Northern Ireland
Legal Quarterly
Vol. 75 No. 3 (2024) 433–442
Editorial DOI: 10.53386/nilq.v75i3.1152

The Windsor Framework – guarantees, gaps and governance

Tobias Lock
Mary Dobbs
Karen Lynch Shally
Maynooth University
Correspondence email: tobias.lock@mu.ie.

This special issue of the *Northern Ireland Legal Quarterly* aims to uncover and examine the many layers of the Protocol on Ireland/ Northern Ireland, as reformed by the Windsor Framework, focusing specifically on governance, fundamental rights and movement of people. It is the product of a workshop held in June 2023 at Maynooth University to mark the launch of the Maynooth Centre for European Law.[1] While significant literature existed on some core aspects of the original Protocol, gaps remained and the ongoing political and legal developments necessitated a renewed analysis. This was exemplified by the Windsor Framework, which was adopted only three months before the workshop was held, and the restoration of Northern Ireland's Executive in February 2024 while the articles herein were being finalised.

The highly politicised nature of the Brexit process is in many ways crystallised in the legal questions and legal solutions for dealing with the United Kingdom's (UK's) only land border with the European Union (EU) and the unique political situation in Northern Ireland. Successive UK governments have struggled with trying to reconcile countervailing, and at times contradictory, demands and desires: the EU's desire to protect the integrity of the single market, while keeping the border between Ireland and Northern Ireland open and free from checks; the (largely self-imposed) objective of removing, as far as possible, any influence of EU law from the laws of the UK, including any controls by the Court of Justice of the EU (CJEU); and the demands – mostly coming from unionists in Northern Ireland – not to create a border for goods in the Irish Sea.

1 See Maynooth Centre for European Law. The workshop was supported by Maynooth University Social Sciences Institute's (MUSSI's) Small Grants Scheme and Maynooth University's Impact Through Dissemination Support Fund.

THE CONTENTIOUS BACKDROP TO THE WINDSOR FRAMEWORK

These contradictions have been haunting the Protocol on Ireland/ Northern Ireland since its inception. They proved to be the downfall of the Theresa May premiership after she was unable to secure House of Commons support for the 'backstop' version of the Protocol. The renegotiated Protocol which became part of the Withdrawal Agreement – far from having achieved the Boris Johnson Government's goal of 'getting Brexit done' – would soon come under attack too, with considerable dissatisfaction amongst Northern Irish unionists in particular. This prompted the Johnson Government to attempt to renegotiate and, failing that, to unilaterally disapply the Protocol in part or a move infamously described by then Northern Ireland Secretary, Brandon Lewis, as breaking international law 'in a very specific and limited way'.[2] This triggered push-back from the EU, with threats of legal action – a situation repeated on several occasions during Boris Johnson's reign,[3] which itself then ended somewhat prematurely without him being able to see through the (either agreed or unilateral) changes to the Protocol. His short-lived successor's successor, Rishi Sunak, then managed not only to improve EU–UK relationships and renegotiate the Protocol, but also to get the EU's agreement to rename it the Windsor Framework.[4]

The Protocol's rebranding as the Windsor Framework was accompanied by substantive changes concerning the management of trade flows between Great Britain (GB) and Northern Ireland, for example through a 'green lane' for traders that are importing goods from GB into Northern Ireland that are not considered to be at risk of subsequently entering the EU.[5] Yet the substance of the overall trading relationship remained largely unaffected. As discussed below, it also encompassed changes to article 13, complemented by unilateral guarantees by the UK Government, to provide Northern Ireland with some slightly greater say over the applicability of individual EU laws within its territory.

---

2 HC Deb 8 September 2020, vol 679, col 509.

3 Eg Jon Henley and Daniel Boffey, 'Brexit: EU poised to take legal action against UK over Northern Ireland' *The Guardian* (London 10 March 2021); and 'EU takes legal action against Britain for breaching Northern Ireland agreement' (*France 24* 15 June 2022).

4 See Joint Declaration No 1/2023 of the Union and the United Kingdom 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 of 24 March 2023 [2023] OJ L102/87.

5 See 'The Windsor Framework – The Green Lane'.

Meanwhile, of course, in February 2022 the Northern Ireland Executive had collapsed following the resignation of First Minister Paul Givan of the Democratic Unionist Party (DUP). The main reason cited was the Protocol.[6]

The Executive was not reinstated until two years later in February 2024. Until then the DUP – the largest unionist, though overall now second largest party in Northern Ireland following the May 2022 Northern Ireland elections – had refused to re-enter the power-sharing Executive citing ongoing concerns about the Protocol, which even the Windsor Framework was not able to alleviate. Only after lengthy negotiations between the DUP and the UK Government, which resulted in January 2024 in a UK Government Command Paper entitled 'Safeguarding the Union',[7] accompanied by a set of measures to be adopted within the UK and under the Windsor Framework itself, did the DUP decide to go back into government.[8]

This brief overview suggests that Brexit – at least as far as Northern Ireland is concerned – is far from settled. In addition to changes to the legal rules, there is now a growing amount of litigation invoking the Windsor Framework. Since the June 2023 workshop, which resulted in this special issue, the Northern Ireland Act has been amended[9] and a number of Joint Committee decisions have been adopted to implement the Windsor Framework.[10] Moreover, there have been several judgments by the Northern Irish courts on article 2 of the Windsor Framework, which entails a guarantee regarding 'rights, safeguards

6 Damien Edgar and Eimear Flanagan, 'DUP: NI First Minister Paul Givan announces resignation' (*BBC News* 3 February 2022).

7 UK Government, 'Safeguarding the Union' (CP1021 January 2024).

8 'Research Briefing: Northern Ireland Devolution: Safeguarding the Union' 3 April 2020.

9 Notably to include sch 6B.

10 Decision No 2/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 3 July 2023 adding two newly adopted Union acts to Annex 2 to the Windsor Framework [2023] OJ L 184/109; Decision No 3/2023 of the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 3 July 2023 amending Part I of Annex I to 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 OJ L 184/111; Decision No 4/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 28 September 2023 adding two newly adopted Union acts to Annex 2 to the Windsor Framework [2023] OJ L2471; in addition, the UK and the EU have made unilateral declarations in the Joint Committee concerning the Windsor Framework.

and equality of opportunity' (RSEO). Both have required our authors to adapt their contributions, for which we are most grateful.

THE BARE BONES OF THE PROTOCOL AND SUBSEQUENT WINDSOR FRAMEWORK

Already in its original form, the (then so-called) Protocol on Ireland/ Northern Ireland presented itself as a multilayered and subtle construct, which would reveal its true meaning only after careful legal analysis, requiring an indepth understanding of both the very specific circumstances of Northern Ireland, in particular the Belfast/Good Friday Agreement (BGFA) and its implementation into UK law, as well as EU law. Some of the Protocol's provisions were not what they appeared to be, most famously perhaps article 4, which stipulates at length that Northern Ireland remains part of the UK customs territory, only to be contradicted in large parts by article 5(4), which states that the provisions of Union law contained in annex 2 shall apply, which then – on closer inspection – turns out to be the entire EU customs code and other trade measures. Whether or not this particular drafting was deliberately used to disguise the true meaning of the Protocol, it is clear that, even if it were a trick to pull the wool over Northern Irish unionists' eyes, this did not work.

The spectre of a customs and regulatory border in the Irish Sea has been haunting the Protocol ever since its adoption as part of the Withdrawal Agreement between the UK and the EU. The subsequent choice by the UK Government to pursue a 'hard Brexit' by basing the overall EU–UK trading relationship on a fairly bare-bones free trade agreement (the Trade and Cooperation Agreement) resulted in the creation of two distinct (and largely uncoordinated) customs and regulatory spaces in the EU and GB respectively, with Northern Ireland caught in between. This has been made more complicated by provisions within the Windsor Framework/Protocol that provide for a role of the EU institutions, including the CJEU, where EU law continues to apply in Northern Ireland. It is this complex relationship and the question of where and how border controls should function that has driven much of the political contention noted above.

Alongside these provisions, the general focus on the BGFA and North–South cross-border cooperation is emphasised across the Preamble and several provisions, including articles 1 and 11. Yet, while the Protocol and subsequent Windsor Framework acknowledge the role of EU law in facilitating such cooperation generally and a joint EU–UK mapping exercise identified numerous areas where the EU underpinned this, this is not then reflected in the Windsor Framework/ Protocol's provisions providing for the continued applicability of

various EU laws. There are major gaps in this respect, although the potential exists to add to these in future, as discussed below. On the other hand, article 2 of the Windsor Framework/Protocol provides a potential safeguard regarding rights (etc), but in a manner that requires careful teasing out to understand fully its scope and role.

An interesting feature of the Windsor Framework/Protocol since its inception has been the requirement of periodic democratic consent votes envisaged by article 18. These are due to take place every four years (unless there is cross-community consent), with the first such vote due to happen in December 2024. That vote concerns the continued operation of articles 5–10 of the Windsor Framework, which are the provisions concerning the free movement of goods. All other provisions of the Windsor Framework – including article 2, which is the subject of four contributions to this special issue – would remain unaffected by a negative consent vote.

The main innovation of the Windsor Framework in governance terms was what is colloquially known as the Stormont Brake. This mechanism allows a minority of Members of the Legislative Assembly (MLAs) of Northern Ireland (30 MLAs from at least two parties) to veto the dynamic alignment of Northern Irish law with EU law where this is envisaged by the Windsor Framework (as, for instance, under article 5(4), in conjunction with article 13). However, the Stormont Brake comes with a number of conditions attached, first and foremost a requirement that the Northern Ireland Executive has been restored.[11] The Stormont Brake only applies in cases of dynamic alignment, namely where a piece of EU law (a 'Union act') was amended or replaced at EU level. Hence it cannot affect the operation of existing EU law *per se* in Northern Ireland. In addition, the content and the scope of the Union act as amended or replaced must significantly differ from the previous version and the application of the amending or replacing act must be such that it 'would have a significant impact specific to everyday life of communities in Northern Ireland in a way that is liable to persist'.[12] In addition to these substantive (and substantial) requirements, the MLAs opposing the Union act (and thus pulling the Brake) must 'demonstrate, in a detailed and publicly available written explanation' that their notification (ie pulling the Stormont Brake) is made in the most exceptional circumstances and as a last resort, having used every other available mechanism; that the substantive conditions are met; and that the MLAs have sought prior substantive discussion with the UK Government and within the Northern Ireland Executive to examine all possibilities in relation to the Union act.[13]

11 Joint Committee Decision 1/2023, annex 1, [2023] OJ L102/61.

12 Art 13(3)(a) Windsor Framework.

13 Joint Committee Decision (n 11 above).

The effects of the Stormont Brake are therefore limited in scope to amending or replacing EU acts made operable by the Windsor Framework. Hence, where the Stormont Brake is successfully activated, the old Union act (to be replaced or amended) remains applicable in Northern Ireland. Depending on the precise content of the amendment or replacement, this could potentially result in the creation of a double barrier to market access (and cooperation) by retaining an existing regulatory difference to GB and by creating a new divergence with the EU.

While the Stormont Brake itself has not yet been used, the so-called 'applicability motion' has. Applicability motions concern new Union acts, which do not replace or amend Union acts referenced in the Windsor Framework, but nonetheless fall within the scope of the Windsor Framework. According to article 13(4) of the Windsor Framework, the Joint Committee (comprised of EU and UK representatives) may add these to the relevant Windsor Framework annex or not. The newly introduced schedule 6B of the Northern Ireland Act 1998 provides that the Northern Ireland Assembly must agree to a motion calling for the addition of that new Union act to the Windsor Framework, in order for it to be duly added.[14] A vote on an applicability motion must be passed with cross-community support. The first such applicability motion was put before the Northern Ireland Assembly on 19 March 2024. It related to EU Regulation 2023/2411 on geographical indications schemes for craft and industrial products.[15] The applicability motion – put forward by DUP MLAs – was defeated due to lack of cross-community support. While a majority of 49 out of 81 members voted in support of the motion, all unionist members opposed it.[16] According to paragraph 18(1) of schedule 6B to the Northern Ireland Act 1998, a UK minister may not now agree to the addition of that Regulation to the Windsor Framework, unless the exception in paragraph 18(2) applies, which is that there are either exceptional circumstances or that the new Union act would not create a new regulatory border between GB and Northern Ireland.

---

14 See para 17 of sch 6B, Northern Ireland Act 1998. Inserted in February 2024 by the Windsor Framework (Democratic Scrutiny) Regulations 2024 (SI 2024/118), reg 1(2).

15 Regulation (EU) 2023/2411 of the European Parliament and of the Council of 18 October 2023 on the protection of geographical indications for craft and industrial products and amending Regulations (EU) 2017/1001 and (EU) 2019/1753 [2023] ELI.

16 Northern Ireland Assembly, Official Report (Hansard), Tuesday, 19 March 2024. The motion must be proposed as a positive statement, stating that 'x' should be added to the relevant annex. Therefore, to block the Regulation's addition, the DUP proposed and then voted against its own motion.

This episode suggests that a notification under the Stormont Brake 'proper' is likely to happen before too long and that its outcome may well be that a replacing or amending Union act will not be added to the Windsor Framework. The requirement of 30 MLAs from at least two parties (including no party) does differentiate it from the procedure for the applicability motion, but it nonetheless seems feasible that this hurdle could be met. It should be noted though that some unionists voted against the above Regulation due to concerns over the lack of scrutiny and therefore the uncertainty as to its impact in Northern Ireland, whereas with the Stormont Brake there is less uncertainty regarding the replacing or amending acts and simultaneously increased uncertainty if those same acts do not apply.

Overall, the Windsor Framework has wide-ranging, significant provisions that address multifaceted issues. However, their contours and parameters remain largely untested and contested, with a clear need for further investigation.

CONTRIBUTIONS OF THE SPECIAL ISSUE

The long wait until the restoration of a Northern Ireland Executive and the rejection of the applicability motion at the first possibility suggest that the UK Government's efforts at replacing the rather anodyne name 'Protocol on Ireland/Northern Ireland' with the deliberately regal title 'Windsor Framework' cannot be judged as having had the desired success of making the Protocol more palatable for unionists. As **Murray**'s article (584–612) explains, much of the motivation behind the negotiations leading to the adoption of the Windsor Framework was to bring about a restoration of the power-sharing government in Northern Ireland. This did not happen until further changes were brought in a year later. The consequences of almost two years without an executive were, as Murray shows, immense. Not only did this result in a depletion of public finances in Northern Ireland, but also a breakdown of democratic governance. This raises important questions about the future of power-sharing under the BGFA and what arrangements might realistically replace it to prevent a situation like this from re-occurring. More developments and on-the-spot creation of governance arrangements demonstrate that the Windsor Framework is only one piece in the puzzle of perpetually adapting governance arrangements for Northern Ireland.

The governance crisis around the Windsor Framework underlines the intrinsic political nature of these post-Brexit arrangements affecting Northern Ireland. Part of the politics around the Windsor Framework is playing out in the courts of Northern Ireland, chiefly because many of the provisions of the Windsor Framework have direct

effect and can therefore be invoked before a court without the need for transposition into domestic law.[17] The most intriguing developments in this regard concern article 2 of the Windsor Framework.

Article 2 of the Windsor Framework contains a commitment on the part of the UK that there shall be no diminution of RSEO as set out in the RSEO section of the BGFA. Much like the above example of the customs rules contained in article 5 of the Windsor Framework, article 2 might at first glance not appear to contain much substance. However, when analysed more closely, it reveals itself to be a fiendishly complex provision, which has resulted in a growing body of case law.

What is striking about article 2 is that it gives effect in law to a part of the BGFA which was not drafted to be justiciable, but in doing so it adds its own criteria and context. This raises many technical difficulties as to article 2's precise scope and precise effects in the law of Northern Ireland today. **McCrudden**'s contribution (443–487) is intriguing in that he uncovers the substantial influence of loyalist politicians in the drafting of the RSEO part of the BGFA. This may perhaps come as a surprise to many familiar with the politics and history of Northern Ireland, where it is often assumed that the protection of human rights at the time was mostly a concern for nationalists and not so much for unionists.

Three further contributions are concerned with the workings of article 2, each complementing the other. The article by **Deb**, **Frantziou** and **Lock** (488–521) explores the continued applicability of the EU's Charter of Fundamental Rights in Northern Ireland by virtue of the Windsor Framework. It shows that the Charter continues to have a role to play in the protection of fundamental rights in situations which would have been within the scope of EU law were Northern Ireland still in the EU. It further reveals that the practical application of article 2 is very complicated. While it is fairly clear from the wording of article 2 and the RSEO section that traditional civil and political rights can be invoked on the basis of article 2, **Bartlett** and **Hervey** (522–549) are asking whether the same is true for social rights. They are making a strong argument that at least some social rights should be considered to have been underpinned by EU law and that the RSEO section is broad enough to accommodate them. Their case studies have great political salience as they are dealing with issues such as the right to housing or the right to health, both of which have arguably suffered given the dire state of Northern Ireland's finances. While Bartlett and Hervey have put great argumentative effort into demonstrating that certain social rights were in fact underpinned by EU law – given that EU law does not itself create concrete social protections in the member states –

17 See *Ní Chuinneagain's Application for Judicial Review* [2021] NIQB 79; *Re SPUC* [2023] NICA 35; *Dillon and Others* [2024] NIKB 11.

Dobbs, **Hough**, **Kelleher**, **Whitten** and **Brennan** (550–553) were in the comfortable position of being able to point to a plethora of EU legislation in the environmental field. The focus of their article was therefore a different one: can the Windsor Framework help to protect the environment in Northern Ireland? This question is particularly intriguing given that the Windsor Framework only mentions the environment expressly once and only in the context of the aims that continued North–South cooperation is meant to achieve. Their article therefore drew on the general purposes of the Framework and sketched out the potential across different Framework articles to help protect the environment, in particular through article 2's guarantees on human rights and safeguards and article 11's focus on North–South cooperation. It shows that different tools do exist, including the novel guarantee in article 2.

While these four papers focus on article 2, they simultaneously highlight striking gaps across the Windsor Framework more generally. For instance, the lack of consideration of the environment in the Windsor Framework is just one example of the Windsor Framework's mostly narrow technical focus on fixing the border issue without adequately addressing the real need for close cooperation and alignment across the island of Ireland in other areas. Article 2 is a notable exception, which suggests that it will in future be used to effect such cooperation where possible and making continued litigation on its scope likely.

Given the issues discussed in these articles one may wonder if, and how far, the Windsor Framework can serve as any kind of role model or even as a harbinger of things to come elsewhere in the world. While it is unlikely that the very specific circumstances of Northern Ireland as a post-conflict society undergoing a process of extraction from a larger trading block will be replicated elsewhere, **O'Donoghue** shows (613–640) how Northern Ireland's economic governance model might nonetheless help to dispel notions that democratic processes hinder the success of a market economy. Her contribution features a fascinating outline of the history of exceptional economic governance spaces in which Northern Ireland, after the Windsor Framework, is one of the latest additions. In a world in which antidemocratic trends are on the rise, the Windsor Framework's robust protections concerning human rights, but also the Stormont Lock and Stormont Brake, could be seen as desirable features for any such development, be it on earth or in outer space.

Finally, the shorter contributions by **Maher** (652–658) and **Schiek** (641–651) address the largely ignored people dimension of trade – or indeed, simply people. The lack of any meaningful free movement provisions in the current EU–UK relationship, including the Windsor Framework, is of course easily explained by a strong desire on the

part of the UK Government to make good on the Brexit promise of ending free movement. But this has concrete consequences for the island of Ireland, which the Windsor Framework partly ignores. While the Windsor Framework does mention the continued operation of the Common Travel Area (CTA) on the island of Ireland, it ignores the fact that the CTA is only 'common' to British and Irish citizens and does not include rights for the large number of foreign citizens (be they EU citizens or third-country nationals), even if they are family members of Irish or British citizens. That this can lead to practical difficulties is very well demonstrated in both contributions, which contain current examples of the CTA not being fit for purpose.

The Windsor Framework and Northern Ireland's post-Brexit position at the intersection of two constitutional and governance spaces remain a work in progress in many respects. The Windsor Framework does not mark the end point of relations on the island of Ireland, nor is it the end point of EU–UK relations more generally either. The recent activation of the Stormont Brake and ongoing litigation around article 2 are the most obvious evidence of this.

The articles in this special issue make a distinct contribution to the literature on the Windsor Framework by helping to throw its specific features into greater relief and by uncovering aspects that were hitherto not clear. They build on the existing literature, notably found in two edited books,[18] an NILQ special issue[19] and several journal articles in this journal and others.[20] Both edited books – which took a global and all-encompassing approach – lay the foundations for the research undertaken here, flagging many of the aspects that this special issue develops and investigates in detail. While the contributions in these books were primarily based on the text of the original Protocol, this special issue has been able to address some of the changes introduced by the Windsor Framework as well as emerging case law on it.

---

18 Christopher McCrudden (ed), *The Law and Practice of the Ireland–Northern Ireland Protocol* (Cambridge University Press 2022) and Federico Fabbrini (ed), *The Protocol on Ireland/Northern Ireland: The Law and Politics of Brexit* vol IV (Oxford University Press 2022).

19 Colin Murray (ed), 'Northern Ireland's Legal Order after Brexit' (2022) 73 (S2) Northern Ireland Legal Quarterly 1–7.

20 Eg Colin Murray and Niall Robb, 'From the Protocol to the Windsor Framework' (2023) 74(2) Northern Ireland Legal Quarterly 395–415; Colin Murray and Clare Rice, 'Beyond trade: implementing the Ireland/Northern Ireland Protocol's human rights and equalities provisions' (2021) 72(1) Northern Ireland Legal Quarterly 1–28; Katy Hayward and Milena Komarova, 'The Protocol on Ireland/Northern Ireland: past, present, and future precariousness' (2022) 13(52) Global Policy (Special Issue: Brexit – Past, Present and Future) 128–137; and Katy Hayward, '"Flexible and imaginative": the EU's accommodation of Northern Ireland in the UK–EU Withdrawal Agreement' (2021) 58(2) International Studies 201–218.