Windsor Framework: limiting the scope of EU law in Northern Ireland in practice, though not in theory \(part 1\)](#), 4 March 2023,

For discussion of the CJEU’s jurisdiction over the Stormont Brake see [section 8.6](#).

7.3 Withdrawal Agreement dispute settlement process

The WA dispute settlement process is set out in Article 169 to 181 of the Agreement. Article 169 provides that the EU and UK “shall endeavour” to resolve any dispute regarding the interpretation and application of the WA by entering into consultations in the Joint Committee “in good faith, with the aim of reaching a mutually agreed solution”.

Article 170 provides that where no mutually agreed solution has been reached within three months of one of the parties notifying that it wishes to commence consultations, then the UK or EU may request the establishment of an arbitration panel. The dispute can be referred to the arbitration panel earlier if both sides agree.

The panel will have five members: two each from the UK and EU listed nominees, and one from a list of jointly proposed chairs. This follows the establishment of a list of potential panel members, all of whom should have judicial expertise and be independent of the UK Government, the EU institutions and EU Member State governments (Article 171).

The panel will normally give its ruling within 12 months of being established. The panel chair will notify the two parties if this is not possible within the timeframe and explain why. Either side can submit a request for the case to be considered urgent, and if the panel agrees, then it will try and rule within six months (Article 173). The arbitration panel will “make every effort” to take decisions by consensus. Where it cannot reach a consensus, a majority vote will be taken (Article 180).

CJEU role in dispute settlement process

Under Article 174, where any dispute between the parties involves questions regarding the interpretation of concepts or provisions of EU law, the arbitration panel must refer questions regarding that interpretation to the CJEU. The CJEU’s ruling on the matter will be binding on the arbitration panel. The time limits applicable to arbitration are suspended where a reference to the CJEU has been made. The arbitration panel must await the CJEU’s ruling and is required to give a ruling only after 60 days have passed following receipt of the CJEU’s ruling.

Article 175 stipulates that the arbitration panel’s rulings are binding on the EU and UK, and that both parties “shall take any measures necessary to comply in good faith with the arbitration panel ruling”.²⁰¹

Compliance with arbitration and possible cross-retaliation in the TCA

Article 178 provides for “temporary remedies” that the complainant can apply if the other party does not comply with the panel ruling within a reasonable period of time. The complainant can ask the panel to impose a “lump sum or a penalty payment” on a non-complying respondent; the panel will determine the seriousness of the breach of obligations and the duration of any non-compliance when setting such a sum or payment.

If the sum or payment has not been paid one month after the arbitration panel has determined it, or if the respondent persists in not complying with the panel’s ruling on the dispute six months after the initial ruling then Article 178(2) provides that the complainant would then be entitled to suspend any part of the WA temporarily, except Part Two (citizens’ rights provisions). It can also suspend parts of any other agreement between the UK and the EU. The suspension of obligations is intended to be temporary and applied until the party has complied or if the two parties have otherwise settled the dispute.

The later Trade and Cooperation Agreement (TCA) recognised the possibility of cross-retaliation from disputes under the earlier WA. Cross-retaliation would apply to most of Part Two of the TCA which include provisions on tariff-free trade (meaning tariffs could be put on some goods) and cooperation on road transport, aviation and fisheries.²⁰²

²⁰¹ For a more detailed overview of the WA dispute settlement process see Section 2 of Commons Library briefing paper 9016, [The UK-EU Withdrawal Agreement: dispute settlement and EU powers](#).

²⁰² See section 4.2 of Commons Library briefing paper 9139, [The UK-EU Trade and Cooperation Agreement: governance and dispute settlement](#). See also Commons Library Insight, [Governing the new UK-EU relationship and resolving disputes](#), 24 February 2021.

8 Stormont Brake: Role of the devolved institutions

8.1 Summary

The [Windsor Framework](#) and related Regulations set out the procedure for 30 Members of the Legislative Assembly (MLAs) from at least two parties to notify the UK Government of their objection to the amendment or replacement of certain EU laws which apply in Northern Ireland under the original Protocol. These mainly relate to goods rules, but not to amended or replaced laws concerning State aid, the Single Electricity Market or most of the EU's customs code.

The MLAs must satisfy certain conditions, including that the amending or replacement EU law “significantly differs” in its content or scope from the original and would have a “significant impact specific to everyday life” of communities in Northern Ireland which is “liable to persist”. If the conditions in the Regulations have been met, then this would place a legal obligation on the UK Government to trigger the “Stormont Brake”.

The UK Government would do so by notifying the EU in writing via the Joint Committee that the Brake has been applied. At that point the relevant EU law would not apply in Northern Ireland. Even if the UK and EU were subsequently to agree (in the Joint Committee) that it should apply in Northern Ireland, it could only do so with cross-community assent in the Assembly, except in “exceptional” and other “highly limited” circumstances.

8.2 The existing consent mechanism

Article 18 of the original [Protocol on Ireland and Northern Ireland](#) provided for a new mechanism on “democratic consent”. This gave the Northern Ireland Assembly a voice on the long-term application of EU laws on goods and customs, the Single Electricity Market, VAT and State aid.

This meant that four years after the Protocol began to apply on 1 January 2021, the Assembly could give its consent to the continued application of relevant EU law or vote to discontinue its application. This requires a simple majority of MLAs rather than cross-community support. Thereafter, every four years the Assembly can vote on the continued application of relevant EU law. If, however, there was cross-community support for the continued application of relevant EU law, the next vote will take place eight years later. If the

Assembly votes to discontinue the application of the Protocol, then Articles 5-10 will cease to apply two years later. It is not entirely clear what would happen in this scenario, but the Joint Committee is requested to make recommendations to the EU and UK on “necessary measures” to remedy the situation and the Committee “may seek opinion” on these measures from Northern Ireland’s devolved institutions.²⁰³

8.3

How the Protocol applied new and updated EU legislation to Northern Ireland

The original Protocol (ie that unamended by the Framework) provided for Northern Ireland’s continuing access to the EU’s single market for goods by applying certain EU laws to Northern Ireland.

Article 5 applies single market goods regulations and the EU customs code (relevant laws are set out in Annex 2), Article 8 applies EU VAT and excise duties regulations (set out in Annex 3), Article 9 applies EU wholesale electricity markets regulations (adding them to Annex 4), and Article 10 applies EU State aid regulations (adding them to Annex 5).²⁰⁴

Process for when these EU laws are updated or amended

Article 13(3) of the original Protocol states that where the Protocol makes reference to an EU law “that reference shall be read as referring to that Union act as amended or replaced”. That meant that updates and amendments to the EU laws were automatically applied in Northern Ireland, without any involvement in their negotiation or adoption.

Joint Committee adoption of new EU laws

Article 13(4) sets out the process for how new EU laws which fall within the scope of the Protocol but do not amend or replace existing laws referred to in it are to apply in Northern Ireland. In the areas of goods regulations, VAT, electricity markets and State aid (Articles 5-10), Northern Ireland is “dynamically aligned” to the EU. This means that where the EU adopts new

²⁰³ For a full explanation of the democratic consent mechanism see Commons Library Briefing Paper CBP8713, [The October 2019 EU-UK Withdrawal Agreement](#), pp38-42. The mechanism was given legal effect via [The Protocol on Ireland/Northern Ireland \(Democratic Consent Process\) \(EU Exit\) Regulations 2020](#), a Regulation made under the European Union (Withdrawal) Act 2018.

²⁰⁴ The Protocol’s Article 2 also commits the UK to ensuring that there is no reduction following the UK’s exit from the EU in the rights and safeguards set out in the Belfast/Good Friday Agreement which were underpinned by EU law, including six core EU equality laws, which applied to perpetuity to Northern Ireland and are set out in Annex 1. Any updates or amendments to these six laws will be read to apply to Northern Ireland as set out in Article 13 (3). There is not “dynamic alignment” in this area though, ie if the EU adds new equality laws, rather than updating or amending them, then these will not apply to Northern Ireland. Article 2 is unaffected by the Framework.

laws in the relevant areas of the Protocol, they will ordinarily apply in Northern Ireland to maintain access to the EU's single market in goods.

Great Britain's freedom to diverge from EU laws post-Brexit, and the requirement for Northern Ireland to dynamically align to relevant new single market laws, means that over time there will likely be growing divergence between Northern Ireland and Great Britain.

This issue has been of particular concern to Northern Ireland's Unionist community.

Process of adopting new EU laws

Article 13(4) sets out the following process for adopting new EU laws:

- When the EU adopts a new law that falls within the scope of the Protocol, it is required to inform the UK through the Joint Committee.
- Either side can request an exchange of views on a new law, which should be completed within a six-week period.
- As "soon as reasonably practical" after the EU informs the UK of a new EU law the Joint Committee should either:
 - adopt a decision to add the new law to the relevant Protocol annex, or
 - where they cannot both agree, ie the UK objects, "examine all further possibilities to maintain the good functioning of this Protocol and take any decision necessary to this effect".
- If the new act is not added to the Protocol or an agreement reached to ensure the good functioning of the Protocol, the EU is empowered, after notifying the UK, to take "appropriate remedial measures". These remedial measures cannot start until at least six months after the EU first informs the UK of the new law (or longer if the new law has not yet been implemented in the EU).

Notification of proposed new EU laws through the Joint Consultative Working Group

While under 13(4) the EU is not required to give formal notice to the Joint Committee about new EU laws until they have been adopted, there are processes to give the UK and Northern Ireland prior notice of upcoming new EU laws that will likely apply under the Protocol.

Article 15 of the Protocol established a Joint Consultative Working Group (JCWG), a body that sits under the Specialised Committee on the Protocol which reports to the Joint Committee.

The JCWG is a forum for the exchange of information and mutual consultation between the EU and the UK, (though it does not have any powers to take binding decisions). Specifically, Article 15 sets out that the EU and the UK shall through the JCWG:

- exchange information about the implementation of EU laws that apply under the Protocol; and
- the EU shall inform the United Kingdom about planned new EU acts within the scope of this Protocol, and EU acts that amend or replace the EU laws the Protocol applies.²⁰⁵

As part of the [January 2020 New Decade, New Approach agreement](#), which restored the devolved institutions in Northern Ireland, the UK Government committed to ensuring that representatives from the Northern Ireland Executive were “invited to be part of the UK delegation in any meetings of the UK-EU Specialised or Joint Committees discussing Northern Ireland specific matters which are also being attended by the Irish Government as part of the European Union’s delegation”. This commitment did not include meetings of the JCWG.²⁰⁶

8.4 “Democratic deficit” and concerns raised by the UK Government

In July 2021, the House of Lords Protocol on Ireland/Northern Ireland Sub-Committee highlighted the:

pervasive sense that the Protocol creates a democratic deficit, in that significant aspects of EU law with wide-ranging political and economic implications apply to Northern Ireland subject neither to UK Government participation in the EU institutions, nor to consent from parliamentarians either at Westminster or Stormont.²⁰⁷

In September 2021, the academics Professors Katy Hayward and David Phinnemore also advocated for involving the democratic institutions and the people of Northern Ireland more directly in the workings of the Protocol, arguing that “doing so should improve their perceived legitimacy”. They suggested greater transparency around the workings of the Protocol’s Specialised Committee and the Joint Consultative Working Group (JCWG), as

²⁰⁵ Article 15 also obligates the EU to provide to the UK all information it considers relevant to allow the United Kingdom to fully comply with its obligations under the Protocol; and that the UK shall provide to the EU “all information that Member States are required to provide to one another or to the institutions, bodies, offices or agencies of the Union pursuant to the Union acts listed in the Annexes to this Protocol”.

²⁰⁶ For more information on the arrangements see correspondence between the [Executive Office and the Northern Ireland Assembly’s Executive Office Committee](#) (PDF), 24 June 2020.

²⁰⁷ [House of Lords – Report from the Sub-Committee on the Protocol on Ireland/Northern Ireland: Introductory report – European Affairs Committee](#), HL Paper 55, 29 July 2021.

well as expert panels to inform the deliberations of the JCWG, and better consultation mechanisms between the Northern Ireland Executive Office and the Joint-Committee Co-Chairs.²⁰⁸

UK Government proposals

In its [July 2021 Command Paper on the Protocol](#), the UK Government proposed “more robust arrangements” for consultation with Northern Ireland’s devolved institutions as well as society and businesses on EU laws applying to Northern Ireland. Although it did not provide any details on how such arrangements should work.²⁰⁹

EU proposals

The EU responded in October 2021 as part of a package of proposed changes to the Protocol. The measures included:

- Improving the exchange of information with stakeholders and authorities in Northern Ireland with regard to the implementation of the Protocol and relevant EU measures;
- Establishing “structured dialogues” between Northern Ireland stakeholders (authorities, civic society and businesses) and the Commission, with the participation of experts;
- Inviting Northern Ireland stakeholders to attend some meetings of the Specialised Committees;
- Creating a “stronger link” between the Northern Ireland Assembly and the EU-UK Parliamentary Partnership Assembly (set up by the Trade and Cooperation Agreement), though “further contacts with Parliament colleagues would be needed to see how the ideas of a Northern Ireland sub-structure could work”;²¹⁰ and
- Setting up a website to show in a clear and comprehensive way the EU legislation applicable in Northern Ireland.²¹¹

²⁰⁸ [‘Northern Ireland’s voice on the protocol needs to be heard’](#), Irish Times, 5 September 2021.

²⁰⁹ HM Government, [‘Northern Ireland Protocol: the way forward’](#) (PDF), 21 July 2021, P21, Para 71.

²¹⁰ The European Parliament Co-Chair of the Parliamentary Partnership Assembly Nathalie Loiseau subsequently stated that [this was a matter for the UK and EU Parliaments, not the Commission](#).

²¹¹ European Commission, [Protocol on Ireland and Northern Ireland – Non-Paper – Engagement with Northern Ireland stakeholders and authorities](#), 13 October 2022.

8.5

The “Stormont Brake”

Under Article 18 of the Windsor Framework (or new Article 13(3a) of the Protocol), the existing democratic consent process (outlined above) will be supplemented with an additional mechanism.

The [Political Declaration by the European Commission and the Government of the United Kingdom](#) refers to “a new emergency brake mechanism – the Stormont Brake”. The Declaration claims it would allow:

Members of the Legislative Assembly in Northern Ireland to stop the application in Northern Ireland of amended or replacing EU legal provisions that may have a significant and lasting impact specific to the everyday lives of communities there. This mechanism would be triggered under specific circumstances in a very well-defined process. The Government of the United Kingdom would operate the mechanism in a way that is consistent with the safeguards set out in the 1998 [Belfast/Good Friday] agreement and its subsequent implementation agreements.²¹²

According to the UK Government’s Command Paper, [The Windsor Framework: A new way forward](#), as the existing consent vote happens only every four or eight years it “cannot by its nature provide for democratic oversight of individual laws”. The Government also “recognises that there is an unanswered question about how to provide a say to MLAs in a scenario in which a cross-community consensus has not been achieved”.

Whereas under the existing Protocol changes to EU customs, goods, and agriculture rules applied automatically in Northern Ireland under Article 13(3), under the new emergency brake mechanism if 30 MLAs from at least two parties raise a notification then this would “enable a sovereign UK Government decision to veto the application of a new rule – and the accompanying ECJ interpretation and oversight – to Northern Ireland permanently”.

The Stormont Brake will only apply to changes to EU goods, agriculture and some customs laws (also known as rules or acts) within the scope of the original Protocol.²¹³ There is no process for the Assembly or UK Government to object to the amendment or replacement of EU laws outside the scope of the Brake, that is those which relate to State aid, the Single Electricity Market or most of the EU’s customs code.

The Leader of the House of Commons announced in the [Business Statement published on 16 March](#) that the House would debate a “motion to approve a

²¹² HM Government, [Political Declaration by the European Commission and the Government of the United Kingdom](#), 27 February 2023.

²¹³ That is, only to measures covered in parts of [Annex 2](#) of the Protocol (which relate to the EU Single Market in goods). The only exceptions to this is a very small number of instruments, such as EU-third country agreements or anti-fraud co-operation, where the concept of a veto is technically unworkable or otherwise not applicable.

statutory instrument relating to the Stormont Brake in the Windsor Framework” on 22 March 2023.

8.6 The Regulations

The draft [Windsor Framework \(Democratic Scrutiny\) Regulations 2023](#) were published on Monday 20 March. These would insert a new [Schedule 6B](#) into the Northern Ireland Act 1998.²¹⁴ This will implement in domestic UK law those aspects of the Windsor Framework relating to the involvement of Northern Ireland Assembly.

The new [Schedule 6A](#) added to the Northern Ireland Act 1998 in 2020 (entitled “EU Withdrawal: Democratic Consent Process”) continues to apply and is unchanged by these Regulations (see **Section 8.2** above).

Context for Regulations to take effect

The draft Regulations will be voted on by both Houses of Parliament on 22 March. If approved, they can then be made by the Secretary of State. They will come into effect a day after being made,²¹⁵ but the Stormont Brake will not become available until the Northern Ireland Executive is “restored and is operational, including with a First Minister and deputy First Minister in post, and the Northern Ireland Assembly is sitting regularly”.²¹⁶

Thereafter, there is the potential for the Brake to be used when the Assembly and Executive are not fully functioning, so long as the MLAs wishing to operate the Brake are “individually and collectively seeking in good faith to fully operate the institutions, including through the nomination of [Executive] Ministers and support for the normal operation of the Assembly”.²¹⁷

The Northern Ireland Assembly and Executive have not been fully functioning since February 2022.²¹⁸

The UK Government’s [Explanatory Memorandum](#) on the Regulations also states that for “the avoidance of doubt” the process set out between the UK Government and the institutions in Northern Ireland within those Regulations

²¹⁴ The Regulations have been made under powers conferred by section 8C(1) and (2) of, and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018.

²¹⁵ See [Regulation 1](#).

²¹⁶ [Explanatory Memorandum, The Windsor Framework \(Democratic Scrutiny\) Regulations 2023](#), para 7.16.

²¹⁷ [Unilateral Declaration by the United Kingdom: Involvement of the institutions of the 1998 Agreement](#), 27 February 2023.

²¹⁸ At that point the Democratic Unionist Party withdrew its First Minister (Paul Givan MLA) from office in protest over the original Protocol. This meant Michelle O’Neill, the Sinn Féin deputy First Minister, also ceased to hold office.

“falls exclusively” within the Strand One arrangements in the 1998 [Belfast/Good Friday Agreement](#).²¹⁹

8.7 The Regulations paragraph by paragraph

Part 1 – General descriptions

Paragraph 1 of the new Schedule 6B provides for general descriptions and interpretative points of detail.

Part 2 – Windsor Framework Democratic Scrutiny Committee

Paragraphs 2 and 3 of new Schedule 6B establish a new **Windsor Framework Democratic Scrutiny Committee** (“the Committee”) of the Northern Ireland Assembly and set out its functions.

Paragraph 3(2) provides that in “order to fulfil its purpose” the functions of the Committee include (emphasis added):

- (a) the examination and consideration of **new** EU acts and **replacement** EU acts,
- (b) the conduct of inquiries and publication of reports in relation to **replacement** EU acts,
- (c) engagement with businesses, civil society and others as appropriate in relation to **replacement** EU acts,
- (d) engagement with His Majesty’s Government in the United Kingdom in relation to **replacement** EU acts,
- (e) engagement with Ministers and Northern Ireland departments in relation to **replacement** EU acts,
- (f) the collation and publication of evidence collected as part of its other activities, and
- (g) dealing with other matters (including legislative proposals which may become **new** EU acts or **replacement** EU acts) which the Committee considers to be connected with its purpose or other functions.

The Unilateral Declaration includes a further condition, that the 30 MLAs:

have met the same requirements as those set out in Annex B of Part 2 of the New Decade, New Approach Agreement, namely that the notification is only

²¹⁹ [Explanatory Memorandum, The Windsor Framework \(Democratic Scrutiny\) Regulations 2023](#), para 7.6

being made in the most exceptional circumstances and as a last resort, having used every other available mechanism.²²⁰

Paragraph 4 of new Schedule 6B provides that membership of the Committee is to be determined in accordance with the Standing Orders of the Northern Ireland Assembly as they apply to a standing committee of the Assembly.

Standing Order 52 of the Assembly requires that standing committees shall be constituted to reflect “as far as possible the party composition of the Assembly”, except in so far as individual parties or individual members may waive their rights. Standing committees consist of 11 members, including the chairperson and deputy chairperson. Seats are allocated on a proportional basis, ie to reflect the proportion of MLAs held by each party in the Assembly. The quorum for a standing committee to take a decision is five MLAs and such a decision shall be decided by a simple majority (unless otherwise provided for in the Standing Orders).²²¹

Paragraph 6 provides that the Committee “may” be notified if a **new** EU law has been proposed by the European Commission, or a **replacement** law has been proposed or published by the Commission. The UK Government can provide this notification to the chair or clerk of the Committee, or to the clerk or Speaker of the Assembly.²²²

The Explanatory Memorandum states that **replacement** EU laws are “**amended** or **replaced** EU goods rules, which would otherwise be applied automatically in Northern Ireland” under the original Northern Ireland Protocol.²²³ The UK already has a veto on the Joint Committee regarding all **new** EU laws that are proposed to be added to the Windsor Framework (ie the amended Protocol) under Article 13(4) (see **Section 8.3** above).

According to the Command Paper, even if only a limited part of an existing EU law (a Directive or Regulation) is updated or amended, the Brake can still be used if the effect of that part is “significant”, its impact “damaging”, and it can be “severed” from the other parts of the Directive or Regulation. Once the UK notifies the EU that the Brake has been triggered, the law in question will not apply in Northern Ireland. It can then only be subsequently applied if the UK and EU agree via the Joint Committee. The Command Paper calls this “an unequivocal veto – enabling the rule to be permanently disapplied”.²²⁴

As the academics Dr Viviane Gravey and Dr Lisa Claire Whitten have observed, the Brake is “novel” from the perspective of both EU external relations and UK constitutional arrangements:

²²⁰ [Unilateral Declaration by the United Kingdom: Involvement of the institutions of the 1998 Agreement](#), 27 February 2023, para 1(c)(i).

²²¹ [Standing Order 52, Northern Ireland Assembly](#).

²²² The SI refers to the “Presiding Officer” of the Assembly, a term which is provided for in the Northern Ireland Act. However, the Assembly generally uses the expression “Speaker”.

²²³ [Explanatory Memorandum, The Windsor Framework \(Democratic Scrutiny\) Regulations 2023](#), para 7.2.

²²⁴ HM Government, [The Windsor Framework: A new way forward](#), CP 806, 27 February 2023.

Both sides have compromised. The UK have conceded that the default setting is for EU law changes to apply in Northern Ireland just as the EU have conceded that, on occasion, this may not be the case.²²⁵

Under **Paragraph 7** of new Schedule 6B, following receipt of a notification, the Assembly Committee may monitor the progress of the proposed new or replacement EU law and publish interim reports. The Committee may also decide to hold an inquiry into that EU law.

In reaching a decision in this respect, then under **Paragraph 8** the Committee (emphasis added):

- (a) must have regard to whether it appears likely that the **replacement** EU act:
 - (i) **significantly differs** (in whole or in part) from the content or scope of the EU instrument which it amends or replaces, and
 - (ii) would have a **significant impact specific to everyday life of communities** in Northern Ireland in a way that is **liable to persist**, and
- (b) may have regard to any other matters the Committee considers appropriate.

A decision must be made by the Committee no later than five working days after the day on which the notification has been made. This decision must be published. A failure to make a decision will be treated as a decision “not to hold an inquiry or not to continue an inquiry which had already begun”.

Under **Paragraph 9**, any Committee inquiry must seek “substantive discussion and engagement” with:

- (a) His Majesty’s government in the United Kingdom,
- (b) a Minister or Northern Ireland department, and
- (c) to the extent the Committee considers appropriate, representatives of businesses and civil society affected by the new EU act or replacement EU act (or who would be so affected if the act enters into force).

A Minister or Northern Ireland department must comply with any “reasonable request” for information made by the Committee relevant to such an inquiry.

Paragraph 10 provides that the Committee must publish an inquiry’s conclusions into a replacement EU law no later than 15 days before the end of the relevant scrutiny period. Within the same time frame, the Committee must also publish any relevant minutes and evidence conducted in relation to its inquiry, subject to appropriate redactions.

The Explanatory Memorandum states that:

²²⁵ Dr Viviane Gravey and Dr Lisa Claire Whitten, [New Governance for Dynamic Alignment under the Windsor Framework – Brexit & Environment](#), Brexit & Environment website, 8 March 2023.

The 15 working day deadline is intended to provide as much time as possible for the Committee to report, while providing due time for the use of the Brake to be notified to the Government by MLAs, and for the Government to notify the Commission subsequently.²²⁶

The Memorandum also states that it would be “anticipated that any use of the Brake would ordinarily follow the Committee’s work, where it does decide to conduct an inquiry, rather than pre-empting it”.²²⁷

Part 3 – Procedure for Stormont Brake

Part 3 of new Schedule 6B sets out the procedure by which MLAs may seek to prevent the application of a replacement EU law.

Paragraph 11 provides that this process is initiated if the Speaker of the Northern Ireland Assembly is provided with a written notification giving detailed reasons for seeking to prevent the application of a replacement EU law with reference to the requirements in paragraph 1(c) of the Article 13(3a) declaration. Thirty MLAs, excluding the Speaker and Deputy Speakers, can initiate a notification, provided that those 30 include any of the following:

- (a) support drawn from two political parties,
- (b) support drawn from a political party and at least one independent MLA (who must have been **elected** as an independent MLA), or
- (c) support drawn from at least two MLAs who were **elected** as independents.

This threshold is identical to the amended “Petition of Concern” provided for in [section 6](#) of the Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022.²²⁸ The Explanatory Memorandum states that a notification is “transmitted directly from the Assembly to the UK Government and does not require any form of vote or approval in the Assembly more broadly”.²²⁹

Notification must be provided to the Speaker no later than 10 working days before the end of the scrutiny period.

Upon receipt of a notification which satisfies the conditions in Paragraph 11, **Paragraph 12** provides that the Assembly Speaker must communicate that notification to the Secretary of State for Northern Ireland as soon as possible

²²⁶ [Explanatory Memorandum, The Windsor Framework \(Democratic Scrutiny\) Regulations 2023](#), para 7.11.

²²⁷ [Explanatory Memorandum, The Windsor Framework \(Democratic Scrutiny\) Regulations 2023](#), para 7.12.

²²⁸ This Act amended section 42 of the Northern Ireland Act 1998. No party has won 30 or more seats since the Assembly was reduced in size from 108 to 90 MLAs. At the 2022 Assembly election, the DUP won 25 MLAs and the TUV 1, which means those parties would most likely need the support of the UUP in order to trigger the UK’s use of the Stormont Brake.

²²⁹ [Explanatory Memorandum, The Windsor Framework \(Democratic Scrutiny\) Regulations 2023](#), para 7.3. Under a regular “Petition of Concern” process, a cross-community vote would be triggered in the Assembly.

and no later than nine working days before the end of the scrutiny period. Under **Paragraph 13** the Speaker must publish such a notification.

The Explanatory Memorandum states that the nine-day period would provide the UK Government “with sufficient time to take forward its own notification process subsequently”.²³⁰

Under **Paragraph 14** the Secretary of State for Northern Ireland must, before the end of the scrutiny period, accept such a notification if it meets all the requirements in Paragraphs 11 to 13 of the Schedule, Article 13(3a) of the Framework and the accompanying Unilateral Declaration. The possibility of the European Union taking “remedial measures” in accordance with Article 13(4) of the Framework **cannot** be taken into account as a relevant consideration.

Paragraph 15 provides that before the end of the scrutiny period, a UK Government Minister **must** give the European Commission written notification of any notification from MLAs which has been accepted by the Secretary of State. In other words, if all the necessary conditions are met, then the Minister would be under a legal duty to give the European Commission written notice.²³¹

Following such written notice, the UK has committed to “intensive consultations in the Joint Committee” on the relevant EU law.²³² At this stage, the DUP MP Sammy Wilson has suggested the UK Government could “try to persuade the EU not to apply its new law”.²³³

Under new Article 13(3a) of the Protocol, the criteria for the UK to notify the EU mirror those required of MLAs before they can ask the UK Government to apply the Stormont Brake (see **Paragraph 8** above).

A notification must take place within two months of the publication of an updated or amended EU law. If the Brake is triggered, then the law will cease its application in Northern Ireland after two weeks.²³⁴

If the EU considers that the UK’s justification for triggering the Stormont Brake is insufficient, then it may request further explanation within two weeks of the notification. The UK shall provide that further explanation within two weeks of

²³⁰ [Explanatory Memorandum, The Windsor Framework \(Democratic Scrutiny\) Regulations 2023](#), para 7.13.

²³¹ [Explanatory Memorandum, The Windsor Framework \(Democratic Scrutiny\) Regulations 2023](#), para 7.14.

²³² As above.

²³³ [Rishi Sunak’s Brexit deal is more threadbare than reckless Tories will admit](#), Daily Telegraph (£), 4 March 2023.

²³⁴ [Explanatory Memorandum, The Windsor Framework \(Democratic Scrutiny\) Regulations 2023](#), para 7.4.

the EU's request. In this case, the relevant EU law will not apply in Northern Ireland as from the third day after the UK's provision of further explanation.²³⁵

The Explanatory Memorandum states that the operation of the Brake process is “solely an internal one within the United Kingdom, with no role for the European Union”.²³⁶

The academics Dr Viviane Gravey and Dr Lisa Claire Whitten have observed that if the Brake is successfully applied then presumably the relevant EU law would continue to apply “but in its unamended or non-updated version”. They observe that:

Such a scenario could be problematic – raises the prospect of stagnant, legacy EU laws [...] continuing to apply in Northern Ireland where they neither apply in Great Britain nor, in the same form, in Ireland. Thus, activating the brake risks placing Northern Ireland in a position of dual divergence with its two largest external markets while, at the same time, leaving arrangements for oversight and enforcement of the given area of law/policy very unclear.²³⁷

Under **Paragraph 16** of new Schedule 6B, if the Secretary of State decides not to accept a notification, he must “without undue delay” provide written reasons to the Assembly Speaker as to why it is considered that the requirements set out in Paragraph 14(1)(a) to (c) have not been met. These reasons must be given to MLAs who initiated the notification as soon as possible. Such a decision by the Secretary of State does not prevent a separate notification from being made in relation to the same replacement EU law.

As RTÉ Europe editor Tony Connelly notes, it is not clear what would happen to a notification made ahead of the Assembly ceasing to function fully: “Does the Stormont Brake collapse with the institutions, or does it survive and then still apply?”.²³⁸

Part 4 – Ministerial consideration of new EU laws

The Stormont Brake only applies to some EU laws referred to in the Protocol which have been **amended** or **replaced**.

Article 13(4) of the Protocol currently covers the introduction of **new** laws that are within the scope of the Protocol but do not amend or replace laws

²³⁵ HM Government, [Draft Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework](#), 27 February 2023.

²³⁶ [Explanatory Memorandum, The Windsor Framework \(Democratic Scrutiny\) Regulations 2023](#), para 7.5.

²³⁷ Dr Viviane Gravey and Dr Lisa Claire Whitten, [New Governance for Dynamic Alignment under the Windsor Framework – Brexit & Environment](#), Brexit & Environment website, 8 March 2023.

²³⁸ [Windsor Framework: This time it's different?](#), RTÉ website, 11 March 2023.

referred to in the Protocol (see **Section 8.3** above). Professor Steve Peers calls this the “Westminster Brake”.²³⁹

However, the Command Paper recognises that the Northern Ireland Assembly “would potentially have just as strong a set of views on those new rules as those covered by the Brake, not least as they could expand the scope of where EU rules apply in Northern Ireland”. The UK Government has therefore proposed that for new EU laws it would “commit to the same constraints, in statute, as proposed under the Stormont Brake”.²⁴⁰

Part 4 of new Schedule 6B therefore provides for Ministerial consideration of **new** (rather than amended or updated) EU laws in the Joint Committee.

Paragraph 17 provides for the Northern Ireland Assembly to table an “applicability motion” as follows:

That [x] should be added to the Windsor Framework by the United Kingdom and the European Union within the Joint Committee in accordance with Article 13(4) of that Framework.

“[x]” is to be substituted with the title of the relevant new EU law or legal instrument.

Under **Paragraph 18**, a UK Government Minister of the Crown must not agree to a decision of the Joint Committee to add a new EU law to the relevant annex in accordance with Article 13(4) of the Framework unless the Assembly has indicated support for the application of that EU law by passing an applicability motion. The Minister may, however, agree to the adoption of such a decision if:

- (a) there are exceptional circumstances that justify the adoption of the decision in the absence of an applicability motion having been passed, or
- (b) the new EU act would not create a new regulatory border between Great Britain and Northern Ireland.

The Explanatory Memorandum refers to these as “highly limited circumstances”.²⁴¹

If the Minister considers that either of these scenarios apply, then they must make a statement to the UK Parliament explaining their decision.

“Exceptional circumstances” include those in which the Assembly has, as its first business, failed to elect from among its Members a Speaker and Deputy Speakers, or there is no First and deputy First Minister in office. In other words, if the Assembly is not fully functioning (as at present). The Explanatory Memorandum states that “exceptional circumstances” is a “constrained

²³⁹ Steve Peers, [EU Law Analysis: Just Say No? The new ‘Stormont Brake’ in the Windsor Framework](#), EU Law Analysis blog, 5 March 2023.

²⁴⁰ HM Government, [The Windsor Framework: A new way forward](#), CP 806, 27 February 2023

²⁴¹ [Explanatory Memorandum, The Windsor Framework \(Democratic Scrutiny\) Regulations 2023](#), para 7.17.

exception” in that it is “not intended that it would be available for ordinary political or policy preferences”.²⁴²

A “new regulatory border” means regulatory requirements relating to the movement of goods that would:

- (a) materially divert trade, or
- (b) materially impair the free flow of goods.

Under **Paragraph 19**, a notification “may” be made if a **new** EU law is being considered by the Joint Committee under Article 13(4) of the Windsor Framework. Such a notification is made if the UK Government provides this to the chair or clerk of the Committee, or to the clerk or Speaker of the Assembly.

The First and deputy First Minister acting jointly may table an applicability motion (in relation to a **new** EU law) within a period of two weeks beginning with the day on which a notification is made. Other MLAs can only table an applicability motion once this two-week period has expired with no such motion having been tabled.

An applicability motion must be passed with cross-community support. The meaning of cross-community support is provided for in [section 4\(5\)](#) of the Northern Ireland Act 1998. It means either:

- (a) the support of a majority of the members voting, a majority of the designated Nationalists voting and a majority of the designated Unionists voting; or
- (b) the support of 60 per cent of the members voting, 40 per cent of the designated Nationalists voting and 40 per cent of the designated Unionists voting.

A “designated Nationalist” is an MLA designated as a “Nationalist” in accordance with Standing Orders of the Assembly, and “designated Unionist” means an MLA designated as a “Unionist” in accordance with the same Standing Orders.²⁴³

An applicability motion passed with cross-community support must be passed within a period of five weeks beginning with the day on which the notification is made. If an applicability motion has been tabled, the Speaker must select it for debate and a vote in the Assembly no later than the final sitting day of the Assembly before the end of the five-week period.

A UK Government Minister may extend any of the time periods referred to in Paragraph 19 by providing written notification of such an extension to the Speaker of the Assembly.

²⁴² [Explanatory Memorandum, The Windsor Framework \(Democratic Scrutiny\) Regulations 2023](#), para 7.20.

²⁴³ [Standing Order 3\(7\), Northern Ireland Assembly](#).

Professor Steve Peers has observed that the Westminster Brake allows the UK to object:

to the application of new EU laws for any reason at all – there is no need to show a ‘significant impact specific to everyday life’ of Northern Irish communities which is liable to persist, and no link to the criteria set out in the UK’s unilateral declaration on the Stormont Brake. What the two Brakes have in common is what happens after the use of each Brake (Article 13(4) of the protocol). First, the parties must examine the possibilities to keep the protocol functioning by other measures, and may ‘take any decision necessary’ to this end.²⁴⁴

8.8 Arbitration where UK does not apply relevant EU law changes in Northern Ireland

“Stormont Brake” arbitration

The Windsor Framework refers to the possibility that a reference may be made to an arbitration panel in relation to the new “Stormont Brake” introduced by the Framework.

The Explanatory Memorandum for the draft Regulations states that:

The European Union is only able to challenge the use of the Brake after a decision has been made and the rule has been suspended, and may do so only through the normal international arbitration route – not through the Court of Justice of the European Union (which has no role).²⁴⁵

The Windsor Framework includes a Draft Recommendation of the Withdrawal Agreement Joint Committee on Article 13(3)(a) which refers to a possible arbitration panel ruling that the UK has failed to comply with the third subparagraph of the proposed Article 13(3)(a) of the Protocol. This is the provision that the UK should only use the “Stormont Brake” mechanism where the amending/replacing EU act significantly differs from the act it is amending/replacing, and where the amending/replacing act would have a significant and enduring impact on everyday life in Northern Ireland.²⁴⁶

The Draft Recommendation of the Withdrawal Agreement Joint Committee provides that where the arbitration panel has made such a ruling, the EU and UK will agree no later than 30 days after the ruling is notified that the EU

²⁴⁴ Steve Peers, [EU Law Analysis: Just Say No? The new ‘Stormont Brake’ in the Windsor Framework](#), EU Law Analysis blog, 5 March 2023.

²⁴⁵ [Explanatory Memorandum, The Windsor Framework \(Democratic Scrutiny\) Regulations 2023](#), para 7.5.

²⁴⁶ UK Government, [Draft Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework](#), 27 February 2023 (PDF).

amending/replacing act in question will apply from the first day of the second month following the ruling notification.²⁴⁷

Similarly, a Draft Joint UK-EU declaration in the Withdrawal Agreement Joint Committee on Article 13(3)(a), published as part of the Windsor Framework, refers to a possible arbitration panel ruling that the UK has failed to comply with Article 5 of the WA (committing the two parties in “[full mutual respect and good faith](#)” to implementing the WA and refraining from measures that jeopardise its objectives) when making a notification under Article 13(3)(a). It states that in such a case, “swift” compliance with the ruling of arbitration panel should be achieved, as set out in the Draft Recommendation.

The preamble to the draft Joint Committee decision also includes a reference to possible arbitration rulings in relation to the provisions of the decision and states that the EU and UK “will take measures necessary to comply rapidly and in good faith with an arbitration panel ruling”.²⁴⁸

Professor Steve Peers of the University of Essex describes the commitments under the Draft Recommendation and Draft Declaration as “soft law” that does not (unlike the amendment to Article 13 of the Protocol) actually amend the WA. Professor Peers comments that the UK would not be legally obliged to give effect to the EU law in question within 30 days, if it lost a case.²⁴⁹ The UK would however be legally obliged to implement the ruling and would eventually be subject to the legal remedies outlined in Article 178 of the WA (including possible cross-retaliation under the TCA) if it did not comply with the ruling.

Possibility of EU remedial measures

Article 13 (4) of the Northern Ireland Protocol already provides that where the EU adopts new legal acts within the scope of the Protocol this will be discussed within the Joint Committee. The Committee will then either adopt a decision to incorporate the act into the annex listing the EU legislation applying in Northern Ireland, or “examine all further possibilities” to maintain the good functioning of the Protocol and take any decision necessary to this effect. Where a decision on this has not been taken within six months, Article 13 (4) provides that the EU can “take appropriate remedial measures”.

In its Q&A on the Windsor Framework, the European Commission refers to the possible taking of “appropriate remedial measures” under Article 13 (4) after the UK has notified the EU that the Stormont Brake has been triggered. It says that should the Brake be triggered “an exchange of views will take place in the Joint Committee on the implications of the amended or replacing act for the proper functioning of the Protocol”. Where there is no agreement between

²⁴⁷ UK Government, [Draft Recommendation of the Withdrawal Agreement Joint Committee on Article 13\(3\)\(a\)](#), 27 February 2023 (PDF).

²⁴⁸ UK Government, [Draft Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework](#), 27 February 2023 (PDF). See recital 12.

²⁴⁹ Steve Peers, [Just Say No? The new ‘Stormont Brake’ in the Windsor Framework \(part 2 of the analysis of the framework\)](#), EU Law Analysis, 5 March 2023.

the two parties either to add an amended or replacing act or to other measures to ensure the proper functioning of the Protocol, the Commission states “that the EU can take appropriate remedial measures, as is the case under Article 13(4) of the Protocol”.²⁵⁰

Professor Peers notes that the new Article 13(3)(a) and existing Article 13 (4) taken together means there are effectively two brakes within the Protocol relating to the adoption of new EU legislation, the new “Stormont Brake” involving the Northern Ireland Assembly and the older “Westminster Brake”, and that in some circumstances it may be difficult to distinguish between amending/replacing and new legislation and therefore determine which of the two brakes are to apply.²⁵¹

Role of UK courts and the CJEU

Media briefings on the Stormont Brake have suggested that the Northern Ireland courts could consider disputes and decide whether to consult the CJEU on interpretation.²⁵² Reports also suggested that the European Commission had agreed to exclude the CJEU from having any role over the Stormont Brake.²⁵³ This was not however reflected in the texts agreed by the UK and EU. Indeed, the Commission has stated that:

There is no change to the role of the Court of Justice of the European Union. The Court of Justice remains the sole and ultimate arbiter of EU law.²⁵⁴

Dr Billy Melo Araujo, an EU legal academic at Queen’s University Belfast, notes that the role of the CJEU remains unchanged, though he acknowledges that the Stormont Brake does, if used, limit Northern Ireland’s EU law obligations in relation to those excluded provisions:

The UK government argues that by giving the UK a right to veto EU legislation, the brake system reduces the role of the ECJ under the protocol. In reality, while the right of veto could (if used) limit the EU law obligations under the protocol, the court’s, jurisdiction remains the same as it is currently.²⁵⁵

Professor Steve Peers suggests that the potential jurisdiction of the CJEU in relation to the use of the Stormont Brake “cannot be entirely excluded”:

Finally, could the UK’s use of the Brake be subject to the jurisdiction of the CJEU? The UK government claims not, because the use of the Brake is not

²⁵⁰ European Commission, [Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland / Northern Ireland](#), 27 February 2023

²⁵¹ As above.

²⁵² See Sky News, [What is the Brexit deal over the NI Protocol being discussed between UK and EU and will it be backed in Northern Ireland?](#), 25 February 2023; and The Guardian, [Sunak could announce Northern Ireland protocol deal on Monday](#), 24 February 2023.

²⁵³ Euronews, [Brexit deal: Is the Stormont Brake an 'unequivocal veto' on EU law, as London has claimed?](#), 28 February 2023.

²⁵⁴ European Commission, [Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland / Northern Ireland](#), 27 February 2023

²⁵⁵ The Conversation, [Rishi Sunak’s Brexit deal: how the Stormont brake could block new EU laws from Northern Ireland](#), 28 February 2023.

an issue of EU law, and the CJEU can only be involved where there is a question about the interpretation or validity of EU law (the protocol gives the CJEU its usual jurisdiction over EU law as regards parts of the protocol, which does not include Article 13 but does include the laws that the Brake could apply to; and the arbitrators must send the CJEU any questions that arise about EU law as part of the arbitration process).

However, the issues of severability of the EU law, of significant change from existing EU law, and even (arguably) about the significant impact of the EU law are questions of EU law; so the potential role of the CJEU cannot be entirely excluded. In any event, a challenge to the validity of any EU retaliation would fall within the Court's jurisdiction, as would questions about the interpretation or validity of EU legislation that was the subject of the Brake (leaving aside the Brake's use as such).²⁵⁶

Professor Peers also suggests it is possible that the UK's "use (or non-use) of the Brake could be disputed in the UK courts", in particular:

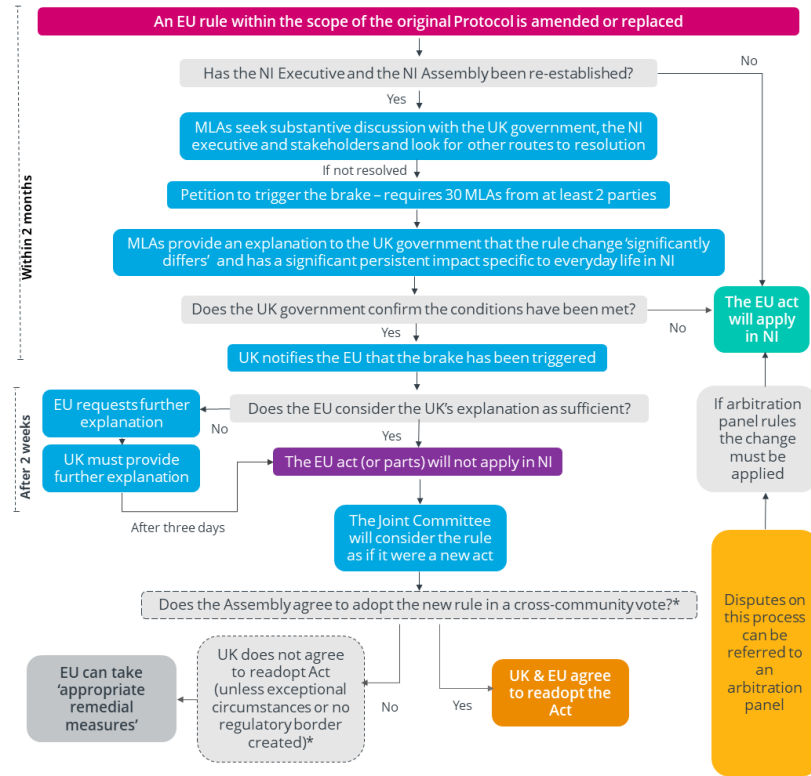
as regards interpretation of the unilateral declaration, as implemented in UK law. It's possible that the UK courts could be asked about Article 13(3a) of the protocol as such too – especially since its substantive criteria are referred to in the unilateral declaration.²⁵⁷

8.9 Illustrative flowcharts

The Institute for Government and the UK in a Changing Europe/The Open University have both produced illustrative flowcharts which aim to show how the Stormont Brake would work in practice:

²⁵⁶ Steve Peers, [EU Law Analysis: Just Say No? The new 'Stormont Brake' in the Windsor Framework](#), EU Law Analysis blog, 5 March 2023.

²⁵⁷ As above.



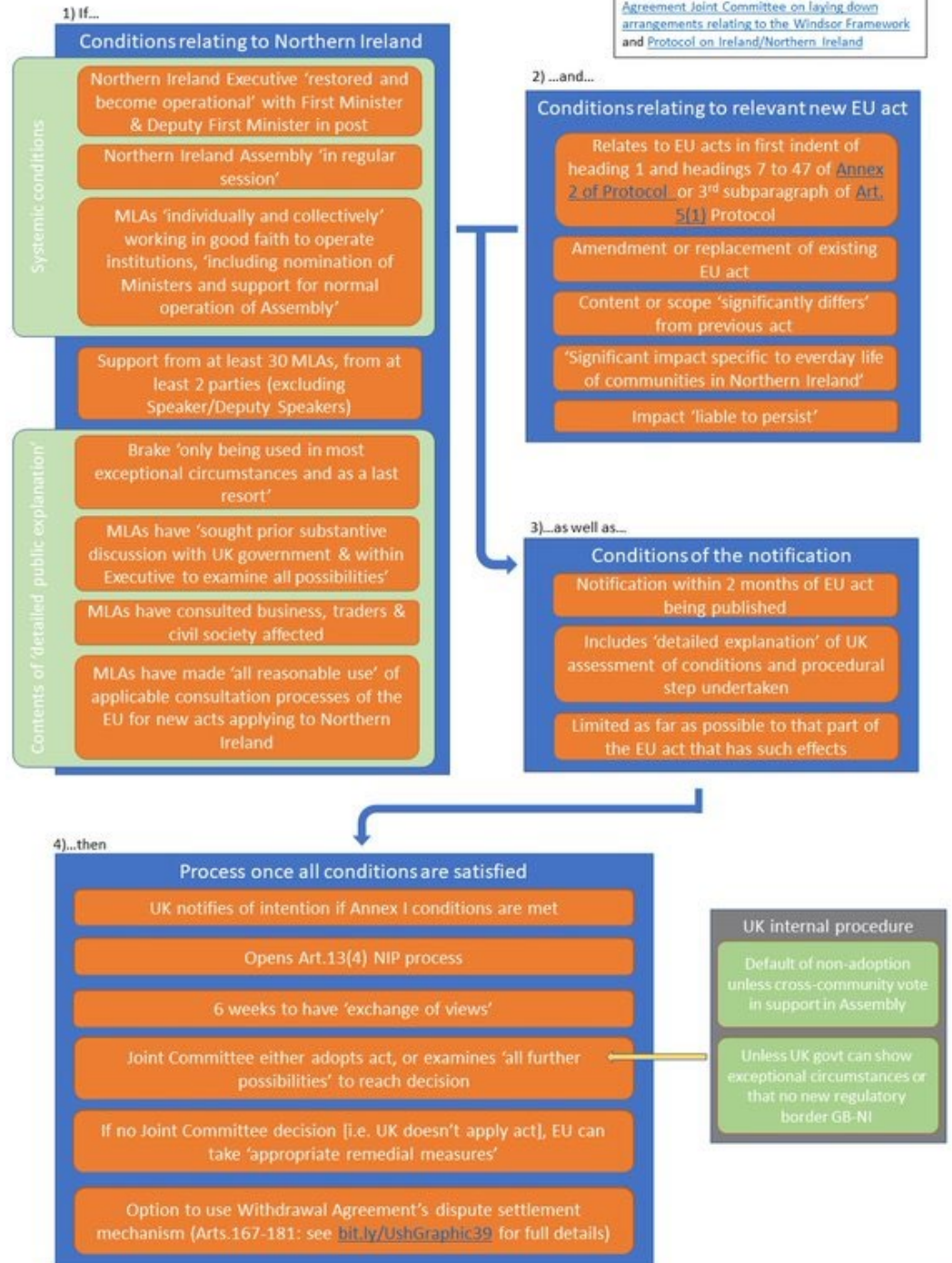
*Exact process and terms is subject to consultation with NI political parties.
 Cross community vote = 50% MLAs + 50% nationalists & unionists or 60% of MLAs + 40% nationalists & 40% unionists
 Courtesy of the Institute for Government

The Stormont Brake

Simon Usherwood (@Usherwood), plus help from Colin Murray (@CRGMurray; Newcastle), Jess Sargeant (@Jess_Sargeant; IFG) & David Torrance (@davidtorrance; Commons Library)

One of the Windsor Framework's key innovations was a mechanism to allow Northern Ireland to object to new EU laws that might apply there. How does it work?

Based on [Draft Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework and Protocol on Ireland/Northern Ireland](#)



Courtesy of the UK in a Changing Europe/The Open University

8.10

New structures for UK-EU cooperation

The UK Government’s Command Paper also sets out new joint UK-EU structures “further to anticipate and deal with any other issues that may emerge”. In this context, the UK has reaffirmed its guarantee that the First and deputy First Minister of Northern Ireland “will have a seat at the table in the UK delegation for any UK-EU Joint Committee meetings which consider matters concerning Northern Ireland”. It said this was “a key request from across the Northern Ireland political spectrum”.²⁵⁸ The EU also committed [in a Commission statement](#) to enhanced engagement with Northern Ireland stakeholders. Specifically, it committed to:

- Engage with Northern Ireland stakeholders each year where they will present the Commission Work Programme for the following year.
- Discuss the Work Programme beforehand in the JCWG.
- Publish a list of new, upcoming EU initiatives of relevance to Northern Ireland on the Protocol webpage.
- Host specific Northern Ireland information sessions on new EU initiatives and additional workshop(s) for Northern Ireland stakeholders.
- Holding public consultations for stakeholders in some cases, that will be advertised on the Protocol webpage.
- In relevant impact assessments for new EU policy initiatives, there will now be a dedicated overview of Northern Ireland stakeholders’ input. This will set out their views on the implications of the initiative for Northern Ireland and how they have been taken into account in the final proposal.²⁵⁹

Specialised Committee and new Special Body on Goods

In a draft joint declaration, the EU and the UK have proposed that the Specialised Committee can sit as a “Special Body on Goods” to consider potential divergence between EU and UK laws on goods. The Body can “where appropriate” adopt recommendations for measures to be taken by the Joint Committee. And “as appropriate”, representatives “from businesses and civic society stakeholders may be invited to attend relevant meetings” of the Body.²⁶⁰ The Body will also be able to request the JCWG and its expert

²⁵⁸ HM Government, [The Windsor Framework: A new way forward](#), CP 806, 27 February 2023. A similar commitment also formed part of the 2020 New Decade, New Approach agreement.

²⁵⁹ European Commission, [Commission statement on Enhanced engagement with Northern Ireland stakeholders](#), 27 February 2023.

²⁶⁰ HMG, [Draft joint declaration by the United Kingdom of Great Britain and Northern Ireland and the European Union in the Withdrawal Agreement Joint Committee on dialogue and goods](#) (PDF), 27 February 2023.

subgroups (see next section) to examine and provide information on a particular issue.

Joint Consultative Working Group rules of procedure changed

The EU and UK intend to amend the rules of procedure of the JCWG, to allow for the creation of “structured sub groups” which will be composed of EU and UK officials to ensure the UK’s views on EU acts being updated or amended that apply to Northern Ireland under the Protocol, are taken into consideration. These discussions should also take into account “input provided by stakeholders in Northern Ireland”.²⁶¹

Commentary

Academics Colin Murray and Niall Robb, approve of these new consultative structures saying that: “Inclusion of both business and civil society responds to requests from those in Northern Ireland and widens the aperture beyond the narrow business focussed structures previously proposed”. They also argue that “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 are hearing the same testimony”.²⁶²

8.11

Legal reassurances on the status of Northern Ireland

On 3 March 2023 Chris Heaton-Harris, the Secretary of State for Northern Ireland, said the UK Government also intended to provide legal assurances on Northern Ireland’s place in the UK. He said:

We are clear that Northern Ireland’s place in the United Kingdom is secure. So we’ll be looking to bring forward amendments to the Northern Ireland Act of 1998 to provide further assurances on that matter. Reassurances in law that Northern Ireland remains an integral part of the United Kingdom and it’s the government saying that in primary legislation which is what people are asking for.²⁶³

Currently, [Section 1](#) of the Northern Ireland Act 1998 hereby declares “that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland”.

²⁶¹ European Commission, [Proposal for a Council Decision on the position to be taken on behalf of the EU in the Joint Consultative Working Group](#), 27 February 2023.

²⁶² C.R.G. MURRAY and Niall Robb, [From the Protocol to the Windsor Framework](#) (PDF), 10 March 2023.

²⁶³ [Windsor Framework: Unionists to get ‘legal reassurances’](#), BBC News online, 3 March 2023.

Speaking in Washington, DC, on 16 March, the Secretary of State referred to restoring Northern Ireland’s “rights under Article Six of the Act of Union”.²⁶⁴ This was a reference to a series of judgments from the Northern Ireland courts and, ultimately, the Supreme Court, in which it was ruled that Article Six of the 1800 Acts of Union (which guaranteed free trade between Great Britain and Northern Ireland) had been expressly modified by the original Northern Ireland Protocol.²⁶⁵

²⁶⁴ [UK government to assure DUP on Northern Ireland’s status amid Supreme Court judgment concerns](#), Belfast News Letter, 16 March 2023.

²⁶⁵ Supreme Court Judgment, [In the matter of an application by James Hugh Allister and others for Judicial Review \(Appellants\) \(Northern Ireland\): In the matter of an application by Clifford Peoples for Judicial Review \(Appellant\) \(Northern Ireland\)](#), 8 February 2023 (PDF).

9 Political reaction to the Framework

9.1 UK political reaction

Westminster parties

The Leader of the Opposition, Sir Keir Starmer, said that “when the Prime Minister puts this deal forward for a vote, Labour will support it and vote for it”.²⁶⁶ He described the red and green lanes proposal as a “good one” that will “make life easier for business, and it will enable the people of Northern Ireland to participate more freely in the economic life of the UK”. Sir Keir said that “this deal is not perfect”, but

because we recognise that the UK agreed to the protocol and has an obligation to make it work, because we recognise that for the protocol to work there will inevitably be trade-offs, and because we always recognise that peace and prosperity in Northern Ireland are hard won, Labour will support the Windsor framework.²⁶⁷

The Chair of the Northern Ireland Affairs Committee, Simon Hoare, said the Government should be “congratulated” on the agreement, and while he agreed with the Prime Minister that the Northern Ireland political parties need time to study the detail of the Framework, that the businesses and people of Northern Ireland want and deserve “quick certainty.” He urged Mr Sunak to arrange any votes on the deal “speedily”.²⁶⁸

Stephen Flynn, leader of the Scottish National Party’s Westminster Group, said he was “fully supportive of the agreement”.²⁶⁹

Sir Ed Davey, leader of the Liberal Democrats, said his party would study the agreement in detail, but asked the Prime Minister to reassure him that the “Stormont brake will not undermine the economic stability and certainty or the political stability so desperately needed in Northern Ireland”.²⁷⁰

Sir Edward Leigh told the Prime Minister that “many of his colleagues on the Government Benches are watching the DUP very carefully, and we will go where they go”.²⁷¹

²⁶⁶ HC Deb 27 February 2023 [c577](#).

²⁶⁷ HC Deb 27 February 2023 [c577](#).

²⁶⁸ HC Deb 27 February 2023 [c582](#).

²⁶⁹ HC Deb 27 February 2023 [c579](#).

²⁷⁰ HC Deb 27 February 2023 [c583](#).

²⁷¹ HC Deb 27 February 2023 [c600](#).

The European Scrutiny Committee (ESC) produced a short report on the Framework in which it urged the Prime Minister to reject any plans for the UK-EU Joint Committee to meet in March and adopt the Joint Committee decision, in order to give Parliament and the Committee sufficient time to scrutinise the agreement. The ESC asked for the House of Commons to have “the opportunity for meaningful input into the shape of the deal, well in advance of sign off by the WAJC [Joint Committee] and without the threat of artificial Government or EU deadlines”.²⁷²

Chairman of the European Research Group (ERG) of Conservative MPs, Mark Francois, said that its “Star Chamber” of lawyers would issue a “detailed legal audit of the Windsor Framework” before the Commons vote on 22 March, and that “Members of the Group will no doubt pay close attention to the Star Chamber’s conclusions, prior to any vote”.²⁷³ The assessment for the ERG was issued on 21 March. In a statement, Mr Francois said:

The Star Chamber's principal findings are: that EU law will still be supreme in Northern Ireland; the rights of its people under the 1800 Act of Union are not restored; the green lane is not really a green lane at all; the Stormont brake is practically useless; and the framework itself has no exit, other than through a highly complex legal process.²⁷⁴

Mr Francois did not say how ERG members would vote on 22 March, saying it would meet again before the vote to discuss the matter.²⁷⁵

Boris Johnson, who as Prime Minister negotiated the Protocol, said that he would “find it very difficult” to vote for the Framework “because I believed that we should have done something different, no matter how much plaster came off the ceiling in Brussels”. He added, “I hope that it will work. And I also hope that if it doesn’t work, we will have the guts to deploy that bill again. Because I’ve no doubt at all, that that was what brought the EU to negotiate seriously”.²⁷⁶

Northern Ireland political parties

Democratic Unionist Party (DUP)

The Democratic Unionist Party (DUP) says it will only support the Windsor Framework if it meets the following seven tests:

1. Northern Ireland (NI) is entitled to the same trading privileges as the rest of the UK (as per Article 6 of the Acts of Union 1801)

²⁷² European Scrutiny Committee, [The Windsor Framework and Prime Ministerial accountability](#), 14 March 2023.

²⁷³ Twitter, [@christopherhope](#), 16 March 2023.

²⁷⁴ ITV News, [Stormont Brake part of Windsor Protocol branded 'practically useless' by group of Conservative MPs](#), 21 March 2023.

²⁷⁵ Politico, [Tory Euroskeptics pan Rishi Sunak's Brexit deal, don't say if they'll vote against](#), 21 March 2023.

²⁷⁶ The Guardian, [Boris Johnson says he will find it 'very difficult' to vote for Northern Ireland deal](#), 2 March 2023.

2. NI consumers and businesses are not forced to purchase certain goods from the EU and not GB
3. No “border in the Irish Sea”
4. The people of NI have “a say in making the laws which govern them”
5. No checks on goods going from NI to GB or from GB to NI and remaining in NI – except for pre-Brexit checks
6. No new regulatory borders between NI and the rest of the UK (unless agreed by the NI Executive and Assembly)
7. Consent from a majority of NI’s citizens would be required for any diminution of its status as part of the UK (as per the Belfast Agreement).²⁷⁷

DUP leader Sir Jeffrey Donaldson says his party “will not be rushed, will not be pushed into a hasty decision” as to whether the Windsor Framework meets these seven tests.²⁷⁸ To examine the Windsor Framework, the DUP has established a panel consisting of a DUP MP (Carla Lockhart), MLAs and life peers (including ex-First Ministers Arlene Foster and Peter Robinson).²⁷⁹

Responding to the Prime Minister’s statement in the House of Commons on 27 February 2023, Sir Jeffrey said:

I believe that our judgment and principled position in opposing the protocol in Parliament and at Stormont have been vindicated [...] In broad terms, it is clear that significant progress has been secured across a number of areas, but we also recognise that there remain key issues of concern. For example, there can be no disguising the fact that in some sectors of our economy in Northern Ireland, EU law remains applicable in our part of the United Kingdom.

My party will want to study the detail of what has been published today as well as examining the legal text, the political declaration and the Government’s Command Paper. Where necessary, we stand ready to engage with the Government in order to seek further clarification, reworking or change as required.²⁸⁰

Prior to publication of the draft Regulations on Monday 20 March, Sir Jeffrey said that:

Whilst representing real progress the “brake” does not deal with the fundamental issue which is the imposition of EU law by the Protocol.

Sir Jeffrey added that given the Commons vote on the Stormont Brake (to take place on Wednesday 22 March) was to be “read as indicative of current positions on the wider Windsor Framework package”, the DUP’s officers had “unanimously agreed” that its MPs would vote against the draft Regulations. He said, however, that the party would:

continue to work with the Government on all the outstanding issues relating to the Windsor Framework package to try to restore the delicate political

²⁷⁷ [DUP Leader announces Seven Tests for HMG plans on NI Protocol | DUP \(mydup.com\)](#).

²⁷⁸ Politico, [DUP ‘won’t be pushed’ into accepting UK-EU deal on Northern Ireland — but sees an attractive veto](#), 27 February 2023.

²⁷⁹ [DUP form eight-member party panel to examine Windsor Framework](#), ITV News website, 6 March 2023.

²⁸⁰ [HC Deb 27 February 2023 Vol 728 c581 \[Northern Ireland Protocol\]](#).

balances within Northern Ireland and to seek to make further progress on all these matters.²⁸¹

Other DUP MPs were critical of the Windsor Framework prior to publication of the draft Regulations. Speaking in his role as parliamentary chair of the think tank [Centre for the Union](#), Ian Paisley Jnr told BBC Northern Ireland it was “very clear” it did not “answer and satisfy all of our seven tests”. He added that the “most obvious” issue was the continued application of EU law in Northern Ireland and the involvement of the European Court of Justice.²⁸²

The Centre for the Union later published legal analysis by John Larkin KC, a former Attorney General for Northern Ireland. This “broadly” welcomed the “concept” of the Stormont Brake but asked for “further clarity” on certain aspects.²⁸³

Sammy Wilson, another DUP MP, told Times Radio the Framework was “not a great deal”.²⁸⁴ He said the Stormont Brake was “not really a brake at all. It’s a delaying mechanism.” He predicted that the UK Government would be reluctant to veto an EU law through being “fearful of the consequences of trade for the rest of the United Kingdom” as well as “retaliatory action” from the EU.²⁸⁵

The journalist Sam McBride, a columnist with the Belfast Telegraph, said his analysis of the Windsor Framework showed that only two of the DUP’s seven tests had been met, numbers 4 and 5.²⁸⁶

Ulster Unionist Party

Ulster Unionist Party (UUP) leader Doug Beattie says his party will assess whether the Windsor Framework protected Northern Ireland’s place within the UK’s internal market.²⁸⁷ Traditional Unionist Voice (TUV) leader Jim Allister has criticised the deal for not substantially altering the terms of the Protocol.²⁸⁸

Sinn Féin

Speaking in the Dáil, Sinn Féin President Mary Lou McDonald said the agreement between the UK and EU was “very welcome”. She added that:

While all parties and sectors are now working through the details of the agreement, it appears that these vital protections have been preserved. We will be seeking clarifications on certain aspects of the Agreement and that

²⁸¹ [DUP statement ahead of vote on Windsor Framework](#), DUP website, 20 March 2023.

²⁸² [Stormont: We need government and we need it now – Sinn Féin](#), BBC News online, 2 March 2023.

²⁸³ [Windsor Framework Legal Advice](#), Centre for the Union website, 1 March 2023, p4.

²⁸⁴ [Stormont brake ‘not really a brake,’ says DUP MP Sammy Wilson](#), ITV News website, 1 March 2023.

²⁸⁵ As above.

²⁸⁶ [DUP’s NI Protocol dilemma: Clear that most of its seven tests not met](#), Belfast Telegraph (£), 1 March 2023.

²⁸⁷ Ulster Unionist Party website, [We will study the detail of new Protocol deal – Beattie](#), 27 February 2023.

²⁸⁸ [Brexit: Pressure builds on DUP over new deal](#), BBC News online, 1 March 2023.

process should be facilitated with all parties. However, it looks as though a positive outcome has been achieved for all of Ireland. For our people. For our peace and stability. For our economic success. We are now at a turning point and that is good news for business and wider society.²⁸⁹

Ms McDonald added that there now existed “no justification for the DUP to keep the [Northern Ireland] Executive down while workers, families and businesses struggle with an unprecedented cost-of-living crisis and as they suffer chronic treatment waiting lists”.²⁹⁰ Sinn Féin deputy leader Michelle O’Neill later said she cautiously welcomed the Windsor Framework.²⁹¹

Social Democratic and Labour Party

Claire Hanna, a Social Democratic and Labour Party (SDLP) MP, commended the Prime Minister “on taking a much more constructive approach than his predecessors”:

So that we can maintain the huge opportunity of the protocol, will the Prime Minister commit his Government to championing loudly our unique dual market access, working to prevent vexatious use of the Stormont brake, and keeping a focus on restoration of the Stormont Executive, to allow those who genuinely believe in democracy and consensus to get back to serving the people they were elected to serve?²⁹²

SDLP leader Colum Eastwood later described the Stormont Brake as “pointless”.²⁹³

Alliance Party

Stephen Farry of the cross-community Alliance Party said his party could “give a broad welcome” to the Windsor Framework. However, he said it had “massive concerns” about the Stormont Brake:

Does the Prime Minister understand that there are real dangers that this process could add more instability into the Assembly, and may I stress to him that the petition of concern is controversial, given its abuse in the past? This also creates uncertainty for businesses regarding ongoing single market rules, particularly with a view to investment into Northern Ireland. So will he meet our party to discuss this in more detail in order to clarify what is potentially being proposed?²⁹⁴

The journalist Tom McTague has observed that from the perspective of Northern Ireland’s nationalist parties the Stormont Brake “looks **too** powerful,

²⁸⁹ [Sinn Féin President calls for restoration of Executive without delay](#), Sinn Féin website, 28 February 2023.

²⁹⁰ [Sinn Féin President calls for restoration of Executive without delay](#), Sinn Féin website, 28 February 2023.

²⁹¹ [Windsor Framework: Stormont brake to be focus of Heaton-Harris talks](#), BBC News online, 5 March 2023.

²⁹² [HC Deb 27 February 2023 Vol 728 c593 \[Northern Ireland Protocol\]](#)

²⁹³ [Windsor Framework: Stormont brake to be focus of Heaton-Harris talks](#), BBC News online, 5 March 2023.

²⁹⁴ [HC Deb 27 February 2023 Vol 728 c587 \[Northern Ireland Protocol\]](#).

the bar for using it **too** low — and with potentially far-reaching consequences”. He added that:

The non-sectarian Alliance party is furious with the proposals, correctly observing that the brake and lock system means unionism’s votes in Stormont will be more powerful than theirs. In Belfast yesterday [28 February] they made their view clear to officials. In time, then, the criticism of the new Stormont Brake may not be that it is too weak, but too strong.²⁹⁵

Other commentary

Hugh Bennett, a former special adviser to Boris Johnson and Liz Truss, observed that the threshold for MLAs to object to EU laws was “very high”:

Even then it will not be an automatic process, but it will be for HM Government and its lawyers to judge whether that high threshold has been reached before notifying the EU, at which point the EU can either challenge the UK’s justification or impose remedial measures. Given Whitehall’s general institutional aversion to confrontation with the EU, the chances of this mechanism being used in practice are remote.²⁹⁶

The legal commentator David Allen Green also commented that “the conditions and process for the brake are such that, in practice, it will be difficult-to-impossible to apply”. He added: “It may become an ornament, for it will be so difficult to use in practice. Perhaps that is the intention: it will just be there for reassurance that such a button can be pressed.”²⁹⁷

The commentator Sam McBride believes that as “with so many aspects of the Windsor Framework, the government has unwisely exaggerated what it is proposing”:

Just over a week ago, Chris Heaton-Harris said that once the EU law in question went to the UK-EU Joint Committee, “the UK government will be bound to veto based on conditions that you’ve seen in the papers that we’ve published”.

The DUP appears to be furious that the published legislation doesn’t tally with that and with whatever assurances it got behind closed doors. Lord Dodds said that the Secretary of State “should be forced to apologise to the people of Northern Ireland” for having given the public information which was “false”.²⁹⁸

Andrew McCormick, a former Northern Ireland Executive official, however, considers the Brake “a very significant and novel development, which has high merit both strategically and tactically”:

²⁹⁵ [Rishi Sunak’s deal has given unionists the upper hand](#), The Post website, 1 March 2023.

²⁹⁶ [Hugh Bennett: The Windsor Framework is a masterclass in rebranding – not a decisive resolution to the problems of the Protocol](#), ConservativeHome website, 2 March 2023.

²⁹⁷ David Allen Green, Is the “Stormont Brake” an instrument or an ornament? And does it matter?, The Law and Policy Blog, 28 February 2023.

²⁹⁸ [Windsor Framework’s Stormont Brake law looks like a unionist veto but it clearly isn’t](#), Belfast Telegraph (£), 20 March 2023.

In effect it would give either of the main designations (unionist or nationalist), or indeed any 30 MLAs, the power to invoke a Petition of Concern. This gives the Assembly a very strong role and goes well beyond the previous commitments which ruled out any side having veto.²⁹⁹

The legal academic Professor Steve Peers has observed that there:

could be room for dispute whether MLAs who want to trigger the Stormont Brake are ‘individually and collectively seeking in good faith’ to operate the Northern Ireland institutions? What if it might be argued that **some** of those seeking to trigger the Brake are acting in good faith in that sense, but **others** are not?³⁰⁰

9.2 Public opinion in Northern Ireland

According to a LucidTalk poll for the Belfast Telegraph, 67% of people in Northern Ireland support the Windsor Framework, with 27% opposed and 6% who do not know.³⁰¹

The Framework is most popular with Alliance or Green voters (98%), followed by nationalists (97%), but is least popular with unionists (38%). Asked how they would vote in a theoretical referendum on the agreement, 88% of TUV voters said they would vote “no”, as did 73% of DUP voters. UUP voters are most likely to support the Framework, with 56% saying they would vote “yes”.

A total of 3,409 people took part in the online poll conducted from 3-5 March 2023. The sample was scientifically weighted to reflect the local population. Across Northern Ireland, the deal was most popular with younger voters, women and the middle-class.

The poll also asked voters if they believed the DUP should return to the power-sharing institutions by nominating a deputy First Minister. Overall, 69% said they did. While 99% of Alliance/Green voters and 98% of nationalists wanted the DUP to do so, only a minority of unionists (43%) agreed. Two-thirds (67%) of UUP supporters believed the DUP should, but just 17% of DUP and 5% of TUV voters agreed.³⁰²

²⁹⁹ [The Windsor Framework: a quick evaluation](#), UK in a Changing Europe website, 28 February 2023.

³⁰⁰ Steve Peers, [EU Law Analysis: Just Say No? The new ‘Stormont Brake’ in the Windsor Framework](#), EU Law Analysis blog, 5 March 2023.

³⁰¹ [Two-thirds back Windsor Framework, but 73% of DUP voters say ‘No’ to deal](#), Belfast Telegraph, 10 March 2023.

³⁰² As above.

9.3

Europe & the EU

EU reaction

Announcing the Windsor Framework, European Commission President Ursula von der Leyen said that the Framework “was made possible by genuine political will and hard work guided by the fundamental principle that the interests and needs of people should always come first”. She said that supporting and protecting “the hard-earned gains of the Good Friday (Belfast) Agreement” was the “prerequisite of our endeavour”. She said that the Framework allowed for “definitive solutions” and turned a page on the UK-EU relationship to one of “close allies standing shoulder to shoulder in times of crisis”.³⁰³

European Commission Vice-President Maroš Šefčovič, the EU co-chair of the Joint Committee who led the negotiations with the UK, said the EU had “from the very beginning shown genuine understanding for the unforeseen practical difficulties in implementing the Protocol on the ground”. He said the joint solutions were a result of the grit and determination of both sides, and would work “for the benefit of everyone in Northern Ireland” as well as uphold the integrity of the EU Single Market.³⁰⁴

A number of newspapers, including the Telegraph, have reported on comments made by Mr Šefčovič in a private briefing for MEPs a few days after the Windsor Framework announcement. It is reported that he said that there should be “no impression that there will be a diminishing of the role of the European Court of Justice” and that the role of the CJEU as “the sole and final arbiter of EU law” remained in place, as the EU had been clear about throughout the negotiations. He reportedly said that the Framework was designed to prevent future disputes over EU rules in Northern Ireland from reaching a “level that would generate political headlines”. Other comments reported to have been made by Mr Šefčovič at the meeting include that the Stormont Brake is very limited in scope, and to be used under “very strict conditions”. If the Brake was not used for a convincing reason, he reportedly said, “we have our joint bodies to deal with this issue, or eventually this case could be presented to the arbitration” and there would also be “the possibility to take limited remedial measures because we can tell them it's affecting the functioning of our single market”.³⁰⁵

³⁰³ European Commission, [A new way forward on the Protocol on Ireland/Northern Ireland: political agreement in principle on the Windsor Framework](#), 27 February 2023.

³⁰⁴ As above.

³⁰⁵ See The Telegraph, [EU chief says Sunak's Northern Ireland deal fails to take back full control in leaked recording](#), 4 March 2023; and Belfast Telegraph, [EU chief dismisses idea protocol deal is UK 'taking back control'](#), 5 March 2023.

Irish Government

On 28 February, Ireland’s Taoiseach Leo Varadkar told the Irish Parliament that the Irish Government was “comfortable and satisfied with the outcome”.³⁰⁶ He said it was reasonable that the DUP should be allowed “a little bit of time to consider the agreement”. He said the EU was happy for this to happen, but he noted that there was strong cross-party support both in UK and Ireland for the new framework and said he hoped “that allows us to proceed and to open a new chapter in relations and particularly to allow the Government to function again in Northern Ireland”.³⁰⁷

Other EU Member States

Reports suggest that the EU Member State Governments were not routinely updated on the details of a possible EU-UK deal on the Northern Ireland Protocol during the negotiations leading up to the Windsor Framework announcement. The Commission therefore briefed EU Member State representatives on the details of the agreement in the days following the announcement.³⁰⁸ The Financial Times reports that Member States including the Netherlands and Germany had concerns about dangerous goods entering the Single Market via Northern Ireland and across the Irish border. However, the report suggested that such concerns had been assuaged by the absence of evidence of this happening over the last two years, when the UK was not fully implementing controls.³⁰⁹

At the UK-France bilateral summit held on 10 March, President Emmanuel Macron of France congratulated Rishi Sunak on the Windsor Framework agreement and said it marked a “new beginning of working more closely with the EU”.³¹⁰

³⁰⁶ The Irish Times, [DUP should be given ‘time and space’ to consider Windsor Framework, Varadkar says](#), 28 February 2023.

³⁰⁷ As above.

³⁰⁸ The Irish Times, [Windsor Framework: EU countries begin to raise questions as they pore over deal with UK](#), 28 February 2023.

³⁰⁹ Financial Times, [Freedoms versus safeguards — the Northern Ireland deal viewed from Brussels](#), 2 March 2023.

³¹⁰ Politico, [Sunak and Macron hail ‘new chapter’ in UK-France ties](#), 10 March 2023.

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