

# **‘Unbalanced and unfair – Windsor Framework endangers peace and prosperity’**

**The fundamental dispute between the UK and the EU over Northern Ireland is a constitutional one, argues author and analyst Derrick Berthelsen.**

Where the Good Friday Agreement succeeded in maintaining peace by balancing the interests of both nationalist and loyalist communities, the Northern Ireland Protocol and its successor, the Windsor Agreement, has upset that delicate equilibrium and made things worse.

*“Unsurprisingly,” argues the author, “the result of such an unbalanced agreement has been the decision by the Unionist community to refuse to participate in the (power sharing) executive in the Northern Ireland Assembly and the announcement by the DUP that they will not return until the Good Friday Agreement balance is restored.”*

As we approach the GFA’s 25<sup>th</sup> anniversary it is still not too late for the government to persuade President Biden to put pressure on the EU to re-negotiate the Protocol properly. The long-term future of the Province may well depend on it.

The article, which we re-produce courtesy of The Bruges Group, is published in full below.

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## **The Windsor Framework is dangerous**

**By Derrick Berthelsen**

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There are many reasons to vote against the Windsor Framework changes to the Northern Ireland Protocol. Several excellent articles have been published outlining why – in this and other periodicals – but today I want to focus on just one: peace and prosperity in Northern Ireland.

### ***Constitutional background***

I do not believe there can be a long term sustainable solution in Northern Ireland until the delicate balance agreed to in the Belfast/Good Friday Agreement is restored. And the Windsor Framework changes to the Northern Ireland Protocol fail miserably to do that.

In the opening paragraphs of the Northern Ireland Protocol is the following sentence:

The Good Friday or Belfast Agreement of 10 April 1998 ... should be protected in all its parts

Not only does the Protocol recognise that the Good Friday Agreement has been integral to “the achievements, benefits and commitments of the peace process” on the island of Ireland and of “paramount importance to peace, stability and reconciliation there”, it makes protecting the Good Friday Agreement the primary purpose of the Protocol to deliver a “unique solution (on the island of Ireland) in order to ensure the orderly withdrawal of the United Kingdom from the Union”

In the USA (which helped broker and is a co-signatory of the Good Friday Agreement), President Biden has been explicit that the terms of the UK’s exit from the European Union cannot alter the delicate balance achieved in the Good Friday Agreement: “the Good Friday Agreement has been the foundation of peace and prosperity in Northern Ireland for nearly 25

years. It cannot change.”

The Belfast/Good Friday Agreement managed to square the seemingly impossible circle. Agreement was reached because both communities felt their interests were protected. Unionists felt that their place in the Union was secure and could not be changed without their express permission.

Nationalists felt a peaceful route to a United Ireland in the future was now possible. The people of Northern Ireland could choose to identify as British or Irish or both, decision making power was devolved to the Northern Ireland Assembly (on a cross community basis) and cross border co-operation was both embedded in and, through design, destined to grow.

All parties paid a price in the deal. In Ireland the constitution was changed to remove their constitutional claim on the six counties. In the UK the Government accepted that the future of Northern Ireland lay entirely in the hands of the people of Northern Ireland. That the UK Government would have no say in the future constitutional position of Northern Ireland.

Nobody can pretend that the Belfast/Good Friday Agreement is perfect, but for nearly 25 years this delicate balance has held. That is until the Northern Ireland Protocol. For whilst all parties claim they wanted a deal which protected and prioritised this delicate balance the resulting deal did anything but.

## ***Effects of Northern Ireland Protocol***

Whilst the elements of the Belfast/Good Friday Agreement which gave Nationalists succour remain untouched, those which persuaded the Unionist Community to support the deal were torn apart. First the guarantee that Northern Ireland’s constitutional position within the United Kingdom would remain

the same until/unless the people of Northern Ireland chose otherwise. The UK Supreme Court made clear that the Northern Ireland Protocol, whilst legal, “effectively superseded” the Act of Union.

The Supreme Court ruled that the Northern Ireland Protocol is legal because the “clearly expressed will of parliament” cannot be overridden. That Parliament has the power to pass legislation which supersedes existing legislation – even on constitutional matters.

All very good and proper but it ignores the fact that the Belfast/Good Friday Agreement expressly states (and the delicate balance it engenders requires) no change in Northern Ireland’s constitutional status without the express will of the people of Northern Ireland. And the UK Government, in the Good Friday Agreement, agreed that the UK would have no say in any change. The Northern Ireland Protocol breaks both.

And this applies equally to Northern Ireland’s place within the UK single market. The Act of Union states:

*“That all parts of the UK forever from & after the Union shall have the same Allowances Encouragements and Drawbacks and be under the same Prohibitions Restrictions and Regulations of Trade and lyable to the same Customs and Duties on Import and Export. And that the Allowances Encouragements and Drawbacks Prohibitions Restrictions and Regulations of Trade and the Customs and Duties on Import and Export settled in England when the Union commences shall from and after the Union take place throughout the whole United Kingdom.”*

Thus the Northern Ireland Protocol, by separating Northern Ireland from the UK single market, also expressly breaks (or “subjugates”) the Act of Union and hence the Good Friday Agreement.

Unsurprisingly the result of such an unbalanced agreement has been the decision by the Unionist community to refuse to

participate in the (power sharing) executive in the Northern Ireland Assembly and the announcement by the DUP that they will not return until the Good Friday Agreement balance is restored.

Indeed the DUP has announced seven tests which it states would have to be met to restore the balance. Clearly the Northern Ireland Protocol agreement – which (I repeat) declares its primary aim to “protect in all its parts” the Good Friday Agreement – has failed miserably to do so.

## ***Negotiations with EU***

The obvious solution was to rewrite the agreement and this time truly prioritise the protection of the Good Friday Agreement. The Boris Johnson Government, first with Brexit Minister Lord Frost and then via Foreign Secretary Liz Truss tried that. However, the EU refused, stating that because the UK signed it they should lump it.

As European Commission vice president Maroš Šefcovic made clear as far as the EU was concerned the protocol was a “joint solution” ratified by the UK Parliament. “We will not agree to a renegotiation of the protocol.” Instead all the EU would agree to discuss were “technical changes in implementation” which the EU itself recognised would not restore the balance.

The EU refusal to properly renegotiate the Northern Ireland Protocol seemed an odd position to take considering they vowed to protect the Good Friday Agreement “in all its parts”. Not least because the Northern Ireland Protocol itself makes clear that it was only ever intended to be temporary until such time as it could be replaced by a wider UK/EU agreement:

*“Any subsequent agreement between the Union and the United Kingdom shall indicate the parts of this protocol which it supersedes. Once a subsequent agreement between the Union and*

*the United Kingdom becomes applicable after the entry into force of the Withdrawal Agreement, this protocol shall then, from the date of application of such subsequent agreement and in accordance with the provisions of that agreement setting out the effect of that agreement on this protocol, not apply or shall cease to apply, as the case may be, in whole or in part."*

It was also a strange position to take when the Northern Ireland Protocol itself allows for unilateral action to be taken by either party if its implementation is found to threaten **the delicate balance of the Good Friday Agreement:**

***"If the application of this Protocol leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade, the Union or United Kingdom may unilaterally take appropriate safeguard measures."***

## ***The Windsor Agreement***

As the above makes clear, the UK was within its rights under the Northern Ireland Protocol to take unilateral action to ensure the balance of the Good Friday Agreement was restored. Indeed under PM Boris Johnson the UK began the process of giving itself the power to do so via the Northern Ireland Protocol Bill (which PM Sunak has currently halted at the Report Stage in the House of Lords).

Cue the appointment of Rishi Sunak as PM in late October 2022. He announced he would reinvigorate negotiations with the EU and push for real changes in the NIP to restore the GFA balance. Arguing that a more collaborative less confrontational approach would succeed where Boris Johnson and Lizz Truss had failed.

His negotiations culminated in the Windsor Framework which he

announced to the world on 27th February 2023 in the company of the President of the European Commission, Ursula von der Leyen. According to Sunak this deal fixes “the practical problems for the people and businesses of Northern Ireland, protects Northern Ireland’s place within our Union, and restores the balance of the Belfast (Good Friday) Agreement in all its dimensions”.

So do the Windsor Framework changes to the Northern Ireland Protocol restore the balance of the Good Friday Agreement in all its dimensions? Well, although the initial media response was almost universally positive, as legal and other expert minds delved into the text in detail (or to be more precise the EU legal text rather than the UK document with no legal effect at all), the response was a universal no.

## ***Assessment***

Steven Barrett KC was one of (if not the) first to publish his analysis. He concluded that “The Northern Ireland Protocol – which the UK Supreme Court ruled is subjugating the union and Northern Ireland’s place in it – is going nowhere.”

He continued “what this agreement means then is that the EU will effectively run Northern Ireland, and the UK can have a voice on the Joint Committee that will do the actual work of running Northern Ireland. But only if the rest of the UK also does as it is told and does not diverge from EU law.”

Professor Steve Peers, a consistently outspoken critic of Brexit, in his article “limiting the scope of EU law in Northern Ireland in practice, though not in theory” concluded “The Windsor Framework does not alter the fundamental legal framework of the Northern Ireland protocol.”

He shares Barrett’s view that Northern Ireland remains in the EU SM, subject to EU rules and regulations and ECJ oversight

and the Irish Sea border between Northern Ireland and the rest of the UK remains. He makes clear that whilst the changes do amount to some reduction in EU laws applicable to Northern Ireland these are not disapplied (legally gone) only suspended from operation unilaterally by the EU. And that the EU retains the right to re-apply them at any point. As Peers puts it, "it is fair to say that in many cases that law will no longer apply de facto, even if it applies de jure".

Former Northern Ireland Attorney General, John Larkin KC provided his analysis at the behest of the Centre for Union and reached the conclusion that the answer to all of the questions below was an unequivocal "no".

Are the proposals contained within 'the Windsor Framework' compatible with the Acts of Union 1800, particularly Article VI thereof?

Do the proposals contained within 'the Windsor Framework' remedy the "subjugation" of Article VI of the Acts of Union 1800?

Do the proposals in 'the Windsor Framework' strengthen the constitutional guarantee respecting the constitutional status of Northern Ireland?

Former UK Civil Servant Caroline Bell who was involved in the original Brexit negotiations reached the conclusion that rather than improve the position of NI versus the original NIP, the Windsor Framework changes actually make matters worse:

With the creation of new directly effective EU regulations, the commitment to consult the EU on new UK legislation to monitor competition risks and to build physical border infrastructure in Northern Ireland, it is clear that the Sunak government has colluded with the EU to develop the Windsor Framework as a vehicle for alignment with, and even subjection to, new EU laws which fall well outside the scope of matters



covered by the Withdrawal Agreement Act which implements the Protocol in the UK.

She continues that “the Windsor Framework drives a coach and horses through the Protocol’s affirmation of the EU’s and the UK’s “shared aim of avoiding controls at the ports and airports of Northern Ireland.” And that “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.”

### ***‘Democratic Deficit’***

On the subject of the democratic deficit for NI in the deal, Bell states that not only is the Stormont Brake “virtually inoperable” it removes the ability for the NI assembly to question the application of EU law in NI (they can merely request the UK government trigger an arbitration mechanism) whilst the “Northern Ireland Assembly has no vote on the Windsor Framework itself or the new EU laws which will implement it.”

I could mention other examples of expert opinion which concur. What I cannot give you is a single example of an expert opinion which agrees with Rishi Sunak’s statement that the Windsor Framework changes to the Northern Ireland Protocol “restores the balance of the Belfast (Good Friday) Agreement in all its dimensions.”

Indeed it would appear that the more time people have to study and understand the full ramifications of the Windsor Framework changes, the less they like what they see. For example Sam McBride, the Northern Ireland Editor of the *Belfast Telegraph & Sunday Independent* published an article on the weekend in which he stated that “the Government misled the public about its EU deal. Contrary to what it told the public, hundreds of

common plants are banned from entering NI from GB – and it seems all online/mail order GB-NI plant shopping will be unlawful...but DEFRA won't admit that."

At the time of introducing the deal, just two short weeks ago, PM Sunak made clear that "everyone, but particularly the Unionist community (would) be given the time and space they need to consider the detail of the Framework." He also promised that there would be a vote "on the Windsor Framework in the Commons...at the appropriate time and that (this) vote will be respected".

### ***'Parliamentary vote'***

Yet this Wednesday 22nd March (less than three weeks after announcing the deal) Sunak plans to introduce secondary legislation (a Statutory Instrument) on the Stormont brake (not the whole Windsor Framework changes to the Northern Ireland Protocol) which Sunak says "would be taken as demonstrating political support for the whole agreement".

According to the House of Commons library this is sufficient because a vote on the Framework as a whole is not required by law. All the Government requires is new UK legislation to implement some of the Framework, for example amending the Northern Ireland Act 1998 to implement the "Stormont Brake".

Whether such significant changes should be made only via secondary legislation is a matter for Constitutional lawyers to debate, but I am not sure a vote on just one piece of secondary legislation covering just one part of the Windsor Framework changes to the Northern Ireland Protocol meets Sunak's promise to give the House a vote on the Windsor Framework itself.

I am certainly far from convinced that less than three weeks to study the deal meets his promise to give the Unionist

community (in particular) “the time and space they need to consider the detail of the Framework.” Especially when you consider that the DUP has yet to publish its legal analysis of the Windsor Framework changes.

It therefore comes as no surprise that today the DUP announced not only that “the “brake” does not deal with the fundamental issue which is “the imposition of EU law by the Protocol” but that considering it seems the “vote on the “Stormont Brake” will be read as indicative of current positions on the wider Windsor Framework package we have “unanimously agreed that our Members of Parliament would vote against the draft statutory instrument on Wednesday”.

It remains to be seen what the Government response to the DUP will be. But considering Foreign Secretary James Cleverly announced that the UK will not sign off on the Windsor Framework changes to the NIP until all DUP concerns are addressed, one can only assume some pause for thought is required and will be forthcoming.

Because, whatever the PR and spin that accompanied PM Sunak’s announcement of the Windsor Framework changes to the NIP, it is clear that once experts delve into the detail they fail miserably to meet his rhetoric of restoring “the balance of the Belfast (Good Friday) Agreement in all its dimensions”.

It’s time to persuade the EU to renegotiate the Protocol properly. Meanwhile, rushing to bring through secondary legislation smacks of a Government attempting to bounce MPs into supporting the Windsor Framework changes to the NIP before the public have been given the chance to understand the full ramifications.

## ***Implications***

And I fear that once the reality of what has been agreed is

experienced on the ground, if Sunak is successful at bouncing MPs into supporting this piece of legislation, it will generate anger and resentment. Anger and resentment which will have no clear democratic outlet, considering all democratic routes of expression in Northern Ireland, are being closed off by the Windsor Framework deal.

Some argue that it is Brexit itself which makes restoring the balance of the Good Friday Agreement impossible. That there simply isn't a solution as long as the UK is out of the EU. That simply isn't true.

As the testimony of Niall Cody (the Head of Ireland Revenue) to the Dail in May 2017 attests, it is perfectly possible for Northern Ireland's constitutional status to remain as is, for Northern Ireland to remain in the UK single market and still ensure east-west as well as north-south trades continues to flow largely freely. It is possible to do so within current EU rules and in a manner which protects the EU single market.

There are also other agreements the UK and EU could reach which would make this simpler. They could agree a veterinary agreement which recognises the equivalence of each other's sanitary measures as the EU has with Canada, New Zealand, and the USA. Maybe even a full Sanitary and Phytosanitary (SPS) agreement like the EU has signed with New Zealand.

## ***Re-negotiate Protocol***

The point is it is possible to re-write the Northern Ireland Protocol, to reach new agreement(s) which can protect the delicate balance of the Good Friday Agreement in a way that both the current deal and PM Sunak's Windsor Framework changes clearly do not.

It just needs the EU to choose to do so.

President Biden is correct that “The Good Friday Agreement has been the foundation of peace and prosperity in Northern Ireland for nearly 25 years.” But he is wrong that it cannot change. The Northern Ireland Protocol and the Windsor Framework agreement has already changed it.

President Biden: If you really want to protect the delicate balance of the Good Friday Agreement, there really is only one solution. It’s time to persuade the EU that for the sake of peace on the island of Ireland, it must agree to renegotiate the Protocol properly and this time put the Good Friday Agreement first.

By Derrick Berthelsen, re-printed courtesy of The Critic for  
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**About the Author:** Derrick Berthelsen is an analyst who has worked for a number of Investment Banks and Investment Managers. He currently runs his own research, business and strategic consultancy firm.

The original article can be found [here](#).

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