

POSITION PAPER

Restoring Constitutional Balance

Progressive Unionist Party

Public Release 17 December 2021

Introduction

[1] In our constitutional statement, we provided a commitment to engage in a process of lobbying and research designed to develop solutions to correct the inherent imbalance within the Belfast Agreement, and ultimately to strengthen the Union.

[2] We provide this position paper for the Government’s consideration on behalf of our party. In line with our commitment to transparent and accountable lobbying on these issues, we will be publishing this position paper for public consumption.

[3] This position paper accordingly sets out the Progressive Unionist Party (‘PUP’) suggestions in regard to legislative amendments, and policy developments, which are required to restore balance to the Belfast Agreement. As set out in detail within this party’s constitutional statement, we believe that the interpretation which has been consistently applied to the Agreement over the past twenty-three years, and specifically in relation to the Protocol, has led to a fundamental imbalance which has caused this party to withdraw support for what the Belfast Agreement has morphed into.

[4] We seek a rebalancing and restoration of the commitments provided to the unionist community in 1998. It can not sustainably be the case whereby the Agreement advances upon the ethos that every constructive ambiguity is to be resolved in favor of nationalism.

Amendments laid to the Northern Ireland (Ministers, Elections and Petitions of Concern) Bill in the House of Lords on 13 December 2021

[5] We support the amendments laid by Baroness Kate Hoey and Lord Dodds in the House of Lords on 13 December 2021.

[6] These amendments proposed the following amendments to the proposed provisions in the Northern Ireland (Ministers, Elections and Petitions of Concern) Bill:

To add to the proposed amendment to Section 42 of the Northern Ireland Act 1998 (‘the 1998 Act’) the following as subsection (9) and (10):

(9) This section has effect notwithstanding section 7A of the European Union (Withdrawal) Act 2018.

(10) No inference is to be drawn from subsection (9) as to whether this section

would otherwise have effect subject to section 7A of the European Union (Withdrawal) Act 2018.

[7] The impact of these amendments is not difficult to discern. Subsection (9) would ensure that that the general words of Section 7A of the European Union (Withdrawal) Act 2018 ('the 2018 Act') cannot subjugate the cross-community consent mechanisms which should be available in relation to a matter coming before the Assembly. This guarantee of cross community protections springs from Strand One (5) (d) of the Belfast Agreement, and finds expression in domestic law by Section 42 of the 1998 Act.

[8] In effect, subsection (9) would prevent Article 18 of the Protocol having direct effect in so far as it purports to envisage a simple majority vote in the Assembly and in consequence the disapplication of cross community consent in relation to the continuation of the Protocol.

[9] However, it is not accepted that Section 7A of the 2018 Act does in fact have the lawful effect of subjugating Section 42 of the 1998 Act. It is the Government who has advanced such a contention in the High Court (which also applies to the Acts of Union which we will develop *infra*), and therefore subsection (10) essentially makes clear that no inference is to be drawn from the insertion of subsection (9); in short it is a belt and braces exercise to defeat the contention of the Government as to the effect of Section 7A of the 2018. The effect would be that even if they were right (which is not accepted), then such a position would be rendered unsustainable by the insertion of subsection (9).

[10] The amendments laid also sought the repeal of Section 56A and Schedule 6A of the 1998 Act. The insertion of these provisions via unilateral amendments to Northern Ireland's constitutional statute were inserted by the Secretary of State by regulation- relying on the power conferred by Section 8C of the 2018 Act to make same- as a means of giving effect to Article 18 of the Protocol in domestic law.

[11] However, Section 10 (1) (a) of the 2018 Act required that in making any regulations a Minister of the Crown would act in a manner consistent with the Belfast Agreement. It is worth setting out the provision in full:

"In exercising any of the powers under this Act, a Minister of the Crown or devolved authority must (a) act in a way that is compatible with the terms of the Northern Ireland Act 1998"

[12] Moreover, Article 18 (2) of the Withdrawal Agreement itself committed to consent being provided in a manner:

"consistent with the 1998 Agreement"

[13] It appears obvious to point out that one does not act in a manner consistent with the Belfast Agreement or the 1998 Act by laying regulations which nullify one of its core protections (cross community consent- s42 of the 1998 Act and Strand One (5) (d) of the Belfast Agreement).

[14] We commend the amendments which have to date been laid in respect of the cross community consent mechanisms and urge the Government to seriously engage with these suggestions and recognise that such amendments could have a significant impact in regards rebalancing the Belfast Agreement and alleviating some concerns in regards to democratic consent in a manner consistent with that which was agreed in 1998 (see Strand One (5) (d) of the Belfast Agreement).

Restoring the constitutional protections for the substance of NI’s place in the Union

[15] As canvassed in detail within our constitutional statement (and we do not intend to repeat the position in this paper) we are deeply concerned as to the apparent weakness of the principle of consent *vis-à-vis* Northern Ireland’s constitutional status. It is worth at this juncture setting out the principle of consent, given effect by Section 1 (1) of the 1998 Act, in full:

“(1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1”

[16] The heading of this section is “Status of Northern Ireland”. There are two interpretive possibilities in Section 1 (1) of the 1998 Act. One is that this protection guards the *substance* of the Union, the other is that this provision is merely *symbolic* in so far as it only directs itself to the severing of the last tie. In the latter interpretation *you can change everything but the last thing* in regards Northern Ireland’s constitutional status as part of the United Kingdom.

[17] As one of the signatories to the multi-party Agreement this party is firm in our position that in 1998 the key element of the Agreement which we advocated for was the principle of consent. This party understood, and we note that Lord Trimble has consistently made clear his party (UUP) also understood, that the principle of consent was a meaningful protection which directed itself to the substance of Northern Ireland’s place in the United Kingdom. In short, for unionism, the position was *you can’t change anything until you change the last thing*.

[18] It appears an elementary statement of reality to point out that no self-respecting unionist (and most certainly not this party) would have supported the Agreement had it been clear that the principle of consent was merely symbolic and in fact lawmaking powers over Northern Ireland could be handed to a foreign jurisdiction (with an Irish dimension), legal jurisdiction over aspects of law could be handed to foreign courts and most crucially that the Union as a legal construct in the form of the Acts of Union could be subjugated or repealed without consent.

[19] There is an incredible admission at paragraph 47 of the Government Command Paper which. It states:

“47. The Protocol is clear that Northern Ireland is fully part of the United Kingdom’s customs territory. But this principle does not apply in practice due to the burdens of paperwork facing all trade moving from GB to Northern Ireland, and due to the absence of entirely tariff-free trade (for example where Northern Ireland traders, uniquely, have been unable to access either the UK’s or the EU’s Tariff Rate Quotas on products such as steel, and therefore face higher tariffs, because of legislation introduced by the EU after the Protocol was agreed). Now, with the increasing evidence of the extremely limited risks to the Single Market in practice, there is an opportunity to build on the “at risk” concept already in the Protocol to genuinely differentiate trade based on its destination.” (emphasis added)

[20] It is clear from the admission *supra* that Northern Ireland in substance is not fully part of the UK Internal Market. That is as fundamental a change of constitutional status as it is possible to imagine.

[21] We repeat here in express terms that which we canvassed in our constitutional statement. If it is the case that the principle of consent is reduced to mere symbolism, then the position of this party, and we apprehend wider unionism, is that there can be no basis for continued unionist support for the Belfast Agreement or the political institutions flowing from same.

[22] The Government must make an interpretive choice- there is no room for ambiguity-between the substance or symbolism interpretation of the principle of consent. It is trite to point out that ambiguity is as corrosive to unionist support for the Agreement as an outright statement of support for the symbolism interpretation. In short, the only way to restore the support of this party for the Belfast Agreement is *inter-alia* to expressly strengthen the principle of consent in Section 1 (1) of the 1998 Act in order to reflect that which was promised to the unionist community in 1998.

[23] Our primary submission is that the Government should as a matter of urgency bring forward legislative amendments to Section 1 (1) of the 1998 Act in order to remedy the ambiguity which has lead to the belief that the principle of consent has been shown to be a deceptive snare.

[24] This party would suggest the following amendment to Section 1 of the 1998 Act:

After subsection (2) insert:

“(3) In this section Northern Ireland’s status as part of the United Kingdom is taken to include the constitutional guarantees contained within the Acts of Union 1800.

(4) Subsection (3) is deemed to have always formed part of this Act and has effect notwithstanding s7A of the European Union (Withdrawal) Act 2018 or

any other enactment”

[25] The suggested amendment *supra* would remedy the fundamental constitutional damage inflicted on Northern Ireland’s place within the United Kingdom by the imposition of the Protocol, and the effects the Government claims flow from Section 7A of the 2018 Act.

[26] However, in the alternative we do recognise that the Government may wish to explore this matter further in advance of making the necessary amendments. Accordingly, our secondary submission is that the Government should urgently commission a review into the scope of Section 1 (1) of the 1998 Act with the view to ensuring it accurately reflects the principle of consent and enshrines protection for the substance of the Union.

[27] In this regard we suggest a ‘**Review of the constitutional protections for Northern Ireland**’ to be conducted by a panel of constitutional law experts, with at least one such expert being a senior counsel (QC) from Northern Ireland.

[28] Given that continued unionist support for the institutions can only be guaranteed by restoring the constitutional protections as promised in the 1998 Agreement, plainly any such review would need to be time-limited with a clear commitment to bring forward appropriate legislation swiftly following the outcome of the relevant review.

[29] We would suggest the following Terms of Reference for the suggested review:

The Secretary of State for Northern Ireland shall appoint a four person panel to conduct a review into the scope of Section 1 of the Northern Ireland Act 1998. This panel shall be made up of four Queens Counsel with at least one of the appointees currently practicing at the Bar of Northern Ireland. All of those appointed shall have expertise in constitutional law and/or significant experience of devolution in Northern Ireland. The Secretary of State shall have regard to, but not be bound by, any recommendations put forward by the Castlereagh Foundation board of trustees.

The panel is obligated to have regard to (i) the respective positions (at the time) of the political parties who were signatories to the Belfast Agreement in relation to their view as to the scope of the principle of consent which they agreed to in 1998; (ii) any verifiably authentic materials or documents which are capable of supporting the positions set out by those consulted in furtherance of (i) and; (iii) the statutory landscape of 1998, with specific regard to the co-existence of the Belfast Agreement with the Acts of Union.

The panel shall [within a period not exceeding six months] provide a report to the Secretary of State for Northern Ireland setting out (i) an overview on the constitutional extent of the protections guaranteed by the principle of consent and (ii) include in draft form any legislative amendments the panel has determined are required to ensure the principle of consent within Section 1 of the Northern Ireland Act 1998 accurately reflects that which was agreed by the

signatories to the multi-party Belfast Agreement

[30] The above terms of reference would provide an opportunity to adequately explore this issue, drawing on appropriate legal expertise and having regard to the signatories to the multi-party Belfast Agreement and the reality that the principle of consent, supposedly given effect by Section 1 of the 1998 Act, sat in co-existent with the Acts of Union. It is obvious to therefore point out the Acts of Union *inter alia* was taken to be that which the principle of consent protected in so far as the Union as a constitutional legal construct is the Acts of Union. To deploy an analogy, the door of the Union is the Acts of Union. The principle of consent merely acted as a padlock on that door, which could only be opened by the ‘key’ of a majority vote for such a change in the status of Northern Ireland. However, the Protocol has blown the door off the hinges, rendering the padlock pointless and circumventing the entire principle of consent.

[31] We specifically draw the Government’s attention to the consistent financial and other assistance provided by the Irish Government in furtherance of developing the cause of a United Ireland (via ‘Shared Island’ initiatives etc). There should be no reticence on the part of the UK Government on equally provided resources and/or commissioning reports designed to explore means by which to strengthen Northern Ireland’s place within the Union.

Further suggested steps to correct the imbalance caused by the Protocol

[32] The Protocol in of itself works from the premise that Northern Ireland is to be left in the EU Single Market, whilst the rest of the United Kingdom is not. This party can never support such a position. Northern Ireland must be a full and integral part of the United Kingdom internal market, in line with the constitutional guarantees set forth within Article VI of the Acts of Union.

[33] The Government itself has accepted the constitutional and identity issues within paragraph 29 of the Command Paper published in July. It states:

(i) There has been significant disruption to longstanding trade flows between Great Britain and Northern Ireland, and a significant, measurable increase in trade on the island of Ireland. The value of Ireland’s exports of goods to Northern Ireland is trending far above historical levels in 2021: up by nearly 40% this year compared to the same period in 2020, and by more than 50% on the same period in 2018.¹ Some sectors particularly susceptible to that diversion, such as food and pharmaceuticals, have experienced even stronger growth. Meanwhile, as set out above, surveys continue to underline the disruption being caused to business with Great Britain, with movements of specific commodities (such as chilled meats) seeing particular impacts.

(ii) Such disruption to trade has in turn exacerbated the perceptions of separation and threat to identity within the unionist community which, in the

context of Northern Ireland, constitute a particularly serious and pressing societal difficulty.

(iii) Further societal and economic impacts are also clear: consumers face higher costs and real risks to goods supplies on which they rely; businesses face increased operating costs that put their survival in jeopardy; and, as many businesses and business organisations have made clear, if the flexibility provided by the grace periods were to be removed, there would be questions as to whether food supplies and parcel deliveries would continue without serious disruption, with significant knock-on impacts for day-to-day lives.

(iv) There has also been political and community instability (with changes of First Minister and the leadership of both main unionist parties), at a time when the challenges of COVID-19 are already acute. There were instances of disorder at Easter across Northern Ireland, with the Protocol cited as one of the significant contributing factors. In May, the Police Service of Northern Ireland noted that of 35 unlawful parades or protests being investigated, 30 related to action against the Protocol.¹¹ Early surveys of attitudes have reflected these concerns and unease, with two-thirds of respondents concerned about the effects of the Protocol on Northern Ireland's economy and on political stability in Northern Ireland.¹² And the absence of buy-in to the existing arrangements from the unionist community leaves an ongoing tension within the power-sharing institutions, undermining the basis which the Belfast (Good Friday) Agreement established for those institutions to function effectively.

[34] Crucially at (i) above, the Government itself now recognises that there is significant diversion of trade, with trade being orientated away from GB and instead towards the Republic of Ireland. It is trite to point out the Government were warned (from as early as October 2019) that the whole objective was to subjugate Northern Ireland within an economic United Ireland. It is no surprise that this is precisely how the Protocol has worked out. Nevertheless, the implied acceptance within paragraph 29 of the correctness of the argument that Northern Ireland was being shoehorned into an economic United Ireland has now, belatedly, been accepted and recognised. We welcome this recognition (which regrettably as yet has not given rise to any sufficient action).

[35] At (ii) the Government sets out the serious concerns of the unionist community in regards the optics of an enforced economic United Ireland and being divided- in a manner incompatible with the very foundational constitutional statute (the Act of Union)- from the rest of the United Kingdom, without the consent of a single elected unionist representative at any level. We welcome this recognition.

[36] At (iii) the clear concerns of business and consumers is set out. It is plain from all the relevant evidence that the Protocol has caused, and continues to cause, significant disruption to the everyday lives of the citizens of Northern Ireland, who have been divorced from our largest market within the UK internal market, and instead essentially colonised within an economic United Ireland under the orbit of the EU. This situation is intolerable.

[37] At (iv) the Government recognises societal instability created by the imposition of the Protocol. This instability has played out on the streets, and in our institutions. These difficulties are liable to persist and underscores the need for urgent Government action.

[38] We reject- **without any equivocation**- the ‘best of both worlds’ theory which seeks to incentivise support for the Protocol by having Northern Ireland in both the EU Single Market and the UK Internal Market. The riposte to such a suggestion is simple; Article VI prevents NI receiving more favorable treatment than the rest of the UK in matters of treaties and trade (and vice versa), every bit as much as it prevents NI being disadvantaged vis-à-vis the rest of the United Kingdom.

[39] We do not in any event accept that membership of both the EU and UK Single Market (even if it were constitutionally compatible- which it is not) provides a benefit to Northern Ireland in the long term. It requires increasing divergence from Great Britain with significant trade diversion, leading incrementally to the development of an economic United Ireland. We can never, and will never, countenance such an arrangement.

[40] It therefore follows that the Protocol is in of itself the problem. We see no route by which the Protocol can work in a manner which is consistent with Northern Ireland’s constitutional position, and therefore the Protocol must- in order to ensure political and societal stability- be removed in its entirety and whatever replaces it must **fundamentally respect Northern Ireland’s place in the Union.**

[41] The practical beating heart of the checks at the Irish Sea border is the provisions set out in Article 5 (2) of the Protocol, given effect in domestic law via s7A of the 2018 Act. It provides *inter alia*:

“2. For the purposes of the first and second subparagraph of paragraph 1, a good brought into Northern Ireland from outside the Union shall be considered to be at risk of subsequently being moved into the Union....”

[42] It is clear therefore from Article 5 (2) that the default presumption is that all goods are at risk until proven otherwise. This is an absurd concept. We recommend reversing this presumption in order that all goods are presumed to be not at risk until shown to be otherwise. We reiterate clearly that such a step in reversing the default presumption in Article 5 (2) – which could be delivered via primary legislation- would assist in dealing with some of the practical issues in terms of the Irish Sea border, but would not be enough to restore the constitutional status of Northern Ireland.

[43] We urge the Government to reconsider the position set out in paragraphs 58-62 of the command paper which embeds the constitutional damage to Northern Ireland by reiterating that NI will continue to align with EU rules, whilst GB will not. This is the very essence of a breach of Article VI of the Acts of Union and is therefore constitutionally incompatible for maintaining the constitutional integrity of the United Kingdom.

[44] We welcome the Government’s stated position in regards the role of the European Court of Justice. It is plainly incompatible with sovereignty that a sovereign part of the

United Kingdom would be subjected to the jurisdiction of a foreign court, who would decide disputes between the EU and UK in relation to the Protocol. It is a fundamental tenet of the Rule of Law that one can not be a judge in ones own case; therefore under no circumstances should the EU Court be the judge of disputes between the EU and UK.

[45] Furthermore, we remind the Government of the commitment set out in Annex A Paragraph (10) of New Decade New Approach ('NDNA'). It stated:

“10. The Government welcomes the consensus reached by all the parties recently on the protections they wish to see for trade between Northern Ireland and Great Britain under the Protocol. The Government is absolutely committed to ensuring that Northern Ireland remains an integral part of the UK internal market, in line with the clear guarantee in the Protocol that Northern Ireland remains in the customs territory of the United Kingdom. To address the issues raised by the parties, we will legislate to guarantee unfettered access for Northern Ireland’s businesses to the whole of the UK internal market, and ensure that this legislation is in force for 1 January 2021. The government will engage in detail with a restored Executive on measures to protect and strengthen the UK internal market.”

[46] The commitment to protect access to the United Kingdom single market requires the maintenance of the integrity of the UK single market. The commitment in NDNA can not be fulfilled by dismantling or subjugating the UK Internal Market. The commitment means what it says; in order for there to be unfettered access to the UK Internal Market, the UK Internal Market (underpinned by Article VI of the Acts of Union) itself must be maintained.

Conclusion

[47] We are firmly of the view that the Government must take urgent corrective action to rebalance the Belfast Agreement, otherwise there is no basis for any unionist to support the Agreement or its institutions given the imbalance at the heart of the present manner by which it is being interpreted.

[48] The rebalancing must, at a minimum, achieve the following outcomes:

(i) Restore Northern Ireland’s place within the UK Internal Market in line with the constitutional requirements clearly set out in Article VI of the Acts of Union.

(ii) Ensure that Northern Ireland is on an equal footing with the rest of the United Kingdom in matters of trade. It follows that Northern Ireland can not be left in the EU Single Market whilst the rest of the United Kingdom diverges from same. The ‘best of both worlds’ theory is constitutionally incompatible.

(iii) Remove Northern Ireland from the jurisdiction of foreign law

makers and foreign courts. The United Kingdom Supreme Court must be the binding authority on all laws which govern Northern Ireland.

(iv) Commit to bringing, or at a minimum preparing within a constitutional protections review, legislative change within a short time frame to protect the substance of the Union via enhanced protections for the constitutional status of Northern Ireland, reflecting the nature of the principle of consent promised to unionist signatories to the Belfast Agreement.

[49] We reiterate our desire to play a role in sustaining and building a peaceful and prosperous Northern Ireland. However, we are deeply concerned as to the imbalanced outworking of the Belfast Agreement, and the weaponisation of its provisions to the detriment of the unionist and loyalist community. The present situation is not a sustainable basis for a peaceful and stable Northern Ireland. The Government must act, and act as a matter of urgency.

Cllr Billy Hutchinson

On behalf of the Progressive Unionist Party