-Analysis Paper-

The Northern Ireland Protocol Bill 2022

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Introduction

This short paper is prepared to provide an initial analysis of the Northern Ireland Protocol Bill 2022 ('the Bill'). It is a complex Bill and therefore requires detailed and extensive scrutiny before a final view can be formed.

Summary

In summary, the Bill for the most part provides a constitutional framework within which new arrangements replacing the Protocol must exist. It does not in of itself proscribe the substance of these new arrangements, but rather creates an architecture within which they are to operate.

The enabling powers provided are broad, and in effect the Bill- if enacted and operated properly- has the potential to entirely dismantle the Protocol, and restore the constitutional integrity of the United Kingdom.

This paper explores a number of the key clauses, offering an initial and succinct analysis of each and in general terms provides suggested technical amendments, particularly in relation to strengthening and providing in substance the purported constitutional protections the Bill proclaims to provide.

Clause 1, 2 and 3 – (including specific focus on the Act of Union)

Clause 1 of the Bill sets out its main provisions. It provides as follows:

> *1 Overview of main provisions*
>
> *This Act –*
>
> *(a) provides that certain specified provision of the Northern Ireland Protocol does not have effect in the United Kingdom;*
>
> *(b) gives Ministers of the Crown powers to provide that other provision of the Northern Ireland Protocol does not have effect in the United Kingdom;*
>
> *(c) provides that enactments, including the Union with Ireland Act 1800 and the Act of Union (Ireland) 1800, are not to be affected by provision of the Northern Ireland Protocol that does not have effect in the United Kingdom;*

(d) gives Ministers of the Crown powers to make new law in connection with the Northern Ireland Protocol (including where provision of the Protocol does not have effect in the United Kingdom).

Clause 1 (a) relates to the elements of the Protocol which will be disapplied by the Bill itself (which will be addressed further *infra*), whilst Clause 1 (b) and (d) relates to the enabling powers provided to Ministers to disapply all other elements.

Put simply; Clause 1 (a) relates to the provisions of the Protocol the Bill expressly disapplies; Clause 1 (b) relates to powers given to Ministers to disapply any other part of the Protocol, thus having the same effect as if it were disapplied in Clause 1 (a) and; Clause 1 (d) provides enabling powers to make new arrangements (within the framework set out within the Bill) replacing parts of the Protocol disapplied by virtue of the provisions falling under Clause 1 (a) or (b).

The key provision, from a constitutional point of view, is Clause 1 (c) which relates to the Act of Union. This has been a key issue for grassroots unionism/loyalism, the DUP (it is the first of their seven key tests) and TUV. It has also been a key feature of the legal challenge to the Protocol in *Allister et al.*

Clause 1 (c) provides that enactments (and on a *prima facie* reading, this protects any statute from implied repeal under section 7A of the EUWA 2018) are not to be affected by any provision of the Protocol which does not have effect in the United Kingdom.

It is important to understand section 7A of the EUWA 2018 and its effect. It was effectively a pipe through which the international treaty, namely the Withdrawal Agreement (inclusive of the Protocol) flowed into domestic law. This meant the obligations flowing from the Protocol were enforceable and binding as a matter of domestic law.

Section 7A (3) of the EUWA 2018 previously had the effect of requiring that all enactments were to be read subject to the Withdrawal Agreement, inclusive of the Protocol.

It was this provision which occasioned the subjugation of the Act of Union, the foundational constitutional statute of the United Kingdom of Great Britain and Northern Ireland.

Therefore, the Bill seeks to remedy this by providing that any element of the Protocol which does not have effect in domestic law cannot subjugate (or impliedly repeal) the Act of Union (or any other statute).

It is necessary therefore to look at what this means by further recourse to the Bill. Turning first to ascertain the meaning of the part of Clause 1 (c) which states "*provision of the Northern Ireland Protocol that does not have effect in the United Kingdom*".

This requires an analysis of the interpretation Clause 25 which provides at (2):

(2) A reference in this Act –

(a) to provision of the Northern Ireland Protocol that does not have effect in the United Kingdom is a reference to provision of the Protocol –

(i) becoming excluded provision wholly or to any other extent, or
(ii) being excluded provision to any greater extent;

(b) to an enactment being affected by provision of the Northern Ireland Protocol is a reference to the enactment being required (by section 7A(3) of the European Union (Withdrawal) Act 2018) to be read and to have effect subject to section 7A(2) of that Act as respects that provision of the Protocol.

The effect of this analysis is that on a *prima facie* reading the Act of Union is protected from interference by any of the provisions which are, by virtue of any of the provisions which fall under Clause 1 (a), (b) or (d), 'excluded'.

But how is this constitutional protection actually provided for in substance within the Bill?

It, in a very convoluted way, is given effect by Clause 2 (2) (b), which provides that the effect of section 7A can not interfere with any other enactment (including but not limited to the Act of Union), in relation to any provision of the Protocol which is excluded by the Bill.

Put simply; as analysed *supra*, section 7A is a pipe through which the Protocol flows into domestic law. The provisions of the Protocol have supremacy via section 7A (3) over any other enactment, including the Act of Union.

The Bill does two things; it prevents the parts of the Protocol excluded by the Bill itself (that which falls under Clause 1 (a)) from flowing through section 7A of the EUWA 2018 and thus 'subjugating' the Act of Union, and provides that any provisions of the Protocol further excluded (by provisions falling under Clause 1 (b) or (d)) can also benefit from this constitutional guarantee.

However, whilst this constitutional guarantee and remedying of the present subjugation of the Act of Union is significant and welcome, it still provides for a backdoor allowing for future subjugation or interference with the Act of Union, under the Regulations which may be made pursuant to the enabling powers provided in the Bill.

To give an example; Clause 15 (2) (d) provides Ministers with enabling powers to decide a provision of the Protocol is no longer 'excluded'. At that point, if for example a provision which had previously been excluded (for example Article 5 (4) of the Protocol) was by Regulations no longer excluded, then that provision could still via section 7A of the EUWA 2018, subjugate or impliedly repeal the Act of Union.

In short form, the Bill does remedy the current infringement of the Act of Union by virtue of the excluded provisions, but there is insufficiency of constitutional protections to prevent such an infringement from happening again.

This can be fixed in the following way:

(1) Insert Clause 2 (1) (c):

> *"the Union with Ireland Act 1800, the Act of Union (Ireland) 1800 or the Northern Ireland Act, notwithstanding any other provision"*

(2) Insert Clause 15 (5):

> *"A Minister of the Crown may not exercise any power under this provision in a manner incompatible with the Union with Ireland Act 1800, the Act of Union (Ireland) 1800 or the Northern Ireland Act 1998"*

(3) Insert Clause 19 (3):

> *"A Minister of the Crown may not exercise any power under this provision in a manner incompatible with the Union with Ireland Act 1800, the Act of Union (Ireland) 1800 or the Northern Ireland Act 1998"*

It is necessary that not only is the subjugation of the Act of Union remedied, but there is a constitutional guarantee to prevent it happening again.

The Bill is significant in so far as it recognises, expressly in Clause 1 (c) and at paragraph (26) of the explanatory notes, the importance of this fundamental constitutional statute.

Therefore, it is important that this constitutional protection is more deeply enshrined within the Bill, and this can be done by the simple technical amendments suggested *supra*.

It is beyond the scope of this <u>initial</u> paper reviewing the Bill, but there should also be consideration given as to whether there needs to be a 'catch all' provision preventing any regulations made under any provision of the Bill from infringing the Act of Union.

This could potentially be achieved by an amendment inserting Clause 22 (8):

> *"Notwithstanding subsection (1), no power under this Act authorises regulations which are incompatible with the Union with Ireland Act 1800, the Act of Union (Ireland) 1800 or the Northern Ireland Act 1998"*

This may obviate the need for some the other suggested amendments set out *supra*, but all of this requires further consideration and analysis.

Customs and Regulatory – Clauses 4, 5 and 6

Clause 4 (1) and (2) excludes from effect in domestic law the provisions of Protocol Article 5 (1), (2) and in so far as it relates to movements of goods, (4) and (5).

This Clause strips out the 'at risk' concept which decreed that all goods moving internally within the UK from GB to NI were by default deemed to be at risk of moving into the EU single market, and therefore subject to checks and controls.

In Clause 4 (3) and (5), Clause 5 (1) and Clause (1) enabling powers are provided to a Minister of the Crown to make by regulations arrangements to replace the operation of the current Protocol.

These Clauses provide the framework within which regulations must operate, however as already addressed, it may be the case each Clause, or alternatively a catch-all provision in the Bill, contains a constitutional guarantee to make expressly clear that such powers must be exercised in a manner of compatible with the Act of Union.

In conclusion, Clauses 4, 5 and 6 are in general positive, but no final determination can be made until the detail of the regulations becomes clear, and there is an assurance as to protections for the Act of Union.

Dual Regulatory system- Clauses 7, 8 , 9 , 10 and 11

This is the 'green lane- red lane' concept which has been outlined by the Government. The detail of this proposal is still not fully clear, and the extent of the free flow of the green lane is yet to be outlined.

Clause 7 provides a broad concept overview, but doesn't specify the detail as to how it would work in practice. Whilst this on a *prima facie* basis provides a framework for a solution, that is only so if in practice it prevents any checks on goods flowing within the UK internal market, judgement must be reserved until further detail is provided.

Clause 8 requires further urgent clarification. The purported explanation at paragraph (53) of the Explanatory Notes is inadequate. If, as it seems, it operates in practice to mean that Northern Ireland is no longer effectively in the EU single market, then it is one of the most significant provisions.

However, if Northern Ireland is still left subject to EU law and under the orbit of the EU single market, then this offends Article VI of the Act of Union, and thus would render the purported constitutional protections in the Bill for the Act of Union wholly deceptive.

Clauses 9, 10 and 11 relate to the framework for the regulations to be made to give effect to the dual regulatory scheme in Clause 7. Again, the detail of such regulations will be of the utmost importance.

Other relevant Clauses

There is a welcome provision which provides for single UK wide subsidy control in Clause 12, and disapplies Article 10 of the Protocol.

Clause 12 (3) again provides enabling powers to make regulations in relation to this provision.

At Clause 13 there is provision for the exclusion of Court of Justice of the European Union ('CJEU'). This is important, not least in pursuit of the objective of ensuring Northern Ireland is not left in the EU single market. This is so because the ultimate jurisdiction of the CJEU is in general terms a pre-condition for the EU single market, and therefore stripping it out is another key staging post in achieving the objective of adherence to Article VI of the Act of Union would prevents Northern Ireland being on an unequal footing (for better or worse) than any other constituent part of the UK.

Clause 15 is a crucial provision in so far as it provides powers to Ministers to effectively turn the Articles of the Protocol on or off at will. This is a broad power which is welcome in enabling stripping out the entire Protocol, but the flip side of that coin is that the power remains to turn it back on.

That is why this Clause must be subject to constitutional protections, and thus a technical amendment is necessary to ensure the powers can only be exercised in a way which is compatible with the fundamental constitutional law of the United Kingdom.

It is worth pointing out that the powers within Clause 15 would permit a Minister of the Crown to 'switch off' the Protocol consent vote (as required by Article 18 and given effect by section 6A of the Northern Ireland Act 1998).

The Article 18 (of the Protocol) consent vote sought to disapply the key provision of cross community consent (found in Strand One (5) (d) of the Belfast Agreement and section 42 of the Northern Ireland Act 1998) and therefore is entirely incompatible with protecting the 1998 Agreement.

Clause 17 permits the UK Government to set VAT, excise duties and other taxes throughout the entire United Kingdom, unimpeded by the Protocol. This is a welcome provision, but again more detail is required.

Clause 20 addresses the role of the CJEU, and ensures that domestic courts are not required to follow any rulings of the European Court in relation to the Protocol or Withdrawal Agreement, and can not refer cases to it.

The supremacy of UK Courts is an important issue of sovereignty and constitutional integrity. This was one of the key issues identified by the anti-Protocol campaign.

Clause 22 sets out the general powers in relation to making of regulations under the Bill. As set out earlier in this paper, there may need to be a technical amendment to provide protection to the fundamental constitutional law of the United Kingdom.

Conclusion

This Bill provides a framework within which a potential solution could be found. This solution must, of course, be the complete removal of the Protocol and the full restoration of Northern Ireland's place within the United Kingdom.

There is much to welcome in the Bill, and it is a significant staging post. However, as identified in this initial paper, there are some tidying up technical amendments required, particularly in relation to providing guarantees and protections in relation to the fundamental constitutional law of the United Kingdom, particularly in relation to the Act of Union.

A matter of concern is the powers in Clause 15 which, in theory, would permit the Protocol to return. It is necessary to neuter this with constitutional constraints on the exercise of this power, such as those suggested elsewhere in this paper.

In addition, much of the Bill provides enabling powers, and only a very small portion of the Bill comes into effect at the point of Royal Assent (see Clause 26). This is regrettable and provides much scope for potential reversal of the positive advancements made.

It is a significant achievement for unionism/loyalism both at a grassroots and political level to have reached this significant staging post. The strong political approach of the DUP and TUV has provided much unity of purpose and energised the grassroots unionist/loyalist community. It is important this unity, and strength, persists and that it is not blunted by the albeit welcome staging post of this Bill.

There has been significant work put in by the grassroots unionist/loyalist protest campaign, and political unionism (particularly the DUP, TUV and PUP) to reach this important stage. It is important political unionism remains united, and the grassroots movement continues to offer unwavering support for the uncompromising stance rightly adopted, inclusive of the DUP's absolutely correct refusal to nominate a speaker or form any Executive unless and until the Protocol is removed.

If this Bill, with some technical amendments, were to become law and sufficient and constitutionally compatible regulations were to follow, then at that point there would be scope for consideration of entering discussions exploring the potential of a new power sharing arrangement, which equally respects the rights of the unionist community and rectifies the imbalance within the 1998 Agreement which has been fatally exposed by the Protocol.

In advance of the second reading, further analysis of the Bill on a more detailed basis will be necessary. It is welcome that the European Research Group ('ERG')- who have recently been strong advocates for the unionist cause- have announced that their Star Chamber legal team will be reviewing the Bill and providing a report on whether its provisions are sufficient to restore and protect the constitutional integrity of the United Kingdom.

In the spirit of continued co-operation and unity, it would be welcome if the Star Chamber included amongst their team a senior counsel constitutional law expert from Northern Ireland.

It is via our unity as a Union of Unionists that the significant achievement of securing the laying of this Bill has been achieved. We must maintain that unity and shared purpose, and work collectively as we seek to finish the job of removing the pernicious Protocol in its entirety.

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