

The Windsor Framework – The Good, The Bad and The Untested

1. Background

1.1. The Windsor Framework, agreed by the UK and EU in February 2023, developed and made material changes to the Protocol on Ireland and Northern Ireland ('the Protocol'). It made specific changes to the movement of goods between Britain and Northern Ireland, the scrutiny of new and updated EU legislation coming into effect in Northern Ireland and made proposals on civic society engagement.

1.2. The Protocol (now Windsor Framework) was negotiated and enacted in recognition of the unique position of Northern Ireland in the context of the UK's exit from the EU. It was developed to maintain a frictionless border in the island of Ireland, enabling free movement across the North/South land border and providing a route for goods to travel into and through Northern Ireland while maintaining the integrity of the EU single market.

1.3. Following extensive civil society lobbying, the Protocol also enshrined vital human rights protections within its text, responding to the concerns about a potential post-Brexit backslide on rights. Article 2 of the Protocol committed the UK Government to ensure that “no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity, results from its withdrawal from the [European] Union”¹, and provided a baseline of 6 EU equality and non-discrimination directives with which NI must keep pace².

1.4. Article 2 is expressly intended to be relied on by individuals in judicial proceedings, and could be a vital legal tool in upholding and preventing a backslide on rights in Northern Ireland. Its direct linkage to the chapter in the Belfast/Good Friday Agreement focused on Rights, Safeguards and Equality of Opportunity has the potential to protect existing legislation that helped give effect to the rights listed in that chapter. Given that many provisions of the Agreement have not been incorporated directly into domestic law this element of the Protocol/Framework is an important safeguard.

1.5. Ahead of the announcement of the Windsor Framework, and given the importance of the Protocol for the maintenance of human rights in Northern Ireland, we had set out 5 Tests that we believed were important for any changes or updates to the Ireland/Northern Ireland Protocol³:

1.51. Make no changes to Article 2 of the Protocol, including to the Directives listed under Annex 1, unless these changes strengthen or expand the protections contained therein;

1.52. Develop common regulatory frameworks between the EU & NI, particularly in areas of equality and human rights and in policy areas enabling North-South Cooperation;

1.53. Ensure that Northern Ireland, and UK-wide, courts have full access to case law of the Court of Justice of the EU, particularly regarding EU equality and non-discrimination law such as those within Annex 1;

¹ Article 2, [Protocol on Ireland/Northern Ireland](#) (UK Government, 2020)

² [UK Government commitment to “no diminution of rights, safeguards and equality of opportunity” in Northern Ireland: What does it mean and how will it be implemented?](#) “In addition, in the event that certain provisions of EU law setting out minimum standards of protection from discrimination - those listed in Annex 1 to the Protocol - are updated or replaced by the EU, relevant domestic law in Northern Ireland will be amended, as necessary, to reflect any substantive enhancements to those protections.”

³ [5 Tests for the Ireland/Northern Ireland Protocol](#) (Human Rights Consortium, February 2023)

1.54. Maintain protections for the Common Travel Area and North-South cooperation;

1.55. Confirm that future legislative undertakings by the UK Government will not diminish or undermine their ability to uphold commitments made in Article 2 of the Protocol.

1.6. This briefing will touch on these tests and a number of the changes made to the Protocol, with a particular focus on the the human rights and equality implications of the Framework and the new ‘Stormont Brake’, but will avoid re-explaining changes to the movement of goods between Britain and NI.

2. Article 2 (non diminution & keeping pace)

2.1. Article 2 of what was originally the Protocol on Ireland and Northern Ireland, now known as the Windsor Framework, contained a commitment from the UK Government to ‘non-diminution of rights [set out in the relevant chapter of the Belfast/Good Friday Agreement] in Northern Ireland as a result of Brexit’, and to ‘keep pace’ with EU Directives related to rights and equality contained within Annex 1 of the Windsor Framework⁴.

2.2. The UK Government, during negotiations with the EU over the Protocol, committed to leaving Article 2 untouched, stating that it was an ‘uncontroversial’ element of the Protocol⁵. As such, the text of Article 2 remains the same. In this manner, the Framework passes the test set out in 1.51, however it doesn’t **expand** these rights and protections as we would’ve hoped.

2.3. The limitations of Article 2 are quite clear. Unlike, say, amended laws related to goods manufacture or customs regulations which are automatically updated in Annex 2 unless blocked using the mechanisms explored below, Northern Ireland misses out on key advancements in rights and equality at the EU level unless said advancement very clearly updates one of the few Directives already contained within Annex 1.

2.4. The EU Pay Transparency Directive, which the Union adopted this year, aims to strengthen pay transparency and eliminate gender pay discrimination in member states. Northern Ireland is the only region in the UK and Ireland which does not place mandatory pay reporting requirements on employers. As such, this Directive would promote gender equality and further equality in the region if it were implemented.

2.5. The Pay Transparency Directive **could** fall under the “keeping pace” commitment, due to its close link to Directive 2006/54/EC on equal treatment of men and women in matters of employment which is contained in Annex 1, and as such the NI Assembly would have a duty to update it. However, the lack of clarity on whether or not this new law is considered to be meaningfully updating the Annex 1 Directive means that this element of Article 2 is not being implemented and we are not fully ‘keeping pace’ with key developments in equality and human rights law.

2.6. It is also worth noting that, even if there was legal clarity around this question, the NI Assembly would still be required to pass legislation implementing this new EU Directive and updating the Annex 1 Directive, which may be difficult to achieve given the existing political differences around

⁴ Article 2, [Protocol on Ireland/Northern Ireland](#) (UK Government, 2020)

⁵ In the House of Lords debate on the NI Protocol Bill, Baroness Ritchie stated, “The operation of Article 2 has never been regarded as controversial; indeed, when the Government identified the list of controversial issues in the protocol, Article 2 was explicitly identified as uncontroversial. So far as I am aware, no unionist politician—and in fact the noble Lord, Lord McCrea, referred to Article 2 earlier in a previous debate—has ever tried to argue that the operation of Article 2 is a problem for them, whatever other problems they consider the protocol to give rise to.” ([Hansard, Northern Ireland Protocol Bill debate, 31-October 2022](#))

the implementation of the Framework/Protocol between Assembly parties. If the Assembly failed to do this, the UK Government would be bound under their commitments in Article 2 of the Framework to implement the updated Annex 1 law⁶, bypassing the Assembly.

2.7. Other elements of the Windsor Framework also have potential consequences for the smooth operation of Article 2. In particular, the nature of how the Stormont Brake may impact on legislative updates in areas relevant to Article 2 is as yet unknown. While any updates to Annex 1 Directives under the 'keeping pace' commitment will not fall under the remit of the Brake, updates to Annex 2 Directives - some of which may have rights implications - can be halted by these 'democratic scrutiny' powers.

2.8. We have also observed a continued - and possibly wilful - ignorance on the part of the UK Government of the impact of Article 2 on the implementation of their legislative agenda in Northern Ireland. The Consortium and other organisations including the Dedicated Mechanisms have identified several breaches of Article 2 rights in the Elections Act⁷, the Retained EU Law Act⁸, and the Illegal Migration Act⁹, breaches which often remained unaddressed past the Bill achieving royal assent.

2.9. During the Dedicated Mechanisms' Article 2 Annual Report Launch they confirmed that updated Cabinet Office guidance will encourage the exploration of Article 2 impacts in the explanatory memoranda accompanying any new Government legislation. It remains to be seen what impact this will have on the compliance of future legislative undertakings with the Article 2 provisions.

3. Stormont Brake & Amended EU Acts

3.1. The Stormont Brake was entered into the Windsor Framework designed to address the perceived "democratic deficit" created by Brexit and the lack of Northern Ireland input into shaping or approving EU law to which it was subject. The Brake itself is a mechanism that operates similar to the petition of concern, in which a group of 30 or more MLAs from 2 or more parties can instruct the UK Government to oppose the inclusion of an amended or updated EU law into Annex 2 of the Windsor Framework.¹⁰

3.2. Annex 2 of the Framework contains a set of EU laws and regulations governing customs, trade, goods manufacturing, medicines and other areas where regulatory cohesion is required to allow access to EU markets. While many of these regulations are less relevant to equality and human rights, some have been identified by the Dedicated Mechanisms as having human rights implications

⁶ [Explainer: UK Government commitment to "no diminution of rights, safeguards and equality of opportunity" in Northern Ireland: What does it mean and how will it be implemented?](#) (UK Gov, August 2020)

⁷ [Joint ECNI / NIHRC Briefing on the provisions on Voting/Candidacy Rights of EU citizens in Northern Ireland in the Elections Bill](#) (NIHRC/ECNI, March 2022)

⁸ [Written evidence submitted by the NIHRC and ECNI](#) (NIHRC/ECNI, January 2023); [Retained EU Law Bill - HRC Briefing](#) (October 2022); [Response to letter from the Chair of Protocol on Ireland/Northern Ireland Protocol Committee](#) (UK Government, June 2023)

While several of the concerns initially raised around the broad scope of the 'sunset clause' were addressed through late Government amendments, concerns remain regarding the compliance with Article 2 of the REUL Act in relation to the removal of the General Principles of EU law and the supremacy of EU law. Secretary of State Kemi Badenoch has committed in writing to addressing these concerns through regulation, however it is unclear when that will occur or whether it will fully address these concerns.

⁹ [Illegal Migration Bill – Joint Briefing](#) (Human Rights Consortium & PILS Project, March 2023); [Northern Ireland Human Rights Commission submission to House of Lords on the Illegal Migration Bill](#) (NIHRC, May 2023)

¹⁰ [Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework](#) - Annex 2

and thus possibly falling under the Article 2 “non-diminution” commitment. As such, the Stormont Brake - which allows for a block to be placed on the inclusion of an amended or updated law within this Annex - has the potential to impact the progression and maintenance of equality and human rights.

3.3. There are a number of preconditions which must be met before engaging this Brake mechanism. The Assembly and other Strand 1 institutions must be established and operating, with a specific requirement for MLAs who wish to operate the mechanism to be “individually and collectively seeking in good faith to fully operate the institutions, including through the nomination of Ministers and support for the normal operation of the Assembly.”¹¹

3.4. Even then it is intended to be used only in “most exceptional circumstances and as a last resort, having used every other mechanism”¹², an approach mirroring the revised language around use of the Petition of Concern established in New Decade New Approach¹³. There must be sufficient evidence that the ‘content or scope of the Union act as amended or replaced [...] significantly differs’ from the unamended EU law, and that it would have a “significant impact specific to everyday life of communities in Northern Ireland in a way that is liable to persist”.¹⁴

3.5. Before engaging the Brake mechanism, MLAs must show that they have engaged with the UK Government, NI Executive, businesses and civil society to garner views and seek to address their concerns through other avenues¹⁵. As such, an NI Assembly Democratic Scrutiny Committee has been created and empowered to conduct inquiries into new and amended EU acts relevant to the Windsor Framework¹⁶.

3.6. Only following an inquiry by the Committee and meeting the above conditions can 30 MLAs from more than one party apply the Brake mechanism. If the Secretary of State considers that these conditions have not been met they must convey this to the Assembly Presiding Officer “without undue delay”.¹⁷ If the conditions are seen to be met the Secretary of State ‘must accept’ the notification and provide written notification to the European Commission that the Brake mechanism has been applied.¹⁸

3.7. It is vital that equality and human rights considerations are baked into the ‘Stormont brake’ mechanism, the work of the Committee and any inquiries into new or replacement EU legislation. In

¹¹ [Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework](#), Annex 1 - Unilateral Declaration by the United Kingdom on Involvement of the Institutions of the 1998 Agreement

¹² Ibid

¹³ [New Decade New Approach](#), Part 2 Annex B (UK Government, January 2020)

¹⁴ [Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework](#), Section 1 Article 2

¹⁵ [Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework](#), Annex 1 - Unilateral Declaration by the United Kingdom on Involvement of the Institutions of the 1998 Agreement

¹⁶ [Windsor Framework \(Democratic Scrutiny\) Regulations 2023](#), (UK Government, March 2023)

¹⁷ Ibid

¹⁸ Ibid

their Annual Report, the Dedicated Mechanisms also made this recommendation¹⁹, in recognition of the EU measures in Annex 2 of the Framework which have equality and/or human rights implications.²⁰

3.8. There is significant potential for an amended/replacement EU law to be blocked **because** it improves on rights and equality in a way that certain parties or political actors do not like. There is already a long history of the Northern Ireland Assembly and Executive being unable to progress human rights legislation because of political differences²¹. It remains to be seen whether or not the additional tests outlined above will be sufficient in preventing this kind of abuse of the Brake mechanism.

4. Applicability Motions & New EU Acts

4.1. New EU legislation being implemented in Northern Ireland is also subject to a similar but separate “democratic scrutiny” measure. While not subject to the Brake, under the Statutory Instrument implementing the Windsor Framework the Assembly must pass an ‘applicability motion’ in the form of a cross-community vote before a new EU law is inserted into the Framework²².

4.2. Once the UK Government has notified the Assembly that a new EU act is being considered by the EU-UK Joint Committee, ‘The First Minister and the deputy First Minister acting jointly may table an applicability motion within a period of two weeks’. Following these two weeks, any other MLA can do so. An applicability motion must be passed with cross-community support - with a majority of both nationalists and unionists voting in favour - within five weeks of the UK Government notification that the Joint Committee was considering the addition of a new EU act to the Windsor Framework.²³

4.3. The UK Government is bound under the Statutory Instrument implementing the Windsor Framework to adhere to the Assembly’s wishes on this legislation and, if an applicability motion is not passed within 5 weeks, oppose its implementation through the established process in the UK-EU Joint Committee²⁴. This may result in ‘appropriate remedial measures’²⁵ from the EU to safeguard their single market and customs union.

4.31. *“A Minister of the Crown must not agree to the adoption of a decision by the Joint Committee to add a new EU act [...] unless the Assembly has indicated support for the application of that EU act by passing an applicability motion.”*²⁶

¹⁹ [NIHRC and ECNI Annual Report on the Implementation of Article 2 of the Windsor Framework](#), (ENCI and NIHRC, July 2023) 2.16: “It is vital that equality and human rights considerations are built into all key stages of the ‘Stormont brake’ mechanism, including inquiries by the Windsor Framework Democratic Scrutiny Committee. It is important that the Windsor Framework Democratic Scrutiny Committee undertakes meaningful and timely engagement with the Commissions and equality and human rights groups in NI, in relation to a proposed EU measure, or a replacement EU act, so as to seek their views on the implications for the promotion and protection of equality and human rights in NI.”

²⁰ [Working Paper: The Scope of Article 2\(1\) of the Ireland/ Northern Ireland Protocol](#), (ECNI and NIHRC, December 2022)

²¹ [DUP accused of blocking NI Bill of Rights - BBC News](#)

²² [Windsor Framework \(Democratic Scrutiny\) Regulations 2023](#), (UK Government, March 2023)

²³ [Windsor Framework \(Democratic Scrutiny\) Regulations 2023](#), (UK Government, March 2023)

²⁴ Article 13(4), [Protocol on Ireland/Northern Ireland](#) (UK Government, 2020)

²⁵ [Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland / Northern Ireland](#), (EU Commission, Feb 2023)

²⁶ [Windsor Framework \(Democratic Scrutiny\) Regulations 2023](#), (UK Government, March 2023)

4.4. In a worst case scenario, the application of the Brake or refusal of an applicability motion for a piece of new EU law could lead to retaliatory actions from the EU which may have a wildly detrimental impact on the economy and on cross-border cooperation. It has even been suggested that the refusal of new legislation could result in changes to Northern Ireland's access to the European Economic Area.

4.41. *"If the application of a law that is essential, in the EU's view, to allow Northern Ireland's continued participation in the single market—I find it hard to imagine how that could arise, but theoretically it could—in that circumstance, if the new law does not get cross-community support, it does not apply and the EU invokes remedial measures [...] which certainly could include the kind of provisions that are in the EEA agreements."*²⁷

4.5. While this is, as Dr McCormack identifies, merely a theoretical suggestion, it illustrates the potential issues with these new "democratic scrutiny" provisions in enabling further divergence and the unknowable "remedial measures" that may accompany them.

4.6. Further, while new and updated laws being added to the Framework will focus on manufacturing and trade and thus all of this legislation may not be relevant to Article 2 or rights and equality generally, there is still the possibility, similarly to the Brake, that this new procedure of requiring an applicability motion could cause issues when a piece of legislation does have a positive impact on human rights.

4.7. The cross-community voting procedure has been used to frustrate the progress of issues such as reproductive justice, same-sex marriage, and the delivery of an Irish Language Act. It is clear that, as was also recognised by the Dedicated Mechanisms, this new mechanism has the potential to create "new procedural hurdles [impeding] the application of a new or amended/replaced EU act that has equality and/or human rights implications."²⁸ It is welcome, though, that this "applicability motion" seems to avoid some of the pitfalls of the St Andrews' veto by allowing any MLA to bring the motion if the First and/or Deputy First Ministers refuse to do so.

4.8. It is worth noting also that the UK Government may agree to the inclusion of a new EU act in the Windsor Framework without an applicability motion from the Northern Ireland Assembly in the event that there are 'exceptional circumstances' – such as the collapse of the Assembly or lack of First and Deputy First Minister – or 'the new EU act would not create a new regulatory border between Great Britain and Northern Ireland'.²⁹

²⁷ [Protocol on Ireland /Northern Ireland Subcommittee, Oral evidence](#) (House of Lords, March 2023), Dr Andrew McCormack

²⁸ [NIHRC and ECNI Annual Report on the Implementation of Article 2 of the Windsor Framework](#), (ENCI and NIHRC, July 2023)

²⁹ [Windsor Framework \(Democratic Scrutiny\) Regulations 2023](#), (UK Government, March 2023)

Fig 1. Windsor Framework - Comparison of the Stormont Brake and the Applicability Motion

	Stormont Brake	Applicability Motion
Applies to:	EU legislation amending or replacing a law already in Annex 2	New EU legislation being added to Annex 2.
Notification period:	Windsor Framework Scrutiny Committee has 5 working days from the UK Gov's notification of a replacement EU law to decide to hold an inquiry. Must publish report no later than 15 days before end of scrutiny period (2 months from publication of amended/replacement EU law). Brake notification must be provided to the Secretary of State no later than 9 days before end of scrutiny period.	Assembly has 5 weeks from UK Government notification of a new EU law being entered into WF to pass an applicability motion. If a motion is not passed in that time period, the UK Government must oppose the inclusion of the new EU Act in the WF at the EU-UK Joint Committee.
If passed:	Indicates that the amended or replacement law should not apply in Northern Ireland	Indicates the NI Assembly's consent for the inclusion of a new law in the Windsor Framework
Threshold:	30 MLAs from 2 or more parties of the same community designation, or 30 MLAs from one party and one elected independent of the same designation, or 30 MLAs including two elected independents	A successful " cross community " vote - a majority of both Unionists and Nationalists voting in favour of the application of the new EU law, or 60% of members voting in favour, with at least 40% of Nationalists and 40% of Unionists in favour.

	Stormont Brake	Applicability Motion
Additional Requirements:	<p>Those using the brake mechanism must be “individually and collectively seeking in good faith to fully operate the institutions”.</p> <p>It should be used following, not preceding, a Committee enquiry, and even then in “most exceptional circumstances and as a last resort, having used every other mechanism.”</p> <p>There must be sufficient evidence that the replacement law “significantly differs” from the unamended EU law, and that it would have a “significant impact to everyday life [...] in a way that is liable to persist”.</p>	<p>First & Deputy First Minister must table an applicability motion jointly. If this is not done within two weeks of the UK Government's notification, any MLA may table the motion. The motion must be passed within 5 weeks of this notification, otherwise it is considered that the Assembly does not consent to the inclusion of the new EU law.</p>
Exceptional circumstances:	<p>If the Secretary of State considers that the requirements outlined above are not met, they must convey this to the Assembly Presiding Officer “without undue delay”. If they consider that the conditions have been met, the SoS “must accept” the notification and provide written notice to the European Commission that the Brake mechanism has been applied.</p>	<p>UK Government may agree to inclusion of a new EU act without Assembly approval in “exceptional circumstances” including:</p> <ul style="list-style-type: none"> - Collapse of Assembly or lack of FM/dFM - New EU act would not create a new regulatory border between GB & NI <p>Secretary of State may also extend relevant timeframes by providing written notification to the Assembly Speaker.</p>
What next?	<p>UK Gov must provide EU with notification that the Brake has been applied. The UK has then committed to “intensive consultations in the Joint Committee” on the relevant EU law. The new law will cease to apply in NI after 2 weeks. Previous EU law would continue to apply in its</p>	<p>If the applicability motion is passed, the new EU law comes into effect in Northern Ireland. If the Assembly does not pass the motion within 5 weeks, the UK Government must oppose the inclusion of the new EU law in the Windsor Framework</p>

	Stormont Brake	Applicability Motion
	unamended version. EU may request further information if they deem the Brake's justification to be "insufficient". The EU may also invoke "remedial measures" in response to the blocking of a replacement act.	through the established process in the Joint Committee. Similarly to the Brake, both EU and UK must seek to ensure the continued operation of the Windsor Framework and "may take any decision necessary" to this end, including through the invocation of "remedial measures".

5. Cross-border Cooperation

5.1. These new political scrutiny arrangements also have the potential to impact cross-border cooperation and regulatory cohesion. Article 11, which was included in the original text of the Protocol, committed the UK and EU Governments to "maintain the necessary conditions for continued North-South cooperation". Similarly to the Article 2 commitments, the UK Government considered this an 'uncontroversial' element of the Protocol and did not attempt to renegotiate it.

5.2. However, the changes made within the Windsor Framework helps create the legal and political environment for increasing divergence between Northern Ireland and the Republic, including potentially in areas relating to equality and human rights or in policy areas which help maintain and encourage cross-border cooperation.

5.3. Brexit itself has already enabled this divergence, even within the original Protocol: many new EU laws have not been included in Annex 2, and new EU case law developed after 31st December 2020 will not be relied upon in NI's jurisprudence, with the exception of that relating to Annex 1 Directives.

5.4. We are already seeing the impacts of this in access to technology and services: the social network Threads launched in the UK recently but not in the EU in part due to the Digital Services Act package, which aims to "create a safer digital space in which the fundamental rights of all users of digital services are protected"³⁰. It does this by placing certain requirements on larger social media platforms or digital markets, including annual risk assessments and measures to enforce greater accountability on how platforms moderate content, advertise and use algorithmic processes³¹.

5.5. On the UK side, comparable regulation is coming in the form of the Online Safety Bill³², which aims to address online harm also, particularly that experienced by children and young people³³. It does this by requiring social media companies and messaging platforms to break their encryption and allow scans of messages and private information for inappropriate content, including child sexual abuse imagery, while also requiring social platforms to remove "legal but harmful" speech, coupling these duties with a heavy sanctions regime.

³⁰ [The Digital Services Act package](#) (EU Commission)

³¹ [Digital Services Act Q&A](#) (EU Commission)

³² [Online Safety Bill](#) (UK Government, 2022)

³³ [A guide to the Online Safety Bill](#) (UK Government, December 2022)

5.6. While some of this may sound reasonable and proportionate, digital rights organisations have warned of the dangers of this Bill³⁴ and the potential consequences for privacy and freedom of expression online. Encrypted messaging platforms including Signal and Whatsapp, the latter of which is used by around 40 million people in the UK and 3 million in the Republic of Ireland³⁵, have said that they will be forced to exit the UK if these regulations go through due to their impact on encrypted messaging.³⁶

5.7. Cross-border cooperation has evolved to rely heavily on digital communication and a cohesive island-wide regulatory framework enabling this cooperation. While the potential removal of vital communication platforms such as Whatsapp is a stark example, the Government's stated desire that the Windsor Framework should "create a different legal and practical context on the island of Ireland"³⁷ will change the shape of this cross-border cooperation in a myriad of as-yet-unforeseeable ways and could potentially accelerate divergence.

5.8. The introduction of the Stormont Brake and applicability motions allowing for MLAs to challenge new and replacement EU legislation has the potential to exacerbate this divergence from both the EU and UK's regulatory frameworks. This could lead to a 'worst of both worlds' scenario of sustained regulatory isolation from both jurisdictions with unknowable consequences for North-South and East-West cooperation. This ignores repeated demands from, in particular, cross-border groups and communities in the border regions for less divergence, not more.³⁸

6. Civic Society Engagement

6.1. The changes to the Windsor Framework also extend to enshrining further civic society engagement into the existing and new legislative processes, including the Stormont brake. Locally, the NI Assembly Democratic Scrutiny Committee must "engage with businesses, civil society and others **as appropriate** [emphasis added] in relation to replacement EU acts"³⁹.

6.2. This should provide an opportunity for Committee inquiries to take stock of civil society views on new or replacement EU acts, although there is a lack of clarity on what form that engagement will take. It marks a welcome pivot towards inclusion of both business and civil society from the business-focussed nature of previous structures, an issue which has been raised consistently by civic groups across different fora, including in representations to the European Economic and Social Committee⁴⁰.

6.3. The Windsor Framework also expanded joint EU-UK structures, including the Joint Consultative Working Group, with the UK and EU. This includes the ability for the Joint Consultative Working Group to establish subgroups, potentially involving business and civic society stakeholders, around specific issues relevant to the Framework.

³⁴ [UK: Online Safety Bill is a serious threat to human rights online](#) (Article 19, April 2022)

³⁵ [Whatsapp users by country 2023](#)

³⁶ [Online Safety Bill: WhatsApp, Signal issue stark final warning against mass snooping of messages](#) (Evening Standard, July 2023)

³⁷ [The Windsor Framework: A new way forward](#) (UK Govt, February 2023)

³⁸ [The Windsor Framework: What could it mean for North-South and East-West cooperation and relations?](#) (Centre for Cross-Border Studies, April 2023)

³⁹ [Windsor Framework \(Democratic Scrutiny\) Regulations 2023](#) (UK Government, March 2023)

⁴⁰ [The implementation of the EU-UK Withdrawal Agreement, including the Protocol on Ireland and Northern Ireland](#) (European Economic and Social Committee, January 2023); [From the Protocol to the Windsor Framework](#), (C R G Murray & Niall Robb, March 2023)

6.4. The EU's proposals for stakeholder engagement⁴¹ extend beyond the Stormont structures and joint structures established or expanded by the Windsor Framework. The stated aim is to remove the need for the application of the Stormont Brake through adequate engagement before the commencement of new or updated legislation. Their 'enhanced measures' include:

6.41. Annual European Commission presentation & engagement on upcoming policy initiatives and legislative proposals;

6.42. Specific Northern Ireland information sessions on new EU initiatives and additional workshop(s) for Northern Ireland stakeholders;

6.43. Hosting NI-relevant public consultations on the Protocol [Windsor Framework] webpage;

6.44. Including a Northern Ireland overview in relevant impact assessments accompanying new EU policy initiatives.

6.5. It remains unclear on all sides what form this engagement will take, who will be involved and how open to feedback from civil society the UK Government, NI Assembly Democratic Scrutiny Committee, European Union and joint UK-EU structures will be. Early signs point to some constructive and structured engagement with the EU through the European Economic and Social Committee and from early engagements with Commission officials.

6.6. There will be a number of barriers to engagement, however, particularly given Northern Ireland's unique position as a post-conflict society and the intimidation individuals have experienced in the past when speaking publicly on the Protocol. Several Consortium members attested to intimidation they and their colleagues had experienced when publicly engaging on the Protocol, particularly those articulating the concerns and priorities of women in PUL communities.⁴²

6.7. Further, Northern Ireland parties have sometimes displayed reticence to engage fully with the Committee process, as demonstrated during the Ad Hoc Committee on the Bill of Rights where the refusal of one party to agree to an expert panel nomination allowed the entire process to stall. While we can strive for constructive engagement, if the political will is not present to make these structures function as intended, that engagement may prove to be less fruitful than hoped.

6.8. Throughout the political declarations and explanatory documents accompanying the legal text of the Windsor Framework, civil society colleagues have noted that there is a marked absence of mention of any engagement with neighbouring stakeholders in the Republic of Ireland and in Britain.⁴³ While the increased mention of engagement with Northern Ireland stakeholders is welcomed, the lack of inclusion of those in border communities and stakeholders across the island with an interest in cross-border cooperation and regulatory cohesion is a notable concern.

7. Conclusion

7.1. Many questions remain about how the Framework will work in practice, not least due to the fact that it was unsuccessful in reestablishing devolved governance in Northern Ireland and hence the

⁴¹ [Enhanced engagement with Northern Ireland stakeholders](#) (EU Commission, February 2023)

⁴² [NI Affairs Committee chair Simon Hoare condemns intimidation of Shankill community worker](#) (The Newsletter, July 2021)

⁴³ [The Windsor Framework: What could it mean for North-South and East-West cooperation and relations?](#) (Centre for Cross-Border Studies, April 2023); [Civic Engagement in the Windsor Framework](#) (Centre for Cross-Border Studies, June 2023)

‘democratic scrutiny’ provisions, including the Stormont Brake and Democratic Scrutiny Committee, are as yet untested.

7.2. As such, the reality of how deeply civic society will be engaged in these processes and structures remains to be seen. Business interests have taken precedence over those of civic society under existing structures for monitoring and engaging on the Protocol, so while the aforementioned expansion of civic engagement is welcomed, it is yet to be seen if this engagement will bear fruit.

7.3. Promised structured civic society engagement on the EU side is still materialising, while contact with the NIO and UK Government has been light on the ground since the Framework was announced. The context of cumulative cuts impacting the community and voluntary sector, including through the loss of the European Social Fund and cuts to the Department for Communities budget, will also have a knock-on effect on the ability of particularly smaller organisations to engage fully.

7.4. Elements of Article 2 also remain relatively untested in the courts. While the Dedicated Mechanisms and other organisations including the Consortium have identified breaches in legislation outlined in 2.4, those breaches are untested and as such Article 2 remains a relatively under-utilised legal tool in upholding rights.

7.4. As for the Five Tests outlined in 1.5, it’s clear that while the Framework doesn’t explicitly breach them, it also does little to reinforce or protect them. While no changes have been made to the language of Article 2, or to the protections the Protocol provided to the Common Travel Area and North-South cooperation, it is clear that the Stormont brake and applicability motions could both potentially be abused to interfere with the Article 2 human rights protections and/or present barriers for the future of cross-border cooperation. In the context of the support for further regulatory divergence expressed in the Windsor Framework documents, it seems relatively unlikely that the development of common regulatory frameworks between the EU and UK is high on the agenda for the foreseeable future.

7.5. As with the previous iteration of the post-Brexit “special arrangement” for Northern Ireland, the true ramifications of this agreement won’t be felt or fully understood until it is implemented.