THE IRISH SEA BORDER

THE PROBLEM, ITS CAUSE AND THE SOLUTION

The Irish Sea Border – The Problem, its Cause and the Solution

The urgent need to remove the Irish Sea Border, and demonstration of a means for doing so, lie at the heart of the TUV manifesto. This document complements our main manifesto publication with a fuller explanation of the presenting challenge, setting out TUV policy in relation to it. This Long Read will begin by setting out the four major problems with the Protocol/Windsor Framework (Part 1). It will then look at how the DUP, which has held all the unionist seats in Parliament in the relevant period during which the Protocol/Windsor Framework has been applied, has completely misused the considerable opportunities and leverage at its disposal, demonstrating the urgent need for new leadership going forward (Part 2).

Part 1: Why the Irish Sea Border is such a serious Problem?

1) Disenfranchising 1.9 million People

Often people think of the border as first and foremost an economic problem relating to the interruption of trade flowing between GB and NI. However, that serious problem is the result of another more fundamental problem that came first, the fact that the Windsor Framework subjects Northern Ireland to a different legal regime from the rest of the UK which governs much of our economic and social life. Far from being subject to just 300 EU laws which we have not made, Northern Ireland is subject to a far larger and constantly growing number of EU regulations within 300 different areas of law.

When we were part of the EU there was a serious democratic problem, 'the democratic deficit', which presented one of the key arguments for Brexit. The deficit resulted from the fact that whilst Northern Ireland, and indeed the wider UK, was represented in both the European Parliament and the Council of Ministers, we could be overruled in the context of majority and qualified majority voting. We were not the final authority in making our own law. This difficulty, however, is mild in comparison to that relating to the Protocol/Windsor Framework which exchanges the democratic shortfall problems associated with the 'democratic deficit' with an arrangement that completely negates democracy in 300 areas of law-making. The result is our colonial subjection to laws made by a foreign Parliament, unelected by us and unaccountable to us.

This is an extraordinary state of affairs because up until this point in time the flow of history has been very much about extending democracy. We are not aware of any other country being subject to the indignity of being taken from a place where for many years everyone could stand for election to make all the laws to which they are subject to a place where they can only stand for election to make some of the laws to which they are subject. In a context where commitment to democracy is a basic standard of civility, government by a foreign Parliament, unelected by us and unaccountable to us, is morally and politically indefensible and unsustainable.

This arrangement is completely unacceptable not just in terms of principle but also practice. Laws are not about theory. They have profound practical implications, some impacting just the lives of some of us, while others impact the lives of all of us.

Two recent examples of the practical difficulties include the future of NHS Dental Services in Northern Ireland and the future production of smoky bacon flavour crisps in Northern Ireland.

The EU is currently proposing to ban the use of amalgam in dental fillings from 1 January 2025. If the ban proceeds in NI, the British Dental Association has said that NHS Dental services are likely to become unsustainable because current NHS funding barely covers the cost of amalgam procedures, and the alternatives are much more expensive to buy and much more expensive to apply. At the same time NHS Dental services in the rest of the UK will continue because they will be able to use amalgam next year and beyond, adopting a much more gradual approach to moving to amalgam alternatives.

In its evidence to the Assembly in March, the British Dental Association cited a dentist who said:

"Increase in expenses and the ban on amalgam are the perfect storm. I don't know any dentist who will be able to deliver any NHS work next year under the circumstances. NHS dentistry is about to collapse."

They expressed real concerns that in this context we will see a significant increase in teeth extractions in Northern Ireland.

It is absurd that a foreign Parliament should make any of our laws, but that they should consider imposing on us legislation that places an aspect of one of our great national institutions - the NHS - in jeopardy, is completely intolerable.

The EU is also proposing legislation that would make it illegal to manufacture smoky bacon flavour crisps in Northern Ireland, even while the production of these crisps will remain legal in the rest of the UK. Moreover, and in a bizarre twist, people in Northern Ireland will still be able to import smoky bacon flavour crisps and eat them in Norther Ireland. We just won't be allowed to make them!

2) Frustrating Economic Development

It is the need to protect the integrity of the market created by the different legislation that operates in Northern Ireland - and indeed across the island of Ireland – that creates the need for the Irish Sea Border as a Customs and SPS (sanitary and phytosanitary) border.

Some might be tempted to think that, while this is clearly unfair given that Northern Ireland is part of the UK and pays UK taxes, Northern Ireland should just suck it up because while it is inconvenient, it need not prevent trade and provides a way of dealing with Brexit. That, however, is to completely misunderstand the nature of the difficulty. Proper understanding can only come when two points are fully appreciated:

First, until the imposition of the Protocol/Windsor Framework on 1 January 2021, Northern Ireland was a fully integrated part of the UK economy. We benefited from being part of an economy of nearly 70 million, fully integrated with its larger supply chains and fully benefiting from the greater economies of scale that attended them. By contrast, the extent of trade with the Republic was, as Prof Graham Gudgin has pointed out, surprisingly limited, notwithstanding the absence of any border paperwork or checks.[1]

Second, trade that takes place between different economies is quite different from trade that takes place within an integrated economy. Lorries engaged in international trade will usually carry one or two products in bulk and when they reach the border will have between two and four sets of paperwork dealing with customs and SPS requirements. While generating the paperwork is an expense, it is by no means an obstacle because expressed as a percentage of the value of the cargo the expense is tiny. Lorries engaged in regional trade within an

[1] https://policyexchange.org.uk/publication/the-island-of-ireland/

integrated economy will, by contrast, carry up to 300 different products as they take goods from regional distribution centres to retailers. If you place an international trade border in their way then you will require them to present, depending on the products, between 300 and 600 pieces of paperwork. The cost of generating these, expressed as a proportion of the value of the cargo, would be considerable in many cases making trade uneconomic and constituting an absolute obstacle that would be completely destructive in its effect. The diverse nature of trade within an integrated economy means makes any attempt to apply and international customs and SPS border across is far more disruptive and divisive than the application of a border between two economies. Such is its absurdity that it has never been attempted before. Notwithstanding the far, far smaller value of the cargo, such is the diversity of domestic trade that it would necessitate more border infrastructure and more border officials in Belfast and Larne than those attending the biggest port in the world. The only way to avoid this is through trade diversion – i.e. getting goods from the Republic/EU rather than GB - and the attendant realignment of supply chains and the foundation of economic life for those concerned.

If the Protocol had been fully applied on 1 January 2021 it would have caused Northern Ireland's supply chain to collapse within 48 hours creating a political crisis that would have completely invalidated the Protocol as a viable political project. This was averted by two provisions that have saved the Irish Sea border: first the immediate application of grace periods and second, the amendment of the Protocol to what is now called the Windsor Framework. The Windsor Framework helped to save the Protocol from drowning in its own absurdity by making an arrangement that was, by the Prime Minister's admission, completely unimplementable, implementable, as a result of making it less onerous and its implementation more gradual.

The implementation of the Windsor Framework comes in three stages, first, on 1 October 2023, when the Green Lane SPS border was introduced, second, on 1 October 2024 when the Green Lane customs border provisions will be applied and third, on 1 July 2025 by which date the Border Controls Posts are supposed to have been completed to enforce the changes. It is important to recognise that while the level of disruption under the Windsor Framework is less than would have been the case under the original Protocol, the original Protocol was never implemented and so with each of the three points of implementation the level of border obstruction increases. The economic crisis that would have invalidated the Protocol in 2021, however, has been averted by long warning periods during which many companies have changed the way their operate, as they - increasingly engaging in trade diversion - seek to acquire goods from the Republic and wider EU rather than from the rest of the UK.

3) Undermining Northern Ireland Politics

We should not be blind to the fact that there is a deeper political problem lurking within the Protocol/Windsor Framework that no one is really talking about at the moment. Champions of the Protocol argue that the disenfranchising consequences of the Windsor Framework are acceptable because they are subject to a vote that the Assembly is required to conduct every four years from this November, on the application of the Windsor Framework for the next four to eight years. The idea that this somehow makes the arrangement acceptable is deeply problematic because of the nature of the vote.

If we argue that the vote, four years after the application of the Protocol, is for the purpose of providing democratic scrutiny of all the laws imposed in the last four years, the mechanics of the vote simply do not allow for this. Article 18 makes provision for one debate of up to 6 hours

and one vote on a motion the wording of which is already determined in law.[2] There is no opportunity to scrutinise the legislation of the past four years, asking questions of the sponsoring EU Commissioners. Moreover, the Assembly will be compelled to submit all the legislation to one vote when clearly meaningful engagement would require the facility to accept some laws, amend and accept others and reject others. As if this was not enough, any claim that this provides democracy suffers from the fatal flaw that even if the Assembly voted 'no' this would not cause any of the laws of the past four years to fall away and would indeed amount to a yes vote to another two years of the continued imposition of new EU laws. At this point, while Articles 5 to 10 would cease to apply, it is unclear what would happen to the laws imposed during the previous 6 years.

If one agrees that Northern Ireland is made a colony of the EU for the first four years and is effectively stuck with the legislation passed during that period, and instead tests Article 18 as a vote for all the legislation that will come in the next four years, one encounters even more difficulties. All the problems about not being able to scrutinise or amend four years of legislation with a single vote stand but with the additional challenge that it would not even be possible to talk about some of the legislation because it would not yet have even been published or necessarily even conceived. Moreover, and once again, a no vote would actually have the effect of being a yes vote to another two years of imposed legislation.

In truth this vote neither performs a democratic function in relation to laws pertaining to the first four year period, nor laws passed for the second four year period. **The vote can only really be understood in terms of its impact. The actual effect of an Article 18 vote is not a provision whereby Northern Ireland can be afforded democratic rights in any recognisable sense: namely in relation to holding Commissioners to account as they propose legislation, and shaping that legislation through amendment, with the option of rejecting it entirely if not satisfied. Rather, it provides a mechanism for renouncing democracy, as MLAs take it on themselves to repudiate the rights of their constituents to be represented in the legislature making the laws to which they are subject in some 300 areas for between 4 to 8 years.**

There are huge problems with this:

In the first instance, the proposition in question is one that proposes a change in the constitutional status of Northern Ireland, shifting aspects of our governance from NI/UK towards the Republic of Ireland/EU, creating an all-Ireland economy. As such, the proposition is contrary to the requirement in international law as set out in the Belfast Good Friday Agreement that: 'It would be wrong to make any change in the status of Northern Ireland [where the presenting treaty context is the governance of NI moving away from the UK towards greater ROI involvement] save with the consent of a majority of its people.' This censures what is proposed, first, because it only proposes an assessment of what people think four years after the change in question, when the assessment should take place beforehand and, second, because rather than assessing the consent of a majority of the people of Northern Ireland, which would require a referendum, the Article 18 vote only proposes an assessment of MLAs at Stormont.

[2] Schedule 6A (1) of the Northern Ireland Act 1998, as inserted by the Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020 determines that motion must be: "That Articles 5 to 10 of the Protocol on Ireland/Northern Ireland to the EU withdrawal agreement should continue to apply during the new continuation period (within the meaning of Schedule 6A to the Northern Ireland Act 1998)." Schedule 6A (10) of the Northern Ireland Act 1998, as inserted by the Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020 determines that the vote must take place 6 hours after the motion is moved.

In the second instance, it is not clear how either the UK Government or the Assembly can help facilitate the vote without further breaking international law as set out in the Belfast Good Friday Agreement because it requires the state parties to uphold the right of the people of Northern Ireland to 'pursue democratically national and political aspirations' where upholding can only be understood has upholding from the point at which the right was conferred in 1998 when the people of Northern Ireland had the right to stand for election to make all the laws to which they were subject. This vote, however, effectively involves the UK Government asking MLAs to vote against the Good Friday Agreement, renouncing the rights of their constituents to 'pursue democratically national and political aspirations' in the making of the laws to which they are subject in some 300 different areas for between four and eight years.

In the third instance, quite apart from the consent and broader democracy protections applied by the Good Friday Agreement, there is a more profound problem. While it is clear logically and morally that elected legislators can stand on behalf of their constituents to make a specific law on their behalf, it is not clear that they have the right to actually vote to negate the right of their constituents to be represented in the making of the laws to which they are subject for between four and eight years. In adopting this role, they are not positively representing their constituent's rights, they are actually negating those rights. It is not clear that it is logically or morally acceptable to ask legislators to renounce the rights of their constituents in this way. If anyone is to negate these rights, arguably the only person who has the right to do so must be the person themself. Indeed, the case could be made that it would be a violation of the rights of the representative to ask them to vote to nullify the rights of their constituents to be represented in the making of the laws to which they are subject in some 300 different areas. It is also plainly absurd to offer the people a referendum to join and leave the EU and to embrace the Good Friday Agreement, none of which removes their enfranchisement, and to then deem that disenfranchising them is a small matter that can be dealt with by a Stormont vote.

In the fourth instance the vote is a massive problem because it violates the Good Friday Agreement as international law in contravening the requirement for 'cross community consent'. Whereas the accepted means for articulating the 'consent' protection is through a referendum in which everyone has a vote, 'cross community consent' pertains to decisions made by the people's representatives at Stormont.

Ever since the then Conservative Government collapsed the Assembly in March 1972, it has been an unchanging constitutional convention of Stormont that proposals regarded by either community as an existential threat must not be considered on a majoritarian basis. The decision to reject majoritarianism was no small matter. The Parliament of Northern Ireland had operated since 1921 on a majoritarian basis and come 1972 this majoritarianism was believed to be implicated in the underlying grievance that in 1969 had resulted in the outbreak of the Troubles. The decision of the UK Government to suspend Stormont involved putting a line in the sand. Majority government from Stormont was over. To this end, rather than inaugurating a new convention, the Good Friday Agreement cross-community consent principle merely recognised and built on the pre-existing convention prohibiting majoritarianism that had been in place since 1972.

When the EU presented the Northern Ireland Protocol, the UK Government said it should only apply with the approval of Stormont. Notwithstanding the fact that their proposal involved disenfranchising UK citizens in relation to 300 areas of law-making, the EU was none too keen on the idea but eventually conceded in the context of two very unusual provisions.

The first (as noted above) was that rather than voting on whether to approve the effective suspension of constituent's rights to be represented in the making of laws to which they are

subject in 300 areas *before* the suspension of those rights, the vote should happen four years *after* the fact, seeking a mandate for their suspension for the next 4 years, but not the first.

The second was that it must be a majoritarian vote. Brussels had become aware that because unionists regard the Protocol as an existential threat, they could use cross community consent to reject it. This was not acceptable to the EU and so they argued that, notwithstanding the sensitivities of Northern Ireland's history, and their stated commitment to the Good Friday Agreement, the Protocol vote must be by simple majority.

In the end the only way in which the Government could accommodate this demand was by developing the completely disingenuous argument that the Good Friday Agreement only pertains to some and not all Stormont decisions. Notwithstanding the fact that the substance of decision-making to be surrendered to the EU was domestic in nature, on 26 November 2020 the Government sought to use the fact that the EU is foreign to reconstitute the competences in question, by means of a process of legislative alchemy, into 'excepted matters', beyond the remit of the Assembly, and the requirements of the Good Friday Agreement, even as UK law simultaneously makes this a matter for Stormont by requiring an Assembly vote. It is hard to conceive a more contrived, contorted and desperate argument, utterly lacking in respect for the intelligence of the people of this country.

In the first instance, there is nothing in the treaty limiting the ban on majoritarianism to certain classes of key Stormont decision-making.

In the second instance, the prohibition on majoritarianism in the Good Friday Agreement has to be read as an affirmation of the convention prohibiting majoritarianism which goes back, not to 1998, but 1972. In this context, it does not matter what the decision is about. What matters is that it is a decision made by Stormont that has the ability to alienate one community or the other.

In the third instance, we must recognise that even during the years of Stormont majoritarianism, Northern Ireland was always protected by the limits of its responsibilities. Far from granting a license to dispense with the prohibition of majoritarianism, the effective extension of the role of Stormont into areas of greater controversy obviously makes the protection afforded by that prohibition more and not less important. The proposed November vote is, without doubt, the most controversial proposition to have ever been placed before Stormont in its 103 year history, inviting MLAs to agree to the transfer of 300 areas of law making from the UK (and thereby the disenfranchisement of their constituents in those areas) to the EU and therein the Republic of Ireland and 26 other sovereign states for a minimum of 4 years.

As things currently stand, Northern Ireland is to be propelled back to deeply contentious practices that have not been countenanced for over fifty years in just five months' time because of the EU. **Lest anyone should seek to minimise the significance of this development by focusing in on the fact that it is just one decision, we must remember that if it is acceptable to make the most controversial decision on a majoritarian basis, what possible justification can exist for arguing that less controversial decisions must be made by cross-community consent? This EU imposition does not just remove the argument for cross community consent in one narrow area. It pulls the rug out from beneath it in general and thereby completely undermines the Good Friday Agreement.**

What is particularly shocking about this development is that it was imposed during the last Parliament when unionism was represented by 8 DUP MPs and when the legislation was debated removing cross community consent from the proposed Assembly vote on

the Protocol on 26 November 2020,[3] not a single DUP MP attended the debate and used their right to put on the record the massive constitutional problems flowing from this change. Moreover, no DUP used the opportunity to register concern by pressing the matter to a vote when given the opportunity to do so on 30 November 2020.[4] This is quite staggering. Please see the full debate in the appendix.

4) Undermining the Standing of the UK in the World Today

The third major political problem is one that directly affects everyone living in the United Kingdom.

One of the most basic principles of international relations is the doctrine of recognition.

Recognition involves state A recognising state B, which means that state A recognises the right of State B to exist and the right of its governance structures to make its own laws, renouncing any claim of its own to make the laws of State B. One way of expressing this arrangement is that 'state A recognises the territorial integrity of state B', the right of the governance structures to make laws that govern not just part of the polity in question, but the full extent of its territory, the integrity of which is both upheld and respected by the fact that its laws cover the full extent of its territorial integrity. State B then reciprocates, recognising the territorial integrity of State A.

If two states can afford each other this reciprocal dignity, then they can give and receive ambassadors and engage in diplomatic relations.

The problem with the Windsor Framework is that while Article 1 states that the EU member states respect the territorial integrity of the UK, most of the subsequent Articles involve their not only disrespecting the territorial integrity of the UK by claiming a right to make laws for part of the UK, thereby effectively dividing the jurisdiction in two, but also in providing a mechanism for the making of those laws. It is hard to conceive of a more fulsome way in which 27 states can disrespect the territorial integrity of the United Kingdom.

In a context of increasing international instability the last thing that the international society of states needs is the undermining of one of the foundational principles of international relations upon which it depends. It is quite wrong both that the EU 27 should seek to treat the United Kingdom in this way and also that the United Kingdom government, as a Permanent Member of the UN Security Council, and in that sense a custodian of the international society of states, should agree to being treated in this way.

Submitting to this arrangement involves the UK Government acting shamefully in sacrificing some of its citizens for disenfranchisement in order to placate other members of the international community. This does not reflect well on the integrity of our political community, communicating a certain moral feebleness and lack of belief in the UK. This is not only bad news for UK citizens living in Northern Ireland but for all UK citizens because a government that cannot uphold its territorial integrity in the international arena signals weakness and will necessarily be weakened in its standing in the international community generally. This is bad news all round!

---

[3] Please see the full debate in the appendix.

[4] Hansard 30 November 2020 p. 126 marks the moment 'EXITING THE EUROPEAN UNION That the draft Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020, which were laid before this House on 2 November, be approved.—(David T. C. Davies.) Question agreed to.' This means that no MP opposed the passing of the legislation and so it went through 'on the nod'. Had a DUP MP done so this would have forced a vote on the matter.

Part 2: The Failure of the DUP to Confront the Irish Sea Border

During the period when the Irish Sea Border came into effect unionism has been represented in Parliament by just one party, the DUP. The failure of the DUP to deal with the problems presented by the Irish Sea Border has not been because, despite doing everything in their power, the challenges were necessarily insurmountable. They have, whether by design of incompetence, squandered numerous opportunities. There have been two main areas of failure:

First, in rejecting Mutual Enforcement.

Second, in accepting the Windsor Framework nearly a year after its publication masquerading as something different, namely the Safeguarding the Union deal, which has helped to save and 'cement in' rather than challenge, the Irish Sea Border.

1) Mutual Enforcement

'Mutual enforcement was initially developed from within the EU by Sir Jonathan Faull, the former Director-General of the 'Task Force for Strategic Issues Related to the UK Referendum, Prof Joseph H.H. Weiler and Prof Daniel Sarmiento.[5] It provides a way of avoiding a hard NI-ROI border by means of the UK agreeing to use its laws to mandate that businesses constructing goods for ROI, do so to ROI standards, while the ROI agrees to use its own laws to require businesses constructing things for NI to do so to UK standards. It was noticeable that to begin with the EU seemed interested, the Financial Times described it as 'the Win, Win solution' and when the EU changed its mind Prof Weiler made it clear that he and his colleagues were by no means persuaded by the EU's objections. Indeed, he presciently questioned the viability of a solution that rejected mutual enforcement pointing out that the consequence was 'however disguised, a customs frontier within the UK. But does anyone believe that is a stable solution?'[6]

In mid-February 2023, UK lawyers troubled about the injustice of the Protocol threw the DUP the lifeline of mutual enforcement, but this was rejected as 'messy', no doubt in favour of the Windsor Framework which would be announced the following week. Another lifeline was then thrown in June by which time it was clear that the Windsor Framework had neither removed the Irish Sea border nor re-enfranchised the people of Northern Ireland.

A 56 page Centre for Brexit Policy report was produced for the DUP under the lead authorship of Barnabus Reynolds (with input from others including Sammy Wilson who has always supported mutual enforcement), setting out mutual enforcement as the solution to the Protocol/Windsor Framework challenge.[7] It was agreed that the DUP leadership would identify fully with it, demonstrating this through the provision of a supportive foreword but then, to the great frustration of the authors, they suddenly withdrew. They were eventually persuaded to honour their commitment but, strangely, would not go beyond welcoming the publication as an interesting contribution to the debate clearly of no immediate importance on account of both the foreword and subsequent interviews repeatedly kicking it into the long grass of interesting 'longer-term' solutions.

What the foreword should have said, and what the DUP should have said repeatedly and should say now repeatedly is:

[5] https://verfassungsblog.de/an-offer-the-eu-and-uk-cannot-refuse/
[6] https://www.ejiltalk.org/brexit-apportioning-the-blame/
[7] https://centreforbrexitpolicy.org.uk/wp-content/uploads/2023/07/MUTUAL-ENFORCEMENT-The-Key-to-Restoring-Government-in-Stormont.pdf

'We call on the Government to point out to the EU that while they may prefer the Windsor framework, and it is consequently convenient for them to pretend that no other solution exists, that such an alternative solution does exist, mutual enforcement, and that given that it provides a means of avoiding a hard border while not disenfranchising 1.9 million people and disrespecting the territorial integrity of the United Kingdom, it would be shameful and unthinkable for the EU and the UK Government to continue to insist on the imposition of the Windsor Framework that commits both these offences.'

Instead, what the foreword actually said, sounding like it had been drafted by the great Sir Humphrey himself, was:

'… we have been clear throughout that Mutual Enforcement is a concept worthy of serious and sustained consideration in terms of delivering a longer-term solution. …In the longer term, Mutual Enforcement would sustainably address the potential problems caused by the imposition of regulations by an entirely separate regulatory regime and respect our constitutional position as part of the UK.'

Instead of fighting for a solution to prevent the disenfranchisement of the people of Northern Ireland, it settled for detached resignation: *'Whether His Majesty's Government is willing to countenance such a proposal … remains to be seen.'*[8]

At this point some might say, its all very well to highlight this solution but just because it exists does not mean that the EU will accept it. That, however, is to completely miss the leverage that Mutual Enforcement provides.

While the EU might prefer a border in the Irish Sea, in the context of the existence of an alternative means of addressing the border that does not necessitate the disenfranchisement of 1.9 million people, and the disrespecting of the territorial integrity of the United Kingdom, it would be shameful for the EU and UK to do anything other than exchange the Windsor Framework for Mutual Enforcement as a matter of some urgency.

If the EU does not avail itself of this opportunity, it will necessarily render itself the deliberate (because it is entirely avoidable) instigator of the most reactionary disenfranchisement exercise of modern times, with deeply unfortunate implications for the EU brand.

Moreover, given the fact that the value of goods entering the EU Single Market in 2020 represented just 0.003% of EU GDP, the willingness of the EU to disenfranchise 1.9 million people NOT on account of there being no other way of managing the border, but simply that it did not amount to their preferred means of border protection, is doubly shameful and morally and politically completely unsustainable.[9]

The problem is that the DUP in the Commons has not sought to place the UK or the EU under sustained pressure on this point. This can be seen on a number of bases:

First, in all their failed negotiations with the UK Government, the DUP went straight to the Government for behind closed doors discussions negotiating from a position of weakness without seeking to exercise any leverage over the UK Government through the support of our fellow citizens in England, Wales and Scotland.

---

[8] This Mutual Enforcement section is taken from an article by Dr Dan Boucher published by the Belfast Newsletter: https://www.newsletter.co.uk/news/opinion/dan-boucher-dup-policy-is-in-effect-one-of-union-with-the-republic-of-irelands-economy-4645457

[9] Working on the basis that in 2021, EU GDP was valued at approximately £12.5 trillion. NI to ROI sales in 2020 were worth £4.1bn according to NISRA. This would equate to 0.003% of EU GDP.

Second, making progress would have necessitated a long term commitment to keeping the Mutual Enforcement solution continually in the media and constantly making the point that in the context of the existence of this solution, any EU decision to reject it in favour of the Windsor Framework involved it needlessly disenfranchising 1.9 million people and in elevating in importance its favoured means of protecting a border that only dealt with goods worth 0.003% of EU GDP moving into the EU, over democracy. Over a period of time there was/is a good chance that the message that 'in an age where commitment to democracy is a basic standard of civility government by a foreign parliament unelected by the people concerned and unaccountable to them is morally and politically unsustainable' would leave the EU sufficiently embarrassed and exposed that it would eventually agree to exchange the Windsor Framework with Mutual Enforcement.

In any event this was the only self-respecting course of action to take. When we consider this means which the DUP could have deployed to remove the Irish Sea border but did not, it is hard not to draw the conclusion that those making decisions at the highest level ultimately did not really want to remove the Irish Sea border. Before examining the grounds for this further, however, it is important to consider the other area of failure.

2) Safeguarding the Union Deal

It is interesting that when Mutual Enforcement was initially rejected out of hand this happened just a week before the announcement of the Windsor Framework and it is very likely that some within the DUP had some idea what was in it in advance, and wanted to remove Mutual Enforcement because they believed that the Windsor Framework would provide the answer. It is important to keep this in mind when we come to the Safeguarding the Union deal because, although it was presented on a basis that stated that it provided the breakthrough that Windsor did not, (which meant that the leadership could recommend that the party now back the deal having previously rejected the Windsor Framework), in all its essentials Safeguarding the Union is the Windsor Framework.

The basic pitch was that the Safeguarding the Union deal had now secured a great breakthrough – 'the Green Lane', which dealt with over 80% of goods moving from Great Britain to Northern Ireland, 'was gone.' The sense was that while the deal was not perfect because the Red Lane remained, that over 80% of the border had effectively been removed and replaced by the UK Internal Market System, wherein goods could move freely so long as people became trusted traders, which depended on a simple one-off registration process. This was a victory that must be banked.

The DUP's own Director of Policy and Research, Dr Dan Boucher resigned over this claim, calling it out over a series of five articles in the Belfast Newsletter in May. He pointed out that when the UK Government presented the idea of the Green Lane (in the Windsor Framework Command Paper Feb 2023) its full name was 'the UK Internal Market System (the Green Lane)' and that it was, therefore, entirely misleading to claim that the Green Lane was gone and then say that it had been replaced by the UK International Market System because, that amounts to an absurd sleight of hand - trying to replace something with itself. He also pointed out that not one word of the legislation introduced both by the EU and the UK to give effect to the Green Lane, UK Internal Market System had been changed, let alone repealed. To this end, Safeguarding the Union represented no progress on the Windsor Framework

whatsoever, just a demeaning attempt by the UK Government and DUP to trick the people of Northern Ireland.[10]

In another article Dr Boucher also expressed his huge concern about the fact that the Safeguarding the Union formalises second class citizenship for the people of Northern Ireland by accepting the provisions of the Windsor Framework (Democratic Scrutiny) Regulations 2023 which the DUP had voted against in March 2023. Rather than correcting the substantive failings with the provisions, the only practical difference arising from the Safeguarding the Union deal is to insert a reference to them in another piece of legislation, published to implement Safeguarding the Union on 31 January, the Windsor Framework (Constitutional Status of Northern Ireland) Regulations 2024. The fact that the DUP is now prepared to celebrate what it previously voted against only serves to demonstrate how badly they have lost their moral bearings. Even if the legislation gave Stormont the power to block all EU legislation it did not like, this would still cement in second class citizenship for UK citizens living in Northern Ireland. While UK citizens living in England, Wales and Scotland would enjoy the right to stand for election to make all the laws to which they were subject, as was the case in NI until 31 December 2020, the people of NI would only have the right to stand for election to make some of the laws that govern us and the right to stand for election to try and stop other laws already made for us by a foreign Parliament.[11]

In truth, however, there are four other major problems. First, under the Windsor Framework the Assembly has no right to try to block some of the EU laws imposed on us in the 300 areas. To this extent rather than cementing in our second-class citizenship, the new procedure has the effect of cementing in the negation of our citizenship. Second, if the Brake (one mechanism in the legislation) applies to the legislation in question, pulling it does not necessarily stop the legislation. The EU can object and then the matter is sent to international arbitration which may find in favour of the EU and against NI, in which case these provisions once again cement in the negation of our citizenship. Third, if an Applicability Motion (the other mechanism) applies to the legislation in question, refusing to pass a motion does not necessarily block the legislation because the UK Government has to agree not to overrule it. Fourth, even if an attempt to block EU law is successful it does not give NI the right to make an alternative law. Mindful of all this it is no surprise that the DUP voted against this Stormont Brake legislation both in the Commons and the Lords even though the new DUP deal now celebrates it as progress to be banked.

The only sense in which it is possible to argue that any progress was made by Safeguarding the Union pertains to the provision of things that do not change the law regarding the Border in the Irish Sea in any way, specifically the East West Council, the provision of Intertrade UK and a Monitoring Committee. While potentially beneficial in and of themselves, they certainly do not justify depriving the people of Northern Ireland government from March 2023 until February 2024 and then returning to Stormont with the Irish Sea Border still in place. When seen in the context of the enormity of the injustice which they were supposed to address, these provisions – especially when set out in the context of their broader attempt at a sleight of hand – must be called out as the supporting distractions to the conjuring illusions that they are. The

[10] https://www.newsletter.co.uk/news/opinion/columnists/dan-boucher-the-green-lane-has-not-gone-or-been-replaced-it-has-simply-been-renamed-as-the-uk-internal-market-system-so-i-have-quit-as-dup-policy-chief-4610769

[11] https://www.newsletter.co.uk/news/opinion/columnists/dan-boucher-as-a-former-dup-director-of-policy-and-research-it-is-essential-that-the-dup-completely-disassociates-itself-from-the-assault-on-democracy-that-is-safeguarding-the-union-4628308

people of Northern Ireland are not fools and to not deserve to be represented in Parliament by people who have lost the right to represent them in Parliament by taking them for fools.

In subsequent interviews from in April, Gavin Robison sought to convey a more moderate appraisal of what had been achieved by clarifying that when the statement 'the Green Lane has gone' was made, the point was not that it had been removed at that moment but rather that the agreement made provision for the removal of the Green Lane in the Autumn. In this he effectively argued that while the effect of the Green Lane going would come, it had not come yet and so even on 8 April, as interim leader, he was still suggesting that the Green Lane was going and not being straight with the electorate that it was going nowhere on account of the fact that the UK Internal Market System and the Green Lane are the same.[12]

The only changes that are coming in the Autumn are the implementation of the second part of the Windsor Framework with the application of the customs border through a new procedure called SPIMM (Simplified Process for Internal Market Movements) on 1 October 2024. Two points must be made in respect of it. First, this change is completely unaffected by the Safeguarding the Union deal and is just the Windsor Framework which the DUP told us was not acceptable. Second, although this change might make life simpler for some, it will make it much more complicated for others. It will mean that we have the most complex customs legislation in the world, and unlike conventional customs legislations which marks the boundaries between economies, this legislation will cut our country into two.

Conclusion: Why the Windsor Framework??

With the DUP effectively coming down in favour of the Windsor Framework on 29 January three points must be considered:

First, it is vital to remember that the primary importance of the Windsor Framework is that it helped to save the Irish Sea Border, which as Rishi Sunak acknowledged to Parliament, the Protocol had made completely unenforceable.

Second, that in settling for the Windsor Framework plus a few peripheral extras on 29th January 2024, the DUP has very serious questions to ask about why it deprived Northern Ireland of government for nearly a year and then went back in on substantially the same terms, with the Irish Sea border still in place.

Third, what has really been going on?

In a context where an obvious solution presented itself in Mutual Enforcement, it is difficult not to draw the conclusion that the DUP negotiating team did not actually want it and actually preferred the Windsor Framework. Why?

From September 2021 the DUP leadership committed to removing the border in the Irish Sea but always subject to the important caveat: '*while maintaining privileged access to the Republic of Ireland*.' It is only as we keep this qualification in mind that it is possible to begin to understand both the support of the DUP negotiating team for Safeguarding the Union and its failure to grab the lifeline of mutual enforcement.

The argument for adopting such a position goes something like this: under mutual enforcement Northern Ireland would only access the Republic subject to border procedures that would not be required if NI was in the same internal market as the Republic. By contrast, under the

[12] https://www.newsletter.co.uk/news/politics/gavin-robinson-says-the-uk-internal-border-will-be-gone-by-autumn-as-he-challenges-the-definition-of-irish-sea-border-4583688

Protocol/Windsor Framework we can get more than this because Northern Ireland becomes part of the Republic of Ireland, and wider EU single market of 450 million consumers, without any border related procedures, while enjoying simplified customs and SPS procedures in relation to the Irish Sea border for some goods, something we only can get because Northern Ireland is still part of the UK for other purposes. This is a clever 'net prosperity gain' that mutual enforcement puts in jeopardy.

While this logic might sound compelling, it is deeply flawed for at least three reasons:

First, the only way we can access this perceived 'net prosperity gain' is by sacrificing our citizenship, such that we can no longer stand for election to make the laws to which we are subject in some 300 areas. This is wholly contrary to the UK political tradition from the Glorious Revolution onwards which is central to our heritage and something we should cherish and protect.

Second, it is not rooted in economic reality. While it might sound amazing to say that Northern Ireland has access to a single market of 450 million consumers courtesy of the Windsor Framework, this has to be assessed in the context of the costs associated with geography and travel that mean that for much of what Northern Ireland produces, the 450 million consumers are quite theoretical. The truth is that for the things we want to sell - especially much of the food we produce - and the things we want to buy, the most important provision is being fully part of the proximate UK economy of nearly 70 million, with its attendant economies of scale in the supply chain, which we lose through the Irish Sea Border and which is by no means made up for by access to the alternative proximate economy of 5 million that is the Irish Republic.

Third, it is in any event based on a complete misunderstanding of mutual enforcement that suggests that its application to the NI – ROI border would result in an arrangement that places our current level of access to the Republic in jeopardy. The truth is that in the context of the Trade and Co-operation Agreement the need for customs duties and tariffs is already minimised such that for many purposes mutual enforcement provides the opportunity to access the Republic on a basis that is, like being in the same market. Thus, mutual enforcement provides what we need, the full reintegration of Northern Ireland into the United Kingdom in the context of preserving our access to the Republic without a hard border. It delivers the very thing that the DUP has committed itself to, while Safeguarding the Union and Windsor Framework puts it in jeopardy, by pushing us away from the key, proximate GB market through the imposition of the Irish Sea border.

At this point it must also be emphasized that even if there were some unanticipated costs associated with accessing the Republic through mutual enforcement, a very obvious solution presents itself. A vast amount of public money is currently being spent on servicing the Irish Sea border. As of February 2023, an answer to a Parliamentary question revealed that the UK Government had spent well over £500 million on it. Out of this £346.2 million had been spent running the Trader Support Service up until that point. The answer also revealed that in addition to the half billion already spent, a further £150 million had been pledged by the UK Government to help DAERA's Digital Assistance Scheme, designed to run the SPS dimension of the border. Then, a recent answer to an Assembly question shows that the construction of the border control posts is estimated to be £192 million. Even if every penny spent on the Irish Sea border was paid to NI businesses trading with the Republic as compensation for potential mutual enforcement border frictions (which would be wholly unnecessary even if customs and tariffs were applied), this would still constitute a massive net gain because it would avoid the indignity of 1.9 million UK citizens being disenfranchised (undermining the Good Friday

Agreement) and the humiliation of the United Kingdom arising from the disrespecting of our territorial integrity by 27 sovereign states.'[13]

How Should You Vote if You Want NI to Remain in the UK? Splitting Unionism?

Some people have argued in this election that the TUV should not stand because doing so splits the unionist vote. That needs to be refuted in the strongest possible terms for three reasons:

First, we did not stand in the 2019 General Election for precisely this reason and trusted the DUP, but for all the reasons set out in this Long-Read Manifesto, that approach is no longer credible.

Second, it is not the DUP that is splitting the vote but the UUP and DUP. On 28 September 2021 all Unionist parties signed up to the following commitment:

'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.'

The UUP and then the DUP moved away from unalterable opposition by going back into Stormont and becoming implementors of the Protocol.

The TUV has had to stand in this election to give the people of Northern Ireland the option of voting for a unionist candidate who are not prepared to serve as implementors of the Protocol and sign up to a deal with the Protocol/Windsor Framework at its heart.

Had they not split unionism away from its place of unity on 28 September 2021 then we would not be standing in this election.

Third, we have to take a long-term view for the good of unionism and recognize that we are confronted with a far greater worry and concern than reduced unionist representation in this next Parliament.

Between 31 January and April the DUP misled the people of Northern Ireland claiming they had negotiated a deal with the government meaning that the Green Lane, which accounted for over 80% of goods moving from Great Britain to Northern Ireland, had gone, to be replaced with UK Internal Market System in which there would be no paperwork and no checks beyond that attending movements within any other part of the UK single market. In adopting this approach, they sought to perform, with the Government, an extraordinary sleight of hand because the Green Lane has always been the shorthand for the UK Internal Market System and so what they were actually claiming was that the Green Lane had only gone in the absurd sense that it had been replaced by itself. In presenting this as a substantive change to be banked the DUP treated the people of Northern Ireland as fools. In this context it is striking that in approaching this election, rather than seeking to defend the way it misled the public at the beginning of the year, the DUP has been forced to fall back on fear tactics, namely arguing that because they were elected as the biggest unionist party in December 2019, people must vote DUP again because anything else would split the unionist vote. In truth, however, those who are committed to NI's ongoing place in the UK cannot fall for this tactic because we know we are confronted by an even greater risk that must be avoided.

[13] This is taken from the article by Dr Dan Boucher published in the Newsletter on 30 May: https://www.newsletter.co.uk/news/opinion/columnists/dan-boucher-the-windsor-framework-must-be-exchanged-for-mutual-enforcement-as-a-matter-of-urgency-4646225

In giving his speech on joining the TUV, Dr Boucher said while there are many wonderful people in the DUP the party has been fatally compromised in recent years by the fact it has sought to face in two directions at the same time. The consequences of this can be seen with great clarity if one surveys its approach to the Protocol/Windsor Framework from 1 January 2021. This encompasses four distinct phases as one view has gained the initiative and then lost it to the other, and vice versa.

Phase 1: Pivoting Towards the Protocol

In entering 2021 it is very clear from speaking to journalists and people in business that, notwithstanding the fact that the DUP had voted against it, many of the key people in the leader's inner circle were arguing that the Protocol presented a real economic opportunity to be exploited. There was even talk about Northern Ireland becoming the Singapore or Hong Kong of Europe. This, however, did not go down at all well as many businesses struggled with the imposition of the parts of the Protocol that were not effectively suspended through grace periods. Members of the DUP rank and file also turned against this approach.

Phase 2: Pivoting Away from the Protocol

There was an attempt to use the arrival of Jeffrey Donaldson as leader to pivot the party back towards complete opposition to the Protocol. In July he set out the DUP 7 tests and on 9 September gave his seminal speech making it clear that if the UK Government did not remove the Protocol, the DUP would withdraw from the Assembly. It was clear that some within the party wanted to pivot back to adopt a positive position, claiming the Windsor Framework as a win in February 2023 but it plainly was not enough and in his party conference speech on 14th October 2023 Jeffrey Donaldson said: '*Upon careful reflection and consideration of the facts, and not the spin, we concluded that the Framework did not meet our seven tests as set out in our 2022 Assembly election manifesto.'*

Phase 3: Pivoting Towards the Protocol (Windsor Framework)

From December onwards, however, it was clear that there was now an attempt to pivot back and to find grounds to justify returning Stormont and on 29 January the leader and deputy leader presented the Safeguarding the Union deal to the Party Executive and asked them to back it and a return to Stormont, making the extraordinary claim that 'the Green Lane's Gone'. One journalist observed that at this point it felt like DUP had returned to a place that was very similar to that of early 2021 and that those championing the best of both worlds had regained control of the party.

Phase 4: Pivoting Away from the Protocol (Windsor Framework)

It was always going to be very difficult to sustain the position that the Green Lane had gone in the real world and so it was perhaps inevitable that it was only a matter of time before reality broke-in. In this context it was reported in late May that someone senior from within the DUP had told the media that the expectation was that on being made leader Gavin would 'pivot' back to adopting a more realistic appraisal of Safeguarding the Union.

The Pivoting Party

The sad reality that this overview of recent DUP history conveys is that rather than being a party of shared principle, it has become a party of pivoting as different sets of people with entirely different objectives have seized, then lost and then regained the initiative, depending on external political pressures of the moment. The DUP has become like a merry-go-round on which, at times it has looked like unionists have been in control **but - and this is critical - even when those championing the best of worlds have stepped back out of regard for**

presenting political pressures, they have never gone away and have always managed to prevent negotiations reaching the point at which they feared unfettered access to the Republic of Ireland and the EU might be compromised.

In this context the truth is that the many good people in the DUP who have not allowed their unionism to be qualified by the shiny lights of the best of both worlds economic and political fantasy have effectively allowed their unionism to be held captive to a party that has lead unionism round in circles for the last five years.

In this context when the claim that the TUV is splitting the unionist vote is made it must be refuted in the strongest possible terms on the following bases:

First, if the DUP carries on as before, those whose best of both worlds agenda actively undermines the union will continue to call the shots in defining the way forward.

Second, those members of the DUP who are committed unionists, whose natural inclination is to stand resolutely against the Protocol, will remain imprisoned in a party that takes them round in circles rather than liberating their commitment into a credible strategy to restore the union through Mutual Enforcement.

The real unionists in the DUP need to take back control of their party and join with other serious unionists in seeking to place the union on a firm foundation or, if this is not possible, to leave the DUP and join the TUV. The best way to liberate the real unionists in the DUP is to invalidate the current strategy of performing whatever circling routine is required so long as it does nothing they fear might conceivably complicate in any way privileged NI access to the EU single market, (although the experts who have developed Mutual Enforcement believe it would effectively secure free access to the Republic) regardless of the constitutional consequences.

That won't happen unless the DUP performs badly in this election such that the party is forced to completely rethink its strategy and personnel.

There is no reason why this need result in reduced unionist representation in the next Parliament if unionists who voted DUP in previous elections vote instead for TUV – No Sea Border on 4 July, and we must, in any event, ever keep two key considerations before us: First, such an eventuality would have no impact on the total number of unionist votes and the message that sends and, most importantly, we have to take the longer term view. **We have to recognise that the greater disaster would be for the DUP to be validated in its strategy of misleading the people and going round in circles while the ship goes down. The priority for unionism in this election must be to secure the greatest number of votes and a foundation upon which to rebuild and remobilize unionism over the next five years on a credible unionist foundation which is unstinting in both its rejection of the Windsor Framework economically, politically and legally and in vigorously promoting the solution for dealing with the problem, Mutual Enforcement.**

Unionism has never faced a more important election.

Regardless of whether you would normally vote UUP or DUP please demonstrate that we cannot continue as we have been.

Vote for the Change Unionism badly needs. Vote TUV/Reform.

Appendix

Delegated Legislation Committee

Debated on Thursday 26 November 2020

Draft Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020

Thursday 26 November 2020

[Esther McVey *in the Chair*]

Draft Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020

11.30am

The Chair

Before we begin, I will mention social distancing again, although you are all sitting in the correct allocated spaces, and when the main Benches were full everybody correctly sat in the Public Gallery at the back.

The Minister of State, Northern Ireland Office

(Mr Robin Walker)

I beg to move,

That the Committee has considered the draft protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020.

It is a pleasure to serve under your chairmanship, Ms McVey. I put on record my thanks to House staff for the work that they have done to make this Committee Room safe for Members in the current difficult circumstances and, indeed, for doing so for the many statutory instrument Committees that we have dealt with recently.

The regulations fulfil a simple but important task: to reflect in domestic law the consent mechanism set out in the Ireland/Northern Ireland protocol and the UK Government's unilateral declaration of 17 October 2019. The Belfast/Good Friday agreement is built on the principle of consent. It was ratified by referendums in Northern Ireland and Ireland, and the agreement is crystal clear that any change in the constitutional position of Northern Ireland within the United Kingdom can come about only if the majority in Northern Ireland consents to that change. The vital importance of consent is recognised in the provision for alignment in the protocol to be disapplied if Northern Ireland's political representatives conclude that it is no longer desirable. Embedding that recognition of consent in the protocol was intrinsic to its acceptance by the Government.

The protocol was designed as a practical solution to avoiding a hard border on the island of Ireland, while ensuring that the UK, including Northern Ireland, could leave the European Union as a whole. The protocol necessarily included a number of special provisions that apply only in Northern Ireland for as long as the protocol is in force. That is why it is for elected representatives in Northern Ireland to decide what happens to the protocol alignment provisions in a consent vote that can take place every four years, with the first vote taking place in 2024. Only elections to the Northern Ireland Assembly and the vote of Members of that Assembly will decide the outcome.

If the draft regulations are approved, the first consent process will take place in 2024. If consent is given at that point, the process will then be repeated every four or eight years—four years if consent is given with a simple majority, eight years if consent is given with cross-community support. This demonstrates that the mechanism is designed to encourage cross-community support, giving the Assembly the opportunity to provide eight years of certainty to Northern Ireland's businesses and individuals through cross-community agreement.

I have heard arguments that this approach is somehow contrary to or not compatible with the Belfast agreement, and I do not accept that that is so. Our approach is entirely compatible with the agreement. The principle of cross-community support set out in the Belfast agreement applies to internal matters for which the Northern Ireland Assembly is responsible. The consent mechanism, contained as it is in the Northern Ireland protocol, relates to the UK's continued relationship with the EU, an excepted matter in Northern Ireland's devolution settlement. That means that the matter at hand falls outside the remit of the Assembly and outside the principle of requiring cross-community support to pass. We have taken the steps we have, with four versus eight years, to incentivise that support.

The regulations implement both the default consent process and an alternative consent process. The default consent process will apply if the First Minister and Deputy First Minister are in office on the day the Secretary of State issues the notification to begin the process—that is, for the first occasion, on 31 October 2024. By contrast, the alternative process will apply if at that point or any future such points the First Minister and Deputy First Minister arere not in office. It should be recalled that the protocol was drafted at such a time, and although we welcome the restoration and subsequent stability that the Executive has achieved, it is right that we have such a fall-back in place.

The alternative process enables any MLA to bring forward the consent motion in the absence of the First Minister and Deputy First Minister. It also puts in place a process to enable the consent vote to take place under the alternative process, even if the Assembly were unable to elect a Speaker when required to do so. That ensures that MLAs will always be able to take a decision on a consent motion, discharging the obligation in international law to facilitate that process.

The Government remain fully committed to implementing the withdrawal agreement and protocol, which were specifically designed to protect the Belfast/Good Friday agreement and the huge gains of the peace process. That is why the alignment provisions within the protocol depend for their legitimacy on consent. That ensures that democratically elected local politicians will decide the future of the protocol in Northern Ireland. By making the regulations, we will ensure that this can be delivered for the people of Northern Ireland, and I therefore commend them to the Committee.

11.35am

Karin Smyth

(Bristol South) (Lab)

It is a pleasure to serve under your chairmanship, Ms McVey. I echo the Minister's thanks to the various House staff who have allowed us to meet today and on other occasions.

We are here today because we have with the Irish Government a joint and solemn responsibility to the people of Northern Ireland. Although Brexit divides the UK and Ireland into different economic blocks, the protocol sets out our need to have regard to the historic ties, recognises the unique and significant challenges that exist on the island of Ireland, and

emphasises that to ensure democratic legitimacy there should be a process of consent—the subject of the regulations before us today, which we support. The instrument looks like a dry, technical piece of process legislation, but it is much more than that.

We have real concerns on which I seek assurances from the Minister. They centre on the unsatisfactory nature of the fact that we are agreeing here in Westminster a process for those elected to Stormont to agree a voting mechanism on a deal that we do not yet have. It invokes the principle of consent and notions of democracy, on which I take issue with the Minister. We also have concerns about the destabilising nature of the timing of the votes.

First, we are agreeing a process today for consent to something that we do not know: the operation of articles 5 to 10 on customs and goods across the island of Ireland. I will not rehearse all the things that we do not know with only 36 days to go, but, as has been the case in the past four years, the lack of certainty and the way in which the delicately balanced unique circumstances of Northern Ireland have been treated does not bode well, and it is not acceptable for the Government to ask us to agree legislation without having agreed what the arrangements are in 36 days' time.

Secondly, I want to highlight the use of the word "consent" by the Government. In the Command Paper, "The UK's Approach to the Northern Ireland Protocol", published in May 2020, the foreword highlights on page 3 that,

"The Belfast Agreement is built on the principle of consent."

The next paragraph states:

"The vital importance of consent is recognised in the provision for alignment in the Protocol to be disapplied",

as the Minister has said, and that

"Embedding that recognition of consent…was intrinsic to its acceptance by this Government."

That is a clear signal, as the Minister outlined, of the linkage of the 1998 agreement and this SI. On the next page, the Chancellor of the Duchy of Lancaster talks about protecting the "Belfast (Good Friday) Agreement" , which is referred to on page 5.

Language matters, particularly in the context of Northern Ireland. The Minister knows that every word of every document is carefully crafted and rigorously studied. There are many examples from the past year of how this democratic consent mechanism has been used to placate the Brexiteers in his own party and the entirely legitimate concerns of Unionists about what the Prime Minister agreed to in order to secure the withdrawal agreement.

This SI deliberately invokes the carefully crafted principle of consent about the constitutional issue from the 1998 treaty, but it is a different mechanism. It is designed for a different purpose and it would have been better to have perhaps used different nomenclature. I know the Minister argues that the mechanism is different. It is passable by a majority vote, because one is part of an international treaty and one enacts something into domestic law, but, having linked the two for political expediency, retreating into legalese and hair splitting is not helpful to trust in the Government's intent.

The word "democratic" is also invoked carefully here. Indeed, writing in *The Belfast Telegraph*, the Chancellor of the Duchy of Lancaster and the Secretary of State said of this proposal,

“Critically, any arrangements for implementing the Protocol will only be able to last as long as they command the support of democratically-elected local politicians. The future is firmly in Northern Ireland's hands.”

Patently, that is not the case. In this negotiation between the UK and the EU, Northern Ireland has never been in control, and this statutory instrument simply allows Assembly Members to agree—or not—to what others have negotiated. The UK Government’s proposal to mitigate the impact of UK Government policy and future alignment—or not—with the European Union is also a UK Government political decision.

To reverse some of the damage to trust in relationships in the past four years, there has to be a more serious commitment by the UK Government to real democratic oversight of the entire protocol, within the context of the 1998 agreement, by the people of Northern Ireland. I have asked several times of this and previous Governments how the enactment of the backstop and now the protocol interplays with the provisions of the north-south and east-west provisions of the Belfast/Good Friday agreement, and I have never had a good answer.

The Joint Committee, the Specialised Committee and the joint consultative working group, plus the process to consent to something that we do not already know, make the whole issue much more problematic and in need of resolution. We need a commitment to be clear on the interrelationships of those bodies and how the Northern Ireland voice is heard and counts, and an assurance that the future really is in the hands of the people of Northern Ireland. I would like the Minister to outline any further thoughts that the Government have on how and when that can happen.

We are also concerned about the destabilising nature of the process, which the Minister has outlined without the context. Article 18 offers the opportunity of a vote, but the SI essentially forces one—it says there will be a vote. The Minister may wish to clarify that, but we might need to consider some flexibility, because the timing and process of a vote within the current electoral cycle is concerning. We have Assembly elections in 2022 and the consent vote that we are debating in November or December 2024. I remind hon. Members that we are also due a general election at that time.

If there is a simple majority in the consent vote in 2024, a two-year review of the articles in the protocol takes us to 2026. It is then two more years to another vote in 2028. If it is rejected in 2024, there will be a need to reopen negotiations on avoiding a hard border, repeating the circular and damaging debate of the last four years, between 2024 and 2026. There is also the prospect of more Assembly elections in 2027. If the consent vote that is part of the SI is approved in 2024, there will be another vote in 2032. That is a long process and a deeply concerning prospect.

There are too many opportunities for division. As we hear from the Government that they are seeking to move away from alignment with the European Union, it appears inevitable that, under their watch, those divisions will continue to be laid bare in Northern Ireland. How much consideration have the Government given to the electoral cycle and the timetable proposed in the SI? What will they be doing to avoid the economic and political instability it portends?

We all need a deal, and one that means that all the difficulties of separation between our two countries are minimised and that the provisions in the SI are part of the dull and technocratic process that the Government are keen for us all to believe in. The signs are not promising, however, and I hope that the Minister will reflect on the issues I have raised. I hope he is assured, however, that the Opposition are ready to do all we can to ensure that we uphold our solemn commitment to the people of Northern Ireland to a strong economy and to peace, stability and reconciliation in the coming difficult years.

11.42am

Mr Walker

I am grateful to the hon. Member for Bristol South, who spoke, as always, with great knowledge and passion on these issues. She has made a number of important points. I agree about our responsibilities to the people of Northern Ireland and about working in a constructive way. She referred, a little unfairly, to a deal that we do not yet have. It is important to reflect that, when we are talking about the protocol, this is the deal that was negotiated and agreed between the UK and the EU, and that we are implementing and delivering on. That is part of the fact that we left the European Union with a deal in place earlier this year. I recognise, however, that her point is really that the nature of its impact will depend on the overall deal. Of course, we all hope that there is progress on that in the coming days and weeks.

The hon. Lady made the point about the importance of timing in the process. I recognise that whatever the timing we announced for it, there would be sensitivities and an interaction with the electoral cycle. The regulations that we are debating achieve it in the simplest way by saying that we agreed to a four-year consent mechanism, which applies four years after the deal was effectively done. However we designed it, there would be some interaction with elections somewhere in the UK. It is right, therefore, to default to a simple process.

Of course, we want to support and incentivise the opportunity for cross-community support through the design of the system, which allows for an eight-year process. That would separate it perhaps a little further from the regular patterns of elections across the UK or in Northern Ireland. That provides the opportunity, if it can be demonstrated that the protocol is working effectively, that it can win cross-community support and that it has Assembly Members behind it, to separate it from some of the challenges.

The review mechanism also plays an important part in that and is part of the way in which the consent process encourages the best possible cross-community agreement. That is why if the resolution passes with cross-community support, the next consent decision would be eight years after the first. There is a strong incentive there, not just for Northern Ireland parties, but for the UK Government, to generate the widest possible support for the protocol and Northern Ireland's unique arrangements.

If the consent mechanism passes with only a simple majority, the UK Government will initiate an independent review into the functioning of the protocol and the implications of any decision to continue or terminate alignment on social, economic and political life in Northern Ireland. The hon. Lady rightly made the point that there are already many Committees and independent reviews to discuss and look into these matters, but the key to the review is in paragraph 8 of the unilateral declaration:

"The independent review will make recommendations to the Government of the United Kingdom, including with regard to any new arrangements it believes could command cross-community support."

That provides an opportunity to foster and build support. Cross-community support is our aim. We want the protocol to command the widest support possible across Northern Ireland. If in 2024 the consent resolution passes with only a simple majority, we would use the outcome of the independent review to continue to work towards further cross-community support for what would then be a subsequent consent decision in 2028.

As I said in my opening speech, the Government remain fully committed to implementing the withdrawal agreement and the protocol. As ever, our intent and our purpose is to protect the

Good Friday/Belfast agreement. That intent was at the heart of our negotiations with the EU last year and is reflected in this consent mechanism. It is something that we will always uphold. Through the mechanism, we ensure that the question of continued alignment with EU law will be decided by those democratically elected to represent the people of Northern Ireland.

Question put and agreed to.

11.46am

Committee rose.

https://hansard.parliament.uk/commons/2020-11-26/debates/82384cf5-23b5-43a4-a1c4-5036a3c687b1/DraftProtocolOnIrelandNorthernIreland


RESTORE THE UNION
UUV
REFORM
UK
NO SEA BORDER