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What the Windsor Framework/Protocol will mean in practice for the institutions of government in Northern Ireland

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Andrew McCormick joined the Northern Ireland Civil Service in 1980, working in the Department of Finance and Personnel (DFP) until 1992, before assisting in the political talks from 1992-1993. From 1993 to 1998 he was a Director in the Department of Education, and then Director of the Central Finance Group (DFP) until 2005, when he became Permanent Secretary of the Department of Health, Social Services and Public Safety. In 2014 he took on the position of Permanent Secretary of the Department for Enterprise, Trade and Investment, moving on to hold the same position at the Department for the Economy until 2018. From 2018 to 2021 he was Director General for International Relations in The Executive Office, with responsibility for EU exit issues.

Abstract

This paper considers what the post-Brexit context will mean for the Northern Ireland Assembly, the Executive and its departments of government, the North-South institutions and the British Irish Council. The relationships, opportunities, risks and obligations will be very different from anything that has gone before. While there are parallels with the operation of the EEA countries, and others with association agreements with the EU, Northern Ireland will be unique in that it is a region of a non-Member State, and not a separate sovereign jurisdiction. The issues that will arise will be affected not only by the relationship with the EU, but by the place of Northern Ireland within the governance and constitution of the United Kingdom, which will itself also be adapting to new policy opportunities and challenges post-Brexit. Communication and understanding (with NI stakeholders as well as the EU and UK institutions) will be absolutely critical if the opportunities are to be realised, and the potential tensions (which could be very significant) are to be anticipated and navigated to avoid disruption or controversy.

Introduction

Brexit created unique challenges for the management of trade in goods for Northern Ireland. These were not recognised or understood sufficiently during the referendum campaign, and at times were dismissed as unimportant or irrelevant, despite the warnings that were given by the former UK Prime Ministers (John Major and Tony Blair) and by some unionist representatives. The negotiations between 2016 and 2023 were bedevilled by misunderstandings and misrepresentations which for too long impeded any effort to develop

practical and workable solutions. The Windsor Framework is the first real occasion when the UK and the EU have addressed the issues and challenges in a realistic and pragmatic way, and hence offers the hope of an enduring resolution of the key consequence of Brexit: the form of the relationship agreed in December 2020 in the Trade and Co-operation Agreement (TCA) leads directly to the need to manage the interface between two regulatory regimes both of which affect Northern Ireland and which have significant potential to diverge.

The Windsor Framework addresses the reality that, following the TCA, it is not possible for there to be a free flow of goods between Northern Ireland and both Ireland and Great Britain. Its implications are complex and will require detailed technical work to understand and manage the precise implications of the evolution of the regulation of goods, as UK and EU law evolve. The greatest weight of that new responsibility will fall on the Northern Ireland Executive – the analysts and advisors who make up the relevant parts of the Northern Ireland Civil Service, and the Ministers and MLAs of the Northern Ireland Assembly. Understanding the consequences of proposals and decisions made by the EU and the UK over the years ahead will depend on the depth and effectiveness of the engagement that officials and Ministers develop and apply with the businesses, organisations and individuals that will be affected by the evolving regulatory regime.

Why is the situation of Northern Ireland unique?

The EU Single Market depends on sufficient confidence across governments and businesses that the standards and obligations that affect producers, processors and traders in all kinds of goods are common across all parts of the Union, and hence that there is no need for checks or controls on goods circulating within the Single Market. As well as the 27 Member States, several other countries have committed to apply the Single Market's regulatory regime, despite not having any agency in the determination of the evolving regulations. Thus the concept of being a rule-taker is not unique – while there is opposition to EU membership in the EEA countries, there is also a clear economic and political calculation that alignment with EU rules and participation in the Single Market is in their respective national interests.

For each such country, the possibility exists that the EU might adopt a regulatory change that would be seriously detrimental to their interests. Also, it is possible that, as sovereign states, they might want to adopt an innovative policy that would be strongly in their national interest, but would be incompatible with the EU Single Market. They always have, starkly, the choice of breaking away, should the price of alignment be too high.

For Northern Ireland under the Windsor Framework, that choice will also exist. However, the context has a fundamental difference compared to the position of Norway, Switzerland or any other country. There would be three, not two relevant drivers of change: as well as the evolution of EU law, and the scope for policy initiative from the NI Executive itself (within the scope of devolved competence, and subject to the constraints of the UK Internal Market legislation), Northern Ireland would be affected by evolving policy and regulation in GB (whether GB wide, in respect of reserved or excepted matters, or in one or more of England, Scotland and Wales, if the area of policy is devolved).

Hence the crunch could come either if the NI Executive and Assembly were strongly committed to a policy initiative that would be incompatible with the Single Market (in parallel with the situations of the EEA countries) or if GB policy or regulation evolves in such a way

that, if Northern Ireland did not follow suit, it would face more serious detriment than would arise through divergence from the EU Single Market. The former is perhaps unlikely. But if, as a significant body within the UK Parliament want, there is significant divergence over the years ahead, the latter possibility is real.

The range of possibilities ahead may include divergences that could be managed without fundamental consequences – if, perhaps, the category of goods affected was capable of being managed such that divergence would not create material risk to the EU Single Market, or distort the level playing field. But it is difficult to project forward to anticipate all the scenarios.

How could the new arrangements be administered?

The Windsor Framework (Democratic Scrutiny) Regulations 2023 address in considerable detail the procedures that would apply to consideration of new and amended EU regulations that would potentially affect Northern Ireland. The key elements are:

- **Criteria**, as set out in the agreed revised text of the Windsor Framework itself, and in the UK Government’s Unilateral Declaration, limiting the potential use of the “Stormont Brake”. These include reference to
 - o changes which make a significant difference;
 - o changes which *“would have a significant impact specific to everyday life of communities in Northern Ireland in a way that is likely to persist.”*
 - o *“...the most exceptional circumstances and as a last resort, having used every other available mechanism;”* and to substantive discussion and consultation with the UK Government, within the NI Executive, and with affected businesses, other traders and civic society.
- **Scrutiny** by a newly established Committee of the Assembly. The 2023 Regulations make detailed provisions for the procedures, powers and obligations of this new Committee, including requirements to seek substantive discussion and engagement with the UK Government, the relevant Executive Department (though engagement with businesses and civic society is at the Committee’s discretion);
- **Procedure to seek to prevent application of a replacement EU act.** This is based on the arrangements for Petitions of Concern as agreed in *New Decade, New Approach* in January 2020. However, there is no prescribed link between the scrutiny function of the new Committee and the provisions for a notification of a **“Concern”**, and hence the most controversial aspects of the application of the Windsor Framework may not arise from the scrutiny process (described more fully below) but from an assertion of risk by a highly motivated lobby.
- **Consideration by the UK government.** The procedures established under the Windsor Framework require the Secretary of State to accept the notification if it meets the defined criteria (which implies a responsibility on the UK government to honour the detailed terms as agreed with the EU).

In addition to the new procedures in relation to updated or amended EU regulations, the Windsor Framework makes new provisions in relation to new EU legislation that would be within the scope of the Protocol. In addition to the original agreement that the UK might not agree to the adoption of the new measure in respect of Northern Ireland, the new Regulations mean that any such new measure will be accepted by the UK if the Northern Ireland Assembly agrees, on a cross-community vote, on a so-called applicability motion.

The Scrutiny Process

In order to carry out their new responsibilities arising from the Windsor Framework, the Ministers and officials of the Northern Ireland Executive will need to have the means to acquire a detailed understanding of the implications of updated, amended and new EU regulations in relation to goods, and of their potential impact on traders, producers, processors and the general public. And this understanding and analysis will need to address several distinct dimensions:

- It will be necessary to be aware of current and potential policy on the relevant issues in the other parts of the UK – considering both the position of the UK government (in relation to any GB wide responsibility and the position in England) and those of the Scottish and Welsh Governments. The UK Internal Market Act (2021) constrains divergence on these issues to some extent, but the scope for detailed issues to arise is still very large. It will not be sufficient to consider the direct implications of the EU's proposals, as changes in the approach elsewhere in the UK could have material implications for the movement of goods between Northern Ireland and Great Britain.
- The implications of regulatory change will be affected by the attitudes of businesses outside Northern Ireland as well as locally – including both importers and exporters and their respective agents and associates in Great Britain and in the EU. Some changes may be seen as insignificant, but if a regulatory change would add time, trouble or cost to a business, it is possible that it could impact on the willingness of traders to maintain established patterns of trade.

All this points to the need for Northern Ireland officials to be in close and continual engagement with all possible sources of insight and intelligence on forthcoming changes to relevant UK and EU regulations. There could be considerable benefit in acquiring such insight at a formative stage, as if the policy approach has already been considered in detail by the 27 Member States before NICS officials become aware of what is planned, it may be more difficult to avoid problematic developments.

As well as self-help (which could include close liaison with other affected countries such as Norway and Switzerland), the more that the UK and EU institutions show sensitivity to, and make allowance for, the possible impact of change on Northern Ireland, the better the process – but it would be reasonable to infer that that is likely to be most difficult in the very cases that might be most controversial.

Even if these approaches are applied as fully as possible, it is still hard to overstate the time and energy that would be required of the personnel, at both official and political level, in the Northern Ireland Assembly and the affected Northern Ireland Departments to maintain the awareness and understanding of changes in the EU acquis. Similarly, business stakeholders

and lobby groups with strong policy interests (for example, in relation to environmental regulation, or food safety) would face an enormous challenge to their capacity. Some organisations in all sectors may have counterparts or partners in large Member States, or in Great Britain, with both capacity and interest in these fields, but it seems imprudent to expect such groups to carry the large burden that will arise.

Considerations

The practical outworking of the Windsor Framework will depend a lot on a number of political considerations as well as the technical and practical factors considered so far:

- If the approach taken by opponents of the Windsor Framework in the Northern Ireland Assembly is tactically to seek to make the maximum possible use of the “Stormont Brake”, significant issues would arise. It is conspicuous that there is no necessary link between the new Assembly Committee and the triggering of a Petition of Concern. It appears that a conclusion or recommendation by the Committee that a measure was acceptable, or that its implications were manageable, would not have any bearing on whether or not thirty MLAs could initiate a petition, other than as an argument that might or might not carry weight as the potential objectors consider their options;
- The agreement assumes that the UK government would apply the criteria in good faith. There are strong reasons to accept that assumption, in that any use of the Stormont Brake that would be in breach of the conditions would be much more likely to provoke remedial measures from the EU. The renewed breakdown of trust that such an action would produce might be as serious as the specific legal response by the EU. And there would also be the possibility for the UK government’s decision to be challenged by judicial review;
- The wider policy direction adopted by the UK government to regulation of standards and trade in goods will be highly significant. If, in practice, the UK remains in close alignment with EU standards and regulations, the possibility of the stated criteria relevant to the Stormont Brake arising would be very low. At the other extreme, if there was pressure for divergence, almost, in some circumstances, for the sake of demonstrating the UK’s freedom to diverge, the scope of difficulty for Northern Ireland would be significant;
- The text of the Protocol as agreed in October 2019 include specific opportunities for the North South institutions to contribute to the work of the Joint Committee and the Specialised Committee on the application and operation of the Protocol, and these provisions are not amended in the Windsor Framework. In practice, however, the aspirations underlying the Protocol as originally developed in 2018 (when these sections were drafted and agreed), have not been developed, because they presuppose a context where the North South institutions are functioning. The possible positive perspective on this point is that, if and when there is a restoration of the Northern Ireland Assembly and Executive, the new context would allow for the development of stronger co-operation with the Irish government. Those who have the greatest scepticism about the operation of the Windsor Framework might be the

most reluctant to draw on (or be seen to depend on) co-operation with the Irish government in the consideration of the implications of evolving EU regulations. On the other hand, if new developments actually get close to meeting the criteria that could lead to the Stormont Brake being invoked, there would be bound to be implications for North South relations as well as for the relationship between Northern Ireland and Great Britain

- Finally, it is vital to recognise that the subject matter in hand is inherently very complex. The likelihood is that many of the amended, updated or new EU regulations will be uncontroversial and unproblematic. Hence the implications of the Windsor Framework for the institutions of government in Northern Ireland may well be much more difficult in theory than in practice.

Conclusion

The Windsor Framework is a complex solution to an inherently complex and challenging set of issues. It is possible that it will lead to very demanding, time-consuming and resource intensive analysis of many and varied regulatory changes. This could include line-by-line scrutiny, detailed consultation with affected businesses and other stakeholders, and briefing for politicians, at least some of whom are likely to be very sceptical and reluctant to take assurances on trust.

Hence the way forward surely requires intensive preparation, through real and substantive engagement between EU, UK and Northern Ireland Civil Service officials, seminars and discussions with businesses and other affected stakeholders, and early and detailed briefing for Northern Ireland Ministers and MLAs on the nature of the issues that will lie ahead.

With goodwill, earned trust, common sense and a proportionate approach, this can be made to work.

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