

EXPLANATORY MEMORANDUM TO
THE WINDSOR FRAMEWORK (CONSTITUTIONAL STATUS OF NORTHERN
IRELAND) REGULATIONS 2024

2024 No. 164

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Northern Ireland Office and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

- 2.1 The purpose of this instrument is to recognise in domestic legislation that the Windsor Framework is without prejudice to the existing constitutional status of Northern Ireland as part of the United Kingdom, and Parliament's existing power to legislate for Northern Ireland; to establish a prohibition on the Government from ratifying new agreements with the European Union which create new EU law alignment for Northern Ireland and result in a regulatory barrier between Great Britain and Northern Ireland; to provide for a statutory transparency obligation to Parliament in relation to primary legislation which would have a significant adverse effect on trade between Northern Ireland and the rest of the United Kingdom; and to place requirements on the Government regarding the conduct of any independent review into the operation of the Framework.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument contains certain descriptive provisions that are intended to clarify the legislative regime that protects Northern Ireland's place within the United Kingdom.

4. Extent and Territorial Application

- 4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales, Scotland and Northern Ireland.
- 4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales, Scotland and Northern Ireland.

5. European Convention on Human Rights

- 5.1 The Secretary of State Chris Heaton-Harris has made the following statement regarding Human Rights:
- 5.2 "In my view the provisions of the Windsor Framework (Constitutional Status of Northern Ireland) Regulations 2024 are compatible with the Convention rights."

6. Legislative Context

- 6.1 This instrument amends section 38 and 39 of, and inserts a new section 38A into, the European Union (Withdrawal Agreement) Act 2020, amends Schedule 6A of the Northern Ireland Act 1998, and amends section 7A of the European Union (Withdrawal) Act 2018 in addition to inserting a new Section 13C after Section 13B.

- 6.2 Section 38 of the European Union (Withdrawal Agreement) Act 2020 recognises that the Parliament of the United Kingdom is sovereign, and that sovereignty subsists notwithstanding, among other things, certain provisions of that Act made in respect of the EU-UK Withdrawal Agreement.
- 6.3 Schedule 6A of the Northern Ireland Act 1998 makes provision for a democratic consent process to be held, consistent with the UK-EU Withdrawal Agreement, and which requires an independent review to be held by the Secretary of State into the functioning of the Windsor Framework in certain circumstances. Article 18 of the Framework applies the democratic consent process to Articles 5 to 10 of the Windsor Framework.
- 6.4 Section 7A of the European Union (Withdrawal) Act 2018 gives effect to Article 4 of the UK-EU Withdrawal Agreement, but does not take account of the Windsor Framework or the democratic mechanisms established in accordance with it.
- 6.5 There are presently no transparency obligations in place regarding Bills which would have a significant adverse effect on trade between Northern Ireland and the rest of the United Kingdom.
- 6.6 No specific provision is made in the European Union (Withdrawal) Act 2018 regarding ratification of any future Northern Ireland-related agreements with the European Union.

7. Policy background

What is being done and why?

- 7.1 The Government recognised that the old Northern Ireland Protocol raised concerns over the status of Northern Ireland as a full and integral part of the United Kingdom, including within its internal market and customs territory. In response, the Government negotiated the Windsor Framework with the European Union, and that agreement is now being implemented.
- 7.2 The Framework reflects the Government's commitment to safeguarding Northern Ireland's place in the Union, including through specific measures to ensure the smooth flow of trade across the United Kingdom and support unfettered access for Northern Ireland traders to the United Kingdom internal market. The Regulations are complementary to those objectives and will come into force after the day on which both they have been made and an Executive is in place.
- 7.3 The first section of the instrument reaffirms in domestic law Northern Ireland's constitutional status as part of the UK. It accordingly provides that the Windsor Framework is without prejudice to the existing constitutional status of Northern Ireland as part of the United Kingdom, Northern Ireland's part in the economy of the United Kingdom (including its customs territory and internal market), or to existing the power of the Parliament of the United Kingdom to make laws for Northern Ireland. The instrument also reaffirms the vesting of executive power in Northern Ireland in His Majesty. That authority is exercised by the Government or the Northern Ireland Departments and Ministers, in accordance with law. The instrument does this by adding new subsections (4) to (5) into section 38 of the European Union (Withdrawal Agreement) Act 2020. The Government remains fully committed to meeting its international legal obligations in all circumstances.

- 7.4 The second part of the instrument prohibits the Government from entering into any agreement with the European Union which creates new EU law alignment for Northern Ireland and results in a regulatory barrier between Great Britain and Northern Ireland. The instrument also provides that, before entering into a Northern Ireland-related agreement with the European Union that would not create a new regulatory border between Great Britain and Northern Ireland, a Minister of the Crown must lay before Parliament a statement explaining why the treaty does not do so. This is achieved by adding new section 38A to the European Union (Withdrawal Agreement) Act 2020. This will provide an enforceable means for the economic rights of Northern Ireland to be upheld in accordance with the Windsor Framework, while ensuring that the benefits of those arrangements are maintained under it.
- 7.5 The fourth part amends section 7A of the European Union (Withdrawal) Act 2018 to provide for democratic scrutiny under the Framework. It adds a new section 13C into the European Union (Withdrawal) Act 2018 providing for a transparency obligation on Ministers of the Crown such that, in introducing primary legislation which, in their view affects trade between Northern Ireland and the rest of the United Kingdom, the Minister in charge of the Bill must, before Second Reading of the Bill in the House in question, make a statement to confirm that it would not have a significant adverse effect on trade between Northern Ireland and the rest of the United Kingdom. Alternatively, the Minister must make a statement that such assurance cannot be given but that the Government nevertheless wishes the House to proceed with the Bill. This obligation does not place any constraint on the ability of Ministers to proceed to put such legislation before Parliament to consider.
- 7.6 The fifth part of the instrument provides for the scope, timeframe and process for an independent review being conducted by the Secretary of State as set out in Schedule 6A to the Northern Ireland Act 1998. It requires that the review must provide a report within six months of the review having been commissioned, and that this should be laid before the Assembly and any issues or recommendations must be raised by a Minister in the Withdrawal Agreement Joint Committee.

Explanations

What did any law do before the changes to be made by this instrument?

- 7.7 Section 38 of the European Union (Withdrawal Agreement) Act 2020 addresses the relationship between the constitutional principle of Parliamentary sovereignty and the law made applicable by the separation agreements as it applies in the UK after exit day by virtue of the Withdrawal Agreement.
- 7.8 Section 6A, Part 6, Paragraph 21 of the Northern Ireland Act 1998 requires that, following a situation in which the Assembly has passed a consent resolution by a majority of the members voting but without cross-community support, the Secretary of State for Northern Ireland must commission an independent review into the functioning of the Windsor Framework.
- 7.9 Section 7A of the European Union (Withdrawal) Act 2018 provides for the application of certain commitments under the Windsor Framework, and Part 5A of the Northern Ireland Act 1998 provides that the operation of those commitments be subject to a suite of democratic mechanisms including a process of consent.
- 7.10 Provision was not made in the European Union (Withdrawal) Act 2018 in respect of transparency obligations.

Why is it being changed?

- 7.11 These arrangements fulfil commitments made as part of negotiations to secure the restoration of the Northern Ireland institutions. These regulations are together intended to faithfully meet those commitments, the underlying intention of which is to reaffirm Northern Ireland's constitutional place within the United Kingdom.

What will it now do?

- 7.12 Section 38 of the European Union (Withdrawal Agreement) Act 2020 is being amended to reaffirm Northern Ireland's constitutional status as part of the United Kingdom. This affirms that the Framework is without prejudice to: the constitutional status of Northern Ireland as part of the United Kingdom; Northern Ireland's part in the economy of the United Kingdom, including its customs territory and internal market; the power of the Parliament of the United Kingdom to make laws for Northern Ireland; and the disposition of executive power as described in section 23 of the Northern Ireland Act 1998.
- 7.13 New Section 38A is being added to the European Union (Withdrawal Agreement) Act 2020 in order to future-proof Northern Ireland's constitutional position against any future UK-EU agreement that relates to the subject matter of the Windsor Framework and that would create new alignment with the EU and result in a new regulatory border between Great Britain and Northern Ireland. This provision does not apply to decisions or agreements made under the existing Windsor Framework.
- 7.14 The definitions provided for in section 39(1) of the European Union (Withdrawal Agreement) Act 2020 are amended to include the Windsor Framework and the modifications made by it to the UK-EU Withdrawal Agreement.
- 7.15 Section 7A of the European Union (Withdrawal) Act 2018 is amended to clarify that, under the Windsor Framework, the application of certain rules are subject to democratic consent and scrutiny in accordance with Articles 13 and 18 of the Framework.
- 7.16 Section 13 of the European Union (Withdrawal) Act 2018 is amended to provide a new transparency obligation, such that information is available to Parliament where a Bill would have a significant adverse effect on trade between Northern Ireland and the rest of the United Kingdom. This provision does not fetter the ability of officials to provide policy advice, nor of Ministers to make policy decisions, nor of Parliament to progress legislation.
- 7.17 Schedule 6A, Part 6, Paragraph 21 of the Northern Ireland Act 1998 is being amended to ensure that any issues raised or recommendations for addressing issues with the operation of the Framework, resulting from an independent review following a consent vote, are presented to the Government within six months of the review being established and are properly scrutinised by the Assembly and Parliament, and must be raised by a Minister of the Crown in the Withdrawal Agreement Joint Committee.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument is not being made to address a deficiency in retained EU law but relates to the withdrawal of the United Kingdom from the European Union. The instrument is being made under section 8C(1) and (2) and paragraph 8F(1) and (4) of Schedule 7 in the European Union (Withdrawal) Act 2018.

9. Consolidation

9.1 There are no plans to consolidate the legislation amended by this instrument.

10. Consultation outcome

10.1 These measures have not been subject to a public consultation.

11. Guidance

11.1 No guidance is necessitated by this instrument.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because, as above, this relates to implementation of an existing commitment.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The Windsor Framework gives rise to continuing international obligations to which the United Kingdom is the contracting state.

15. Contact

15.1 Theo Bonds at the Windsor Framework Task Force in the Cabinet Office, Email: Theo.Bonds@cabinetoffice.gov.uk, Tel: 07902 236 591 can be contacted with any queries regarding the instrument.

15.2 Paul Flynn, Deputy Director at the Windsor Framework Task Force in the Cabinet Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Secretary of State for Northern Ireland, Rt Hon Chris Heaton-Harris MP, at the Northern Ireland Office can confirm that this Explanatory Memorandum meets the required standard.