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## **The European Research Group's Legal Advisory Committee's Review and Assessment of the "The Windsor Framework"**

Commenting on the release of the legal assessment, ERG Chairman Mark Francois MP, said:

*"I would like to thank the Star Chamber, Chaired by Sir Bill Cash MP and ably supported by Martin Howe KC, Barnabas Reynolds and David Jones MP for their diligent and thorough examination of the legal implications of the Windsor Framework.*

*"The Star Chamber's principal findings are: That EU law will still be supreme in Northern Ireland; The rights of its people under the 1800 Act of Union are not restored; the 'green lane' is not really a 'green lane' at all; the Stormont Brake is practically useless and the framework itself, has no exit, other than through a highly complex legal process."*

The full report can be found at: <https://lawyersforbritain.org/windsor-deal-erg-legal-advisory-committee-assessment/>

### **Principal findings:**

#### **1. EU law remains supreme in Northern Ireland**

**Removal of EU law?** No EU laws will be "disapplied" or "removed" from Northern Ireland, contrary to claims in the UK Command Paper. Northern Ireland will remain subject to the power and control of EU law, the European Court (ECJ) and the European Commission on EU single market laws which govern the manufacture and sale of goods in Northern Ireland, and EU customs formalities and duties will still apply to goods sent from Great Britain unless one of the limited exemptions applies.

The deal makes only limited legal changes to the Northern Ireland Protocol, on the basis of temporary legal powers under the UK-EU Withdrawal Agreement which do not permit any changes to "essential elements". Claims that this amounts to a new framework or structure are not correct.

**Limited easings within existing Protocol structure.** The two different legal systems, (a) UK law in Great Britain, and (b) EU law in Northern Ireland, are the underlying cause of a border in the Irish Sea, with checks and controls required between those two parts of the same country. This underlying cause is not addressed by the Windsor deal.

Instead, there will be limited easings from the Irish Sea border customs and regulatory requirements for businesses in Great Britain selling goods into Northern Ireland. These easings will not benefit businesses in Northern Ireland. They will remain fully subject to all EU laws under the NI Protocol when making goods and when selling goods to Northern Ireland consumers in competition with goods of British origin.

Easings for very specific areas are to be made *under EU law directly applicable in Northern Ireland*, for medicines, some retail goods (mainly foods), pets and plants. Allowing these easings to be done within EU law (rather than in a bilateral instrument) has adverse consequences:

- Their interpretation, enforcement and validity is automatically under the jurisdiction of the ECJ rather than of the Withdrawal Agreement arbitration panel.
- The UK has no legal remedy if the EU does not pass these easings into law in the form the Commission now proposes, or if the EU decides to amend or repeal them in future.
- This creates an incredibly dangerous precedent of allowing the EU to make Regulations which apply only within the territory of Northern Ireland, a precedent which could be turned against the UK in future.

**VAT and excise.** Ameliorations are made in EU rules on VAT and excise which will allow changes made (or shortly to be made) to VAT and alcohol duties since Brexit in Great Britain to be replicated in Northern Ireland. But there is no overall removal of VAT and excise from EU control, and the deal provides for a new "enhanced co-ordination mechanism" on VAT and excise. Changing tax structures or rates outside the boundary of the specific relaxations will involve negotiation with the EU and their permission.

**EU State aid law and its "reach-back" into the UK.** EU State aid law, by virtue of Article 10 of the NI Protocol, is applicable in Northern Ireland *and across the whole of the UK* if aid might affect trade under the NI Protocol. Article 10 *will not be amended*, leaving the EU still in complete control of State aid within Northern Ireland. The Windsor deal will use a declaration (less legally secure than amending the treaty text) which seeks to limit (but not eliminate) the reach-back of EU State aid law across the whole UK, putting recipients of aid within Great Britain at risk of Commission proceedings requiring the aid to be repaid for 10 years after it is granted.

## **2. The rights of the people of Northern Ireland under the Act of Union 1800 are not restored.**

**Different treatment under a treaty with a foreign power.** Unlike Great Britain, Northern Ireland will remain subject to the power and control of EU law, the Court of Justice of the European Union (ECJ) and EU administrative organs (such as the European Commission). Northern Ireland citizens will have no ability to vote to change or remove the body of EU laws which apply to them under the NI Protocol, unlike citizens in Great Britain who have the power to change or remove retained EU law.

**Customs and restrictions on goods between parts of the United Kingdom.** Customs between Great Britain and Northern Ireland will remain unless a specific exemption applies. Larger businesses in Northern Ireland will have to pay EU tariffs on goods inputs from Great Britain if they do not satisfy rules of origin under the UK-EU Trade and Cooperation Agreement. Burdensome administrative requirements will apply to goods even within the scope of the specific easings; and outside those easings the full panoply of EU external border rules will apply to goods moved from Great Britain.

## **3. The 'green lane' is not really a 'green lane'**

**Limited (and conditional) easings.** Limited easings from the full application of EU external customs duties and customs and regulatory requirements are to be made, involving reduced checks for certain goods sent within the UK across the Irish Sea which are accepted by the EU as destined solely for Northern Ireland and as not placing any risk on the EU's "single market".

These easings, which cover customs and certain goods standards, are highly constrained and carefully defined.

- They cover certain aspects of East-West trade only. E.g. full EU customs checks and duties, if payable, will still apply to business acquisitions of input goods to be processed in Northern Ireland by larger companies.

- The easings will not readily be available to smaller traders.
- Registration will be required by UK traders and carriers.
- Some elements of the new scheme require businesses to become authorised under a newly established mechanic, managed by the UK but overseen by the EU.
- Some of the elements contain new, detailed application, compliance and monitoring processes, with restrictions on how the UK applies the scheme.
- Declarations will still be required, as will compliance checks.
- Precautionary usage of the "red lane" involving full checks is likely, and there is no reimbursement mechanism for duties where goods end up solely in Northern Ireland.
- The scheme is not on a secure legal base vis-à-vis the EU, since it is vulnerable to suspension by the EU on grounds of suspected fraud, or termination by the EU on "diversion of trade" grounds.

These complex easings do not resemble a "green lane" where no checks are required and anyone is free to walk through. The schemes are burdensome and it is not clear if they will actually be better or worse than the way the NI Protocol currently operates with 'grace period' suspensions. These easings are not available to all businesses since smaller traders will find them more difficult to operate or even impossible. Nor do they cover all forms of business such as supplying plants direct to gardeners by mail order.

#### **4. The Stormont Brake is practically useless**

**The 'Stormont brake'.** A new 'Stormont brake' is to be inserted into the NI Protocol which gives a certain number of members of the NI Assembly the ability to call for the rejection of incoming EU laws. However, this only applies to future changes to EU law and confers no right to change any part of the existing body of EU laws imposed on Northern Ireland under the NI Protocol. The 'brake' is of very narrow application in theory and is likely to be useless in practice. It is a highly restricted version of a process contained in the European Economic Area (EEA) Agreement, and allows the EU to take "remedial" countermeasures. There has only been one attempt to use the EEA version of the brake, by Norway in 2011, which was abandoned in 2013. Norway failed. (A flow chart for the Brake is attached)

#### **5. There is no exit from the framework other than through a highly complex legal process**

**Doubling down.** The UK provides new commitments and undertakings which reaffirm and embed the status and structures of the Withdrawal Agreement and its NI Protocol.

- The Government commits to new, tougher arrangements for market surveillance and enforcement under the NI Protocol. New commitments are made by the UK on "exports" from Northern Ireland to Great Britain.
- The Government commits to stopping the progress of the Northern Ireland Protocol Bill which, if enacted, would allow for the restoration of UK sovereignty in Northern Ireland.
- The EU sets out how EU representatives will engage directly with Northern Ireland "stakeholders", undermining the status of Northern Ireland within the United Kingdom.

**The Windsor arrangement risks incentivising the UK and its future governments to copy future EU rules, and adjustments to existing EU rules, so as to avoid the imposition of new checks across the Irish Sea.** Businesses in Northern Ireland will be denied the benefits of reformed post-Brexit UK law applied in Great Britain and will be faced in their home market with competition from goods supplied by mainland businesses which comply with UK rules without themselves being able to benefit.

The Government's claims	Analysis
<p><b>Is this legally binding on both sides?</b></p> <p><i>"It does what many said could not be done., legally binding changes to the protocol treaty itself."</i></p>	<p>The Northern Ireland Protocol remains intact, supplemented by some additional easings. The UK cannot hold the EU to its commitments which will ultimately be governed by the ECJ.</p>
<p><b>Has it removed EU laws?</b></p> <p><i>"over 1,700 pages of EU law – with accompanying European Court of Justice (ECJ) jurisdiction – are disapplied," (CP 806)</i></p>	<p>There is no evidence that 1,700 pages of EU law has been disapplied. Not a single EU single market law has been removed from Northern Ireland. At most there has been 'keyhole' surgery within the scope of these laws.</p>
<p><b>The Stormont Brake:</b></p> <p><i>"It gives us control over dynamic alignment, through the Stormont brake, beyond what the [Northern Ireland Protocol] Bill promised."</i></p> <p><i>"these arrangements provide for the appropriate sovereignty in Northern Ireland for the Stormont Assembly to have that say. It is more than a say; it is an ability for the Assembly to block new EU goods laws as they come down the pipe if Assembly Members are not happy with them."</i></p> <p><i>"It is for us to make the determination whether the threshold has been met."</i></p>	<p>The 'brake' is of very narrow application in theory and is likely to be useless in practice.</p> <p>It covers a limited range of EU laws applicable to Northern Ireland. It does not cover laws on EU trade defence measures, State Aid, VAT, Excise, most of the Customs Code, or the Electricity market.</p> <p>The UK cannot determine if the thresholds have been met. If the tests are not met then adjudicators could find against the UK and reapply the law.</p>
<p><b>Medicines:</b></p> <p><i>"it provides dual regulation for medicines. The UK's regulator will approve all drugs for the whole UK market, including Northern Ireland, with no role for the European Medicines Agency. That fully protects the supply of medicines from Great Britain into Northern Ireland"</i></p>	<p>The UK MHRA will remain subject to EU law when authorising new medicines in Northern Ireland which fall outside these special categories.</p> <p>The concession could be removed by EU legislation or withdrawn under the legislation if the UK is judged to have contravened its terms.</p>
<p><b>UK alignment with EU rules?</b></p> <p><i>"we have also committed to a range of other things to ensure that we protect against trade and regulatory divergence, including dialogue with businesses in Northern Ireland and also with the European Union."</i></p>	<p>In practice, the Windsor deal will incentivise the UK and its future governments to copy future EU rules (and adjustments to existing rules) so as to avoid the imposition of new checks across the Irish Sea.</p>

<p><i>“there are opportunities to do things differently across the UK to drive growth and prosperity,”</i></p> <p><i>What that refers to very specifically is the work of the Office for the Internal Market, which we have strengthened as a result of the agreement and provided some extra detail about what we do in the Command Paper.</i></p>	<p>The UK will have to engage in an on-running system of negotiations via the Joint Committee or see the Irish Sea border harden and fall foul of its own legislation to ensure there is no further hardening of the Irish Sea Border.</p>
<p><b>Pets</b></p> <p><i>“A pet owner travelling from Great Britain to Northern Ireland just needs to make sure that their pet is microchipped and then they will simply need to tick a box when booking their travel.”</i></p>	<p>The EU has allowed GB pets to travel to Northern Ireland if they are microchipped and have an accompanying travel document and declaration stating the pet will not go to the Republic of Ireland.</p>
<p><b>Green Lane</b></p> <p><i>“Within the green lane, burdensome customs bureaucracy will be scrapped and replaced with data sharing of ordinary, existing commercial information. Routine checks and tests will also be scrapped. The only checks will be those required to stop smugglers and criminals. Our new green lane will be open to a broad, comprehensive range of businesses across the UK.”</i></p>	<p>Full customs formalities will remain for many businesses importing goods from Great Britain and complex Tariff Rate Quotas and Rules of Origin will complicate Northern Ireland Firms’ supply chains.</p> <p>The ‘green lane’ is only available for a limited range of goods considered not ‘at risk’ and involves burdensome pre-registration and administration.</p>
<p><b>Northern Ireland’s place in the UK</b></p> <p><i>“I can say with conviction that it does address the issues that were raised, and that it does secure Northern Ireland’s place in the Union and safeguard sovereignty.”</i></p>	<p>The Articles of of Union of 1800 have not been restored. There are serious questions regarding UK sovereignty in Northern Ireland and Great Britain.</p>
<p><b>Is the Protocol Permanent?</b></p> <p><i>“it is a significant development that the Vienna convention on the law of treaties is in the political declaration”</i></p>	<p>The NI Protocol contains no viable exit or review clause. The “democratic consent” mechanism is not cross-community as it should be under the Belfast (Good Friday) Agreement. Even if invoked, the NI Protocol remains in place and governs any replacement arrangement.</p>
<p><b>Plants</b></p> <p><i>“That is why today’s agreement will lift the ban on shrubs, plants and trees going to Northern Ireland”</i></p>	<p>The agreement only applies only to “professional operators”, is subject to “the rules for their entry into the Union laid down in Regulations (EU) 2016/2031 and (EU) 2017/625”, and only applies to a handful of trees and shrub species that need to be accompanied by plant health certificates.</p>

## The Stormont Brake in practice

