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The Stormont Brake – What Can We Learn from the Swiss–EU Relationship?

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Key points

- The purpose of the Stormont Brake is to stop the automatic application of new EU customs, goods, and agricultural rules in Northern Ireland when they significantly impact everyday life in Northern Ireland.
- The Windsor Framework provides an opportunity to protect Northern Ireland's parliamentary and UK sovereignty whilst implementing the EU-UK Protocol on Northern Ireland.
- The vague application conditions and shallow consultation rules may either help the UK Government to implement the Stormont Brake or help it to prevent its use.
- As long as Northern Ireland's goods have free access to the EU single market, the UK will inevitably face sovereignty issues arising from regulatory differences.
- The UK Government could create a third-party dispute settlement system (i.e., an ad-hoc arbitration tribunal) for the pre-veto scrutiny process. This system would bridge the gaps in the institutional provisions of the Windsor Framework in interpreting and monitoring the implementation of the NI Protocol, thereby reducing the use of the Stormont Brake.

The Windsor Framework, agreed on 27 February 2023, is a crucial breakthrough in overcoming the practical challenges of the EU-UK Protocol on Northern Ireland (NI Protocol). Within this framework, the Stormont Brake acts as an emergency mechanism to protect Northern Ireland's parliamentary sovereignty, but it is also the most controversial part of the Framework. While PM Rishi Sunak highlighted the Stormont Brake's value in stopping the automatic implementation of EU Goods laws in Northern Ireland, Ursula von der Leyden, President of the European Commission, emphasized the mechanisms in the Windsor Framework to avoid having to resort to the Stormont Brake (Please see the press conference). While Members of Parliament (MPs) have voted to accept the Stormont Brake, misunderstanding its implications for protecting Northern Ireland's parliamentary sovereignty could distort the Democratic Unionist Party (DUP) decision about whether to accept the political solution offered by the Windsor Framework. The current deal, while not meeting any side's aspirations completely reflects the fact that perfection is not possible in this situation. What it does, however, is still extraordinary: it provides an opportunity to protect Northern Ireland's parliamentary and UK sovereignty, by securing significant concessions on both sides. As we will see in the analysis below, it is almost impossible for the UK to get a better result in the negotiations with the EU on preventing the EU from automatically enforcing new laws in Northern Ireland.

Switzerland has also tried to prevent the encroachment of economic integration on legislative sovereignty in its approach to European relations. This encroachment is precisely the issue with the NI Protocol and what the Stormont Brake in the Windsor Framework seeks to address. This Briefing Paper draws on the Swiss-EU relationship experience to share some reflections on the Windsor Framework and the Stormont Brake.

Introduction to the Stormont Brake

The purpose of the Stormont Brake is to stop the automatic application of new EU customs, goods, and agricultural rules in Northern Ireland when they significantly impact on everyday life in Northern Ireland. Under paragraph 62 of the Windsor Framework, when such new EU rules emerge, Members of the Legislative Assembly (MLAs) of Northern Ireland can sign a petition to initiate the application of the Stormont Brake. The petition must be supported by 30 MLAs from two or more political parties to be valid. This procedure is the same as a separate 'Petition of Concern' in the revised Belfast (Good Friday) Agreement. It is worth noting that the application of the Stormont Brake is also subject to two conditions: (1) the new EU rules must have a significant difference in content or scope from the old ones; (2) the new EU rules must have a significant impact specific to everyday life that is liable to persist. Therefore, the MLAs of Northern Ireland should prove these points when submitting the petition. The petition's compliance with these conditions is subject to a scrutiny process, which the UK government promised to establish through consultation with local parties of Northern Ireland. In this process (which appears to be a consultation), the UK government, the parties in Northern Ireland, and affected stakeholders (like businesses) will sit together to evaluate the eligibility for implementing the Stormont Brake. If the petition meets the above conditions, the UK government should inform the EU of the Stormont Brake. Once the notification is complete, the rule in question is suspended automatically from coming into effect (i.e., the UK government unilaterally vetoes the EU's new rule.)

A veto triggered by the Northern Ireland Assembly and enforced by the UK government has an absolute binding effect on the EU. Paragraph 61 makes it clear that a sovereign UK government can veto the application of a new rule – and the accompanying European Court of Justice (ECJ) interpretation and oversight – to Northern Ireland. In other words, the ECJ has no authority to interpret and monitor the UK government's veto of new EU rules. In this way, paragraph 61 excludes the ECJ's jurisdiction over the Stormont Brake and eliminates the possibility of the ECJ overturning the veto. After the veto takes effect, the UK government and the EU need to form a joint committee to decide whether/how to reinstate the vetoed rules in Northern Ireland. The EU can only subsequently apply rules subject to the Brake in Northern Ireland if the UK also agrees to that in the joint committee.

High Application Threshold

It is worth noting that the conditions negotiated between the UK Government and the EU will make it difficult for the Northern Ireland Assembly to meet the requirements to trigger the Stormont Brake. First, the Windsor Framework's conditions for using the Stormont Brake are (legally) hollow. There is no clear definition in the text of the Windsor Framework of what constitutes a 'significant difference between the old and new rules' and what constitutes a 'significant impact on everyday life.' In addition, a more precise explanation is needed as to how the UK Government will determine whether the significant impact of the new rules on everyday life is liable to persist. Under the current text, the UK Government will have tremendous powers to interpret these key criteria. Paragraph 62 of the Windsor Framework states that the UK Government will consult with stakeholders to ensure that the Stormont Brake is deployed only as a mechanism of last resort to address these issues. However, specific measures, including consultation, have yet to be developed. The vague conditions of application and shallow consultation rules in the text may either help the UK Government to implement the Stormont Brake or help it to prevent its use. This uncertainty may increase the DUP's concerns about the Stormont Brake. The UK Government very evidently wants the DUP to accept the proposed Windsor Framework and restore the Northern Ireland Assembly, which is not currently operational, and it could help that process by introducing detailed rules with the EU as soon as possible to explain the application and consultation rules further.

Moreover, paragraph 66 of the Windsor Framework states that the EU may take appropriate remedial measures to deal with the consequences of regulatory differences on its markets arising from the permanent rejection of the new EU rules. The above statement is undoubtedly intended to discourage the use of the Stormont Brake and would create significant political pressure on the Northern Ireland Assembly not to trigger the Stormont Brake. Considering all the above, the Stormont Brake's practical value has limits.

Risk of Failing to Address the Democratic Deficit

Managing the flow of goods between Northern Ireland and Ireland is a significant challenge arising from Brexit. The UK and the EU each have their own concerns on this issue. On the one hand, the UK needs to uphold Northern Ireland's integral place in the UK and its internal market; this should imply all interactions between territories within a unified state, such as the free movement of people and goods. On the other hand, the UK needs to avoid a hard border on the island of Ireland and support North-South cooperation, which means that there can be no border checks on goods or people between Northern Ireland and Ireland. However, the EU needs to set up rules to prevent non-compliant goods from entering the Republic of Ireland and the rest of the EU single market from Northern Ireland through a border with no checkpoints.

How can the conflicting needs of the EU and the UK be met? The solution was to establish a border between Northern Ireland and the rest of the UK territory (i.e., on the Irish Sea) to inspect goods coming into Northern Ireland. Article 5 of the NI Protocol requires suppliers to demonstrate that goods will not subsequently enter the EU single market - following EU-approved criteria - before transporting goods from Great Britain into Northern Ireland. These cumbersome customs measures have erected serious trade barriers, severely impeding the free movement of goods between Northern Ireland and the rest of the UK and causing severe disruption to the daily lives of Northern Ireland citizens.

Apart from provisions removing existing trade barriers, the Windsor Framework sets up the Stormont Brake to address a democratic deficit (i.e., the inability of the Northern Ireland Assembly to decide on some of the measures that significantly impact the daily lives of Northern Ireland citizens). This mechanism aims to be a permanent solution to trade barriers caused by the differences between UK and EU rules. As noted above, under the original NI Protocol, goods entering Northern Ireland from the UK must meet EU-approved conditions. What is more, the EU can change and automatically apply these rules in Northern Ireland (see Article 13(3) of the NI Protocol). The Stormont Brake in the Windsor Framework is designed to address the democratic deficit by giving the Northern Ireland Assembly the power to veto such rules. Therefore, the Stormont Brake's value lies in upholding the Belfast Agreement's principle: that nationalists and unionists manage the affairs of Northern Ireland by democratic consensus in the Assembly.

However, as noted above, the UK Government and the EU have set a high threshold for applying the Stormont Brake in the Windsor Framework making it difficult for the Northern Ireland Assembly to actually launch the Stormont Brake to stop the application of EU law in Northern Ireland. Furthermore, given that the EU is actively reforming its domestic laws, it is highly likely that the Northern Ireland Assembly will often find it difficult to decide whether to trigger the Stormont Brake. However, one can hardly imagine the Northern Ireland Assembly regularly pushing the 'nuclear button' to require the UK government to implement this mighty power. If the Northern Ireland Assembly cannot easily launch the Stormont Brake, the mechanism, which aims to provide timely democratic oversight, will not achieve its ostensible legislative purpose.

Sovereignty Issues in Swiss-EU Relationship

The Swiss-EU relationship is extraordinary. Unlike other countries signing an overarching agreement to join the EU, Switzerland signed sectoral agreements to develop its bilateral relations with the EU. These bilateral agreements consist of two batches. The first signed in 1999 includes the free movement of people, air traffic, agricultural products, technical trade barriers, public procurement, and science. The second, signed in 2004, includes security and asylum and Schengen membership, cooperation in fraud pursuits, and final stipulations in open questions about agriculture, environment, media, education, care of the elderly, statistics and services. The second group of agreements contains a particular clause stating that if any deal is renounced or not renewed, they all cease to apply. Switzerland has used this cherry-picking approach to secure a single market status while maintaining its independence from the EU.

However, life is like a box of chocolates. Switzerland had to accept unwanted elements to gain more access to the single market. For example, Switzerland's restrictions on the free movement of people disqualified it from participating in Horizon 2020 and Erasmus+. What is more, the EU closed negotiations on any further opening of the single market, including the electricity market and stock exchange equivalence to Switzerland, when the Swiss Federal Council unilaterally terminated the talks on the EU-Swiss Institutional Framework Agreement (IFA). The IFA bundled into one instrument the agreements on the free movement of people, air transport, carriage of goods and passengers by rail and road, trade in agricultural products, and mutual recognition of industrial standards.

Like the Windsor Framework, the automatic alignment of EU law is an essential element of the drafted EU-Swiss IFA. When the EU adopts new legal rules, the EU must notify Switzerland of the corresponding changes (See Article 13 of the IFA). Upon receipt of the notification, Switzerland has the right to challenge the automatic implementation of the new EU rules in Switzerland on the grounds that it must satisfy its constitutional obligations, including the referendum. The most likely example, in reality, would be a request by Switzerland for a referendum to decide whether the Swiss government accepts the implementation of the newly enacted EU laws/regulations in Switzerland. However, an objection by the Swiss government cannot immediately and unilaterally terminate the implementation of new EU rules in Switzerland. Article 14 of the IFA provides for an interim implementation clause. This clause allows the EU to temporarily implement new EU laws/regulations in Switzerland while the latter is exercising its constitutional procedures (e.g., a referendum). And it stipulates that implementing Switzerland's constitutional obligations cannot normally take more than two years. In the case of a referendum the process can take up to three years. If Switzerland wishes to terminate the implementation of new EU rules on its territory immediately, it must give reasons to the EU. The IFA's draft text does not stipulate specific criteria for the determination. This rule means that, in general, Switzerland cannot unilaterally and immediately stop the automatic alignment of EU laws/regulations in its territory.

In contrast, while providing for activation conditions, the Stormont Brake allows the UK Government to immediately terminate the implementation of EU rules in Northern Ireland at its own discretion. If the Swiss Government wishes to avoid aligning with EU laws/regulations, the best-case scenario for the Swiss Government would be for the EU to agree to its going through the entire three-year referendum process. In this way, Switzerland could put its dispute with the EU on hold for three years. But if the referendum rejects the EU law/regulations, Switzerland would lose all of its negotiations with the EU under the IFA. The consequences of using the Stormont Brake would be much less severe. The EU is only allowed to take remedial measures to compensate for the differences between the new and UK rules. Arguably, the EU made significant concessions in negotiating the Windsor Framework with the UK, not only ensuring that the UK can unilaterally and immediately terminate the implementation of EU rules in Northern Ireland but also significantly reducing the consequences that the UK government would have to suffer if the new EU laws/regulations were banned.

Switzerland rejected the IFA for reasons similar to the DUP's rejection of the original NI Protocol; signing it would automatically align Swiss laws with EU ones in the corresponding areas. Switzerland's direct democracy (i.e., the tradition of enacting laws by referendum) and neutrality prevent it from making concessions on parliamentary sovereignty.

The consequences of terminating the negotiations are already bitter. What is worse is that Switzerland has no opportunity to strengthen its alignment with the single market than to wait for a political opportunity to re-open a framework agreement negotiation, if indeed, it can maintain its current status that long.

Takeaways from the Swiss-EU Relationship

1. Only by ceding parliamentary sovereignty to eliminate regulatory differences can full and guaranteed access to the single market be obtained. The Swiss experience shows that the enjoyment of autonomous legislative powers cannot indefinitely avoid regulatory differences that will ultimately limit access to the single market because regulatory differences can stem from both active and passive divergences. Even if Switzerland takes a prudent legislative approach (i.e., does not deliberately legislate to move away from retained EU law), it can only eliminate active divergences. Yet, passive divergences arise when the EU enacts new rules. In such cases, the legislature must decide whether to amend national laws to comply with EU ones. To qualify for the single market, either the legislators amend laws following the new EU ones, or the judges of national courts technically circumvent the differences through judicial interpretation in order to maintain de facto alignment. Besides these two approaches, there is no way to remove regulatory differences' negative impact on access to the EU single market. For Northern Ireland, the lesson is that as long as its goods continue to have free access to the EU single market, the UK will inevitably face sovereignty issues arising from regulatory differences. There is no perfect way of squaring this circle.

2. The European Economic Area (EEA) model has one important lesson for the UK. The UK Government could usefully reflect on the EEA's dispute resolution model based on a third-party dispute settlement system to design the scrutiny process. Such a process would complement the Stormont Brake in preserving UK sovereignty.

   The EEA Agreement is an international agreement that extends the EU's single market to European Free Trade Association (EFTA) members. By 1995, all EFTA states except Switzerland joined this Agreement. The Agreement's interpretation and implementation are subject to institutions independent of the EU, jointly led by member states. Implementing the EEA Agreement among the EEA-EFTA states is subject to the EFTA Surveillance Authority (the counterpart of the European Commission) and the EFTA Court (the counterpart of the ECJ) instead of the European Commission and the ECJ. As to disputes between an EU and an EEA-EFTA state, they are referred to the EEA joint Committee, which comprises representatives from the EEA states and the European Commission. Only if the Joint Committee cannot provide a resolution within three months will the ECJ have jurisdiction on disputes concerning provisions identical to EU law.

   This EEA model, which sets up neutral arbitrations (terminologically called an international third-party dispute settlement system), aims to prevent EU domination of EEA-only members and to provide a fairer and more transparent collaborative platform than an EU-led institution, such as the ECJ. Indeed, independent institutions could improve the balance of bilateral relations and the transparency of agreement implementation, helping to mitigate the agreement's encroachment on the legislative power of the parties. Such a collaborative platform could also reduce nationalist resentment over the erosion of judicial sovereignty.

   Yet, the EEA model can only theoretically prevent EU domination of EEA-only members. EEA-EFTA states must cede judicial sovereignty to the EFTA Surveillance Authority, the EFTA Court, and the EEA joint committee. What is more, these bodies never reject EU regulations for fear of the political costs resulting from renegotiating bilateral relations with the EU. For EEA-only members, the value of the EEA model is that they can participate in discussions on EU policymaking, which helps reduce conflicts between them and the EU regarding implementing laws and regulations. Perhaps Switzerland's greatest omission in the Swiss-EU relationship has been refusing to join the EEA, as the other EFTA members did, and losing the opportunity to engage in EU rulemaking. That said, EEA-only members have minimal influence on EU policymaking. They can only participate in discussions but not decide on the final policy.

   While the UK cannot participate in EU rulemaking, the Windsor Framework already gives the UK Government the supreme power to unilaterally and immediately prohibit the implementation of new EU rules in Northern Ireland. In addition, paragraph 63 of the Windsor Framework states that the EU and the UK will resolve any dispute over the veto through independent arbitration under international

rather than EU law. The Stormont Brake allows Northern Ireland to opt out of new EU rules. This power is extraordinary, even if it will be used only rarely.

Therefore, the UK should draw on the EEA's idea of third-party dispute settlement to improve Stormont Brake's pre-veto scrutiny process instead of setting up an EEA-like dispute resolution mechanism parallel to the Brake. The improved pre-veto scrutiny process would bridge the gaps in the institutional provisions of the Windsor Framework in interpreting and monitoring the implementation of the NI Protocol, thereby reducing the use of the Stormont Brake.

It would be desirable for the UK Government to establish a third-party dispute settlement mechanism independent of Northern Ireland's political parties and local citizens to resolve disputes arising from new EU laws/regulations. If 30 MLAs from two or more political parties of Northern Ireland agree to trigger the Stormont Brake, the UK Government should convene an ad-hoc (neutral) arbitration tribunal (i.e., the parties and the arbitrators independently determine the procedure without the involvement of an arbitral institution). It aims to provide a platform for Northern Ireland citizens (e.g., residents and merchants) to discuss the extent to which the changes in EU laws/regulations will affect their daily life. One possible scenario is that while the EU has imposed an environmental standard on goods exported from Northern Ireland, 30 MLAs from two or more political parties of Northern Ireland and citizens hold opposite opinions on the new rule's impact on the daily lives of Northern Ireland citizens. In this case, any Northern Ireland citizen can refer a dispute to the ad-hoc arbitration tribunal which can balance their and the MLAs' political positions prior to the UK Government deciding whether to exercise its veto. The arbitration tribunal consisting of three independent arbitrators should decide whether a petition of MLAs meets Stormont Brake's threshold.

Paragraph 62 of the Windsor Framework indicates that the EU allows the UK to establish an ad-hoc arbitration tribunal to implement the pre-veto scrutiny process. In this respect, the arbitration tribunal convened by the UK Government has absolute autonomy compared to those under the EEA agreement because it completely excludes the EU's participation. The role of such bodies is to find as flexible a dispute resolution as possible to prevent EU law from severely impacting Northern Ireland citizens' daily lives and thus avoid the use of the Stormont Brake, which will prove relatively disruptive to the EU-UK economic relationship. They would create maximum flexibility for resolving the Northern Ireland issue; it would not only reduce concerns about the UK's sovereign crises but also avoid the negative impact of the Stormont Brake on trade flows between Northern Ireland and the EU and between the UK and the EU.

3. Policymakers should take advantage of the opportunity to sign a favorable agreement. This is the last but most important lesson that policymakers can take away from the Swiss-EU relationship. The perception of sovereignty is highly politicized, and policy must be changed over time. The deal the UK makes between parliamentary sovereignty and access to the single market must consider the cross-community consensus of Northern Ireland citizens. This naturally affects the content of the text significantly. The Stormont Brake in the Windsor framework is certainly not a mechanism for the perfect exercise of timely democratic oversight of laws. As stated above, the Brake needs to be complemented by an independent body operating the pre-veto scrutiny process (i.e., interpreting and monitoring the implementation of the NI protocol), given that it is difficult for the Northern Ireland Assembly to invoke. But compared to bilateral agreements between Switzerland and the EU (or even between the EU and EEA-EFTA countries), the Stormont Brake is undoubtedly a significant concession by the EU, which puts the decision-making initiative in the hands of the UK Government. MPs have voted to accept the Stormont Brake. It would be desirable for the DUP to follow up this political decision.

Conclusion

The Windsor Framework may be neither as good nor as bad as proponents and opponents make out. The Stormont Brake enables the UK Government and the Northern Ireland Assembly to protect Northern Ireland's parliamentary and UK sovereignty. However, given the impact of applying this measure on trade flows between Northern Ireland and the EU and the political tensions it may create, the UK Government and the Northern Ireland Assembly may feel unable to use this mechanism to provide timely democratic oversight of new EU laws. But the Stormont Brake is the cornerstone of protecting Northern Ireland's parliamentary and UK sovereignty. If the UK Government succeeds in establishing an independent body to conduct pre-veto consultations (i.e., to interpret and monitor the implementation of the NI protocol from a UK perspective), it can effectively reduce the disadvantages of the Stormont Brake and exploit its advantages.

Trade liberalization comes with trade-offs. This Briefing Paper shares some reflections on the Windsor Framework and the Stormont Brake, drawing on the sovereignty issues in the Swiss-EU relationship:

1. Regardless of the agreement, the UK will inevitably face sovereignty issues arising from regulatory differences if Northern Ireland goods continue to have free access to the EU single market. After all, the EU must establish border control rules to prevent British goods from flowing into the EU's single market from the checkpoint-less Irish and Northern Ireland borders. When the UK cannot avoid the passive divergences resulting from EU law changes, it will confront a sovereignty challenge and have to maintain the integrity of the UK market through the Stormont Brake's scrutiny process (e.g., an ad-hoc arbitration) or the Brake itself.
2. Relative to the experience of Swiss-EU relations, the Stormont Brake is not a window-dressing but rather a cornerstone of protecting Northern Ireland's parliamentary and UK sovereignty. The UK Government only needs to establish a third-party dispute settlement system (i.e., an ad-hoc arbitration) for the pre-veto scrutiny process, which can find as flexible a dispute resolution as possible to prevent EU law from severely impacting Northern Ireland citizens' daily lives and thus avoid using the Stormont Brake. It would supplement the Stormont Brake to stabilize the fragile EU-UK relationship.
3. The Windsor Framework is still a good agreement for the UK, which secures the integrity of the UK internal market and guarantees the UK's power to take the initiative in resolving trade legislation issues. Compared to the Swiss-EU IFA and the EEA agreement, only the Windsor Framework allows a contracting party to unilaterally and immediately prohibit the automatic alignment of EU laws and regulations. The only caveat is that the UK Government must establish a third-party dispute settlement system (I recommend an ad-hoc arbitration as always) for the pre-veto scrutiny process to complement the Stormont Brake in interpreting and monitoring the implementation of the NI Protocol. While it is beyond the scope of this Briefing Paper to provide a detailed arbitration process, it would be desirable for the political parties of Northern Ireland to accept the Windsor Framework and cooperate with the UK Government and affected stakeholders to improve the process.

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