



## The Centre for Cross Border Studies

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### *Submission to the House of Lords European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland's inquiry on the Windsor Framework*

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This document has been prepared by the Centre for Cross Border Studies in response to the call for evidence issued by the House of Lords European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland.<sup>1</sup>

#### **About The Centre for Cross Border Studies**

The Centre for Cross Border Studies (CCBS), based in Armagh, Northern Ireland, has a strong reputation as an authoritative advocate for cross-border cooperation and as a valued source of research, information and support for collaboration across borders on the island of Ireland, between the island of Ireland and Great Britain, elsewhere in Europe and beyond.

The submission that follows, therefore, is closely informed by the Centre's particular knowledge of and experience in cross-border socio-economic development involving a range of sectors from both Northern Ireland and Ireland, including public bodies, business and civil society. **It is focused on the Centre's ongoing efforts in monitoring the extent to which the necessary conditions for North-South cooperation are being maintained following the UK's withdrawal from the EU,<sup>2</sup> and in particular on the results of its quarterly surveys on the**

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<sup>1</sup> This response was authored by Dr Anthony Soares, Director of the Centre for Cross Border Studies ([a.soares@gub.ac.uk](mailto:a.soares@gub.ac.uk)).

<sup>2</sup> The Centre has responded to a range of relevant parliamentary inquiries and produced a number of Briefing Papers, which can be consulted at <http://crossborder.ie/category/research-and-policy/policy/consultation-responses/> and <http://crossborder.ie/category/research-and-policy/policy/briefings/>.

**conditions for North-South and East-West cooperation**, ongoing since the first quarter of 2021, as well as the Centre’s role in convening the Ad-Hoc Group for North-South and East-West Cooperation.<sup>3</sup>

## Overview

1. The joint announcement on 28 February 2023 by the UK Prime Minister and the President of the European Commission that the UK and the EU had reached an agreement on how to resolve issues regarding the implementation of the Protocol on Ireland/Northern Ireland marked a significant and positive change in UK-EU relations. This change in relations is stressed at various points in the [Political Declaration by the European Commission and the Government of the United Kingdom](#), which concludes:

The new way forward on the Windsor Framework marks a turning point in how both the United Kingdom and the European Union will work together collaboratively and constructively. It also reflects the full commitment of both to protect the Good Friday or Belfast Agreement of 10 April 1998 and its subsequent implementation agreements and arrangements (p.4).

Cooperation is built on the trust that develops through relations working for mutually beneficial outcomes. Prior to the joint work that led to the Windsor Framework, UK-EU relations were in a poor state where trust was in very short supply, not least due to the UK Government’s introduction of the [Northern Ireland Protocol Bill](#) and the EU’s response to it. The absence of trust between the UK-EU was reflected in the Centre for Cross Border Studies’ quarterly surveys on the conditions for North-South and East-West cooperation, where the political context was consistently seen as unsatisfactory for cooperation.<sup>4</sup> Importantly, the previously poor state of UK-EU relations and lack of mutual trust had impacted on relations between the UK and Irish governments, co-guarantors of the Belfast/Good Friday Agreement.

2. It will be essential for both the UK and EU to devote constant attention to sustaining and building on their more ‘positive bilateral relationship now and into the future’ as they implement the Windsor Framework,<sup>5</sup> and to exploit the potential benefits of the UK-EU Trade and Cooperation Agreement. There will no doubt be challenging moments as each side seeks to put into place what will be necessary to allow the Framework to ease the frictions

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<sup>3</sup> The views expressed in this submission are entirely those of the Centre for Cross Border Studies and should not be seen as representing the opinions of the organisations supporting the Ad-Hoc Group for North-South and East-West Cooperation. For further information on the Ad-Hoc Group, see <https://crossborder.ie/ad-hoc-group-for-north-south-and-east-west-cooperation/>.

<sup>4</sup> The quarterly surveys began in the first quarter of 2021, coinciding with the end of the Brexit transition period and the beginning of the operation of the Protocol on Ireland/Northern Ireland. The Centre has published analyses of the results of each quarterly survey, available on the [Briefing Papers](#) section of our website, as well as a [report](#) looking at the overall trends in 2021. These quarterly surveys are ongoing, with the support of the Department of Foreign Affairs’ Reconciliation Fund.

<sup>5</sup> [The Windsor Framework: A new way forward](#), paragraph 75.

associated with the Protocol, but these can be overcome if the positive relationship and mutual trust are maintained.

3. The Windsor Framework fulfils a significant role in abiding by the UK and EU's joint commitment to protect the Belfast/Good Friday Agreement and its subsequent implementing agreements and arrangements, in all its dimensions and strands. Crucially, however, as a product of the type of Brexit pursued by the UK, it is not the Windsor Framework that can guarantee that protection. Unilateral policies pursued beyond the scope of the Framework will potentially undermine the totality of relations that the Good Friday/Belfast Agreement encompasses, unless such policies are subject to rigorous assessments of how they may impact on the 1998 Agreement and modified or abandoned accordingly.

4. Similarly, while the Windsor Framework protects both Northern Ireland's place in the UK's internal market and unique access to the EU Single Market, it does so within the limits imposed by the UK's desired post-Brexit relationship to the EU, and both are particularly dependent on unilateral policies pursued by the UK. It is also vital that recognition is given to the fact that Northern Ireland has only *partial* (although valuable) access to the EU Single Market. Northern Ireland's position outside the EU Single Market in terms of services, for example, presents a serious challenge to the joint commitment made by the UK and EU to 'maintain the necessary conditions for continued North-South cooperation', as set out in Article 11 of the Protocol/Windsor Framework.

### **Regulatory divergence**

5. It would be entirely disingenuous to act in the belief that only policies emanating from Brussels could have an impact on the operation of the Protocol/Windsor Framework or, crucially, on Northern Ireland's relations with the Republic of Ireland and/or the rest of the United Kingdom. Paragraph 55 of the UK Government's Command Paper, [\*The Windsor Framework: A new way forward\*](#), makes this clear from the outset as it refers to the implications of what it notes earlier (paragraph 54) as what will be 'now considerable underlying regulatory divergence North and South':

The Government recognises that these changes do create a different legal and practical context on the island of Ireland, with substantial and likely increasing divergence between Northern Ireland and Ireland over time – building, of course on the in-built capacity for divergence in the vast majority of areas outside the Protocol including environmental law, professional qualifications, employment law, procurement, immigration, banking, data and a wide range of services and other rules.

6. While departure from the EU has provided the UK the 'in-built capacity for divergence', making use of that capacity is likely to directly impact on Northern Ireland. Therefore, just as engagement with Northern Ireland stakeholders, including the Executive and the Assembly, needs to take place regarding EU policies and legislation, the same holds true in relation to UK Government policies and legislation that would result in divergence – either divergence

between Great Britain and Northern Ireland, or between Northern Ireland and the Republic of Ireland and the rest of the EU.

7. The issue of potential UK divergence underlines the urgency for the UK Government and officials to adopt the practice of assessing the cross-border impact of potential policies and legislation – “border-proofing”. That requirement already exists in the Republic of Ireland, where the Department of the Taoiseach’s [Cabinet Handbook](#) states that proposals should be assessed in terms of their impacts on North-South and East-West relations, noting moreover that ‘often policy proposals not directly related to North/South relations do have implications for people in Northern Ireland or for all-island co-operation’ (paragraph 3.4).

8. As the UK Government has made clear in its Command Paper, the Windsor Framework will not prevent UK-EU divergence. Therefore, as the Centre for Cross Border Studies set out in a 2019 [Briefing Paper](#), for example, the need for “border-proofing” is all the more urgent:

“Border-proofing” must be undertaken, for example, in relation to the development of UK common frameworks encompassing such areas as international trade, immigration and international relations. This does not mean simply ensuring the proper involvement and consideration of the devolved administrations in the formulation of such frameworks, although this will be vitally important; it means testing any proposed framework within the specific context of the Northern Ireland-Ireland border region – which necessarily implies doing so from a *cross-border* perspective – as well as in the wider context of cross-border relations within and across these islands. Moreover, while the consideration of potential economic impacts is imperative, “border-proofing” also includes an assessment of potential impacts across a further three dimensions: social, environmental and cooperation (p.5).

### **The democratic deficit and the ‘Stormont Brake’**

9. The Windsor Framework has introduced additional measures to provide the institutions under Strand 1 of the Good Friday/Belfast Agreement with the capacity to make their views known on EU acts relevant to the operation of the Protocol, beyond those already laid out in Article 18. When Boris Johnson MP as UK Prime Minister first proposed in October 2019 that the Northern Ireland Assembly should have the ability to give its consent on an ongoing basis to the application of EU laws in Northern Ireland, the Centre for Cross Border Studies noted in a [Briefing Paper](#) that this could ‘give rise to political and community tensions and create intolerable uncertainty for businesses and citizens’ (p.7). These concerns remain, and they are particularly conscious of how political instability in Northern Ireland and of the Strand 1 institutions under the Good Friday Agreement impact on North-South and East-West relations.

10. To contribute to the avoidance of the unnecessary creation of uncertainty for businesses and citizens and of community tensions in Northern Ireland, it is entirely appropriate that a high bar of proof should have been set for the triggering of the Stormont Brake, as set out in

the [Windsor Framework \(Democratic Scrutiny\) Regulations 2023](#). Given the nature of this mechanism (broadly speaking, 30 MLAs from two parties or more that could be of the same designation seeking to prevent a replacement EU act from applying under the Framework), it is important that the Secretary of State acts in good faith to ensure all the conditions for the triggering of the Stormont Brake are met.

11. In contrast to the operation of the Stormont Brake, the applicability motion mechanism requires that any such motion must be voted on and passed by the Assembly with cross-community support. This results in a mechanism to address a democratic deficit introduced as a result of the Windsor Framework relying on a voting system that, as the Centre for Cross Border Studies stated in [written evidence](#) to the House of Commons' Northern Ireland Affairs Committee, 'does not translate as offering effective representation within the Strand One institutions for those who identify as neither nationalist or unionist' (paragraph 5).

12. Although in a limited way, the [Windsor Framework \(Democratic Scrutiny\) Regulations 2023](#)'s establishment of the Windsor Framework Democratic Scrutiny Committee brings the Northern Ireland Assembly into line with the Scottish Parliament and Welsh Senedd, where committees already exist to scrutinise their respective government's policies relating to the EU and international affairs. Given the purpose of this new Northern Ireland Assembly committee as set out in the legislation, it is unclear to what extent it could consider wider EU policies that could be usefully discussed at the North South Ministerial Council (NSMC). In this regard, it is important to recall that under Strand 2 of the 1998 Belfast/Good Friday Agreement, among the responsibilities of the NSMC is 'to consider the European Union dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework'.

13. Given the need for consultation and examination of EU legislation, the mechanisms for democratic scrutiny by the Northern Ireland institutions introduced by the Windsor Framework will require considerable resources in terms of relevant expertise. Those resources will need to be expended not only by officials within the Northern Ireland Assembly supporting the work of MLAs, as well as officials within Northern Ireland government departments, but also by businesses and civic society with whom the institutions will have to consult. The question arises as to where the financing of these resources is to be found, as well as the risk that MLAs and officials' energies will be overly diverted to these matters, to the detriment of other issues requiring their attention.

14. In order to avoid political and community tensions and the creation of uncertainty for businesses and citizens that could arise if political parties in Northern Ireland wished to trigger the Stormont Brake, it is crucial that politicians and officials engage with developments in EU policy and legislation at the earliest opportunity. In this regard, it is not only important that full use is made of the structures introduced by the European Commission for early engagement with proposed EU policy and legislative initiatives in order to identify potential problems for Northern Ireland that require resolution as early as possible, but also that

Northern Ireland's existing assets are properly exploited. Crucially, in this regard, will be the role played by the Northern Ireland Executive Office in Brussels which, with proper political direction and resourcing, can prove to be enormously valuable in acting as a channel of communication between Brussels and Belfast.

### **Engagement with Northern Ireland stakeholders**

15. The European Commission's statement on [Enhanced engagement with Northern Ireland stakeholders](#) published alongside the Windsor Framework comes in addition to proposals published in October 2022 in a [non-paper on Engagement with Northern Ireland Stakeholders and Authorities](#), which included the establishment of fora for structured dialogue 'to allow for the views of Northern Ireland stakeholders to be expressed in the areas relevant for the implementation of the Protocol'. The extent of the effectiveness of the structures for engagement proposed by the European Commission will depend on whether they provide meaningful two-way communication. They will not be effective or sustainable if they are largely employed as a means for the Commission to inform stakeholders of EU policy initiatives. If, on the other hand, stakeholders' views are seen to contribute to the shaping of relevant EU policies, this will more properly ensure the smooth operation of the Protocol/Windsor Framework.

16. But in terms of engagement, this cannot only be with Brussels. Although the arguments are often framed on how policies and legislation developed in the European Union may impact on Northern Ireland, the same principle and the same need for engagement must apply to policies and legislation developed in Westminster.

17. Crucially, engagement with stakeholders, whether it be on the part of the mechanisms established by the Withdrawal Agreement and the Protocol (Joint Committee, Specialised Committee, Joint Consultative Working Group), the European Commission, the UK Government, or the Northern Ireland Assembly, needs to recognise that the Protocol/Windsor Framework exists to support flows and relations of which Northern Ireland is a part. This means that such engagement must include not only stakeholders from Northern Ireland, but also those from outside involved in those flows and relations, particularly those on which North-South and East-West cooperation and relations depend. As the Centre for Cross Border Studies and the Ad-Hoc Group for North-South Cooperation have argued previously, no adequate monitoring of the operation of the Protocol/Windsor Framework is possible without engagement with stakeholders from the Republic of Ireland or Great Britain.<sup>6</sup> In this regard, the proposals from the European Commission fall short.

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<sup>6</sup> See, for example, the Centre for Cross Border Studies' [2021 written evidence](#) to this Committee, as well as the [evidence provided to this Committee in 2022](#) by the Ad-Hoc Group for North-South and East-West Cooperation.