

The Windsor Framework

Written evidence submitted to the Legislation, Justice, and Constitution
Committee of Senedd Cymru

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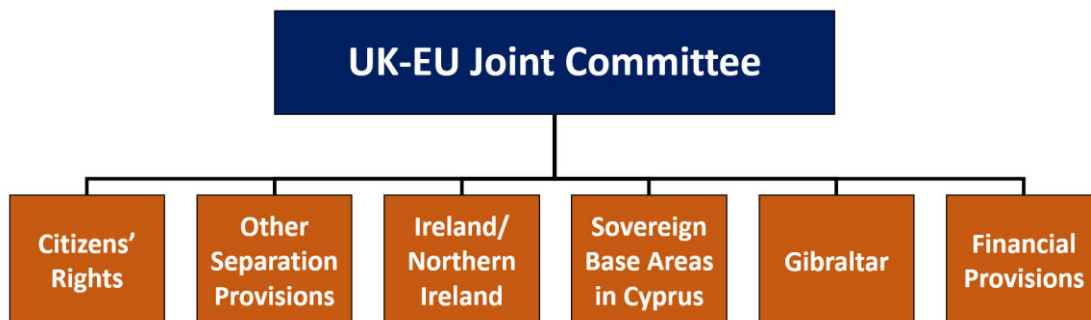
Queen's University Belfast

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This evidence is submitted as part of three-year academic research project on *Governance for 'a place between': the Multilevel Dynamics of Implementing the Protocol on Ireland/Northern Ireland* funded by the Economic and Social Research Council.³ It focuses primarily on the institutional architecture and governance arrangements in UK-EU agreements as they relate to Northern Ireland and specifically the Protocol on Ireland/Northern Ireland and particularly since the adoption of the Windsor Framework.

The institutional architecture and governance of UK-EU agreements and how these have evolved in practice.

1. The institutional architecture and governance arrangements for UK-EU relations post-Brexit are based on the Withdrawal Agreement (2020), and the Trade and Cooperation Agreement (2020).
2. The Withdrawal Agreement (WA) provides arrangements governing UK withdrawal from the EU. They are limited in terms of their scope to essentially citizens' rights, the financial settlement, 'other separation provisions', as well as certain matters relating to Gibraltar and the UK Sovereign Base Areas in Cyprus. To oversee implementation a series of joint UK-EU bodies have been established: a Joint Committee and six Specialised Committees.



Most of the Specialised Committees are expected to have either a limited shelf-life or see decreasing activity as the terms of withdrawal are implemented. The significance for UK-EU

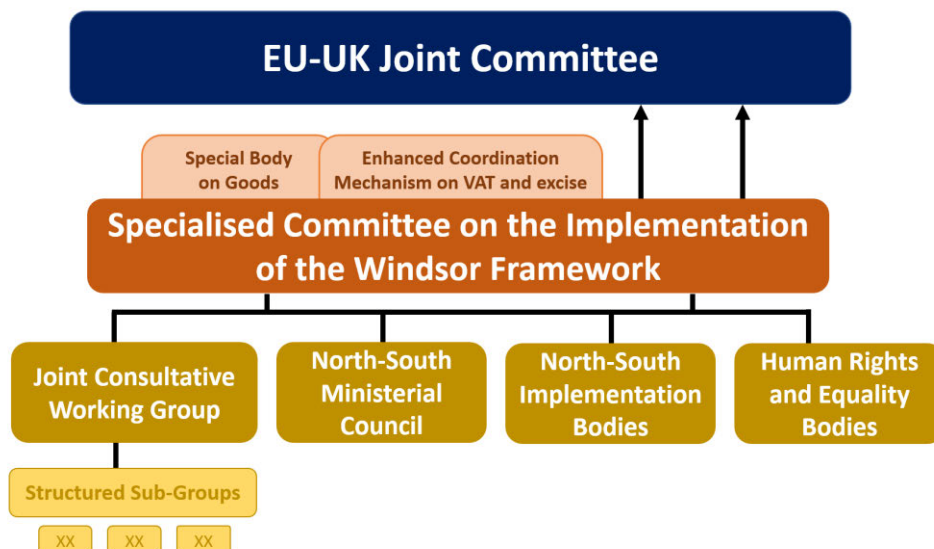
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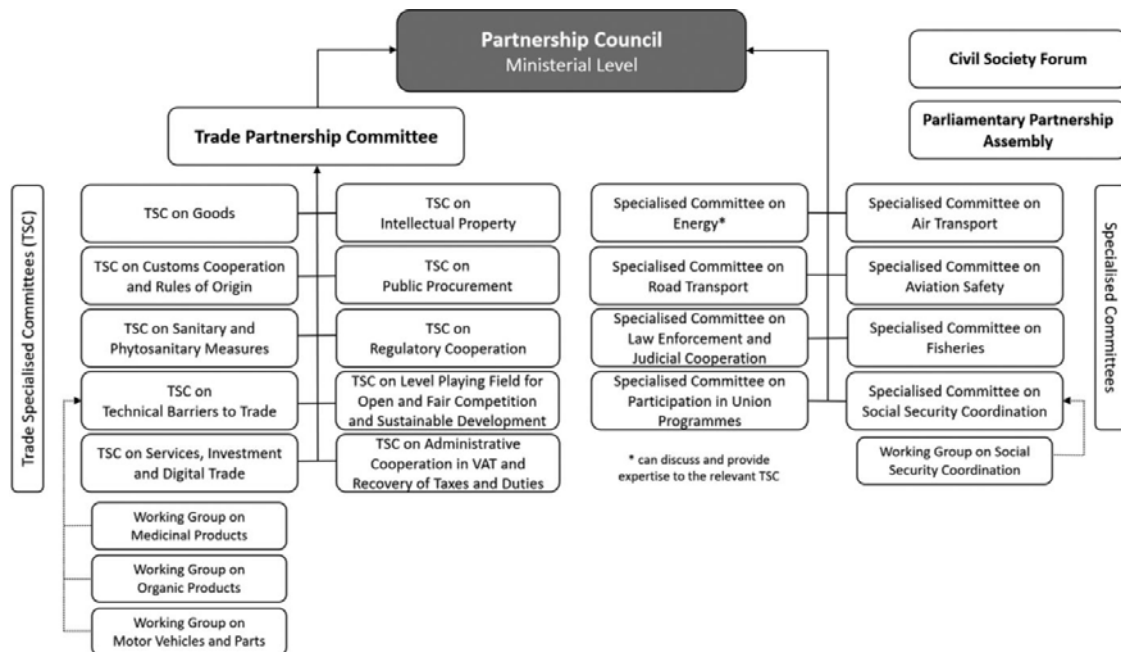
³ www.qub.ac.uk/sites/post-brexit-governance-ni.

relations of the governance arrangements established by the Withdrawal Agreement will therefore generally decrease over time.

3. The main exception concerns the governance arrangements for the operation of the Protocol on Ireland/Northern Ireland. This reflects the semi-permanency of the detailed arrangements established by the Protocol ‘to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions’. With Northern Ireland in the EU customs territory and part of the EU internal market for goods and in a position of dynamic regulatory alignment with the EU, there is a need for a detailed institutional framework to manage the relationship.
4. For the Protocol on Ireland/Northern Ireland, the governance arrangements are more developed than for any other element of the Withdrawal Agreement and they have recently been added to by the Windsor Framework in 2023 (see para. 6 below), Essentially the arrangements comprise three tiers: the Joint Committee, a Specialised Committee, and then four sets of bodies reporting to the Specialised Committee. The first – the Joint Consultative Working Group (JCWG) – is specific to the Protocol and is focused on the dynamic regulatory alignment of Northern Ireland with EU legislation relating to customs, the free movement of goods, and the single electricity market on the island of Ireland. The remainder are pre-existing bodies established by or as a result of the 1998 Belfast (Good Friday) Agreement, these include: the North-South Ministerial Council (NSMC), North-South Implementation Bodies, and rights and equality bodies tasked with monitoring the implementation of Protocol Article 2.
5. A further feature of the Protocol on Ireland/Northern Ireland (as noted at para. 24(a) below) is the ‘democratic consent’ mechanism. It involves members of the Northern Ireland Assembly (MLAs) being given an opportunity from 2024, and potentially every four years thereafter, to vote on the continued application of core provisions of the Protocol (Articles 5-10) governing the movement of goods into and out of Northern Ireland and the single electricity market on the island of Ireland.
6. With the Windsor Framework, the Specialised Committee was renamed, and two new formations established. Provision was also made for the creation of thematic sub-groups to the JCWG with five currently being established. They cover: goods regulation, the Single Electricity Market, customs, agrifood and subsidy control.



7. The institutional framework for the Trade and Cooperation Agreement (TCA) is more dense and more complex. It comprises the EU-UK Partnership Council which is supported on trade issues by a Trade Partnership Committee and ten Trade Specialised Committees (TSCs), and on other issues by eight Specialised Committees. A number of specific Working Groups support the work of Specialised Committees. In addition, there is a Civil Society Forum and Parliamentary Partnership Assembly.



8. An early academic assessment (July 2022) of the governance arrangements of the Withdrawal Agreement and the Trade and Cooperation Agreement concluded:

Withdrawal from the EU has seen the UK abandon membership of and formal influence over the strategic priorities of and policy making in the EU. Early experiences reveal a rather weak UK influence over the terms of both the WA and the TCA. Greater preparedness, internal UK cohesion, time and ambition may have led to a less imbalanced outcome to the withdrawal negotiations and those on the TCA. However, through the two agreements, frameworks for UK–EU engagement have been established and these do provide opportunities for the UK to shape the development of relations as well as, notionally at least, influence EU policy making. This is particularly so in the case of the arrangements in place for the Protocol on Ireland/Northern Ireland where structures have also evolved to accommodate stakeholder input. Further developments may occur as well, although the UK government’s proposed legislation for unilateral action to disapply much of the Protocol clearly threatens this.

Arrangements in place for the Protocol also provide some counter to the processes of disintegration and disengagement that generally define the UK’s post-Brexit approach to its relations with the EU. Equally, the slow operationalization of the TCA’s institutional framework and limited use of governance mechanisms set up for the purpose of managing the Protocol’s implementation speak strongly to the disengagement narrative. These remain early days, however, in the post-Brexit UK–EU relationship; and the extent of the UK government’s engagement with the

institutional frameworks established through the WA and the TCA may increase assuming future UK governments focus less on achieving an ideologically pure Brexit and instead adopt a more pragmatic and stakeholder-informed approach to managing relations with the UK. If such a change does occur, the denseness of the frameworks should provide opportunities for significant engagement with the EU and the possibility of exerting some influence over its decision-making. Given the limited ambition of the TCA and the absence of a high-level political body to promote the development of relations, that engagement may, structurally at least, be limited to addressing essentially technical issues. However, the institutional arrangements could evolve. As initial experience from the Protocol shows, evolution and adaption are possible, as are influence. It should be noted, however, that the Protocol and developments around its implementation are a response to very particular and 'unique circumstances' on the island of Ireland where, through the Protocol, the EU now has a formal obligation to support peace and stability. They should not necessarily be seen as a precedent for some privileged status for the UK if it were to seek a more integration-based relationship with the EU. In leaving the EU, the UK has opted to be a non-Member State. The EU's response has been to treat it as such.⁴

9. To date, no changes have been made to the governance arrangements for the TCA. As noted, however, the Windsor Framework has introduced changes to the governance arrangements for the Protocol on Ireland/Northern Ireland.⁵ The new mechanisms are an enhancement of the existing institutional framework for managing the implementation of the Protocol and offer the means for institutional responsiveness to Northern Ireland's unique position. The potential of these mechanisms to bring benefit will depend on their specific design and operation, the frequency of meetings, the quality of information they can draw upon, and the willingness of both the UK and EU to invest necessary time and resources in them.
10. The Specialised Committee will now meet additionally in two new 'specific compositions': the Enhanced Coordination Mechanism on VAT and Excise (ECMVE) and the Special Body on Goods. The ECMVE will primarily, it seems, function through the work of two 'lead experts' appointed by the UK and EU. These lead experts can exchange views and meet informally and representatives of 'third parties' or 'other experts' 'may be invited to talk on particular matters'.⁶
11. The Special Body on Goods has provision for 'representatives from business' to be invited to attend its meetings, which will be convened 'as necessary'. This will be an important body given that it could provide for 'exchanges of views' on any future UK legislation regarding goods of relevance to the Protocol, including 'assessing the potential divergence between UK and EU rules'. The Specialised Committee can also

⁴ Phinmore, D. (2022) 'The United Kingdom: Turning its Back on Influencing the EU?', *JCMS: Journal of Common Market Studies*, <https://doi.org/10.1111/jcms.13419>, 18-19.

⁵ This section draws on evidence previously submitted by the authors and Prof. Katy Hayward to the House of Lords European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland as part of its 2023 inquiry into the Windsor Framework; see: <https://committees.parliament.uk/writtenevidence/120901/pdf/>.

⁶ *Decision No 1/2023 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 24 March 2023 laying down arrangements relating to the Windsor Framework*, OJ L102, 17 April 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2023:102:TOC>

adopt recommendations for measures to be taken by the Joint Committee.⁷ This suggests that the work of the Special Body is potentially very significant, including in regard to monitoring and managing regulatory divergence (see para. 19).

12. The establishment of the sub-groups to the JCWG will provide opportunities for wider specialised input into the work of this important body. At the moment, the adjustment made to the JCWG Rules of Procedure provides for these sub-groups to include UK and EU officials only; it is anticipated that officials from Northern Ireland will be part of the UK delegation to meetings. There is also potential for these JCWG sub-groups to draw in experts from industry as well as stakeholders.
13. Complementing the existing democratic consent provisions in the Protocol, the Windsor Framework also introduced a 'Stormont Brake' mechanism allowing MLAs, in strictly defined circumstances to block the application in Northern Ireland of amendments and replacements to EU acts applicable under the Protocol. A second 'Stormont Brake' requires MLAs approval for the addition in the future of any new EU laws that the EU maintains should apply under the Protocol. These are discussed in greater detail below (see para. 24(b)).
14. Such measures are designed to help addressing the 'democratic deficit' inherent in the Protocol and its operation. Also contributing is the joint UK-EU commitment to 'establish regular engagement with Northern Ireland stakeholders' at 'each level' of the institutional framework for managing the implementation of the Protocol. This can include political representatives.⁸
15. Whether an effective contribution can be made to reducing the democratic deficit will also depend on the extent to which expertise and experience from Northern Ireland is heard and can be seen to be heard in the decisions that are made, either directly through representation or through stakeholder engagement. Essential here will be timely, visible, and accessible reporting on the planned and actual activities of the various joint bodies and mechanisms. Consideration needs therefore to be given to how activities are reported to and can be scrutinised by interested parties, most notably elected representatives, particularly in the Northern Ireland Assembly but also at Westminster. There is also a need for the Northern Ireland Assembly to have effective scrutiny arrangements in place.

The role of the devolved governments in the institutional architecture and governance of the UK-EU agreements themselves and UK intergovernmental arrangements in place to support their engagement.

16. Throughout the implementation of the Protocol – and most recently in the Windsor Framework, the UK government has committed to the participation of the First and deputy First Ministers of Northern Ireland (when in office) in the UK delegation to the Joint

⁷ *European Commission, Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland/Northern Ireland*, QANDA/23/1271, Brussels, 27 February 2023, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/qanda_23_1271/QANDA_23_1271_EN.pdf and *Joint Declaration No 2/2023 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*, L102/91, 17 April 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2023.102.01.0091.01.ENG&toc=OJ%3AL%3A2023%3A102%3ATOC

⁸ *Windsor Political Declaration by the European Commission and the Government of the United Kingdom* 27 February 2023 Available: <https://commission.europa.eu/system/files/2023-02/political%20declaration.pdf>

Committee. It has also included officials from Northern Ireland in the UK delegation to meetings of the Specialised Committee and the JCWG.

17. Neither the Withdrawal Agreement nor the Protocol/Windsor Framework contain provision for or a commitment to enabling the devolved institutions of Wales or Scotland to input to the implementation of the Protocol/Framework or its governing architecture. As most of its provisions are focused exclusively on Northern Ireland, this is perhaps unsurprising. Nonetheless it is worth noting that due to changes agreed under the Windsor Framework businesses, traders, and parcel carriers based in Great Britain will be newly eligible to use new 'green lane' systems of customs and regulatory easements for the movement of goods from GB into Northern Ireland for use or sale there. Although much will depend on how these new systems are operationalised and used, the expanded scope of eligibility may lead to stakeholders in Scotland and Wales seeking to develop avenues for inputting into the joint bodies managing the Protocol/Windsor Framework. In this respect, the Special Body on Goods would likely be the most relevant context for potential involvement of stakeholders from Wales or Scotland, including elected representatives.
18. There is no formal relationship between the joint bodies of the Withdrawal Agreement and those of the Trade and Cooperation Agreement. This is potentially problematic due to the overlap between the scope of certain TCA Committees (e.g., TSC on goods, TSC on customs cooperation and rules of origin, TSC on sanitary and phytosanitary (SPS)) and the scope of the Protocol/Windsor Framework and those EU laws it makes applicable to Northern Ireland (including on regulation of goods, customs, SPS rules etc.).
19. The relationship between different bodies tasked with monitoring and/or managing regulatory divergence both within the UK and between the UK and EU is not clear. For example, it is unclear if/how the Special Body on Goods assessment of any potential divergence of UK and EU rules (see para. 11) relates to the monitoring work of the Office for the Internal Market regarding divergence within the UK internal market, including between NI and GB arising as a consequence of the Protocol/Windsor Framework. Similarly, it is unclear if/how the operation of Common Frameworks in areas covered by the Protocol/Windsor Framework will relate to or account for developments in the latter's implementation.
20. Overall the post-Brexit regulatory environment in the UK is extremely complex and continues to evolve and remains affected by UK relations with and commitments to the EU. Yet, there are clear gaps in the architecture for monitoring and implementing the TCA and the Protocol/Windsor Framework dimensions of the UK-EU relationship. Ensuring that the views of the devolved institutions, particularly those in Wales and Scotland, are represented is set to remain a major challenge.

The role of UK legislatures and particularly devolved legislatures in the oversight of decision-making and scrutiny of the operation of the agreements.

21. UK legislation that implements the WA and TCA in domestic law does not provide for the routine involvement of devolved legislatures in general in the oversight of decision-making and/or of the operation of either agreement. The exception in this regard is the series of provisions made for the involvement of Northern Ireland institutions (when operational) in some oversight and scrutiny activities related to the Protocol/Windsor Framework.
22. The absence of a functioning Northern Ireland Assembly means there is currently no scrutiny taking place at devolved level in Northern Ireland of the implementation of the Protocol/Windsor Framework or TCA. During its period of post-Brexit operation (January

2020 – February 2021) the Northern Ireland Assembly did review the implementation of the Protocol, primarily through the Committee for The Executive Office. This included holding evidence sessions with the UK and EU co-chairs of the Joint Committee, David Frost and Maroš Šefčovič.

23. Assuming the restoration of devolved government in Northern Ireland, the UK government has mandated the establishment in the Northern Ireland Assembly of a Windsor Framework Democratic Scrutiny Committee. Its primary purpose is to support MLAs in determining whether use should be made of the Stormont Brake (see para. 24(b)). What other, wider scrutiny arrangements will be put in place – including any evidence sessions with co-chairs of the various Protocol/Windsor Framework joint bodies – remains to be seen.
24. Due to the unique arrangement for Northern Ireland under the Protocol/Framework a series different processes exist which enable the Northern Ireland Assembly to periodically express a view on the operation and/or continuation of aspects of the Protocol/Framework. These fall into two broad categories:
 - a. Democratic Consent Mechanism: under Article 18 of the Protocol, the Northern Ireland Assembly will be given opportunity to vote, first in 2024 and then every four or eight years thereafter, on the continuation or otherwise of Articles 5-10 of the Protocol which primarily concern the movement of goods. If a simple majority in favour of continuation is achieved, another vote on the same terms will be held four years later; if a cross-community majority in favour of continuation is achieved, another vote on the same terms will be held eight years later; if a majority against continuation is achieved, Articles 5-10 of the Protocol will cease to apply two years later and, in the interim, the Joint Committee will make recommendations to the UK and the EU on ‘necessary measures’ taking into account obligations arising under the Belfast/Good Friday Agreement.
 - b. Stormont Brake Procedures:
 - i. Under (new) Article 13(3)(a) of the Protocol, 30 MLAs from at least two parties in the Northern Ireland Assembly may opt to notify the UK government that an amendment or update to EU laws on the regulation of goods, which would otherwise apply in Northern Ireland under Article 5 of the Protocol, is likely to have ‘significant impact specific to everyday life of communities in Northern Ireland’ in a manner that is ‘liable to persist’ and therefore should not take effect in Northern Ireland. If the UK government consider the MLAs notification to be legitimate and compliant with relevant conditions, they may notify the EU in the Joint Committee and the relevant amendment or update will not apply in Northern Ireland; should this scenario arise, the EU can take ‘remedial measures’.
 - ii. Under Article 13(4) of the Protocol, the UK and EU can agree to add new EU laws to those which already apply to Northern Ireland under its terms if the new act is deemed to be in scope of its objectives and necessary for its operation. Fulfilling a commitment in its Windsor Framework Command Paper the UK government introduced a new domestic process related to the Article 13(4) process whereby, prior to the addition of a new EU act being agreed in the Joint Committee, a vote must be held in the Northern Ireland Assembly on an ‘applicability motion’ concerning the legitimacy or otherwise of adding the relevant EU act. A UK Minister cannot agree to the addition of

an EU act without having first secured cross-community majority consent for doing so in the Northern Ireland Assembly unless ‘exceptional circumstances’ apply.⁹

The role of civil society in the operation of the agreements and in particular the role of the Civil Society Forum and Domestic Advisory Groups under the Trade and Cooperation Agreement¹⁰

25. Polling carried out as part of our three-year research project has consistently revealed public support for direct UK-EU engagement with Northern Ireland regarding the Protocol. In February 2023, before the Windsor Framework was announced, almost three quarters (73%) of respondents agreed that the UK and the EU should commit to regular consultation with Northern Ireland stakeholders and political representatives on how the Protocol is implemented. This included majorities from supporters of the main Northern Ireland political parties (i.e. Sinn Féin, the Democratic Unionist Party, the Alliance Party, the Social Democratic and Labour Party and the Ulster Unionist Party).
26. In our most recent polling (March 2023),¹¹ more than three quarters (77%) of respondents agreed that commitments in the Windsor Framework for increased UK Government and EU engagement with Northern Ireland stakeholders and political representatives regarding the implementation of the Protocol are ‘welcome and important’. Significantly, this included the majority of respondents from across the political spectrum, with 56% of those respondents identifying as ‘strongly unionist’ and 72% of ‘slightly unionist’ welcoming these commitments. It also included the majority of supporters from each of the five main political parties in Northern Ireland, plus the plurality of TUV supporters.
27. The European Commission’s ‘enhanced measures’ for the involvement of Northern Ireland stakeholders are novel and provide a privileged form of consultative engagement that goes beyond arrangements the EU has as part of its relations with non-member states. Essential to the overall success of the measures will be the extent to which they provide meaningful opportunities for stakeholder input into Protocol-relevant European Commission proposals and for relevant interests and concerns to be reflected in part, at least, in the substance of those proposals and the decisions ultimately adopted by the EU and, as appropriate, the Joint Committee.
28. Stakeholder engagement needs effective resourcing. While the extent of the envisaged engagement is substantial, it is open to question the extent to which stakeholders across Northern Ireland will have the capacity to engage on an ongoing basis in meaningful consultations. To this end, consideration needs to be given to how best the UK Government and the European Commission can facilitate the engagement of stakeholders through (a) appropriate resourcing and support and (b) the design of mechanisms. Co-design with stakeholders should be encouraged.

⁹ *The Windsor Framework (Democratic Scrutiny) Regulations 2023* DRAFT SI 2023/XX Available: <https://www.legislation.gov.uk/ukdsi/2023/9780348246322>

¹⁰ This section draws on evidence previously submitted by the authors and Prof. Katy Hayward to the House of Lords European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland as part of its 2023 inquiry into the Windsor Framework; see: <https://committees.parliament.uk/writtenevidence/120901/pdf/>.

¹¹ Phinnemore, D. *et al* Testing the Temperature Extra: *What do voters in Northern Ireland think about the Windsor Framework?*, Queen’s University Belfast, April 2023 <https://www.qub.ac.uk/sites/post-brexite-governance-ni/ProjectPublications/OpinionPolling/TestingTheTemperature-Extra/>.

29. If stakeholder engagement is to contribute to a reduction in the 'democratic deficit' under the Protocol, it will be important for evidence of engagement and the associated outcomes to be fully documented and made public. It is recommended that, once evidence is available, examples are produced of how stakeholder engagement has shaped EU decisions with relevance to the Protocol.
30. We note that while the European Commission has adopted 'enhanced measures', there is no corresponding statement as yet from the UK Government as to the measures it will take, as per the Windsor Framework Political Declaration it issued with the European Commission, to contribute to 'regular engagement with Northern Ireland stakeholders including citizens and businesses, at each level of the Withdrawal Agreement's structures and with the co-chairs of the Joint Committee'.¹²

The transparency and accountability of these new UK-EU governance structures.

31. Although the UK Government and the EU do maintain relevant webpages,¹³ the transparency of UK-EU governance structures established under the Withdrawal Agreement is limited. Prior to meetings of the Joint Committee or Protocol/Windsor Framework Specialised Committee a provisional agenda is normally published; after the meeting has taken place a joint EU-UK or separate UK and EU statements are normally published. Typically, the information provided in provisional agendas and/or statements is very high-level. No public record is made of when JCWG meetings take place or what is discussed. The Joint Committee publishes an annual report on its activities that also references the work of the Specialised Committee and the JCWG.
32. There is greater transparency regarding the activities and discussions that take place in TCA committees. An agenda is published before any meeting of a Specialised or Trade Specialised Committee and a detailed minute of proceedings is published after the meeting takes place. These are made available online via UK government and the European Commission webpages.¹⁴

¹² *Political Declaration by the European Commission and the Government of the United Kingdom*, 27 February 2023, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1139420/Political_Declaration_by_the_European_Commission_and_the_Government_of_the_United_Kingdom.pdf

¹³ See UK Government 'Withdrawal Agreement Joint Committee' *gov.uk* Available: <https://www.gov.uk/government/collections/withdrawal-agreement-joint-committee> and European Commission 'Meetings of the EU-UK Joint and Specialised Committees under the Withdrawal Agreement' *commission.europa.eu* Available: https://commission.europa.eu/strategy-and-policy/relations-non-eu-countries/relations-united-kingdom/eu-uk-withdrawal-agreement/meetings-eu-uk-joint-and-specialised-committees-under-withdrawal-agreement_en

¹⁴ See European Commission 'Meetings of the EU-UK Partnership Council and Specialised Committees under the Trade and Cooperation Agreement' *commission.europa.eu* Available: https://commission.europa.eu/strategy-and-policy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement/meetings-eu-uk-partnership-council-and-specialised-committees-under-trade-and-cooperation-agreement_en and UK Government 'Trade and Cooperation Agreement Governance' *gov.uk* Available: <https://www.gov.uk/government/collections/trade-and-cooperation-agreement-governance>