

## **A “DECISIVE BREAKTHROUGH”: SMOOTH-FLOWING TRADE BETWEEN GREAT BRITAIN AND NORTHERN IRELAND SHOULD SHORTLY BECOME A REALITY**

Hailing a “new chapter” in the United Kingdom’s relationship with the European Union and a “decisive breakthrough,” Prime Minister Rishi Sunak, appearing alongside EU Commission President Ursula von der Leyen announced yesterday a “political agreement in principle” on ending the dispute over the 2021 Northern Ireland Protocol (the “Protocol”).<sup>1</sup> The announcement of the new “Windsor Framework” follows four months of negotiations (known as the “tunnel”) as well as headlines in the British press (where Brexit continues to figure prominently) questioning whether the Tory government could deliver a solution to the Protocol given the continued fragmentation of the parliamentary party. Borrowing a phrase near and dear to the hearts of the ardent, hardline Brexiteers, Sunak proclaimed, in his [opening statement](#) in the House of Commons yesterday, the Windsor Framework (amending the Protocol) allows Britain to “take back control.”

That a British Prime Minister would pay tribute in the House of Commons to his “European friends,” and in particular President von der Leyen (who earlier in the day had addressed the Prime Minister as “dear Rishi”),<sup>2</sup> and that the Labour Leader Keir Starmer would offer the support of his parliamentary party on the spot (and seemingly without precondition), underscores the sea change in London and Sunak’s courage in taking on the hardliners. Sunak will now need to sell the Windsor Framework to the Brexiteers and the Democratic Unionist Party (DUP), which has boycotted the power-sharing arrangements in the Northern Ireland Assembly (Stormont), since May, as part of its opposition to the Protocol.<sup>3</sup>

The agreement on the Windsor Framework now means that the highly controversial Northern Ireland Protocol Bill that would have severely undermined the Protocol can be withdrawn. In his [Commons address](#), the Prime Minister stated that the “sound justification legally for the Bill now has fallen away.” The European Commission in parallel will drop its seven EU infringement proceedings brought against Britain relating to the Protocol.

Essentially the new arrangements are based on safeguards designed to ensure that goods moving from Great Britain to Northern Ireland (“GB-NI”) are not transported onward to Ireland or via Ireland into the EU single market. These safeguards are built on three pillars:

- a “trusted trader scheme,” with a robust authorisation and monitoring process that forms part of a new UK Internal Market Scheme (“UKIMS”);

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<sup>1</sup> I chronicled the many twists and turns on the Protocol, and the rationale for it as well as the relationship between the Protocol and the Belfast/Good Friday Agreement, in a series of briefing notes, available here: [November 25, 2022](#); [July 16, 2022](#); [November 3, 2021](#); and [October 12, 2021](#).

<sup>2</sup> An additional Sunak tribute was to “my predecessors for laying the groundwork,” which drew sustained laughs across the Commons.

<sup>3</sup> After ceasing to be the largest party, the DUP said they would not allow for the election of a Speaker of the Assembly until their issues with the Protocol had been addressed. As a result, the Assembly was unable to continue to act and an Executive (First Minister, deputy First Minister and eight departmental Ministers) could not be formed.

- data-sharing on movements of goods allowing risk-assessments to be performed; and
- reinforced procedures, such as increased market surveillance, in place to ensure that purported GB-NI goods will be consumed only in Northern Ireland.

Specific guarantees are provided for the movement of agri-food products, including appropriate labelling and sanitary and phytosanitary (SPS) facilities, which will also reflect the longstanding animal and plant health status of the island of Ireland.

It is important to remember that Northern Ireland remains within the EU single market, and the Windsor Framework does not alter that status. This then means that the land border between Northern Ireland and Ireland remains open, but goods transiting GB-NI are subject to checks and controls. The Windsor Framework, at its core, has eased the frictions on GB-NI trade based on a dual regime, consisting of a “green lane” and a “red lane.”

Under the Windsor Framework, among other provisions:

- Businesses participating in the trusted trader scheme will benefit from reduced customs paperwork and checks on goods that move GB-NI but are intended to remain in Northern Ireland – these will pass through a “green lane” as not destined for the European Union. Goods intended for Ireland or for onward delivery to the rest of the European Union will pass through the “red lane” and be subject to full customs checks in the ports of Northern Ireland and to EU SPS rules. Spot checks will remain, based on risk assessments. Green lane certification will be reduced to a single certificate per truck (in contrast of the hundreds now required) confirming that the goods will remain in Northern Ireland. Retailers will be asked to mark a small number of particularly high risk food products as “Not for EU,” with a phased roll-out.
- Food retailers (including supermarkets), wholesalers and hospitality businesses will also be able to join the UKIMS, and use the green lane.
- The same food (including chilled meats, particularly sausages, which under current rules are banned, causing much consternation in the public space) will be available on supermarket shelves in Northern Ireland as in the rest of the United Kingdom. GB-NI agri-food retail products destined for Northern Ireland will move with minimal certification requirements and controls. British public health standards will apply to agri-food retail goods destined for Northern Ireland only, while EU plant and animal health rules will apply for the protection of the EU single market.
- All medicines will be available at the same time and under the same conditions in Great Britain and Northern Ireland. UK labelling will apply. The UK regulator will approve all drugs for the entire UK market; the European Medicines Agency will have no role. Under current rules, medicines destined for Northern Ireland (representing 80% of medicines sold in Northern Ireland) needed two labels and two different supply chains. The Northern Ireland healthcare industry will have access to both EU and UK markets.
- The criteria to participate in the trusted trader scheme will be tightened.
- The European Union will have access to databases that track GB-NI shipments.

- The European Commission will be required to provide Britain with notice of future EU regulations (either amendments or replacements) that would apply in Northern Ireland, and Stormont will have the ability to apply an “emergency break” (generally being referred to as the “Stormont brake”) to changes based on “cross-community consent.”<sup>4</sup> The predicate for applying the brake is that 30 members of Stormont (from at least two parties) request it and the test is that the changes “may have a significant and lasting impact specific to the everyday lives of communities in Northern Ireland.”

If the European Union disagrees with the application of the Stormont brake, the issue would be submitted to independent arbitration (a significant concession by the European Union, given their red line on eliminating Court of Justice of the European Union (CJEU) oversight). The courts of Northern Ireland will be able to adjudicate disputes over the application of EU laws in Northern Ireland, although judges retain the ability to consult the CJEU on questions of interpretation. However, the CJEU will remain the “sole and ultimate arbiter of EU law.”

The Stormont brake requires re-opening the Protocol, which EU negotiators heretofore had ruled out.

Of note, the brake is only effective if there is a functioning power-sharing arrangement in Northern Ireland, meaning the DUP must relent.

- Britain will be able to set rules on VAT and state aid that apply in Northern Ireland (which also crossed EU “red lines”).
- The European Union rejected Britain’s proposal to establish a dual-regulatory mechanism under which businesses in Northern Ireland could have chosen whether to follow EU or British rules when manufacturing goods, based on where the goods were to be sold.

The Windsor Framework, assuming it is approved, will be phased in over time as a legally binding agreement (with the force of a treaty), with some provisions (goods, agri-food, pets and plants) to be applied later this year, and the balance in 2024. Going forward, the Protocol, as amended by the Windsor Framework and the [Joint Committee Decision](#), will be known as the Windsor Framework for legal and regulatory purposes.

For those following the fine print, there is plenty. The documentation [issued](#) yesterday by the British government includes, among others:

- [A Press Release](#)
- [The Windsor Framework: A new way forward](#)
- [A Political Declaration](#)
- [The HMG Legal Position](#)
- [Arrangements drawn up by the Withdrawal Agreement Joint Committee](#)

The documentation [issued](#) yesterday by the European Commission includes, among others:

- [President von der Leyen’s Statement](#)

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<sup>4</sup> The cross-community consent and 30-member provision are based on the “petition of concern” set out in the Belfast/Good Friday Agreement. The provision goes significantly further than the “all or nothing” vote every four years provided under current rules.

- [European Commission Press Release](#)
- [European Commission Q&A](#)
- [European Commission Fact Sheet](#)
- [Proposal for a Regulation on SPS measures](#)
- [Proposal for a Regulation on Medicines](#)

As the Windsor Framework is a “political agreement in principle,” the terms must now be transposed into law. Much of this will fall within the remit of the Withdrawal Agreement Joint Committee under powers provided by the Withdrawal Agreement.

If the deal does move forward, it is likely to herald far more cooperation between Britain and the European Union. This could be good news for a range of constituencies, including scientists and researchers who, since Brexit, have been excluded from the Horizon Europe research and innovation program. It is noteworthy that President von der Leyen made the trip to Windsor and went out of her way to stress the changed (and much improved) nature of the relationship.

From a purely US perspective (admittedly as a bystander, and ignoring the reported outburst by Boris Johnson), the deal meets the concerns of senior US political leaders, including President Biden, who issued a [statement](#) recognizing that the Windsor Framework ensures “that the hard-earned peace and progress of the Belfast/Good Friday Agreement is preserved and strengthened.” The President’s visit to the United Kingdom reportedly was conditioned on an acceptable agreement being reached by the 25<sup>th</sup> anniversary (April 10<sup>th</sup> of this year) of the Belfast/Good Friday Agreement.

The hallmark of a successful agreement is that both sides made concessions, and that is very much the case here. Red lines on both sides fell by the wayside in the spirit of compromise. Rishi Sunak has achieved what his three predecessors were unable to do, and this represents a clear victory for him (and, in fact, his first real victory in government). The deal, however, is yet to be sealed.<sup>5</sup>

The Prime Minister has said that Parliament will have the chance to vote on the deal (even though under the terms of the Protocol it appears to not be required), but it is unclear when and in what form the vote will take. The Prime Minister can pass the deal with the votes of Labour, but presumably he would prefer to have the full backing of his parliamentary party. (In the next two years, there will be a general election.)

The Tories are a significantly fractured lot, with multiple factions. The test will be to keep them in line. For weeks now, commentators have been speculating on what Boris Johnson will do, and as of today that remains a mystery. Also uncertain, as of today, is how the hardline European Research Group (ERG) and the DUP will react, particularly given the fact that EU law still applies in Northern Ireland. One of the key Brexit “Spartans,” Steve Baker has offered his support for the deal. The DUP is studying the text, against its [seven tests](#) set

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<sup>5</sup> Already, some senior Brexiteers and senior DUP figures (including former DUP First Minister Arlene Foster) were visibly annoyed by news that King Charles had had tea with President von der Leyen Monday afternoon. The meeting was deemed too political. Buckingham Palace suggested the government asked for the meeting (acting on “the government’s advice”), while No. 10 attributed the meeting to a decision by the Palace.

out in its 2022 Assembly election manifesto. While the DUP has no veto in the Commons, its leverage is its willingness or unwillingness to re-enter the power-sharing Stormont arrangements. When the Prime Minister [speaks](#) of the deal “closing the democratic deficit,” he is referring to the need to restore the Stormont power-sharing arrangement.<sup>6</sup>

Finally, it bears repeating that yesterday’s announcement only addresses the Protocol, and while it presages warmer relations with the European Union, it does not address the more fundamental, and regrettable, consequences of Brexit, namely the broader economic impacts of the United Kingdom’s withdrawal from the single market and the customs union (*see* my previous briefing notes, available [here](#) and [here](#)). Ironically, today Rishi Sunak, speaking at a factory in Northern Ireland, stated that if the Windsor Framework is implemented and Stormont gets back into operation, Northern Ireland will be in “the unique position ... in having privileged access not just to the UK home market, ... but also the European Union single market.” That incidentally was the position of the entire United Kingdom before Brexit.

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<sup>6</sup> The more hard-line elements in the DUP wish to see the removal of all EU law and CJEU jurisdiction over Northern Ireland, which is impossible so long as Northern Ireland remains in the EU single market. Removal would likely lead to the reimposition of the hard Ireland-Northern Ireland border, avoiding which is the entire *raison d’être* for the Protocol. To Brexiteers, the democratic deficit is the application of EU law and CJEU jurisdiction. Note that the green lane regime narrows the scope of EU laws that apply to Northern Ireland. According to the British, over 1,700 pages of EU law (and accompanying CJEU jurisdiction) have been removed under the Windsor Framework.