

# **‘Handing back control’**

**Evelyn Farr – aka Caroline Bell – is a former civil servant turned affiliate-columnist who provides an insider’s take on the Prime Minister’s Windsor Agreement.**

In a withering analysis which lays bare the reality of the current negotiations, she argues that the government’s proposal actually makes things worse, reinforcing the EU’s stranglehold on the Province and introducing regulatory alignment between the UK and the EU via the back door.

When an ex-civil servant tells you that the original Withdrawal Agreement was ‘brazenly mis-sold’ or that the ‘sting in the current Windsor Framework is carefully disguised by scattering the details through multiple documents’ we should all sit up and take notice.

At the time of publication the DUP has yet to pronounce on the deal but what follows should concern all of us who care about democracy, freedom and the integrity of the United Kingdom.

Caroline Bell’s article which we publish courtesy of our Affiliate Briefings for Britain, can be read in full below.

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## **The Windsor Framework – getting Brexit undone**

**By Caroline Bell**

**The rebranding of the Northern Ireland Protocol as the ‘Windsor Framework’ is perhaps one of the biggest political con tricks of the Brexit years.**

*Rather than removing administrative burdens and trade frictions between Great Britain and Northern Ireland created by the Protocol, the Windsor Framework tinkers with bureaucratic technicalities and reinforces the EU's legal stranglehold over the Province.*

*It circumvents existing treaties to introduce regulatory alignment between the UK and EU by the back door and sees the EU usurp the British government's sovereign right to legislate for the United Kingdom – seemingly without requiring the consent of either Parliament or the Northern Ireland Assembly. Instead of 'taking back control' and 'getting Brexit done', the Windsor Framework hands control back to the EU and makes big strides towards getting Brexit undone.*

## ***Unpacking the 'deal'***

The civil service likes to 'unpack' policies. It also likes to misrepresent policies by shrouding unpalatable legal details in 'explainers' which are often not worth the paper they are printed on. A classic example was Theresa May's Withdrawal Agreement, which was brazenly mis sold in a deliberate misinterpretation of the legal text. Number 10 has learnt new tricks since then, although its modus operandi hasn't changed.

The Windsor Framework (WF) is much more cleverly constructed than May's 'deal' in order to lure people into reading only the Way Forward PR brochure, which is a masterpiece of waffle and misdirection. The EU's succinct factsheet and Q & A page are ruthlessly dry, very accurate, and in several areas flatly contradict the UK's 'explainer'.

The sting in the Windsor Framework is carefully disguised by scattering the details through multiple documents. In total, no less than 37 separate documents relating to the WF have been published on the British government and European Commission websites. Of these, 14 are press releases and

explainers (11 of them British), 3 are EU position papers (usually a reliable indicator of exactly where Brussels has drawn its red lines), 6 are joint political declarations and 4 are unilateral UK declarations (all without the force of law).

The meat of what is in essence a revised international treaty is contained in 10 draft legal texts – Joint Committee Decisions and Recommendations, EU Council Decisions and new EU Regulations.

## ***A legal takeover***

The legal changes to the Protocol contained within the Windsor Framework are substantial, but they come into being entirely at the pleasure of the EU through a European Council Decision and create new EU laws applicable throughout the UK, overseen by the ECJ.

Where is the draft government Bill enacting the Windsor Framework? Is Rishi Sunak going to do a Theresa May and sign off the WF and let the EU pass laws which come into direct effect immediately in the whole of the United Kingdom without a vote by Parliament? His refusal to attend the Commons Scrutiny Committee on the WF is very concerning, as his agreement to drop the Northern Ireland Protocol Bill at the request of the European Union.

The government explainer (Para 73) states that the WF ‘will be approved at the next meeting of the UK-EU Joint Committee’, which is expected to take place this month (March 2023). After that, the UK and the EU will respectively take forward legislative measures to translate the solutions into law’.

**Given this timetable and the complete dominance of new EU law in the Windsor Framework, it seems that Parliament has already been largely cut out of the legislative process.**

## ***New EU law for the UK***

All the legal texts in the WF are draft European Union laws, **even though these new EU laws will apply solely to the internal affairs of the United Kingdom**. We have reached the utterly surreal position where, three years after Brexit, the entire UK will become subject to new laws made in Brussels with the stated aim of 'protecting the UK's internal market' and 'Northern Ireland's place in the United Kingdom'. Isn't that the job of the British government and the sovereign UK Parliament?

If the Windsor Framework goes ahead, the Protocol will work exactly as the backstop was designed to do. It was never about avoiding a hard border in Ireland, but was created as a way to maintain a large corpus of EU law on the UK's statute book and act as a conduit for new EU law to be introduced into the UK, thus keeping the UK fully aligned to Single Market rules for the benefit of EU businesses.

## ***Handing control back to the EU***

Boris Johnson's renegotiation of the Protocol in 2019 removed many of the more iniquitous elements of May's backstop, but the EU (ably abetted by the civil service) managed to retain Annex 2, which contains all the Single Market law applicable in Northern Ireland, largely intact. The projected implementation of the ludicrously named 'Windsor Framework' will not only strengthen but enhance the EU's legal stranglehold over the Province.

If the WF actually respected the UK's legal order and the territorial integrity and sovereignty of the United Kingdom (as every preamble to the Protocol claims), the Joint Committee would agree to remove or fully disapply sections of

the EU regulations causing trade frictions from Annex 2 and allow the grace periods and easements which are currently in operation to become permanent under laws passed by the UK Parliament – for the very good reason that operation of the UK's internal market is absolutely none of the EU's business and that as a third country, the UK cannot be subject to EU law.

Instead, Rishi Sunak has agreed to drop UK legislation – the Northern Ireland Protocol Bill – and allowed the EU to draft brand new EU laws to govern trade **which takes place solely within the UK's borders**. This is an indefensible usurpation of sovereign power both within Northern Ireland and the wider United Kingdom, representing a craven abandonment by the British government of its duty to govern the country.

Crucially, if this surrender stands, all future rules on the movement of goods, plants, foodstuffs, medicines, parcels and pets from GB to NI **would be decided by direct EU regulation made in Brussels**, not UK law made at Westminster (the Protocol explicitly creates an updating mechanism for EU law applicable under Annex 2). It is an appalling betrayal of the principle of consent which underpins the Good Friday Agreement and hands control of the whole of the UK's internal market to an unaccountable foreign organisation.

### ***Easements or enforcement?***

My colleague Harry Western has provided detailed analysis on the proposed solutions to problems created by the Protocol contained within the Windsor Framework, and correctly notes that these are neither generous nor guaranteed (as they would be under UK law). In its factsheet, the EU explicitly states that with regard to customs processes, it retains the 'possibility to suspend or terminate schemes in certain circumstances', and for SPS (Sanitary and phytosanitary) goods

and retail agri-food it may 'suspend facilitations partly or fully'.

Rather than removing all obstacles to trade within the UK's internal market, **the Windsor Framework actually forces the British government to implement EU regulations in NI which have so far not been enforced** under the unilateral grace periods. In return, the EU is offering a basic green lane system which still requires significant customs paperwork and the sharing of live trade data – and reserves the right to suspend it at any time.

## ***Parcels***

For example, parcels sent from GB to Northern Ireland can be posted now as they would be to any other part of the UK because the government has never enforced EU customs rules. Under the WF, only C2C (personal) parcels will continue to be free of red tape. Goods ordered by NI consumers from online retailers based on the mainland will require carriers to be authorised in order to enforce data collection.

The data requires the name of the recipient and an assessment by the sender of the standing of the recipient (to guarantee non-commercial use), to be transferred to the EU. This represents a considerable increase in administration costs as well as a serious breach of the privacy of NI consumers (you may wish to reconsider ordering products like Viagra from the mainland, guys).

And for commercial parcels, grace period easements will disappear. Under the WF, businesses will have to comply fully with the new EU trusted trader scheme and customs processes in order to use the green lane – which may be withdrawn any time the EU sees fit.

## ***Livestock, fish and veterinary medicines***

There are no easements at all for certain key areas – such as livestock movements or the landing of fish – while the supply and use of veterinary medicines remains fully controlled by the EU (although the British government is extending grace periods to 2025).

## ***Bangers smash UK law***

A **new EU regulation** will cover SPS requirements for certain foods like sausages. Products made in one part of the UK will only be allowed to be consumed in Northern Ireland (another part of the UK, in case Brussels hasn't realised) **by express permission of the EU** – and that permission may be withdrawn at any time.

This requires strict monitoring, authorisations and the enforcement of **new EU labelling rules on UK goods produced for consumption solely within the UK's internal market**. Apart from this unlawful overreach into matters which fall solely within the purview of the UK legislature, the rules would increase costs on UK business, with the likelihood of higher prices for NI consumers and trade diversion – both things the Protocol is supposed to avoid.

## ***New EU rights – competition, tax and regulatory alignment***

But the Windsor Framework gets even worse. In return for the technical tweaks above, which allow the EU alone to set the rules for GB to NI trade, the Windsor Framework grants the EU new rights to be consulted in advance over swathes of legislation governing the entire UK economy.

The British government's Way Forward explainer (para 32)

claims that a new mechanism will be established 'enabling the UK and EU to look at **future EU rule changes** and make further legally binding changes to resolve any distortive impacts that **new EU red tape** could cause' in the areas of VAT and excise.

The legal amendments to the Protocol contained in the Draft Joint Committee Decision are far more expansive. Para 8 states clearly that new VAT rules 'should not lead to fiscal fraud risks or **any potential distortion of competition**'. To this end, an Enhanced Coordination Mechanism for VAT and excise is to be established.

New Protocol Article 17 says that the Mechanism will 'review the implementation and application of Article 8 of the Protocol with regard to the provisions **of Union law** listed in Annex 3 to the Protocol.'

However, amended Article 18 of the Protocol tasks the Mechanism with providing 'a forum for the enhanced and timely coordination of the exchange of relevant information and for consultation on **future United Kingdom** and Union VAT and excise legislation whenever in particular it affects the trade in goods in Northern Ireland due to **important changes envisaged in the applicable legislative framework**'.

This catch-all article therefore gives the EU consultation rights on **all current and future UK VAT and excise legislation** and provides a lever for the EU to threaten to withdraw Protocol easements if the UK does not drop tax changes it does not like.

VAT and excise have nothing all to do with avoiding a hard border on the island of Ireland (there has always been a fiscal and currency border). Their inclusion in the protocol was to prevent the UK diverging from EU law. If the EU really wanted to make the Protocol work, EU VAT and excise legislation would be entirely removed from it. Instead it is



amended in the Windsor Framework by **a new EU tax regime uniquely applicable** to the UK.

In a Joint Declaration, the British government has also committed itself to allow the EU oversight of proposed changes to UK goods legislation. A Special Committee will be established to 'provide for exchanges of views on any future **United Kingdom legislation regarding goods** of relevance to the operation of the Windsor Framework.'

Since all UK goods legislation will be relevant to Northern Ireland, this gives the EU consultation rights on legislation applicable only in the UK, and a further hook into our trade and commercial policy, which, with a new Office of the Internal Market to prevent divergence between the UK and Northern Ireland, will begin to ensure dynamic alignment under the Protocol – giving the EU exactly what it failed to get in the original Protocol and the TCA.

## ***Democratic deficit***

The democratic deficit represented by the Windsor Framework is as wide as the Grand Canyon. The Stormont Brake is virtually inoperable, setting an extremely high bar for the brake to be pulled by the British government (not Stormont, which can merely request the government to trigger an arbitration mechanism). The Northern Ireland Assembly has no vote on the WF itself or the new EU laws which will implement it.

No-one appears to have noticed the gaping democratic deficit with regard to the UK as a whole. There is no provision in any of the papers I have seen for British parliamentary approval of what is in essence a new international treaty.

## ***Action plan***

There is time to change course. The Windsor Framework is only a **draft political agreement**, and all the new EU laws are only proposals for enabling legislation.

Members of Parliament who believe in democracy and the right of British citizens to self-government need to take action immediately to avert the legal and democratic fraud which would be perpetuated on their constituents if the Windsor Framework is allowed to be enacted by the EU in Brussels as currently drafted.

An easy fix would be to amend the Joint Committee Decision such that whilst the UK and the EU agree the principles underpinning the easements and new trader schemes, all the implementing legislation is made under UK law. The UK legislation with relevant powers is already in place, without the Northern Ireland Protocol Bill (the TCTA, the Internal Market Act, Finance Acts, SPS regulations). The government should draft the new regulations with reference to the Windsor Framework and the new commitments it has made.

The new Articles granting the EU rights of consultation on new UK legislation should remove the reference to competition and narrow the focus so that consultation may only take place on matters **which are solely applicable to the effective operation of the Protocol**.

The trade-off for the EU would be that the EU retains the Protocol, loses the Northern Ireland Protocol Bill and Article 16 is not triggered.

## ***Getting Brexit undone***

As it stands, the 'Windsor Framework' is a staggering political and legal sleight of hand devised to facilitate the transfer of legislative control over crucial areas of UK

economic policy to the EU, through the mechanism of the Northern Ireland Protocol. It takes the Protocol backwards, to follow the colonial path set out in May's backstop, and cements it as a permanent arrangement which not only carves out Northern Ireland from the rest of the UK, but allows the EU to make new laws which are enforceable throughout the United Kingdom.

You cannot really undo Brexit more thoroughly or more sneakily than that.

By Caroline Bell, for Briefings for Britain, 16 March 2023

**About the Author:** Caroline Bell is a French Historian and former civil servant and a regular contributor to Briefings for Britain

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