

## Unionist Voice Policy Studies

### Analysis of the Windsor Framework

#### Compatibility with the Ulster Day 2021 declaration and DUP's seven tests

##### Introduction

The Unionist Voice Policy Studies constitutional working group has tasked me with producing an initial analysis of the Windsor Framework, with specific focus on the joint Unionist declaration of Ulster Day 2021, and the DUP's seven key tests.

It has been agreed that the paper will be published on UnionistVoice.com, once provided to the Chairman and twelve-person committee.

##### The joint-Unionist Declaration (DUP/TUV/PUP/UUP)- Ulster Day 2021

It is worth recounting, in full, the text of the joint-unionist pledge, and it's all important accompanying explanatory note. It stated:

**"We, the undersigned Unionist Political Leaders, affirm our opposition to the Northern Ireland Protocol, its mechanisms and structures and reaffirm our unalterable position that the Protocol must be rejected and replaced by arrangements which fully respect Northern Ireland's position as a constituent and integral part of the United Kingdom".**

##### Explanatory Note:

Northern Ireland is a constituent part of the United Kingdom of Great Britain and Northern Ireland by reason of the Acts of Union 1800 and the continuing express will of its people.

The Union is both economic and political.

The Belfast Agreement set the conditions on this island for the operation of two separate jurisdictions in order to promote peace, reconciliation and place the people at the heart of any decisions that are made about the sovereign status of Northern Ireland. The Belfast Agreement gave assurance against change without consent and guaranteed equilibrium as between East/West and North/South arrangements. Yet, under the Protocol the East/West relationship has been severely undermined, again without consent. Furthermore, the Protocol is in conflict with the Acts of Union – as declared recently in the High Court.

The economic union is grounded in Article 6 of the Acts of Union, which guarantees unfettered trade on the same footing between and within all parts of the United Kingdom. The Northern Ireland Protocol fundamentally alters the arrangements within the Belfast Agreement by making Northern Ireland subject to European Union laws and processes of a Single Market for goods, under a European Union customs code

and VAT regime, with the rest of our nation decreed a “third country” when it comes to trade and the import of goods.

Economically, the Protocol has inflicted grave damage on many business sectors, which will increase with the end of grace periods. The huge disruption of trade in the supply of goods from Great Britain to Northern Ireland has caused unnecessary supply chain disruption and unacceptable and unsustainable levels of bureaucracy and barriers to trade within our own nation. The resulting diversion and reorientation of trade is destructive of Northern Ireland’s place in the United Kingdom and will result in an economic realignment which is unacceptable.

Through the Northern Ireland Protocol, the European Union asserts sovereignty over economic and trading matters in Northern Ireland, subjecting us to their laws – which we cannot change – and the rule of the European Court of Justice without local political representation, creating a major democratic deficit.

We wish nothing more than good and practical relations with the European Union and the Irish Republic which is our nearest neighbour and with whom we share a frontier between the United Kingdom and the European Union. However, this cannot be achieved with Great Britain designated as a ‘third country’, with a regulatory border partitioning the United Kingdom, and subjecting Northern Ireland to European Union laws and jurisdiction.

Thus, going forward, any agreement which fails to ensure a proportionate and equitable solution which respects the sovereignty of the United Kingdom and restores our unfettered place within the Internal Market, cannot command the support of the unionist community.

(underlining has been added)

In assessing this declaration, a number of principles which are solemn promises to the unionist community can be distilled.

- (i) The Protocol must be replaced.
- (ii) The Act of Union *is* the Union. It has both an economic (Article 6) and political element (element). These core components must be restored.
- (iii) Northern Ireland can not be designated as a third country
- (iv) There can be no regulatory border partitioning the United Kingdom
- (v) Northern Ireland can not be subject to EU laws and jurisdiction

If we take each in turn.

- (i) *The Protocol must be replaced.*

The Protocol is not being replaced, but (taking even the Prime Ministers claims at their height) it is being modestly amended. The core of the Protocol remains in place. If it

were to be superseded the means by which to do so is Article 13 (7) of the Protocol. However, the changes are being made via Article 164 (1) of the Withdrawal Agreement (the joint committee).

There is no credible argument that the Protocol has in fact been replaced; if anything it has been further entrenched.

*(ii) The Acts of Union*

The answer as to whether the Acts of Union are restored, and this Northern Ireland's place in the Union is freed from its present subjugation, is straightforward. The inconsistency with the Acts of Union is derived primarily from (i) the continued application of EU law; (ii) the jurisdiction over trade of the ECJ; (iii) the unequal footing in matters of trade, i.e. the increased regulatory requirements to trade GB-NI vis-à-vis the requirements to trade within GB (e.g. from England to Scotland).

None of those fundamental issues are resolved within the Windsor Framework, indeed they are in truth further entrenched.

If further confirmation as to this position is required, it can be found in the legal opinion by John F Larkin KC, Northern Ireland's former Attorney General. When asked whether the Windsor Framework is compatible with the Acts of Union, and whether it remedies the present subjugation of Northern Ireland's place in the Union, the emphatic answer is no.

*(iii) Northern Ireland can not be designated a third-country*

The Windsor Framework continues to subject Northern Ireland to EU law, most notably the provisions of, for example, Regulation 2017/625 which applies via Annex 2 of the Protocol. This OCR at Article 64 (1) treats Northern Ireland as the entry point into, and thus part of, the territory of the European Union. This applies in its entirety and does not merely apply to that which is deemed 'at risk' of entering the EU.

There is nothing in the Windsor Framework to remedy this constitutional assault on Northern Ireland's place in the Union.

*(iv) There can be no regulatory border partitioning the United Kingdom*

The Windsor Framework entrenches the Irish Sea border. It requires 'authorisation' to trade via the so called 'green lane' (see Articles 7-11 of the draft decision of the joint committee, which is the all-important legal text). Even if 'authorisation' is granted and the EU on that basis will 'permit' some aspects of trade GB-NI, this remains subject to customs requirements. This is expressly set out at Article 9 (2) of the draft decision of the joint committee.

There remains a customs border in the Irish Sea, with permission required to obtain 'authorisation' to trade GB-NI without been subject to full EU checks. There is no necessity to obtain permission to trade, for example, between England and Scotland.

The EU itself helpfully set out the position. Its explainer on the Windsor Framework stated:

*“goods not at risk of entering the EU will benefit from an unprecedented reduction, although not a full eradication, of customs requirements.” (underlining added).*

It really cannot be any clearer. Even those goods which are not at risk of entering the EU (i.e., those moving exclusively within the UK internal market) are only ‘permitted’ by the EU (one may rightly ask, what right have the EU to dictate to the UK within our own sovereign territory?) to ‘benefit’ from a “...*reduction, although not a full eradication, of customs requirements*”.

It is an extraordinary situation whereby a foreign power is dictating to the sovereign UK Government as to the manner by which they will ‘allow’ goods to move within our own country, subject to the EU’s customs requirements. This is incompatible with sovereignty and no independent country in the world would voluntarily accede to such colonisation.

(v) *Northern Ireland cannot be subject to EU laws and jurisdiction*

This can be easily answered. There is not even the pretence that NI is not subject to EU laws and jurisdiction of the ECJ. It is. Even the Prime Minister in his efforts to promote the Windsor Framework has been clear that NI will be subject to EU law and the ECJ in those areas in which it applies.

### **Conclusion on the compatibility of the Windsor Framework with the Unionist declaration**

The Windsor Framework does not satisfy any of the key requirements set out in the joint Unionist Ulster Day declaration. There is not even a respectable argument to suggest that it does. To accept the Windsor Framework in its present form would be to betray the solemn promise made in the Ulster Day 2021 declaration.

### **The DUP’s seven key tests**

The DUP obtained a resounding mandate for their seven key tests, which- they have repeatedly confirmed- must be satisfied before there could be any consideration of a return to power-sharing. It is important to therefore measure the seven tests, upon which the DUP mandate rests, to see whether the Windsor Framework satisfies them.

This paper includes- **in red text**- the test and the DUP’s explanation they provided to the unionist electorate as to what the test meant.

**Firstly, new arrangements must fulfil the guarantee of the Sixth Article of the Act of Union 1800. The Act of Union is no ordinary statute. It is the constitutional statute which created the United Kingdom for the people I represent. The sixth article essentially requires that everyone in the United Kingdom is entitled to the same privileges, and be on the same footing as to goods in either country, and in respect of trade in the United Kingdom. Under the protocol this is clearly no longer the case.**

**The Prime Minister assured me that the passing of the EU (Withdrawal) Act 2018 did not result in the implied repeal of Article 6 of this constitutional statute yet that is exactly what the High Court in Belfast held. Mr Justice Colton having heard the case**

concluded that the protocol does not put the people of Northern Ireland on an 'equal footing' with those in the rest of the UK.

It appears quite remarkable that such a foundational statute could have been repealed without the Prime Minister realising it. Indeed, unless someone can tell me differently there is no evidence that a single member of the House was aware that they were repealing and subverting aspects of the Act of Union.

Though the case is under appeal in Northern Ireland it is absolutely essential that any new arrangements honour the promise that was made in the sixth article of the Act of Union.

There can be no credible suggestion that the Act of Union has been restored. If anything, the breach has been entrenched. This is not only the view of this analysis, but it is the view of NI's former Attorney General John F Larkin KC.

It cannot, with any semblance of respectability, be suggested that the Windsor Framework restores the Acts of Union. It does not.

It should be noted that the DUP's commitment to the Acts of Union is absolute. In their own words, it is "*absolutely essential*" that Article VI of the Acts of Union is restored.

The Windsor Framework fails this first and most fundamental of tests. It does not achieve that which is (rightly) cast in terms of being "*absolutely essential*". Accordingly the consideration as to whether to accept, endorse, or be complicit in implementing the Windsor Framework (via silence or merely superficial opposition whilst operating the framework), should really start and end with an analysis of this most fundamental of constitutional tests. It does not satisfy that test, and therefore it would be an act of constitutional self-harm, and a betrayal of the solemn promises to the unionist electorate, if the failure to satisfy that test were to be waived.

**Secondly, any new arrangements must avoid any diversion of trade.** It is simply not acceptable that consumers and businesses in Northern Ireland are told that they must purchase certain goods from the EU and not from Great Britain. In this regard it is notable that Article 16 of the protocol already permits the UK to take unilateral safeguarding measures to ensure that there is no diversion of trade.

The Windsor Framework may mitigate diversion of trade (although, even that is debatable), but it does not "*avoid any diversion of trade*". This test, as framed, is plainly not met.

**Thirdly it is essential that any new arrangements that are negotiated do not constitute a border in the Irish Sea.** This is the claim that the Secretary of State made on the 1 January and new arrangements need to see it implemented in deed as well as word. In line with the Act of Union, there should be no internal trade border in the UK. Northern Ireland's place in the UK Internal Market must be fully restored.

The new arrangements in the Windsor Framework entrench the border in the Irish Sea. For the so-called 'red lane' (those destined for the EU, or 'at risk' of reaching that destination), the full EU customs border applies, inclusive of border control posts.

The purported 'green lane' firstly requires a trader to sign up and go through onerous paperwork in order to obtain 'authorisation' (subject to numerous conditions), and once obtained, information must be provided for "customs purposes". This is expressly set out in Article 9 (2) of the draft decision of the joint committee.

Accordingly, there is an entrenched border internally within the UK, not only an EU border moved from the land to the sea for those ultimately entering the EU, but also for those moving goods internally within the UK who will- even for goods not at risk of entering the EU- be subject to customs requirements.

As set out earlier in this paper, Regulation 2017/625 also continues to apply. It decrees (Article 64 (1)) that Northern Ireland is the entry point into, and thus part of, the territory of the European Union. How can it credibly be argued there is no regulatory border when this remains in place?

The Windsor Framework entrenches that internal UK border, partitioning our country. This test isn't even close to being met. To claim it is would be an act of fundamental intellectual dishonesty.

**Fourthly new arrangements must give the people of Northern Ireland a say in the making of the laws which govern them.** This guarantee is implicit in Article 3 of Protocol 1 of the ECHR where it is stated, "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." The fact that a vast range of Single Market laws detailed in Annex 2 of the protocol apply in Northern Ireland without any democratic control is a clear breach of that promise and it must be rectified.

This test is broad and vague, it merely requires "a say" in the making of laws. It could be argued that the so-called Stormont Brake does provide "a say", albeit that say doesn't in fact amount to anything of substance because in fact Stormont has no substantive break at all. Instead Stormont, in limited and exceptional circumstances, can ask for the UK (who, by the way are the sovereign Government) to use a veto, but that is a matter of UK Government discretion.

However, even if the UK Government used the veto, this can be effectively overruled by an arbitration ruling. It is, in truth, worthless as presently constructed.

In any event, with a generous interpretation, it could be said to meet the fourth of the seven key tests.

**Fifthly, new arrangements must result in "no checks on goods going from Northern Ireland to Great Britain or from Great Britain to Northern Ireland."** Again, these are not my words but the words of the Prime Minister on the Sophy Ridge on Sunday programme on 8 December 2019. We do of course accept that checks that were in place before Brexit should continue and goods that are

proceeding on from Great Britain, through Northern Ireland, to the EU may have different arrangements.

This test simply in truth repeats that which is already bound up in the first and third tests. The same analysis can be applied and it is unnecessary to repeat it in detail.

There will be checks on goods (the extent is irrelevant, the test commits expressly to “*no checks*” going from GB-NI, which are not moving to the EU. These requirements are set out explicitly in the draft decision of the joint committee.

This test is failed.

**Sixthly, new arrangements should ensure no new regulatory barriers develop between Northern Ireland and the rest of the United Kingdom unless agreed by the Northern Ireland Executive and Assembly.** This commitment was made in paragraph 50 of the Joint Report from the negotiators of the European Union and the United Kingdom Government in December 2017, and we expect it to be honoured.

The continued imposition of new EU law (leaving aside the somewhat useless ‘brake’), and the continued imposition of EU law applying already, will plainly create divergence once GB diverges. This is a matter of the most elementary logic. It follows this will create regulatory divergence in perpetuity.

In those areas in which Northern Ireland are subject to EU law, there will- of course- be future divergence. How this is managed or mitigated is a different matter. The test requires “*no new regulatory barriers*”.

The Windsor Framework, via the imposition of a required to obtain ‘authorisation’ to trade via the purported ‘green lane’ in fact *creates* in of itself a new regulatory barrier.

This test is not met.

**Seventhly, new arrangements must preserve the letter and spirit of Northern Ireland’s constitutional guarantee set out most recently in the Belfast Agreement by requiring in advance the consent of a majority of the people of Northern Ireland for any diminution in its status as part of the United Kingdom.** To reduce the constitutional guarantee to having a say in the final step of leaving the United Kingdom would mean that in effect it is no meaningful guarantee at all.

This test is not presently met, or even addressed by the Windsor Framework, but the Prime Minister and Secretary of State have made commitments to legislate to strengthen the constitutional guarantee as to Northern Ireland’s place in the Union. At (i) of the summary in the UK Government Windsor Framework command paper, this is also alluded to.

Therefore, it may be the case that this test could be met by the promised legislation, but until this legislation comes, as it presently stands this test is not met.

## **Conclusion on the DUP's seven key tests**

The DUP's seven key tests are the solid foundation upon which their mandate is based. They have obtained, and retain, the support of the vast majority of the unionist/loyalist community on the basis of these fundamental principles and objectives. All the tests must be met in order for there to be a mandate to restore power sharing. At the moment, applying a generous interpretation, one of the seven key tests are satisfied.

## **Omnibus conclusion**

The promises political unionism (including the UUP who have long ago forsaken or misunderstood their solemn commitments in the Ulster Day 2021 declaration) made to the unionist community are clear and unambiguous.

These promises have been transposed into key principles which are the foundation of the solemn commitment of 'unalterable opposition' to the Protocol.

The Windsor Framework is incompatible with this solemn commitment, and it therefore can not be accepted in its present form, unless and until it is fundamentally altered in order to satisfy the key constitutional requirements denoting Northern Ireland's place in the United Kingdom.

There has been promises made to bring forward constitutional legislation to strengthen Northern Ireland's place in the Union, and to deal with the subjugation of the Acts of Union.

Any such legislation, to be worthwhile, would need to define 'constitutional status' within the meaning of section 1 (1) of the NI Act 1998 as encompassing the Acts of Union, and additionally to make both that amended version of section 1 (1) of the NI Act 1998, and the Acts of Union, applicable notwithstanding section 7A of the European Union (Withdrawal) Act 2018.

If that were to be done (and, to be clear, that would fundamentally alter the structure of the Windsor Framework) then it is possible that all of the DUP's seven key tests could be met with such primarily legislation.

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**On behalf of Unionist Voice Policy Studies**

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