

Conclusions on Northern Ireland Protocol Bill

Unionist Voice Policy Studies

27 June 2022

Foreword

This report provides conclusions on the Northern Ireland Protocol Bill, and supplements the preliminary report published on 14 June 2022.

It should be recognised that the grassroots unionist and loyalist community have secured once unthinkable progress, essentially creating the political and societal climate which has forced the Government to in substance abandon the Union-subjugating Protocol.

The grassroots campaign provided an energy and impetus, which caused political unionism (DUP/TUV/PUP) to act, albeit at different times. Notwithstanding very real concerns around undue delay in making power-sharing Government unworkable, we got there in the end and a unity of purpose amongst anti-Protocol unionism is essential.

As it presently stands, the DUP are standing firm, alongside the principled and unbending stance of the TUV, and of course it is important also to mention the PUP who have been consistent in their position on the constitutional impact of the Protocol.

This strength and unity of purpose must be maintained. If we think of it as a unionist picket-line, no one should cross it until our objectives have been achieved.

That is why the Protocol Bill is to be welcomed and embraced, but not as a solution in of itself, because that is not what it is. It is a staging post towards the ultimate prize of removing the cause of political and societal instability. That prize can only be won whenever Northern Ireland is fully restored to its rightful place within the United

Kingdom, *and* when there are balanced and equitable new arrangements for power sharing within Northern Ireland.

In the first instance, undoing the constitutional harm of the Protocol requires several steps, set out in detail in both the UVPS preliminary report and this report providing conclusions. The key issue is not only undoing the present breach of the Act of Union but preventing such a breach from reoccurring. This requires an amendment to the Bill to require Ministers to act compatibly with the Act of Union in making future regulations.

In terms of finding new balanced and equitable arrangements for power sharing, this requires steps to strengthen the principle of consent to ensure it protects the substance rather than merely the symbolism of the Union. This has been a core commitment of the TUV, PUP and is the seventh of the DUP's 'key tests'.

As an initial confidence building measure, the Northern Ireland Office should commission a report to be produced by a senior counsel constitutional law expert, to look at ways in which the purported constitutional protections enshrined in section 1 of the Northern Ireland Act 1998 can be amended in order to reflect the constitutional guarantee as promised to unionism in 1998. Put simply, *you can't change everything but the last thing in relation to Northern Ireland's place in the Union, the last thing being merely the final formal handover of sovereignty.*

The continued existence of red lanes should remain objectionable to unionism, and as a long-term strategy the objective should be to either ensure the arrangements operate on the basis of mutual enforcement, or to secure the removal of the red lane to the land border.

However, that objectionable element of the proposed arrangements must not be a barrier to grasping the significant strategic gains on offer within the present Bill. The key is to view the Bill as a staging post, to be built upon.

The internal question for unionism is at what point consideration should be given to exploring whether can be the development of *new* power sharing arrangements which operate with balance and on an equitable basis.

Aside from the Protocol, there can in any event be no return to the status quo in relation to Belfast Agreement power sharing. After twenty-five years whereby the ethos has been that *unionism must give, and nationalism must get* it is obvious that such a process has run its course long ago.

Therefore, any consideration of a return to power sharing arrangements must not only be conditional upon decisive action to remove the Protocol, but also that power sharing operates on an equitable basis, rather than unionists being treated as second class citizens.

It is hoped the second reading of the Bill today (27 June 2022) will see a reasonably comfortable majority voting for it to pass that stage of proceedings. If however the Bill were to be knocked back, then it is difficult to envisage any circumstance whereby power-sharing could ever be revived with unionist consent.

Jamie Bryson

27 June 2022

Background

Unionist Voice Policy Studies ('UVPS') is a constituted organisation 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

In line with these objectives, UVPS brings together a network of groups and individuals from within the pro-Union community to engage in research, academia, media engagement, Law and Public Policy.

Our high level strategic advisory panel is responsible for identifying areas of importance, which are then tasked by our management committee to one of our three working groups (Law and Human Rights/Media/Public Policy) for focused actions.

This focused work includes both producing internally and commissioning reports, formulating written submissions to Consultations, and developing policy/legal papers focusing on areas of importance identified by our strategic advisory group.

Introduction

On 14 June 2022 UVPS published a preliminary report on the Northern Ireland Protocol Bill ('the Bill'), giving a general welcome to its scope. However, it was made clear that final conclusions would follow only once there had been the opportunity to consider the Bill more fully. We have now had time to do so.

These conclusions should be read in conjunction with the preliminary report, which provided a detailed explainer as to the effect of the key Clauses within the Bill.

In the interim period, the European Research Group ('ERG') 'Star Chamber' has delivered their legal opinion on the Bill, and endorsed its provisions.

We broadly agree with the majority of the conclusions drawn by the ERG, but do differ in some respects in relation to their analysis of the provisions in so far it relates to the Act of Union.

Conclusions

1. The Bill provides a strong foundation, which if built upon could remove the present cause of political instability in Northern Ireland. However, in of itself the Bill does not represent a complete solution. It is a necessary step forward, and if enacted alongside the laying of appropriate regulations, will represent a decisive dismantling of the core elements of the Protocol. That is to be embraced and welcomed but should be properly viewed as a staging post within a wider process of restoring equal constitutional citizenship (inclusive of equal economic rights) and rebalancing power sharing arrangements in Northern Ireland.
2. Whilst the Bill takes steps to restore the present breach of Article VI of the Act of Union occasioned by the Protocol (caused by the provisions of Article 5 (4) of the Protocol and NI being effectively left in the EU Single Market subject to EU laws), it does not go so far as to prevent a further breach of the Act of Union occurring via Regulations made pursuant to the powers contained within the Bill.
3. Considering the conclusion at (2), it would be desirable if the Bill were to be amended to include a requirement that the exercise of any power to make regulations by a Minister of the Crown must be consistent with the Act of Union. If that simple tweak could be made, the Bill would present a more robust constitutional framework which protects the substance of the Union not only in the present, but in the future. This would allow unionism to have confidence that the Bill will ultimately provide the basis for a durable rather than merely temporary solution.
4. Notwithstanding the conclusions at (2), there remains an arguable doctrinal point around whether the ERG 'Star Chamber' analysis on the Act of Union at page 7 of

their report is in fact correct. They have held that due to the dual regulatory scheme (Red Lane-Green Lane) as per Clause 7, and the fact that goods travelling only to NI are not to be subject to following EU Law pursuant to Clause 8, that this fully restores Article VI of the Act of Union.

5. Article VI of the Act of Union provides:

That it be the sixth article of union, that his Majesty's subjects of Great Britain and Ireland shall, from and after the first day of January, one thousand eight hundred and one, be entitled to the same privileges, and be on the same footing as to encouragements and bounties on the like articles, being the growth, produce, or manufacture of either country respectively, and generally in respect of trade and navigation in all ports and places in the united kingdom and its dependencies; and that in all treaties made by his Majesty, his heirs, and successors, with any foreign power, his Majesty's subjects of Ireland shall have same the privileges, and be on the same footing as his Majesty's subjects of Great Britain.

6. The question which arises is whether Article VI is satisfied if citizens of Northern Ireland have the choice (via the dual regulatory system) to be on an equal footing, or not. This is further complicated by the fact that the existence of 'choice' may well in of itself confer an unequal footing in so far as citizens of Northern Ireland could choose to follow EU standards, and thus be able to trade in both the EU and UK internal market. This choice isn't open to citizens of Great Britain, therefore it is difficult to see how by default- regardless of which option is chosen- citizens of Northern Ireland are not on an unequal footing (perhaps more advantageous) than the rest of the UK.
7. This is not a straightforward question, and there is little doctrinal material upon which to rely. We therefore propose to take it in stages and start at the concluding limb of Article VI and work backwards.
8. The first question therefore is whether the citizens of Northern Ireland, in the treaty made with a foreign power, have the same privileges and are on the same footing as

Great Britain. The obvious superficial answer is no because this limb of Article VI relates to international treaties with foreign powers, and the Protocol plainly puts Northern Ireland on an unequal footing.

9. However, it is not within the gift of Parliament to unilaterally change a treaty, as this requires international law action, but it can plainly strip out the effect of a treaty in domestic law. As such, whilst the Withdrawal Agreement treaty should never have been made given it conflicted with primary legislation (see p.55 of *Miller 1 [2017] UKSC 5*), this Bill would as a matter of domestic law ensure that citizens of Northern Ireland have the same privileges as citizens of Great Britain.
10. This is so because the second limb of Article VI is worded in such a way whereby it directs itself to citizens of Northern Ireland having the same privileges and being on the same footing as citizens of Great Britain, rather than vice versa. So, as we will address *supra* the citizens of Great Britain may not be on an equal footing with Northern Ireland. In truth, this anomaly is probably just due to the fact that when drafting the Act of Union it was presumed (rightly) that it would be GB (the home of Parliament) making treaties, notwithstanding that is in of itself a bit confusing given that regardless of where Parliament sits, it represents the entire Union equally.
11. Nevertheless, we are prepared to accept that the breach of the second limb of Article VI is cured in domestic law by the provisions contained within the Bill. However, as set out at (3), it would be more robust if the Bill was amended to expressly prevent any future breach.
12. The Protocol flowed into domestic law via the ‘supercharged’ provisions within section 7A of the European Union (Withdrawal) Act 2018 which *inter-alia* provided that every enactment was to be read and given effect subject to the Withdrawal Agreement (and thus the Protocol). In effect this provision was a pipe through which the Protocol flowed into domestic law. It was these provisions that operated to “subjugate” the Act of Union.

13. In stripping out the effect of section 7A in relation to provisions of the Protocol which are now excluded (the vast majority of it), the Protocol can not flow into domestic law in a way which operates to override the Act of Union.
14. The next question is more complex. It is whether citizens of Great Britain and Northern Ireland are (i) “entitled” to the same privileges and (ii) are on an equal footing on matters of trade. We agree with the finding of the ERG Star Chamber that the breach of Article VI is cured if viewed through the prism that citizens of Northern Ireland will be- if the Bill is enacted and regulations thereafter do not undo the correction of the present breach- entitled to the same privileges as citizens in Great Britain and will be on an equal footing in relation to trade in this regard.
15. However, we believe on this discrete issue the ERG Star Chamber has fallen into error in the following way. The analysis at page 7 of their report looks at the Act of Union only through the prism as to whether Northern Ireland is on an equal footing and is entitled to the same privileges with Great Britain. But the error is immediately apparent; the existence of ‘choice’ means that Northern Ireland by default is in a more advantageous position than Great Britain, and therefore as a matter of the most compelling logic equal footing is impossible.
16. Therefore, given that the existence of the ‘choice’ within the dual regulatory scheme means that citizens of Northern Ireland are in theory in a more advantageous position than Great Britain, thus from a purist point of view the breach of Act of Union arguably remains.
17. Accordingly, whilst we are prepared to accept that the guarantees in Article VI of the Act of Union are restored by the Bill (if enacted) in relation to Northern Ireland’s interests, it remains true to point out that on a strict reading of Article VI there remains a technical breach in so far as citizens of Great Britain are in a disadvantageous position *vis-à-vis* Northern Ireland.
18. It is for citizens of Great Britain to raise the issue via their political representatives as to whether they are content with the interpretation of the Act of Union which permits,

via the choice of the dual regulatory scheme, for those in Northern Ireland to in theory at least have a potentially more advantageous position.

19. We are prepared to endorse the Bill in regards the Act of Union on the basis of the following conditions being met: (i) that Northern Ireland is not to be placed in a disadvantageous position on matters of trade *vis-à-vis* Great Britain (such as regulatory divergence within the UK Internal Market); (ii) that the Bill will be amended to require that the use of any powers to make regulations conferred by the Bill must be exercised in a manner consistent with the Act of Union; (iii) that all goods remaining within the UK Internal Market flow freely without any impediment; and (iv) Northern Ireland is not to be subject to EU laws via being effectively left in the EU single market.
20. The Bill on its face would seem to satisfy (i) and (iv) *supra*, with further clarification (not least in relation to seeing the exact provisions of the relevant regulations to be made) required on (iii). The key issue is (ii), namely securing an amendment to prevent future breaches of the Act of Union, which can be achieved via a provision requiring that in the exercise of any power conferred by the Bill, a Minister of the Crown must act compatibly with the Act of Union.
21. That being the key constitutional issue, our other conclusions are relatively straightforward. We welcome the exclusion of the CJEU, the restoration of VAT powers to the sovereign UK Government and as has been addressed in relation to the Act of Union, the exclusion of the 'at risk' concept in Article 5 (4) of the Protocol.
22. The Bill is plainly worthy of support as a key staging post. It is not a solution in of itself, but an important and necessary step along the way. Once enacted, the next stage towards a lasting and durable solution will be ensuring the relevant regulations are compatible with Northern Ireland's constitutional status, and thereafter to work to remove the existence of the 'red lane' concept via (i) mutual enforcement or (ii) moving the 'red lane' to the land border.

23. We recommend support for the Bill, representing as it does a significant dismantling of the core elements of the Protocol. We do so based on the numerous caveats within this report, and on the express basis that it is a staging post, with further action required to arrive at a durable solution and achieve the complete removal of all residual tenets of the Protocol and association Irish Sea border.

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