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The British Constitution, the Northern Ireland Protocol and the Windsor Framework

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THE BRITISH CONSTITUTION, THE NORTHERN IRELAND PROTOCOL AND THE WINDSOR FRAMEWORK*

di AURÉLIEN ANTOINE**

ABSTRACT (ITA): Il presente contributo esamina le implicazioni costituzionali del Protocollo dell'Irlanda del Nord e del Framework di Windsor nell'ordinamento giuridico post-Brexit. L'analisi verte sulla struttura normativa del Protocollo (2019), che ha istituito un regime commerciale sui generis per l'Irlanda del Nord, prevedendone la contestuale integrazione nel mercato interno britannico e nel mercato unico europeo per quanto attiene alla circolazione delle merci. Tale configurazione ha sollevato questioni di legittimità costituzionale di particolare rilevanza, risolte dalla Corte Suprema nella sentenza Allister (2023), che ne ha sancito la compatibilità con l'Atto di Unione del 1800. Il Framework di Windsor (2023) ha successivamente introdotto meccanismi di controllo democratico ex novo, tra cui lo "Stormont brake", attribuendo all'Assemblea nordirlandese potere di opposizione alle modifiche normative dell'UE. L'implementazione del "DUP Deal" (2024) ha altresì consentito il ripristino dell'esecutivo di power-sharing. La ricerca evidenzia come l'Irlanda del Nord rappresenti un caso paradigmatico di intersezione tra ordinamento costituzionale britannico e acquis dell'Unione nel contesto post-Brexit.

ABSTRACT (ENG): This paper examines the constitutional implications of the Northern Ireland Protocol and the Windsor Framework in the post-Brexit legal order. The analysis focuses on the normative structure of the Protocol (2019), which established a sui generis commercial regime for Northern Ireland, providing for its simultaneous integration into both the British internal market and the European single market with regard to the free movement of goods. This configuration raised significant constitutional legitimacy issues, which were resolved by the Supreme Court in the Allister judgment (2023), which affirmed its compatibility with the Act of Union 1800. The Windsor Framework (2023) subsequently introduced novel democratic control mechanisms, including the "Stormont brake", granting the Northern Ireland Assembly the power to oppose EU regulatory changes. The implementation of the "DUP Deal" (2024) has furthermore enabled the restoration of the power-sharing executive. The research demonstrates how Northern Ireland represents a paradigmatic case of intersection between the British constitutional order and the Union acquis in the post-Brexit context.

PAROLE CHIAVE: assetto costituzionale post-Brexit, devoluzione, governance transfrontaliera.

KEYWORDS: Brexit constitutional settlement, devolution powers, cross-border governance.

SOMMARIO: 1. Introduction; 2. Institutional dimensions of Ireland/Northern Ireland Protocol; 3. Constitutional review of the Ireland/Northern Ireland Protocol; 3.1 Reminder of the context; 3.2 The judgment of the *Northern Ireland High Court*; 3.3 Northern Ireland Court of Appeal ruling; 3.4 The decision of the Supreme Court; 4. Constitutional settlements of the Windsor Agreement.

1. Introduction

Northern Ireland, which was largely forgotten during the 2016 Brexit referendum campaign, was central to the negotiations between the European Union and the United Kingdom, both in terms of the Withdrawal Agreement adopted on 17 October 2019, and the Trade and Cooperation Agreement signed on 30 December 2021.

The Protocol on Ireland and Northern Ireland is annexed to the Withdrawal Agreement. When published, the prevailing feeling was one of circumspection, due to the difficulty of grasping its concrete implications for the UK as a whole. The major challenge was to find mechanisms to avoid re-establishing a physical border between the two Irelands and

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increasing administrative burdens (red tape). Articles 2 to 7 of the agreement achieve this goal. They deal with the rights of citizens, the Common Travel Area, the UK internal market, the conditions for avoiding the reestablishment of a hard border between the two Irelands, the necessary administrative regulations and formalities, and the VAT regime for goods (the free movement of services is excluded from the scope of the Protocol and the TCA).

The rights of Irish and Northern Irish citizens recognised in the Good Friday Agreement are guaranteed and preserved. The consequence of this principle is not neutral from the point of view of the relationship between the UK and the EU legal systems. A number of EU laws, listed in the annexes, continue to be in force in Northern Ireland to ensure that the equivalence of the status of people and goods moving between the two parts of the island of Ireland is maintained in order to avoid border controls. Equal treatment under EU law therefore continues to be a legal realty in Northern Ireland.[1] For goods transiting between Northern Ireland and Ireland, EU customs law applies almost in full. This alignment means that Northern Ireland remains in a customs union with the Republic of Ireland, and consequently with the EU (Art. 4 of the Protocol). This system entails the creation of a new VAT registration number for trade between the EU and Northern Ireland on all documentation when companies communicate with EU customers or suppliers (with the prefix "XI")[2].

The first part of the Protocol is completed by a second part in order to preserve the union. Article 5 specifies that Northern Ireland also belongs to the UK internal market. The free movement of goods and people is therefore, as a matter of principle, maintained between all the British nations. In practical terms, there are no checks on goods and people between Northern Ireland and the United Kingdom.

As long as goods are not intended to enter the Common market, no customs duties or other non-tariff barriers are required. On this point, the CTA has made the Protocol more flexible, since it excludes customs duties, quantitative restrictions on trade and equivalent measures on trade between the EU and the UK for goods produced in both countries, provided they comply with the rules of origin as defined by the treaty.

These arrangements entail substantial obligations for the UK government, some of which will be eased by the Windsor Agreement. Firstly, the UK administration must ensure that goods and animals transiting between the two free-trade areas meet European standards in terms of plant and animal health (Sanitary and Phytosanitary Measures). Secondly, EU VAT rates continue to apply in Northern Ireland to prevent the development of smuggling between the North and the South. Finally, the UK is responsible for collecting VAT on behalf of the EU on goods moving from Northern Ireland to the EU[3].

The whole system implies a close focus and control in setting rules of origin, in determining whether a good belongs to a category of goods, in identifying exemptions for listed goods, and in processing products for which the regime is given by the TCA and the decisions of the Joint Committee created by the Withdrawal Agreement. The application of the legal texts relating to Brexit on these points has proved to be abstruse. Part of the complexity of the Protocol is due to the fact that the EU wants to avoid Northern Ireland becoming a

[1] Six directives are covered by Annex 1 to the Protocol. Any amendments to these legal norms will not prevent them from being applied in Northern Ireland (Art. 13, § 3 of the Protocol), which will have to amend its law in such an eventuality.

[2] For a complete overview of the protocol's implications for businesses, see the UK government website.

[3] See A. GUIGUE, *Le Brexit et les autorités dévolues*, in *RFDA* 2020, p. 415.

"Trojan horse", allowing products imported into the UK to be shipped to Ireland (and the common market) via Northern Ireland without efficient checks.
Difficult as it may be to understand the texts in question, the ambiguous status of Northern Ireland meant that new border structures had to be put in place at the Irish Sea ports and at airports handling goods in transit between Great Britain and the island of Ireland. In addition to this "physical" dimension, new administrative burdens were introduced to identify the origin and substance of exports. The system introduced in 2019 has never been really effective and was never fully implemented.
Above all, the Protocol has given rise to deep opposition from the unionists in Northern Ireland (particularly the Democratic Unionist Party, DUP). For them, it separated Northern Ireland a little further from the rest of the United Kingdom. The Northern Ireland Assembly and the devolved government, which had not been operational since 1998, were completely blocked. As soon as the Withdrawal Agreement was adopted, the Protocol was already being called into question for its practical and institutional pitfalls, including by Boris Johnson who signed it. Unsurprisingly, several members of the DUP took legal action against the Protocol, challenging its lawfulness in relation to the fundamental norms governing relations between Northern Ireland and Great Britain. The Supreme Court put a definitive end to the litigation by its judgment of 8 February 2023, *James Hugh Allister and others v the Secretary of State for Northern Ireland and others*[4].
After strained negotiations between 2017 and 2019, the case of Northern Ireland spoiled the implementation of the Withdrawal Agreement and heavily impacted the negotiations on the Trade and Cooperation Agreement. Tensions with the EU were so great that the Commission initiated a series of legal actions against the UK[5]. It was not until Boris Johnson left 10 Downing Street that things began to move in the right direction. The arrival of Rishi Sunak resolutely initiated a true shift[6].
The Windsor Framework, which was agreed under Article 164, § 5 of the Withdrawal Agreement[7], was signed on 27 February 2023 and incorporated into domestic law through a number of legal instruments[8]. Unnecessary burdens of administration are abolished for trade in the majority of goods within the UK internal market (new Article 6, § 2 of the Protocol). For instance, the constraints of rules of origin or customs declarations for packages are softened. The official documents required for the transit of agricultural food products have been lightened. An unprecedented system for sharing dematerialised data to control trade and manage risks has been created[9].

[4] *James Hugh Allister and others and Clifford Peeples v the Secretary of State for Northern Ireland and others* [2023] UKSC 5.
[5] S. FELLA, *The Northern Ireland Protocol: EU legal action against the UK*, House of Commons Library, 22 June 2022.
[6] V. M.C. CHARON, *Rishi Sunak parviendra-t-il à régler les dossiers les plus épineux de l'après Brexit ?*, in *Observatoire du Brexit*, 7 November 2022.
[7] This article «provides that the Joint Committee may adopt decisions to correct errors, address omissions or other deficiencies, or address situations that were unforeseen when the Withdrawal Agreement was signed. The Protocol can only be amended in this way for a period of four years after the end of the transition period (i.e. until end 2024)» (see this link).
[8] The Windsor Framework (Constitutional Status of Northern Ireland) Regulations 2024 and The Windsor Framework (UK Internal Market and Unfettered Access) Regulations 2024 pursuant to paragraph 8F(1) and (4) of Schedule 7 to the European Union (Withdrawal) Act 2018 and section 47(10) of the United Kingdom Internal Market Act 2020 (statutory instruments approved by the Parliament).
[9] For a detailed presentation, see EUROPEAN COMMISSION, *Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland/Northern Ireland*, 27 February 2023.

Border controls will only be required in the event of a specific risk or suspected fraud. A few fresh food products can once again be exported from Great Britain to Northern Ireland, such as sprouted potatoes and sausages. VAT and other taxes on goods intended to remain in Northern Ireland will be aligned with those in the UK (amendment to Annex 3 of the Protocol). These taxes will be abolished for energy-saving equipment (solar panels, heat pumps, etc.). European Medicines Agency controls will be waived for pharmaceutical products that are not intended to leave the UK market. However, the Union Customs Code continues to apply to and in Northern Ireland for goods exported to the European common market. The European Court of Justice retains full jurisdiction in the event of any difficulty in interpreting or implementing these rules[10].

This first part is completed by an institutional part. It strengthens the role of the Northern Ireland Assembly and is aimed at gaining the support of Northern Ireland's unionists. Suspending its agreement on the Windsor Framework to bilateral discussions with the UK government, the DUP finally agreed to the new arrangements[11]. These concessions paved the way for the restoration of power-sharing in Belfast from 30 January 2024[12].

It took almost a year for a normalisation of the political and institutional status of Northern Ireland. Between the Supreme Court's decision of 8 February 2023 and the new bilateral framework approved by the Unionists with the UK Government, the legal security of the post-Brexit arrangements is more secure, at least from a constitutional point of view. The aim of this article is to review the general structure of the Protocol from a constitutional and institutional point of view, to analyse its constitutional legality as enshrined by the UK courts, and to present the evolution of the Windsor Framework. This corpus now shapes Northern Ireland's post-Brexit constitutional status, although its long-term future within the United Kingdom nevertheless remains uncertain.

2. Institutional dimensions of Ireland/Northern Ireland Protocol

The Northern Ireland Protocol sets out an original institutional framework designed to safeguard the rights and freedoms of the citizens of Northern Ireland, while taking into account the political constraints in country due to the opposition between Unionists and Republicans.

The Protocol introduces a sophisticated decision-making process. Article 18 provides that the "democratic consent of Northern Ireland" to be periodically renewed to confirm the accession of the Northern Irish institutions to the frontstop. Four years after the end of the transition (i.e. from December 2024), the Northern Ireland Assembly may refuse to extend the regulatory alignment. This consultation can be repeated every four years in the event of a simple majority vote or every eight years if the arrangement is supported by Northern Ireland's Unionist and Republican parties. In the latter case, an absolute majority of the Members present must vote to approve it. In addition to this majority rule, the consent of a sub-majority of Unionists and Republicans must be obtained. Further implementation of the Protocol for eight years will also be enacted if 60% of the MPs present support it and the majority includes at least 40% of Unionists and Republicans. In the event of rejection

[10] See HOUSE OF LORDS, SUB-COMMITTEE ON THE PROTOCOL ON IRELAND/NORTHERN IRELAND, *The Windsor Framework*, 7th Report of Session 2022-23, HL Paper 237, 25 July 2023, p. 133.

[11] SECRETARY OF STATE FOR NORTHERN IRELAND, *Safeguarding the Union*, Command Paper No. 1021, January 2024, p. 80.

[12] J. RUTTER, M. FRIGHT, *Government deal with the DUP to restore power sharing in Northern Ireland*, in *Institute for Government*, 1 February 2024.

at any time, the Protocol will cease to apply within two years of the decision being taken by the Assembly[13].

The introduction of a consent clause appears to be the most original aspect of the Protocol, but it is not the only one. Legislation adopted by Westminster or the Northern Ireland Assembly at Stormont must comply with the requirements of the Protocol, which itself guarantees the integrity of the peace agreements (section 23 and appendix 3 of the EU (Withdrawal Agreement) Act 2020). The Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland exercise oversight to ensure compliance with Article 2 of the Protocol regarding the rights of individuals. These bodies may produce reports on request or on their own initiative if they deem it necessary. They can inform the specialised committee (set up by the withdrawal agreement to monitor its proper application) in the event of a problem. Both committees also have the power to initiate legal proceedings, to assist citizens in proceedings and to intervene in proceedings involving Article 2.

The Withdrawal Agreement and the TCA also establish a number of committees that can take decisions in relation to Northern Ireland and Ireland (Title II of the Withdrawal Agreement and Art. 7 et seq. of the TCA). The Joint Committee[14] is competent, in principle (with the support of the Specialised Committee on matters relating to the implementation of the Protocol on Ireland and Northern Ireland, art. 14 of the Protocol), to adopt decisions essential for its implementation[15] or to amend it. For example, at the meeting of 17 December 2020, several decisions were adopted to this effect in order to amend the list of European regulations that are binding on Northern Ireland[16]. The Partnership Council created by the TCA took over from the Joint Committee with the full implementation of the Protocol by both parties[17]. In the event of disagreement on the Irish case, the dispute resolution procedures are provided for in Part Six of the TCA (Art. 734). It has already been activated a few weeks after the provisional entry into force of the treaty, which shows

[13] See *Institute for Government*. See also The Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020.

[14] The Committee is established by Article 164, § 1 of the Withdrawal Agreement and may take decisions (Art. 164, § 5) that are binding on both parties and are incorporated into the acquis of the agreement (Art. 166, § 2).

[15] For example, in order to identify "the criteria for considering that a good brought into Northern Ireland from outside the Union is not at risk of subsequently being moved into the Union. (Art. 5 (2) 4 of the Protocol).

[16] Dec. No. 3/2020 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 EAEC of 17 December 2020 amending the Protocol on Ireland and Northern Ireland to 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 [2020/2247], OJEU L 443, 30.12.2020, p. 3. For a constant update of the decisions and statements of the Joint Committee, see the official EU website.

[17] The committee has only had a limited role since 1 January 2021, the date of the provisional entry into force of the TCC. Until spring 2021, its main decision was to agree on the deadline for provisional application of the TCC (Dec. No. 1/2021 of the Partnership Council established under the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, on the one hand, and the United Kingdom of Great Britain and Northern Ireland, on the other hand, of 23 February 2021 as regards the end date of provisional application under the Trade and Cooperation Agreement [2021/356], OJEU L 68, 26 Feb. 2021, p. 227).

that the implementation of the Protocol has proved difficult[18], and favourable to potential litigation[19].

3. Constitutional review of the Ireland/Northern Ireland Protocol

Both Brexit treaties had to respect the UK Constitution. With regard to the first treaty, Article 50 of the TEU directly refers to compliance with the constitutional rules of the outgoing country[20]. Moreover, we know to what extent the UK's withdrawal from the EU has had significant consequences in British constitutional law, as symbolised by the two *Miller* judgments handed down by the Supreme Court[21]. The *James Hugh Allister v the Secretary of State for Northern Ireland* judgment appears to be the third fundamental decision from a constitutional point of view, even though it has had less impact than the previous two.

3.1 Reminder of the context

The originality of the legal and historical status of Northern Ireland could only raise questions insofar as the 1998 Good Friday Agreement (an instrument that was superseded by the Northern Ireland Act 1998) establishes the constitutional status and organisation of that part of the United Kingdom. The DUP's fierce opposition to any distinctive scheme for the benefit of Northern Ireland, which was already manifested with regard the 1998 Act[22], has seen new developments during Brexit. Unionists have long asserted this hostility between June 2017 and July 2019 since the then Conservative government led by Theresa May had an absolute majority in Parliament thanks to their support. It is even possible to consider that this circumstantial parliamentary alliance was the cause of the difficulties of the head of government. The political crisis and the blocking in Parliament of the adoption of the first drafts of the withdrawal agreement were due to the fact that Theresa May and her ministers could not find common ground between the moderate Conservative MPs (supporters of a soft Brexit) and those of the right fringe of the DUP's objective allies party in the desire to impose a hard Brexit. This version of withdrawal would have made it possible to maintain the most loose ties with the EU, notably excluding Northern Ireland from a common free trade area with the EU Member State Republic of Ireland.

The DUP's intransigence over strict alignment between the two sides of the UK is one of the factors that led to Theresa May's downfall. The arrival of Boris Johnson initially reassured unionists since he came from the ranks of hard Brexiteers. The new Prime Minister's political calculations and voluntarism overcame the opposition of the DUP and all the Unionists. The drafting of the Protocol adopted in the autumn of 2019 introduced a border in the Irish Sea and confirmed the existence of a dual free trade area, the effect of which was to strengthen the legal particularity of Northern Ireland within the United Kingdom. Defeated on the diplomatic and parliamentary front, the Unionists finally embarked on a contentious path to bring down the Northern Ireland Protocol. The iconic figure who gave his name to the Supreme Court ruling is James Hugh Allister. He was a

[18] See M.C. COSNIDERE-CHARON, *Protocole nord-irlandais: l'impasse persiste*, Observatoire du Brexit, 4 September 2021.
[19] Many Brexit disputes have arisen in Northern Ireland. V. S. PEERS, *Litigating Brexit: a guide to the case law*, in *EU Law Analysis*.
[20] Paragraph 1: "Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements."
[21] *R (Miller & others) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (*Miller 1*); *R (Miller & others) v The Prime Minister*; *Cherry and others v Advocate General for Scotland* [2019] UKSC 41 (*Miller 2*).
[22] V. A. EDWARDS, *Unionism and the Belfast/Good Friday Agreement*, *UK in a Changing Europe*, 13 April 2023.

member of the European Parliament between 2004 and 2009. He has been a member of the Northern Ireland Assembly since 2011. As chairman of the party he founded, Traditional Unionist Voice, he is to the right of the DUP with which he broke up in opposition to the St Andrews agreements of 13 October 2006, which reinstated the Northern Ireland Executive after a long period of dysfunction.

3.2 The judgment of the *Northern Ireland High Court*

Before turning to the Supreme Court ruling *James Hugh Allister v the Secretary of State for Northern Ireland*, it is useful to recall a few Brexit disputes that have arisen in Northern Ireland. On 13 February 2017, the Supreme Court of Ireland referred several questions relating to the effects of Brexit within the framework of the European arrest warrant to the Court of Justice of the European Union (judgment of 25 July 2017[23]). This related to a question of whether a Member State had the possibility to refuse the extradition of a national to the UK because of a prison sentence that extended after the date of Brexit. The Court of Justice gave its replies in Case C-327/18 PPU *OR* of 19 September 2018 and case C-661/17 *MA* of 23 January 2019. During the negotiations, the UK remained bound by the rights and obligations arising from EU law.

The years following this first dispute were dominated by the requests of Mr McCord, who in particular initiated the action against the extension of Parliament in September 2019 before the Court of Appeal of Northern Ireland[24]. In 2020, the same court confirmed that the 1998 law gives the Secretary of State sole discretion to hold a referendum, even if polls show support for reunification under the undeniable influence of Brexit[25].

In December 2020, a resident of Northern Ireland applied for leave to issue judicial review proceedings challenging the lawfulness of the Prime minister's decision to sign the Withdrawal Agreement. The court refused the application for leave[26].

These cases reveal the strong divisions within Northern Irish society, as Brexit has been challenged both by applicants in favour of maintaining strong ties with the neighbouring Republic and the EU, and by citizens who are passionately attached to the union with Britain. It is hardly surprising then that a dispute has arisen over the compliance of the Northern Irish Protocol with the constitutional regime applicable to Northern Ireland.

The High Court in Northern Ireland was the first court to rule on the thorny issue after two motions were lodged. The first (most important) was initiated by James Allister, Arlen Foster (the then First Minister), Lord Trimble (the first Unionist First Minister from 1998 to 2022), an elected member of the European Parliament of the Brexit Party (Benyamin Habib), and two other personalities (Baroness Hoey and Steve Aiken). The second was introduced by Clifford Peeples, a Northern Irish loyalist who is hostile to establishing a border in the Irish Sea. The hearings began in May 2021. The High Court had to respond to the following five pleas raised by the applicants based on the violation of either domestic law or European rights:

Ground 1: Article VI of the Act of Union 1800

Ground 2: Section 1 of the Northern Ireland Act 1998

Ground 3: Section 42 of the Northern Ireland Act – the 2020 Regulations on democratic consent

[23] *Minister for Justice v O'Connor* [2018] IESC 3.
[24] *McCord & Ors v The Prime Minister & Ors* [2019] NICA 49.
[25] *McCord, Re Application for Judicial Review* [2020] NICA 23.
[26] *JR83 (N°2) v. Prime Minister* [2021] NICA 49.

Ground 4: The Protocol and the European Convention on Human Rights ("ECHR")
Ground 5: The Protocol and EU law.
From a constitutional law point of view, the most contentious question was therefore the potential infringement of the Act of Union 1800, the Good Friday Agreement transposed into domestic law by the 1998 Act and the fundamental rights protected by the European Convention on Human Rights.
On the first ground of appeal relating to Article VI of the Act of Union 1800 ("the subjects of Great Britain and Ireland shall be on the same footing in respect of trade and navigation, and in all treaties with foreign powers the subjects of Ireland shall have the same privileges as British subject"), LJ Colton replied as follows. Firstly, the trade regime provided for in the Protocol could contradict the provision of the 1800 Act, which states that trade between Northern Ireland and Great Britain is on the same basis. Indeed, the creation of a border in the Irish Sea violates the unity of the applicable rules provided for in Article VI. Moreover, the introduction of such a border is likely to create difficulties in trade between the two parts of the United Kingdom. LJ Colton previously recalled that he did not have sufficient empirical evidence. However, he did not deny the existence of friction (para 61). In the following paragraph, he was obliged to acknowledge that the Protocol did not place Northern Ireland and the rest of the United Kingdom on an equal footing in terms of trade ("Compliance with certain EU standards; the bureaucracy and associated costs of complying with custom documentation and checks; the payment of tariffs for goods 'at risk' and the unfettered access enjoyed by Northern Ireland businesses to the EU internal market conflict with the '*equal footing*' described in Article VI", para. 62).
He then explained that Article VI cannot limit the prerogatives of the UK government in the conduct of international negotiations ("it was clear that the making of treaties is a prerogative power not readily subject to domestic judicial supervision", para 67), even though the Supreme Court could require that a decision by the Prime Minister to notify the United Kingdom's intention to withdraw from a supranational organisation could be subject to judicial review and, in the context of Brexit, require the intervention of representatives of the citizens of the UK to authorise the notification (*Miller 1*).
Finally, the judge examined whether the Act of Union 1800 should be imposed on the statutes transposing into domestic law the withdrawal agreement (European Union (Withdrawal) Act 2018 amended by the European Union (Withdrawal Agreement) Act 2020) to which the Protocol is appended, which it was observed were in conflict with the requirements of the 1800 Act on commercial matters, but also on the application instruments of said laws in Northern Ireland.[27] The argument was clearly intended to consider that certain statutes with particularly important constitutional content (such as the conditions of the unity of the United Kingdom) would be superior to subsequent legislation ("The real issue on the Article VI point is whether or not it enjoys interpretative supremacy over the later 2018 and 2020 Acts", para 72; "As to the resolution of any conflict between Article VI and the Withdrawal Acts the applicants seek to qualify the basic rule of legislative supremacy on the basis that the Act of Union 1800 enjoys a privileged status as a 'constitutional statute'", para 74). Taking this path would be tantamount to considering that a Act of 1800 could lead to an act of Parliament voted in 2018-2020 being illegal and, consequently, inapplicable (para 81-82). By virtue of instances of several case law now

[27] 2020 Regulations that were made by the Secretary of State on 9 December 2020 in exercise of the powers conferred by section 8C(1) and (2) of, and paragraph 21 of Schedule 7(2) to the EUWA 2018.

famous and initiated by the *Factortame* decision, which precisely concerned European law,[28] several justices were able to consider that acts of Parliament of a constitutional nature could not be the object of an implied repeal[29]. This approach does not mean that UK courts have explicitly recognised the existence of a normative hierarchy, but that some Westminster statutes benefit from special protection[30]. LJ Colton did not deny that several legal texts could be qualified as constitutional. This applies to the devolution, the European Communties Act 1972, or the Acts of union, for example. However, this is also the case with the acts of 2018 and 2020 transposing the withdrawal agreement and the Protocol into the domestic legal order. In paragraphs 93 et seq., it identifies, from the reading grid given by Lord Justice Laws, several elements of these acts in order to identify their constitutional status: they directly concern the ECA 1972, which they repeal; they determine the relations between a citizen and the State in general; and extend or diminish what must be considered as fundamental constitutional rights.

Once the nature of the acts of 2018 and 2020 had been identified, Lord Colton pondered what to do when several legal norms with the same nature are in conflict. In our view, quite logically, we must return to the traditional rules that stem from the sovereignty of Parliament: the most recent act takes precedence over the oldest (para 95). The Lord Justice states: "it will be noted that he recognised that a constitutional statute can be repealed by specific language if it has the same effect as express repeal. The principle is that general or broad terms will yield to terms which are more specific" (para 109). From a certain point of view, Lord Colton draws inspiration in his last sentence from the classic principle of law according to which the specific legislation presides over the more general law (*lex speciali derogat legi generali*). On this basis, he determined the general and open nature of the 1800 Act of Union ("open textured", para 110), while he identified section 7A of the 2018 Act amended in 2020 as special. His conclusion is therefore clear: "The more general words of the Act of Union 1800 written 200 plus years ago in an entirely different economic and political era could not override the clear specific will of Parliament, as expressed through the Withdrawal Agreement and Protocol, in the context of the modern constitutional arrangements for Northern Ireland" (para 110). The acts of 2018-2020 therefore take precedence over that of 1800.

Having rejected the first ground, it was up to the High Court to control the compatibility of the Protocol with the Good Friday Agreement. For the claimants, the Protocol would undermine the integrity of several provisions of the 1998 Act in that it recalls Northern Ireland's membership of the United Kingdom and in that it requires the consent of the Northern Irish people if separation from Great Britain was envisaged (section 1(1) of the Northern Ireland Act 1998).

Relying once again on the *Miller 1* judgment, LJ Colton dismissed the argument since the Protocol does not lead to any reunification between the two Irelands - the only hypothesis envisaged by section 1(1) for a referendum to be held. Under no circumstances shall the procedure required by the Good Friday Agreement be applicable to the constitutional change arising from the Protocol.

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[28] *R v Secretary of State for Transport, ex parte Factortame Ltd (No. 2)* [1991] 1 AC 603.

[29] *Thoburn v Sunderland City Council* [2003] QB 151, Lord Justice Laws; *H v Lord Advocate* [2012] UKSC 24, Lord Hope, about the Scotland Act 1998 (para 30).

[30] *R (Jackson) v. Attorney General* [2005] UKHL 56; *AXA General Insurance Ltd. v. Lord Advocate* [2011] UKSC 46, Lord Hope; *R (Buckinghamshire County Council) v. Secretary of State for Transport* [2014] 1 WLR 324, Lord Neuberger, Lady Hale and Lord Mance; *Miller 1* prec., Lord Neuberger.

The third ground related to another incompatibility of the 2018 Act with the Northern Ireland Act. Article 18(2) of the Protocol provides that "for the purposes of paragraph 1, the United Kingdom shall seek democratic consent in Northern Ireland in a manner consistent with the 1998 Agreement. A decision expressing democratic consent shall be reached strictly in accordance with the Unilateral Declaration made by the United Kingdom on [DATE], including with respect to the roles of the Northern Ireland Executive and Assembly". The implementing rules adopted on the basis of this provision (Democratic Consent Process) (EU Exit) Regulations 2020 ("the 2020 Regulations") provided for several procedures in order to satisfy the requirement of democratic consent necessary for the continued application of the specific legal regime applicable to Northern Ireland pursuant to the Protocol. According to the claimants, the procedures provided for in the regulations that derogate from the democratic and cross-community consent process of (1) of the Northern Ireland Act 1998[31] were illegal. The applicants added that the adoption of a separate procedure should have been subject to Northern Ireland's consent under section 42. The argument was rejected, because the Protocol falls under international law and it is up to the UK government alone to determine, with the EU, its content. The consent of Article 18 of the Protocol is a "tailor-made" arrangement, separate from the one provided for in the Good Friday Agreement, but allowing the intervention of the Northern Ireland Assembly under the supervision of the British Secretary of State in charge of that territory. This is not a legislative process by which the Assembly brings into compliance or implements an international obligation under its jurisdiction under the Northern Ireland Act (paragraph 190).

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The resolution of this substantive problem did not prevent the court from questioning whether the regulations complied with Article 18 of the Protocol itself. Here again, the High Court did not uphold the excess of power of the Executive in relation to the authorisation of the legislator to specify the procedure (para. 206).

The last ground that we were interested in was: how could a part of EU law continue to prevail in Northern Ireland without, however, its representatives having access in the future to the European institutions, in particular the European Parliament? This situation was considered by the applicants to be incompatible with Article 3 of Protocol No. 1 annexed to the European Convention on Human Rights on the right to free elections. The new rules imposed by the Northern Ireland Protocol would force Northern Irish citizens to apply standards that they would not have agreed to through their representatives. Using an extremely excessive argument, the Unionist Council, John Larkin, did not hesitate to compare the mechanism established by the Protocol to the Vichy regime in France, which, during the Second World War, collaborated with the Nazi authorities.[32] LJ Colton strongly condemned this inappropriate comparison (paragraph 218). More seriously, the High Court confirmed that Northern Ireland would inevitably be subject to EU law, although in proportions that were still difficult to assess on the day of the judgement (paragraph 238). The violation of compliance with Article 3 of Protocol No. 1 was nevertheless ruled out, because the withdrawal agreement and its protocols were adopted according to a democratic procedure that ensures its validity in the light of the margin of discretion granted by the European Court of Human Rights in this matter. The negotiations were conducted under the control of MPs at Westminster (which includes representatives from Northern

[31] Amended by the Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022 that sets out areas for which cross-community consent is required for Petitions of Concern.
[32] J. CAMPBELL, *Brexit: NI Protocol like Vichy regime, court is told*, in *BBC*, 14 May 2021.

Ireland) and taken over by a government that had a mandate to carry them out following the position expressed by the people in the 2016 referendum. As for the Protocol, it was scrutinised by Parliament, which incorporated it into the national legal order by the laws of 2018-2020. The Protocol itself provides for democratic consent to confirm its implementation every five years. Finally, no right guaranteed by the Good Friday Agreement should be called into question or abolished under the Brexit agreements. All the guarantees provided by the Protocol are considered to be compatible with the law of the European Convention on Human Rights and the margin of discretion that the Court recognises for States to comply with the right to free elections.

The second appeal lodged by Mr Peeples raised an interesting point: a passage from the British Irish Agreement (which is one of the two legal documents composing the Good Friday Agreement with the Multi-party Agreement) states "that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people". For the applicant, this provision was transposed into domestic law by the 1998 Act, but also by the European Union (Withdrawal Agreement) Act 2018 via section 7(A).[33] The Protocol also stipulates that it is designed "to protect the 1998 Agreement in all its dimensions", which would mean that the act transposing the withdrawal agreement should be interpreted in strict compliance with the British Irish Agreement. In addition to the arguments developed in the *Allister* case, the judge added that Article 1 of the Protocol "does not have the effect of incorporating the Agreements into domestic law. Rather, the Protocol is the outworking of the compromises political designed to preserve and protect the Belfast/Good Friday Agreement" (paragraph 319).

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The claimants were dissatisfied and logically challenged the judgment before the Northern Ireland Court of Appeal.

3.3 Northern Ireland Court of Appeal ruling

On 22 March 2022, the Court of Appeal handed down a judgment confirming the previous ruling[34]. Two opinions were expressed: a majority opinion by Lady Chief Justice Keegan and Lord Justice Tracy, and a dissenting opinion by Lord Justice McCloskey. The analysis of the Court of Appeal was shorter than that of the High Court and particularly draws attention in the way it apprehends the normative relationship between Article VI of the 1800 Act of Union and the Protocol transposed into domestic law. The two approaches adopted nevertheless lead to the same conclusion that there is no implicit or explicit repeal of Article VI. That of LJ Keegan and Tracy considered that the 2020 Law made a "subjugation" of Article VI (paragraphs 194 and 202). For LJ McCloskey, it rather amended the provision of the 1800 Act in its effects. As one commentator of these opinions observes[35], it is not easy to distinguish between the two conceptions, both of which seem less clear than LJ Colton's reasoning (according to which, in the face of two statutes of a constitutional nature, the most recent one must be given precedence).

This subjugation is explained in paragraph 194: "Section 7A does not purport to repeal. Rather, it states that any enactment pre-dating the EUWA 2018 must be read 'subject to'

[33] Paragraph 310: "Because the Protocol is an integral part of the Withdrawal Agreement and imposes '*liabilities, obligations and restrictions*' it is caught within the meaning of 7A(i) and is therefore enforceable in domestic law by reason of section 7A(ii)."

[34] *Allister and others v Prime Minister and others* [2022] NICA 15.

[35] A. Deb, *Allister Round 2: a deeper dive into the Mariana Trench of UK constitutional law*, in *EU Law Analysis*, 6 May 2022.

its terms." It is therefore a question of reading any legislative provision prior to the Acts of 2018-2020 in light of the provisions of the latter according to a technique which is much like that of compliant interpretation ("The terms of Article V1 are subject to the Protocol and so are clearly modified to the extent and for the period during which the Protocol applies", paragraph 193). The demonstration of the two justices also implies admitting that the acts transposing the Protocol into domestic law clearly have the intention of "subjugating" Article VI It is thus easy to understand what distinguishes this reasoning from that which prevailed in the first instance: for Lady Chief Justice Keegan, the question of implicit or explicit repeal does not arise, nor does the question of a possible hierarchy (normative or temporal) between the 1800 Act of Union and the statutes on the withdrawal agreement. In short, the issue is not one of the compatibility between two legal norms that would enter into conflict (paragraph 195), because it is possible to read Article VI in the light of the Acts of 2018-2020 in accordance with the sovereignty of Parliament and fundamental rights (paragraph 196 et seq.).

In his dissenting opinion, Lord McCloskey prefers to consider that "Section 7A(3) of EUWA 2018 has the effect of suspending the operation of the first two clauses of Article VI of the Act of Union" (paragraph 389). His position is halfway between those of the High Court and Lady Chief Justice Keegan by evoking a suspension of the effects of the Act of Union, which makes it possible to remove any potential incompatibility. More specifically, the reasoning of the Lord Justice is built around two mechanisms. The first, similar to the majority opinion, is intended to recognise that the Acts of 2018 and 2020 did indeed amend Article VI, and that this amendment prevails over the previous text, in line with Lord Colton's opinion. Lord McCloskey defines the amendment as less radical than an implicit or explicit repeal that would not be possible in this case ("Modification is to be contrasted with repeal of whatever species. It is a less intrusive interference", paragraph 392). With regard to Article VI, the Protocol only partially amends it and does not in any way call into question the unity of the legal regime for trade between Northern Ireland and Great Britain, quite the contrary (paragraph 393).

The second mechanism cited led LJ McCloskey to reject part of the reasoning of the first instance, which considered it necessary to produce a "statutory interpretation" of the 1800 Act in the light of the Acts of 2018 and 2020. For the Lord Justice, "the 'interpretive supremacy' label, though superficially appealing, suffers from opacity" (para 396). He referred to the existence of an amendment to the Act of Union of 1800 (paragraph 403), without implied repeal.

The two opinions expressed do not appear to us to be fully in line with the Supreme Court's definition of implied repeal. In its judgment *The UK Withdrawal From The European Union (Legal Continuity) (Scotland) (rev 2)* [2018] UKSC 64), it explains that "without attempting an exhaustive definition, a protected enactment will be modified by a later enactment, even in the absence of express amendment or repeal, if it is implicitly amended, disapplied or repealed in whole or in part. That will be the position if the later enactment alters a rule laid down in the protected enactment, or is otherwise in conflict with its unqualified continuation in force as before, so that the protected enactment has to be understood as having been in substance amended, superseded, disapplied or repealed by the later one." (paragraph 51). A potentially conflicting substantial amendment of an earlier statute

therefore entails an implied repeal,[36] contrary to the premise developed by the Court of appeal.
Having once again failed to convince the court of the relevance of their pleas, the claimants had no choice but to refer the matter to the Supreme Court.

3.4 The decision of the Supreme Court

The Supreme Court handed down a unanimous ruling by five of its judges on 8 February 2023. The opinion was drafted by the Northern Ireland representative in the jurisdiction, Lord Stephens. The compliance report between the Acts of 2018-2020 and the Act of Union of 1800 is the most important contribution. Before referring to this, it should be noted that the Supreme Court considers that the regulations implementing the Democratic Consent Laws in Northern Ireland, which do not follow those of the Northern Ireland Act 1998 (section 42), are lawful. For the five justices, there was no abuse of power by the government in its application of the 2018 Act which, by its Section 7A, had already amended Section 42 to allow it to determine the conditions of democratic consent provided for in Article 18 of the Protocol (paragraph 108). The reasoning of the Court is, on this point, substantially distinct from that of the lower courts[37].
As regards the constitutional compatibility of the 2018-2020 laws with Article VI of the 1800 Act of Union, the Court's ruling is quite expedient. It considers that the protocol takes precedence over the Acts of Union. Article VI, like any other part of the 1800 Acts, is set aside as long as the protocol, which was more recently incorporated into the domestic legal order, is in force. On the second point, the justices consider that the people of Northern Ireland can only be called upon to determine their wish to continue the union with Great Britain or, on the contrary, a merging of the two Irelands. Thirdly, the protocol transposed into domestic law by the 2018 Act and the European Union (Withdrawal Agreement) Act 2020 can completely modify the law in force. Therefore, any regulatory act legally taken on its basis cannot be declared as non-compliant with a previous text.
The major lesson to be drawn from the Court's judgment is the refusal to enshrine the existence of supra-legislative standards that would be imposed on subsequent statutes because of their constitutional importance. While it is almost certain that some norms are the subject of particular attention on the part of judges due to their constitutional nature (implying that they cannot be the subject of an implicit repeal), the Supreme Court stresses in this case that:
"The debate as to whether article VI created fundamental rights in relation to trade, whether the Acts of Union are statutes of a constitutional character, whether the 2018 and 2020 Acts are also statutes of a constitutional character, and as to the correct interpretative approach when considering such statutes or any fundamental rights, is academic. Even if it is engaged in this case, the interpretative presumption that Parliament does not intend to violate fundamental rights cannot override the clearly expressed will of Parliament. Furthermore, the suspension, subjugation, or modification of rights contained in an earlier statute may be effected by express words in a later statute. The most fundamental rule of UK constitutional law is that Parliament, or more precisely the Crown in Parliament, is sovereign and that legislation enacted by Parliament is supreme. A clear answer has been expressly provided by Parliament in relation to any conflict between the Protocol and the rights in the trade limb of article VI. The answer to any conflict between the Protocol and

[36] In this sense, see A. DEB, above.
[37] In this sense, see A. DEB, *Allister: the effect of the EU Withdrawal Act*, in *EU Law Analysis*, 22 February 2023.

any other enactment whenever passed or made is that those other enactments are to be read and have effect subject to the rights and obligations which are to be recognised and available in domestic law by virtue of section 7A(2)" (paragraph 66).
In relation to the two opinions on the *Re Allister* case expressed by the Northern Ireland Court of Appeal, Lord Stephens creates a form of synthesis by partially retaining the subjugation of article VI by the laws of 2018-2020: "the subjugation of article VI is not complete but rather article VI is modified in part. Furthermore, the subjugation is not for all time as the Protocol is not final or rigid so that those parts which are modified are in effect suspended". The Court has taken into account here the probability of an amendment to the Protocol (which will become effective with the Windsor Agreement).
By considering that the debate on the potentially hierarchical relationship between two Acts of Parliament would be purely academic, the Court refuses to engage in a reasoning as advanced as the first instance and appeal, which, it is true, may have seemed to be lacking. This clear angle of attack is not satisfactory, because the question of the hierarchy of legal norms, although it is the subject of numerous and sometimes endless academic debates even beyond the UK, is not an exclusively academic matter. It is a crucial subject in law of potential conflicts of standards, for which it is up to the court to provide clear answers. The interest of the Supreme Court of the United Kingdom on this subject in the context of the decisions mentioned after *Thoburn* proves this.
For several commentators, the Court's position would herald the end of the recognition of constitutional statutes[38] or, at the very least, a return of the primary approach to Parliament's sovereignty[39]. According to Colin Murray, who implicitly refers to other case law in this sense, particularly since the departure of Lady Hale, "the current Supreme Court continues its opposition to any legal doctrine which it sees as a constraint upon the will of Parliament. Dicey would be thrilled."[40] While it does not seem possible to confirm this assertion, it is more likely to consider that the Court did not wish to apply the doctrine of implied repeal in this case, because there was no need to do so. This is, more or less, what the Northern Ireland Court of Appeal has recalled. The dispute in question is therefore not within the scope of *Thoburn*. Beyond that, the Court may have wanted to insist on the fact that establishing a hierarchy between standards of the same (constitutional) nature is not relevant (which does not explicitly mean that the question would not be relevant in the case of two standards of a distinct nature, one constitutional, the other legislative as was the case

[38] D.A. GREEN, *Is it, at last, time to say 'good by' to Thoburn and the idea of 'constitutional statutes'?*, in *Law and Policy Blog*, 9 February 2023. K. MAJEWSKI, Re Allister*: The End of 'Constitutional Statutes'*, in *U.K. Const. L. Blog*, 21 February 2023. The author applied the reasoning produced in *Re Allister* to the aforementioned *Factortame* decision from which the *Thoburn* case law was constructed to identify constitutional statutes. According to K. Majewski, *Re Allister* would weaken the doctrine of implied repeal by rejecting its application to the normative relations between the laws of 2018-2020 and the Act of Union. Indeed, the subjugation already identified by the appeal judges could very well have been mobilised in the context of the conflict between the Merchant Shipping Act of 1988 and the European Communties Act of 1972 in light of the transposition into domestic law of Community law that this latter legislation operates ("Section 2(4) of the 1972 Act was analogous to section 7A(3)" of the 2020 Act). In our opinion, the analogy is not the most relevant since the 1988 law at issue in *Factortame (No. 1)* is not of the same nature as the European Communties Act 1972. We therefore return to the essential and unprecedented point of *Re Allister*, namely the potential conflict of two laws of a constitutional nature.
[39] J. BELL, *The Supreme Court judgment in Re Allister et al. Constitutional statutes, quo vadis?*, in *Brexit Institute News*, 2023.
[40] C. MURRAY, *Maybe we Like the Misery: The Culmination of the Northern Ireland Protocol Litigation*, in *EU Law Analysis*, 8 February 2023.

in *Thoburn*). Finally, the expression "academic debate", while it may seem clumsy, is understandable if we stick to the present case. *Re Allister* has, moreover, only been rendered by five justices, making it a relatively important case. This decision therefore does not close the debate on constitutional statutes which has never been heard, contrary to what some members of the doctrine claim.[41] The doctrine of implied repeal leading to the recognition of constitutional statutes by common law is alive (like the principles of parliamentary sovereignty or rule of law on which it is based). Hasty and overly general conclusions should not be drawn from a particular case dealt with in a very particular context marked by the major political risks that would have resulted from a finding of illegality. The remaining regret is that, without reaching a separate conclusion, the Supreme Court justices could have engaged in the constitutional law field to enrich its substance and clarify the new constitutional law post-Brexit[42]. It is, quite logically, on the diplomatic front that the (temporary?) reconciliation was finally found for the restoration of the Executive in Northern Ireland after the adoption of the Windsor Framework.

4. Constitutional settlements of the Windsor Agreement

The *Allister* case showed that the UK Conservative government had not reached a political agreement that was satisfactory to the Unionists. Boris Johnson's betrayals of the DUP in 2019, although essential to removing the major obstacle in negotiations on EU withdrawal, were one of the decisive factors in maintaining London's direct rule over Belfast. The other reason was the DUP's unwillingness to enter into negotiations since 2019 within any institutional structure created to facilitate consensus. This was also qualified by a judge as "abject breach of their solemn pledge" and "unlawful" behaviour, though the court nevertheless refused to order political leaders to participate in negotiations[43].

After the interlude of Liz Truss, who did not really have the opportunity to look into the Northern Ireland imbroglio in detail, Rishi Sunak set out a dual objective of appeasement: with the European Union, which was not satisfied with the unwillingness of previous governments to implement the Protocol, and with the Unionists. This meant negotiating an amendment to the Protocol. Political events made it easier for him. The DUP underperformed in the 2022 elections, which allowed Sinn Féin to win the position of Northern Ireland First Minister for the first time[44]. Despite this electoral setback, Northern Ireland's constitutional arrangements give a central role to Unionists under the principle of cross-community support, allowing the DUP to prevent a government agreement from being reached with the other parties. The Northern Ireland (Executive Formation and Organ and Tissue Donation) Act 2023 was needed for the government to remain in operation to avoid the holding of new elections that Sinn Féin refused. The Windsor Agreement came a few weeks after the 2023 Act was passed.

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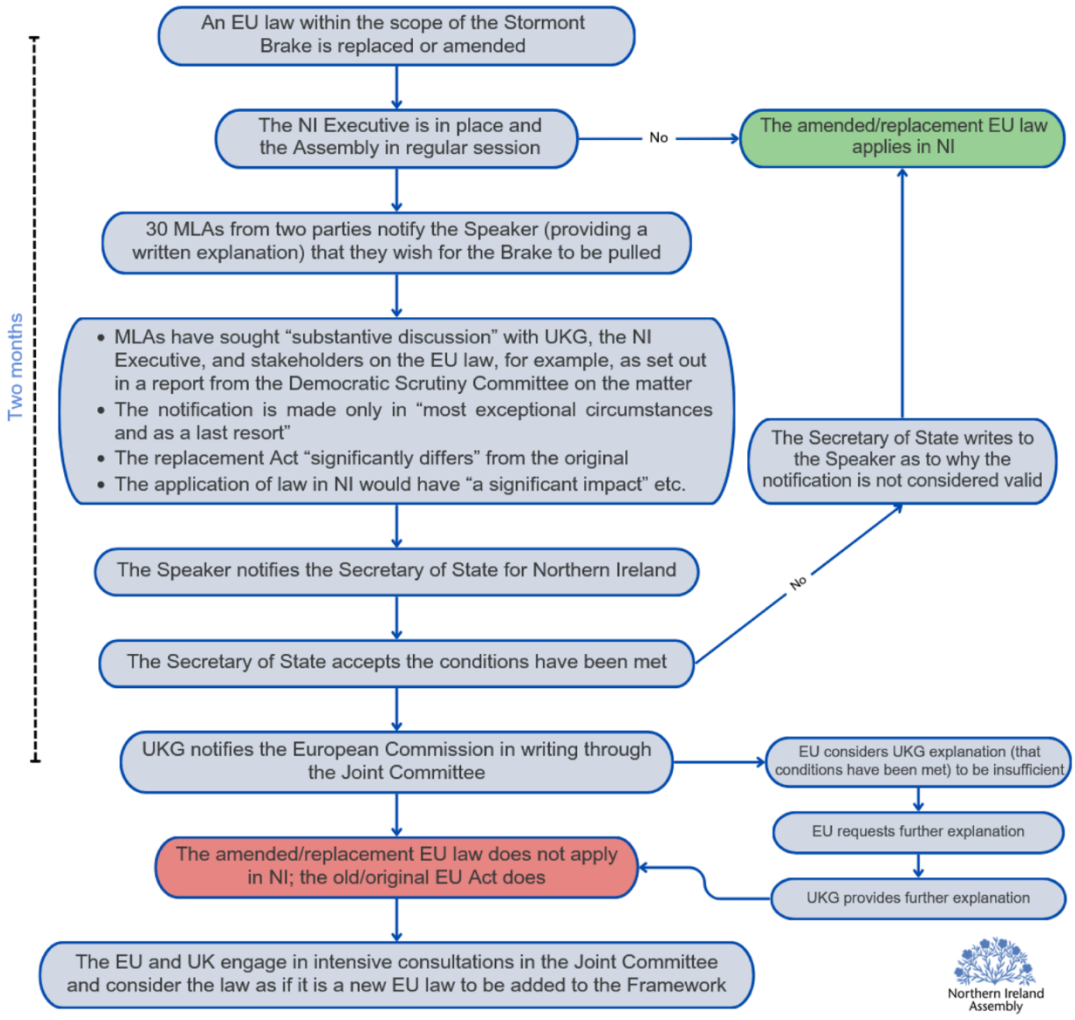
[41] See in this regard O. GARNER, *The UK Supreme Court Northern Ireland Protocol Judgment: A Return to Pre-EU Membership Orthodoxy?*, in *Brexit Institute News*, 2023.

[42] V. M. ELLIOTT, N. KILFORD, *Nothing To See Here? Allister in the Supreme Court*, in *Edinburgh Law Rev.*, 2024, vol. 28, p. 95: «The reality is that the UK's new relationship with the EU – including Withdrawal Agreement law and its place within the domestic legal system – raises questions about the nature of the UK constitution just as profound as those raised by EU membership and just as deserving of normative interrogation».

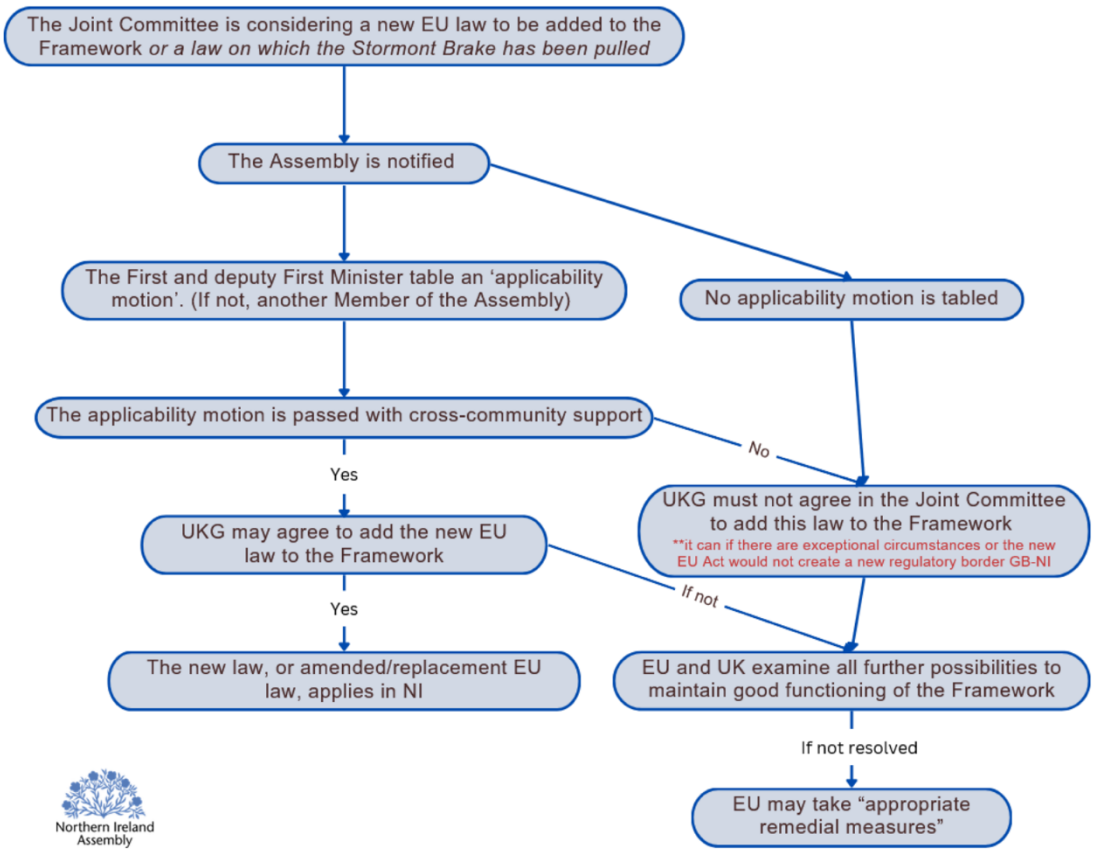
[43] *Re Sean Napier 2021] NIQB 120* (v. R. CORMACAIN, *What should courts do when ministers flout the law?*, in *U.K. Const. L. Blog*, 22 December 2021).

[44] V. M.C. CONSIDERE-CHARON, *Point d'actualité et retour sur la situation en Irlande du Nord après les élections du 5 mai 2022*, in *Observatoire du Brexit*, 7 June 2022.

From a constitutional perspective, the purpose of the Windsor Framework was to strengthen the position of Northern Irish institutions. The *Allister* case showed that the reduced importance of cross-community support under the Protocol was one of the most sensitive points raised by the claimants. It should be recalled that, initially, the Assembly of Northern Ireland had to periodically renew its consent to the arrangements of the Protocol under fairly complex terms (Article 18 of the Protocol). The Windsor Framework added that the Stormont Assembly could oppose any changes to existing EU rules on customs, goods and agricultural products covered by the Protocol. This potential brake on regulatory alignment between the two Irelands (*Stormont brake* introduced in Article 13(3)(a) of the Protocol) may be activated if a legal change causes a slowdown in trade and disrupts the daily lives of Northern Irish citizens. A substantiated petition on this factual basis would have to be brought by 30 Northern Irish MPs from at least two different political backgrounds (similar to the mechanism provided for in the Northern Ireland Act 1998 for petitions of concern). The UK will then notify its European partner of a "veto" on the application of the new rule, which will be suspended. Discussions will be initiated on the subject in the Joint Committee. In the event of a disagreement, the use of arbitration proceedings is provided for, without the intervention of the Court of Justice (which was not necessarily the case previously since it was intended to be seized when EU law was at issue).



A second mechanism is introduced. In the event of new European legislation (and not just a change), an "applicability motion" may be adopted by the Northern Ireland Assembly: "before the UK can agree with the EU in the Joint Committee that a new EU law should apply in NI, the Northern Ireland Assembly must indicate cross-community support for the new law to be added to the Framework by passing an 'applicability motion'. The First Minister and the Deputy First Minister may table the motion, otherwise another member of the Assembly may then do so". This motion is not required in the event of an emergency or if the new standard will "not create a new regulatory border between Great Britain and Northern Ireland" (Article 13(4)).



The UK has said it will commit to tighter controls between the north and south of the island of Ireland to prevent any misuse of the Windsor arrangement. Changes in the institutional framework for cooperation between the two parties will make it possible to closely monitor the implementation of the agreement.

The assessment of this new system is mixed. To its credit, it ends nearly two years of conflict between the EU and a United Kingdom whose Conservative government had multiplied legal provocations by explicitly violating the Protocol, in particular by its *Northern Ireland Protocol Bill*, which was withdrawn. The Windsor Agreement does not fundamentally call into question the Protocol. The innovation of the "Stormont brake" must be put to the test and must only be a last resort motivated by exclusively concrete and objective considerations as provided for in Article 13(3a).

Above all, the Windsor framework is largely based on good faith cooperation and mutual trust that must govern relations between the EU and the UK on the one hand, and Great Britain and Northern Ireland on the other hand. Tensions with the unionists will not therefore necessarily disappear, as illustrated by the initial rejection by the DUP[45] before its final acceptance. The DUP's blockades against the restoration of the Northern Ireland Executive led to the urgent adoption of legislation to avoid a new vote after the 2022 vote (the latest being the Northern Ireland (Executive Formation) Act 2024). The "DUP Deal" (*Safeguarding the Union* paper) of January 2024 was essential for the effective implementation of the Windsor Framework and the advent of the 7th Northern Ireland Assembly. The purpose of the deal was to provide concrete answers to Northern Irish concerns in order to remove any barriers, borders and controls on goods intended to remain in the UK domestic market. The following provisions were adopted: to keep Great Britain (England, Wales and Scotland) aligned with European standards; new laws at Westminster would be checked to ensure they did not compromise unfettered trade with Northern Ireland, meaning no separate rules or labels for goods that remain in the region; the establishment of a new body, Intertrade UK, to promote trade within the UK; to put an end to the "Not available in Northern Ireland" issue that afflicted online shoppers when they are trying to buy goods from other parts of the UK; no border control post at Cairnryan in Scotland; when UK ministers will introduce new legislation, they will be compelled to tell Parliament if their bill will have "significant adverse implications for Northern Ireland's place in the UK internal market"; and the introduction of an "explicit Internal Market Assessment" as part of the usual regulatory checks made by public authorities to identify any adverse impact on the UK internal market). Not all Unionists were happy with the DUP deal and several Conservative party figures have criticised it, particularly because it keeps Great Britain aligned with European standards to avoid distortions with Northern Ireland's trade regime, which must be in line with that of the Republic of Ireland, as an EU member. The removal of the border in the Irish Sea for goods intended to remain in the UK free trade area could, in any case, only lead to such a consequence.

The Windsor Agreement was finally incorporated into domestic law by the Windsor Framework (Democratic Scrutiny) Regulations 2023. The Secretary of State for Northern Ireland made these Regulations in exercise of the powers conferred by section 8C(1) and (2) of, and paragraph 21 of Schedule 7 to the European Union (Withdrawal) Act 2018. They entered into force on 2 February 2024 after the common ground reached with the Unionists. They amended Schedule 6B into the Northern Ireland Act 1998 in order to introduce the "Stormont Brake" and create a new Windsor Framework Democratic Scrutiny Committee.

The appeasement that resulted from these lengthy negotiations did not prevent the DUP from attempting to veto a new EU law applying in Northern Ireland by using the mechanism of the applicability motion of the Windsor Framework as early as March 2024[46]. The DUP opposed the application of new European legislation on the protection

[45] This "Protocol 2.0" did not return to two aspects strongly criticised by the *DUP* and the most right-wing fringe of the Conservative Party: the maintenance of the jurisdiction of the Court of Justice and the preservation of the essential state aid regime enforceable against Northern Ireland.

[46] J. CAMPBELL, *NI Brexit deal: DUP to test Windsor Framework at Stormont*, in *BBC*, 16 March 2024.

of geographical indications for craft and industrial products[47]. The DUP was not backed and the motion was ultimately rejected[48]. Moreover, the first meetings of the Windsor Framework Democratic Scrutiny Committee took place without major malfunctions in order to provide the first analyses of developments in European legislation potentially affecting trade in Northern Ireland.[49]

Northern Ireland and its law are at the confluence of UK constitutional law and EU law. They must never cease to attract interest from lawyers who study standard-setting relationships between legal systems, as it helps to appreciate the subtlety of constitutional arrangements between different parts of the UK and the new complexity of the relationship between the UK Constitution and EU law, which, despite Brexit, continues to influence domestic law.

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[47] Regulation (EU) 2023/2411 of the European Parliament and of the Council of 18 October 2023 on the protection of geographical indications for craft and industrial products and amending Regulations (EU) 2017/1001 and (EU) 2019/1753.
[48] NORTHERN IRELAND ASSEMBLY, *Brexit & Beyond newsletter*, 25 March 2024.
[49] NORTHERN IRELAND ASSEMBLY, *Brexit & Beyond newsletter*, 19 June 2024.