

UK and EU formally adopt the Windsor Framework



Foreign Secretary James Cleverly & European Commission Vice President Maroš Šefčovič after today's formal adoption by the UK and EU of the Windsor Framework.

The UK left the EU on Jan. 31, 2020, and the post-exit “transition period” during which the UK remained in the EU’s Single Market ended on Dec. 31, 2020. Although the EU and UK concluded a comprehensive Trade and Cooperation Agreement on Christmas Eve 2020 that took effect on Jan. 1, 2021, they have continued to disagree, frequently and vehemently, about the implementation of the Protocol on Ireland/Northern Ireland contained in, and part of, the 2019 Withdrawal Agreement. Indeed, they have disagreed to such an extent that the EU initiated several infringement procedures against the UK last year for violating the terms of the Protocol and the UK introduced legislation last June that would unilaterally amend the Protocol, notwithstanding the fact that, as an integral part of the Withdrawal Agreement, it can’t be unilaterally amended by only one of the two parties.

The Protocol, 45 pages in length, sets out the arrangements the EU and UK agreed would be necessary after the UK’s exit in order to address the unique circumstances on the island of Ireland – specifically, the need to maintain North-South cooperation, avoid a hard land border between the Republic and Northern Ireland, and protect the 1998 Good Friday/Belfast Agreement in all its dimensions. The arrangements, agreed by Prime Minister Boris Johnson in the autumn of 2019 after an earlier version of the Withdrawal Agreement negotiated by Theresa May’s government in 2018 had been rejected three times by the House of Commons, included most notably—and controversially—Northern Ireland continuing to adhere to the rules and regulations of the EU’s Single Market and continuing to apply the EU’s customs code and border procedures to all goods arriving from Great Britain. In effect, the Protocol created a border in the Irish Sea for goods moving from Great Britain to Northern Ireland in order to avoid creating a hard land border between Northern Ireland and the Republic.

In July 2021, the British government issued a Command Paper, entitled “Northern Ireland Protocol: the way forward,” which called for new talks aimed at amending the Protocol and establishing a “new balance” in regard to the movement of goods between Great Britain and Northern Ireland. It noted that, while the Joint Committee responsible for implementing the Withdrawal Agreement had agreed on time-limited grace periods for some goods moving from Great Britain to Northern Ireland, the default assumption—that all goods moving from Great Britain to Northern Ireland would be subject to the full checks and controls that apply to goods moving from third countries into the EU—remained in effect, even for goods destined for consumption in Northern Ireland. It claimed supply chains had been disrupted, costs to businesses had increased, at least 200 companies in Great Britain had stopped supplying the Northern Ireland market, resulting in a substantial diversion of trade to Ireland, supermarkets had reduced their product lines because of delays and shortages, and the supply of medicines produced in Great Britain for use in Northern Ireland had been disrupted. The paper concluded “the current situation is not sustainable. The way the Protocol is working needs to change.”

In October 2021, talks focused on the problems created by the Protocol began between teams headed by European Commission Vice President Maroš Šefčovič and Lord David Frost, Minister of the Cabinet Office. After Frost resigned from the government in late 2021, the talks continued with the British side led by Foreign Secretary Liz Truss. While their meetings took place in a cordial atmosphere, Truss soon became sufficiently frustrated by the lack of progress that she urged Johnson to warn the EU that the UK was prepared to suspend parts of the Protocol if there was no agreement on modifying it before the election of the Northern Ireland Legislative Assembly on May 5, 2022. She also directed officials to prepare legislation that would give the government the power to unilaterally disregard certain provisions of the Protocol covering customs duties, the movement of goods from Great Britain to Northern Ireland, value-added and excise taxes, and other issues.

On May 5, Sinn Féin won an historic victory in the Northern Ireland election, which meant it would, under the terms of the Northern Ireland (St. Andrews Agreement) Act 2006 which amended the Northern Ireland Act 1998, nominate the First Minister of the Northern Ireland Executive. The Democratic Unionist Party, the loudest opponent of the Protocol, refused to support the election of the Speaker of the new Assembly, which meant Michelle O’Neill, the leader of Sinn Féin, couldn’t be elected First Minister. The DUP also made it clear that it wouldn’t, as the 2006 Act requires, nominate a deputy First Minister, meaning that, under the complex power-sharing rules set forth in the 2006 Act, the Assembly wouldn’t be able to form the Executive and O’Neill wouldn’t be able to take office as First Minister.

Last June, Truss introduced legislation that proposed a number of modifications of the rules in the Protocol in regard to the movement of goods from Great Britain to Northern Ireland, the regulations that apply to goods sold in Northern Ireland, the application of

EU state aid rules and VAT and excise taxes in Northern Ireland, and the resolution of disputes. One notable proposal involved creation of two “channels” – a green one for goods to be consumed in Northern Ireland and a red one for goods that could be consumed in Ireland or elsewhere in the EU. Goods arriving in the “green channel,” unlike those arriving in the “red channel” and destined for the EU, would no longer require the burdensome paperwork and customs procedures required under the terms of the Protocol. In addition, the bill proposed exempting goods moving from Great Britain to Northern Ireland for consumption in Northern Ireland from the regulations to which they would be subject if sold in the EU. It also proposed allowing the UK to apply UK rules, rather than EU rules, in regard to value-added and excise taxes on goods. And it proposed that disputes arising under the Protocol be dealt with by arbitration rather than by the European Court of Justice. The EU not surprisingly challenged both the legal basis on which the UK claimed it could unilaterally amend the Protocol and the specific changes proposed by the UK.

Early last July, Johnson resigned as leader of the Conservatives and, after a vote of the party membership last summer, Truss was elected party leader and, because the party has a majority in the House of Commons, became prime minister when the House reconvened in September. But only a month later, she resigned in the wake of an uproar over her mini-budget that included substantial unfunded tax cuts that rocked the financial markets. Several days later, Rishi Sunak, her opponent in the leadership contest and a former Chief Secretary of the Treasury and Chancellor of the Exchequer, was chosen to replace her as party leader and prime minister. The bill introduced by Truss was quietly set aside and Sunak directed his government to resume negotiations with the EU in regard to implementation of the Protocol. The talks, led by Šefčovič for the EU and Foreign Secretary James Cleverly for the UK, made good progress, and in January the two sides entered an intensive negotiating “tunnel” that precluded any further public statements until the negotiation had been completed.

On Feb. 27, European Commission President Ursula von der Leyen and Sunak met in Windsor and announced “a political agreement in principle on the Windsor Framework” which, the EU said, “constitutes a comprehensive set of joint solutions aimed at addressing, in a definitive way, the practical challenges faced by citizens and businesses in Northern Ireland....The joint solutions cover, amongst other things, new arrangements on customs, agri-food, medicines, VAT and excise, as well as specific instruments designed to ensure that the voices of the people of Northern Ireland are better heard on specific issues particularly relevant to the communities there. These new arrangements are underpinned by robust safeguards to ensure the integrity of the EU’s Single Market, to which Northern Ireland has a unique access.” As part of the agreement, the UK agreed not to proceed with the Northern Ireland Protocol Bill the government brought forward last year and the EU agreed that when the arrangements announced at Windsor are implemented there will no longer be grounds for continuing with the infringement procedures the Commission initiated last year.

Under the Framework, there will be new arrangements in the area of customs that will be based on an expanded trusted trader scheme open to businesses in Great Britain, thereby greatly simplifying procedures, including declarations. The system of red and green lanes for goods being sent from Great Britain to, respectively, the EU or Northern Ireland will be used to greatly simplify the documentation and paperwork required for such goods. An arrangement was found that will ensure that people in Northern Ireland have access to all medicines that are available to people in the rest of the UK at the same time and under the same circumstances. In the sanitary and phyto-sanitary (SPS) area, the solutions ensure that the same food will be available on supermarket shelves in Northern Ireland as in the rest of the UK. Agri-food retail products for end consumption in Northern Ireland will be able to move from Great Britain to Northern Ireland with minimal certification requirements and controls and UK public health standards will apply to such goods. Value-added and excise taxes on goods to be sold in Northern Ireland will be set by the UK. A solution, in the form of simple documentation, will allow people to travel with their pets from Great Britain to Northern Ireland. And a solution was found that will allow plants, shrubs, trees and seeds to be moved easily from Great Britain to Northern Ireland, thereby supporting garden centers and farming.

The EU and UK also agreed that the voices of the people and stakeholders of Northern Ireland will be better heard through regular engagement at each level of the Withdrawal Agreement structures and with enhanced engagement on Protocol-related matters, including new thematic subgroups within the Joint Consultative Working Group. And most importantly, they agreed to create a new “emergency mechanism” – the Stormont Brake – which will allow the UK government, at the request of 30 members of the Legislative Assembly in Northern Ireland (Stormont), “to stop the application in Northern Ireland of amended or replacing provisions of Protocol-related EU law that may have a significant and lasting impact specific to the everyday lives of communities there.” The mechanism would be triggered only under the most exceptional circumstances and as a matter of last resort, in a very well-defined process to be set out in a Unilateral Declaration by the UK.

At Windsor, the EU and UK agreed to proceed with the necessary steps to translate their joint solutions into legally binding instruments and then implement them. Toward that end, the Commission submitted proposals to the Council for a Union position in regard to the decisions to be taken at a meeting of the EU-UK Joint Committee on the Withdrawal Agreement, which is co-chaired by Šefčovič and Cleverly and is responsible for the implementation of the Agreement. On Tuesday, the General Affairs Council unanimously agreed to the Windsor Framework and adopted two decisions that established the EU’s position in the Joint Committee and the Joint Consultative Working Group set up under the Withdrawal Agreement and allowed the EU to agree to the main elements of the Windsor Framework within those two bodies and, in so doing, translate them into legally binding commitments. The first decision allows the EU to agree to a Joint Committee decision and a set of joint recommendations, including targeted amendments to the Protocol, new provisions on the determination of goods

arriving in Northern Ireland from Great Britain that are not at risk of subsequently being moved into the EU, and an enhanced coordination mechanism for issues related to VAT and excise taxes pertaining to goods. The second Council decision allows the EU to agree to a change in the rules of procedure of the Joint Consultative Working Group, which serves as a forum for the exchange of information and consultation between the EU and the UK on issues related to Northern Ireland. The first decision, allowing the EU to agree in the Joint Committee to targeted amendments to the Protocol – something it has heretofore adamantly rejected – and to new provisions in regard to goods arriving in Northern Ireland from Great Britain that are destined for use or consumption in Northern Ireland, is obviously exceptionally important; indeed, it could in time lead to an amicable resolution of the protracted and heated dispute between the UK and the EU over the Protocol.

On Wednesday, the UK House of Commons approved by a decisive margin the Windsor Framework (Democratic Scrutiny) Regulations 2023. That instrument amends the Northern Ireland Act 1998 to provide for the Stormont Brake. It sets out the procedure for 30 members of the Legislative Assembly of Northern Ireland from two or more parties to initiate the Brake and provides for a new process to support the MLAs in notifying the government in cases in which an amended or replaced EU goods rule, or part of a rule, would have a significant impact on the everyday lives of communities that would be liable to persist. The regulations stipulate that the two parties can be of the same community designation under the Northern Ireland Act 1998. The notification would be transmitted directly to the government and would not require any formal vote or approval in the Assembly. The regulations also provide for a Windsor Framework Democratic Scrutiny Committee within the Assembly to support MLAs in considering whether to make use of the notification process. In the event the UK government is notified in regard to an EU rule pertaining to goods, it would be under a binding statutory obligation to trigger the Brake, after which the rule would be suspended. Subsequently, the UK government would have a veto power in the Joint Committee as to whether the rule should be disapplied permanently. According to the regulations, the veto power must be used unless there is cross-community support in Northern Ireland for the rule. The regulations make it clear that the application of the Brake is solely an internal matter within the UK, with no role for the EU. The only action the EU could take would be to make a single request for further information within two weeks of the Brake being triggered. The EU could challenge the use of the Brake after a decision has been made and the rule in question has been suspended only through the normal international arbitration route – not through an appeal to the European Court of Justice. The regulations also stipulate that the UK government must accept an MLA notification which meets the criteria set out in the Windsor Framework and must therefore notify the EU if the conditions are met. The regulations also stipulate that the government cannot agree to a Joint Committee decision which would apply a new EU law, or one that is a subject of the Stormont Brake, without Assembly approval through a specified motion which must be passed with cross-community support. Lastly and importantly, in light of the current refusal of the DUP to participate in the election of a Speaker and the

formation of the Executive in the Legislative Assembly, the regulations state that the Brake will not become available until the Northern Ireland Executive is restored and operational, including with a First Minister and a deputy First Minister and an Assembly that is sitting regularly.

On Wednesday, the House of Commons voted overwhelmingly in favor of the Draft Windsor Framework (Democratic Scrutiny) Regulations 2023. 515 MPs – 281 Conservative MPs, 160 Labour MPs, 43 Scottish National Party MPs, 13 Liberal Democrats, 9 Independents, 3 Plaid Cymru MPs, and a few others – voted in favor. Only 29 MPs – 22 Conservatives, 6 DUPs, and one independent – voted against. (Notable among the 22 Conservatives were former prime ministers Boris Johnson and Liz Truss.) 47 Conservative MPs, along with 36 Labour MPs and about a dozen others, abstained. Notwithstanding the 22 Conservatives who voted against the regulations and the 47 Conservatives who abstained, it was the closest thing to a cross-party landslide on an important piece of legislation that has occurred in recent years.

Today, the EU-UK Joint Committee, co-chaired by Šefčovič and Cleverly, met in London and adopted a decision laying down the arrangements relating to the Windsor Framework. The decision is a 38-page document that deals with the movement of goods from Great Britain to Northern Ireland that are not at risk of entering the Single Market, the Stormont Brake, and VAT and excise-related solutions, including the establishment of an Enhanced Coordination Mechanism for both. Interestingly, in view of the EU's previous refusal to consider amending the Protocol, the decision amends two of the articles and one annex in the original Protocol and provides elaboration for some other articles in the original Protocol. The decision states that the EU and UK have made a Joint Declaration in the Joint Committee to the effect that, wherever relevant, they will refer to the amended Protocol as the "Windsor Framework." The Joint Committee's decision will enter into force tomorrow although certain parts will become applicable gradually; for example, the new and expanded trusted trader scheme for freight will start applying on Sept. 30, provided relevant safeguards are in place. The Commission has already tabled legislative proposals in regard to sanitary and phytosanitary (SPS) rules, medicines, and tariff rate quotas. and will be working with the European Parliament and the Council to ensure their adoption.

Over the past 27 months since the UK's post-Brexit "transition period" ended, the EU and the UK have disagreed frequently and vehemently over the implementation of the Protocol on Ireland/Northern Ireland contained in the EU-UK Withdrawal Agreement. And just as frequently, the EU made it clear that the Protocol could not and would not be amended. But now that has happened – not enough, of course, to placate the hardline opponents, but enough to address most of the issues raised by the government in its July 2021 Command Paper, "Northern Ireland Protocol: The Way Forward." The way forward, it turns out, is the Windsor Framework.

David R. Cameron
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