

# Power-sharing or Protocol

*The Three Phases of Action*

**Unionist Voice Policy Studies**

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## Introduction

The solemn commitment between political unionism and the unionist/loyalist electorate is that there will be no power sharing in Northern Ireland until the Protocol is removed. This political action (or, in regards power sharing, inaction) provides unionism with the only lawful leverage at its disposal with which to resist the continued imposition of the Protocol, which subjugates Northern Ireland's place in the Union.

It is trite to point out that 'power sharing or Protocol' is a relatively binary choice, but it is necessary to set out precisely what must happen before a return to power sharing can be considered.

We have termed this the 'Three Phases of Action'. The completion of any one of the phases (or elements therein) is not, in of itself, decisive action. It is only when all phases are completed, that the proper context exists for unionism to engage in an internal *conversation* about re-entering power sharing arrangements.

This was recognised by the DUP in their statement following the election of Lis Truss as the new leader of the Conservative party. In his statement, the DUP leader Sir Jeffrey Donaldson stated that the Protocol Bill was "*only enabling legislation*". In an additional oral interview, Sir Jeffrey confirmed the DUP would not be taking anything on trust. This plainly means that until all phases of action are completed, there can be no power sharing.

It must nevertheless be kept in mind that what has been seen cannot be unseen. The unionist community can no longer claim to be blind to the fundamental imbalance at the heart of the Belfast Agreement, illuminated by the revelation that the principle of consent is purely symbolic (in relation to Northern Ireland's place in the Union, *you can change everything but the last thing*, the last thing being merely the final formal handover of sovereignty) rather than offering any substantive protection to the Union.

This creates a problem. If it transpires that the Three Phases of Action are satisfactorily completed, there remains the fundamental imbalance within the constitutional governance arrangements. It would seem absurd to suggest that unionism should simply 'overlook' this key issue.

For devolution within the terms of the Belfast Agreement to be durable it must, at its core, possess the necessary balance. The Belfast Agreement- so long as the principle of consent is purely symbolic- presently does not do so. Not even those who are the most ardent unionist supporters of the 1998 Agreement can resist this point, given that the entire foundation of pro Agreement unionism was built upon the supposedly solid foundation of the principle of consent. It has transpired (as recognised by the late David Trimble) that foundation is in fact quick-sand.

Therefore, in the space between the completion of the three phases of action and a return to devolution, consideration must be given to steps which should be taken to ensure durable and balanced governance arrangements for Northern Ireland.

## Draft

Publish the NI Protocol Bill

and

Publish the regulations that will replace Protocol 'excluded provision/s' in domestic law, ensuring that they are consistent with the Acts of Union.



## Act

The Northern Ireland Protocol Bill receives Royal Assent

\*The Bill must pass at least as introduced, but preferably strengthened to guard against any future breach of the Act of Union

## Commence

Bring all the provisions of the NI Protocol Bill into force, stripping the Protocol out of domestic law via 'excluded provisions'



## Deploy

Bring into force the regulations to replace the Protocol in domestic law

## Assess

Overall assessment of the new arrangements against the DUP's seven key tests

## **Phase One - Draft (NI Protocol Bill and relevant regulations)**

At the time of writing, we are in this phase. The Northern Ireland Protocol Bill has been published (but has no effect until it becomes law), and its terms set out the framework within which an acceptable replacement for the Protocol *could* be arrived at.

The Bill, once commenced, will exclude from domestic law the most constitutionally offensive parts of the Protocol. This is termed 'excluded provision'. It further provides enabling powers both to deal with the excluded provision process in the future (and, in theory this could permit that which has been taken out to be put back in) and to- by regulations- replace that which has been excluded as a matter of domestic law.

Whilst the Bill has been published (and is presently before the House of Lords), the regulations to replace the 'excluded provision' which the Bill strips out of domestic law have not.

This is a matter of concern. The former Secretary of State Brandon Lewis (who initially deceptively pretended there was no Irish Sea Border) confirmed to Sir Jeffrey Donaldson that the making of regulations would be consistent with the Acts of Union, however this does not have the force of law. There is nothing in the Protocol Bill which requires that the exercise of powers therein (once it becomes an Act) be in a manner consistent with the Acts of Union.

Therefore, whilst the Bill- once it becomes an Act and its core sections are subject to the necessary commencement order- remedies the present breach of the Acts of Union, there is nothing to prevent a future breach.

Put simply; the Bill strips out the constitutionally offensive parts of the Protocol (by making them 'excluded provision' and thus preventing them flowing from the international treaty into domestic law through the section 7A of the European Union (Withdrawal) Act 2018 'conduit pipe'). This remedies the subjugation of the Acts of Union. It does not however prevent that which replaces the excluded provision from causing a new breach of the Acts of Union.

The way in which the commitments made by the Secretary of State could obtain the force of law and thus allay concerns is by amending Clause 22 of the Bill to insert a requirement that the exercise of any powers conferred by its provisions be exercised in a manner compatible with the Acts of Union.

As it presently stands, there can be no assessment as to the compatibility of the proposed regulations with the Acts of Union, because they have not been published.

## **Phase Two – Act and Commencement**

The Bill once it receives Royal Assent becomes an Act. This is an important staging post. It then has the force of law.

At this stage it will be necessary to assess whether the Bill has become law in the same manner (or in stronger terms) as it was introduced, or whether it has been weakened in any way. It is difficult to see how Phase Two could be deemed satisfactorily completed if the Bill becomes law in a different manner than it was initially presented, other than if it does so having been strengthened (such as amending Clause 22 to ensure the exercise of powers to make regulations be consistent with the Acts of Union).

However, once the Bill becomes an Act, this has no immediate effect on the Protocol.

It in fact has no effect at all until a Minister of the Crown exercises the powers in Clause 26 (3) to bring the relevant provisions (and all of them) into force. Only Clauses 21-26 come into effect at the point of Royal Assent, none of which have any effect on the continued operation of the Protocol.

It should be said that commencement provisions are not at all unusual. They are contained in most Bills. In this present case there is such necessity for the provisions to come into force, that this should happen as a matter of urgency.

If the provisions are not brought into force, then the route to power sharing doesn't even get off the ground in the second phase. The bringing into force of the relevant provisions is an absolute necessity, and without this action, no progress can be made.

### **Phase Three- Deploy and Assess**

This is the final phase, and only arises for consideration if Phase One and Two have been satisfactorily completed by virtue of the necessary action having been taken.

If in the 'draft' phase the Government take the sensible approach of ensuring the Regulations they plan to deploy are consistent with the Acts of Union, then come the point of deployment this should be relatively uncontentious and could be speedily passed to the satisfaction of unionism.

It is suggested in Phase One that the initial draft regulations are published alongside the Bill. This is so because it enables early consideration as to their acceptability, or otherwise.

However, if the Regulations are only published at the point of deployment, this will cause delay and, depending on their substance, could operate as a fatal impediment to consideration of the restoration of power sharing. This is so because once published, there will need to be time given to consider the broad constitutional impact of the new arrangements.

If this consideration leads to the conclusion that the new arrangements are constitutionally inconsistent with Northern Ireland's integral place within the Union, then it is obvious to point out that this will prevent any consideration of the restoration of power sharing.

A proper assessment as to whether the new arrangements satisfy the DUP's seven key tests can only be carried out once (i) the Protocol Bill becomes law; (ii) all its provisions are commenced; and (iii) satisfactory regulations consistent with the Acts of Union are laid to replace that which is excluded from domestic law.

In advance of this, the proposed solution cannot be measured against the seven key tests, because the core of the solution remains unknown.

## Conclusion

The Government's basis of necessity, they say, for acting on the Protocol is primarily the collapse of power sharing in Northern Ireland and the risk to peace this causes.

It is obvious to point out therefore that restoring power sharing, in advance of the necessary action to remove the Protocol having been completed, would remove the necessity for such action. This approach is circular, which can only lead to perpetual constitutional corrosion.

The suggestion, trumpeted by only the UUP, that unionism should return to the Assembly/Executive is foolish and based upon a fundamental misunderstanding of the present political context, and of the constitutional impact of the Protocol.

In equal terms, the UUP's suggestion that the Government should "*negotiate*" with the EU is equally absurd and rooted in a weakness evidenced by the consistent need to seek to appease those who demand the subjugation of Northern Ireland's place within the Union. I suggest to the UUP that the late David Trimble's affidavit in the Protocol case should be mandatory reading for all those speaking publicly on behalf of the party, not least the present leader.

There remains no basis for power sharing, and this position will not change until the Three Phases of Action have been satisfactorily navigated.

Whilst the DUP have not used the terminology of the Three Phases of Action concept (which is unsurprising as it has only been developed), it is nevertheless entirely consistent, and we would suggest simply puts a structure to, their clear commitments that only decisive action to remove the Protocol will be enough.

If all Phases of Action are completed, there remains the fundamental issue set out in the introduction to this briefing paper, namely the imbalance at the heart of the Belfast Agreement, which must be resolved.

It may be the case that a separate parallel process is required to restore this balance, but in the absence of *at the very least* a time-limited process, with a clear commitment to amending section 1 of the Northern Ireland Act 1998, then this would seem to be another distinct impediment to any self-respecting unionist being able to advocate a return to power sharing.