Dual EU/UK internal market access offends NI's constitutional status

Briefing Note

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This publication is in furtherance of the Unionist Voice Policy Studies objectives of:

(i) Promoting the constitutional position of Northern Ireland as a full and integral part of the United Kingdom in line with the Acts of Union 1800

(ii) Advocating for the interests of the Unionist/Loyalist community in Northern Ireland with specific focus on the areas of Media, Law and Public Policy

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About Unionist Voice Policy Studies

Unionist Voice Policy Studies ('UVPS') is an organisation established with the following objectives:

(i) To promote the constitutional position of Northern Ireland as a full and integral part of the United Kingdom in line with the Acts of Union 1800

(ii) To advocate for the interests of the Unionist/Loyalist community in Northern Ireland with specific focus on the areas of Media, Law and Public Policy

The 'best of both worlds' theory

The 'best of both worlds' theory essentially argues that Northern Ireland ('NI') stands to benefit from the imposition of the Protocol, due to the ability to have dual trading access to both the United Kingdom ('UK') and European Union ('EU') internal markets, the latter via necessary continued EU alignment and the supremacy of the European Court of Justice ('ECJ') in interpreting EU law (making it sovereign over the rules NI follows via EU alignment).

It is not in any way clear that 'the best of both worlds' does in fact offer any economic advantage; rather the more likely outcome is that NI trade becomes increasingly orientated towards the Republic of Ireland ('ROI'), thus forming a de-facto economic United Ireland which will become further embedded as Great Britain ('GB') diverges from the EU, which due to the requirement for continued regulatory alignment will by necessity cause NI to drift further apart from GB.

The making of laws by the EU which bind NI is, in of itself, constitutionally incompatible with the fundamental norms of the United Kingdom. To borrow an American phrase, it is taxation without representation. The elected representatives of Northern Ireland have no say in the making of laws (in some areas) which bind us, and indeed due to their membership of the EU the Irish Government have a greater say over the making of some laws in NI than our purportedly sovereign Parliament. That is constitutionally unacceptable, and goes far beyond even that which was envisaged by the Anglo-Irish Agreement.

In addition, continued regulatory alignment with the EU requires the supremacy of the ECJ in determining disputes. That means, in some areas of law governing NI, a foreign court retains supremacy. That is not only constitutionally incompatible, but is entirely at variance with the promise of Brexit.

Why dual market access for NI alone is constitutionally incompatible

All the above, grounded in NI and GB having a different status in matters of trade and treaty, leaves an unequal footing between constituent parts of the UK. There can be an argument as to whether NI does in fact have an economic advantage, or not (we say clearly not in the long term) but whether NI is left in a more advantageous or disadvantageous position *vis-à-vis* the rest of the UK matters not because the fundamental constitutional bedrock of the UK internal market requires all parts to be on an **equal footing** in matters of trade and treaties with any foreign power.

The Union as a legal construct is the Acts of Union 1800. That is the foundational constitutional statute of the United Kingdom. Any diminution or interference with that fundamental constitutional bedrock therefore plainly amounts of a change in the constitutional arrangements of the Union.

It is for this reason that the 'best of both worlds' theory is incompatible with NI's place within the Union.

In order for it to advance, it requires (as the High Court has held) the subjugation or repeal of Article VI of the Acts of Union itself. It follows that in order for NI to have dual access to two markets, whilst the rest of the UK remains firmly and solely in the UK internal market, amounts to unequal footing and thus offends the fundamental constitutional arrangements.

On 15 July 2021 the Democratic Unionist Party ('DUP') published seven key tests which would have to be met in dealing with the Protocol. The first (and plainly most constitutionally important) test was as follows "*fulfil Article VI of the Acts of Union*".

In a speech by Sir Jeffrey Donaldson as recently as 3 February 2022 he said:

"We are clear that the Protocol represents an existential threat to the future of Northern Ireland's place within the Union. The High Court has ruled that the Protocol suspends key elements of the Acts of Union and specifically Article 6, which previously guaranteed the right of every citizen and business in Northern Ireland to trade freely with the rest of the United Kingdom. The longer the Protocol remains, the more it will harm the Union itself."

Two key DUP policy positions emerge: *firstly*, that any 'solution' to the Protocol must met the first of their seven key tests, which requires adherence to Article VI of the Acts of Union. This expressly and without any equivocation therefore prohibits EU alignment for NI allowing access to the EU internal market, whilst the rest of GB has no such status. This creates an unequal footing between NI and GB, and thus breaches Article VI of the Acts of Union.

Secondly, the DUP (as recently as 3 February 2022) correctly recognise that the subjugation, suspension or implied repeal of the Acts of Union represents an "*existential threat to Northern Ireland's place within the Union"* and sets out very clearly that "*the longer the Protocol remains, the more it will harm the Union itself*".

Therefore, as a matter of the most compelling logic, it is (or should be) impossible for any unionist party, to accept any solution which creates an unequal footing between NI and GB. This is so because the creation of such unequal footing offends the Acts of Union.

In order to support NI having dual access to the EU and UK internal markets (the 'best of both worlds') you must as a matter of elementary logic therefore support the subjugation or repeal of Article VI of the Acts of Union. It follows that such a position- using not only the DUP's own yardstick but basic common sense- therefore poses an existential threat to the Union. The development or progression of such a position would "*harm the Union itself*".

It is beyond any reasonable doubt that dual access to the EU and UK internal market (brought about by NI having regulatory alignment with the EU or otherwise) offends the very bedrock of the Union itself. It therefore can not be consistent with NI's position as part of the Union.

To argue for dual market access, or as has been labelled the 'best of both worlds', is to argue for a diminution of the Union itself. This, it seems, is a wholly absurd position to adopt for anyone who values the Union.

The principle of consent – substance or symbolism?

It is worth further briefly drawing attention to the seventh of the DUP's excellent set of 'key tests'. It provides:

"Preserve the letter and spirit of NI's constitutional guarantee in the Belfast Agreement by requiring consent from the majority of its citizens for any diminution of its status as part of the UK"

The constitutional guarantee means the principle of consent. As a matter of domestic law this is found in Section 1 (1) of the Northern Ireland Act 1998 ('the 1998 Act'), a constitutional statute.

As has been canvassed already in this briefing note, the imposition of the Protocol (most notably in relation to putting NI and GB on an unequal footing) amounts to a change to NI's constitutional status. This is so because UK's constitutional status is governed by the Acts of Union 1800, and therefore a breach of the Acts of Union *vis-à-vis* Northern Ireland amounts to a change in constitutional status.

The High Court, at first instance, ruled that Section 1 (1) of the 1998 Act was purely territorial and related solely to a border poll. In short, *you can change everything but the last thing.*

This it was correctly argued on behalf of all applicants (including the DUP and UUP) in the Protocol legal challenge revealed the principle of consent to be a "*deceptive snare*" which protected merely the symbolism rather than the substance of the Union.

It was also argued that if the constitutional guarantee (the principle of consent- Section 1 (1) of the 1998 Act) did not prevent powers to make laws over NI being handed to a foreign power in the form of the EU, then equally it would not prevent such powers being handed to Dublin.

As such, the effect of test seven- and indeed any basic pro Union analysis- can only be that Section 1 (1) of the 1998 Act requires fundamental reform. Given it is this constitutional guarantee which forms the bedrock of apparent unionist support for power sharing arrangements, it is clear that such arrangements could not conceivably continue in the absence of this constitutional guarantee being amended to protect the substance rather than merely the symbolism of the Union.

Therefore, the DUP's seventh test- if it is to be applied with intellectual honesty- mandates that any solution would requirement a legislative amendment of Section 1 (1) of the 1998 Act.

Conclusion

It is incumbent upon all unionist parties to remain constitutionally pure, and honest with the unionist electorate. It can not be the case whereby fundamental principles (or 'key tests') are fudged or remoulded for political expediency.

The best of both worlds' theory is constitutionally incompatible with the Union. If any 'unionist' wishes to argue in favour of such a theory, they must confront rather than evade this key issue.