‘Standing Firm’

Achieving unionism’s core objectives

Unionist Voice Policy Studies

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Foreword

This latest report by UVPS has been compiled by our constitutional working group, and endorsed by our central committee. It reflects- in our view- the core objectives which unionism and loyalism have collectively agreed, and what these objectives actually mean.

There has been a consistent, orchestrated and at times a malicious effort to bully and force unionism- particularly the DUP- into what can only be described as parley and surrender. It is welcome that unionism and loyalism via the TUV, PUP, grassroots movements and Loyal Orders have remain unmoved by this pressure and continued to stand united.

The UUP's abandonment of any pretence of genuine opposition to the Protocol has been obvious for a long time, but was illuminated in startling brightness by their recent pact with Alliance and the SDLP in Ards and North Down, whereby the UUP voted against fellow unionists in order to not only implement the Protocol, but in fact to enhance said implementation.

Given the intense pressure on the DUP from sources external to unionism (the UUP doesn't really count as pressure, because within the unionist family they have slipped into irrelevance) including the UK Government, a hostile Irish Government, a partisan the Biden administration and a choir of self-appointed elitist academics, commentators and the 'twitterati', it is to their credit they have stood firm- solidified by the political support of the TUV ensuring unionism's backbone remains strong.

The promises which have been made are well known. They have been set out in seven key tests, in numerous statements and public and Parliamentary commentary. There can be no one in any doubt as to the basis upon which the DUP's mandate rests. Regardless of what those external to the unionist family say, there is no DUP mandate to return to Stormont whilst the Protocol remains in place and in consequence the Union remains subjugated with Northern Ireland partitioned from the rest of the United Kingdom via both the hard (red lane) and soft (green lane) versions of the Irish Sea border.

In equal terms, there is no mandate for seeking to shave down the core unionist objectives, or tinker with that they really require and mean in order to be met, in pursuit of a 'compromise' deal. There is no compromise to be made: the Protocol and subjugation of the Union is an injustice imposed upon unionism. You do not resist or respond to an injustice by accepting a little less injustice.

Put another way; if a robber breaks into your home and plunders it, an offer from the robber to return some of your possessions is hardly a 'good deal'.

Or, for those wishing to collaborate in implementing the subjugation of the Union, a more vivid analogy is apt.

The Protocol is a fire which has been unleashed upon the house of Union. If left, it will burn the house to the ground. In order to resist that, no sane person would think

it a good idea to collaborate with the fire by pouring fuel on it, whilst- somewhat inexplicably- at the same time shouting ‘we must do this to save the house’.

There can be no compromise between the arsonist and the fireman.

This paper seeks to crystalise and provide clarity as to precisely what is required. It, without any reluctance, sets out to dismantle the tropes and close off any pathways to a fudge or a ‘compromise’.

This is the greatest peril the Union has faced since 1912, and the most egregious existential threat to Northern Ireland there has ever been. It is time for drawing a line in the sand. Over 25 years unionism has give, and give, and then been expected to give some more. It is long past time that those who advocating the perpetual giving that eventually there will be nothing of the Union left.

I repeat, again, there is no compromise to be made between the fireman and the arsonist, and unionism should not try and- in different contexts over the past 25 years- should never have tried.

Jamie Bryson

Director of Law and Public Policy

Unionist Voice Policy Studies

Executive summary

(i) Unionist leaders have recognised via the Ulster Day 2021 declaration and repeated comments that the Acts of Union must be restored. This means restoring the subjugated provisions to their pre-Protocol status, and- going forward- ensuring interpretative supremacy of the Acts of Union. This must mean disapplying section 7A of the EUWA 2018.

(ii) The restoration of the Acts of Union requires both an end to the application of EU law for goods remaining within the UK internal market or going to a non-EU country, and a removal of the Irish Sea customs border which has both a hard (red lane) and soft (green lane) manifestation. However, both represent an Irish Sea border.

(iii) There is no available subjective interpretation or creation of 'rights' to be drawn from Article 6 of the Acts of Union, rather the fundamental rights are enshrined within the text of Article 6 itself and therefore nothing less than the full restoration of that statutory provision will achieve the core unionist objective of restoring our foundational constitutional statute.

(iv) The necessary solutions requires removing the offensive provisions of the Protocol, and fundamental change to the Windsor Framework. If there isn't a willingness to engage with this reality on the part of the Government, then there is nothing to negotiate on.

(v) Any unionist who advocates returning to Stormont without the Union having been restored is required, as a matter of law, to collaborate in perpetually and dynamically implementing the Protocol and thus the subjugation of the Union. This is a position no self-respecting unionist could conceivably adopt.

The promise of "unalterable opposition" to the Protocol

On Ulster Day 2021 the leaders of the four unionist parties (DUP/TUV/PUP/UUP) signed a joint-declaration, annexed to which was an explanatory note setting out how the declaration should be interpreted.

Let us start by breaking down what the pledge means, and its implications, starting first with the declaration itself:

"*We, the undersigned Unionist Political Leaders, affirm our opposition to the Northern Ireland Protocol, its mechanisms and structures and reaffirm our* ***unalterable position*** *that the Protocol must be* ***rejected and replaced by arrangements which fully respect Northern Ireland's position as a constituent and integral part of the United Kingdom****".* (my emphasis)

Two key issues emerge. Firstly, the position of rejecting the Protocol and demanding its replacement is *unalterable*. That means, in short, the Protocol must go. There is no room in that for 'solutions within the Protocol', 'the best of both worlds' or 'exploiting potential benefits', all of which would require to keep at least parts of the Protocol and thus would be entirely inconsistent with the unalterable position that the Protocol "*must be rejected and replaced*".

Secondly, as we will see from the explanatory note, respecting Northern Ireland's position within the United Kingdom is denoted by the continued application of the Acts of Union 1800.

The Protocol, primarily in relation to Article VI, conflicts- and more than that purports to subjugate- the Acts of Union. It is elementary to point out that Northern Ireland being within the orbit of the EU and UK internal markets- the 'best of both worlds'- is entirely incompatible with the equal footing clause in Article VI.

There was previously some mischief making which sought to suggest 'best of both worlds' would be a suitable landing ground.

If any unionist supports the dual access position, then they must confront the consequences of that position, which causes- by their own yardstick- constitutional change.

It would seem to me to be an extraordinary position for any unionist party to support fundamental change to the constitutional status of Northern Ireland within the United Kingdom.

The declaration was also accompanied by an explanatory note. Here are some key extracts (italicised) with commentary on each.

Explanatory Note:

Northern Ireland is a constituent part of the United Kingdom of Great Britain and Northern Ireland by reason of the Acts of Union 1800 and the continuing express will of its people.

This means that the Union is the Acts of Union 1800, and the "*continuing express will of its people*" can only refer to the principle of consent, embodied (in theory at least) in section 1 (1) of the 1998 Act.

The implication is obvious. Anything that interferes with the Acts of Union (such as the seeming UUP position of dual market access) amounts to constitutional change in breach of the principle of consent.

The Union is both economic and political.

This is an elementary point, and circles back to the first paragraph of the explanatory note. The political and economic Union is Article III and VI of the Acts of Union.

The Belfast Agreement set the conditions on this island for the operation of two separate jurisdictions in order to promote peace, reconciliation and place the people at the heart of any decisions that are made about the sovereign status of Northern Ireland. The Belfast Agreement gave assurance against change without consent and guaranteed equilibrium as between East/West and North/South arrangements. Yet, under the Protocol the East/West relationship has been severely undermined, again without consent. Furthermore, the Protocol is in conflict with the Acts of Union – as declared recently in the High Court.

The clear express implication of this paragraph is that the Protocol causes *"change without consent"*. That can only therefore mean a breach of the principle of consent (section 1 (1) of the 1998 Act), which according to the above paragraph was a core assurance of the Belfast Agreement, and so it follows that given section 1 (1) of the 1998 Act has been shown not to guard against such fundamental change, then it plainly is fatally flawed and thus the fundamental basis of the Belfast Agreement is unsustainable.

On that footing, which is simply a matter of the most compelling logic, how therefore can any unionist party continue to operate the institutions of the Belfast Agreement, when the core assurance for unionists has been shown to be a deceptive snare?

I should note the UUP, represented via Steve Aiken, had the very argument advanced on their behalf in the High Court Protocol proceedings that section 1 (1) of the 1998 Act was a "*deceptive snare*".

It seems to me to be an act of constitutional self-harm on an epic scale to continue operating the institutions of the Belfast Agreement in circumstances which by unionism's own yardstick (measured by the submission in the Protocol case and the paragraph in the declaration around change without consent) have shown the core guarantee for unionists to be a deceptive snare.

The economic union is grounded in Article 6 of the Acts of Union, which guarantees unfettered trade on the same footing between and within all parts of the United Kingdom. The Northern Ireland Protocol fundamentally alters the arrangements within the Belfast Agreement by making Northern Ireland subject to European Union laws and processes of a Single Market for goods, under a European Union customs code and VAT regime, with the rest of our nation decreed a "third country" when it comes to trade and the import of goods.

Again, this paragraph is emphatic on Article VI of the Acts of Union. It therefore- beyond any doubt- precludes any unequal footing (which means NI cannot be in either a more advantageous or disadvantageous position- such as having dual EU and UK market access).

Thus, going forward, any agreement which fails to ensure a proportionate and equitable solution which respects the sovereignty of the United Kingdom and restores our unfettered place within the Internal Market, cannot command the support of the unionist community.

This, again, is emphatic and the effect put beyond any doubt when read in conjunction with the rest of the explanatory note and the declaration itself.

The effect is this: (i) The sovereignty of the United Kingdom means there can be no scope for EU law-making or judicial authority via the ECJ over NI; (ii) restoring NI's place within the Internal Market means restoring Article VI of the Acts of Union, and that means NI must be outside the EU single market and on equal footing with the rest of the UK, which obviously prohibits dual market access.

The Act(s) of Union is the Union

The Acts of Union are the fundamental bedrock of the Union. As Lord Trimble said in 1998: "*the Act(s) of Union…is the Union*." It follows therefore that the subjugation and suspension of the Acts of Union brought about the Northern Ireland Protocol, and embedded by the Framework, is a constitutional assault on the Union itself.

It is well established that the Protocol Framework is inconsistent with the Acts of Union, however due to section 7A of the EU Withdrawal Act 2018 ('EUWA 2018') which acts as a conduit pipe through which the Protocol flows into domestic law, it is the Protocol (and Framework) which has complete supremacy over all law and thus subjugates and suspends Article 6 of the Acts of Union.

However there has been much less discussion around what precisely brings about the inconsistency. The High Court and Court of Appeal (whose decision on this point was not interfered with by the Supreme Court) in *Allister et al* identified the key issues.

Colton J at first instance said at paragraph [62]:

> *[62] Although the final outworkings of the Protocol in relation to trade between GB and Northern Ireland are unclear and the subject matter of ongoing discussions it cannot be said that the two jurisdictions are on "equal footing" in relation to trade. Compliance with certain EU standards; the bureaucracy and associated costs of complying with customs documentation and checks; the payment of tariffs for goods "at risk" and the unfettered access enjoyed by Northern Ireland businesses to the EU internal market conflict with the "equal footing" described in Article VI.*
>
> (underlining added)

This can be summarised as three core issues: (i) the continued application of EU law/standards; (ii) the Irish Sea customs border; (iii) the 'privileged' access to the EU internal market.

In the Court of Appeal, the judgment of Keegan LCJ and Treacy LJ dealt with the matter in the following way at paragraph [185]:

> *[185] However, the respondent did not offer much resistance to the argument that changes have been effected to trading arrangements by EUWA 2018. In our view there is also a valid argument that the EUWA 2018 as amended conflicts with the same footing provision in Article VI because the citizens of Northern Ireland remain subject to some EU regulation and rules as part of the withdrawal framework which does not apply to other citizens of the United Kingdom. These are the provisions in Article 5-10 of the Protocol which are discussed in foregoing paragraphs.*
>
> (underlining added)

Whilst expressed in more general terms (arguably in fact encompassing the entirety of Article 5-10 of the Protocol as being a source of inconsistency with Article 6) it is clear from the Court of Appeal that the continued application of EU law is the fundamental issue, and it is from this that the Irish Sea customs border flows.

In his concurring judgment, McCloskey LJ with typical clarity put the matter beyond any doubt at paragraphs [325] – [328]:

> *[325] The effect of the Protocol is that NI on its own, without GB, is in regulatory alignment with an extensive body of EU rules governing manufactured and agricultural goods: per Article 5(4) and Annex 2. This is conveniently summarised by Professor Stephen Weatherill in McCrudden (op cit), pp 71 – 72. Annex 2 to the Protocol lists 287 EU legislative instruments: a non-static list which is subject to amendment and enlargement. The NI/EU alignment also embraces EU customs regime trade rules, VAT and excise rules, the single electricity market and specific state aid rules: Protocol, Articles 5 to 10. All of this means that the treatment of NI products differs from that of GB products. By virtue of these divergent regulatory regimes there is a customs and regulatory border between NI and GB. In consequence, NI belongs more to the EU internal market than the UK internal market. Resulting alterations in trade patterns are inevitable. The trial judge, Colton 107 J, commented that the evidence of this impact is vague, adding that the advantages of NI's access to the EU internal market must not be overlooked.*
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> *[326] By way of resume, the Protocol has the following characteristics and effects. First, it represents an attempt to preserve the soft texture, or invisibility, of the NI/ROI border pre-Brexit. This is both economically and politically significant. Second, the de facto external border between NI and GB is located within the territory of, and policed by, a non-Member State (the UK). Third, the economic freedoms and internal market rules affecting NI are divided. Fourth, the border between NI and GB is of the trade variety and is not an international one. The effect of all of the foregoing is that the NI/GB geographical border has become hardened, in contrast with the arrangements of the preceding three centuries. In overarching terms, the Protocol and its associated arrangements were driven by the EU's need to preserve the integrity of its heavily regulated internal market which, in turn, required protection by an external border. In basic terms, the international deal, ultimately, struck between the UK and the Union sacrificed the long standing soft border between NI and GB (dating from the Act of Union) and altered internal trading arrangements, while simultaneously perpetuating the application of a discrete and potentially evolving corpus of EU laws in NI.*
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> *[327] In a nutshell, the Protocol creates a customs and regulatory border between NI and GB in those specified areas of trade to*

which it applies. It positions NI primarily within the EU internal market rather than that of the UK. With hindsight, there is general agreement that in the aftermath of the Brexit referendum vote there were only three choices: (i) no hard border between NI and GB; (ii) no hard border between NI and ROI; and (iii) regulatory autonomy for the whole of the UK. Only two of these outcomes were achievable (see McCrudden, op cit, pp 5, 71 and 72). The solution effected by the Protocol enshrines a classic compromise, the effect whereof is to subject NI to a uniquely regulated trading regime.

[328] Outwith the provisions of the Protocol and the transition period having elapsed, the continuing impact of EU law in NI (and, indeed, the UK as a whole) is probably through the "retained" EU law & case law provisions of the withdrawal statutes. However, in those areas to which Articles 5 – 10 of the Protocol apply, specified provisions of EU law govern with unabated force. This means that in those areas the courts must apply the principle of the supremacy of EU law, make Article 267 TFEU referrals in relation to issues arising under Articles 5, 7 – 10 and 12(2) of the Protocol, apply the general principles of EU law, give effect to the CJEU jurisprudence in specified respects, observe the CFR and finally, it would seem, adjudicate in Francovich claims for damages. See McCrudden (op cit), p 127, per Professor Anthony.)

(underlining added)

It is clear and obvious that the continued application of EU law which must continue "*with unabated force"* is the core breach of Article 6 of the Acts of Union. It follows, as a matter of the most obvious logic, that in the absence of ending EU law, the breach of the Acts of Union cannot be cured.

And, obviously, EU law- and the subjugation of Article 6- cannot be undone without fundamentally altering the Protocol and/or disapplying section 7A of the EUWA 2018.

Any legislation which doesn't disapply or include a 'notwithstanding' section 7A clause is worthless, because it will always yield to the Protocol and thus will be legally incapable of ending EU law, removing the Irish Sea border which flows from it and in consequence restoring the Acts of Union.

In recent weeks there has been a nuanced but notable effort to contrive a new concept of 'fulfilling rights under Article 6'. The underlying premise of this is that from Article 6 subjective 'rights' can be extracted, and it is these which could be 'restored and protected'.

That is arrant nonsense and a (poor) effort at deception. Article 6 of the Acts of Union confers what it confers: equal footing in matters of trade. You cannot extract from Article 6 some subjective version of 'rights', but leave Article 6 itself subjugated and in suspension. This is a rather transparent effort to disconfigure unionism's central

objective (and the DUP's first test) in order to bend it to fit into the Protocol Framework, and thus yield to it. This is plainly unacceptable.

Therefore, restoring Article 6 of the Acts of Union must mean, in simple terms, restoring Article 6 of the Acts of Union to pre-Protocol status, and reversing the supremacy of section 7A in order that it yields to the Acts of Union rather than the other way around.

The Irish Sea border

The Irish Sea border itself flows from the continued application of EU law (breaching the Acts of Union).

That the Irish Sea border remains in force is beyond any rational dispute. The 'green lane' does not repair the constitutional damage, but rather embeds it. This is so because even for goods moving solely within the UK internal market, in order to even access the 'green lane' customs processes must be complied with (see Article 9 (2) of joint committee decision 01/2023) and authorisation must be obtained (see Article 7 ibid).

It is impossible to remove the Irish Sea border without removing *inter alia* Article7 and 9 (2) of 01/2023. This, of course, requires changing the Framework: something the Government has said it will not do. If they remain faithful to that position, then its impossible to arrive at a solution which is consistent with the unalterable commitments made by political unionism to the electorate. That being so, there is no basis upon which power sharing could be restored.

The constitutional folly of the 'best of both worlds' concept

Having addressed, in general terms, the two core issues of (i) the breach of Article 6 of the Acts of Union; and (ii) the continued Irish Sea border (both of which flow from inter alia the continued application of EU law) it is worth touching briefly on the issue of 'best of both worlds', or put another way (as it was by Colton J) Northern Ireland have privileged access to the EU single market.

This can be quickly addressed: the 'best of both worlds' theory was always a deceptive snare, and it is regrettable that some unionists of prominence fell into that trap. In order to have the so-called 'best of both worlds', NI must comply with EU law and thus be at least semi-detached (but in reality in time fully detached) from GB. This is obvious because NI would be initially straddling two regulatory regimes (although "belonging more to the EU market than the UK market" as per McCloskey LJ), but the centre of gravity- due to the continued supremacy of EU law- would inevitably lead to increased diversion of trade and thus NI would become bound into an economic United Ireland.

Therefore, proponents of privileged access to the EU single market for NI are unwittingly advocates for the incremental binding of NI into an economic United Ireland and a border in the Irish Sea because, it is rhetorically asked, how could NI have dual market access without a customs border between GB and NI?

Moreover, it is- as identified by Colton J- wholly inconsistent with Article 6 of the Acts of Union. There is no credible suggestion that it is anything otherwise. At times some have attempted to create wriggle room by suggesting Article 6 didn't require 'equal footing', but instead just that no part of the UK could be treated detrimentally.

It requires little analysis to see how intellectually incoherent this suggestion is. If NI has 'privileged' access to the EU single market, and GB does not (hence NI's 'privilege') then how is the whole Union on an "equal footing in matters of trade"?

Unionists must never collaborate in implementing the subjugation of the Union

There have further been suggestions that unionists ought to collaborate in the constitutional damage set out above, by implementing it and- somehow- fighting from within. This suggestion is the height of foolishness and could only be perpetuated by someone lacking even the most elementary understanding of the Protocol and its embedding Framework.

If in an Executive, unionists are legally required to implement the Protocol Framework. This has been put beyond all doubt in *JR181 (3) and Edward Rooney's* application (the 'Poots case'). How is it supposed one can credibly claim to be resisting that which one is simultaneously implementing?

The UUP's version of challenging the Protocol Framework was given an illuminating test run last month in Ards and North Down Council. On the basis of claiming (erroneously) it was a legal obligation, the UUP joined with Alliance and the SDLP to vote (against all other unionists) for not only the implementation of the Protocol Framework, but for a project to enhance said implementation.

If this is an example of the promised 'fighting from within', then it is assumed all unionists will be capable of seeing through this suggestion.

In equal terms, the DUP have repeatedly committed- and their mandate is based upon- seven key tests. These tests mean what they mean, they cannot be bent, twisted or disconfigured to turn black into white. As pointed out by Nigel Dodds in recent days, there is no second chances: a fudge will not suffice.

Restoring the Acts of Union and removing the Irish Sea border means what it means. And, as set out in this paper, the requirements to achieve those objectives are clear. Those seeking to finesse those requirements do a disservice to unionism, and the Union.

It is important that time is not wasted on trying to find a way 'around' the seven key tests, and rather focus is on meeting them in substance and reality. UVPS, and we are sure others within political and grassroots unionism/loyalism, will continue to hold firm to the fundamental and unalterable commitments made, and remain alert to efforts to- whether via nuance or manoeuvring- contrive a way by which to subjugate the Union whilst pretending to have secured the opposite.

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