

Safeguarding the Union – HRC Briefing

1. Background

1.1 The UK Government's *Safeguarding the Union* Command Paper builds on the Windsor Framework Command Paper, presented in February 2023,¹ with a package of measures and commitments to address concerns regarding the implementation and effects of the Windsor Framework (formerly the Protocol).² Likewise, this briefing develops on our September 2023 briefing on the Windsor Framework³ and focuses on the practical implications of the Safeguarding the Union Command Paper for human rights and equality protections in Northern Ireland.

1.2 The Safeguarding the Union package, encompassing the Command Paper and three pieces of legislation, is the product of negotiation between the UK Government and the Democratic Unionist Party. Its contents are consistent with the operation of the Windsor Framework, and it is not, therefore, changed. Rather, the package affects the domestic implementation and operation of the Windsor Framework with implications for the rights and equality protections contained therein.

1.3 The Command Paper states that the package will 'copper-fasten Northern Ireland's political and constitutional place in the Union, strengthen the operation of the UK internal market, and support ever greater opportunities for trade within it' (para 5) in the context of restored and functioning devolved institutions. The vast majority of *Safeguarding the Union* relates to the trade in goods and the only explicit mention of Article 2 frames the Windsor Framework as 'applying only in respect of the trade in goods' (para 46). The Command Paper promises a range of structures and bodies to create a UK Internal Market System, secure Northern Ireland's place in the UK, and monitor and manage the Windsor Framework. These include new intergovernmental structures and requirements to screen legislation to avoid creating 'new regulatory borders' between GB and NI (para 32).

1.4 The package includes three pieces of legislation – the *Windsor Framework (Constitutional Status of Northern Ireland) Regulations 2024*, the *Windsor Framework*

¹ UK Government, *The Windsor Framework: a new way forward*, 2023, CP 806, <https://www.gov.uk/government/publications/the-windsor-framework>.

² UK Government, *Safeguarding the Union*, 2024, CP 1021, <https://www.gov.uk/government/publications/safeguarding-the-union>

³ Human Rights Consortium, *The Windsor Framework – The Good, The Bad and The Untested*, 2023, <https://www.humanrightsconsortium.org/wp-content/uploads/2023/09/WindsorFramework-HRCBriefing-Sept23.pdf>

(Internal Market and Unfettered Access) Regulations 2024, and the Windsor Framework (Marking of Retail Goods) Regulations 2024 – together with new or amended implementation guidance, and new proposed bodies and/or structures to manage the Windsor Framework. It also contains two annexes on the Constitutional Context of the Windsor Framework and proposals on Strengthening Northern Ireland's Place in the Union, the latter of which develops further on the promises made in the Command Paper.

1.5 This briefing will outline the key elements of the Safeguarding the Union package and assess it against our five tests for the negotiations leading to the Windsor Framework⁴ to:

- 1.5.1 Make no changes to Article 2 of the Protocol, including to the Directives listed under Annex 1, unless these changes strengthen or expand the protections contained therein;
- 1.5.2 Develop common regulatory frameworks between the EU & NI, particularly in areas of equality and human rights and in policy areas enabling North-South Cooperation;
- 1.5.3 Ensure that Northern Ireland, and UK-wide, courts have full access to case law of the Court of Justice of the EU, particularly regarding EU equality and non-discrimination law such as those within Annex 1;
- 1.5.4 Maintain protections for the Common Travel Area and North-South cooperation;
- 1.5.5 Confirm that future legislative undertakings by the UK Government will not diminish or undermine their ability to uphold commitments made in Article 2 of the Protocol.

2. Article 2

2.1 This package of measures, like the Windsor Framework before it, does not change the text of Article 2 or Annex 1 which contain the key human rights and equality protections, neither diminishing nor expanding upon them either. This falls short of our aim to see these protections strengthened or expanded. We will continue to monitor EU legislative developments and campaign for the addition of EU legislation which expands protections to the Windsor Framework to build upon the protections it already contains.

2.2 We continue to observe - possibly wilful - ignorance on the part of the UK Government of the implications of Article 2 on their legislative agenda. The reference to Article 2 in the Command Paper explicitly pushes back on the scope of the protections it provides, at once claiming that 'the Windsor Framework applies only in respect of the trade in goods' and that 'Article 2 of the Framework... applies in respect of rights set out in the relevant chapter of the Belfast (Good Friday) Agreement' (para 46) in a confusing digression on the Safety of Rwanda (Asylum and Immigration) Bill.

⁴ Human Rights Consortium, '5 Tests' for the Protocol Deal, 2023
<https://www.humanrightsconsortium.org/protocol-5tests/>

2.3 The Government maintains in this section (para 46) that the Safety of Rwanda (Asylum and Immigration) Act will apply in all parts of the United Kingdom, including Northern Ireland.⁵ While the powers in the Act are clearly drafted to apply on a UK wide basis, the Consortium and others have previously pointed out that by seeking to limit the use of human rights laws to challenge automatic removal of asylum seekers to Rwanda, the Act is very likely to be found in violation of the provisions of Article 2 of the Windsor Framework.⁶

2.4 Article 2 commits to the non-diminution of rights contained within the ‘rights, safeguards and equality of opportunity’ section of the Belfast/Good Friday Agreement. That section of the agreement outlines the UK Government commitment to ensure access to rights within the European Convention of Human Rights in domestic law and remedies for any breaches of those Convention rights. These protections were given effect via the passing of the Human Rights Act. The Rwanda Act requires that UK courts ignore sections of the Human Rights Act (particularly sections 2, 3 and 6 to 9 that deal with interpretation of convention rights, interpretation of legislation and acts of public authorities) when hearing any legal challenge to the policy of automatic removal of asylum seekers. Likewise, there are various EU Directives and safeguards dealing with the rights of victims and asylum seekers that continue to form part of the legal standards to be upheld in Northern Ireland by virtue of the Article 2 provisions.⁷ The Rwanda Act, if implemented, would set aside and ignore UK duties to respect these continued standards.

2.5 The Governments inclusion of this point on the then-Rwanda Bill in the Safeguarding the Union Command paper is likely in response to some political concerns that the Rwanda Act would apply differently in Northern Ireland.⁸ But the Article 2 powers are specifically designed to apply asymmetrically to Northern Ireland given the unique geographic and political requirements of our peace process and the resulting deal reached under the Windsor Framework.

2.6 By proceeding in this manner, without proper consideration of the requirements of the Article 2 duties in legislative and policy development, the UK Government are ignoring their duties under the Windsor Framework and aiding in the politicisation of these core protections. We have already witnessed Northern Ireland courts apply an interpretation of Article 2 in a manner that directly challenges the actions of the UK Government.

⁵ UK Government, Safety of Rwanda (Asylum and Immigration) Bill, 2023, <https://www.gov.uk/government/publications/safety-of-rwanda-asylum-and-immigration-draft-bill>

⁶ Human Rights Consortium, Rwanda Bill: An Attack on Fundamental Rights, 2023, <https://www.humanrightsconsortium.org/rwanda-bill-an-attack-on-fundamental-rights/>

⁷ For instance Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime or Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims.

⁸ Kurtis Reid, “DUP amendment to Rwanda Bill seeks to put UK law ahead of EU’s in Northern Ireland” 16 January, 2024, <https://www.belfasttelegraph.co.uk/news/northern-ireland/dup-amendment-to-rwanda-bill-seeks-to-put-uk-law-ahead-of-eus-in-northern-ireland/a954914452.html>

2.7 The recent High Court ruling on the Legacy Act found that the proposed conditional immunity from prosecution for Troubles-era crimes were incompatible with articles 2 and 3 of the European Convention on Human Rights and article 2 of the Ireland/Northern Ireland Protocol/Windsor Framework.⁹ The UK Government should learn from this decision and begin to respect the role that compliance with the ECHR and Article 2 of the Windsor Framework should play in all legislative and policy development that impacts on Northern Ireland – including the Rwanda Act.

3. Stormont Brake and Democratic Scrutiny

3.1 As part of this package, the UK Government sets out the 'operational procedures' governing the Stormont Brake procedure. These include giving the Assembly advance notice of proposed replacing/amending acts and providing the Assembly's Democratic Scrutiny Committee with the same information as is provided to Parliament, including through Explanatory Memoranda.

3.2 The restoration of the Northern Ireland institutions has triggered the formation of the Windsor Framework Democratic Scrutiny Committee in the Assembly. It has a statutory duty, contained in the Windsor Framework (Democratic Scrutiny) Regulations 2023,¹⁰ to 'engagement with businesses, civil society and others as appropriate in relation to replacement EU acts'. It will be important to ensure that equality and human rights considerations are built into the Stormont brake mechanism and that civil society are involved in providing appropriate evidence in this regard, as it is highly likely that elements of the Windsor Framework that deal with trade may well have rights implications.

3.3 Other committees in the Assembly will have a role to play in scrutinising EU legislation outside the scope of the Windsor Framework Democratic Scrutiny Committee, while the UK Government and Northern Ireland Executive must implement legislative changes in a timely and effective manner. The European Union must also play its part in notifying the UK Government of relevant changes to human rights and equality protections contained in Annex 1 so that Northern Ireland 'keeps pace' with legislative developments.

3.4 It is incumbent on the UK Government and the European Commission to ensure that stakeholders in Northern Ireland are kept informed of legislative developments in both jurisdictions and that information on the impacts of legislation for Northern Ireland is made available. Such mechanisms are foreseen in both the Windsor Framework and Safeguarding the Union and should be delivered.

⁹ Dillon, McEvoy, McManus, Hughes, Jordan, Gilvary, and Fitzsimmons Application and In the matter of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 and the Secretary of State for Northern Ireland, 2024, [https://www.judiciaryni.uk/sites/judiciary/files/decisions/Dillon%2C McAvoy%2C McManus%2C Huges%2C Jordan%2C Gilvary%2C and Fitzsimmons Application.pdf](https://www.judiciaryni.uk/sites/judiciary/files/decisions/Dillon%2C%20McAvoy%2C%20McManus%2C%20Hughes%2C%20Jordan%2C%20Gilvary%2C%20and%20Fitzsimmons%20Application.pdf)

¹⁰ UK Government, Windsor Framework (Democratic Scrutiny) Regulations 2023, <https://www.legislation.gov.uk/ukdsi/2023/9780348246322>

3.5 Safeguarding the Union also sets out the procedures for review of the Windsor Framework following a simple majority affirmative vote in the democratic consent process. An Independent Monitoring Panel will be established which would review the functioning of the Windsor Framework arrangements and consider ‘any steps which could be taken to enable the Framework to command support across the community’ (para 163). In doing so, it ‘would be empowered’ to ‘consult with... civil society groups, representative organisations and trade unions’ (para 164). It is important that such an independent review made it a priority to engage with civil society and this should be upgraded to a requirement when it is established.

3.6 The composition of the Independent Monitoring Panel is currently unknown, and it is vital that its membership extends beyond trade and business organisations to include civil society organisations with an understanding of the rights and equality implications of the Windsor Framework.

4. Common Travel Area and Cross-border Cooperation

4.1 We remain concerned, as we were following the Windsor Framework, about the status of the Article 3 commitment to upholding the Common Travel Area and the Article 11 commitment to maintaining the necessary conditions for continued North-South cooperation. Safeguarding the Union continues to signal the prospect of divergence between Northern Ireland and Ireland and makes commitments to repeal section 10(1)(b) of the European Union (Withdrawal) Act which requires the UK Government ministers to give ‘due regard’ to the 2017 Joint Report of EU and UK negotiators in exercising its functions. This is singled out in the Command Paper as containing a commitment to the ‘all-island economy’ but also contains many other commitments.

4.2 It may be arguable that this is no longer a relevant provision and that this is simply ‘the cleaning up of an outdated provision on the statute book’¹¹ but is also a development that is clearly focussed on giving political comfort to one political party while also likely to be of concern to others who place greater value on North/South trading relationships. How this squares with the parity of esteem commitments within the Belfast/Good Friday Agreement are left unexplored. The focus in Safeguarding the Union on ensuring that businesses maintain market access while simultaneously promising greater North-South divergence is ultimately confusing and concerning.

4.3 The Annex B package commits the UK Government to improving access to British citizenship for people born in Ireland who live in Northern Ireland and supporting the Private Members’ Bill of Gavin Robinson MP (para 12).

5. Common frameworks and new institutional structures

¹¹ Colin Murray, “Saying Nothing much at all, to General Acclaim – The Windsor Framework Relaunch” *EU Law Analysis* (blog), 1 February, 2024, <https://eulawanalysis.blogspot.com/2024/02/saying-nothing-at-much-all-to-general.html>

5.1 In this context, our ambition for common regulatory frameworks between the EU and UK unfortunately seems unlikely. However, there may be new opportunities to improve rights and equality protections on an east-west basis. The Command Paper creates new bodies to operate the Windsor Framework including an Independent Monitoring Panel and a UK East-West Council. These are clearly designed with the primary aim of dealing with trade related issues on an East-West basis.

5.2 The East-West Council will sit in a configuration called Intertrade UK with a specific remit to promote trade within the UK, while the Independent Monitoring Panel provides oversight and monitoring of the UK Internal Market to ensure that goods move smoothly between GB and Northern Ireland. The East-West Council also exists to deepen connections between Northern Ireland and the rest of the UK in areas like education and culture.

5.3 Annex B (para 9) states that 'The Government will facilitate the establishment of a UK East-West Council, a new forum in which key representatives from government, civil society and business from the constituent parts of the UK will be able to advance the opportunities and address the challenges we share.' There may be scope to utilise this forum to prioritise the challenge of creating stronger human rights and equality protections across all parts of the UK. Such opportunities are worth exploring but will depend significantly upon Government support for its scope to be inclusive of these issues.

6. Conclusion

6.1 The Safeguarding the Union Command Paper and supporting legislation provide a detailed set of proposals and commitments that have clearly been designed with the intention of creating sufficient political support for the return of the Stormont institutions and the day-to-day operation of the Windsor Framework. The measures themselves make no changes to the primary human rights protections contained within Article 2 of the Framework but the approach of the UK Government in – possibly wilfully - ignoring the full scope of its duties under this aspect of the Windsor Framework continues to be of serious concern moving forward, as it will likely result in even greater conflict between their current legislative and policy ambitions and the protections of Article 2.

6.2 The elements dealing with trade are primarily and understandably focussed on further reducing checks in the movement of GB to NI goods and re-emphasising Northern Ireland's existing place within the United Kingdom. However, in the same way that checks on goods in the Irish Sea created anxiety among unionists, the removal of UK commitments to the all-island economy have created some concerns among nationalists.

6.3 What this means for the operation of the Common Travel Area and North-South cooperation in the long-term is yet unclear. The challenges ahead look set to continue to primarily be focussed on the continuation of Article 5-10 (dealing with the trade in goods and Single Market access) in advance of the democratic consent vote due later

this year and the operation of the Stormont Brake and Democratic Scrutiny Committee. Yet the potential for human rights protections within the Windsor Framework to be further politicised continues to grow with every element of legislation that the UK Government advances without adherence to those protections.