

EXPLANATORY MEMORANDUM TO
THE WINDSOR FRAMEWORK (DEMOCRATIC SCRUTINY) REGULATIONS
2023

2023 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Northern Ireland Office and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

- 2.1 This instrument amends the Northern Ireland Act 1998 to provide for the Stormont Brake, a core part of the Windsor Framework, in domestic law.
- 2.2 It sets out the procedure for 30 Members of the Legislative Assembly (MLAs) to initiate the Stormont Brake, and provides for a new Northern Ireland Assembly scrutiny process to support the MLAs in their work. It would place an obligation on the UK Government to trigger the Stormont Brake when a notification by MLAs meets the relevant conditions in the Windsor Framework. And it would place the Government under a duty to veto the application of an EU rule under Article 13(4) unless there was cross-community support for its application, other than in highly limited circumstances.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The extent of this instrument (that is the jurisdiction(s) which the instrument forms part of the law of) is England, Scotland, Wales and Northern Ireland.
- 4.2 The territorial application of this instrument (that is where the instrument produces a practical effect) is England, Scotland, Wales and Northern Ireland.

5. European Convention on Human Rights

- 5.1 The Secretary of State for Northern Ireland, Chris Heaton-Harris, has made the following statement regarding human rights:

“In my view the provisions of the Windsor Framework (Democratic Scrutiny) Regulations 2023 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The Northern Ireland Act 1998 makes provision for the government of Northern Ireland for the purpose of implementing the agreement reached at multi-party talks on Northern Ireland as part of the Belfast (Good Friday) Agreement 1998. It was amended in 2020 to add a new Schedule 6A titled “EU Withdrawal: Democratic Consent Process”, which makes provision for the democratic consent process set out at Article 18 of the Windsor Framework.

- 6.2 These Regulations implement new domestic provisions which put in place the operational underpinnings of the Stormont Brake, a central part of the Windsor Framework agreed between the UK and EU (see CP 806 for further details).
- 6.3 It is also worth considering, alongside these Regulations, Article 2 and Annex I of the draft decision of the Joint Committee laying down arrangements relating to the Windsor Framework, which would add a new Article 13(3a) to the Windsor Framework and set out a UK Unilateral Declaration on “Involvement of the institutions of the 1998 Agreement” (the “Unilateral Declaration”).

7. Policy background

What is being done and why?

- 7.1 The Regulations would provide for the domestic delivery of the Stormont Brake, the powerful new democratic safeguard at the heart of the Windsor Framework, rooted in the principles of the Belfast (Good Friday) Agreement. The Regulations ensure that the veto power it establishes is implemented in domestic law, and there is a framework to enable it to operate effectively in practice. This would enable amended or replaced EU goods rules, which would otherwise be applied automatically in Northern Ireland, to be made subject to a Brake and subsequent UK veto in a process that provides a genuine and powerful role for the Northern Ireland institutions. The Regulations also put in place a new duty on the Government regarding its approach to any decision in the UK-EU Withdrawal Agreement Joint Committee on the use of its veto power following the use of the Brake (or indeed any other veto decision), providing a specific set of protections for Northern Ireland in that scenario.
- 7.2 The UK already has a veto at the UK-EU Withdrawal Agreement Joint Committee regarding all new EU rules that are proposed to be added to the Windsor Framework under Article 13(4). The Windsor Framework, through a new Article 13(3a), extends this significantly to enable amended or replaced goods rules, that would otherwise be automatically applied under Article 13(3), to be subject to that same veto process. This provides a new role for the Northern Ireland Assembly in determining whether significant new goods rules impacting on everyday life in Northern Ireland should be applied.
- 7.3 The process works by allowing 30 MLAs from two or more parties to make a notification in cases where a significant amended or replaced EU goods rule, or part of a rule, would have a significant impact specific to the everyday lives of communities that would be liable to persist. As the Regulations make clear, those two parties can be of the same community designation under the Northern Ireland Act 1998. The notification is transmitted directly from the Assembly to the UK Government, and does not require any form of vote or approval in the Assembly more broadly. As set out in the Windsor Framework, the Brake will only become available once the power-sharing institutions have been restored.
- 7.4 The Regulations would provide for a new Windsor Framework Democratic Scrutiny Committee within the Assembly to support MLAs in considering whether this new power should be used. Where it is used, and a notification is made in line with the conditions set out in the Windsor Framework, the Regulations would place the Government under a binding statutory obligation to trigger the Brake (with no discretion to take into account any remedial measures the EU might later seek to apply were the rule to be disappplied permanently). After that point, the rule would be

suspended from applying. And subsequently the UK Government would have a veto power in the Joint Committee as to whether the rule should be disapplied permanently. The Regulations would provide a further safeguard by setting out that the veto power must be used unless there is cross-community support for the rule, the rule would not apply a new regulatory border between Great Britain and Northern Ireland, or other exceptional circumstances apply.

- 7.5 The operation of the Brake process is solely an internal one within the United Kingdom, with no role for the European Union. The only step the European Union can take during the process is to request further information on the basis on which the Brake has been triggered. This is limited to a single request within a fortnight of the notification being provided, to which the UK responds within a fortnight, avoiding any delay in the process overall. The European Union is only able to challenge the use of the Brake after a decision has been made and the rule has been suspended, and may do so only through the normal international arbitration route - not through the Court of Justice of the European Union (which has no role). The exercise of the UK's veto at the Joint Committee is also solely a matter for the UK.
- 7.6 For the avoidance of doubt, the process set out between the UK Government and the institutions in Northern Ireland within these Regulations falls exclusively within the Strand One arrangements within the 1998 Agreement. The individual Parts of the Regulations are explained in further detail below.
- 7.7 Most of the detail of the Regulations is set out in a new Schedule 6B to the Northern Ireland Act 1998. Elsewhere regulation 1 covers citation, commencement and extent. Regulation 2 details amendments to the Northern Ireland Act 1998 to take account of the new provisions inserted on the Stormont Brake.

Part 1 of new Schedule 6B – General

- 7.8 Paragraph 1 of new Schedule 6B provides for general descriptions and interpretative points of detail. Paragraph 1(1)-(3) sets out what the different Parts of Schedule 6B do.

Part 2 of new Schedule 6B - Windsor Framework Democratic Scrutiny Committee

- 7.9 Paragraphs 2 and 3 establish a new Windsor Framework Democratic Scrutiny Committee (“the Committee”) of the Northern Ireland Assembly, and set out its functions. It is established to support MLAs in considering whether to seek to use the Brake. As such its key focus is on new or amended EU law which is relevant to either Article 13(3a) or 13(4) of the Windsor Framework. The Regulations enable the Committee to undertake inquiries and reports, with many of its engagement functions supporting the engagement requirements set out at paragraph 1(c)(iii) of the Unilateral Declaration. They also include provision for the UK to notify the Committee that a new, amended or replaced act has been proposed by the Commission or published by the EU, to support its scrutiny functions.
- 7.10 The Regulations set out that the Committee should determine whether to initiate inquiries into any specific legislative proposals or acts which could be subject to the Brake, and confirm whether an inquiry is being initiated or continued within 5 working days of a notification of publication from the Government. These provisions ensure that MLAs can be clear, in considering whether the Brake should be used, whether the Committee will undertake any work to support that assessment.

- 7.11 Paragraph 10 sets out that the Committee must publish an inquiry report and associated materials no later than 15 working days before the end of the two month scrutiny period. The 15 working day deadline is intended to provide as much time as possible for the Committee to report, while providing due time for the use of the Brake to be notified to the Government by MLAs, and for the Government to notify the Commission subsequently.
- 7.12 The work of the Committee is intended to support MLAs in deciding whether to use the Brake, but does not prevent MLAs drawing on any other information, assessment or evidence in deciding whether to use the Brake. It would be anticipated that any use of the Brake would ordinarily follow the Committee's work, where it does decide to conduct an inquiry, rather than pre-empting it.

Part 3 of new Schedule 6B - Procedure by which members of the Assembly may seek to prevent the application of a replacement EU act

- 7.13 Paragraphs 11 to 13 set out the process for initiating the brake process through a written notification from 30 MLAs from two or more parties. This does not include the Assembly Speaker or deputy Speakers, but the MLAs may all be drawn from the same community designation. In making a notification the MLAs must set out the basis for their assessment in line with the requirements set out in the Windsor Framework. This notification must be provided to the Speaker no later than 10 working days before the end of the two month scrutiny period, which the Speaker must then provide to the Secretary of State as soon as possible (and in any case no later than 9 working days before the end of the two month scrutiny period). This provides the UK Government with sufficient time to take forward its own notification process subsequently.
- 7.14 Paragraphs 14 to 16 set out that the UK Government must accept an MLA notification which meets the criteria set out in the Windsor Framework. This means that the Government must notify the EU if those conditions are met. The only relevant consideration for the Government is whether the conditions are met, and the Government would not be able to consider any extraneous factors. To that end, paragraph 14(2) clarifies that the possibility of EU remedial measures is not a relevant consideration for Ministers in considering a notification. Thus, if the conditions in the Windsor Framework are met, paragraph 15 places the Minister under a legal duty to give the European Commission written notice of this before the end of the two month scrutiny period, in line with the process set out in Article 13(3a). This will be operated fully consistently with the obligations in the Windsor Framework.
- 7.15 Paragraph 16 sets out that the Secretary of State must provide written reasons in any case where a notification is not accepted. The Speaker must then pass these onto the members who made the notification as soon as possible. Such a decision does not prevent a separate notification from being made in relation to the same EU act.
- 7.16 The Brake will not become available until the Northern Ireland Executive is restored and is operational, including with a First Minister and deputy First Minister in post, and the Northern Ireland Assembly is sitting regularly. Thereafter, MLAs wishing to operate the Brake must be individually and collectively seeking in good faith to fully operate the institutions, including through the nomination of Ministers and support for the normal operation of the Assembly.

Part 4 of new Schedule 6B - Joint Committee consideration of new EU acts

- 7.17 Part 4 prohibits the Government from agreeing to apply any new EU law, or amending EU law that has been subject to the Brake, in Northern Ireland through the UK-EU Joint Committee unless there has been cross-community agreement to its application in the Assembly, or other highly limited circumstances are applicable.
- 7.18 Paragraph 18(1) sets out that Ministers must not agree to a Joint Committee decision which would apply a new EU law, or one made subject to the 13(4) process through the use of the Stormont Brake, without Assembly approval through a specified motion, which must be passed with cross-community support. ‘Cross-community support’ takes the same meaning as elsewhere in the Northern Ireland Act 1998. This is a significant duty that places legal constraints on Ministers in their decision-making at the Joint Committee.
- 7.19 Paragraphs 18(2) to (5) make clear that a Minister could agree to add a new piece of legislation to the Windsor Framework only in two other highly limited circumstances: there are exceptional circumstances; or the EU act would not create a new regulatory border between Great Britain and Northern Ireland. The Minister would, of course, remain free to reject a rule in the Joint Committee for other reasons, even if those circumstances apply. If proposing to add a new rule to the Windsor Framework in either of those scenarios, a Minister must make a statement to Parliament before doing so, explaining why they are of the opinion that either of the circumstances have been met.
- 7.20 ‘Exceptional circumstances’ is a constrained exception. It is not intended that it would be available for ordinary political or policy preferences. As per paragraph 18(5), the definition includes the absence of an Assembly or Executive, ensuring that the absence of functioning institutions does not preclude the Government’s ability to make decisions in relation to Article 13(4) in the Joint Committee.
- 7.21 Paragraph 17 defines the terms of the cross-community vote relevant to the prohibition - the “applicability motion” described in the Regulations. Paragraph 19 sets out that the motion needs to be passed within a period of 5 weeks from the day on which the UK Government notifies the Assembly, to enable the functioning of the subsequent UK-EU Joint Committee process (though the time period can be extended). Paragraph 19 also sets out the means by which a motion can be tabled, and ensures that the Presiding Officer must select the motion for debate and vote before the end of the relevant period where it is tabled.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument is not being made to address a deficiency in retained EU law but relates to the withdrawal of the United Kingdom from the European Union because it is being made under section 8C of the EU (Withdrawal) Act 2018.

9. Consolidation

- 9.1 There is no consolidation done by this instrument.

10. Consultation outcome

- 10.1 The Government has considered and reflected engagement and consultation with interested stakeholders, including the Northern Ireland parties, in drafting these Regulations.

11. Guidance

- 11.1 The Northern Ireland Office does not consider it necessary to issue any guidance specifically in relation to this instrument.

12. Impact

- 12.1 The impact on business, charities or voluntary bodies is not possible to hypothetically estimate, as it will hinge around the future potential decisions made by democratically elected representatives.
- 12.2 The impact on the public sector is not possible to hypothetically estimate, as it will hinge around the future potential decisions made by democratically elected representatives.
- 12.3 A full Impact Assessment has not been prepared for this instrument because democratic scrutiny and control is an intrinsic part of the Windsor Framework but, as with all democratic processes, it is not possible to hypothetically estimate the future potential decisions made by democratically elected representatives.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 There is no specific monitoring or review provision with this legislation. However, the UK Government plays an active role in the new processes established within the Regulations, and as such will be able to review their operation on an ongoing basis.
- 14.2 The democratic consent provisions in Article 18 of the Windsor Framework - which mean that the continued application of Articles 5 to 10 of the Windsor Framework is subject to the consent of a majority of MLAs in the Northern Ireland Assembly every 4 or 8 years - continue to apply and are unchanged by these Regulations.

15. Contact

- 15.1 Ed Monteith at the Northern Ireland Office (edward.monteith@nio.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Paul Flynn, Deputy Director at the Northern Ireland Office, can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Secretary of State for Northern Ireland can confirm that this Explanatory Memorandum meets the required standard.