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Research Briefing

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Northern Ireland Protocol Bill 2022-23

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Summary

The Northern Ireland Protocol Bill 2022-23 was introduced in the House of Commons on 13 June 2022. The second reading will take place on 27 June.

The Bill, and its Explanatory Notes, can be found on the UK Parliament website.

The Northern Ireland Protocol (the Protocol) is part of the UK's Withdrawal Agreement with the EU and sets out special arrangements for Northern Ireland, so the island of Ireland remains border-free.

The Bill empowers ministers to disapply parts of the Protocol and relevant parts of the Withdrawal Agreement (WA) in UK law.

Why is the Government introducing this Bill?

The Foreign Secretary, Liz Truss, says the Government's preference remains to reach a negotiated outcome with the EU, but that the EU's current proposals are not able to address the Government's "fundamental concerns" over the Protocol.

In a policy paper published alongside the Bill, the Government outlined these concerns. They include "trade disruption and diversion, significant costs and bureaucracy for traders and areas where people in Northern Ireland have not been able to benefit fully from the same advantages as those in the rest of the United Kingdom".

The paper says, "this has contributed to a deep sense of concern that the links between Great Britain and Northern Ireland have been undermined".

What does the Bill do?

The Withdrawal Agreement/Protocol in domestic law

Currently, the Withdrawal Agreement is given direct effect and supremacy in UK domestic law by Section 7A of the EU (Withdrawal) Act 2018. Section 8C of that Act also gives ministers powers to ensure effective implementation of the Protocol.

Exclusion of parts of the WA/Protocol

This Bill empowers ministers to make parts of the Protocol and related parts of the Withdrawal Agreement "excluded provision", stopping their direct effect in UK law.

Clause 2 does by partially disapplying section 7A(2) of the 2018 Act, limiting the scope of direct effect of the Withdrawal Agreement. Clause 2 also qualifies the effect of section 7A(3) of the 2018 Act, meaning that the Northern Ireland Protocol Act 2022, and anything done under it, would take priority, in UK law, over the Withdrawal Agreement.

This means UK courts will no longer be able to recognise and give effect to those "excluded" provisions by relying directly on the Withdrawal Agreement.

The following clauses of the Bill make parts of the Protocol "excluded provision":

- **Clause 4: Movement of goods and customs** – excludes various parts of Article 5 of the Protocol concerned with customs and the movement of goods between the UK and Northern Ireland. This will allow the UK to set up a "green lane" for goods, so they can avoid customs and Sanitary and Phytosanitary (SPS) checks (checks on agri-food, plants and animals).
- **Clauses 8: Regulation of goods –** excludes parts of Article 5 and Annex 2 of the Protocol that relate to the regulation of goods. This will allow the UK to set up a "dual regulatory regime" in Northern Ireland, enabling businesses to choose whether to follow UK or EU rules on manufactured goods, medicines and agri-food goods.
- **Clause 12: Subsidy control** – excludes Article 10 of the Protocol and related Annexes 5 and 6 on State Aid/subsidy control. This will allow Northern Ireland to follow the UK's subsidy regime and not the EU's State Aid rules.

CJEU jurisdiction and dispute mechanisms

An important aspect of the Withdrawal Agreement is that it includes mechanisms for the enforcement both of the Agreement generally and the Protocol in particular. This includes various supervisory and dispute roles for EU institutions and a role for the Court of Justice of the European Union (CJEU) in interpreting and applying EU law where it is incorporated into the Protocol and other parts of the Withdrawal Agreement.

Clause 13 of the Bill excludes any provision of the Withdrawal Agreement that would give the CJEU a role in enforcing the Protocol and its related provisions. It is re-enforced by **clause 20** of the Bill, which removes the "binding" status of CJEU case law in relation to the Protocol and its related provisions, and prevents references being made to the CJEU (despite this being a requirement of the Protocol).

Clause 14 of the Bill also disapplies the Withdrawal Agreement dispute settlement process more broadly in relation to parts of the Protocol disapplied by the legislation.

Power to exclude further parts of the Protocol/Withdrawal Agreement

Clauses 15-16 allow ministers to "exclude" further provisions of the Protocol/Withdrawal Agreement, and to make new laws to implement these changes. They can also be used to modify the effects of excluded provisions, and to make parts of the Protocol/Withdrawal Agreement no longer excluded.

Clause 15 defines several "permitted purposes" for which ministers may use the power to "exclude" other provision. The purposes in question are loosely defined and include "safeguarding social or economic stability in Northern Ireland" and "safeguarding the territorial or constitutional integrity of the United Kingdom".

Parts of Protocol protected from being excluded

Subsection 15(3) states there are three sections of the Protocol to which ministers are barred from making "additional excluded provisions":

- Article 2 (rights of individuals);
- Article 3 (Common Travel Area); and
- Article 11 (other areas of North-South co-operation).

The democratic consent process set out in Article 18 of the Protocol is not protected in the same way.

VAT and excise

Article 8 of the Protocol which covers VAT and excise and ensures the EU's VAT laws apply to Northern Ireland, is not an excluded provision. But **clause 17** allows ministers to introduce regulations to "make any provision" about VAT, excise duty or any other tax which ministers "consider appropriate in connection with the Northern Ireland Protocol".

Questions over breaking of international law?

The Withdrawal Agreement is an international treaty between the EU and the UK.

Article 4 of the Withdrawal Agreement requires the UK to ensure that directly applicable provisions of the treaty (and anything done under it) are given "the same legal effects" in UK law as they would have in EU law and in the law of Member States. Article 5 of the Withdrawal Agreement, on good faith, states

the EU and UK will faithfully enact the measures to fulfil their obligations arising from the Agreement.

The Vienna Convention on the Law of Treaties (VCLT), governs the creation, termination, interpretation, and violations of treaties, between states, but it is applicable to the Withdrawal Agreement (a treaty between a state – the UK- and an international organisation – the EU).

Under the VCLT, and customary international law, states are under a general obligation to abide by their agreements in good faith according to the principle of *pacta sunt servanda* (agreements must be kept, see Article 26 VCLT). Nor can states "invoke the provisions of its internal law as justification for its failure to perform a treaty" (Article 27 VCLT).

Government legal position and doctrine of necessity

The Government concedes in its legal position paper on the Bill that passing this legislation will amount to a "non-performance of its obligations contained in the Withdrawal Agreement and/or the Protocol".

However, the Government argues it can justify its approach in international law under the "doctrine of necessity" a concept in customary international law.

In its legal position paper, the Government states the strain upon institutions in Northern Ireland, and more generally on socio-political conditions, has reached the point where it has no other way of safeguarding the essential interests at stake than through the adoption of the Bill, and that there is clear evidence of a state of necessity to which the Government must respond to. It argues that the legislation is currently the only way to alleviate the socio-political conditions, while continuing to support the Protocol's objectives, including supporting North-South trade and cooperation, and the interests of both the EU and the UK.

The doctrine of necessity is one of a limited number of "circumstances precluding wrongfulness" – in other words, a legal defence that permits an otherwise unlawful breach of international law. The doctrine of necessity is narrow and limited, and can only apply in very exceptional circumstances.

Most legal commentators disagree with the Government that the current situation in Northern Ireland is so exceptional to warrant the defence of necessity, and point to other remedies such as using the safeguard measures found in Article 16 of the Protocol.

What has the reaction been?

European Union

After the Bill was published on 15 June, the European Commission announced it was moving forward with the legal action against the UK it first launched in March 2021. The Commission had paused these infringement proceedings in July 2021, while it pursued negotiations with the UK. The Commission also announced it was launching two new infringement proceedings against the UK for not supplying the EU with trade statistics data for Northern Ireland, as required under the Protocol, and for not applying the EU's SPS rules for goods entering Northern Ireland.

In addition, the Commission published two new position papers on customs and SPS rules, that gave further details of its proposed solutions to ease these checks in addition to the non-papers that it had published in October 2021.

Northern Ireland

Democratic Unionist Party (DUP) leader Sir Jeffrey Donaldson MP welcomed the Bill, saying Parliament had to choose between the Belfast/Good Friday Agreement and the Northern Ireland Protocol.

Michelle O'Neill, Sinn Féin's Stormont leader, said the Bill was "in clear breach of international law" and accused the Prime Minister of "pandering" to the DUP. Alliance leader Naomi Long also accused the UK Government of treating Northern Ireland's political parties in a "differential manner", something it rejected.

A letter signed by 52 MLAs from Alliance, Sinn Féin and the Social Democratic and Labour Party said that while the Protocol had flaws it represented "the only available protections for Northern Ireland" from the impact of Brexit.

1 Background to the Bill

The Northern Ireland Protocol Bill was introduced on 13 June 2022.

The UK Government argues the legislation is necessary to solve problems arising from the Protocol on Ireland/Northern Ireland (The Protocol). It says these include "trade disruption and diversion, significant costs and bureaucracy for traders" as well as "areas where people in Northern Ireland have not been able to benefit fully from the same advantages as those in the rest of the United Kingdom". The Government says this has "contributed to a deep sense of concern that the links between Great Britain and Northern Ireland have been undermined".[1]

The Government's rationale for introducing this legislation are set out in its policy paper: Northern Ireland Protocol: the UK's solution, published alongside the Bill.

The EU and the UK negotiated the Protocol. The EU accepts that issues and unforeseen complications have arisen from its implementation, but believes these can be solved with solutions that stay broadly within the existing parameters of the document, and have strongly criticised the Government's unilateral action in introducing this Bill (see section 3.1 for more).

1.1 The Northern Ireland Protocol

What is the Northern Ireland Protocol?

The Northern Ireland Protocol (the Protocol) sets out Northern Ireland's post-Brexit relationship with both the EU and Great Britain. It came into force on 1 January 2021.

The Protocol ensures there are no checks on goods that move between Northern Ireland and Ireland (and the rest of the EU). It does this by applying the EU's Single Market rules for goods to Northern Ireland, and the EU's customs rules. This means that goods coming into Northern Ireland from Great Britain must be checked and/or have paperwork to show they comply with the EU regulations.

The Protocol is part of the EU-UK Withdrawal Agreement, an international treaty between the UK and EU which set out how the UK's exit from the EU

[1] Foreign, Commonwealth and Development Office, Northern Ireland Protocol: the UK's solution, 13 June 2022.

would work. This is separate from the Trade and Cooperation Agreement (TCA) which is the agreement that governs trade and other cooperation between the UK and the EU.

The Consent Mechanism

Article 18 of the Northern Ireland Protocol sets out how the Northern Ireland Assembly's 90 members can provide "consent" for Northern Ireland to continue to abide by Articles 5 to 10 of the Protocol. These Articles cover the movement of goods, as well as VAT, State Aid, and the electricity market. The first vote is due to take place towards the end of 2024.

This democratic consent mechanism does not require a fully functioning Northern Ireland Executive and Assembly. If a motion is not jointly proposed by the First Minister and deputy First Minister (ie if a power-sharing Executive does not exist), then a motion can be tabled by any Member of the Legislative Assembly (MLA). Failing that, the default would be for Articles 5 to 10 of the Protocol to continue to apply in Northern Ireland after 2024.[2]

Consent only requires a majority in the Northern Ireland Assembly. Under the relevant Regulations, there is no Petition of Concern mechanism or requirement for cross-community consent.[3]

Article 16

The Protocol includes a safeguard mechanism that allows either party to introduce emergency measures to deal with serious difficulties arising from implementation of the Protocol. This is only if the application of the Protocol leads to "serious economic, societal or environmental difficulties that are liable to persist", or to "diversion of trade". These measures, however, need to be targeted to directly address the problems they are trying to fix.

This safeguard mechanism set out in Article 16.

Unionist politicians in NI have been calling for the UK Government to trigger Article 16 to stop checks and controls on goods entering the region.

For more details see Commons Library Briefing: Northern Ireland Protocol: Article 16.

1 The Protocol and the Belfast/Good Friday Agreement

[2] See The Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020

[3] The Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020

The UK Government cited protection of the Belfast/Good Friday Agreement when it negotiated and agreed the Protocol on Ireland/Northern Ireland in October 2019. One of the recitals to the Protocol states:

> that the Good Friday or Belfast Agreement of 10 April 1998 between the Government of the United Kingdom, the Government of Ireland and the other participants in the multi-party negotiations (the "1998 Agreement"), which is annexed to the British-Irish Agreement of the same date (the "British-Irish Agreement"), including its subsequent implementation agreements and arrangements, should be protected in all its parts.[4]

In 2021 a group of Unionist politicians, including Jim Allister (leader of Traditional Unionist Voice), Arlene Foster (the then First Minister of Northern Ireland and leader of the DUP) and Lord Trimble (a former UUP First Minister), sought to challenge the domestic validity of the Protocol. They argued that it was incompatible with Northern Ireland's pre-Brexit constitutional arrangements.

Specifically, Allister et al claimed it was inconsistent with either or both the Acts of Union 1800 and/or the Northern Ireland Act 1998 (which implemented the Belfast/Good Friday Agreement). At the heart of their argument was a claim that the older legislation should take precedence over the EU (Withdrawal) Act 2018 and the EU (Withdrawal Agreement) Act 2020 and anything done under any powers contained in either of those Acts.

The Northern Ireland Court of Appeal ruled in *Allister* that the Protocol was not in breach of the Northern Ireland Act 1998 (grounds 2 and 3 of the appeal) nor in breach of the 1800 Act of Union (ground 1 of the appeal). *Allister* also ruled that the Protocol did not breach Article 3 of Protocol 1 to the European Convention on Human Rights (ground 4) nor EU law (ground 5).[5]

The UK Government's argument in the context of the Northern Ireland Protocol Bill appears to be that the cross-community basis of the Belfast/Good Friday Agreement is under threat because many in Northern Ireland's Unionist community are opposed to the Protocol.

Attorney General Suella Braverman QC MP is reported as saying the Belfast/Good Friday Agreement has "primordial significance" which justifies altering the Protocol. Speaking to LBC on 13 June 2022, Prime Minister Boris Johnson said the UK had a "higher and prior legal commitment" under the Belfast/Good Friday Agreement to ensure peace in Northern Ireland:

> What we have to respect — and this is the crucial thing — the balance and the symmetry of the Belfast Good Friday agreement. And we have to understand there are two traditions in Northern Ireland, probably two ways of looking at the border issues, and one community at the moment feels very, very estranged

4 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community

5 [2022] NICA 15. The Northern Ireland High Court had reached the same view in [2021] NIQB 64.

> from the way things are operating and very alienated. And we've just got to fix that.[6]

In a document setting out its legal argument published alongside the Northern Ireland Protocol Bill, the Government said "protection" of the Belfast/Good Friday Agreement and the "effective functioning of the unique constitutional structures created under that Agreement" were among the "essential interests of the United Kingdom".

The document goes on to state that the Protocol as it "currently stands" is "a barrier to forming a new Executive in Northern Ireland" (see **Box 2**) and, in "its application", is "not operating to protect the [UK's] prior commitments and responsibilities under the Belfast (Good Friday) Agreement". The measures proposed in the Northern Ireland Protocol Bill were, therefore:

> fully aligned with and advance the UK's commitments and responsibilities under the Belfast (Good Friday) Agreement, including protecting the economic rights of the people of Northern Ireland and ensuring just and equal treatment for the identity, ethos and aspirations of both communities.[7]

This could be a reference to a section of the Belfast/Good Friday Agreement under the heading "Rights, Safeguards and Equality of Opportunity: Economic, Social and Cultural Issues". Paragraph 1 of this said the UK Government would "pursue broad policies for sustained economic growth and stability in Northern Ireland" while paragraphs 3 and 4 included commitments to the promotion of the Irish and Ulster-Scots languages which have yet to be fully implemented.[8] Strand 1 of the Agreement covered a power-sharing Assembly and Executive in Northern Ireland, neither of which are currently fully functioning.

For the constitutional history and development of Northern Ireland, see Commons Library briefings Parliament and Northern Ireland, 1921-2021, CBP9104 The Northern Ireland border and CBP9260 The Anglo-Irish Treaty, 1921.

6 "Boris Johnson downplays 'trivial' changes to Northern Ireland protocol", The Times (£), 13 June 2022

7 Foreign, Commonwealth & Development Office, Northern Ireland Protocol Bill: UK government legal position, 13 June 2022

8 See Belfast/Good Friday Agreement, pp19-20. The Identity and Language (Northern Ireland) Bill is currently being considered by the House of Lords. See House of Lords Library Research Briefing, Identity and Language (Northern Ireland) Bill [HL]: HL Bill 11 of 2022-23.

1.2 EU-UK discussions on the Protocol

Grace periods created to ease implementation of the Protocol

EU-UK discussions on the implementation of the Protocol have been ongoing since it came into force.

However, before the Protocol came into force, technical negotiations were required to define certain categories of goods and decide further details of how the Protocol would operate. These took place in the EU-UK Joint Committee, set up under the UK-EU Withdrawal Agreement. The Committee did not make all the necessary decisions until December 2020. This gave little time for businesses in Northern Ireland (NI) and Great Britain (GB) to prepare for the new regime.

The EU and UK therefore agreed to simplify some procedures for a short period and temporarily suspend the full application of EU law to NI in respect of mandated checks and controls. These became known as "grace periods".

Some of the most consequential of these were:

- a three-month grace period for supermarkets and their suppliers, for EU agri-food rules;
- a six-month grace period for supermarkets for EU rules on certain types of chilled meats, such as sausages;
- a one-year grace period for implementing in full the EU's rules on testing and selling human and veterinary medicines.

Despite these grace periods, problems with moving goods between GB and NI emerged, and businesses are concerned that these issues will get worse when the grace periods end. They are therefore looking for permanent solutions.

UK asks for more flexibility and extends some grace periods

The UK has since asked the EU for flexibility in several other areas, such as steel quotas, the movement of livestock and the movement of pets.

The UK unilaterally extended the three-month agri-food grace period in March 2021. In response the EU began an enforcement mechanism, raising tensions between the two sides. In June 2021, the UK asked the EU to extend the six-month grace period for fresh meats. The EU granted a further three months, while also announcing several proposals for new Protocol flexibilities.

Flexibilities requested and granted

The EU's proposed solutions included flexibilities for the movement of guide dogs, the movement of livestock from GB to NI, and a requirement for UK drivers to show motor insurance green cards. The EU also agreed to change the application of EU law to ensure that medicines from GB can move into NI without constraints which might affect supplies in the region.

Command Paper on 'the way forward'

On 21 July 2021, the UK Government published a Command Paper. This in part reiterated the Government's calls for the EU to show more "flexibility" and "creativity".

Specifically, it suggested the EU could use the "at risk goods" principle under the Protocol for applying tariffs on GB-NI trade to both customs and Sanitary and Phytosanitary (SPS) checks (checks on agri-food, plants and animals). This would differentiate trade based on its destination. Goods that were destined for Northern Ireland would not require customs processes and most SPS checks, while those moving to Ireland would have full customs and SPS formalities which the UK would enforce. This is often now referred to as the "green channel/lane" and "red channel/lane" system, and is provided for in the Northern Ireland Protocol Bill (see section 2.2)

The Government asked for the grace periods to continue indefinitely and for the EU to halt its legal proceedings while the EU and UK negotiated.

The paper proposed some significant new changes to the Protocol, such as asking for the jurisdiction of the Court of Justice of the EU (CJEU) over the Protocol to be removed, as well as restrictions on State Aid. It also requested new flexibilities in areas such as VAT and for medicines to be removed from the scope of the Protocol entirely.

On Article 16, the Government said it believed the threshold for triggering it had been reached but it would not do so yet, hoping for further solutions in the negotiations.

EU reaction to the Command Paper

The EU rejected renegotiating the Protocol, pointing to the new flexibilities it had already proposed.

It said, however, that it would continue to engage with the UK, including on the suggestions made in the Command Paper. While it was ready to continue to seek creative solutions, they should be "within the framework of the Protocol".

On 27 July 2021 the EU said it would halt legal proceedings against the UK for breaching the Protocol, "in order to provide the necessary space to reflect on these issues and find durable solutions to the implementation of the Protocol". These proceedings were restarted by the EU on 15 June 2022 in response to the UK's publication of this Bill (see section 3.1 for more).

EU publishes detailed proposals in response to Command Paper

On 13 October 2021 the EU published a detailed response to the UK's Command Paper. It said it would not accept any changes to the CJEU's role in enforcing the Protocol, and did not respond to UK proposals on changing the Protocol's provisions on State Aid and VAT.

The bloc did propose some changes to simplify customs checks by expanding the definition of goods "not at risk" to cover more goods and reducing customs formalities, including declarations for those goods.

It also proposed simplified SPS checks for retail goods

The EU said it would agree to GB chilled meats and sausages being sold in NI, but only if they met certification, production and labelling criteria.

Overall, the EU said these proposals would mean the reduction of SPS checks by 80% and customs checks by "at least" 50%. It appears this would be compared to the full checks mandated by the Protocol, rather than the lighter-touch grace periods regime currently in place.

Lord Frost resigns, Liz Truss becomes UK chief negotiator

In December 2021, Lord Frost resigned from the Government and the Foreign Secretary, Liz Truss, took over his responsibilities as UK chief negotiator for the talks on the Protocol and Co-Chair of the Joint Committee.

Despite an intensification of talks in early 2022 and initial talk of a "cordial atmosphere" between the two sides, there was no breakthrough.[9]

UK announces it will pass legislation to override the Protocol

On 17 May 2022 Liz Truss announced that the Government will "in the coming weeks" introduce legislation unilaterally to change the Protocol.[10][11]

The Foreign Secretary said the Government's preference remains reaching a negotiated outcome with the EU, but that the EU's current proposals are not able to address the Government's "fundamental concerns" over the Protocol.

She said the legislation will make four main changes to the Protocol, all of which were proposed in the July 2021 Command Paper:

9 European Commission, Joint Statement by Vice-President Maroš Šefčovič and UK Foreign Secretary Liz Truss, 14 January 2022.

10 HC Deb, Northern Ireland Protocol, 17 May 2022, C546.

11 HC Deb, Northern Ireland Protocol, 17 May 2022, C546.

- Remove checks and paperwork on so called "green lane" goods (relating to both customs and SPS controls). These are goods moving from GB to NI that are destined to stay in NI and are not at risk of moving into Ireland/the EU.
- Create a new dual regulatory system where NI companies can choose to apply the EU or the UK's regulatory regime for goods.
- Allow changes to VAT rates in GB to be applied to NI also (at present the EU's VAT rules apply in NI).
- Remove the jurisdiction of the Court of Justice of the EU (CJEU) which currently has a role in enforcing EU rules and settling disputes over the Protocol.

The Foreign Secretary also said the Government wanted to "fix" the State Aid/subsidy control regime too.

The EU responded by saying that if the UK "move ahead with a bill disapplying constitutive elements of the Protocol" then they will "need to respond with all measures at its disposal".[12] The EU said it is ready to continue discussions with the UK "to identify joint solutions within the framework of the Protocol" but added that the potential of the flexibilities it has already offered "is yet to be fully explored" by the Government.

May 2022 Assembly elections and DUP block on power-sharing

Northern Ireland Assembly Elections were held on 5 May. Sinn Féin won the most seats in the election (27)—the first time a nationalist party has been the largest at Stormont in terms of MLAs. The DUP were the second-largest party with 25 seats.

The Assembly met on 13 and 30 May but the DUP blocked the election of a Speaker and deputies, meaning the Assembly cannot conduct any other business, including the nomination of a First and deputy First Minister and other Executive ministers. A caretaker Executive remains in place but cannot take any new decisions.

The DUP has said it will not allow a Speaker to be chosen or nominate Executive ministers until its concerns about the Protocol are resolved. All the other parties in the Assembly, except the Traditional Unionist Voice (TUV) party do not support this approach.

The UK Government has said that Unionist concerns over the Protocol and the effect of this on power-sharing in Northern Ireland are part of the reason why this legislation is necessary, see Box 1 for further details.

[12] European Commission, Protocol on Ireland/Northern Ireland: Statement by Vice-President Maroš Šefčovič following today's announcement by the UK Foreign Secretary, 17 May 2022.

Proposals for permanent solutions

More permanent solutions to checks and controls on goods moving from GB to NI have been proposed by political parties in Northern Ireland and external commentators, these include the UK and EU signing a veterinary agreement and "trusted trader schemes".

There have also been calls from academics and the House of Lords' Committee on the Protocol for Northern Ireland's political institutions and civil society to have a greater say on Protocol-related discussions between the EU and UK.

Further reading

For further details of EU-UK negotiations on the Protocol, and proposed solutions see Commons Library briefing: Northern Ireland Protocol: Implementation, grace periods and EU-UK discussions (2021-22).

1.3 The Northern Ireland Protocol's implementation in domestic law

The Northern Ireland Protocol is an integral part of the Withdrawal Agreement as set out in Article 182 of the Agreement. As such, its implementation in UK law is achieved (mostly) through the same mechanisms as the implementation of the Withdrawal Agreement in general. This includes section 7A of the EU (Withdrawal) Act 2018, giving direct effect and supremacy to relevant applicable provisions.

However, there are also specific ministerial powers directed towards the more effective implementation of the Protocol, most notably section 8C of the EU (Withdrawal) Act 2018.

Article 4 of the Withdrawal Agreement – general implementation

Article 4 of the Withdrawal Agreement requires the UK to ensure that directly applicable provisions of the treaty (and anything done under it) are given "the same legal effects" in UK law as they would have in EU law and in the law of Member States. It says:

> 1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.
>
> Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.

> 2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.

Supremacy and direct effect of the Withdrawal Agreement

Article 4(1) WA therefore emphasises both the "supremacy" and the "direct effect" of the Withdrawal Agreement.

On supremacy, its directly applicable provisions are expected to take priority over inconsistent UK domestic law.

On direct effect, those provisions are to be able to be relied on in UK courts in their own right. It should not be necessary for each provision to be given effect by further or supporting domestic legislation (as would normally have been the case, for example, with EU Directives).

UK domestic implementation requires primary legislation

Article 4(2) WA goes further. It makes clear that the UK must ensure the "supremacy" and "direct effect" are achieved using "domestic primary legislation". There was therefore an explicit expectation that there would be a general rule in an Act of Parliament:

- giving precedence to the relevant provisions of the Withdrawal Agreement over incompatible domestic law; and
- making relevant rights, powers, liabilities, obligations and restrictions available in UK domestic courts.

Interpretation of the Withdrawal Agreement

Article 4 of the WA also imposes requirements as to the interpretation of the Withdrawal Agreement by UK courts. Since the Withdrawal Agreement incorporates provisions of European Union law, there needs to be a consistent interpretation of that law not just within the EU but also as it applies to the UK by virtue of the Withdrawal Agreement. Articles 4(3-4) WA require any relevant concepts or provisions of EU law referred to in the Withdrawal Agreement to be interpreted:

- in accordance with the methods and general principles of EU law
- in conformity with any caselaw of the CJEU before the end of the transition period (31 December 2020).

Additionally, the UK courts are expected to have "due regard" to any post-transition caselaw of the CJEU where it has a bearing on the interpretation of the Withdrawal Agreement, under Article 4(5) WA.

Article 5 of the Withdrawal Agreement

Article 5 of the Withdrawal Agreement, on good faith, states that the EU and UK with faithfully enact the measures to fulfil their obligations arising from the Agreement:

> The Union and the United Kingdom shall, in full mutual respect and good faith, assist each other in carrying out tasks which flow from this Agreement.
>
> They shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this Agreement and shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement.

This provision has been understood as re-enforcing, among other things, Article 4. The UK having legislated for supremacy and direct effect, it is then expected not to take steps that would undermine the general implementation of the Withdrawal Agreement.

Section 7A of the EU (Withdrawal) Act 2018

Article 4 of the Withdrawal Agreement is given effect by section 7A of the EU (Withdrawal) Act 2018 (as amended).

Subsection 7A(1) says that directly applicable provisions of the Withdrawal Agreement "are without further enactment to be given legal effect or used in the United Kingdom".

Subsection 7A(2) clarifies that this means:

> The [relevant] rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be—
>
> (a) recognised and available in domestic law, and
>
> (b) enforced, allowed and followed accordingly.

Between them, subsections 7A(1) and (2) therefore give direct effect to the relevant provisions of the Withdrawal Agreement.

Subsection 7A(3) addresses the question of supremacy, by saying that "every enactment" is to be read and have effect "subject to" those directly effective provisions.

Section 8C of the EU (Withdrawal) Act 2018

Although section 7A of the EU (Withdrawal) Act gives effect to the directly applicable provisions of the Protocol in UK law, it is not the full story.

Some provisions of the Protocol are not directly applicable, and therefore require additional steps to be taken for domestic implementation. In other areas, the UK's obligations can be more effectively and coherently implemented if section 7A's effect is supplemented by domestic legislation.

This is why the EU (Withdrawal) Act 2018 contains section 8C. It confers delegated powers on ministers to make regulations in connection with the Protocol. These regulations can be made by ministers whenever they consider them appropriate:

- to implement the Protocol;
- to supplement the effect of section 7A in relation to provisions of the Protocol; and/or
- to deal with matters arising out of or related to the Protocol.

This delegated power is limited by reference to its purposes. It is highly unlikely that it could be used to make provision that would obstruct the implementation of the Protocol or any other part of the Withdrawal Agreement. It also has to be read "subject to" section 7A of the 2018 Act. However, it is an extensive power, and can be used to make changes to primary legislation (it is a "Henry VIII" power).

1.4 Compatibility with International Law

Government's legal position

One of the most notable arguments about the Northern Ireland Protocol Bill concerns whether the proposed legislation, and the powers it provides to disapply parts of the Northern Ireland Protocol, is compatible with international law.

The Government published its legal position on 13 June 2022.[13] In this position paper, the Government accepts the proposed legislation would amount to a "non-performance of international obligations", in particular:

> It is the Government's position that in light of the state of necessity, any such non-performance of its obligations contained in the Withdrawal Agreement and/or the Protocol as a result of the planned legislative measures would be justified as a matter of international law.[14]

The Government argues that this measure can be justified in international law under the doctrine of necessity. This doctrine, including its requirements and limitations, is set out below.

In outlining the Government's justifications for invoking the doctrine of necessity, the legal position paper argues that:

- the Protocol is placing a strain upon institutions in Northern Ireland, and more generally on socio-political conditions;

13 Foreign, Commonwealth and Development Office, "Northern Ireland Protocol Bill: UK government legal position", 13 June 2022.

14 Foreign, Commonwealth and Development Office, "Northern Ireland Protocol Bill: UK government legal position", 13 June 2022.

- this strain has reached the point where the Government has no other way of safeguarding the essential interests at stake than through the adoption of the legislative solution that is being proposed;
- there is clear evidence of a state of necessity to which the Government must respond to;
- the Protocol is not operating to protect the prior commitments and responsibilities under the Belfast (Good Friday) Agreement;
- the legislation is currently the only way to provide the means to alleviate the socio-political conditions, while continuing to support the Protocol's objectives, including supporting North-South trade and cooperation, and the interests of both the EU and the UK;
- these measures will alleviate the imbalance and socio-political tensions without causing further issues elsewhere in the Northern Ireland community, including by ensuring that East-West connections are restored, without diminishing existing North-South connections.

The Government's preference for negotiations and the renegotiation of the Northern Ireland Protocol is also outlined in the legal position paper, where it states:

> The Government's clear preference remains a negotiated solution with the EU to address the situation of necessity that has arisen. The Protocol contemplates the possibility of being superseded, in whole or in part, by subsequent agreements (Article 13(8)). Moreover, the Parties agreed to include in the Withdrawal Agreement a time-limited mechanism for making amendments necessary to "address omissions or other deficiencies, or to address situations unforeseen when this Agreement was signed" (Article 164(5)(d)). This mechanism is available to the Parties for a period of four years from the end of the transition period.[15]

Article 16

The legal position paper also makes some reference to Article 16 of the Northern Ireland Protocol which allows the UK or EU to take unilateral safeguarding measures where the application of the Protocol "leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade".

The Government's legal position paper does not explicitly explain whether the measures proposed in the Bill are intended to be unilateral safeguarding measures under Article 16. In any case, the relevant procedure for invoking Article 16, as set out in Annex 7 to the Protocol, has not been initiated by the UK Government.

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[15] Foreign, Commonwealth and Development Office, "Northern Ireland Protocol Bill: UK government legal position", 13 June 2022.

See the Library briefing Northern Ireland Protocol: Article 16 for more.

The UK's dualist approach to international law

In the UK, provisions of an international treaty can only have direct effect in domestic law if they are written into or incorporated by domestic legislation. Provisions of treaties that are not made part of UK law (ie have not been incorporated) are not usually recognised by UK courts.[16] This is known as a dualist approach to international law. It has been confirmed in many domestic cases.[17]

The Internal Market Bill, when originally introduced in September 2020, contained provisions that would have breached the UK's international obligations to implement the Protocol. These provisions were later removed. When justifying the legality of those (later omitted) provisions, the Attorney General at the time said that this dualist approach to international law allows the domestic principle of parliamentary sovereignty to have effect.[18] The then Attorney General wrote:

> Parliament is sovereign as a matter of domestic law and can pass legislation which is in breach of the UK's Treaty obligations. Parliament would not be acting unconstitutionally in enacting such legislation.

Similar arguments were also made in commentary at that time.[19]

While this does mean that a Bill, if enacted, could be compatible with the UK's domestic law, the UK's internal principle of parliamentary sovereignty has no bearing on the legal effect of the UK's international obligations because no rule of a state's internal law can be used to justify a breach of an international obligation. This principle is set out in Article 27 of the Vienna Convention on the Law of Treaties (pdf).

The UK's dualist approach was discussed in the *Miller* case. In discussing the dualist approach to international law and the role of Parliamentary sovereignty, the Supreme Court stated:

> … international law and domestic law operate in independent spheres. … [T]reaties between sovereign states have effect in international law and are not governed by the domestic law of any state.[20]

This approach was further discussed by the Supreme Court in 2021. It stated that:

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16 See, for example, Anthony Aust, Modern Treaty Law and Practice, 3rd edition, pp 168-171.

17 See, for example, *Miller & Anor, R (on the application of) v Secretary of State for Exiting the European Union* [2017] UKSC 5

18 Letter Dated 10 September 2019 from the Attorney General to Simon Hoare MP, Chair, Northern Ireland Affairs Committee, Annex

19 See, Martin Howe, 'Forget the foaming indignation, this Brexit bill is perfectly justifiable', The Telegraph, 10 September 2020

20 R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5, at [55]

> ... the dualist system, based on the proposition that international law and domestic law operate in independent spheres, is a necessary corollary of Parliamentary sovereignty. It is only because "treaties are not part of UK law and give rise to no legal rights or obligations in domestic law" (para 55) that the prerogative power to make and unmake treaties is consistent with the rule that ministers cannot alter the law of the land.[21]

Relevant international law

Core treaty obligations

The UK Government's legal position paper on the proposed legislation notes that the Bill will result in the UK's non-conformity with international obligations.

As well as disapplying parts of the Withdrawal Agreement and the Northern Ireland Protocol, wider international law is also relevant in this context.

International law governs the creation, termination, interpretation, and violations of treaties under the Vienna Convention on the Law of Treaties (VCLT).[22] Although the Withdrawal Agreement is a treaty between the UK (a state) and the EU (an international organisation), and the VCLT applies to treaties between states, large parts of the VCLT reflect customary international law on treaties which does bind the EU. Furthermore, the Court of Justice of the EU (CJEU) in its Wightman judgment on 10 December 2018 confirmed that the VCLT could be taken into account for the international law on treaties.[23]

Under the VCLT, and customary international law, states are under a general obligation to abide by their agreements in good faith according to the principle of *pacta sunt servanda* (agreements must be kept, see Article 26 VCLT). *Pacta sunt servanda* does not mean that treaties cannot be terminated, but the grounds for doing so are strictly limited, as detailed in light of a previous version of the Withdrawal Agreement in the Library briefing: Could the Withdrawal Agreement be terminated under international law? 19 March 2019.

Article 27 of the VCLT specifically provides that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

This means that this Bill cannot change the legally binding nature, in international law, of the UK's international obligations in and of themselves.

Under the VCLT, a nation may only get out of a treaty in the following circumstances:

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21 *R (on the application of SC, CB and 8 children v Secretary of State for Work and Pensions and others* [2021] UKSC 26, para 78

22 Vienna Convention on the Law of Treaties (adopted 23rd May 1969, entered into force 27th January 1980) 1155 UNTS 331 (hereinafter VCLT)

23 *Wightman and Others v Secretary of State for Exiting the European Union*, Case C-621/18, 10 December 2018.

- Where a treaty provision allows it, or by mutual consent with the other parties;
- Where there is an **intended or implied right** to unilateral termination;
- **Where the object and purposes of the treaty have been fulfilled,** or it is clear from its provisions that it is limited in time and the required period has ended;
- Where there has been a 'material breach' by the other party of an important provision;
- Where the agreement cannot be carried out because of the "permanent disappearance or destruction of an object indispensable for the execution of the treaty";
- **A fundamental change of circumstances**: But this is narrowly interpreted and requires:
  - the existence of those circumstances must have constituted an **essential basis** of the consent of the parties to be bound by the treaty;
  - the change must have been **unforeseen** by the parties; and
  - the effect of the change must be to transform radically the extent of obligations still to be performed under the treaty.

Previously, commentators pointed out that these exceptions did not apply to the UK's position when it initially signed the Withdrawal Agreement,[24] and the UK's legal position paper does not suggest that any of these conditions apply to the current situation.

The doctrine of necessity

The doctrine of necessity is part of the customary international law rules on state responsibility for internationally wrongful acts, which determine the consequences and any possible defences for breaches of international obligations. These rules are outlined in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles / ARISWA), adopted by the UN General Assembly in 2002.[25]

The ILC is a UN body whose role is to "initiate studies and make recommendations for the purpose of encouraging the progressive

[24] One of these exceptions was discussed in the context of the previous version of the Withdrawal Agreement: Marko Milanovic, Brexit, the Northern Irish Backstop, and Fundamental Change of Circumstances, EJIL: Talk!, 18 March 2019.

[25] UNGA Res 56/83, Responsibility of States for Internationally Wrongful Acts, (28 January 2002) UN Doc A/RES/56/83, Annex.

development of international law and its codification".[26] The Articles are not a treaty. They are, however, regarded as generally reflecting customary international law.

The doctrine of necessity is one of a limited number of 'circumstances precluding wrongfulness' – in other words, a legal defence that permits an otherwise unlawful breach of international law. Circumstances precluding wrongfulness are outlined briefly in the Library briefing: Principles of International Law: a brief guide, 21 September 2020. Circumstances where a breach of an obligation will not be considered wrongful include:

- where the potential victim has consented to the act (but not for important non-derogable obligations on international law);
- where the breach amounts to a lawful countermeasure (subject to procedural and substantive safeguards);
- Where there is an unforeseen event making it materially impossible to fulfil the obligation;
- In situations of extreme distress, and there are no other means available to an official to save their life or the life of others entrusted to them;
- Where there is a state of necessity (which the UK Government argues applies in these circumstances); and,
- Where the breach is a lawful act of self-defence under the United Nations Charter.

The doctrine of necessity is narrow and limited, and can only apply in very exceptional circumstances. This is evident from the fact that Article 25 of the ILC Articles is framed in the negative.

Necessity – Article 25 of the ILC Articles on State Responsibility

Article 25 of the ILC's Articles on State Responsibility states, in full:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

   a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
   b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

[26] International Law Commission, Homepage, accessed 23 June 2021.

> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
>
> a) the international obligation in question excludes the possibility of invoking necessity; or
> b) the State has contributed to the situation of necessity.

Article 25 only refers to states and does not mention obligations owed by states to international organisations, as is the case with the UK and EU under the Withdrawal Agreement/Protocol. This raises the question as to whether, as a matter of customary international law, the doctrine of necessity applies where the obligation is owed, not to a state, but to an international organisation.

The International Law Commission also provides commentaries alongside the Articles on State Responsibility, explaining the operation of the doctrine based on international practice and legal developments. In the ILC's commentaries on necessity,[27] the Commission explains the exceptional nature of necessity:

> It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse.[28]

The first requirement on necessity, that the act must be the only way to safeguard against an essential interest against a grave and imminent peril, requires:

> Whatever the interest may be … it is only when it is threatened by a grave and imminent peril that this condition is satisfied. The peril has to be objectively established and not merely apprehended as possible. In addition to being grave, the peril has to be imminent in the sense of proximate.[29]

The course of action taken must be the "only way" available to safeguard that interest. This means, according to the ILC:

> The plea is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient.[30]

This was supported by the International Court of Justice's approach in the *Gabčíkovo-Nagymaros Project* case, where the availability of alternative

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27 International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, commentaries to Article 25, p 80-84.

28 International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, commentaries to Article 25, p 80 para 2.

29 International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, commentaries to Article 25, p 83, para 15.

30 International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, commentaries to Article 25, p 83, para 15.

solutions to a problem faced by Hungary was considered as one of the reasons why necessity could not be invoked in that case.[31] In this case, the Court also accepted that the state relying on necessity could not be the sole judge of whether the conditions for necessity have been met.[32]

The UK Government argues that "the Government has no other way of safeguarding the essential interests at stake than through the adoption of the legislative solution that is being proposed." It also argues:

> The Government's assessment that the situation in Northern Ireland constitutes a state of necessity is without prejudice to the UK's right to take measures under Article 16 of the Protocol to safeguard against serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade.[33]

Although the doctrine of necessity requires an imminent peril, the ILC accepted that uncertainty about the future does not necessarily disqualify a state from invoking necessity, so long as "the peril is clearly established on the basis of the evidence reasonably available at the time".[34]

The doctrine of necessity is also limited by Article 25 1(b) where it would seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole. This means, according to the ILC, that:

> the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective.[35]

The UK Government's legal position states that the proposed legislation will not seriously impair an essential interest of the state or states towards which the obligations exist, or of the international community as a whole.[36] The Government does not expand on its assessment in this regard.

A further limitation under Article 25(2)(b) is that necessity is unavailable when the state invoking necessity has contributed to the situation of necessity. The UK Government argues that the UK has not contributed to the situation of necessity because:

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31 Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997, (1997) ICJ Reports 7, para 55

32 Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997, (1997) ICJ Reports 7, para 51

33 Foreign, Commonwealth and Development Office, "Northern Ireland Protocol Bill: UK government legal position", 13 June 2022.

34 International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, commentaries to Article 25, p 83, para 16

35 International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, commentaries to Article 25, p 83-4, para 17

36 Foreign, Commonwealth and Development Office, "Northern Ireland Protocol Bill: UK government legal position", 13 June 2022

The UK exercised its sovereign choice to leave the EU single market and customs union and the peril that has emerged was not inherent in the Protocol's provisions.[37]

The doctrine of necessity in practice

The doctrine of necessity has been invoked in several legal cases and arbitral tribunals, but the actual success of this reliance has been rare. The table below includes some examples of these cases.

Table 1 Examples of international cases involving necessity

Case	State of Necessity Argued	Accepted or Rejected
LG&E Energy Corp v Argentina (Arbitration – International Centre for the Settlement of Investment Disputes, 3 October 2006)	Argentina argued that "the financial crisis, riots and chaos of the years 2000 through 2002 in Argentina constitute a national emergency" sufficient to invoke necessity.	**Accepted** In the judgment of the Tribunal, from 1 December 2001 until 26 April 2003, Argentina was in a period of crisis during which it was necessary to enact measures to maintain public order and protect its essential security interests. Note: Argentina argued the existence of necessity in several other arbitration proceedings relating to other measures during the same crisis, but most were rejected on the grounds that Argentina did not fulfil all the conditions of necessity. Internal economic factors were taken into account as contributing to the crisis in some cases: See, for example, National Grid Plc v Argentine Republic (UNCITRAL Tribunal, 3 November 2008 – opens PDF).
Gabčíkovo-Nagymaros Project (International Court of Justice, 25 September 1997)	Hungary, abandoning some work as part of a joint dam-building project, argued that there was a "state of ecological necessity" in preventing environmental damage from the dams that had been agreed to being built.	**Rejected** Although concerns may have existed about the project, Hungary did have other avenues open to address those issues, and so necessity could not be used.
The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v Guinea)	Guinea argued that an extension of is customs laws to its exclusive economic zone,	**Rejected** Guinea offered no evidence to show its essential interests were in "grave and

[37] Foreign, Commonwealth and Development Office, "Northern Ireland Protocol Bill: UK government legal position", 13 June 2022

(International Tribunal for the Law of the Sea, 1 July 1999)	outside of territorial waters, was necessary to protect essential state interests against "considerable fiscal losses … from illegal off-shore bunkering in its exclusive economic zone", including in its fisheries and environmental interests.	imminent peril", and other means of safeguarding those interests were available.

Previous use of necessity by the UK

The UK does not appear to have invoked the modern doctrine of necessity in an international dispute since the UN General Assembly's adoption of the ILC Articles. One possible historical example, highlighted by the International Law Commission, was during the Caroline Incident of 1837.[38] This is often cited as an example of the requirements of self-defence in using force in international law, but the ILC also points out that this incident "really involved the plea of necessity at a time when the law concerning the use of force had a quite different basis than it has at present."[39]

In this incident, British armed forces entered US territory, attacking and destroying a vessel (The Caroline) owned by US citizens which was carrying recruits and military and other material to Canadian insurgents. The UK justified the measure as "absolutely necessary", while the US argued that the British Government should prove that its actions were caused by "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation".[40]

There may be examples of conduct by the UK that could be justified as necessity, but there do not seem to be any explicit examples of the UK relying on this doctrine more recently.

Questions of compensation

Article 27 of the ILC Articles provides that any use of the doctrine of necessity (or any other circumstance precluding wrongfulness under the Articles) to justify the non-performance of international obligations is "without prejudice" to any question of compensation that could be due "for any material loss caused by the act in question".

38 For an overview of this incident, see, International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, commentaries to Article 25, p 81, para 5.

39 International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, commentaries to Article 25, p 81, para 5.

40 International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, commentaries to Article 25, p 81, para 5.

The ILC explains that this compensation is separate to the normal type of compensation due as reparations for a breach of an international obligation and relates specifically to making good on "material losses", which is much narrower than compensation for "damages" incurred more generally.[41]

Legal commentary

Anthony Aust states in his book Modern Treaty Law and Practice that "it goes without saying that if a party to a treaty does not perform it, that will, to the extent of non-performance, be a breach of its international obligations to the other party or parties".[42]

Dr Billy Melo Araujo, Senior Lecturer on EU law at Queen's University Belfast, argues that by "merely publishing its intention to unilaterally override the protocol" the UK is "already in breach of international law, specifically the good faith requirement under Article 5 of the withdrawal agreement".[43]

Writing before the Bill was published, Martin Howe QC argued that "the usual suspects will claim that such a bill would breach the UK's international obligations". However, he said the "EU has obligations too", including:

> arguably under Article 13 of the Protocol to consider and agree in good faith changes to the Protocol that protect the Belfast (Good Friday) Agreement and that continue to protect the EU single market from duty-avoiding or non-compliant goods.[44]

Sir Jonathan Jones, former Treasury Solicitor and Permanent Secretary of the Government Legal Department, describes the Government's argument that legislation is currently the only way alleviate the issues arising in Northern Ireland from the Protocol, and that it is justified in international law by the doctrine of necessity as "hopeless".[45]

Commenting that the concept of necessity is "an extremely high test" and "applies only where a state must act to safeguard its essential interests against 'grave and imminent peril'", Sir Jonathan asks, "How can an agreement willingly entered into only in 2020, at what the Prime Minister described as a "fantastic moment", be already proving so disastrous as to represent "grave peril" to the country?". He specifically asks how the jurisdiction of the CJEU represents a "grave and imminent peril" to the UK, and also why the Government has not first attempted to use the Article 16 safeguard measures in the Protocol to address the situation. He also

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41 International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, commentaries to Article 27, p 86, para 4 and 5.

42 Anthony Aust, Modern Treaty Law and Practice, 3rd edition, p 161.

43 The Conversation, Northern Ireland protocol explainer: why the UK government's plan to change it violates international law, 14 June 2022.

44 Daily Telegraph, Overriding the Northern Ireland Protocol would be entirely legitimate, 24 April 2022.

45 Jones J, The Northern Ireland Protocol Bill is one of the most extraordinary pieces of legislation I have ever seen, The House Magazine, 15 June 2022.

questions if legislation that might take a year to enact is the appropriate remedy to a situation where the peril to the country is imminent.[46]

Steven Barrett a Barrister writing for the Spectator, argues the UK Government isn't breaking international "Because there is no land where international law exists", and that "Treaties are more like agreements: 'We promise to do this if you do that'". By using the Bill to unincorporate parts of the Protocol in domestic law, Mr Barrett contends the Government is removing the only legal barrier to stop it not performing what is set out in the international agreement, saying "if the government breaks incorporated treaties, then by all means say they are acting illegally. But if the treaty is unincorporated, it's not law and if you care about law, there's nothing to get excited about". [47]

Seemingly responding to Mr Barrett's argument, Professor Lorand Bartels, Professor of International Law at the University of Cambridge, asked by the House of Commons Public Administration and Constitutional Affairs Committee, what international law is and its relevance to Parliament noted "it does exist, by the way". He added that states "can't escape international law", but they can "change it in various ways".[48] Asked about the Bill and if he was surprised that the Government had invoked the state of necessity at this point in time, Professor Bartels responded: "you resort to a defence of necessity when it's necessary, in other words when you don't have anything else".[49]

The pro-Brexit European Research Group (ERG) within the Conservative Party has reportedly asked its "Legal Star Chamber" described as a "group of preeminent constitutional and European lawyers", to scrutinise the Bill.[50] Sir William Cash MP, Chairman of the European Scrutiny Committee and a member of the Star Chamber released a statement outlining the group's analysis. He says the Bill "achieves the constitutional objective of re-affirming Northern Ireland as part of the constitutional territory of the United Kingdom and its sovereignty", and that it "properly reinforces the Belfast (Good Friday) Agreement and the Union". He further argues the bill

> will reaffirm in substance the elements of the Articles of Union of 1800 which were held by Keegan (Lord Chief Justice) in the Allister case to have been 'subjugated' by the Protocol as given effect by the EU Withdrawal Agreement Act 2020.[51]

46 As above.

47 The Spectator, Changing the Northern Ireland Protocol won't break the law, 13 June 2022.

48 Public Administration and Constitutional Affairs Committee, Oral evidence: The Scrutiny of International Treaties and other international agreements in the 21st century, HC 214, 21 June 2022, Q114.

49 Public Administration and Constitutional Affairs Committee, Oral evidence: The Scrutiny of International Treaties and other international agreements in the 21st century, HC 214, 21 June 2022, Q128.

50 The Newsletter, Northern Ireland Protocol Bill 'reinforces' Union, say ERG law experts, 25 June 2022.

51 The Newsletter, Northern Ireland Protocol Bill 'reinforces' Union, say ERG law experts, 25 June 2022.

1.5 Northern Ireland's economic and trade performance

The UK Government has argued the Bill is necessary in part because of the effect of the Protocol is having on Northern Ireland's economy, and the diversion of GB-NI trade.

NI economic performance and impact of Protocol

Recent performance

The Covid-19 pandemic had a major negative impact on the Northern Ireland economy, as in the UK as a whole. Economic output declined by 18% in the first half of 2020.[52]

The recovery, although punctuated by disruption from new waves of cases and associated restrictions, has been strong. The Office for National Statistics estimates that GDP in Northern Ireland had recovered to above its pre-pandemic level by the first quarter (Q1) of 2022.[53] Among the devolved nations and English regions, only London had also done so. These estimates are experimental and subject to some uncertainty.[54, 55]

Economic impact of the Protocol

How much of the economy's recent performance is linked to the role of the Northern Ireland Protocol is difficult to assess. Disentangling the effects of the Protocol to date from the larger short-term effects from the pandemic is extremely hard to do with any accuracy. As Paul Mac Flynn, co-director of the Nevin Economic Research Institute, notes, the Protocol's impact on the economy is "sandwiched" between two other important events: the pandemic and the conflict in Ukraine. He doesn't believe the Protocol's economic impact can be determined definitively:

> I am willing to stick my neck out here and say that not only do we not know what the economic impact of the protocol has been, it is also quite likely that we will never know. Political negotiations will continue over the coming month and weeks and a lot will be said. Definitive pronouncements about the

52 Q2 2020 compared with Q4 2019; NISRA, NICEI publication and tables Q4 2021, 31 March 2022

53 ONS, Model-based early estimates of regional gross value added in England, Wales, Scotland, and Northern Ireland: Quarter 1 (Jan to Mar) 2022, 7 June 2022 – pre-pandemic level figure is from Q4 2019; "London's recovery outstrips rest of UK in blow to levelling up agenda", Financial Times, 7 June 2022

54 The GDP figures are estimated from modelling that is based on historical relationships. Economic shocks specific to one region/nation are unlikely to be picked up in the model's estimates.

55 Other indicators show similar broad trends. For example, NI Department for the Economy, Northern Ireland Economic Output Statistics, 16 June 2022

> economic impact of the protocol, one way or the other, should be taken with a very large pinch of salt.[56]

Richard Ramsey, Northern Ireland chief economist for Ulster Bank, also believes "it's complicated".[57] He warns of the dangers of seeing every economic development through the prism of the Protocol.

For some specific economic sectors, the economic effect of the Protocol may be easier to determine. For example, output among food and drink producers in Northern Ireland is outperforming the overall UK sector.[58] This may be due to re-alignment of supply chains to an all-island basis, for example through "NI companies displacing operators from GB as suppliers to the Irish market".[59]

Economic outlook

As in the rest of the UK, economic prospects in Northern Ireland are clouded by rising inflation and its impact on business and households. A prominent business survey suggested economic activity in Northern Ireland's private sector may have fallen slightly in May, for the first time since March 2021.[60] Firms reported reductions in new orders and rising cost pressures. Consumer confidence in Norther Ireland fell in the first quarter of 2022, with people concerned about their finances given the high rate of inflation.[61]

Danske Bank downgraded its forecasts for economic growth in Northern Ireland in 2023 from 1.7% to 1.0% citing economic uncertainty and the effects of higher inflation squeezing household spending as factors.[62] Although growth forecasts for 2022 were left unchanged at 3.6%, this reflects a strong performance at the beginning of the year, with growth slowing from the second quarter of the year onwards.

NI trade and impact of the Protocol

Data published by the Northern Ireland Statistics and Research Agency (NISRA) indicates that in 2020 (the most recent year for which data is available) the total value of Northern Ireland's 'external sales', ie, sales of

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56 Paul Mac Flynn, Nevin Economic Research Institute blog, Northern Ireland Protocol, 8 June 2022

57 Richard Ramsey, Ulster Economix blog, Northern Ireland's economic miracle?, 21 June 2022

58 Ulster Economix blog, Chief Economist's Weekly Briefing – Central Banking Time, 20 June 2020 based on NI Department for the Economy, Index of Production, 16 June 2022

59 Richard Ramsey, Ulster Economix blog, Northern Ireland's economic miracle?, 21 June 2022

60 S&P Global, NatWest UK Regional PMI for May 2022 (PDF), 13 June 2022 and Ulster Bank, Ulster Bank NI PMI for May 2022 (PDF), 13 June 2022

61 Danske Bank, Consumer Confidence Index 2022 Q1, survey carried out in March. For more on rising inflation and its economic impact see Library briefing, Rising cost of living in the UK

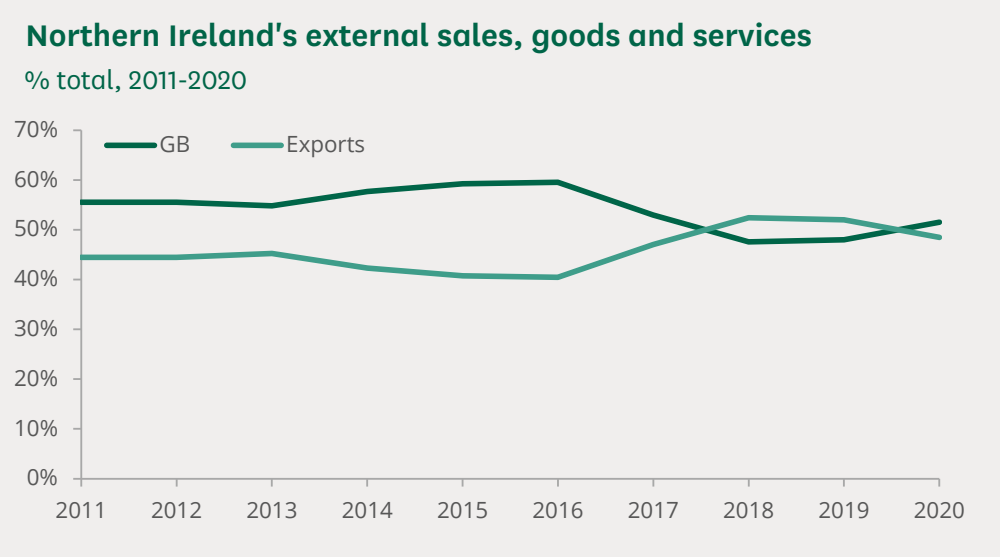
62 Danske Bank, Northern Ireland Quarterly Sectoral Forecasts 2022 Q2, 10 June 2022

goods and services to the rest of the UK plus international exports of goods and services was £21.2 billion.[63]

Of this:

- £10.9 billion (51%) were sales to the rest of the UK
- £10.3 billion (49%) were international exports.

2020 was the first year since 2017 that the value of sales from Northern Ireland to Great Britain exceeded the value of Northern Ireland's exports.



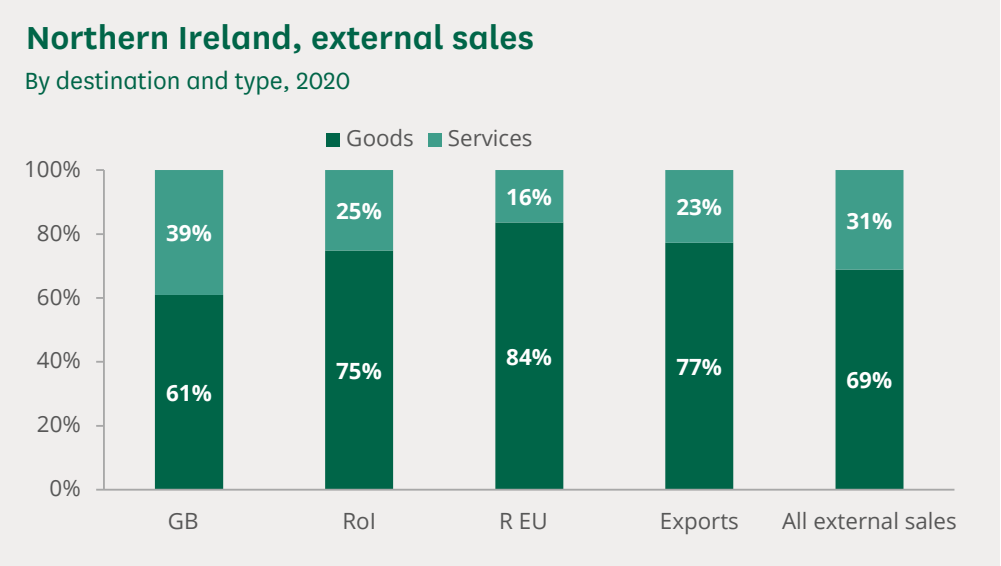
Source: NISRA, Broad Economy Sales & Exports Statistics

Of Northern Ireland's exports:

- £4.1 billion (40%) were to the Republic of Ireland, making it Northern Ireland's largest export market (though sales to Great Britain were worth just over 2.5 times more)
- £2.2 billion (21%) were to the rest of the EU (ie, excluding the Republic of Ireland)
- £4.0 billion (39%) were to the rest of the world.

Northern Ireland's exports were skewed toward goods exports rather than services, with goods accounting for around 77% of Northern Ireland's total exports. The trend was slightly different for sales to Great Britain – goods accounted for 61% of Northern Ireland's sales to Great Britain, while services accounted for 39%. The Northern Ireland Protocol only covers trade in goods between Northern Ireland and the rest of the EU, and not trade in services.

[63] All data in this section is taken from NISRA, Overview of Northern Ireland Trade, 18 May 2022, unless stated



Source: NISRA, Overview of Northern Ireland Trade

In 2020 the value of Northern Ireland's total purchases – ie, purchases of goods and services from the rest of the UK plus imports of goods and services, was £20.3 billion.

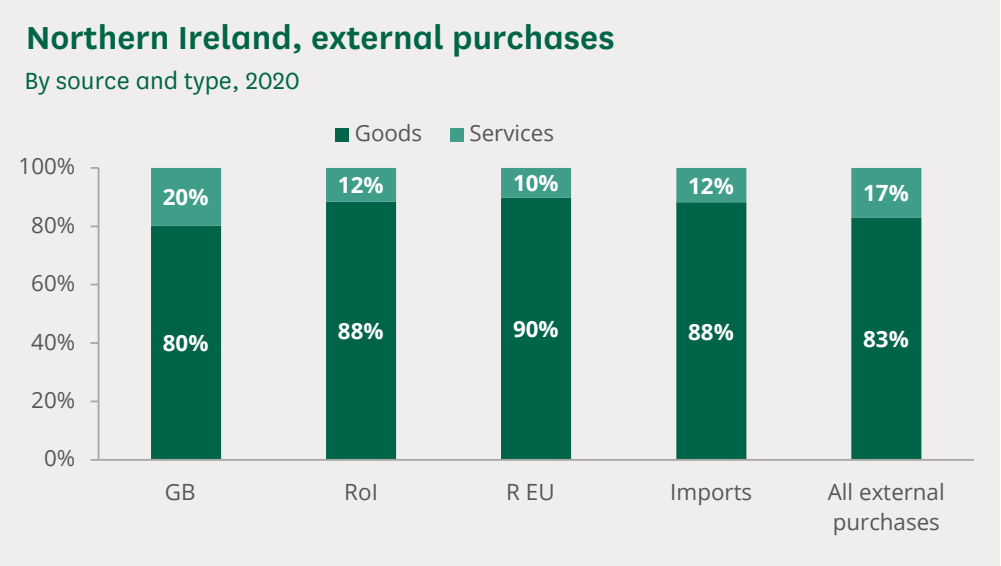
Of this total:

- £13.2 billion (65%) were purchases from the rest of the UK
- £7.1 billion (35%) were international imports.

Of Northern Ireland's imports:

- £2.8 billion (39%) were imported from the Republic of Ireland – making it Northern Ireland's single largest source of imports (though the value of purchases from Great Britain was just under 5 times greater).
- £2.3 billion (32%) were from the rest of the EU (i.e., excluding the Republic of Ireland)
- £2.0 billion (28%) were from the rest of the world.

Northern Ireland's imports were heavily skewed toward imported goods rather than services, with goods accounting for 88% of Northern Ireland's total imports. The trend was slightly different for purchases from Great Britain – goods accounted for 80% of Northern Ireland's sales to Great Britain, while services accounted for 20%.



Source: NISRA, Overview of Northern Ireland Trade

In 2020, the value of Northern Ireland's purchases of goods and services from Great Britain exceeded the value of sales of goods and services to Great Britain by £2.3 billion.

Northern Ireland recorded trade surpluses with the Republic of Ireland and overall trade surpluses in all its international trade and all of its external trade (ie, international trade plus trade with Great Britain).

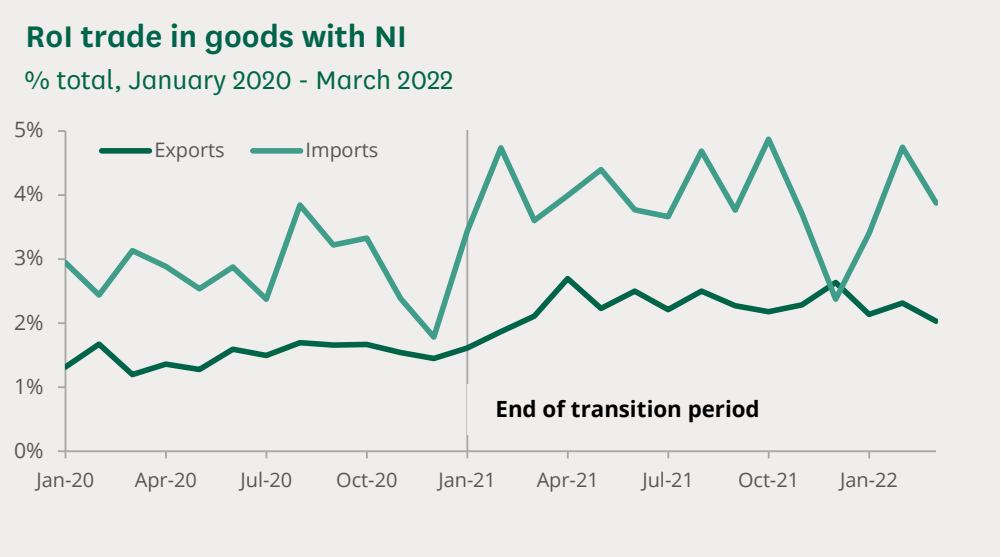
Source: NISRA, Broad Economy Sales & Exports Statistics

The end of the transition period on 1 January 2021 saw the UK leave the EU single market and customs union, though under the Northern Ireland Protocol, Northern Ireland has effectively remained within the EU single market for goods.

Monthly data from the Irish Central Statistics Office indicates that this has had a significant effect on the Republic of Ireland's trade with Northern Ireland.

The proportion of the Republic of Ireland's trade in goods with Northern Ireland has increased since January 2021 – Northern Ireland accounted for 5% of the Republic of Ireland's goods imports in February 2021, more than double the equivalent figure for December 2020. In cash terms, the value of the Republic of Ireland's goods imports from Northern Ireland increased by 38% between December 2020 and January 2021 and by a further 42% between January and February 2021.

While monthly trade data can be erratic, the Republic of Ireland's trade with Northern Ireland has generally remained above typical levels since January 2021.



Source: Irish Central Statistics Office

In 2021, Northern Ireland accounted for 2.3% of the Republic of Ireland's goods exports (its highest share of the Republic of Ireland's goods exports since 1998) and 3.9% of the Republic of Ireland's goods imports (its highest share of the Republic of Ireland's goods exports since 1990).

2 The Bill

2.1 Non-enforcement of Withdrawal Agreement and Protocol obligations in UK law

Clauses 1-3, 13-16 and 20 collectively set out the Government's general proposition that the UK should not fully implement, in domestic law, the UK-EU Withdrawal Agreement. Specifically, they disapply or override existing domestic legislation that would otherwise give effect to several commitments made under the Protocol on Ireland/Northern Ireland (an integral part of the Withdrawal Agreement). Other parts of the Bill then give ministers powers to make alternative provision that conflicts with the UK's obligations under the Withdrawal Agreement.

The overview clause: Clause 1

Clause 1 of the Bill provides an "overview" of the Act. This is an unusual, though not unprecedented, approach to primary legislation. An overview clause can also be found in the Bill of Rights Bill, which the Government recently introduced.

Four objectives of the legislation are set out:

1. [To provide] that certain specified provision of the Northern Ireland Protocol does not have effect in the United Kingdom;
2. [To give] Ministers of the Crown powers to provide that other provision of the Northern Ireland Protocol does not have effect in the United Kingdom;
3. [To provide] that enactments, including the Union with Ireland Act 1800 and the Act of Union (Ireland) 1800, are not to be affected by provision of the Northern Ireland Protocol that does not have effect in the United Kingdom; and
4. [To give] Ministers of the Crown powers to make new law in connection with the Northern Ireland Protocol (including where provision of the Protocol does not have effect in the United Kingdom).

The use of overview clauses generally

The Office of Parliamentary Counsel's Drafting Guidance from June 2020 draws a distinction between "overview" provisions and "purpose" provisions.

- Overview provisions are intended "to help the reader to navigate through the legislation" and are "not usually intended to have any operative effect of [their] own".
- Purpose provisions by contrast are "intended to affect the interpretation of other provisions"

The Office of Parliamentary Counsel (OPC) describes the main advantages of well-crafted overview provisions as:

- providing a "pithy summary" of long or complex legislation;
- drawing out "themes and relationships" between provisions; and
- to signpost the interaction between new legislation and other legislative provisions.

However, the OPC Guidance also acknowledges risks associated with such provisions. The main risk is that the courts might give a different and unintended interpretive effect to a provision (effectively treating it as a purpose provision rather than an overview one).

It is not clear whether **clause 1** is purely an "overview" clause or to what extent it impacts the interpretation of the other parts of the Bill.[64] The Explanatory Notes describe it as a "summary" of the effect of the Bill, but also says that it "makes clear" the intention as to the relationship between this primary legislation and other law.

Alexander Horne, a legal commentator and former parliamentary official, has suggested the clause may be intended to ensure Parliament is "squarely confronting" what it is doing in overriding the Withdrawal Agreement, and "accepting the political cost".[65] This is a legal test, previously outlined by Lord Hoffmann in the case of *ex parte Simms*. In that case, Hoffmann concluded that Parliament cannot override fundamental rights using "general" or "ambiguous" words.[66] The clause may therefore be intended to prevent the Act's provisions being "read down" so as not to conflict with rights or obligations guaranteed under the Protocol.

Limiting implementation of the Protocol: Clause 2

Clause 2 of the Bill would disapply the key implementation mechanism for the Protocol that currently exists in UK domestic law. It does this in two important respects.

Limit the direct effect of the Withdrawal Agreement

Clause 2 partially disapplies section 7A(2) of the EU (Withdrawal) Act 2018, limiting the scope of direct effect of the Withdrawal Agreement. If "rights, powers, liabilities, obligations, restrictions, remedies [or] procedures" arise

64 See David Allen Green, "The curious clause one of the Northern Irish Protocol Bill", The Law and Policy Blog, 14 June 2022

65 Alexander Horne, Twitter, 22 June 2022

66 *R (Simms) v Secretary of State for the Home Department* [1999] UKHL 33

under "excluded provision" (given a broad definition in **clause 25** but more fully defined across **clauses 4, 8, and 12-16**) then they would no longer be given direct effect by the 2018 Act.

Therefore, it would no longer be possible to ask a UK court to recognise and give effect to those provisions by relying directly on the Withdrawal Agreement. Instead, individuals would have to rely on any specific measures the UK Government had taken to implement those parts of the Protocol, if indeed such provision has been made.

If brought into force, this change in domestic law would constitute non-performance of the UK's obligations under Article 4(1) and (2) of the Withdrawal Agreement, so far as "excluded provision" is concerned.

Qualify the supremacy of the Withdrawal Agreement

Clause 2 would also qualify the effect of section 7A(3) of the EU (Withdrawal) Act 2018. This means that the Northern Ireland Protocol Act 2022 (NIPA), and anything done under it, would take priority, in domestic law, over the Withdrawal Agreement. The Withdrawal Agreement would no longer enjoy the status of supremacy in UK domestic law to that extent.

If the UK Government made regulations under the NIPA that were incompatible with the Withdrawal Agreement, UK courts would give effect to those regulations rather than to the WA.

If brought into force this change in domestic law would also constitute non-performance of the UK's obligations under Article 4(1) and (2) of the Withdrawal Agreement.

Interpretation and separation agreement law: Clause 3

Section 7A of the EU (Withdrawal) Act 2018 only partly implements Article 4 of the Withdrawal Agreement. That section addresses direct effect and supremacy, and therefore deals with the UK's obligations under Article 4(1-2) WA.

However, on its own it does not (fully) address questions of interpretation, and the relevant related rules set out in Article 4(3-5) WA. Those are more fully addressed by section 7C of the EU (Withdrawal) Act 2018, which governs the interpretation of domestic law in light of all three separation agreements.

Given the Bill proposes to amend section 7A, to exclude certain provision from domestic law, this has a knock-on effect on interpreting domestic law, and in particular for section 7C of the 2018 Act. As the Explanatory Notes put it:

> courts could be placed in a contradictory position whereby they would be required to interpret domestic law in light of EU law that no longer applies in the UK.[67]

Clause 3 of the Bill is intended to address this knock-on effect. It ensures that (for example) regulations about "excluded provision" made under this Bill would not have to be read in light of the Withdrawal Agreement.

This therefore enables UK courts to interpret and give effect to domestic law, including regulations made under this Bill, in ways that are expressly incompatible with the Protocol and Withdrawal Agreement.

The scope of "excluded provision"

The definition and scope of "excluded provision" under this Bill is critical as to the extent of the UK's non-performance of its Withdrawal Agreement obligations. **Clause 25** notionally defines the term as follows:

> provision of— (a) the Northern Ireland Protocol, or (b) any other part of the EU withdrawal agreement, so far as it is excluded provision by virtue of this Act (including any regulations made under this Act)

However, as this definition suggests, it is necessary to look elsewhere in the Bill to find provision that would be excluded "by virtue of this" legislation. Of particular relevance are **clauses 4, 8, 12-16**.

Clause 4: Movement of goods and customs

Clause 4 provides that various parts of Article 5 of the Protocol are "excluded provision". Article 5 is concerned with customs and the movement of goods between the UK and Northern Ireland. Provisions specifically "excluded" are:

- Article 5(1) subparagraphs 1 and 2;
- Article 5(2); and
- Articles 5(3) and (4) so far as they relate to qualifying movements of UK or non-EU destined goods

For further detail on the implications of those provisions being excluded, see section 2.2 below.

Clause 8: Regulation of goods

Clause 8 further excludes Article 5(4) and Annex 2 of the Protocol so far as they prevent **clause 7** from having effect. **Clause 7** contains provision for a "dual regulatory regime", enabling businesses to choose whether to follow UK or EU rules on manufactured goods, medicines and agri-food goods.

For further detail on the implications of those provisions being excluded, see section 2.3 below.

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[67] Explanatory Notes, para 31

Clause 12: Subsidy control

Clause 12 provides that Article 10 (on state aid or subsidy control) and related Annexes 5 and 6 of the Protocol are "excluded provision".

For further detail on the implications of those provisions being excluded, see section 2.4 below.

Excluding and making non-binding the Court of Justice of the EU (CJEU): Clauses 13 and 20

One of the provisions that section 7A of the EU (Withdrawal) Act 2018 gives direct effect is Article 12(4) of the Protocol. It does this to comply not just with the Protocol, but also Article 4 of the WA itself.

Article 12(4) of the Protocol states that the EU institutions and bodies shall have "the powers conferred upon them by Union law" in relation to the enforcement of Article 12(2), Article 5 and Articles 7 to 10 of the Protocol.

Article 12(4) specifies, in particular, that the CJEU shall have the jurisdiction provided for in the EU Treaties in relation to these provisions. It specifically references Article 267 of the Treaty on the functioning of the EU (TFEU) whereby Member States can seek preliminary rulings from the CJEU regarding the interpretation of EU law. UK courts would similarly be able to refer questions regarding the interpretation of the EU law provisions applied under the Protocol to the CJEU.

Two of the Bill's clauses would fundamentally change this arrangement.

Clause 13(1): excluding provision granting CJEU jurisdiction

Clause 13 subsection (1) makes further "excluded provision" from the Protocol and related parts of the Withdrawal Agreement. Provision would be "excluded" if – and to the extent that – it confers jurisdiction on the CJEU in relation to the Protocol (or its related WA provisions). This potentially covers any disputes about the Protocol and not just disputes about the other excluded provisions set out in the Bill.

In practical terms, this would remove (in UK law) the role the CJEU has in in interpreting and enforcing the Protocol. It would mean, for example, that the European Commission's power to refer infringement cases to the CJEU where it believes the UK has not implemented the relevant EU law covered by the Protocol, would have no effect in UK law.

Similarly, the role of the CJEU in the WA dispute settlement arbitration process would not apply to disputes relating to the implementation of the Protocol (as a matter of UK law). Article 174 of the WA provides that in any dispute involving questions regarding the interpretation of concepts or provisions of EU law, the arbitration panel must refer these questions to the CJEU and the CJEU's ruling rulings on the matter will be binding. This dispute

mechanism would no longer be acknowledged in UK law to the extent it concerned disputes about the Protocol.

By excluding this jurisdiction in this way, the UK would be in a position of non-performance with regard to Article 12 of the Protocol as well as provisions of the main Withdrawal Agreement (including Article 174).

This clause would **not** affect the CJEU's jurisdiction in relation to parts of the Withdrawal Agreement that are unrelated to the Protocol (for example Part 2 on citizens' rights).

Clause 20(2): domestic courts not to be bound by or refer matters to CJEU

Clause 20 subsection (2) of the Bill would make two important and related changes that follow-on from **clause 13**. Both would amount to further non-performance of the UK's obligations under the Withdrawal Agreement.

Firstly, **clause 20** provides that the UK courts are, in future, not to be bound by case law of the CJEU so far as it concerns the Protocol, related parts of the Withdrawal Agreement, or the UK's legislation concerned with the Protocol's implementation.

This is in conflict with the following provisions of the Withdrawal Agreement.

- Article 4(3) WA because UK courts would no longer be required to interpret relevant provisions of EU law (incorporated by the WA) in accordance with the methods and general principles of EU law;
- Article 4(4) WA because UK courts would be able to depart from binding case law of the CJEU handed down before the end of the transition period; and
- Article 4(5) WA because UK courts would no longer have to have "due regard" to relevant CJEU caselaw handed down after the transition period.

Secondly, **subsection 20(2)** would prevent any UK court from referring a question of interpretation of the Protocol, or related provision, to the CJEU. This appears to be a breach both Article 4 of the WA generally and a related breach of Article 12 of the Protocol in particular, for similar reasons as **clause 13**.

Subsections 20(3-4) leave open the possibility of a more limited reference procedure from UK courts to the CJEU on Protocol-related matters. However, this would depend on such provision being made by a minister in regulations: such a procedure is not itself on the face of the Bill.

Clause 14 of the Bill also disapplies the WA dispute settlement process more broadly in relation to parts of the Protocol disapplied by the legislation (see below).

Other enforcement provisions: Clauses 13 and 14

Clause 13 also disapplies other provisions relating to implementation and enforcement of the Northern Ireland Protocol.[68] Subsection (2) disapplies provisions of Article 12 of the Protocol. Those provisions give EU representatives rights to be present during activities of the UK authorities where and to the extent that EU law is being implemented under the Protocol.

Subsection 13(4) enables Ministers to make regulations on any provision to which **clause 13** relates. **Subsection 13(5)** states in particular that such regulations may cover arrangements relating to supervision of the operation of the Protocol and information sharing under these arrangements.

Clause 14 disapplies a range of other provisions in the Withdrawal Agreement concerned with the implementation, application, supervision and enforcement of the Protocol. It does this "so far as the provision applies in relation to any other excluded provision".

Provisions disapplied include:

- **Parts of Article 12** of the Protocol. These include provisions obliging the UK authorities to implement provisions of EU law that are applicable under the Protocol, and provisions providing that applicable EU law has the same effect in Northern Ireland as it would in EU Member States.
- **Article 13** of the Protocol, which sets out arrangements for the adoption of new EU legislation within the scope of the Protocol.
- **Article 4** of the WA, which requires the UK to ensure that directly applicable provisions of the treaty are given "the same legal effects" in UK law as they would have in EU law and in the law of Member States.
- **Articles 170 to 181** of the WA which provide for the resolution of disputes by an independent arbitration panel, make the panel's rulings binding on the UK and EU, and allow for temporary remedies in cases of non-compliance. These temporary remedies could also involve suspension of obligations in the UK-EU Trade and Cooperation Agreement.[69]

Subsection 14(4) includes a broad delegated power. It allows Ministers to make:

> any provision… in connection with any provision of the Northern Ireland Protocol and other parts of the EU withdrawal agreement to which this section relates.

The Delegated Powers Memorandum gives no clear indication about how the delegated powers in **clauses 13 and 14** are likely to be used. In both cases, the memorandum indicates that there will be a new "regime" in respect of

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68 Explanatory Notes, para 72

69 See Commons Library Insight, Governing the new UK-EU relationship and resolving disputes, 24 February 2021; and Commons Library Briefing, The UK-EU Withdrawal Agreement: dispute settlement and EU powers.

which the powers may need to be used, but that the details will be arrived at in consultation with stakeholders.[70]

Making changes to "excluded provision"

As explained above, several of the Bill's clauses designate parts of the Protocol and the Withdrawal Agreement as "excluded provision".

Clause 15 allows ministers to extend this status, by regulations, to other parts of the Protocol or related parts of the Withdrawal Agreement. If this is done, these are to be known "additional excluded provisions".

Subsection 15(2) would also allow Ministers to make provisions no longer excluded, while **subsection 15(4)** provides exceptions to existing exclusion of provisions. Taken in the round, **clause 15** would give ministers very broad discretion to ratchet up or down the extent to which this Bill blocks the operation of the Protocol in domestic law.

Subsection 15(1) defines several 'permitted purposes' for which ministers may use this power to make provisions of the Protocol/WA excluded. These are:

> (a) safeguarding social or economic stability in Northern Ireland;
>
> (b) ensuring the effective flow of trade between—
>
> > (i) Northern Ireland and another part of the United Kingdom, or
> >
> > (ii) a part of the United Kingdom and anywhere outside the United Kingdom;
>
> (c) safeguarding the territorial or constitutional integrity of the United Kingdom;
>
> (d) safeguarding the functioning of the Belfast Agreement;
>
> (e) safeguarding animal, plant or human welfare or health;
>
> (f) safeguarding biosecurity or the environment;
>
> (g) safeguarding the integrity of the EU single market;
>
> (h) lessening, eliminating or avoiding difference between tax or customs duties in Northern Ireland and Great Britain;
>
> (i) securing compliance with, or giving effect to, any international
>
> obligation or agreement to which the United Kingdom is a party

[70] Delegated Powers Memorandum, paras 91 and 100

(whenever the United Kingdom becomes a party to it), except for—

(i) the Northern Ireland Protocol or any other part of the EU withdrawal agreement, or

(ii) any obligation under them.

The range of reasons potentially applicable are therefore very broad. Key terms like "safeguarding the territorial or constitutional integrity of the United Kingdom" or "safeguarding the functioning of the Belfast Agreement" are not defined in any level of detail. There is also no clear test of proportionality or necessity for when Ministers can use these powers.

Subsection 15(3) states there are three sections of the Protocol to which Ministers are barred from making "additional excluded provisions":

- Article 2 (rights of individuals);
- Article 3 (common travel area); and
- Article 11 (other areas of North-South co-operation).

The democratic consent process set out in Article 18 of the Protocol (see section 1.1.) is not protected in the same way, meaning Ministers could by regulation block the process or change the way it operates. The process for the mechanism is set out in a statutory instrument that came into force in December 2020.

Additional excluded provisions and new law: Clause 16

Clause 16 sets out how Ministers can make new law when provisions of the Protocol or WA are made "additional excluded provision" by virtue of the powers in clause 15.

Subsection 16(1) says this power can be used to "make **any** provision which the Minister considers appropriate", in connection with additional excluded provisions. This means it is not limited by the "permitted purposes" in **clause 15.** As the Explanatory Memorandum makes clear "the power to make regulations contained in this clause is not limited in any way by the other powers in the Bill".

This makes it an exceptionally broad power with few constraints.

2.2 Goods: Movements and customs

The Government's view on the operation of the Protocol

The Government believes that the Protocol has led to burdensome customs processes on goods moving from Great Britain to Northern Ireland and inflexible regulation. It argues that "unnecessary checks and paperwork" required by the Protocol undermine Northern Ireland's place in the UK internal market.[71]

Under the Protocol, full customs processes and SPS checks[72] on agri-food products are required for goods entering Northern Ireland even if they will remain there and not move into the EU single market. The Government argues this has had an adverse effect on business, pointing for example, to business surveys showing that over 100 GB retailers have stopped serving customers in Northern Ireland.[73]

Some agree with this assessment. For example, a leader column in the Economist said that it was "beyond dispute" that the Protocol needs adapting as it imposed "pettifogging bureaucracy on imports from the mainland into Northern Ireland" but described the Government's approach as "thoroughly misguided".[74]

The Government's proposals

On 13 June, the Government published proposals to address these issues in a policy paper, Northern Ireland Protocol: the UK's solution. These involve a system of green and red lanes.

Green lane

Goods remaining within the UK would no longer be subject to unnecessary paperwork, checks and duties. There would be no customs processes or complex certification requirements for agri-food products. The green lane would be reserved for those in a new trusted trader scheme (see below). Non-commercial goods, such as post and parcels, would automatically use the green lane.

Red lane

Goods going to the EU, or moved by traders not in the new trusted trader scheme, would be subject to full customs procedures, checks and controls, thereby protecting the EU single market.

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[71] Foreign, Commonwealth and Development Office, NI Protocol: The UK's solution, 13 June 2022, p3

[72] Sanitary and Phytosanitary checks relating to food safety and animal and plant health

[73] Foreign, Commonwealth and Development Office, NI Protocol: The UK's solution, 13 June 2022, p3

[74] "Britain's bill to rip up the Northern Ireland protocol is a terrible idea" [leader article] [online], The Economist, (accessed on 17 June 2022)

Trusted trader scheme

For audit and compliance purposes, traders would need to provide information about their business and supply chains. There would be substantial penalties for abuse of the scheme, including exclusion from the green lane.

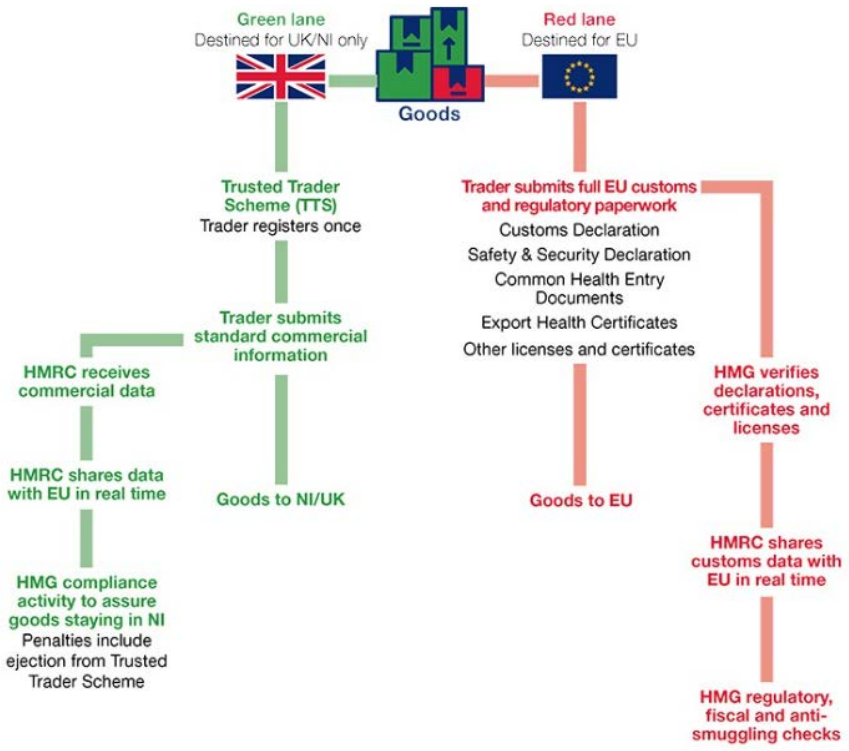
Data sharing

The UK would share data with the EU to monitor the risk of abuse and facilitate cooperation.

High risk goods

In cases where there is a "different order of risk", controls would continue to be applied. This happened while the UK was in the EU for movement of live animals, for example. UK and EU authorities would work together "under a new bespoke biosecurity assurance framework" to manage these higher risk goods.

The Government's policy paper illustrates the proposed system in the diagram below.



The Bill: Clauses 4-6

Clauses 4 to 6 relate to the movement of goods and customs. They disapply parts of the Protocol and give Ministers powers to make regulations. While the Bill itself does not refer to red and green lanes, the Explanatory Notes

make it clear that the powers in these clauses could be used to implement such as system.

Clause 4: Movement of goods (including customs): excluded Protocol provision

This clause disapplies significant parts of the Protocol relating to customs and the movement of goods. As a result, goods moving between Great Britain and Northern Ireland which remain in the UK (or are destined for another non-EU country) would not face the requirements imposed on them by the Protocol.[75]

Subsection 4(1) disapplies parts of Article 5(1), and Article 5(2) of the Protocol from domestic law. These parts of the Protocol relate to customs duty on goods entering Northern Ireland which are "at risk" of subsequently entering the EU single market. According to the Explanatory Notes, the "at risk" test will be replaced by a different approach, such as, one based on 'red' or 'green' lanes, for example.[76]

Subsection 4(2) disapplies Articles 5(3) and 5(4) and Annex 2 of the Protocol so far as they relate to "qualifying movements" of UK or non-EU destined goods. Articles 5(3) and 5(4) and Annex 2 apply certain EU customs and single market rules to Northern Ireland. A "qualifying movement" is defined in subsection **4(6)** but is essentially:

- A movement to Northern Ireland from Great Britain or anywhere else outside the EU
- A movement from Northern Ireland to Great Britain or anywhere else outside the EU
- A movement within the UK

According to the Explanatory Notes, the effect of **subsection 4(2)** is to remove "customs requirements, tariffs, and certain regulatory requirements such as SPS controls on "qualifying movements" including those from Great Britain into Northern Ireland."[77]

Subsection 4(3) allows a Minister, by regulations, to provide prescribed descriptions of those "qualifying movements" that could benefit from any arrangements (such as a 'green lane') by being UK or non-EU destined.

Subsection 4(4) sets out a range of factors which a prescribed description of qualifying movements of UK or non-EU destined goods could relate to. These include:

[75] Explanatory Notes, para 33
[76] Explanatory Notes, para 34
[77] Explanatory Notes, para 35

- the purpose for which the goods are being moved (including whether the goods are being moved for commercial or non-commercial purposes);
- the manner in which the goods are being moved;
- the person or service being used to move the goods;
- whether or not the movement is a direct movement from one place to another;
- the place where the goods are being moved from or to;
- the place where the goods are destined to remain or move to after a qualifying movement;
- the nature of the goods.

This provision would allow a Minister to stipulate, for example, that non-commercial goods (eg goods moved by a passenger in their baggage) would always be "qualifying movements". The Explanatory Notes say this "provides the basis for the operation of a regime which could distinguish between UK destined and EU destined goods".[78]

Subsection (5) allows a Minister, by regulations, to make provision about the meaning of "UK or non-EU destined". This allows goods to be defined as eligible for the green lane if they meet certain conditions. For example, this could be if they are declared to be UK or non-EU destined in a trusted trader scheme.[79]

Clause 4(6) defines "qualifying movements" – see comment under Clause 4(2) above.

Clause 5: Movement of goods: new law about matters other than customs

This clause gives a Minister the power to make provision for UK and EU destined goods to be differentiated, for example by providing for different requirements as to the checks and controls to which they will be subject.[80]

Subsections (1) and (2) say that a Minister may, by regulations, make any provision they consider appropriate in connection with any provision of the Protocol covered by **clause 4**, except provisions about customs matters which are covered by **clause 6**.

According to subsection (3), regulations under this clause may, in particular:

[78] Explanatory Notes, para 37
[79] Explanatory Notes, para 38
[80] Explanatory Notes, para 40

- provide for checks, controls, and administrative processes including powers of search, examination and entry;
- restrict or prohibit the movement of UK or non-EU destined goods into the EU;
- make provision about the treatment of goods which cease to be, or become, UK or non-EU designated goods.

According to the Explanatory Notes, this subsection "would enable the continued application of pre-EU Exit controls on the movement of live animals. It would also ensure that a 'trusted trader' regime could be accompanied by appropriate underpinnings and restrictions to allow it to function effectively and avoid abuse of the scheme."[81]

Clause 6: Customs matters: new law

Clause 6 allows HM Treasury to legislate on customs matters. The Government say that this will allow for the establishment of any green and red lane regime and any accompanying trusted trader scheme.[82]

Subsection (1) gives HM Treasury and HMRC powers to make any provision, by regulations, about customs which they consider appropriate in connection with the Protocol. **Subsection (2)** sets out that these regulations may, in particular:

- Impose or vary customs duties;
- Provide for checks, controls and administrative procedures including powers of search, examination and entry;
- restrict or prohibit the movement of UK or non-EU destined goods into the EU;
- make provision about the treatment of goods which cease to be, or become, UK or non-EU destined goods.

2.3 Regulation of goods

The Government's view on the operation of the Protocol

The Government argues that the Protocol's requirements on regulation of goods create problems. The Protocol requires that most goods on the Northern Ireland market meet EU rules, even if they will never reach the EU single market. This creates a barrier to trade between Northern Ireland and Great Britain. These problems will be made worse, according to the Government, if there is greater divergence between UK and EU rules in future.

[81] Explanatory Notes, para 43
[82] Explanatory Notes, paras 44-45

According to the Government, the current arrangements under the Protocol create significant burdens for business, especially those which trade only in the UK. These barriers are a disincentive for companies supplying the Northern Ireland market. This risks important products, such as veterinary medicines, being unavailable on the Northern Ireland market. Ultimately, the Government argues that "there is no durable framework for safeguarding Northern Ireland's place in the UK market …"[83]

The Government's proposals

The Government proposes a dual regulatory regime where goods on the Northern Ireland market could meet either UK or EU rules (or both).

The Government argues that this will protect the UK internal market by reducing trade barriers between Great Britain and Northern Ireland. This would mean less risk of Northern Ireland consumers being unable to buy the products they want. At the same time, the EU single market would be protected by "robust safeguards."

Goods could be marked to show whether they conformed with UK or EU rules. Northern Ireland businesses would have unfettered access to the Great Britain market whichever set of rules they operated under.

Protections for the EU would include:

- Businesses placing goods on the market would remain responsible for complying with the relevant rules;
- Businesses which break the rules would be subject to stringent penalties;
- Agri-foods could only move from Great Britain to Northern Ireland under the Trusted Trader Scheme;
- Greater market surveillance activity alongside cooperation between authorities in the UK, Ireland and the EU to support compliance.[84]

The Bill: Clauses 7-11

Clauses 7 to 11 deal with regulation of goods and relate to the establishment of a dual regulatory system in Northern Ireland. Certain parts of the Protocol are disapplied to the extent that they would prevent businesses choosing between the UK and EU regulatory route.

Clause 7: Regulation of goods: option to choose between dual routes

Currently, goods sold in Northern Ireland must meet EU single market rules listed in Annex 2 of the Protocol. **Clause 7** sets up a "dual regulatory regime" by allowing businesses to choose between a UK or EU regulatory route in Northern Ireland for regulated classes of goods. These include manufactured goods, medicines and agri-foods. **Subsection 7(3)** stipulates that a class of goods is regulated if any provision of Annex 2 applies to regulation of goods in

[83] Foreign, Commonwealth and Development Office, NI Protocol: The UK's solution, 13 June 2022, p6
[84] Foreign, Commonwealth and Development Office, NI Protocol: The UK's solution, 13 June 2022, p7

that class. **Clause 10** defines "regulation of goods". It will be possible for a product to meet both UK and EU regulations if those regulations allow.

Clause 8: Regulation of goods: excluded Protocol provisions

Clause 8 disapplies Article 5(4) and Annex 2 of the Protocol from domestic law where they would prevent the choice of regulatory regimes provided for in **clause 7**. Article 5(4) and Annex 2 apply certain EU rules to Northern Ireland. This clause allows the dual regulatory regime to function in practice.

Clause 9: Regulation of goods: new law

Clause 9 gives a Minister powers to make regulations relating to the dual regulatory system in Northern Ireland. According to the Explanatory Notes, there may need to be adjustments to provide clarity for business on how the regulatory regime will work in practice. The Explanatory Notes say this "is needed in order to safeguard the interests of consumer safety, biosecurity arrangements, and maintain appropriate public health standards".[85]

Subsection 9(1) gives a Minister the power to make "any provision about regulation of goods which the Minister considers appropriate in connection with the Northern Ireland Protocol". **Subsection 9(2)** states that these regulations may, in particular, be used in conjunction with the UK or EU regulatory routes referred to in clause 7, and to amend clauses 7 and 8.

Clause 10: Meaning of "regulation of goods"

Clause 10 provides definitions relating to the dual regulatory regime.

Subsection (1) says that "regulation of goods" means regulation of:

- Making goods available on the market;
- Putting goods into service;
- Production of goods (by manufacture or other process);
- Use and import of goods.

Subsection (2) provides a non-exhaustive list of regulatory matters. **Subsection (3)** says that placing goods on the market or putting goods into service may also include production of goods. **Subsection (4)** gives a minister powers to make provisions, by regulations, about the meaning of regulation of goods in the Bill, including changing the effect of other provisions in this clause.

[85] Explanatory Notes, para 54

Clause 11: Regulation of goods: supplementary provision

Clause 11 allows the Government to switch the dual regime on or off for specific types of good.

Subsection 11(1) allows a minister to apply **clause 7** only to prescribed classes of regulated goods or prescribed regulatory routes. The Explanatory Notes say this "allows a Minister to prescribe whether the dual regime should no longer apply to a specific class of regulated goods. It also provides a power for a Minister of the Crown to modify the different regulatory routes available in Northern Ireland."[86]

Subsection 11(2) states that the power can be applied to some or all of the specified regulatory route or some or all of the regulated class of goods. The Explanatory Notes say:

This has the practical effect of allowing ministers to create a UK-only regulatory route and furthermore to apply this approach to part or all of a category of goods or to some or all of the required regulatory route.[87]

Subsection 11(3) defines "regulatory route" as either a UK regulatory route or an EU regulatory route, as defined in clause 7.

2.4 Subsidy control

State aid provisions in the Protocol

Under Article 10 of the Protocol, EU state aid rules continue to apply to state aid – or subsidy measures[88] – related to trade in goods and the wholesale electricity market, insofar as this can affect trade between Northern Ireland and the EU. State aid regulations under the Protocol are enforced by the European Commission and are subject to judicial review of the Court of Justice of the EU (CJEU). See box 2 for further details.

2 State aid provisions in the Protocol

Article 10 of the Protocol states that EU state aid law shall apply to the United Kingdom "in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol." This means that EU state aid law covers the support benefitting manufactured goods and

[86] Explanatory Notes, para 63

[87] Explanatory Notes, para 64

[88] The EU law term 'state aid' and the UK term 'subsidy' both refer to a financial (or in kind) contribution such as a grant, loan or guarantee, provided by a public authority to an enterprise and conferring a specific benefit (an economic advantage) to the recipient not available on market terms, insofar this can distort competition and trade.

wholesale electricity markets, insofar as this affects trade between Northern Ireland and the EU.

Under the Protocol the European Commission is responsible for enforcing the state aid rules with respect to Northern Ireland and EU trade. This includes the requirement for the UK to notify the Commission before granting larger amounts of covered state aid. The Commission must keep the UK "fully and regularly informed" of the progress and outcomes of its assessments.

The applicable EU regulations - effectively covering the main part of the EU state aid rules - are listed in Annex 5. Annex 6 includes procedural rules for agricultural subsidies.

Article 12 sets out the commitments relating to the implementation, application, supervision and enforcement of the Protocol. In particular, Article 12(4) gives the Court of Justice of the EU (CJEU) the jurisdiction over the enforcement of state aid rules under the Protocol.

State aid for agriculture

Article 10(2) of the Protocol provides for an exemption for state aid to production of and trade in agricultural products in Northern Ireland. This is subject to the UK-EU Joint Committee (JC) agreeing a maximum exempted annual level of support (Annex 6). The Article 10(2) also stipulates that the JC must agree a minimum percentage of the exempted agriculture support which is required to comply with the WTO rules (Annex 2 of the WTO Agreement on Agriculture, also known as 'Green Box'). Beyond these thresholds, EU state aid rules apply to agriculture.

The agreed maximum amount of exempted agricultural subsidies is currently set at £382.2 million per year (PDF). The minimum percentage of the WTO-compliant support within that total amount is set at 83%. The JC has also exempted aid to fisheries up to nearly £17 million over five years, with a maximum spend of £4m in any given year.

Compensation of extra customs costs

While not being a part of the EU Customs Union, in practice, Northern Ireland applies many EU customs rules. Because of having to apply the Union Customs Code, traders may incur extra costs. Therefore, the Protocol **(Article 5(6) a-d)** lets the UK reimburse tariff duties for goods moving from Great Britain to Northern Ireland, which can be shown not to have entered the EU. The UK may also compensate or waive other costs to businesses related to the implementation of EU customs rules. Such UK Government schemes would be subject to EU state aid rules in accordance with Article 10.

Why are changes proposed?

Dual regime

The Government says that EU state aid rules under the Protocol are limiting the level of support that may be granted in Northern Ireland or limit who is eligible for support without prior approval from the EU. It cites the Covid-19 Recovery Loan Scheme as an example. According to the Government this is creating significant uncertainty for businesses and authorities. The Protocol is also creating a "two-tiered" system for subsidy control in the UK.[89]

Having left the EU, the UK Government brought forward a bill building a new UK legal framework for subsidies. The Government's aim is to have a more flexible regime with minimum bureaucracy.[90] The Bill received Royal Assent on 28 April 2022 and became the Subsidy Control Act. The main parts of the Act are expected to come into effect in Autumn 2022.

Section 48(3) of the Act excludes subsidies covered by the Protocol from the scope of the UK subsidy control requirements. As a result, two subsidy control frameworks would be in force in the UK, in relation to trade between Northern Ireland and the EU.

The Government says having two different regimes creates "problems and confusion" and affects Northern Ireland and the UK Internal Market, especially in relation to inward investment.[91]

This has been echoed by various state aid experts. Some have said that granting authorities may become reluctant to give subsidies in fear of non-compliance with EU state aid rules.[92]

The issue of a dual subsidy control regime for Northern Ireland was also part of debate on the Subsidy Control Bill in Parliament. For example, Sammy Wilson (DUP) was concerned that the Bill would place any attempt to attract business to Northern Ireland at a disadvantage, as Northern Ireland would effectively be subject to a dual subsidy regime: the UK and the EU state aid regime, while the rest of the UK would have access to the new, swifter procedures.[93]

In the Lords Grand Committee in February 2022, Lords Dodds (DUP) summarised the difference between the EU and the UK regime:

> Effectively, we have two regimes which are very different in policy terms and practical effect. Under the UK scheme, things will be automatically approved

89 Foreign, Commonwealth and Development Office, NI Protocol: The UK's solution, 13 June 2022, p8

90 HCWS134, 30 June 2021

91 Letter of Lord Callanan, Minister for Business, Energy and Corporate Responsibility, BEIS to Lord Jay of Ewelme, Chair of the Protocol on Ireland/Northern Ireland Sub-Committee, 22 March 2022

92 See for example George Peretz, The UK's new subsidy regime: a marsh of uncertainty, Monckton Chambers, 1 January 2021; Thomas Pope, Eleanor Shearer, Institute for Government, Taking back control. Replacing EU state aid rules in the UK, May 2021, p42

93 HC Deb 22 September 2021 [Subsidy Control Bill], c338

> unless specifically prohibited. In Northern Ireland, we are subject to EU rules under which everything is prohibited unless approved, effectively.[94]

Lord Dodds cited the Department for the Economy in Northern Ireland saying Northern Ireland would be at a disadvantage compared to the rest of the UK attracting investment. In Northern Ireland, state aid approvals under EU rules would take significantly longer than the new UK timescales. The rest of the UK would have "far fewer conditions or restrictions and might well receive greater levels of funding than would be possible under the EU regime in Northern Ireland", which puts ceilings on the amount of permitted state aid.[95]

Reach-back

UK legal experts generally agree that the application of Article 10 of the Protocol alongside the UK domestic subsidy control rules could create legal and practical issues for Northern Ireland authorities and businesses. In addition, they recognise that the coverage of EU state aid rules is not geographically limited to those support measures provided by the devolved and local government bodies in Northern Ireland, or UK Government measures designed specifically for Northern Ireland. [96]

In certain situations, EU state aid rules could apply to subsidies provided by the UK Government for the whole or part of the UK regardless of which UK authority has provided the support. For example, a UK-wide tax measure benefitting a Northern Ireland business could be caught by the EU state aid enforcement regime as it could potentially affect trade between Northern Ireland and the EU. EU state aid rules would apply as long as a support measure meets the EU state aid test. This is often referred to as **"reach-back" of EU state aid rules**.[97]

Whereas initially holding the view that the EU state aid provisions of the Protocol would mainly be confined to Northern Ireland, the Government recognised that reach-back might be an issue.[98] Introducing the UK Internal Market Bill in September 2020, Robin Walker, then Minister of State at the Northern Ireland Office, said:

> There is a risk that a maximalist interpretation of article 10 of [the] protocol by the EU, which was never intended but is none the less a risk we must protect

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94 HL Deb 7 February 2022 [Subsidy Control Bill], cc348-350GC

95 HL Deb 7 February 2022 [Subsidy Control Bill], cc348-350GC

96 G.Peretz QC in "Boris Johnson's efforts to escape EU state aid rules 'mistaken'", Financial Times, 9 February 2020; HL European Affairs Committee Protocol on Ireland/Northern Ireland Sub-Committee, Corrected oral evidence: The role of the CJEU in relation to the Protocol on Ireland/Northern Ireland, 20 January 2022, Q10; George Peretz QC, Alfred Artley, State aid under the Northern Ireland Protocol, Tax Journal, 15 May 2020

97 As above [G.Peretz QC in "Boris Johnson's efforts to escape EU state aid rules 'mistaken'", Financial Times, 9 February 2020; HL European Affairs Committee Protocol on Ireland/Northern Ireland Sub-Committee, Corrected oral evidence: The role of the CJEU in relation to the Protocol on Ireland/Northern Ireland, 20 January 2022, Q10; George Peretz QC, Alfred Artley, State aid under the Northern Ireland Protocol, Tax Journal, 15 May 2020]

98 HM Government Command Paper, The UK's Approach to the Northern Ireland Protocol, CP 226, May 2020

> against, could give the European Commission extensive jurisdiction over subsidies granted in the rest of the UK, known as reach-back. All the subsidies granted to the services sector in Northern Ireland could be caught even if there is no link, or only a trivial one, to a goods provider.[99]

After discussions in the EU-UK Withdrawal Agreement Joint Committee, the EU sought to address UK concerns about the reach-back by giving a clarification of Article 10's application in a unilateral declaration (PDF):

> When applying Art. 107 TFEU to situations referred to in Art. 10(1) of the Protocol, the European Commission will have due regard to Northern Ireland's integral place in the United Kingdom's internal market. The European Union underlines that, in any event, an effect on trade between Northern Ireland and the Union which is subject to this Protocol cannot be merely hypothetical, presumed, or without a genuine and direct link to Northern Ireland. It must be established why the measure is liable to have such an effect on trade between Northern Ireland and the Union, based on the real foreseeable effects of the measure.

The Government saw the declarations of the JC as an agreement in principle having legal force as an interpretation of the NIP.[100]

The UK Government's interim guidance on the UK's international subsidy control commitments (paragraph 7.1) follows the wording of the unilateral declaration. It explains that "reach-back" situation could arise in certain, limited circumstances, where there is "a clear benefit from and a genuine, direct link between the subsidy and companies in Northern Ireland".

However, legal commentators in the UK have said they didn't believe the unilateral declaration would have much effect on the reach-back issue and noted that the Court of Justice of the European Union retains its jurisdiction over State Aid matters under the Protocol. It was unclear what weight the CJEU would give to the unilateral declaration.

A European Commission's Notice to Stakeholders on state aid after the departure of the UK from the EU, issued in January 2021, confirmed a wide interpretation of which measures can "affect trade" between Northern Ireland and the EU. It said that the unilateral declaration "clarifies, but does not alter" the notion of "effect on trade" in the existing case law.[101]

So far, the UK and EU interpretations of the potential reach-back of the state aid provisions under Article 10 of the Protocol appear to diverge to some extent.

Proposed solutions

Some experts called for the Protocol's state aid provisions to be replaced by the Trade and Cooperation Agreement regime during the negotiations of the

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[99] HC Deb 21 September 2020 [United Kingdom Internal Market Bill], c652

[100] Cabinet Office, Command Paper The Northern Ireland Protocol, CP346, p21 (paras 50-51)

[101] European Commission Notice to stakeholders, Withdrawal of the United Kingdom and EU rules in the field of state aid, 18 January 2021

Trade and Cooperation Agreement, and this argument is still being made.[102] Thomas Pope and Eleanor Shearer argued in the Institute for Government May 2021 report, Taking back control of subsidies (PDF), that the new UK subsidy control system has to be so effective and robust as to demonstrate that it prevents UK subsidies from affecting the EU and so Article 10 of the Protocol is no longer necessary. Over time, "the UK government should look to negotiate a limit to the scope of Article 10 or complete removal."[103]

In the Command Paper, Northern Ireland protocol - next steps of 21 July 2021, the Government argued that the UK-EU Trade and Cooperation Agreement and the Subsidy Control Bill would give the EU enough certainty that UK subsidies would not distort NI-EU trade and competition, making the existing provisions in article 10 redundant in their current form. Given the sensitivity of the issue, the UK would offer additional reassurances to the EU by "establish[ing] enhanced processes for any subsidies on a significant scale relating directly to Northern Ireland", such as enhanced referral powers or consultation procedures.[104]

In its proposals to address UK concerns, the EU did not include a position on state aid/subsidy control.

The Government proposals in the Northern Ireland Protocol Bill are geared towards removing the effects of EU state aid rules on NI-EU trade, but do not include "additional reassurances" for subsidies mentioned in the Command Paper.

Clause 12 (Subsidy control)

Clause 12 of the Bill creates a basis for a single UK-wide subsidy control regime replacing the two regimes created by the Protocol and the UK Subsidy Control Act passed in April 2022.[105] It would bring Northern Ireland within the scope of the new UK subsidy control regime, as proposed in the Government's Command Paper.

Disapplying Article 10 of the Protocol

Clause 12 excludes the Protocol's state aid provision from the list of provisions given effect in domestic law by section 7A(2) of the EUWA.

Subsection 12(1) would disapply state aid provisions of Article 10 and Annexes 5 and 6 of the Protocol. Under Article 10 support measures affecting trade in goods between Northern Ireland and the EU, and the wholesale electricity market are subject to EU state aid rules. Annex 5 lists the applicable EU state

[102] James Webber, International Trade Committee, Oral evidence: UK-EU trading relationship, HC 1206, 22 April 2021, Q119

[103] Thomas Pope, Eleanor Shearer, Institute for Government, Taking back control. Replacing EU state aid rules in the UK, May 2021, p43

[104] HM Government, Command Paper, Northern Ireland protocol - next steps, CP 502, 21 July 2021, para 65

[105] EN, para 66

aid rules - effectively the whole body of regulations and guidance. Annex 6 contains procedures related to agricultural aid.[106]

Amending the Subsidy Control Act

Subsection 12(2) would amend the Subsidy Control Act 2022, Section 48(3), to remove the provision that now excludes subsidies covered by the Protocol from the scope of the UK subsidy control requirements.

Subsection 12(2) would also amend the way "Minimal Financial Assistance" and "Services of Public Economic Interest" are calculated. This technical amendment to Section 42(8)(d) of the Subsidy Control Act would take into account that Article 10 of the Protocol no longer applies. For details see Explanatory notes.[107]

Power to make regulations

Finally, **Subsection 12(3)** of this Clause would give a Minister of the Crown powers to make regulations related to state aid/subsidy control covered by the Protocol.

2.5 VAT and excise duties (Clauses 17 & 24)

Background

EU VAT law

The current EU VAT system was introduced as part of the creation of the "Single Market", allowing for the abolition of VAT-related customs controls at the borders between EU Member States. These had been in place to ensure the correct amount of VAT was paid on goods brought into one EU country from another. Instead, Member States now exchange data from VAT returns on goods sent from one EU country to another via the "VAT Information Exchange System" (VIES), allowing for records of business-to-business trade in goods between different Member States to be compared electronically to determine the correct VAT liability. Import controls related to VAT are still carried out at the EU's external border on goods imported from outside its Customs Union.[108]

106 EN, para 68

107 EN, para 69

108 For further background see, "EU rules on minimum VAT Rates: potential implications for the UK under the Northern Ireland Protocol", European Scrutiny Committee, Eighteenth Report of Session 2021-22, HC 121-xvii, 3 March 2022

3 In detail: development of EU and UK VAT rules

In May 1977 EU Member States adopted the sixth VAT directive (77/388/EEC). This marked a turning point in the development of EU VAT law – as governments agreed on common criteria for the VAT base in all Member States (ie, specifying those goods and services which could be exempted from tax). Subsequently in June 1991 Member States agreed provisions to harmonise the rates of VAT (Directive 92/77/EEC), which amended the sixth VAT directive accordingly – with effect from 1 January 1993.

In brief, all Member States:

- had to apply a standard VAT rate of 15% or more from 1 January 1993.
- had the option of applying one or two reduced rates, no lower than 5% to certain specified goods and services, as listed in Annex H of the directive.
- were entitled to continue charging any lower rates, including zero rates, that had been in place on 1 January 1991, assuming these rates were in accordance with Community law.

In November 2006 the European Council of Finance Ministers adopted a new principal EC VAT directive (2006/112/EC) to consolidate the main provisions of EU VAT law, including these rules. Annex H to the revoked sixth directive was recast as Annex III to the new directive. The new directive made no change to EC or UK VAT law.

Certain other provisions of the 1992 directive setting rules on VAT rates should be mentioned.

First, specific provision was made to allow Member States to apply a reduced rate to supplies of natural gas and electricity, provided this did not pose a risk of distortion of competition (this was replicated in Article 102 of the principal VAT directive).

Second, the UK secured the right to bring any of its zero rates into a reduced rate band, even if they were not listed in Annex H (this was replicated in Article 113 of the principal VAT directive). However, this provision would not have allowed the UK to reintroduce a zero rate that had been in place on 1 January 1991 which it had subsequently withdrawn.

Third, the Directive barred any Member State from introducing a new zero rate, though there was limited provision for those countries whose standard rate was

below 13% at 1 January 1991 to charge a rate below 5% on certain supplies (this was replicated in Article 113 of the principal VAT directive).[109]

The UK's approach to charging VAT on domestic supplies of fuel and power provides an illustration of the implications of these rules.

> In the UK domestic supplies of fuel and power were charged VAT at the zero rate when VAT was first introduced in 1973. In the 1993 Budget the then Chancellor Norman Lamont proposed that the zero rate would be replaced by a reduced 8% rate on 1 April 1994, and then this supply would be charged the standard rate of VAT from 1 April 1995. The Conservative Government did not proceed with the second step of this policy, having lost a vote on the issue following the 1994 Budget. In July 1997 when the then Labour Government wished to cut the rate of VAT on domestic supplies of fuel and power, these EU rules meant they were only able to cut it as low as 5%.[110]

It is important to add that EU Member States have recently agreed changes to these EU rules. On 7 December 2021 EU Finance Ministers agreed to amendments to the principal VAT directive to give individual EU countries much more flexibility to introduce both reduced rates and zero rates.[111] These changes took effect on 6 April 2022 (Directive 2022/542).[112]

EU excise law

As part of the Single Market, EU law also requires its Member States to apply excise duties to sales of alcohol, tobacco and energy products.[113] The specific requirements vary between and within these product groups, but broadly speaking EU excise legislation sets minimum rates of duty for different "excise goods", allowing Member States to determine their own rates provided they respect those minimum thresholds. In many cases, national duty rates now significantly exceed the EU minimum because the latter typically have not been adjusted for inflation in many years.

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109 A Library briefing provides further detail on the development of EU VAT law, and the limited discretion the UK had to amend VAT rates, when – as part of the EU – it fell within the ambit of this legislation: Commons Library briefing CBP2683, VAT : European law on VAT rates, 17 January 2019.

110 A Library briefing published in 1997 give more details: Commons Library briefing CBP97-87, VAT on fuel and power, 9 July 1997.

111 EC press notice, Commission welcomes ECOFIN agreement on new rules governing VAT rates in the EU), 7 December 2021.

112 "EU rules on minimum VAT Rates: potential implications for the UK under the Northern Ireland Protocol", European Scrutiny Committee, Eighteenth Report of Session 2021-22, HC 121-xvii, 3 March 2022

113 For more details see, HMG, Review of the Balance of Competences between the United Kingdom and the European Union – Taxation, July 2013 p16

VAT and excise in the Protocol and UK Government concerns

The purpose of Article 8 of the Protocol

Article 8 of the Northern Ireland Protocol deals with VAT and excise. While the UK remains responsible to the application and implementation of VAT and excise rules in Northern Ireland, and collects the duties, the EU's VAT rules for goods continue to apply in Northern Ireland. This includes the EU's rules on setting VAT rates, although Article 8 allows Northern Ireland to apply exemptions and reduced rates that are applicable in Ireland.

To help facilitate this Northern Ireland continues to be able to operate the EU's VIES system (VAT Information Exchange System) and to share data with Ireland and other Member States.[114]

Some months later, in May 2020, the Government published a Command Paper setting out its approach to the Protocol, which addressed Article 8, and in which it said it was

> confident that we can use the flexibilities available, in the context of the wider commitments to Northern Ireland's place in the UK internal market, to implement these aspects of the Protocol in a way which minimises new costs and burdens on businesses in Northern Ireland.[115]

It said while Northern Ireland remains "bound by EU rules" these "provide a good deal of flexibility already".[116]

With the end of the transition period businesses in Northern Ireland involved in trade with goods with the EU have used a specific geographic VAT identifier code – adding an 'IX' prefix in front of their VAT number when communicating with an EU customer or supplier.[117]

In November 2020 the European Scrutiny Committee considered the draft legislation the European Commission had published draft legislation to implement this measure.[118] The Committee's report provides a more detailed overview of the purpose of Article 8, and for convenience, this is reproduced in the text box below.

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114 European Commission, Brexit: What did you agree with the UK today?: Questions and answers, 17 October 2019

115 Cabinet Office, The UK's Approach to the Northern Ireland Protocol, CP226, May 2020 pp15-6. The Government introduced a zero rate of VAT on sanitary protection from 1 January 2021

116 Cabinet Office, The UK's Approach to the Northern Ireland Protocol, CP226, May 2020 pp15-6. The Government introduced a zero rate of VAT on sanitary protection from 1 January 2021 (for details see, Commons Library briefing CBP1128, VAT on sanitary protection, 9 August 2021).

117 HM Revenue and Customs (HMRC), Accounting for VAT on goods moving between Great Britain and Northern Ireland from 1 January 2021, 18 May 2022. See also, HMRC, Changes to accounting for VAT for Northern Ireland and Great Britain from 1 January 2021, 18 May 2022

118 COM(2020) 360 final, 7 August 2020. Provision for this change was made by EU Directive 2020/1756, 20 November 2020.

4 The purpose of Article 8 of the Protocol: Further details

Under Article 8 of this Protocol, EU legislation on Value Added Tax (VAT) "concerning goods", as well as EU excise duty legislation for alcohol, tobacco and fuel, will remain applicable in Northern Ireland beyond the end of the transition period. By contrast, VAT rules for the provision of services in, to or from Northern Ireland will be set by the UK without being legally constrained by EU tax law.

On goods arriving at the EU from outside its Customs Union, checks are normally carried out at ports and borders to ensure the importer pays the correct amount of VAT. The ultimate aim of Article 8 is to render unnecessary any such VAT-related formalities on goods being moved across the land border on the island of Ireland.

To achieve this, businesses active in Northern Ireland will continue—as businesses in the whole of the UK will do until the end of the transition period—to submit information on cross-border sales and purchases of goods[1] to the EU's confidential VAT Information Exchange System (VIES). This information will allow the tax authorities of the EU 27 Member States, and HM Revenue & Customs, to check if VAT is being accounted for on cross-border transactions of goods involving a company in the EU and a counterparty in Northern Ireland.

In return for continued compliance with the relevant EU rules, businesses that trade in goods from Northern Ireland are also expected to have continued access to VAT-related facilitations for intra-EU trade available under European law, including an electronic refund system for business purchases and the 'One Stop Shop' mechanism for business-to-consumer sales.[2] Northern Ireland is also expected to remain bound by the EU's rules on minimum VAT rates for specific goods, although it is permitted to vary them to match those applicable in Ireland.[3]

By contrast, businesses active only in Great Britain—irrespective of whether they deal in goods or services—will be outside the scope of EU VAT law completely from the end of transition on 31 December 2021. The Government will be free to alter how VAT is charged, rated and administered in the rest of the UK. This also means such companies will no longer have access to the aforementioned facilitations when they buy or sell goods involving a counterparty in the EU, unlike competitors in who carry out such activities from Northern Ireland.[4] They will not have to submit statements to VIES, but instead fiscal controls—documentary and physical—will take place on British exports entering the EU, to ensure VAT is charged correctly.

More pressingly, the legal logic of the Protocol dictates that the avoidance of VAT-related customs controls on the land border in Ireland creates the need

for such checks on goods arriving in Northern Ireland by sea and air from outside the EU instead, including from the rest of the UK.

Notes

[1] Between Northern Ireland and the EU, not any non-EU territories.

[2] VAT is a consumption tax and therefore normally payable in the country where the final consumer of a good or service is located. The EU's 'One Stop Shop' mechanism allows a company in one EU country selling to a consumer in another EU country to pay the VAT at the rate applicable in the latter to their domestic tax authority, which then remits to its counterpart in the Member State of the consumer. This means that the company does not have to register for VAT, with its attendant legal obligations, in every EU country where it has customers. See for more information the European Scrutiny Committee's Report of 30 January 2019.

[3] This is why, for example, the Government could zero-rate VAT on women's sanitary products from 1 January 2021, since that is the rate applicable in Ireland, thanks to a country-specific derogation, even though the EU VAT Directive generally requires the lower rate of VAT on such products. It is not clear, however, if Northern Ireland will be permitted to maintain the various exemptions from the default minimum rates for goods which the UK negotiated while it was still a Member State.

[4] This means, among other things, that a business in Great Britain making a business purchase in an EU country on which they wish to claim an input VAT refund will need to do so by means of a paper-based application, as the electronic VAT refund system for such purposes under EU law is available only to businesses within the scope of EU VAT legislation.

Source: "Northern Ireland Protocol: EU VAT identifier for businesses", Twenty-seventh Report of Session 2019-21, HC 229-xxiii, 10 November 2020 pp16-25 para 4.1-4

The UK Government's concerns about margin scheme for second-hand cars

On 2 December 2020, the Northern Ireland Affairs Committee took evidence from HMRC officials on the future implications of the Protocol for customs and tax. One issue that was raised was the way in which second-hand goods moving from Great Britain to Northern Ireland would be treated for VAT purposes.

Generally, someone selling second-hand goods may be entitled to use a margin scheme; this allows them to account for VAT on the difference between they paid for an item and what they sell it for, rather than the full selling price. In his evidence Ian Broadhurst (Deputy Director, VAT Reliefs, Deductions and Financial Services, HMRC) noted that businesses selling

second-hand motor cars would have to comply with the EU's margin scheme, not the UK's margin scheme:

> [The EU's VAT rules] include allowing businesses to account for VAT on the profit margin when trading in second-hand goods [...] If the goods purchased do not fall within the scope of the scheme, VAT is charged on the full resale value rather than the margin. The provisions allowing for VAT to be accounted for on the profit margin only apply where those EU VAT rules are applied.
>
> This means that, after the end of the transition period, that will only be where the goods are purchased either within the EU or locally within Northern Ireland. This will mean that, although the second-hand margin scheme can continue to be used in Northern Ireland, it will not be able to be used where the goods are purchased in or from Great Britain and moved to Northern Ireland after the end of the transition period [...] We very much understand the impact that this is having or is likely to have in certain sectors, particularly including the resale of second-hand cars [...] We have raised the issue with the European Commission, so it is a matter for ongoing discussion.[119]

At the time the Government noted that "while these changes will not affect stock bought in advance of 1 January 2021, even if sold later, we acknowledge that this is not a longer-lasting solution to the issue", adding that it was "continuing to explore options for addressing the impacts".[120]

In January 2021 Treasury Minister Jesse Norman confirmed the Government would seek to agree a long-term derogation with the EC to allow the margin scheme in Northern Ireland to apply in respect of motor vehicles sourced in Great Britain.[121]

In its report on the Protocol published in July 2021 the House of Lords European Affairs Committee observed that the UK and the EU needed to find "practical solutions in a number of specific areas" to ensure "the proportionate application of the Protocol, and meet the commitment in the Preamble that it should impact as little as possible on the everyday life of communities in both Ireland and Northern Ireland."

The Committee noted that one of these areas was extending the VAT margin scheme for second-hand vehicles brought in from Great Britain.[122] Notably the Committee did not mention any other aspects of Article 8 having a detrimental impact in this way.

Subsequently, in the Autumn 2021 Budget the Government announced it would introduce a Second-Hand Motor Vehicle Export Refund Scheme. This would allow businesses that removed used motor vehicles from Great Britain for resale in Northern Ireland or the EU to claim a refund of VAT following export.

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119 Northern Ireland Affairs Committee, Oral evidence: Brexit and the Northern Ireland Protocol, HC 767, 2 December 2020 Q767. The issue was raised in a number of PQs at the time: for example, PQ117393, 23 November 2020; PQ120976, 4 December 2020.

120 Cabinet Office, The Northern Ireland Protocol, CP346, December 2020 para 44

121 Written Statement HCWS710, 14 January 2021

122 House of Lords European Affairs, Report from the Sub-Committee on the Protocol on Ireland/Northern Ireland: Introductory report, HL Paper 55, 29 July 2021 para 243

In effect Northern Ireland motor vehicle dealers would remain in a comparable position as those applying the VAT margin scheme elsewhere in the UK. Prior to the new scheme's implementation, an interim arrangement would apply, extending the UK's VAT margin scheme to Northern Ireland on a limited basis in respect of motor vehicles sources from Great Britain, provided agreement for this could be reached with the EU.[123]

Legislation for these measures was included in the Finance Bill introduced after the Budget.[124] At present HM Revenue & Customs anticipate the new scheme will come in from 1 October 2022.[125]

Issues raised in the July 2021 Command Paper

The Government's July 2021 Command Paper on the Protocol called for changes to Article 8. As well as mentioning specific issues such as the application of the margin-scheme for second-hand cars, the Government warned that these issues "may multiply" as the GB and NI regimes diverge, so it wants a "more flexible settlement", with "greater freedom to set VAT and excise rates and structures in Northern Ireland".[126]

In its response published in October 2021 the EU did not respond to this proposal for amending Article 8.[127]

The EU's decision was flagged in the evidence recently submitted to the House of Lords Sub-Committee on the Protocol - as part of the Committee's ongoing inquiry on the impact of the Protocol - by Dr Colin Murray (Reader in Public Law at Newcastle University), Dr Sylvia de Mars (Senior Lecturer at Newcastle University), and Dr Clare Rice (Research Associate at University of Liverpool).

The authors noted the EU did not propose "any compromise position on Northern Ireland's inclusion in the EU VAT regime in its October 2021 proposals, and it is difficult to see why it would given the clear operation of the Protocol's terms in this regard":

> VAT came to the fore in a speech by the Foreign Secretary on 17 May 2022, when she told the House of Commons that "citizens in Northern Ireland are unable to benefit fully from the same advantages as the rest of the UK, like the reduction in VAT on solar panels".[128]

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123 Autumn Budget and Spending Review 2021, HC 822, October 2021 para 5.62-3. For more details see, HMRC, Northern Ireland second-hand margin scheme interim arrangement, and, Second-hand Motor Vehicle Export Refund Scheme, 27 October 2021

124 These provisions now form sections 69-70 of the Finance Act 2022. See also Treasury Minister Lucy Frazer's explanation of this part of the Bill (HC Deb 1 December 2021 cc1011-2).

125 HMRC, Prepare for the second-hand motor vehicle export refund scheme, 25 March 2022

126 HM Government, Northern Ireland Protocol: the way forward, CP 502, July 2021 para 54

127 European Commission, Commission proposes bespoke arrangements to benefit Northern Ireland, 13 October 2021. See also, Institute for Government, Northern Ireland protocol: ongoing UK–EU disagreements, 26 January 2022

128 In the Spring Statement on 23 March 2022 the Chancellor announced a temporary zero rate on the installation of certain types of 'energy-saving materials', including solar panels, to apply in Great

> It is not clear how this is causing either practical or constitutional problems **in general** in Northern Ireland, and so the EU's appetite for renegotiating the VAT arrangements in place to enable goods to move across the island of Ireland (and into the EU) without charging VAT is likely to be limited. This does not preclude collaborative adjustments to VAT, or even temporary exceptions to the EU VAT regime that the UK government can present as working to address economic or societal difficulties (which, as Article 16 indicates, permits temporary disapplication of the Protocol's rules); these are likely to be negotiable in the Joint Committee, as long as targeted, and temporary.[129]

The Bill: Clauses 17 & 24

Clause 17(1) provides that the Treasury may introduce regulations to "make any provision" about VAT, excise duty or any other tax which Ministers "consider appropriate in connection with the Northern Ireland Protocol."

Clause 17(2) states that any such regulations may be introduced with the purpose of lessening, eliminating, or avoiding differences in VAT, excise duty or other taxes between Northern Ireland and Great Britain. This would, in effect, allow the Government to legislate for the introduction of rates and structures of VAT and excise in Northern Ireland that are not permitted by EU legislation included in the Protocol.

The Government's case for this provision was set out in its policy paper the Bill.[130] The paper suggests that "as EU rules still apply on goods, people and businesses in NI are not guaranteed to benefit from UK VAT and excise reforms or reductions":

> This has prevented access to recently announced reliefs on energy-saving materials—costing families in NI up to £300 in VAT relief on a typical solar panel installation—and new alcohol duty structures.
>
> This is despite the UK operating its tax system fully in line with OECD best practice and working with EU partners to continue work to raise standards (such as on global minimum tax rates).[131]

The paper goes on to argue that the Protocol "does not allow for VAT and excise rules to be adapted for the unique context in Northern Ireland—EU rules limit the UK Government's ability to responsively set VAT and excise rates and reliefs in Northern Ireland, even if the changes would have no impact on the EU." In this context the Government proposed to "maintain the existing arrangements in the Protocol on VAT and excise to support trade on the island of Ireland. But we would provide freedom for Ministers to adapt or

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Britain, from 1 April 2022 to 31 March 2027 (HMRC, The Value Added Tax (Installation of Energy-Saving Materials) Order 2022 23 March 2022.)

129 House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland, Follow-up inquiry on the impact of the Protocol on Ireland/Northern Ireland: Written Evidence (FUI0006), 16 June 2022 para 17

130 Foreign, Commonwealth and Development Office, Northern Ireland Protocol: the UK's solution, 13 June 2022. The Explanatory Notes to the Bill do not provide any examples of current or possible differences in this context (Bill 12-EN para 94).

131 as above p8

disapply rules so that people in NI can benefit from the same policies as those elsewhere in the UK".[132]

UK Government examples of issues with current VAT and excise regime

In its policy paper, the Government provided further details of issues where it could not apply changes to VAT and excise rates in Northern Ireland.

First, in March 2022 the Government announced a new, temporary, zero rate of VAT for the installation of energy saving materials in residential accommodation, which would include the installation of solar panels.[133] The zero rate applies from 1 April 2022 until 31 March 2027.[134] In this context it is worth noting the EU's new VAT Rates Directive in April 2022 allows Member States to apply a much wider range of reduced or zero rates of VAT than was previously the case – and one of the list of goods and services which may be zero-rated is the installation of solar panels.[135]

Second, in the Autumn 2021 Budget, following a call for evidence, the Government announced plans to amend the structure of excise duty on alcoholic drinks from February 2023.[136] It launched a consultation on the details of these reforms at the time, which closed at the end of January 2022. No further details have been published to date.[137] The Government's consultation paper noted that many of the proposals for reform would depart from the current EU Directive governing the structure of alcohol duty, and stated that it would "continue to discuss the application of these reforms to Northern Ireland with the EU during the consultation period of the review."[138]

Currently, the EU is also considering new legislation on fuel duty,[139] and the European Commission is due to present further proposals on alcohol and tobacco duty later in 2022. Any resulting EU laws would be applicable in Northern Ireland under the Protocol. **Clause 17** could also be used to make regulations to diverge in Northern Ireland from any such new EU rules with respect to rates and structures of alcohol, tobacco and fuel duty.

Unlike other clauses of the Bill in relation to areas such as clause 6 on customs, clause 17 would not disapply Article 8 of the Protocol in domestic law as such by making it an "excluded provision". Instead, would but give Ministers the power to implement VAT and excise rates and structures that are not compliant with EU law (and thereby override the Protocol). The desire

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132 as above pp8-9

133 Spring Statement, CP653, March 2022 para 3.12

134 HMRC, Energy-saving materials and heating equipment: VAT Notice 708/6, 6 April 2022

135 Specifically the "supply and installation of solar panels on and adjacent to private dwellings, housing and public and other buildings used for activities in the public interest." Provision to this effect is made by Article 98(2) of Council Directive 2006/111/EC (the 'principal VAT directive), as amended (see item 10(c) to Annex III).

136 Autumn Budget and Spending Review 2021, HC 822, October 2021 para 5.58

137 PQ9851, 6 June 2022

138 HMT/HMRC, The new alcohol duty system: consultation, October 2021 para 1.14-6

139 "Northern Ireland Protocol: Draft EU Energy Taxation Directive", European Scrutiny Committee, Eighth Report of Session 2021-22, HC 121-viii, 28 September 2021

not to dis-apply the UK's obligations under Article 8 altogether may be related to the fact that the Bill could also have consequences for the Government's ability to detect tax fraud and evasion on goods imported into Northern Ireland.

Risk to UK access to EU's VAT and excise systems

Payment of VAT and excise duties on goods brought in from another country usually relies on customs formalities at the border to help establish the tax liability. This can be significant depending on the products involved. Because such customs controls have been abolished between EU countries within the Single Market, for VAT the EU instead operates the "VAT Information Exchange System" (VIES) for Member States to exchange data on goods traded between them without the need for customs controls. This relies on commercially sensitive sales data submitted by individual businesses. Similarly, for excise duties, the EU has a separate "Excise Movement and Control System" (EMCS) to track intra-EU movements of excise goods such as cigarettes or spirits until duty has been paid.

Under the Protocol, the UK retains access to VIES and EMCS to help HMRC identify tax liabilities for commercial transactions of goods between Northern Ireland and the EU (whereas those liabilities for trade between Great Britain and the EU, as well as between Great Britain and Northern Ireland under the Protocol, now again rely in part on customs documentation and border controls).

If the EU were to switch off UK access to VIES and EMCS in response to the UK's unilateral dis-application of parts of the Protocol, the Government could find it more difficult to verify whether businesses in Northern Ireland importing goods from the EU across the land border were accurately declaring their VAT and excise liabilities: there would be no customs formalities at the border, and the UK would not be able to access information on exports from EU countries to Northern Ireland via EU systems. That could increase the risk of VAT and duty evasion and fraud on trade across the Irish border.

Fiscal risks and potential hardening of the Irish border

The Bill does not make Article 8 of the Protocol an "excluded provision" like other parts of the Protocol. This might be because the Government hopes this less substantive potential breach of the Protocol's obligations, might mean the EU don't cut them off from the relevant systems.

The Bill and Explanatory Notes do not indicate how the Government intends to address any increased fiscal risks from Northern Ireland being excluded from VIES and EMCS, should it arise. Whether such a scenario might, in particular in light of Ireland's status as an EU Member State, lead to a 'hardening' of the border to ensure payment of VAT and excise duties is also unclear.

Clause 24 and retrospective provision

Clause 24 of the Bill sets out the procedure for making tax regulations under clause 17, as well as customs regulations (covered by clause 6). Generally, these regulations are to be subject to the negative procedure.

Clause 24(5) requires that if these regulations contain provision to amend an Act of Parliament or make retrospective provision, they are subject to the draft affirmative procedure before the House of Commons only. However, it allows for a regulation making this type of change to be subject to the affirmative procedure if it contains a declaration by the relevant minister that in their view this is necessary "by reason of urgency". In this context it is worth noting that the use of retrospective tax legislation – that is, provision to impose or increase a tax charge prior to the legislation being introduced – is highly controversial. Common practice has been for governments to make any such changes through primary legislation, as part of the annual Finance Bill.[140]

2.6 Other powers: Clauses 18 and 19

Clause 18: Power to "engage in conduct"

Clause 18 includes a general power for a minister to "engage in conduct in relation to any matter dealt with in the Northern Ireland Protocol". This power may be used if considered "appropriate" by the minister "in connection with" any of the purposes of this Bill. **Clause 3** clarifies that this conduct can be at express variance with the UK's obligations under the Protocol.

Sir Jonathan Jones, the former Treasury Solicitor, has described this clause as "extraordinary" and said it could be described as a "do whatever you like" power.[141]

"Engage in conduct" is an unusual form of words for a statutory power. The Explanatory Notes to the Bill suggest that it authorises "sub-legislative activity" including producing guidance relevant to the Protocol and the Acts other provisions.[142] It is understood as having no effect on any powers to make delegated legislation, or any powers exercised under the Royal Prerogative.

Since this authorised "conduct" does not involve the making of legislation, **clause 18** is not mentioned in the Delegated Powers Memorandum. No other explanatory reference is made to it in the materials made available by the Government.

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140 For more details see, Commons Library briefing CBP4369, Retrospective taxation, 27 August 2020.

141 The House Magazine, J Jones, The Northern Ireland Protocol Bill is one of the most extraordinary pieces of legislation I have ever seen, 15 June 2022.

142 Explanatory Notes, para 96.

Clause 19: New agreements amending/replacing the Protocol

Clause 19 empowers ministers to make regulations that would implement or deal with matters arising from an agreement that amends or replaces the Protocol.

If implementing regulations are made under this power, their scrutiny arrangements are the same as for most of the other powers in the Bill. If they involve only changes to delegated legislation, no parliamentary approval is needed (they are able to be made under the "negative procedure" subject to annulment). However, if implementation would require changes to primary legislation, or would make retrospective provision, the affirmative procedure applies. If changes needed to be implemented urgently, those regulations might still be made without prior parliamentary approval, but would require such approval within 28 days.

Article 13 of the Protocol states that any subsequent agreement/agreements the EU and the UK negotiate should set out what provisions, if any, supersede the Protocol in whole or part. This provision was largely a holdover from the original Protocol negotiated under the Theresa May Government, in which this agreement commonly known as "the backstop", was intended to be temporary and replaced by a future relationship agreement between the EU and the UK.

The current Protocol was intended to be the permanent solution to solving the issue of the border between Ireland and Northern Ireland (although the consent mechanism could bring substantive parts of it to an end). The TCA, the only substantive post-Brexit treaty the EU and the UK have agreed, did not amend or replace any part of the Protocol.

As mentioned in section 1.4, under the UK's dualist system, for provisions of an international treaty to have direct effect in domestic law they must be written into or incorporated by domestic legislation. **Clause 19** would allow the Government to implement any agreement it could potentially negotiate with the EU to amend the Protocol in domestic law through regulations. This would allow the Government, argues Conor Murray of Newcastle Law School, "to give effect to such an Agreement without first jumping through processes like public consultations".[143]

If such an agreement between the EU and the UK was a substantive treaty, then it would also have to be laid before Parliament as set out by the Constitutional Reform and Governance Act 2010 (CRAG) and given approval for it to be ratified.

If, however, the EU and UK used a less substantive form of international agreement like a Memorandum of Understanding (MoU) or Joint

[143] EU Law Analysis Blog, Breaching International Law in a General and Far-Reaching Way: The Northern Ireland Protocol Bill, 14 June 202.

Interpretative Instruments (like it did with changes to earlier versions of the Withdrawal Agreement/Protocol), then Parliamentary scrutiny could be largely sidestepped.

Since MoUs, unlike treaties, are not legally enforceable, it seems unlikely that the EU would be satisfied with using this approach to change the Protocol, should it be persuaded to do so.

See Commons Library briefing: How Parliament treats treaties for further details.

2.7 Regulations and commencement

Delegated powers

Henry VIII powers

Subsection 22(1) provides that every single delegated power in the Bill is a "Henry VIII" power. This means that either a Government Minister, or in some cases the Treasury or HMRC, can use secondary legislation to amend or modify the effect of primary legislation (Acts of Parliament).

Delegated legislation can override Protocol

Subsection 22(2) makes explicit that any regulations can override incompatible measures of the Protocol, including by suspending, repealing or making alternative arrangements to it. Equally, those regulations can give effect to specific parts of the Protocol by other means, for example by adding to or modifying the body of domestic law known as "retained EU law".

Prohibition on creating or facilitating new border arrangements

There is an overarching constraint in **subsection 22(3)** preventing the use of regulations to "create or facilitate border arrangements" including "physical infrastructure" and "checks and controls" if such arrangements did not exist before exit day (31 January 2020).

Option to sub-delegate regulation-making to devolved authorities

Most of the powers in the Bill are exercisable by a Minister of the Crown (ie a UK Government Minister). However, **subsection 22(6)** allows such a Minister to delegate their power to, or to exercise it concurrently with, a devolved authority (whether in Northern Ireland, Scotland or Wales).

By way of justification for this option to "sub-delegate" the Delegated Powers Memorandum says that the "division of responsibilities in implementing new arrangements" had yet to be determined because key policy decisions about what should replace the Protocol have not yet been taken:

> Where a matter would normally fall within the legislative competence of the devolved administrations and the passage of devolved primary legislation would not be appropriate, or timely it may be appropriate to create a new devolved delegated power by exercise of this power.[144]

Parliamentary scrutiny of regulations

The rules on scrutiny of regulations by Parliament subdivide into broadly three categories:

- Delegated powers generally (which are governed by **clause 23**)
- Tax and customs regulations (which are governed by **clause 24**)
- Commencement powers (which are covered in **clause 26**).

Clause 23: General scrutiny

By default, regulations under the Bill would be made under the negative procedure. This means they could be made immediately and would be subject to annulment by either House of Parliament within 40 days of being made.

However, if regulations either modify an Act of Parliament or make retrospective provision then the draft affirmative procedure must normally be used. That means seeking prior approval from both Houses of Parliament before the statutory instrument is made.

The need for prior approval can be circumvented if a minister invokes "urgency" as a justification for making regulations immediately. There is a form of made affirmative procedure in these cases. This means that regulations can be made, and have effect immediately, but they expire after 28 days in the absence of Parliamentary approval.

These arrangements broadly reflect normal practice, albeit urgency procedures usually require specific justification. Throughout the Delegated Powers Memorandum the Government maintains that almost all of the powers in the Bill might need to be used at very short notice..

Clause 24: Tax and customs regulations scrutiny

The main difference with regulations under this Bill concerned with tax and customs is that they will typically only require approval from the House of Commons rather than both Houses. This reflects the normal approach to statutory instruments and the primacy of the Commons on matters to do with taxation.

As explained previously in Section 2.5 above, it is possible to use the tax and customs powers in this Bill retrospectively. Retrospective provision is regarded as particularly sensitive in that context, more so than with other types of legislation.[145]

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144 Delegated Powers Memorandum, para 154

145 For more details see, Commons Library briefing CBP4369, Retrospective taxation, 27 August 2020.

Clause 26: Commencement regulations

As is the norm, regulations that simply bring parts of the final Act into force, or which make related provision directly concerned with entry into force of its provisions, do not attract any requirement for Parliamentary approval.

Clauses 21-25 (those concerned with regulations, interpretation and commencement) come into force on Royal Assent, whereas all other parts of the Bill rely on Ministerial regulations for commencement.

Interpretation and commencement

Clause 25 is the main interpretation provision in the Act, including a range of important definitions for words and phrases used elsewhere in the Bill. Most notably, it provides the definition of "excluded provision" which is fundamental to how the Bill determines the parts of the Protocol that would no longer be given full effect under UK domestic law.

Clause 26 clarifies that the Act would be of UK-wide application, includes limited powers to make incidental, supplementary and consequential provision in relation to commencement, and confirms that the short title of the Act would be the Northern Ireland Protocol Act 2022.

3 Reaction to the Bill

3.1 European Union and United States

European Union

The European Commission responded to the UK Government's announcement it would introduce the Bill on 17 May 2022, by saying that it would "need to respond with all measures at its disposal". The Commission said it was ready to continue discussions with the UK "to identify joint solutions within the framework of the Protocol" but added that the potential of the flexibilities it has already offered "is yet to be fully explored" by the Government. [146]

Following publication of the Bill on 13 June, Commission Vice-President Maroš Šefčovič said that the UK action was "damaging to mutual trust" and that there was no workable alternative solution to the Protocol. He said the Commission was now considering relaunching the infringement proceedings against the UK previously paused in July 2021[147] (see box 3).

Irish Minister for Foreign Affairs Simon Coveney tweeted:

> UK Gov[ernmen]t now proposing to set aside Int Law, reject a partnership approach, ignore majority in NI & deliberately ratchet up tension with an EU seeking compromise. We remain open to dialogue to find agreement but his approach adds to instability & is no fix.[148]

Taoiseach (Irish Prime Minister) Micheál Martin called the new legislation "anti-business and anti-industry". Mr Martin told Irish broadcaster RTÉ that the UK's action represented a "fundamental breach of trust" and made for "very difficult times ahead". He said nobody wanted "acrimony or real difficulty", but publication of the Bill made it more difficult to avoid such a situation. The Taoiseach said that the proposed legislation would have a "destabilising" effect on politics in Northern Ireland and said he did not

146 European Commission, Protocol on Ireland/Northern Ireland: Statement by Vice-President Maroš Šefčovič following today's announcement by the UK Foreign Secretary, 17 May 2022

147 European Commission, Statement by Vice-President Maroš Šefčovič on the UK government's decision to table a bill disapplying core elements of the Protocol on Ireland/Northern Ireland, 13 June 2022

148 Simon Coveney (@simoncoveney). "Spoke with @LizTruss [...]" (Twitter), 13 June 2022 [accessed 24 June 2022]. Available from twitter.com/simoncoveney/status/1536264515624611840

accept that the Northern Ireland Protocol was undermining the Belfast/Good Friday Agreement. [149]

Ireland's European Commissioner Mairead McGuinness said the step being taken by the UK Government on the Protocol was "aggressive" and "much worse than anticipated" and was threatening the EU-UK working relationship. Several EU governments accused the UK of threatening to break international law. German Chancellor Olaf Scholz said that in responding to the UK the EU had the "entire toolbox at its disposal". [150]

EU relaunches legal action against the UK

On 15 June, the Commission announced it was relaunching the previously paused infringement action against the UK. It also announced it was launching two new infringement proceedings against the UK for not supplying the EU with trade statistics data for Northern Ireland, as required under the Protocol, and for not applying the EU's sanitary and phytosanitary (SPS) rules for goods entering Northern Ireland.

The Commission said that the UK Government had failed to implement the Protocol, despite repeated calls to do so and attempts to find new solutions, and that this was a "clear breach of international law". It said that the legal action had previously been put on hold in a spirit of "constructive cooperation" to find new solutions, and that the UK's "unwillingness to engage in meaningful discussion since February 2021 and the new legislation went "directly against this spirit". Šefčovič said:

> Trust is built by adhering to international obligations. Acting unilaterally is not constructive. Violating international agreements is not acceptable. [151]

He also added that the EU "cannot exclude anything" if the Bill becomes law. [152]

Šefčovič also said that the EU's "door remains open to dialogue" and that it wanted to discuss solutions with the UK government. At the same time as launching the dispute, the Commission published further details of solutions it was proposing to address UK concerns on the Protocol. This included two new position papers on customs and SPS rules, that gave further details of its proposed solutions to ease these checks in addition to the non-papers that it had published in October 2021.

5 The EU infringement procedure

Under the EU infringement procedure, if the Commission considers that if a Member State (or the UK in the implementation of the Northern Ireland Protocol and certain other limited areas of the Withdrawal Agreement[153]) has failed to implement an EU legal obligation then, it may send a letter of formal notice to the state concerned requesting further information. The state is requested to

send a detailed reply within a specified period. This first stage of the procedure was initiated by the EU in relation to the UK in March 2021.

In the second stage of the procedure, if the Commission concludes that the State is failing to fulfil its legal obligations under EU law, then it may send a reasoned opinion. This is a formal request to comply with EU law. The Commission requests that the State inform the Commission of the measures taken, within a specified period, usually two months. If the State still doesn't comply, the Commission may decide to refer the matter to the CJEU.

The Commission said it was triggering this second stage against the UK on 15 June 2022. It said that if the UK Government did not reply within two months, then it would consider taking the UK to the CJEU. The CJEU could take several months to make a ruling.

Where the CJEU finds that a Member State has failed to fulfil an obligation under the Treaties, the State is then required to take necessary measures to comply with the judgment of the Court. If the State does not comply with the judgment then the Commission can ask the CJEU to impose a lump sum fine and/or ongoing penalty payment (calculated on the basis of a daily rate).

Given that the Northern Ireland Protocol Bill seeks to remove the jurisdiction of the CJEU over the Protocol in UK law, the Government may not comply with CJEU decisions relating to infringement proceedings if it reaches this stage.

Other possible EU responses

In announcing the renewed legal action on 15 June, the European Commission also pointed to other possible remedies, including through the Trade and Cooperation Agreement (TCA), which governs ongoing UK-EU trade relations and other areas of cooperation. Responding to the publication of the Bill on 13 June, Šefčovič said that the Commission recalled "that the conclusion of the Withdrawal Agreement was a pre-condition for the negotiation of the Trade and Cooperation Agreement".[154]

When it initially launched infringement proceedings in March 2021, the EU warned that in the absence of "good faith" discussions with the UK it may also

149 "NI Protocol: Government urges DUP to return to Stormont 'as soon as possible'", BBC News online, 14 June 2022

150 RTÉ, EU threatens strong response to UK protocol plans, 14 June 2022

151 European Commission, Commission launches infringement proceedings against the UK, 15 June 2022

152 Politico, EU launches legal action over UK's Northern Ireland Brexit bill,

153 See Commons Library Briefing, The UK-EU Withdrawal Agreement: dispute settlement and EU powers

154 European Commission, Statement by Vice-President Maroš Šefčovič on the UK government's decision to table a bill disapplying core elements of the Protocol on Ireland/Northern Ireland, 13 June 2022

initiate the dispute settlement procedure established by the Withdrawal Agreement. This provides for a UK-EU consultation period of three months, followed by an independent arbitration process lasting twelve months (or six months if deemed urgent) if the matter cannot be resolved.

The WA and TCA provide for "cross-retaliation", meaning if one party fails to comply with an arbitration panel decision under the WA, the other can retaliate by suspending parts of the TCA. This could include provisions on tariff-free trade (meaning tariffs could be put on some goods) or cooperation on road transport, aviation and fisheries. However, the timelines for this are long. Consultations and arbitration under the WA together would take nine to fifteen months. Suspension of treaty obligations will then come after six months of non-compliance with the ruling (or just one month if the requirement is just to pay a fine). [155]

If passed, the Northern Protocol Bill would mean the WA dispute settlement process would not apply in UK law to the parts of the Protocol disapplied by the legislation. The EU is preparing for the eventuality that the UK does not cooperate with the WA dispute settlement process. The Commission has proposed new legislation on the implementation and enforcement of the two agreements setting out internal EU procedures for the adoption of measures under the WA and TCA. If adopted by the Council of the EU (Member State Government Ministers) and the European Parliament, this would enable the European Commission to adopt implementing acts in relation to areas of the two agreements which allow either party to impose measures in response to an action by the other party (for example non-compliance with an arbitration ruling).

The proposed legislation states that the EU should be in a position to take "appropriate measures" if effective recourse to the dispute settlement processes in the two Agreements is not possible because the UK is not cooperating with these procedures. In such cases, the legislation would empower the Commission to adopt measures "restricting trade, investment or other activities within the scope of the Trade and Cooperation Agreement". [156]

The EU has already responded to UK positioning on the Protocol by refusing to sign off on UK participation in EU programmes. The TCA provided for UK participation in some EU programmes, including the Horizon Europe research programme, but final sign off of the protocol on participation is needed by

[155] See Commons Library Insight, Governing the new UK-EU relationship and resolving disputes, 24 February 2021; Commons Library briefing paper, The UK-EU Withdrawal Agreement: dispute settlement and EU powers; and Commons Library briefing paper, The UK-EU Trade and Cooperation Agreement: governance and dispute settlement (section 4).

[156] European Commission, Proposal for a Regulation of the European Parliament and of the Council laying down rules for the exercise of the Union's rights in the implementation and enforcement of the UK-EU Withdrawal Agreement and Trade and Cooperation Agreement, COM/2022/89 final, 11 March 2022

both sides and the EU has linked this to resolution of NI Protocol implementation issues.[157]

There are reports that the EU may also halt talks with the UK on Gibraltar's post-Brexit relationship with the UK. Gibraltar was excluded from the scope of the TCA. UK-EU negotiations on its relations with the EU began in 2021 but have been moving slowly. [158]

Other possible EU measures that have been discussed include delaying further on measures giving UK financial services greater access to EU markets and reconsidering decisions allowing transfer of personal data between the EU and UK.[159]

Terminating the TCA has been described as a "nuclear option". Either side can do this without a stated reason. This requires twelve months' notice. The Agreement can be terminated more swiftly if one party believes that the other has breached the "essential elements" of the partnership as defined in Article 771. These include "democracy, rule of law and human rights". In such cases, the TCA can be terminated after 30 days, but the alleged breach would need to be of a grave and "exceptional nature". Certain parts of the TCA can be terminated separately with nine months' notice. These included Part Two (covering trade, road transport, aviation and fisheries), and Part Three (law enforcement and judicial cooperation).[160]

Further reading

For further discussion on possible EU reactions to unilateral UK actions in relation to the NI Protocol see Commons Library Briefing, Northern Ireland Protocol: Article 16

See also Commons Library Insight: The Northern Ireland Protocol: EU legal action against the UK, 22 June 2022

United States

In an interview with The Parliament Magazine, the US ambassador to the European Union, Mark Gitenstein, said the United States Government would prefer to see the UK reach a negotiated outcome with Brussels, rather than take unilateral steps:

> Our primary goal is to keep the Good Friday Agreement alive and functioning. It so one of the great accomplishments of diplomacy in the last 50 years. It would be unfortunate if that was jeopardised and if we have to return to negotiations to resolve the differences between the EU and the UK, then we'd

157 Commons Library Insight, Is the UK still participating in EU programmes?, 18 November 2021

158 GBC online, As tensions rise between the EU & UK over the Northern Ireland protocol, could Gibraltar's treaty talks be halted?, 11 May 2022r

159 Politico, Beyond the Brexit sound and fury, a legal quagmire awaits, 14 June 2022

160 See section 7.2 of Commons Library briefing paper, The UK-EU Trade and Cooperation Agreement: governance and dispute settlement.

> be supportive of that. We would prefer that the UK didn't disrupt that agreement in any way.[161]

These remarks conflated the Belfast/Good Friday Agreement and the Northern Ireland Protocol, as did the US Secretary of State Antony Blinken in a call with Foreign Secretary Liz Truss. He urged her "to continue good faith negotiations with the EU to reach a solution that preserves the gains of the Belfast/Good Friday Agreement", according to a State Department readout.

Richard Neal, who chairs the US House of Representatives Ways and Means Committee and led a US delegation to the UK and Ireland, said he would continue to "urge the UK and the EU to find joint, negotiated solutions to post-Brexit trading arrangements":

> We must cooperate and stay united in rebuilding our global economy in the wake of the pandemic and in supporting the Ukrainian people through Russia's unprovoked war. The U.S. remains a guarantor of the historic Good Friday Agreement and peace on the island of Ireland, which all parties must protect, and build on for future generations.

Mr Neal's committee colleague Brendan Boyle went further, warning that the UK Bill "clearly violates international law" and stressing the pro-Protocol majority in the Northern Ireland Assembly. "The people of Northern Ireland have spoken loud and clear," said Mr Boyle "The British Government needs to listen to them".[162]

3.2 UK political reaction

Upon publication of the Bill, Mark Francois, chairman of the European Reform Group of Conservative MPs, said:

> Just as they did with the original Withdrawal Agreement and the subsequent Trade and Co-Operation Agreement, the Star Chamber will now examine this new Bill, line-by-line, to ensure that it is not only legally sound but fully restores the sovereignty of UK law in Northern Ireland, as an integral part of the United Kingdom.[163]

In a speech to the UK in a Changing Europe, Lord Frost said that:

> In these circumstances the British Government has no choice in my view to act as it is doing – its responsibility for the integrity of the country and for the Belfast Good Friday Agreement must be paramount.[164]

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161 "Government Accused Of Pandering To DUP As Tory Rebels Prepare For Fight Over Northern Ireland Protocol Bill", PoliticsHome website, 12 June 2022

162 Politico website, "US urges UK to keep talking to EU in 'good faith' amid Brexit row", 13 June 2022

163 "Boris sets collision course with Brussels and Remainers", Mail Online, 13 June 2022

164 "Lord David Frost keynote – Brexit six years on: is it working?", UK in a Changing Europe, 23 June 2022

PoliticsHome has reported that Conservative MPs opposed to the Government's plan unilaterally to override the Northern Ireland Protocol have circulated a briefing document which sets out why they intend to vote against the Bill. The document, which lists "the problems with the bill" and what Boris Johnson "should do instead", says it is "damaging to everything the UK and the Conservatives stand for":

> Breaking international law to rip up the Prime Minister's own Treaty is damaging to everything the UK and Conservatives stand for. We are a country that acts with integrity and honours the agreements we sign.
>
> A Bill with 'notwithstanding' clauses disapplying our own ratification legislation breaks international law: no amount of shopping around for rent-a-quote lawyers can hide that Labour's decision to do this over Iraq was damagingly exposed and should be a cautionary tale.

The briefing adds that the plan is "fundamentally damaging" to the Union and could lead to a growing number of people in Northern Ireland supporting breaking away from the UK:

> The principle of consent in the Good Friday Agreement means a majority of people in Northern Ireland can choose whether they want to stay in United Kingdom or not.
>
> Protecting our precious Union means persuading the moderate centre ground. We are alienating them by pursuing a reckless Bill that is toxic to the very swing voters the Union depends on.[165]

According to the Financial Times, some Conservative MPs have also expressed fears that Clause 15 of the Northern Ireland Protocol Bill could be used to scrap the democratic "consent vote" due in 2024. However, the newspaper quoted Government officials who insisted that was neither the intention of Clause 15 nor a possible outcome, since the consent vote was enshrined in an international treaty and could not be affected by a change to domestic law.[166]

Opposition parties

Following a visit to Belfast on 10 June, Sir Keir Starmer said his party would vote against any Protocol legislation at Westminster and argued that the focus ought to be on achieving a negotiated settlement with the EU to resolve issues with implementation of the Protocol:

> We would scrap the legislation and I think there has been an impasse in the negotiations because we haven't seen the high levels of trust that we need for negotiations like this, not least from our prime minister. But also we need give and take on both sides. The EU, as well as the UK, to give and take, to be flexible about the approach.

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165 "Government Accused Of Pandering To DUP As Tory Rebels Prepare For Fight Over Northern Ireland Protocol Bill", PoliticsHome website, 12 June 2022

166 "Tory MPs attack Boris Johnson over plan to rip up N Ireland Brexit deal", Financial Times (£), 12 June 2022

> I'm not pretending there aren't issues and challenges with the protocol, of course there are. We have been listening to the political parties here, to communities, to business groups. I think those challenges can be overcome around the negotiating table with statecraft, with high levels of trust.
>
> It is that high level of trust that is missing with this Prime Minister and I think he is making a mistake by going down the route of legislation which will breach international law and, actually, I think, be an impediment to the negotiations that, in the end, are going to resolve these difficult issues.[167]

Responding to publication of the Bill on 13 June, Emily Thornberry, the Shadow Attorney General, said using the doctrine of necessity to justify the Bill was "complete and utter nonsense": "The doctrine of necessity relies on grave and immediate peril. Boris Johnson's career may be in peril but it doesn't seem to apply otherwise".

Northern Ireland parties

DUP leader Sir Jeffrey Donaldson MP told a Stormont briefing:

> We believe it is right that the UK Government takes this action, the UK Government has a primary responsibility to protect the integrity of the United Kingdom and its internal market, whilst at the same time making reasonable proposals that offer protection to the European Union and their single market.
>
> We will consider these proposals against our seven tests to determine if they meet what is required to achieve the objectives, which is of course to restore Northern Ireland's place within the UK internal market, to remove the barriers to trade within the UK, and to enable us then to restore the political institutions and protect the principle of consensus, cross-community consensus which is at the heart of the Belfast Agreement and of how the political institutions operate.

Former DUP special adviser Richard Bullick tweeted a "reminder" of the DUP's "seven tests" "against which the party has said it will assess the new bill". Sir Jeffrey had also set these out in the House of Commons on 15 July 2021.[168]

Elsewhere, the DUP leader said there was "a stark choice here for Parliament". "The Northern Ireland Protocol and Good Friday Agreement cannot exist together," he said:

> One seriously harms the other [...] Parliament can either choose to go forward with the [Good Friday] Agreement and the political institutions and stability in Northern Ireland, or the Protocol, but it can't have both.[169]

Sinn Féin's Stormont leader Michelle O'Neill said:

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167 "A Labour government would axe laws that override Northern Ireland Protocol, Keir Starmer vows", ITV News website, 10 June 2022

168 HC Deb 15 July 2021 Vol 699 cc566-68

169 BBC News online, "NI Protocol: Government urges DUP to return to Stormont 'as soon as possible'", 14 June 2022

> Boris Johnson's action is illegal, he is in clear breach of international law, regardless of the detail. He himself signed up to an agreement, he signed on the dotted line and he's now legislating to breach that international agreement [...] The reality is here that the Protocol is working.[170]

Ms O'Neill also accused the Prime Minister of "pandering" to the DUP at Westminster. She said there should be no further delay on forming an executive and called for both sides to find an agreed way forward on the protocol. "Society and the people should not be held to ransom while that work continues," she said. "What we want is an executive formed today; we're ready to be there today".[171]

According to The Times, UK Government ministers have told the DUP that they must re-establish full power-sharing with Sinn Féin before the Northern Ireland Protocol Bill is considered by the House of Lords:

> The onus is on the DUP to show good faith and nominate not just a speaker for the Stormont Assembly but also a deputy first minister to allow power sharing to get up and running fully. Our expectation is that this should come when the bill is passed by the Commons, which will hopefully be before the summer recess.[172]

Victoria Prentis, the farming minister, told Times Radio it was vital that Unionists showed "a real practical willingness to sort this out".[173]

Following publication of the Bill, a majority of MLAs in the Northern Ireland Assembly signed a joint letter to the Prime Minister outlining their opposition to the proposed legislation. The letter, signed by MLAs from the Social Democratic and Labour party (SDLP), Sinn Féin and the Alliance party, said that while the Protocol had flaws, it "currently represents the only available protections for Northern Ireland" from the impacts of Brexit:

> The protocol also offers clear economic advantages to our region, and the opportunity for unique access to two major markets. The fact that you have removed this advantage from businesses in Great Britain, at a clear economic cost, does not justify doing the same to businesses in Northern Ireland.

The letter added that the way to improve the arrangements was through engagement with the EU based on trust, "rather than law-breaking and unilateral abrogation of treaty obligations":

> It is also deeply frustrating that you and your ministers continue to misrepresent our desire to see smooth implementation as an endorsement of your government's reckless actions on the protocol – it is categorically not.

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170 BBC News online, "UK reveals plans to ditch parts of EU Brexit deal", 13 June 2022

171 BBC News online, "NI Protocol: Government urges DUP to return to Stormont 'as soon as possible'", 14 June 2022

172 "Boris Johnson downplays 'trivial' changes to Northern Ireland protocol", The Times (£), 13 June 2022

173 "Boris Johnson downplays 'trivial' changes to Northern Ireland protocol", The Times (£), 13 June 2022

> To complain the protocol lacks cross-community consent, while ignoring the fact that Brexit itself – let alone hard Brexit – lacks even basic majority consent here, is a grotesque act of political distortion.[174]

Alliance leader Naomi Long rejected a UK Government invitation to technical briefing about the Bill, arguing that it had treated Northern Ireland's political parties in a "differential manner":

> We are fully aware that one, and only one, [Northern Ireland] political party has been central to the preparation of this legislation.
>
> We are, therefore, not interested in offering the government's approach any veneer of credibility, given the fact that it has been treating NI parties in a differential manner and ignoring the expressed views of a majority of NI elected representatives, businesses and civil society on this matter.

A Government source told PoliticsHome that Long's characterisation of the Government's engagement with Northern Ireland political parties was "inaccurate":

> It is disappointing that Naomi Long is the only party leader to reject the offer of a technical briefing on the Government's Protocol legislation. It is designed in the best interests of all the people and businesses in Northern Ireland.[175]

Speaking to BBC Radio 4 on 13 June 2022, the UK Government Northern Ireland Office minister Conor Burns rejected criticisms that the Protocol Bill was being introduced "for the DUP", telling the BBC that–"we are doing this because it's the right thing to do for the United Kingdom".[176]

3.3 Business reaction

Business views on the current operation of the Protocol

Businesses in Northern Ireland have a range of views on how well the Protocol is currently working. While it has created problems for some, others are in favour of it. For example, the Northern Ireland dairy industry, which is highly integrated with the industry in Ireland, has said that the Protocol is working and welcomes the access it gives to both the UK and EU markets.[177] Other businesses have said that the Protocol has led to significant cost increases.[178]

174 "Majority of Northern Ireland MLAs condemn plan to alter Brexit protocol", Guardian, 13 June 2022

175 "Government Accused Of Pandering To DUP As Tory Rebels Prepare For Fight Over Northern Ireland Protocol Bill", PoliticsHome website, 12 June 2022

176 BBC Radio 4, PM, 13 June 2022

177 "Northern Ireland Dairy Council chief insists protocol is working", Belfast Telegraph [online], 8 June 2022

178 "Northern Ireland Protocol: Manufacturer challenges 'pervading narrative' and statistics", News Letter [online] 15 June 2022

An article in the Economist said that most firms wanted the Protocol to be reformed, not scrapped. It noted than many businesses actively support it and that greater uncertainty or a trade war would be damaging.[179]

A survey by Manufacturing NI in April 2022 found that Brexit ranked 9th as an issue for business. The top three business concerns were rising energy costs, the cost of doing business and the availability of materials/supply chain issues.[180] 57% of respondents accepted that the Protocol was here but wanted derogations and mitigations while 12% said the Protocol should be replaced.[181]

The House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland has published evidence relating to its follow-up inquiry into the impact of the socio-economic and political impact of the Protocol.

Business reaction to the Government's proposals

Some business groups have highlighted potential problems with the Government's proposals, especially the proposed dual regulatory regime. There has been a degree of support for the idea of green and red lanes and a preference for the UK and EU to reach a negotiated solution.

The Northern Ireland Business Brexit Working Group issued a statement on the Government's proposals.[182] The main points were:

- It wished to see an agreed outcome that brought stability, certainty, simplicity and affordability;
- Full implementation of Protocol obligations would mean significant challenges;
- There were significant concerns about the dual regulatory regime among agri-food businesses and exporters;
- There was much to be explored in the UK's green and red lane approach (and the EU express lane) proposals but progress would have to be made through meaningful engagement;
- There was particular disappointment about the EU's "regressive step" on parcels;

[179] "The Northern Ireland protocol enrages some businesses, pleases others", The Economist [online], 16 June 2022

[180] Manufacturing NI, "Survey results show spring in the step of manufacturers", 27 April 2022.Table C5, p17

[181] As above, Table E8, p33 (Respondents could choose more than one response so the total adds up to more than 100)

[182] This an umbrella group representing a range of business organisation in Northern Ireland. See Northern Ireland Business Brexit Working Group – Written evidence submitted to the House of Lords European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland, 7 June 2022

- The Working Group called on the UK and EU to engage in substantive talks.[183]

Farmers and manufacturers have warned that the Government's proposals risk an increase in bureaucracy and could jeopardise Northern Ireland's access to the EU single market. Stephen Kelly, chief executive of Manufacturing NI said they would "add significantly to the burden on businesses" in both Northern Ireland and Great Britain and "when you get into the area of dual regulatory regime we could see at best a chilling and likely a complete exclusion from markets leaving NI in a worse position than GB."[184]

The Northern Ireland Chamber of Commerce and Industry said that some parts of the Government's proposals were welcome. But it was important to balance these against the gains already made by exporters and agri-food. It highlighted concerns over the "apparent shifting of risk onto NI businesses." It believed that an agreement was possible and called for a negotiated solution.[185]

According to an article in the Financial Times, farmers in Northern Ireland say the proposals threaten the dairy sector. The industry spans the Irish border with 800 million litres of milk produced in Northern Ireland being processed in Ireland. Cheese, butter and other products combine milk from Northern Ireland and Ireland.[186] Dr Mike Johnston, head of the Northern Ireland Dairy Council said the Protocol was working for the dairy sector.[187]

The Northern Ireland Food and Drink Association said that it supported the Protocol and that the current arrangements were working well for majority of its members. It said there had been issues for a minority and that it had been working with government to make improvements.[188]

There has been some support for elements of the Government's proposals. For example, the Cold Chain Federation has said it supported the green lane approach but emphasised the importance of reaching agreement with the EU for it to work.[189] The Road Haulage Association welcomed the Government's proposals saying they would largely address hauliers' concerns.[190]

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[183] JPCampbellBiz (@JP_Biz). Twitter. 17 June 2022 [accessed 17 June 2022]. Available at: https://twitter.com/JP_Biz/status/1537776301087629312

[184] "Scrapping Northern Ireland protocol will trigger wave of red tape, warn farmers", Daily Telegraph, 15 June 2022

[185] Northern Ireland Chamber of Commerce and Industry, "Response to publication of NI Protocol bill", 13 June 2022

[186] "Brexit bill spells uncertainty for Northern Irish dairy farmers", Financial Times [online], 15 June 2022

[187] "Northern Ireland Dairy Council chief insists protocol is working", Belfast Telegraph [online], 8 June 2022

[188] "Protocol has been "vital" for continuity of trade – NIFDA" The Irish Times [online], 11 June 2022

[189] Shane Brennan (@ColdChainShane). Twitter. 13 June 2022 [accessed 17 June 2022]. Available from: https://twitter.com/ColdChainShane/status/1536247662638469120

[190] Road Haulage Association, "NI Protocol: Foreign Secretary Liz Truss meets with RHA and McCulla Ireland", 26 May 2022

Andrew McCormick, a former senior civil servant in the Northern Ireland Civil Service, has pointed out that the EU would not accept a risk of food products crossing into the single market where they do not comply with EU standards, especially if UK standards diverge. He says the key question is "how can we be sure that something potentially carrying disease entering NI stays in NI?". He argues that this means it would be difficult to have no checks at all on goods passing through the "green lane".[191]

McCormick writes that there is room for more negotiations and that progress is possible:

> There is clearly scope for further negotiation, taking account of the UK's proposals in the Command paper of July 2021, reiterated by Foreign Secretary Liz Truss in her 17 May statement, and the EU's proposals of October 2021. The latter would indeed mean more checks than are being applied at present with the grace periods operating- though far fewer than implied in the position agreed in December 2020.
>
> It is clear that significant easement from the standard rules is possible – further work is needed on minimising the scale and cost of checks on goods moving from GB to NI, while addressing the substance of the EU's concerns, including the need for EU exporters to assure buyers of the standards and integrity of origin of their products; and the issues of precedent and legal process that cannot just be ignored.
>
> Northern Ireland is small and unique – the issues may be complex, but with goodwill, realism, honesty and trust, progress is both possible and essential.[192]

[191] Andrew McCormick, "Why is the Northern Ireland Protocol so difficult? UK in a changing Europe", 20 May 2022

[192] As above

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