

NO DEAL

IS BETTER THAN A BAD DEAL



WHY UNIONISM MUST NEVER
ACCEPT THE IRISH SEA
BORDER

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No Deal is better than a Bad Deal

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Executive Summary

- The reported 'deal' is sub-optimal. There is no prospect that it will restore NI's place in the Union or remove the Irish Sea border.
- NI will remain subject to EU law; the fetters on internal UK trade will remain via both a hard and soft version of the Irish Sea border.
- A 'patriotic rebranding' of the Irish Sea border does not alter the existence of the Irish Sea border.
- The DUP's seven key tests are not met.
- NI will continue to be treated as EU territory, with GB treated as a foreign country.
- Any unionists who accepts such an arrangement will be responsible and have full ownership for the implementation of the Irish Sea border which all unionists agree undermines the Union.
- Section 7A of the European Union (Withdrawal) Act 2018 will not be altered in any shape or form, thus ensuring the Protocol and Windsor Framework continue with unabated force without a word or syllable changed.
- The disapplication of cross-community consent in order to deprive unionists of this safeguard remains. This central feature of the Belfast Agreement remains fatally undermined.

Introduction

As those who shared multiple platforms with Sir Jeffrey Donaldson repudiating the Protocol, we wish to provide guidance and opinion on what seems to be unfolding.

The blame for the present situation rests solely and entirely with the Conservative and 'Unionist' Government, the EU and the Irish Government. The DUP is left in the invidious position of having to safeguard the Union against those whose job it is to have done so. It must not, through its own actions legitimise their imposition of the Protocol/Framework and the Irish Sea Border.

It is equally outrageous that the Government, and their surrogates, have sought to bully, blackmail and bribe unionism with threats of 'joint-authority', 'Dublin involvement', and more recently by effectively taking public sector workers hostage to use pay parity as leverage against the DUP.

While we have yet to see the full detail of the proposed 'deal', from what is known of it, the deal would not meet the DUP's 7 tests, would not undo the constitutional damage inflicted upon Northern Ireland and the Union and would neuter Brexit.

The government's commitment not to make new laws which would cause GB to diverge from the EU would not achieve its goal of masking the Irish Sea border. The EU itself will be making new laws with which NI would be required to comply. Northern Ireland will diverge from GB no matter what.

The deal as disclosed, would give up Brexit and fail to save the Union with Great Britain.

A restoration of Stormont to achieve such a deal would serve to implement our government's malign intent for Northern Ireland and the Union.

Any deal must be judged not by its hype and spin but against the legal and constitutional realities created by the Protocol, remembering the solemn declaration of all unionist leaders was one of "unalterable" rejection of the Protocol.

Thus, the key determining question is how far does the deal remove, or even change, the Protocol. If it changes not one word of the legal text of the Protocol/Windsor Framework nor disapplies EU law, then, the verdict is clear: it fails to remedy the dire constitutional harm inflicted upon our position within the UK and signing up to such a deal requires unionists to accept the Protocol and implement it, and the Irish Sea border it creates. Whilst we focus in this paper on the legal and constitutional impact of the Protocol/Framework and resulting Irish Sea border, it is important to remember the daily impact to people's lives in terms of being able to access items and materials, and increased cost for businesses and consumers.

The legal and constitutional realities requiring to be addressed

The Union of Great Britain and Northern Ireland is a political union (created by Art 3 of Act(s) of Union) and an economic union of unfettered trade (created by Art 6). Equal citizenship within the union is the resulting expectation and promise.

Little wonder Lord Trimble maintained "The Act of Union is the Union". Tamper with the Act(s) of Union and you tamper with the Union!

The subjugation of the Act(s) of Union by the Protocol

The pan-unionist case taken to the Supreme Court put some vital matters beyond doubt. By reason of the supremacy given to the Protocol through Section 7A of the EU Withdrawal Act 2018, the Supreme Court has ruled Article 6 of the Act(s) of Union is in suspension. Since Art 6 is a constitutional guarantee its suspension fundamentally diminishes and changes NI's position in the UK.

Only the restoration of Art 6 can restore the integrity of the UK and NI's place within it. Such restoration is impossible without the removal of the operation of EU law in Northern Ireland, because it is such, including the requirement of the EU Customs Code to treat GB as a third/foreign country, which suspends Art 6.

Thus, any deal which leaves EU law and the EU Customs Code in control is incapable of restoring or fulfilling Art 6.

The governance of large parts of our economy and citizen's rights by EU law Under the Protocol the laws that govern our goods economy and border are not British laws, but those of the EU. This in turn subjects NI to the jurisdiction of the European Court of Justice. To be ruled, colony-like, by laws we don't make and can't change is of immense constitutional significance and detriment.

The effect of these arrangements has been put beyond doubt by our Court of Appeal, when Lord Justice McCloskey confirmed that the arrangements mean that "*NI belongs more to the EU market than the UK market*".

Any deal which does not remove the operation of EU law in NI will not restore our constitutional position.

The building of an economic All-Ireland through alignment with ROI

The Protocol is so cherished by Irish nationalists because it achieves what the IRA never could: it drives the border to the Irish Sea and weds NI to the Irish Republic in economic alignment in large parts of our economy under precisely the same EU laws. This is to affect an economic All-Ireland.

Northern Ireland is treated as the entry point into, and thus part of, EU territory

As established in the legal cases of *Rooney and JR181 (3)-v-Poots*¹, the effect of the Protocol is that the UK is "no longer to be treated as a unitary state", and that NI is to be treated as the entry point into and thus part of EU territory.

This is the effect of EU 2017/625 and the Official Controls (NI) Regulations 2023 which decree that NI is not to be treated as part of the UK, but rather moving goods from GB to NI is the equivalent of moving them to a foreign country.

A deal which falls to, in a meaningful and substantive way correct this and thus sustains NI as EU territory is wholly unacceptable.

Creates a customs border in the Irish Sea

The Protocol, embedded by the Windsor Framework, now operates on the basis of a 'red lane' and a deceptively labelled 'green lane'. Of course, the very existence of border controls denotes moving from one territory to another. To our knowledge, there is not another unitary sovereign territory in the world which has a customs border dividing its own territory.

It is important to understand that the red lane and green lane are enshrined by the Windsor Framework, using the core architecture of the Protocol, and that they do not - contrary to the spin - operate on the basis that those trading with the EU use the red

¹ *Rooney and JR181 (3) v Poots* [2022] NIKB 34, see paragraphs [178]-[181]

lane, and those trading internally within the UK use the green lane. This is a deliberately contrived misconception.

The red lane does not just catch goods which are moving into the EU, but in fact encompasses many goods which are destined to never leave the United Kingdom, but are nevertheless deemed 'at risk' of moving into the EU, including all raw materials used in manufacturing in NI.

It is essentially EU law that controls the Irish Sea border and dictates the requirement for border posts at Larne, Belfast and Warrenpoint.

Any deal which leaves border posts fettering our trade from GB has not removed the Irish Sea border.

The Protocol is much more than just a trade issue – it divides the UK on citizenship rights

As has been recently evidenced by the Government's Rwanda Bill and the Illegal Migration Act 2023, the Protocol is far from just a trade issue. It requires NI to operate different standards than applicable in GB and in consequence remedies to deal with illegal immigration may not be available here, possibly making NI a hotspot for illegal immigration and asylum.

Due to Article 2 of the Protocol potentially an evolving and dynamic swathe of EU law in areas such as 'rights' will continue to apply in NI, but not the rest of the UK. To give one example, the EU Charter of Fundamental Rights, which no longer applies in GB, will continue with unabated force in NI.

What the deal is said to contain

We are given to understand that in broad terms the recent reporting by James Crisp in the Daily Telegraph is largely accurate. We proceed on this basis, given that no party has contradicted his reporting. We address each reported element of the deal.

Whilst we are mindful we have not seen the legal text accompanying any of these concepts, nevertheless many of the concepts have fundamental characteristics which render them wholly incompatible with the stated objectives of unionists to remove the Irish Sea border.

A 'patriotic rebrand' of the green lane to be renamed 'the UK Internal Market lane'

It is hard to overstate how insulting this proposal is. We can answer it in one short paragraph: it matters not if you paint the Irish Sea border red, white and blue- it is still an Irish Sea border and will still be unacceptable to any principled unionist.

It is an insult and an effort to demean and treat the unionist community as fools.

Screening of new laws to ensure they do not harden the Irish Sea border

A purported safeguard against a hardening of the Irish Sea border (which is dressed up as ‘future divergence’) confirms the current Irish Sea border remains.

If the Irish Sea border was removed, consistent with the DUP’s third test, then there would be no need for any mechanism to guard against a future hardening of a border which no longer existed.

An East-West Council

Whilst, in itself, anything which strengthens ties across the United Kingdom is a good thing, it does absolutely nothing to remove the Irish Sea border. Likewise, though a fine idea, an UK InterTrade body removes none of the sea border.

Unfettered NI-GB trade

This guarantee is already enshrined in the UK Internal Market Act 2020. The Irish Sea border is asymmetric; the core of the problem is not NI-GB trade, but rather GB-NI trade due to NI being treated as a foreign country in relation to the rest of the United Kingdom.

‘Legislation to strengthen NI’s constitutional position’

Any such legislation will not be able to go further than section 1 (1) of the NI Act 1998 (the principle of consent). The Government has already committed to making no change to this provision. It is of course this provision which was exposed in the Supreme Court as being a “deceptive snare” (the submission endorsed by all applicants) owing to the fact that it does much less than was promised.

Therefore, any legislation will be mere window dressing. Indeed, will there even be primary legislation or mere statutory instrument(s) which are as nothing compared to the juggernaut of S7A of the EU Withdrawal Act 2018 which imposes EU law directly to our constitutional detriment.

If a majority of unionists vote against the Protocol in the Assembly consent vote² (December 2024) the UK Government will commission a ‘report’

This is not new. Only the timeframe within which it would be produced.

If Stormont is functioning when the vote takes place, then it will be a meaningless tick box exercise. It is only if unionists are still refusing to implement the Protocol will this report stand any chance of being meaningful.

² As required by Article 18 of the NI Protocol. Section 56A of and Schedule 6A to the NI Act 1998 have been amended to facilitate this vote with the removal of cross community safeguards to prevent unionism relying upon them.

How far would such a deal address the legal and constitutional realities?

As set out above, this deal would not alter one word or syllable of the Protocol. It would continue- via section 7A of the EUWA 2018- to flow with unabated force into domestic law and reign supreme over every other law, including Article 6 of the Acts of Union. EU law will still apply; NI will still be treated as EU territory; Art 6 of the Acts of Union will remain subjugated and in suspension; the Irish Sea border will remain with unabated force. All-Ireland alignment will continue as designed by the Protocol.

How would Stormont operate under such a deal?

In accepting such a deal, unionist members of the Executive will be legally obliged to implement the Protocol, Irish Sea border and administer the hundreds of EU laws imposed upon us. This is put beyond doubt by the High Court ruling of Mr Justice Colton in *Rooney and JR181 (3) v Poots*³

There has been some suggestion that, in order to spare the blushes of unionist ministers that civil servants would report to Whitehall rather than Stormont in regards the implementation of the Protocol.

Acquiescing in such a contrived arrangement to enable the implementation of the Protocol while trying to claim distance from it, is disreputable.

How far are the DUP's seven tests met?

The deal, as reported, does not meet any of the DUP's seven tests. Indeed, it would embed and compel acceptance of much of that which the tests committed to having removed as the condition for resuming powersharing.

1. Fulfil Article 6 of the Acts of Union

This test, on any reading, requires, as the DUP has repeatedly promised, the restoration of Article 6. There can be no subjective 'guarantee' extracted from Article 6 which is distinct from the text of the key constitutional provision itself. Article 6 is a constitutional guarantee.

EU law will continue to apply; NI will continue to be on unequal footing and in a different economic regulatory territory from the rest of the UK; and there will continue to be fetters on GB-NI trade which doesn't apply to goods moving between two locations in GB within the UK internal market.

³ *Rooney and JR181 (3) v Poots* [2022] NIKB 34

2. Avoid any diversion of trade

The very essence of the Protocol is to engender trade divergence. It is already happening as the inevitable outcome of the Protocols restraints on GB-NI trade.

3. Not constitute a border in the Irish Sea

The existence of the Protocol requires, as a condition precedent of being under the EU Customs Code and EU law, an Irish Sea border. Therefore, if the Protocol remains, then so too does the Irish Sea border, however multicoloured its lanes!

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

All the EU laws essential to NI's retention within the EU single market and Customs Code and which are specified in the Protocol (particularly in Annex 2) will continue to apply. None have been removed. They cannot be amended or removed by Stormont. Under this projected deal we are bound to laws we did not make, and which we cannot change. This is the very essence of colonial rule which the useless 'Stormont Brake' will do nothing to abate.

5. Result in no checks on goods going from NI to GB or from GB to NI

The core issue is GB to NI trade, and, once again, as a condition precedent of the Protocol such checks are demanded and stay! If the Protocol/Framework remains, then so too do the checks.

6. Ensure no regulatory borders develop between NI and the rest of the UK

It will be claimed, with much fanfare, this test is met by what appears to be a 'screening' process to guard against divergence. But, the crucial point is that this arrangement, as reported, does not impose a prohibition or mandatory duty not to bring forward laws or act in a way which creates such barriers NI-GB. It simply requires a Ministerial statement. There is nothing to prevent such a statement to the effect it does create barriers, but the law proceeding anyway (such as the Rwanda Bill which is unable to say via Ministerial Statement it is compatible with the ECHR, but it is progressing anyway).

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

This requires an amendment of section 1 (1) of the NI Act 1998 to ensure the principle of consent operates as it was promised it would operate. That this is necessary has been put beyond doubt by Sir Jeffrey Donaldson's article announcing this policy, and his video accompanying it.

There is not even a suggestion there will be any movement in this area.

Conclusion

There can be no doubt the suggested deal falls far short. It is thin gruel indeed.

- It changes not one word of the Union-dismantling Protocol, nor disappplies a single syllable of EU law - leaving ECJ oversight in place.
- Northern Ireland would remain under the EU Customs Code, which decrees GB a third/foreign country.
- NI still treated as EU territory where all the EU laws governing our goods economy remain in full force - laws which are identical to those applicable in ROI, with obvious alignment consequences.
- It leaves NI detached from the constitutional framework of the UK and subjecting us alone to foreign laws and jurisdiction.
- Any unionist serving in the Stormont Executive would by law be required to implement the unaltered Protocol.
- It leaves the Irish Sea border intact.
- It comprehensively fails to meet the DUP's seven tests. It follows that the DUP has no mandate to return to Stormont.
- It is unworthy of the support of any unionist who cares about maintaining the Union, because to accept this deal is to accept that never again will NI be a full part of the UK, but rather will be in transition into an economic all-Ireland.

We therefore urge the DUP- and all principled unionists- to reject such a deal which patently comes nowhere close to meeting the rightful demands we collectively made in opposing the Protocol. Surely, none of us can now become Protocol implementers!

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