



Briefing Paper

Protocol developments

20 May 22

Introduction

This short briefing note is prepared to provide answers to a number of questions which have arisen following the Foreign Secretary's statement to the House of Commons on Tuesday 17 May 2022. This followed a long essay in the Belfast Telegraph by the Prime Minister published on Monday 16 May 2022. We draw on both the Foreign Secretary's statement and Prime Minister's article in this briefing note.

It is common cause that the majority of unionism (indeed every section of political and grassroots unionism/loyalism other than the UUP) stand in unity on the solid ground that there will be no power sharing until the Protocol is removed. This is the position upon which the DUP received their mandate as the majority voice of unionism, and this manifesto commitment was also given by the TUV and PUP. In particular the TUV took over 65,000 votes.

In total, over 265,000 unionists voted for anti-Protocol unionists committed to the position that there could never again be power sharing until the Protocol is removed. There is no semantics; whether the Protocol is removed will not be judged by the words of our Government, or anyone else, rather it will be measured against unionism's key tests.

There has been a deliberate effort to divide and undermine unionism with a play on words between 'scrapping' and 'changing' the Protocol. These descriptions are irrelevant, what matters is whether unionism's key tests are met. It is trite to point out that the Protocol cannot survive if unionism's key tests are met. The most important test is whether the Protocol is killed; if it is left to rot as a stone-cold corpse or cremated is really of no consequence.

Thus far the DUP have remained faithful to their manifesto commitments. They therefore deserve the backing of all those in unionism in the stand they are taking. There has been no softening, and nor can there be. The TUV, PUP and grassroots unionism/loyalism will ensure the continuing purity of the collective anti-Protocol message.

It remains a matter of deep regret that not only are the UUP standing apart from our Union of Unionists standing together in unity on the anti-Protocol picket line, but they now actively seek to undermine our cause. The leverage unionism holds is found in the veto over the election of a speaker, and ultimately the veto over the formation of an



Executive. That the UUP would seek to undercut this is not only shameful, but a betrayal of the cause they purport to serve.

As with much of the UUP's recent utterances (such as their disavowal of the Act of Union), much of it is rooted in their absolute failure to understand the constitutional consequences of the Protocol, or indeed the fundamental constitutional underpinning the Union. In this context, they really ought to simply stay quiet rather than risk doing further damage to the anti-Protocol movement.

It is absolutely the case that there has been a number of monumental shifts in Government policy, but policy counts for nothing unless ultimately it finds itself translated into law. As such, the proposed legislation is insufficient to warrant unionism re-engaging, in any way, with power sharing because at this stage it does not go on beyond a policy intention. Therefore, the test for decisive action is whether the proposed legislation is enacted and operative.

In these most trying of times, when unionism is under siege by the weight of the establishment and many partisan international actors (such as the current US administration) and the hostile and covetous Irish Government, it is essential all strong unionists stand together, and that those who are weak on the Union at least do the decent thing and do not get in the way or undermine the position of Unionism.

This briefing paper identifies and answers a number of questions which have arisen and seeks to do so under a number of broad headings.

Briefing Note

Should unionism now go back to nominate speaker/Executive?

No, the DUP and TUV- which together by some distance got the largest unionist mandate (over 181,000 for the DUP) stood on the manifesto commitment that they would not re-enter an Executive until the Protocol was removed. **It is a mandate for removal, not for the promise of removal.**

If the legislation is laid and progressing at sufficient pace (eg, on an expedited basis- or in conjunction with Article 16) then unionism at that time could consider a reciprocal gesture of goodwill- indicating the desire to have working devolution, by considering nominating a speaker.

However, unionism must remain faithful to the clear commitments and mandate they have received and as such the Protocol must be removed before an Executive could be formed.

The key test is not the promise of legislation- but rather whether it is **enacted and operative.**



Government have been clear, they are not scrapping Protocol

If the statement to the House by the Foreign Secretary is translated into legislation then all the key organs of the Protocol would be stripped out. The Protocol would be gone. That has been acknowledged even by the EU who have talked about the “constitutive parts” being stripped out by the Government’s proposed actions.

If there is a play on words, which is probably more about protecting the Government’s position in any future international law dispute, then that is not of much consequence.

It is not the symbolism but the substance that matters. If the Protocol is gone in substance and Northern Ireland is restored to the UK internal market, which means the restoration of the Act of Union, then an objective unionism was told was unachievable has indeed been hard won.

Isn’t that what the UUP have been looking for?

The UUP’s policy on the Protocol has been completely confused. To take one example, they do not view the Act of Union as a red line, but are simultaneously party to the pan-Unionist legal case which- correctly- argues that any change to the Act of Union amounts to fundamental constitutional change (a position endorsed on affidavit by Lord Trimble).

It is clear the Government has moved because they have been brought to the understanding that it is power sharing or the Protocol. The UUP’s strategy of implementing power sharing and Protocol, alongside endless talks, would not have achieved the desired result. At this point the only leverage unionism has is refusing to nominate a speaker and form an Executive. It is extremely harmful for unionism that the UUP continue to try and undercut this unionist leverage.

We would encourage all unionists to draw this issue to the attention of your local UUP representative and as them to explain their constitutionally harmful actions.

Sir Jeffrey and DUP want ‘best of both worlds’, he said he wants access to EU single market

This is a misrepresentation. Sir Jeffrey and DUP have been clear they remain faithful to their seven key tests, the first of which is the restoration of the Act of Union. An unequal footing- such as NI having privileged access to the EU single market, which requires being in the single market for goods- would offend that key test. It is therefore a none-runner. Northern Ireland must be out of the EU single market for goods, that is the key test in terms of satisfying the Act of Union.

What Sir Jeffrey was referring to was trade with the EU under the Trading Cooperation Agreement, crucially he refers to trading on the same terms as the rest of the United Kingdom.



There is no best of both worlds, and the present situation which leaves NI in the EU single market for goods- described by Lord Justice McCloskey as NI being “more in the EU market than that of the UK”- is constitutionally unacceptable and incompatible with the first of the DUP’s seven key tests.

The US administration, Irish Government and partisan academics/commentators say the Protocol is necessary to protect the Belfast Agreement

There has been a complete misrepresentation of the Belfast Agreement almost from its very inception. Put simply, nationalism and their partisan allies have adopted the language of the ‘spirit’ of the Belfast Agreement. It is trite to point out this ‘spirit’ is an entirely partisan and artificial construct and in effect simply means that every provision and/or constructive ambiguity must be resolved in favour of nationalism.

That is why we are told that the Protocol is necessary to protect the Belfast Agreement. The Protocol is an entirely nationalist construct, designed to sever NI from the rest of the United Kingdom and subjugate us within an economic United Ireland.

However, the Belfast Agreement is in fact based on power sharing. That means the consent of both unionists and nationalists. The Protocol has no consent (and never had) from unionism, and therefore far be it from protecting the Belfast Agreement it dismantles its key purported aim of ensuring Government arrangements command cross-community support.

It is notable that the key cross community protections for minority rights and key decisions, and indeed power sharing itself which relied on consent from both communities rather than majority rule, were all key pillars of peace until such times as these tools impeded rather than assisted nationalism’s objective. All of a sudden the demand of the nationalist elite and international actors (including the hostile Irish Government) is for majority rule in order to ram through the subjugation of unionism.

This demonstrates the fundamental dishonesty of nationalism’s support for the Belfast Agreement and highlights that protecting the Agreement really means simply protecting nationalism’s interests.

If there had been a hard border between NI and the Republic of Ireland (which the Belfast Agreement would not prevent, by the way) then we would have had the same international actors and partisan nationalist elite activists within the opinion-forming institutions saying that would represent a breach of the Belfast Agreement.

There has been no satisfactory answer as to why a North-South border would offend the Belfast Agreement because it would erode nationalist consent for power-sharing, but the imposition of an internal UK border has no such effect, presumably because unionism is simply expected to sit quietly at the back of the bus and consistently suffer whichever humiliation and constitutional reversal deemed necessary to placate nationalism.



The UK Government must protect the text rather than the concocted ‘spirit’ of the Belfast Agreement, and that means ensuring that there is unionist consent for power sharing. There will not be whilst the Protocol remains.

In equal terms the international community should consider unionism’s views and concerns, rather than treating us as second class citizens who should willingly accept the subjugation of our place in the United Kingdom in order to assist nationalism’s political objective.

Finally, partisan academics have written a number of entirely skewed articles which appears to suggest that there would be a risk to peace from a land border because it would have eroded the ‘conditions for peace’ (whatever that means). Why the same logic doesn’t apply to the imposition of a border down the middle of the United Kingdom has yet to be explained.

The seven key tests – how they would be met if the proposed legislation becomes law

1- Fulfil Article VI of the Act of Union

The Foreign Secretary repeatedly referred to parity of treatment and economic rights across the UK, this is the core basis of Article VI. This was clear in her statement to the House, and in a tweet the night before.

In addition, the PM in his Belfast Telegraph article developed the concept of ‘economic rights’ within the United Kingdom, which is to be protected by the 1998 Agreement. The logic of this is that section 1 of the 1998 Act (principle of consent) should be amended to enshrine this broader application of ‘constitutional status’ into law. This has been a key issue identified by the DUP.

Equal treatment (parity) and the preservation of economic rights is a clear nod to the Act of Union. Whilst it will be necessary to see the express detail of the legislation to ensure the broad concepts are developed into firm legal principles, on the face of it the Government appear to recognise the significance of restoring constitutional economic rights.

The statement to the House was clear that the Government has responsibility to protect “parity of esteem” and “economic rights”. This concept could only be rooted in fidelity to the Act of Union.

2 Avoid any diversion of trade

The proposals set out by the Foreign Secretary would restore free and unfettered trade within the UK internal market, and thus in consequence removing the Irish Sea border which has been the cause of significant trade diversion, as recognised by the Government itself in its July 2021 command paper.



Again, we await the legislation to ensure the proposals would create a green lane for all goods travelling from GB-NI and staying there, and not merely a green lane for some traders with others- especially small business- still being subjected to needless red tape and customs forms.

3- Not constitute a border in the Irish Sea

The green and red lane proposal would ensure there is no border between the constituent parts of the UK for the movement of goods. If, as a gesture of goodwill to keep the land border open, goods clearly destined for the ROI are to be checked at the point of entry to the land mass then this isn't a matter of significant objection.

However, to be clear, the key issue here is the complete abolition of the 'at risk' concept; goods moving from one part of the UK to another must by default be deemed to be not at risk, with only those goods destined for the ROI subject to checks.

The Government proposes creating criminal sanctions as deterrents to prevent anyone using the green lane to smuggle goods onwards into the EU single market.

4- Give the people of NI a say in the laws which govern them

The Government's proposals have expressly made clear they will deal with issues of Governance, and have since made clear this includes removal of the jurisdiction of the ECJ. This is an important step in restoring sovereignty to Northern Ireland.

This test is in some ways bound up with the Act of Union, which if restored would remove Northern Ireland from the EU single market for goods and thus ensure NI was not an EU law-taker.

This, again, demonstrates the importance of the restoration of Article VI of the Act of Union.

5- Result in no checks on goods going from NI to GB or from GB to NI (remaining in NI)

The proposed bill, we are told, will ensure goods will be freed to move through the green lane and thus unimpeded. That would ensure no checks and thus the test would be satisfied.



6-Ensure no regulatory border develop between NI and the rest of the UK

The Bill, according to the statement to the House, will “remove regulatory barriers to goods made to UK standards being sold in Northern Ireland”. This is an express satisfying of this key test.

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

This key test relates to the application of section 1 of the NI Act 1998 (the principle of consent). In short it directs itself to ensuring the principle of consent, a key promise to unionism in 1998, protects the substance not merely the symbolism of the Union.

Put simply, you cannot change everything but the last thing in relation to NI’s place in the Union, the last thing being merely the final formal handover of sovereignty. This can also be illustrated as ‘salami slicing’ the Union.

In the Court the Government argued for a narrow application of section 1 of the 1998 Act, applying only to a border poll and thus the final formal handover of sovereignty. This in effect meant all the constitutional underpinning of NI as part of the Union (such as the Act of Union) could be incrementally stripped away, with only the final handover of sovereignty attracting any protection. This would of course be wholly incompatible with the promises of 1998.

As a result of unionist lobbying, the Government via the Prime Ministers article in the Belfast Telegraph appear to acknowledge a broader application of the principle of consent is necessary to ensure balance in the Belfast Agreement. He refers to economic rights and identity as being subject to protections based in the 1998 Agreement.

The concept of constitutional economic and identity is rooted firmly in the Act of Union, and this broadening of the Government’s position is a welcome first step.

However, given the Courts finding in relation to the legal application of section 1 of the 1998, the Government must develop the concept of economic and identity rights into a legislative provision to ensure these protections exist as a matter of law.

At this stage unionism hasn’t made the enactment and operation of that legislation as fundamental barrier to the restoration of power sharing, however we do need to see serious and confidence building steps taken to begin the process of enshrining protections for economic and identify rights of unionists as part of the UK.



We would welcome, for example, a Government review of the operation of the principle of consent, drawing on the expertise of the foremost constitutional law experts in the UK, and particularly Northern Ireland, in order to provide a forward that will reflect the constitutional guarantee in all its parts as a matter of domestic law.

Conclusion

Unionism has reached a significant staging post. That is to have forced the change in Government policy, however this progress will ultimately count for nothing unless enacted and operative legislation has the effect of removing the Protocol in its entirety.

There can be no compromising or weakening of unionism's position. It is time for increased strength, not weakness.