

FROM: JONATHAN STEPHENS
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PS/Secretary of State (L&B)

cc See Copy Distribution Below

cc Mr Smyth
Mr Sweeney (Comm)
Miss O. Bayle.
BTM
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FAILSAFE BILL AND AGREEMENT: OUTSTANDING POLICY ISSUES

I attach the latest drafts of:

- the supplementary International Agreement with the Irish Government;
- the Northern Ireland Bill.

Both are necessary to give effect to the failsafe mechanism. We cannot legislate without agreement with the Irish Government. The essential structure of the two documents is:

- both the supplementary International Agreement and the Bill contain the trigger mechanisms for suspension in virtually identical terms;
- the Bill then sets out the detail of the suspension of devolution and re-imposition of direct rule;
- the draft Agreement sets out the detail of the suspension of the NSMC, BIC and North/South implementation bodies;
- there has to be an inevitable degree of overlap between the two.

2. Agreement with the Irish Government is therefore essential to proceed at all. There are a number of serious outstanding policy issues which now need urgently to be

resolved and agreed with the Irish Government. Our approach has been to maximise the reassurance for the UUP, within the terms of last Friday's statement.

3. With No 10's agreement, we have put these drafts to the Irish side tonight with a view to discussing them with Irish officials tomorrow; the Prime Minister also plans to speak to the Taoiseach tomorrow. The rest of this note focuses on the outstanding policy issues and the approach we recommend.

To legislate or not

4. The Irish Government (Dermot Gallagher's letter of 8 July) have formally pressed us to take no action in advance of suspension actually being required; but only to produce drafts of the Bill and the International Agreement now to reassure David Trimble that action could be taken rapidly.

5. The Irish Government argue that:

- this is what was intended last Friday;
- it is more consistent with the Agreement;
- it reduces the risk of a constitutional challenge in the Irish Courts to the amendments to the Irish constitution.

6. Our presumption remains that the actual enactment of legislation is essential for Trimble. No 10 are checking this with Trimble and, in any case, the Prime Minister will stress the importance of legislation to the Taoiseach.

Trigger mechanism

7. Both the draft International Agreement and the Bill provide two identical triggers:

- an adverse report by the Decommissioning Commission;
- a judgement by the Secretary of State that a commitment relating to devolution has been breached.

8. It is essential that the decommissioning trigger is entirely automatic and provides for no element of discretion. But the more automatic it is, the more likely we are to end up with suspensions we do not want.

9. The approach taken so far is that a breach of a decommissioning commitment by any paramilitary organisation formally recognised as on ceasefire (under the sentences legislation) automatically triggers suspension. The current list is the IRA, UVF, UDA, INLA and LVF.

10. The alternative approach would be to limit suspension to breaches by organisations with links to political parties, either in the Assembly or in the Executive. But this suffers from the following drawbacks:

- someone has to make a judgement as to which parties are linked with which organisations;
- although the dogs on the streets know this, in formal and legal terms the Governments would not be trusted to reach this judgement and the Decommissioning Commission does not have the evidence;
- the Irish Government in any case will be very reluctant to contemplate any provision (and the provision would have to appear in the International Agreement) which asserts a link between Sinn Féin and the IRA;
- a breach by the UDA would not give rise to suspension because the UDP is not represented in the Assembly (and, in practice, failure by both the UDA and the

UVF to decommission alongside the IRA would have knock-on consequences for the prospects of IRA decommissioning);

- a trigger targeted only on parties in the Executive in effect means Sinn Féin and looks unbalanced.

11. Our recommendation, reluctantly, therefore is to stick with the current approach - even though this may require rather more suspensions than we would like, albeit ones which should be very short lived.

Assembly to meet or not

12. Perhaps the single most contentious issue is whether, during a suspension period, the Assembly should be able to meet in shadow form.

13. On Trimble's view:

- the solution to a breach lies in the Assembly and so it must meet;
- the first step after suspension is to test exclusion, which requires the Assembly to meet, and a formal review is only needed if that fails;
- rewinding to the status quo means rewinding to a situation in which the Assembly can meet (although in practice it has not done so since early March).

14. The SDLP, Sinn Féin and Irish Government view is:

- the agreed proposal last Friday was to suspend the operation of all institutions: that is incompatible with the Assembly continuing to meet;
- once suspended, the only way forward under the Belfast Agreement is a formal review which, under paragraph 7 of the relevant section, is to be conducted by

both Governments, in consultation with the parties in the Assembly: so there can be no question of the Assembly meeting before the review has started;

- politically, nationalists could not accept meetings of the Assembly when meetings of the North/South Council were impossible (all the more so in the case of a breach in commitments on devolution).

15. Our approach reflected in the current Bill is to provide for the Assembly to meet, but only at the direction of the Secretary of State and only to consider such business as she requires it to consider. We have argued to the Irish side that, even on their view, one outcome of any review could be the need for the Assembly to take action before powers can be resumed, so we should at least keep this option open.

16. Unless Ministers want us to drop the possibility of the Assembly meeting altogether, we think we must stick with this line. But it will encounter very strong Irish Government and nationalist objections - we may need to give assurances that we shall only call meetings of the Assembly in consultation with all parties in the Assembly.

Implementation Bodies: practical difficulties

17. The draft International Agreement proposes a two stage process for the suspension of implementation bodies:

- stage 1: immediately, the bodies cease to be under the direction of the NSMC and come under the direction of the British and Irish Governments but can only carry out such activities as were exercisable prior to the suspension order. They cannot carry out new policies or actions, nor have new functions conferred on them and no new implementation bodies can be created;
- stage 2: within two months, the two Governments must agree on arrangements for the transfer of the bodies' functions (while the bodies themselves continue to exist) to the relevant departments, North and South, subject only to the

bodies retaining those functions which have always been operated on a cross-border or all-Ireland basis (eg Foyle Fisheries and Irish Lights).

18. In practical terms, our assessment is that this is the best we can offer. The bodies have a number of real functions - such as contractual obligations and legal duties, including in one case the ability to bring prosecutions - which cannot simply be divided up overnight. But the reassurance that the bodies cannot take on any new policies or actions and, if the suspension lasts for longer, that the Governments must return their functions should meet the unionist concern that these bodies do not continue in perpetuity if the other institutions collapse.

19. The Irish Government agree with this broad approach but emphasise the practical difficulties (they will require further legislation in the Dail) and will press us to increase the period of two months allowed - if pressed, we suggest we can go to four or even six months.

Resumption

20. The Bill currently provides, at the end of the suspension period that:

- all previous Ministers return to office unless, in the meantime they have become ineligible for office (eg death, ceasing to be a member of the Assembly or the Assembly has passed an exclusion motion against them);
- this means in particular, in the case of the Assembly passing an exclusion motion during the suspension period, that this will (under existing provisions) result in the re-running of the d'Hondt procedure to form a new Executive.

21. There is little point in providing for the re-running of the d'Hondt procedure in all cases because:

- unless a party has been excluded in the meantime (in which case the re-running of d'Hondt is automatic) it will result in exactly the same distribution of Executive seats;
- in any case, it will be difficult to provide for the re-running of the d'Hondt procedure in all cases without also providing for the re-election of the First and Deputy First Minister in all cases (which we want to avoid).

22. A possible concession for Trimble (not in the current draft Bill) would be to make the resumption of devolution subject to cross-community approval in the Assembly first. This would guarantee that he would not find himself back in Government with Sinn Féin unless he was satisfied with the basis of the resumption. (But the Irish Government may object that this is an extra and unnecessary hurdle to be crossed.)

Next steps

23. We are sending the attached versions to the Irish Government tonight, with No 10's agreement. Subject to Ministers' views, we shall engage with Irish officials tomorrow on the basis suggested in this submission.

24. Mr Murphy also told the Northern Ireland parties that they would get a draft Bill tomorrow: we suggest we hold off on this until we are in a position to assess both the Irish reaction and how it will interplay with the UUP Executive meeting.

25. We also need to consult the Decommissioning Commission: we plan to show them the attached drafts tomorrow as well.

(Signed JAS)

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