

ANALYSIS OF THE UK GOVERNMENT COMMAND PAPER ON THE NI PROTOCOL

21 July 2021

Summary

[1] The 28-page command paper ('the paper') was presented simultaneously to both the House of Commons and House of Lords by Brandon Lewis MP and Lord Frost respectively, on 21 July 2021. The paper purports to set out the Government's position on the unworkable NI Protocol, which has caused serious economic, societal and political difficulties within Northern Ireland.

[2] Inherent throughout the paper, as it has been consistently within the Brexit process, is a commitment to protect the Belfast Agreement in all its parts. Indeed, Article 18 (2) of the Protocol itself committed to a consent process "consistent with the 1998 Agreement". However, this was then shredded a few lines later in Article 18 (5) when a consent mechanism was contrived to nullify any opportunity for unionism to avail of one of the key planks of the Belfast Agreement (Strand One (5) (d)) in the form of the cross-community consent mechanism.

[3] This 'facing both ways' approach of the Government then found itself replicated in the insertion of Section 56A and Schedule 6A to the Northern Ireland Act 1998 ('the 1998 Act'). Whilst simultaneously arguing that section 42 of the 1998 Act did not apply in any event as it was not a devolved matter (section 42 does not constrain itself to devolved matters only), they nevertheless felt it prudent to use section 56A and Schedule 6A to disapply the operation of section 42 when it came to the vote on the Protocol.

[4] The shredding of the Belfast Agreement whilst purporting to protect it in all its parts is a frequent occurrence in regard to the Protocol. Certainly, from the EU and Irish Government side, protecting the Belfast Agreement really means weaponising it to resolve every ambiguity in favour of nationalism. Hence why a North-South border (even so much as a CCTV camera) is heresy, but an East-West border is not only tolerable, but to be welcomed and "rigorously implemented". This flushes out the hollow nature of claims of protecting the Belfast Agreement; the only interest, and objective, is the colonisation of Northern Ireland within an economic United Ireland. It is no wonder nationalism- and their EU allies- are so wedded to the Union-dismantling Protocol.

The Command Paper

[5] It has long been the assessment of many within the Protestant, Unionist, Loyalist ('PUL') community that given the deep-rooted ideological agenda driving the Irish Government and EU, that it is necessary for the taking of unilateral action via Article 16. This position was not widely accepted, however the paper sets out that the Government has now formed the view that the conditions for the triggering of Article 16 are now in fact met. At paragraph 29 the Government sets out their reasons:

(i) There has been significant disruption to longstanding trade flows between Great Britain and Northern Ireland, and a significant, measurable increase in trade on the island of Ireland. The value of Ireland's exports of goods to Northern Ireland is trending far above historical levels in 2021: up by nearly 40% this year compared to the same period in 2020, and by more than 50% on the same period in 2018.¹ Some sectors particularly susceptible to that diversion, such as food and pharmaceuticals, have experienced even stronger growth. Meanwhile, as set out above, surveys continue to underline the disruption being caused to business with Great Britain, with movements of specific commodities (such as chilled meats) seeing particular impacts.

(ii) Such disruption to trade has in turn exacerbated the perceptions of separation and threat to identity within the unionist community which, in the context of Northern Ireland, constitute a particularly serious and pressing societal difficulty.

(iii) Further societal and economic impacts are also clear: consumers face higher costs and real risks to goods supplies on which they rely; businesses face increased operating costs that put their survival in jeopardy; and, as many businesses and business organisations have made clear, if the flexibility provided by the grace periods were to be removed, there would be questions as to whether food supplies and parcel deliveries would continue without serious disruption, with significant knock-on impacts for day-to-day lives.

(iv) There has also been political and community instability (with changes of First Minister and the leadership of both main unionist parties), at a time when the challenges of COVID-19 are already acute. There were instances of disorder at Easter across Northern Ireland, with the Protocol cited as one of the significant contributing factors. In May, the Police Service of Northern Ireland noted that of 35 unlawful parades or protests being investigated, 30 related to action against the Protocol.¹¹ Early surveys of attitudes have reflected these concerns and unease, with two-thirds of respondents concerned about the effects of the Protocol on Northern Ireland's economy and on political stability in Northern Ireland.¹² And the absence of buy-in to the existing arrangements from the unionist community leaves an ongoing tension within the power-sharing institutions, undermining the basis which the Belfast (Good Friday) Agreement established for those institutions to function effectively.

[6] Crucially at (i) above, the Government now recognise that there is significant diversion of trade, with trade being orientated away from GB and instead towards the Republic of Ireland. It is trite to point out the Government were warned (from as early as October 2019) that the whole objective was to subjugate Northern Ireland within an economic United Ireland. It is no surprise that this is precisely how the Protocol has worked out. Nevertheless, the implied acceptance within paragraph 29 of the correctness of the argument that Northern Ireland was being shoehorned into an economic United Ireland has now, belatedly, been accepted and recognised.

[7] At (ii) the Government sets out the serious concerns of the unionist community in regards the optics of an enforced economic United Ireland and being divided- in a manner incompatible with the very foundational constitutional statute (the Act of Union)- from the rest of the United Kingdom, without the consent of a single elected unionist representative at any level. This would appear to be an elementary point, the most concerning part of which is that it has taken the Government so long to recognise it; indeed, in January 2021 when this author suggested that a campaign should be launched to trigger Article 16, the DUP described the suggestion as “foolish”, whilst the Secretary of State pretended the Irish Sea border did not exist.

[8] At (iii) the clear concerns of business and consumers is set out. It is plain from all the relevant evidence that the Protocol has caused, and continues to cause, significant disruption to the everyday lives of the citizens of Northern Ireland, who have been divorced from our largest market within the UK internal market, and instead essentially colonised within an economic United Ireland under the orbit of the EU. This situation is intolerable.

[9] At (iv) the Government recognises the significant societal instability created by the imposition of the Protocol. It is patently obvious from this submission that the protests, *all of them*, and especially the campaign of unnotified public processions (which is specifically referenced), played a key role in creating the circumstances for the triggering of Article 16. It is obvious to therefore point out that a renewed and intensified campaign of protest- at the optimum strategic moment- provides a clear lever for the PUL community to pull in order to dictate the pace of progress in the ultimate removal of the Protocol. Whilst plainly some *small* amount of space must be allowed for the command paper’s strategic objectives to work outwards, and for the result of same to be judged on its merits, nevertheless this can not be taken to be an acceptance of the Protocol, and nor can there be complacency which may by stealth allow the outworking of the Protocol to embed.

[10] At paragraph 30 and 31 the Government appears to misdirect itself in so far as it suggests the conditions “taken together...” (para 30) and “in combination” (para 31) amount to sufficiently serious difficulties to warrant the utilisation of Article 16. This is plainly correct in so far as it goes, but it is a wholly unnecessary misdirection which amounts to setting the burden to be discharged much higher than the plain reading of Article 16 imposes. Any of the difficulties outlined within paragraph 29, taken alone, are sufficient to trigger Article 16 (1) which provides:

“1. 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 the United Kingdom may unilaterally take appropriate

safeguard measures. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Protocol."

[11] As is self-evident from a plain reading of Article 16 (1), there is no necessity for economic, societal, or environmental difficulties to each be in play, nor for more than one to be in play to measure a cumulative effect to any objective standard. Rather, the mere existence of any economic, societal, or environmental difficulty, and/or diversion of trade difficulties, is suffice. In short, taking the four key areas of difficulties set out within paragraph 29 at their height, each would- in of itself- stand alone as sufficient to discharge the burden for the triggering of the broad provisions within Article 16 (1).

[12] At paragraph 34 the Government concludes (notwithstanding that by its own admission difficulties far greater than is required for the triggering of Article 16, are already in existence) that "for the time being" Article 16 should not be triggered. Their conclusion in full is as follows:

"34. For these reasons the Government has concluded that for the time being it is not appropriate to exercise its rights under Article 16. Nevertheless, such action remains on the table as a possibility for the future if circumstances justify it. We must always have available to us all the necessary options to meet our overriding responsibilities for peace, prosperity and stability in Northern Ireland and to support the Belfast (Good Friday) Agreement."

[13] Taken in context with the conclusions within paragraph 29 in regard to the societal instability caused by the protests, it would seem logical to conclude that an increased intensity of protest would- deploying the Government's own yardstick- be sufficient to nudge the conclusion in paragraph 34 to the next point, which is triggering Article 16 in order to protect peace and stability. This message should be heard and understood by the PUL community.

[14] Notwithstanding the inevitable conclusion drawn above, the European Union responded quickly and decisively rejecting any possibility of re-negotiating the Protocol, thus rendering paragraphs 35-37 of the paper redundant. Setting that against the conclusions in paragraph 29, and indeed the inherent message throughout the entire paper that the Protocol is incompatible with protecting peace and stability, then the only logical conclusion is it is now time to trigger Article 16. This should therefore be done without delay given that it is plain that the ideologically aggressive Irish Government and EU have no interest in finding any solutions other than colonising Northern Ireland as de-facto subjects of the EU, subjugated within an economic United Ireland with incrementally increased diversion of trade. This, of course, works from the premise of the EU itself which has shown that it is but a small step from economic Union to political Union.

[15] The interplay between economic Union and political Union can be seen within the foundational statute of the United Kingdom. Article 6 deals with the UK internal market; that this key plank of our founding constitutional statute has been subject to implied repeal (*notwithstanding my clear view Colton J has 'made law' and is entirely wrong on this conclusion*) illuminates that a key

plank of the constitutional integrity of the United Kingdom- namely economic Union- has been removed and re-positioned (in NI's case anyway) within an arrangement that partitions the UK economically, and instead welds NI to the Irish Republic. This is plainly constitutionally absurd, and if it is the price of apparent 'peace', then it is a price too high.

[16] There is an incredible admission at paragraph 47. It states:

"47. The Protocol is clear that Northern Ireland is fully part of the United Kingdom's customs territory. But this principle does not apply in practice due to the burdens of paperwork facing all trade moving from GB to Northern Ireland, and due to the absence of entirely tariff-free trade (for example where Northern Ireland traders, uniquely, have been unable to access either the UK's or the EU's Tariff Rate Quotas on products such as steel, and therefore face higher tariffs, because of legislation introduced by the EU after the Protocol was agreed). Now, with the increasing evidence of the extremely limited risks to the Single Market in practice, there is an opportunity to build on the "at risk" concept already in the Protocol to genuinely differentiate trade based on its destination." (emphasis added)

[17] Astonishingly the Government itself accepts that Northern Ireland is not *in practice* a full part of the United Kingdom's customs territory. It amounts to saying that whilst NI is part of the UK symbolically, it is not in substance. This, in of itself, illuminates the constitutionally abominable nature of the Protocol. It is, in effect, an admission that the Protocol- agreed to by the Government- has carved off part of the United Kingdom's customs territory.

[18] As an ancillary, but nonetheless crucial point, the admission within paragraph 47 of the paper plainly points to a change to the substance of Northern Ireland's place within the United Kingdom territory. If this substantive change does not trigger the apparent protections for the constitutional status of Northern Ireland contained within section 1 (1) of the 1998 Act, then it is plain such protections are- in the words of John Larkin QC in *Allister's application* [2021] NIQB 64- little more than a "deceptive snare".

[19] The protection for the Union (applying the 'symbolism theory'¹) would guard only against the severing of the last tie; in short, *everything but the last thing* could be changed without offending the provisions of section 1 (1) of the 1998 Act. That is plainly an intolerable situation and displays the inherent imbalance within the Belfast Agreement which it is increasingly clear attaches the principle of consent to merely the symbolism of the Union, rather than its substance. That is perhaps unsurprising given the Agreement to nationalism is part of a 'process', the end point of which is a United Ireland. The 'process' must therefore be incrementally moving forward to its end objective; it stands to reason it must as such be continually eroding the Union. This would be incompatible

¹ <https://unionistvoice.com/opinions/substance-or-symbolism-does-the-belfast-agreement-really-protect-northern-irelands-constitutional-status/>

with protecting the substance of the Union. It may be said therefore that a basic reading of the Belfast Agreement, and twenty-three years of observation of its outworking, should illuminate to even the most elementary observer that it is- by design- a weapon to end the Union by stealth. The Protocol- *and the reality accepted by the Government itself at paragraph 47 of its own paper-* is just another outworking of that Union-dismantling process.

[20] The justification for the entire Protocol, was the need to 'protect peace'- which was a fancy way of saying placate nationalist threats of violence. Once you reward such tactics- as the Protocol has- then you create an imbalance whereby it is perfectly logical and rational for the PUL community to conclude (and I make no comment either way upon such a conclusion) that the same tactics should legitimately be used to prevent a Sea border.

[21] The thinking goes; if threats of violence is good enough to prevent a land border, then the threat of violence should equally prevent a Sea border, and thus to maintain peace both these options (land border and Sea border) must be jettisoned in favour of a balanced outcome which does not reward one side over the other. In short, the precedent set in rewarding nationalist threats of violence (and it is only that side's threats which has been rewarded thus far) has ensured that there is now a gross imbalance within the delicate 'peace' in Northern Ireland. The only way this can be remedied is to take PUL concerns now equally onboard, and as such 'protect peace' and its delicate balance by restoring Northern Ireland to its rightful place within the United Kingdom internal market.

[22] However, tucked away within the last sentence of paragraph 47 is the dagger which could wedge itself within the heart of the Protocol, and thus largely eliminate the Irish Sea border at least (which would still leave many issues outstanding). It states, inter alia:

"...there is an opportunity to build on the 'at risk' concept already in the Protocol to genuinely differentiate trade based on its destination"

[23] This is undoubtedly a reference to Article 5 (2) of the Protocol, which provides, inter-alia:

"2. For the purposes of the first and second subparagraph of paragraph 1, a good brought into Northern Ireland from outside the Union shall be considered to be at risk of subsequently being moved into the Union...."

[24] The provisions of Article 5 (2) are therefore the beating heart of the Irish Sea border. It creates a default presumption that goods are at risk of travelling to the EU, unless it can be shown otherwise. As such, all goods start from the presumption they are at risk, and as such would be subject to checks. This concept was set out within this author's recent article on Lets Talk Loyalism².

² <https://letstalkloyalism.co.uk/if-the-protocol-is-the-price-of-peace-its-price-too-high-by-jamie-bryson>

[25] A reversal of the default presumption, to the position that only goods which are clearly destined for the EU would be “at risk” would ensure trade within the UK internal market could flow freely.

[26] In regards SPS measures, the Government at paragraphs 49-50 outline in practice an arrangement on the same basis as that set out for customs. At paragraph 51 it is accepted that there is a slight difference in relation to live animals; this does not pose a difficulty given that these checks were in existence internally within the UK long before leaving the EU.

[27] Despite the largely positive positions set out within section five of the paper, it nevertheless then veers off back into a wholly unacceptable position in paragraphs 58-62 in so far as there is a constitutionally absurd acknowledgement that NI (but not the rest of the UK) is to align with EU rules. That is wholly incompatible with not only the Act of Union, but the most fundamental tenets of sovereignty. It can not be the case that NI is an EU rule taker.

[28] If we reverse back slightly to the analysis in relation to section 1 (1) of the 1998 Act, the same concerns as [27] above can be transported into NI being an EU rule taker. If NI can have laws imposed upon it by a foreign jurisdiction without offending the principle of consent, then what would prevent law making powers also being handed to Dublin? (of course, as a member of the EU, in the present arrangement Dublin in some respects already has a greater say of laws applying in NI than our sovereign Parliament).

[29] In paragraphs 66-70 there is a welcome *suggestion* (I put it no higher than that) that the jurisdiction of the European Court of Justice and the European Commission in regards enforcement must end. This is plainly correct and is something the Government must ensure transpires. Northern Ireland must not be subject to the jurisdiction of foreign courts, or law makers.

[30] The regressive positions (also contained within paras 58-62) however maraud throughout paragraphs 70-71 which provides:

71. We should also take the opportunity to ensure that in any areas where EU law is applied or replicated in Northern Ireland under a rebalanced settlement, there are more robust arrangements to ensure that, as rules are developed, they take account of their implications for Northern Ireland – and provide a stronger role for those in Northern Ireland to whom they apply (including the Northern Ireland Assembly and Executive, and wider Northern Ireland civic society and business).

72. Of course, for as long as some legislation affecting Northern Ireland continues to be made outside the United Kingdom, the consent mechanism will need to continue to apply.

[31] This envisages that EU law will perpetually continue to be applied within Northern Ireland. For reasons already ventilated above in this analysis, this is incompatible with sovereignty *per se* and more specifically the constitutional status of Northern Ireland as part of the United Kingdom. This must be remedied and corrected, and sadly the paper provides no indication of Government

intent to do so. In its simplest form, the United Kingdom- as a whole- voted to leave the European Union. It is an act of extreme bad faith to claim to be implementing the democratic will of the people of the United Kingdom, whilst simultaneously leaving part of the United Kingdom subject to foreign laws.

Conclusion

[32] The command paper provides a clear indication that the Government recognises the constitutionally unacceptable nature of the Protocol, and the reality that it is incompatible with political and societal instability. The conclusions within paragraph 29 of the paper point clearly to the means by which the Protocol can be continually made unworkable.

[33] Undoubtedly the Government has drawn its sword and sharpened its blade. This is to be welcomed. However, regrettably it has not gutted the iniquitous Protocol, rather it has threatened to do so at a later date if the EU do not renegotiate some of the agreement's fundamental terms. Given the EU, and their surrogates in the hostile Irish Government, have already said they will not renegotiate, then by the Government's own yardstick its time to plunge the sword deep into the heart of the Protocol.

[34] A short time should of course be allowed to assess the outworking of the paper, and to give space for the Government to take the course of action they have set forth within their statements today. This, however, can not be an endless piece of string. The PUL community have had enough (23 years), and indeed it is largely through grassroots efforts that the Government have been dragged to the position they have adopted today. Protests therefore, as was said all along, had a strategic objective. The protests- **all of them, in every shape and form**- has collectively succeeded partially in so far as they have forced the Government to move, but so too must it be borne in mind that the Government have not yet finished the job, and therefore to ensure that happens in a timely fashion the societal instability must continue. The underlying societal instability criteria could, of course, still be satisfied by the maintenance of *a very short* period of breathing space, predicated upon the reality that if the Government do not move at the promised speed, then underlying societal instability will once again become overt and visible instability; only this time with a greater intensity than seen before.

[35] The PUL community must not be lulled into a false sense of security, or to permit the Protocol to embed by stealth by inadvertently being distracted. There is a fundamental right to protest (see Article 10 and Article 11 ECHR) and this must always be open to any and all members of the PUL community to exercise freely at a time and place of their choosing. There should be no interference with this basic right.

[36] The command paper, viewed in its totality, is a positive step forward. Of course, that should be embraced, and given a guarded and **time limited** opportunity to progress. However, that 'in its totality' analysis can not conceal the fundamental errors (*the Government misdirecting itself as to the burden for triggering Article 16 etc.*) and irrationalities (*the decision not to trigger Article 16, acceptance of NI being subject to EU laws, the 'in practice' wedging of NI out of the UK internal market etc.*) which pervade throughout it.

[37] The Protocol is imbalanced in precisely the same way its father, the Belfast Agreement, is imbalanced. Dismantling the Protocol is the current pressing necessity, but thereafter peace and stability will also require a fundamental balancing of the Belfast Agreement in order that the *substance* of Northern Ireland's place within the United Kingdom is protected.

Jamie Bryson

Unionist Voice Policy Studies