



## **Northern Ireland Protocol Bill**

### **HL Bill 52 of 2022–23**

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On 11 October 2022, the second reading of the Northern Ireland Protocol Bill is scheduled to take place in the House of Lords.

The bill would make some provisions of the Northern Ireland Protocol ‘excluded provision’, meaning they would no longer apply in domestic law. This would include provisions dealing with customs and the movement of goods between Great Britain and Northern Ireland, state aid and the jurisdiction of the Court of Justice of the European Union over the protocol. The bill would give ministers delegated powers to change which parts of the protocol would be ‘excluded provision’ in domestic law. They would also have delegated powers to make new law in connection with the protocol, such as on the movement and regulation of goods. The wide scope of these powers has been criticised and the House of Lords Delegated Powers and Regulatory Reform Committee has recommended many of them be removed from the bill.

The government argues the bill is needed because the protocol is failing to achieve all its objectives and has led to disruption to the economy and challenges to political stability in Northern Ireland. Discussions with the EU over many months have not resulted in any agreement to change the protocol. However, according to recent press reports, talks between officials could start again in early October 2022.

Power-sharing collapsed in February 2022 over Democratic Unionist Party (DUP) objections to the protocol. The DUP has welcomed the bill but has not returned to the executive. Northern Ireland remains without fully functioning political institutions. All the non-unionist parties in the Northern Ireland Assembly object to the bill. If no executive is in place by 28 October 2022, a new assembly election must be called.

The government acknowledges the bill envisages the non-performance of some of the UK's international obligations. It maintains this is justified in international law by the doctrine of necessity. However, many legal commentators are not convinced the government has demonstrated a situation of necessity exists that would justify non-performance of the UK's international obligations.

The EU has criticised the UK for taking unilateral action over the protocol. It has launched infringement procedures against the UK for alleged non-compliance with the protocol. The EU put forward proposals for implementing the protocol more flexibly but has ruled out renegotiating the text.

The bill was not amended in the House of Commons. MPs raised concerns about its compatibility with international law, the scope of delegated powers, what should be 'excluded provision' and securing the consent of different communities in Northern Ireland.

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## I. Overview

The [Northern Ireland Protocol Bill](#) is due to receive its second reading in the House of Lords on 11 October 2022. The bill was introduced in the House of Commons on 13 June 2022. On the same day, the government published two policy papers about the bill: '[Northern Ireland Protocol: the UK's solution](#)' and '[Northern Ireland Protocol Bill: UK government legal position](#)'. The government has also published [explanatory notes](#) alongside the bill. The bill's committee and remaining stages in the House of Commons took place on 13, 19 and 20 July 2022. No amendments were made in the House of Commons.

The EU and the UK agreed the Protocol on Ireland/Northern Ireland as part of the broader withdrawal agreement in 2019. The protocol was designed to avoid a hard border between Northern Ireland and the Republic of Ireland following the UK's departure from the EU, while also safeguarding the Belfast (Good Friday) Agreement, protecting Northern Ireland's place in the UK and its internal market, and safeguarding the EU single market.

The bill would amend the operation of the protocol—an international agreement—in domestic law. It would do this by:

- making some provisions of the protocol 'excluded provision', meaning they would no longer apply in domestic law
- giving ministers delegated powers to change which parts of the protocol would be 'excluded provision'
- preventing specified parts of the protocol from being made 'excluded provision' (rights of individuals; common travel area; areas of North-South cooperation)
- giving ministers delegated powers to make new provision in domestic law "in connection with" 'excluded provision'

The bill would also give ministers a delegated power to implement any new agreement with the EU on the protocol if one were reached through negotiation.

The government has said the bill would enable “the sustainable operation of the protocol” in line with its proposals to:<sup>1</sup>

- establish new ‘green channel’ arrangements for goods staying in the UK
- establish a new ‘dual regulatory’ model to provide flexibility to choose between UK or EU rules
- ensure the government can set UK-wide policies on subsidy control and VAT
- deal with the protocol’s “unequal governance”, removing the role of the Court of Justice of the European Union (CJEU) in dispute settlement and providing the means for UK authorities and courts to set out the arrangements which apply in Northern Ireland

Not all of these proposals are legislated for on the face of the bill. For instance, the bill would make provisions of the protocol that deal with customs and the movement of goods ‘excluded provision’ for some goods movements, but it would not explicitly establish in domestic law new ‘green lane’ arrangements to replace them. However, the government has indicated that ministers could use the delegated powers in the bill to do this.<sup>2</sup>

## **2. Background: The Northern Ireland Protocol**

### **2.1 Operation**

Under the terms of the protocol, Northern Ireland has a unique status. It is part of the UK’s customs territory but is subject to the EU’s customs code, VAT rules and single market rules for goods, including sanitary and phytosanitary (SPS) rules to protect animal, plant and public health. EU rules on state aid apply to the UK in respect of measures which affect trade

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<sup>1</sup> Foreign, Commonwealth and Development Office, [‘Northern Ireland Protocol: The UK’s solution’](#), 13 June 2022.

<sup>2</sup> Foreign, Commonwealth and Development Office, [‘Delegated powers memorandum: Northern Ireland Protocol Bill’](#), June 2022, p 14.

between Northern Ireland and the EU that is covered by the protocol.

## **Checks on goods**

The application to Northern Ireland of the EU's customs rules and single market rules for goods means that there are no checks on goods moving from Northern Ireland to the Republic of Ireland or the rest of the EU. However, goods moving from Great Britain to Northern Ireland are subject to checks and paperwork requirements to show they comply with the relevant EU regulations.

## **Application of changes in EU law**

The protocol also means that future changes in EU law may apply to Northern Ireland although the UK is no longer represented in the EU decision-making bodies that make EU law. EU law measures that continue to apply to Northern Ireland are listed in the annexes to the protocol. If the EU amends or replaces any of these measures, the changes apply in Northern Ireland automatically. If the EU adopts a new law in an area that falls within the scope of the protocol but does not amend or replace an EU act already listed in the annex, discussions may take place in the Joint Committee—the joint UK-EU body that oversees the withdrawal agreement and the protocol—about whether the new act should apply to Northern Ireland. The protocol allows the EU to take “appropriate remedial measures” if the Joint Committee cannot reach a decision within a reasonable time.

## **Consent mechanism**

The protocol contains a democratic consent mechanism that gives the Northern Ireland Assembly a vote on whether articles 5 to 10 should continue to apply.<sup>3</sup> These are the provisions that cover customs, movement

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<sup>3</sup> More detailed domestic arrangements for the consent mechanism are set out in the UK's unilateral [‘Declaration by Her Majesty’s Government of the United Kingdom of Great Britain and Northern](#)

of goods, VAT and excise, the single electricity market and state aid. The first vote is due to take place by the end of 2024. If the Northern Ireland Assembly voted not to give consent, then articles 5 to 10 would cease to apply from 31 December 2026. The protocol does not specify what arrangements would replace these parts of the protocol if that happened. If the Northern Ireland Assembly gave its consent to the continued application of the protocol by a simple majority of those present and voting, another vote would be held in another four years (by the end of 2028). If consent was given on a cross-community basis, the next vote would be held in eight years (by the end of 2032).

For more detailed analysis of the provisions of the protocol, see:

- House of Lords European Union Committee, '[The Protocol on Ireland/Northern Ireland](#)', 1 June 2020, HL Paper 66 of session 2019–21
- House of Commons Library, '[The October 2019 EU-UK withdrawal agreement](#)', 18 October 2019, section 4 on 'Protocol on Ireland/Northern Ireland'

## Grace periods

The protocol came into force from 1 January 2021, after the end of the Brexit transition period. However, it has never been implemented in full. Initially, this was by agreement with the EU, but more recently the EU has launched enforcement action against the UK for not fully applying all the requirements of the protocol.

In December 2020, the EU and the UK agreed several 'easements' and 'grace periods' where they would not apply the full requirements of the

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[Ireland concerning the operation of the 'Democratic consent in Northern Ireland' provision of the Protocol on Ireland/Northern Ireland](#), October 2019 and the [Protocol on Ireland/Northern Ireland \(Democratic Consent Process\) \(EU Exit\) Regulations 2020](#).

protocol. These included:

- A three-month delay until March 2021 on introducing certification requirements for supermarkets and their trusted suppliers moving agrifood products from Great Britain to Northern Ireland.
- Temporary arrangements for six months until June 2021 allowing certain chilled meat products to be moved from Great Britain to Northern Ireland.
- A grace period lasting until the end of 2021 for Northern Ireland to fully implement EU rules on testing and selling human and veterinary medicines.

These grace periods formed part of a package of formal decisions made by the Joint Committee and unilateral declarations made by the UK and the EU. As well as the grace periods, these covered matters such as the extent of the application of state aid provisions under the protocol and the definition of what goods should be considered as ‘at risk’ of moving from Northern Ireland into the EU single market. As a result of these agreements, the government did not pursue controversial provisions it had looked to include in the United Kingdom Internal Market Bill to give itself powers to unilaterally interpret or set aside parts of the protocol. This is covered in greater detail in the House of Commons Library briefing, [‘Joint Committee decisions on the Northern Ireland Protocol’](#) (23 December 2020).

The government unilaterally announced in March 2021 it was extending the grace period for certification requirements for agrifood products, delaying the introduction of customs declaration forms for most parcels travelling from Great Britain to Northern Ireland, and allowing products grown in Great British soil to be moved to Northern Ireland (which was prohibited under EU rules).<sup>4</sup>

In response, the European Commission launched an infringement process against the UK for what it said were “breaches of substantive provisions of

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<sup>4</sup> For further details, see: House of Lords Library, [‘Queen’s Speech 2021: UK-EU relationship’](#), 4 May 2021, section on ‘Implementing the Northern Ireland Protocol’.



EU law concerning the movement of goods and pet travel” applicable under the protocol.<sup>5</sup> The European Commission also requested bilateral consultations in the Joint Committee over the unilateral measures announced by the UK. It said these were “a violation of the duty of good faith under article 5 of the withdrawal agreement”.

However, the EU agreed in June 2021 to a UK request to extend the grace period on the transport of chilled meats from Great Britain to Northern Ireland until the end of September 2021.<sup>6</sup> It then also stepped back from its decision to launch enforcement action, announcing in July 2021 that it was pausing the infringement procedure to allow space for further discussions with the UK on the protocol to take place.<sup>7</sup>

This followed the UK government’s publication in July 2021 of a command paper setting out its case for a “new balance” in the protocol.<sup>8</sup> The command paper included a call for the EU to agree to a “standstill’ on existing arrangements, including the operation of grace periods in force, and a freeze on existing legal actions and processes, to ensure there is room to negotiate without further cliff edges”. The government said in September 2021 that it would continue to operate the protocol on the basis of all the easements and grace periods then in force.<sup>9</sup> It has stated more recently that the continued operation of the ‘standstill’ arrangements has “sought to maintain a stable basis for trade and movements between Great Britain and Northern Ireland in the light of the difficulties experienced by businesses and citizens”.<sup>10</sup>

For a more detailed analysis of the implementation of the protocol and the

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<sup>5</sup> European Commission, [‘Withdrawal Agreement: Commission sends letter of formal notice to the United Kingdom for breach of its obligations under the Protocol on Ireland and Northern Ireland’](#), 15 March 2021.

<sup>6</sup> Cabinet Office, [‘Declaration by the United Kingdom on meat products’](#), 30 June 2021.

<sup>7</sup> Mehreen Khan, [‘Brussels pauses legal action against UK over Brexit deal breach’](#), Financial Times, 27 July 2021.

<sup>8</sup> HM Government, [‘Northern Ireland Protocol: The way forward’](#), 21 July 2021, CP 502.

<sup>9</sup> House of Lords, [‘Written statement: Northern Ireland update’](#), 6 September 2021, HLWS257.

<sup>10</sup> [‘Explanatory notes’](#), p 4.

grace periods, see the House of Commons Library briefing: [‘Northern Ireland Protocol: Implementation, grace periods and EU-UK discussions, 2021–22’](#), 1 June 2022.

## 2.2 Impact on Northern Ireland economy

Assessing the impact of the protocol on Northern Ireland’s economy is not straightforward. The House of Lords Protocol on Ireland/Northern Ireland Sub-Committee noted in its recent report on the subject that the economic data necessary to conduct a comprehensive statistical analysis of the impact is not yet available.<sup>11</sup> The committee’s witnesses stressed it was difficult to distinguish the economic impact of the protocol specifically from other factors such as Brexit, the pandemic, labour shortages unrelated to the protocol, and the rising cost of living exacerbated by the war in Ukraine.<sup>12</sup> The committee noted that different witnesses drew different conclusions from the available data:

Some witnesses pointed to various economic data as demonstrating the drawbacks or benefits of the protocol, including increases in costs of moving products from Great Britain to Northern Ireland, data pointing to a growth in North-South trade, or economic modelling showing Northern Ireland performing relatively well compared to other parts of the UK. However, the reliability or significance of these figures were disputed by others, which sometimes led witnesses to reach opposite conclusions.<sup>13</sup>

Overall, the committee found a “dichotomy” in people’s experience of the economic impact of the protocol.<sup>14</sup> Businesses reliant on trade between

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<sup>11</sup> House of Lords Protocol on Ireland/Northern Ireland Sub-Committee, [‘Follow-up report’](#), 27 July 2022, HL Paper 57 of session 2022–3, p 3.

<sup>12</sup> House of Lords Protocol on Ireland/Northern Ireland Sub-Committee, [‘Follow-up report’](#), 27 July 2022, HL Paper 57 of session 2022–3, p 15.

<sup>13</sup> House of Lords Protocol on Ireland/Northern Ireland Sub-Committee, [‘Follow-up report’](#), 27 July 2022, HL Paper 57 of session 2022–3, p 15.

<sup>14</sup> House of Lords Protocol on Ireland/Northern Ireland Sub-Committee, [‘Follow-up report’](#), 27 July 2022, HL Paper 57 of session 2022–3, p 3.

Great Britain and Northern Ireland, on which Northern Ireland's economy has typically been reliant, had been negatively affected by increases in bureaucracy, staff resources, cost, delivery times and less flexibility to respond to supply and demand. The committee found there were widespread concerns within the business community about the impact on Northern Ireland of increasing regulatory divergence between the UK and the EU. On the other hand, businesses trading with Ireland and the rest of the EU found the protocol had a beneficial impact for Northern Ireland. The protocol was particularly important for sectors that are reliant on complex cross-border supply chains on the island of Ireland, such as the dairy and meat processing industries. However, the committee noted that some people have warned such benefits have arisen due to trade diversion rather than growth, and the overall impact on the Northern Ireland economy therefore remains uncertain.

### **2.3 Impact on Northern Ireland politics**

Northern Ireland has been without a fully functioning executive since February 2022 following the collapse of power-sharing over the Democratic Unionist Party's (DUP) objections to the protocol. Unionists argue that the protocol undermines Northern Ireland's place within the United Kingdom by effectively placing a trade barrier in the Irish Sea between Northern Ireland and the rest of the UK.

Paul Givan of the DUP resigned as first minister of the Northern Ireland Executive on 3 February 2022, citing the impact of the protocol on the "delicate balance created by the Belfast and St Andrew's Agreements".<sup>15</sup> Under the Northern Ireland Act 1998, if the first minister resigns, the deputy first minister also ceases to hold office. Therefore, Mr Givan's resignation meant that Michelle O'Neill of Sinn Féin ceased to be deputy first minister. The Northern Ireland Executive was no longer able to meet as it is chaired jointly by the first and deputy first ministers. Other executive ministers stayed in post but could not make decisions on "significant or controversial" matters or those that cut across the responsibilities of more

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<sup>15</sup> Paul Givan, '[Personal Twitter account](#)', 3 February 2022.

than one minister.<sup>16</sup> This included agreeing a budget.<sup>17</sup>

Scheduled assembly elections were held on 5 May 2022. These returned Sinn Féin as the largest party, with 27 seats, followed by the DUP, on 25 seats.<sup>18</sup> The Alliance Party had 17 seats, the UUP had 9 and the Social Democratic and Labour Party (SDLP) had 8. However, the Assembly has yet to form a new executive since the elections. This is due to the DUP's ongoing refusal to elect a new speaker or nominate a deputy first minister until its continuing concerns with the protocol are resolved.<sup>19</sup> The Assembly must elect a new speaker and deputy speaker before it can fill the offices of first and deputy first minister or conduct any other business.<sup>20</sup>

Explaining this stance to the Assembly on 13 May 2022, Paul Givan stated that the “Irish Sea border has fundamentally undermined the Belfast Agreement [and] has changed our relationship with the United Kingdom”.<sup>21</sup> He said his party had “received a mandate in the assembly election to remove the Irish Sea border” and that would need to be respected. Writing in a newspaper article, Sir Jeffrey Donaldson, leader of the DUP, described it as “unfortunate” that he had “had to cease operating the political institutions before Dublin and Brussels fully recognise[d] the lack of cross-community support for the protocol”.<sup>22</sup> He stated that: “If the protocol is not resolved, then Northern Ireland will be without a devolved government”.

Other parties were critical of the actions of the DUP, with Michelle O'Neill, Sinn Féin's first minister designate, saying they were denying democracy and obstructing the executive from serving the public and properly supporting

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<sup>16</sup> Northern Ireland Executive, '[Ministerial code](#)', accessed 4 October 2022.

<sup>17</sup> BBC News, '[Stormont ministers advised budget cannot pass without NI executive](#)', 9 March 2022.

<sup>18</sup> BBC News, '[Northern Ireland Assembly election results 2022](#)', accessed 12 September 2022.

<sup>19</sup> BBC News, '[Northern Ireland Protocol: Assembly speaker blocked by DUP for second time](#)', 30 May 2022.

<sup>20</sup> Northern Ireland Assembly, '[Letter to all members](#)', 28 September 2022.

<sup>21</sup> Northern Ireland Assembly, '[Official Report](#)', 13 May 2022.

<sup>22</sup> News Letter, '[Sir Jeffrey Donaldson: Prime Minister Boris Johnson must deal with Northern Ireland Protocol once and for all](#)', 7 June 2022.

public services.<sup>23</sup> Doug Beattie, leader of the UUP, argued that electing a speaker would ensure the Assembly would not be silent on important issues, without compromising the DUP's position on the protocol.<sup>24</sup>

## 2.4 Government case for legislating

### Government assessment of the impact of the protocol

The government maintains that the protocol is not fulfilling all of its original objectives and that legislation is the only way to address this:

The Northern Ireland Protocol was intended to meet several policy objectives: to safeguard the Belfast (Good Friday) Agreement in all dimensions; to avoid a hard border on the island of Ireland; to protect Northern Ireland's place in the United Kingdom internal market; and to safeguard the EU's single market. Its operation has continued to support trade between Northern Ireland and Ireland as intended. However, its requirements for full EU customs, sanitary and phytosanitary and other controls, as well as for Northern Ireland to apply EU rules in a variety of areas concerning goods, have led to a significant degree of disruptions and burdens in practice.

[...] the government's assessment is that the ongoing practical issues, as well as challenges to political stability in Northern Ireland, linked to the Northern Ireland Protocol, demonstrate that it is not meeting its original objectives. Without change, those issues pose significant challenges to the functioning of the Belfast (Good Friday) Agreement and the institutions it establishes, as well as to broader social and economic conditions in Northern Ireland. The government's assessment is that, while the preference is to find joint solutions, action is necessary to respond to the urgent and serious context in Northern Ireland and

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<sup>23</sup> Northern Ireland Assembly, '[Official Report](#)', 13 May 2022.

<sup>24</sup> Northern Ireland Assembly, '[Official Report](#)', 13 May 2022.

cannot await such an agreement.<sup>25</sup>

The government's position has been for some time that the protocol needs to be permanently amended. It set out its case for reaching a "new balance" in the July 2021 command paper.<sup>26</sup> It maintained it was "clear that the circumstances exist to justify using article 16". This is a provision in the protocol that allows either side to take "appropriate safeguard measures" if the application of the protocol leads to "serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade". In the command paper, the government pointed to "significant disruption to longstanding trade flows between Great Britain and Northern Ireland"; "exacerbated [...] perceptions of separation and threat to identity within the unionist community", societal and economic impacts of the protocol on consumers and businesses; and political and community instability. However, the government said it had concluded "that for the time being it is not appropriate" to exercise the UK's rights under article 16. Instead, it said it would "prefer to find a consensual path" through negotiation with the EU.

## Talks with the EU

To date talks with the EU have not resulted in a solution. The UK has proposed amendments to the protocol, while the EU has suggested looking for additional 'flexibilities' in implementing the existing protocol without renegotiating the text. Neither side has accepted the other's proposals.

The government put forward a proposed approach in the July 2021 command paper.<sup>27</sup> It proposed that:

- full customs and SPS processes should only be applied to goods arriving in Northern Ireland if the goods were ultimately destined for the EU

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<sup>25</sup> [Explanatory notes](#), pp 4–5.

<sup>26</sup> HM Government, '[Northern Ireland Protocol: The way forward](#)', 21 July 2021, CP 502.

<sup>27</sup> HM Government, '[Northern Ireland Protocol: The way forward](#)', 21 July 2021, CP 502.

- goods made to UK rules and regulated by UK authorities should be allowed to circulate freely in Northern Ireland as long as they remained in Northern Ireland
- the governance of the protocol should be changed so disputes would be managed through international arbitration and Northern Ireland should be more involved in shaping legislation that would affect it

In response, Maroš Šefčovič, vice-president of the European Commission and co-chair of the Joint Committee, said the EU would continue to engage with the UK but would “not agree to a renegotiation of the protocol”.<sup>28</sup> The European Commission published a package of what it called “bespoke arrangements” in October 2021.<sup>29</sup> These looked for flexibilities in implementing the protocol, rather than renegotiating the text. The EU proposed:

- Simplifying the customs processes and SPS checks that would apply to goods moving to Northern Ireland. It said this would mean SPS checks would reduce by 80% and customs paperwork would reduce by 50%.
- Amending EU law so that UK authorities could continue to approve generic medicines for Northern Ireland and drugs for Northern Ireland could continue to be tested in Great Britain.
- Greater engagement of Northern Ireland institutions and stakeholders.

Intensive discussions between the UK and the EU took place over the following months, but by February 2022 no substantive progress had been made.<sup>30</sup> The EU adopted legislation in April 2022 which it said would ensure

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<sup>28</sup> European Commission, [‘Statement by Vice-President Maroš Šefčovič following today’s announcement by the UK Government regarding the Protocol on Ireland/Northern Ireland’](#), 21 July 2021.

<sup>29</sup> European Commission, [‘Protocol on Ireland/Northern Ireland: Commission proposes bespoke arrangements to benefit Northern Ireland’](#), 13 October 2021.

<sup>30</sup> [Explanatory notes](#), p 5.

the continued supply of medicines to Northern Ireland.<sup>31</sup>

The UK government maintains the EU’s proposals would “leave the people and businesses of Northern Ireland worse off than the current standstill arrangements”.<sup>32</sup> Liz Truss, speaking when she was still foreign secretary, said it “would make the situation on the ground worse, adding further to the tensions and stresses; goods going solely to Northern Ireland still face customs paperwork and sanitary and phytosanitary certificates”.<sup>33</sup>

Mr Šefčovič reportedly confirmed to Ms Truss in a call in May 2022 that “there was no room to expand the EU negotiating mandate or introduce new proposals to reduce the overall level of trade friction”.<sup>34</sup> Ms Truss advised him that if the EU did not show the “requisite flexibility” to help solve the issues with the protocol, “as a responsible government [the UK] would have no choice but to act”.

For a more detailed analysis of the UK-EU discussions, see the House of Commons Library briefing: [‘Northern Ireland Protocol: Implementation, grace periods and EU-UK discussions, 2021–22’](#), 1 June 2022.

## **Government confirms its plans to legislate**

Liz Truss confirmed on 17 May 2022 that the government would introduce legislation to “make changes to the protocol”.<sup>35</sup> She said the UK’s preference remained a negotiated solution with the EU. In parallel with introducing legislation, she therefore said she was “open to further talks if we can achieve the same outcome through negotiated settlement”.

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<sup>31</sup> Council of the European Union, [‘EU-UK relations: The Council adopts legislation to ensure continued supply of medicines’](#), 12 April 2022.

<sup>32</sup> [HC Hansard, 27 June 2022, col 44.](#)

<sup>33</sup> [HC Hansard, 27 June 2022, col 44.](#)

<sup>34</sup> Foreign, Commonwealth and Development Office, [‘Foreign secretary’s call with European Commission vice president Maroš Šefčovič’](#), 12 May 2022.

<sup>35</sup> [HC Hansard, 17 May 2022, cols 545–7.](#)



However, Ms Truss argued the government had to act because the Belfast (Good Friday) Agreement was “under strain”. The Northern Ireland Executive had not been functioning since February 2022 because the protocol “does not have the support necessary in one part of the community in Northern Ireland”. She said the protocol had caused “practical problems” such as increased costs and paperwork for moving goods to Northern Ireland, leading some businesses to stop this trade altogether, “onerous” SPS rules and restrictions on Northern Ireland citizens’ benefiting from the same tax rules as the rest of the UK. She argued that “without resolving these and other issues, we will not be able to re-establish the executive and preserve the hard-won progress sustained by the Belfast (Good Friday) Agreement”. She said the legislation would “cement those provisions which are working in the protocol”, namely the common travel area, the single electricity market and North-South cooperation. At the same time, she said it would ‘fix’ the elements that were not working: the movement of goods, goods regulation, VAT, subsidy control and governance.

### **3. Developments since the bill’s introduction**

#### **3.1 Northern Ireland: No restoration of power-sharing**

The government has said that the restoration of power-sharing is one of the reasons behind its introduction of the bill. For instance at the bill’s second reading, Liz Truss said Northern Ireland had been without a devolved government since February 2022 “due specifically to the protocol, at a time of major economic challenges” and the government therefore had a “duty [...] to act now to enable a plan for restored local government to begin”.<sup>36</sup>

However, the bill’s introduction has not to date resolved the formation of a new executive in Northern Ireland. Sir Jeffrey Donaldson, leader of the DUP, described its introduction as an “important step” but said it did not

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<sup>36</sup> [HC Hansard, 27 June 2022, cols 38 and 41.](#)

“deliver anything in and of itself”.<sup>37</sup> At the bill’s second reading in the House of Commons, Sir Jeffrey said he could not restore the political institutions if Northern Ireland ministers were “required to impose a protocol that harms Northern Ireland”.<sup>38</sup> However, he hinted there might be some progress once the bill completed its Commons stages:

If this bill convincingly passes all its Commons stages in its current form and the government continues to develop the regulations required to bring an end to the harmful implementation of the protocol, that will of course give substantially greater confidence that new arrangements are on the way, which in turn would provide a basis to take further steps to see the return of our local institutions.

Meanwhile, non-unionist parties in the Northern Ireland Assembly have expressed their strong objection to the government’s approach on the protocol. In a joint letter to Boris Johnson, the then prime minister, on the day the bill was introduced, the Sinn Féin, Alliance and Social Democratic and Labour Party (SDLP) members of the assembly (MLAs) said they represented a majority of MLAs and a majority of the votes cast in the recent election.<sup>39</sup> They acknowledged that the protocol was “not ideal” but said it represented “the only available protections for Northern Ireland from the worst impacts of [a] hard Brexit” and offered “clear economic advantages” to Northern Ireland by giving it unique access to two major markets. They argued the way to achieve “smooth implementation” of the protocol was through engagement with the EU, not through the “unilateral abrogation of treaty obligations”. They rejected the government’s argument that its actions would protect the Belfast (Good Friday) Agreement.

At the bill’s third reading in the House of Commons, Colum Eastwood of the SDLP said that if the DUP did not take the opportunity to go back into Stormont once the bill had passed through the House of Commons, his party would table a motion to recall the Northern Ireland Assembly, calling

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<sup>37</sup> Steven Swinford, [‘Northern Ireland Protocol: DUP refuses to commit to return of power-sharing’](#), Times (£), 14 June 2022.

<sup>38</sup> [HC Hansard, 27 June 2022, col 68.](#)

<sup>39</sup> SDLP, [‘MLAs write to Johnson opposing protocol legislation’](#), 13 June 2022.

on the DUP to nominate a speaker and a deputy first minister.<sup>40</sup> The DUP described the recall as a “stunt”.<sup>41</sup> When the Assembly was recalled on 3 August 2022, the DUP again refused to nominate a speaker.<sup>42</sup> Sir Jeffrey Donaldson said the DUP would not return to power-sharing before a new prime minister took office, as the party needed to know whether they would reopen negotiations with the EU over the protocol.<sup>43</sup>

Liz Truss was announced as the new prime minister at the beginning of September 2022. Sir Jeffrey said that in the absence of a negotiated solution with the EU, “it would be better for Northern Ireland, and the entire United Kingdom, if the NI Protocol Bill can be moved forward as expeditiously as possible”. He said this would enable the government to provide cost of living and energy support to Northern Ireland without taxation rules being subject to the protocol.<sup>44</sup> He repeated the DUP view that “we cannot sustain power sharing on a foundation which is being undermined by the sea border”. Michelle O’Neill, the Sinn Féin first minister-designate, called on Liz Truss to prioritise the restoration of devolution at Stormont and “stop pandering” to the DUP.<sup>45</sup>

The new secretary of state for Northern Ireland, Chris Heaton-Harris, has urged the Northern Ireland political parties to re-form the executive, stressing that “whatever issues there are with the protocol, there are very important functions and services that the people of Northern Ireland need to work”.<sup>46</sup>

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<sup>40</sup> [HC Hansard, 20 July 2022, col 1066.](#)

<sup>41</sup> Democratic Unionist Party, [‘Stunt politics isn’t the basis for moving forward’](#), 21 July 2022.

<sup>42</sup> BBC News, [‘Stormont recall: Third attempt to fully restore NI Assembly fails’](#), 3 August 2022.

<sup>43</sup> Jude Webber, [‘DUP refuse to return to power-sharing until new UK PM in office’](#), Financial Times, 3 August 2022.

<sup>44</sup> Sir Jeffrey Donaldson, [‘Our new prime minister must deliver the Northern Ireland Protocol Bill to help the whole United Kingdom’](#), Conservative Home, 7 September 2022.

<sup>45</sup> ITV News, [‘Northern Ireland parties react as Liz Truss to be new prime minister’](#), 5 September 2022.

<sup>46</sup> [HC Hansard, 7 September 2022, col 220.](#)

## Deadline for forming new executive

There is a time limit on how long Northern Ireland can continue without a full executive following the May elections. Under new rules brought into force by the Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022, if a first minister and deputy first minister are not appointed within 24 weeks, the secretary of state for Northern Ireland must appoint a date for new assembly elections within the next 12 weeks. This would mean that if no executive is in place by 28 October 2022, another election would have to take place by 19 January 2023.<sup>47</sup>

## Forthcoming Supreme Court hearing

The Supreme Court is due to begin hearing a legal case challenging the lawfulness and constitutionality of the government's actions over the protocol on 30 November 2022.<sup>48</sup> Northern Ireland politicians including Jim Allister (leader of the Traditional Unionist Voice), Ben Habib (former Brexit Party MEP for London), Baroness Hoey (non-affiliated), Steve Aiken (former leader of the Ulster Unionist Party), Arlene Foster (former leader of the DUP) and Lord Trimble (former leader of the UUP who sat in the House of Lords as a Conservative prior to his death in July 2022) brought judicial review proceedings in 2021.<sup>49</sup> They argued that:

[...] the protocol is incompatible with the Act of Union 1800, and specifically with article VI which provides that the subject of Great Britain and Ireland shall be on the same footing with respect to trade and that any future treaty entered into with a foreign power shall

<sup>47</sup> Katy Hayward, '[Northern Ireland—Is another election just around the corner?](#)', UK in a Changing Europe, 2 August 2022.

<sup>48</sup> Supreme Court, '[In the matter of an application by James Hugh Allister and others for judicial review \(appellants\) \(Northern Ireland\)](#)', accessed 4 October 2022.

<sup>49</sup> Harry Yorke, '[Unionist legal challenge over Northern Ireland Protocol set for high court hearing](#)', Telegraph (£), 29 March 2021. Their application for judicial review was heard with a separate application brought by Clifford Peeples, a pastor from Northern Ireland ([\[2021\] NIQB 64](#) and [\[2022\] NICA 15](#)).

preserve that footing. They also argued that the protocol breached the Northern Ireland Act 1998, specifically section 1(1) which provides that “Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of the majority of the people of Northern Ireland voting in a poll...”, as well as the European Convention on Human Rights.<sup>50</sup>

The High Court dismissed this judicial review application in June 2021.<sup>51</sup> The judge held that:

[...] both the Act of Union and the 2018 and 2020 acts [the legislation that implemented the protocol in domestic law] are of constitutional character and are constitutional statutes and that where two constitutional statutes appear to conflict, the fundamental principle of interpretation is that the more recent statute be preferred. The judge also held that the constitutional character of the 2018 and 2020 acts should be seen in the context of the modern constitutional arrangements for NI. The more general words of the Act of Union 1800 written over 200 years ago in entirely different economic and political circumstances could not override the clear specific will of Parliament as expressed in legislation in the modern constitutional context.<sup>52</sup>

[The Court of Appeal rejected an appeal against this in March 2022.](#)<sup>53</sup> It held that article VI of the Act of Union 1800 has been modified rather than impliedly repealed. It also held that there was no conflict with section 1(1) of the Northern Ireland Act 1998. The Supreme Court will hear an appeal against the Court of Appeal judgment. According to the BBC, [the Supreme](#)

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<sup>50</sup> Supreme Court, ‘[In the matter of an application by James Hugh Allister and others for judicial review \(appellants\) \(Northern Ireland\)](#)’, accessed 4 October 2022.

<sup>51</sup> [\[2021\] NIQB 64](#).

<sup>52</sup> Supreme Court, ‘[In the matter of an application by James Hugh Allister and others for judicial review \(appellants\) \(Northern Ireland\)](#)’, accessed 4 October 2022.

<sup>53</sup> Judicial Communications Office, ‘[Court dismisses appeal against EU exit protocol—Summary of judgment](#)’, 14 March 2022; and [\[2022\] NICA 15](#)

[Court is unlikely to deliver a judgment before 2023.](#)<sup>54</sup>

### 3.2 European Union: Infringement procedures

#### Initial response

The European Union expressed its “significant concerns” when Liz Truss first announced her plan to legislate to disapply parts of the protocol. European Commission Vice-President Maroš Šefčovič said:

The announcement by the UK government, however, to table legislation that would disapply constitutive elements of the protocol, raises significant concerns. First, because the protocol is the solution agreed between the EU and the UK to address the challenges posed by the UK’s withdrawal from the EU for the island of Ireland, and to protect the hard-won gains of the peace process. Second, because the protocol is an international agreement signed by the EU and the UK. Unilateral actions contradicting an international agreement are not acceptable. Third, because the withdrawal agreement and its protocol are the necessary foundation for the Trade and Cooperation Agreement, which the EU and the UK have agreed upon to organise their overall relationship after the UK’s withdrawal.<sup>55</sup>

He said the EU would “respond with all measures at its disposal” if the UK moved ahead with the bill.

#### June 2022 infringement procedures

Since the bill’s introduction, the European Commission has moved ahead with several infringement procedures against the UK over the protocol.

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<sup>54</sup> John Campbell, ‘[Northern Ireland Protocol: Supreme Court set to hear challenge](#)’, 25 April 2022.

<sup>55</sup> 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.

On 15 June 2022, it said it was re-activating the infringement procedure it had previously started, then paused, in 2021. This concerned the UK's unilateral decision to delay the full application of the protocol rules on the movement of goods and pet travel from Great Britain to Northern Ireland.<sup>56</sup> Restarting these proceedings in June 2022, the Commission said it had now decided to take them to their second stage by issuing a reasoned opinion.<sup>57</sup>

The Commission also launched two new infringement procedures against the UK on 15 June 2022 for not carrying out its obligations under the protocol to implement EU SPS rules and provide the EU with trade data on Northern Ireland.<sup>58</sup>

The original deadline for the UK to respond to these infringement procedures was 15 August 2022. However, the EU agreed to extend this by one month to 15 September 2022 at the UK's request.<sup>59</sup> The UK reportedly wrote to the European Commission on this date to say it would continue not to implement checks on agrifood and other products entering Northern Ireland from Great Britain.<sup>60</sup>

## July 2022 infringement procedures

The European Commission launched four further infringement procedures against the UK for non-compliance with the protocol on 22 July 2022, the day after the bill completed its passage through the House of Commons.

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<sup>56</sup> European Commission, '[Withdrawal Agreement: Commission sends letter of formal notice to the United Kingdom for breach of its obligations under the Protocol on Ireland and Northern Ireland](#)', 15 March 2021.

<sup>57</sup> European Commission, '[Commission launches infringement proceedings against the UK for breaking international law and provides further details on possible solutions to facilitate the movement of goods between Great Britain and Northern Ireland](#)', 15 June 2022. The EU infringement procedure follows steps laid out in the EU treaties. For further details, see: European Commission, '[Infringement procedure](#)'.

<sup>58</sup> European Commission, '[Commission launches infringement proceedings against the UK for breaking international law and provides further details on possible solutions to facilitate the movement of goods between Great Britain and Northern Ireland](#)', 15 June 2022.

<sup>59</sup> BBC News, '[NI Protocol: UK given extra time to respond to EU](#)', 8 August 2022.

<sup>60</sup> Cristina Gallardo, '[UK tells EU it will keep waiving Northern Ireland Brexit checks](#)', Politico (£), 15 September 2022.

The European Commission said the UK’s “unwillingness to engage in meaningful discussion” since February 2022 and the continued passage of the bill through Parliament went directly against a “spirit of constructive cooperation”.<sup>61</sup> The EU alleged the UK had failed to comply with obligations under the protocol to: implement customs and other requirements on the movement of goods from Northern Ireland to Great Britain; notify the EU it had transposed EU legislation on excise duties into domestic law; and implement EU rules on VAT for e-commerce.

The deadline for responding to this set of infringement procedures was 22 September 2022. The UK reportedly requested an extension to this deadline.<sup>62</sup>

### **Possibility of other actions**

The European Commission said when launching the July infringement procedures that if the UK did not respond within the required deadline, or failed to take the measures required, it could take the UK to the CJEU.<sup>63</sup> It also warned that “other remedies are possible, including in relation to the Trade and Cooperation Agreement”. As the House of Commons Library has explained, in addition to infringement procedures under article 12 of the protocol, there are a variety of possible remedies through the withdrawal agreement and the TCA for disputes over the protocol:

When it initially launched infringement proceedings in March 2021, the EU warned it may also initiate the dispute settlement procedure established by the withdrawal agreement (WA). This provides for a period of consultation, followed by an independent arbitration process if the matter cannot be resolved. If questions of EU law are raised, the CJEU provides binding interpretations to the arbitration panel.

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<sup>61</sup> European Commission, [‘Protocol on Ireland/Northern Ireland: Commission launches four new infringement procedures against the UK’](#), 22 July 2022.

<sup>62</sup> Jessica Parker, [‘Personal Twitter Account’](#), 22 September 2022.

<sup>63</sup> European Commission, [‘Questions and answers: Commission launches four new infringement procedures against the UK’](#), 22 July 2022.



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 can take nine to fifteen months, and then there is another month to comply with the ruling.

If passed, the Northern Ireland Protocol Bill would mean the WA dispute settlement process would not apply to the parts of the protocol that are no longer applied in UK law. The EU is considering new legislation for the implementation and enforcement of the two agreements. This allows the European Commission to adopt measures restricting trade, investment or other activities in the TCA if the UK is not cooperating with the dispute settlement process.<sup>64</sup>

### **October 2022: Resumption of talks?**

James Cleverly, the new foreign secretary, and Maroš Šefčovič discussed the protocol in a video call on 30 September 2022.<sup>65</sup> According to press reports, following this conversation officials from both sides are due to meet in early October 2022 to discuss restarting the EU-UK talks over the protocol that had largely stalled since February 2022.<sup>66</sup>

### **3.3 Scotland and Wales: Legislative consent**

The Scottish and Welsh governments have both said they would not

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<sup>64</sup> House of Commons Library, [‘The Northern Ireland Protocol: EU legal action against the UK’](#), 22 June 2022.

<sup>65</sup> James Cleverly, [‘Personal Twitter account’](#), 30 September 2022.

<sup>66</sup> BBC News, [‘UK and EU to restart talks over NI Protocol’](#), 1 October 2022; and Andy Bounds and George Parker, [‘UK and EU agree to meet to try to resolve Northern Ireland dispute’](#), Financial Times, 30 September 2022.

recommend their respective parliaments grant legislative consent to the bill.

The Sewel convention states that the UK Parliament will not normally legislate on matters within devolved competence without the consent of the devolved legislatures.<sup>67</sup> The Supreme Court has concluded that the Sewel convention does not give rise to a legally enforceable obligation.<sup>68</sup> The UK Parliament has previously legislated in the absence of legislative consent—one or more of the devolved legislatures withheld consent from the European Union (Withdrawal) Act 2018, the European Union (Withdrawal Agreement) Act 2020, the United Kingdom Internal Market Act 2020 and the European Union (Future Relationship) Act 2020.<sup>69</sup>

The explanatory notes state the bill contains provisions that cover devolved or transferred matters.<sup>70</sup> The government's clause-by-clause analysis of which provisions it considers engage legislative consent is set out in annex A of the explanatory notes. The government has written to the Scottish and Welsh governments to seek consent to legislate.<sup>71</sup> The Northern Ireland Executive and Assembly were not formed at the time of the bill's introduction, but the government intends to seek the Northern Ireland Assembly's consent as soon as possible.

Angus Robertson, Scotland's cabinet secretary for constitution, external affairs and culture, said in June 2022 it was “inconceivable” that the Scottish government could recommend legislative consent for a bill that “wants to tear up [the protocol] and renege on the UK government's commitment and international obligations”.<sup>72</sup> The Scottish Parliament agreed a motion on 29 June 2022 calling on the UK government to withdraw the bill.<sup>73</sup> The Scottish government laid a memorandum before the Scottish Parliament in

<sup>67</sup> UK Parliament, '[Sewel convention](#)', accessed 9 September 2022.

<sup>68</sup> Supreme Court, '[Press summary—R \(On the Application of Miller and Another\) \(Respondents\) v Secretary of State for Exiting the European Union \(Appellant\)](#)', 24 January 2017.

<sup>69</sup> See Institute for Government, '[Sewel convention](#)', 9 February 2022 for further details.

<sup>70</sup> [Explanatory notes](#), p 7.

<sup>71</sup> [Explanatory notes](#), p 7.

<sup>72</sup> Scottish Government, '[Northern Ireland Protocol Bill: Ministerial statement](#)', 29 June 2022.

<sup>73</sup> Scottish Parliament, '[Official report](#)', 29 June 2022, col 117.

August 2022 in which it explained that it did not plan to lodge a legislative consent motion on the bill.<sup>74</sup> It said the bill should not receive consent for three reasons: “its potential illegality; the impact it is already having on Scottish interests; and its potential future impact, in the event of further escalation in the UK government’s associated dispute with the EU”.

The Welsh government has recommended that the Senedd withholds consent for the bill.<sup>75</sup> The Welsh government said it had concerns about “the underlying rationale for the bill, the broad powers it gives to ministers of the crown and the potential breach of international law”. It said that if Welsh ministers recommended consent to the bill, it could “call into question their adherence to the ministerial code and the ‘overarching duty on ministers to comply with the law, including international law and treaty obligations’”.

## 4. Bill provisions

### 4.1 Clauses

#### Introduction (clause 1)

Clause 1 of the bill is titled as an “overview of main provisions” of the bill. Clause 1 states that the bill:

- (a) provides that certain specified provision of the Northern Ireland Protocol does not have effect in the United Kingdom;
- (b) gives ministers of the crown powers to provide that other provision of the Northern Ireland Protocol does not have effect in the United Kingdom;
- (c) provides that enactments, including the Union with Ireland Act 1800 and the Act of Union (Ireland) Act 1800, are not to be affected by

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<sup>74</sup> Scottish Government, [‘Legislative consent memorandum: Northern Ireland Protocol Bill’](#), 19 August 2022.

<sup>75</sup> Welsh Government, [‘Written statement: The Northern Ireland Protocol Bill’](#), 29 September 2022.

provision of the Northern Ireland Protocol that does not have effect in the United Kingdom;

- (d) gives 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).

Clause 1(c) specifically mentions the Union with Ireland Act 1800 and the Act of Union (Ireland) Act 1800 as enactments that would not be affected by protocol provisions that are disapplied in domestic law under the bill. Neither of these acts are specifically mentioned elsewhere in the bill.

The bill's explanatory notes state both that clause 1 "summarises the effect of the bill" and that it "makes clear" how the relationship between other enactments and the protocol would be affected by the bill.<sup>76</sup> The House of Commons Library has suggested that "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".<sup>77</sup> The legal commentator David Allen Green has argued that "it is difficult to imagine what the parliamentary drafter intends by clause 1 as to its legal effect".<sup>78</sup> He questioned whether if clause 1 were removed from the bill, it would make a difference to the bill's overall legal effect once enacted.

### **Limitation of effect of protocol etc (clauses 2 and 3)**

Clauses 2 and 3 would limit the effect of 'excluded' provisions of the protocol in domestic law. Currently, the withdrawal agreement and the protocol are given effect in domestic law through the European Union (Withdrawal) Act 2018 (EUWA) as amended by the European Union (Withdrawal Agreement) Act 2020.

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<sup>76</sup> [Explanatory notes](#), p 8.

<sup>77</sup> House of Commons Library, '[Northern Ireland Protocol Bill 2022–23](#)', 24 June 2022, p 41.

<sup>78</sup> David Allen Green, '[The curious clause one of the Northern Ireland Protocol Bill](#)', The Law and Policy Blog, 14 June 2022.

The explanatory notes explain how this works:

Section 7A [of EUWA] gives effect to article 4 of the withdrawal agreement. Article 4 provides that the withdrawal agreement and the provisions of EU law which it makes applicable are to have “the same legal effects” in the UK as those which they produce within the EU and its member states. The effect of this is that the EU law applied under the Northern Ireland Protocol has supremacy in the UK’s legal order (meaning incompatible domestic legislation would be disapplied); EU law applied under the Northern Ireland Protocol will have direct effect in the UK (provided that the EU law conditions for direct effect are satisfied); and EU law remedies will be available [...]

Section 7A(2) works as a ‘conduit pipe’ through which directly effective provisions of the withdrawal agreement (including the Northern Ireland Protocol) and EU law made applicable by it (eg regulations, decisions) flow into domestic law without the need for any further implementing legislation.<sup>79</sup>

Clause 2 would switch off this ‘conduit pipe’ for provisions of the protocol that are made ‘excluded provision’ by the bill. Some provisions of the protocol are made ‘excluded provision’ on the face of the bill, and clause 15 would give ministers power to exclude, in whole or in part, other provisions of the protocol. Any provision of the protocol or the withdrawal agreement that became ‘excluded provision’ would no longer have effect in domestic law. This would mean that, as far as ‘excluded provision’ was concerned:<sup>80</sup>

- Individuals and businesses would no longer be able to rely directly on the terms of the withdrawal agreement or protocol to bring a claim before UK courts.
- The withdrawal agreement or protocol would no longer have supremacy over domestic law provisions that were incompatible or

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<sup>79</sup> [Explanatory notes](#), p 6.

<sup>80</sup> [Paras 109 to 118](#) of the Explanatory notes to the European Union (Withdrawal Agreement) Act 2020 explain the operation of section 7A of EUWA.

inconsistent with them.

Clause 2(3)(b) specifically provides that regulations made using the powers in the bill would take priority over section 7A of EUWA.

Provisions of the protocol and the withdrawal agreement that are not ‘excluded provision’ would continue to have domestic effect via EUWA.<sup>81</sup>

EUWA (as amended) also requires the courts to interpret ‘relevant separation agreement law’ in a way that is compatible with the withdrawal agreement. ‘Relevant separation agreement law’ is those provisions of domestic law that implement the ‘divorce’ agreements the UK signed with the EU and with the EFTA member states, namely the withdrawal agreement (including the Northern Ireland Protocol), the EEA-EFTA Separation Agreement and the Swiss Citizens’ Rights Agreement.<sup>82</sup> The explanatory notes to the bill explain how this works:

Section 7C [of EUWA] supplements section 7A in ensuring the “same legal effect” of EU law in the UK that it produces in the EU by directing courts to interpret relevant separation agreement law in accordance with the withdrawal agreement. ‘Relevant separation agreement law’ is defined in section 7C(3) and, amongst other things, includes anything which is domestic law by virtue of section 7A and the power to implement the Northern Ireland Protocol in section 8C, as well as anything else so far as it is domestic law for the purpose of, or otherwise in scope of, the withdrawal agreement.<sup>83</sup>

Clause 3 of the bill would amend section 7C of EUWA so that domestic law that was ‘relevant separation agreement law’ would not have to be interpreted compatibly with any provisions of the withdrawal agreement or the Northern Ireland Protocol that were ‘excluded provision’. The

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<sup>81</sup> [HC Hansard, 13 July 2022, col 380.](#)

<sup>82</sup> For a fuller explanation of ‘relevant separation agreement law’, see: Jack Williams, ‘[Relevant separation agreement law: A guide for the perplexed](#)’, EU Relations Law Blog, 29 December 2020.

<sup>83</sup> [Explanatory notes](#), p 6.

government states in the explanatory notes that “without this clause, 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”.<sup>84</sup>

### **Goods: Movement and customs (clauses 4 to 6)**

Clauses 4 to 6 would disapply from domestic law some of the requirements in the Northern Ireland Protocol that relate to customs and the movement of goods and would give ministers powers to make new law on these subjects.

The government has argued that Northern Ireland’s place in the UK’s internal market is “being undermined due to the unnecessary checks and paperwork imposed by the protocol”, which it says “treats goods going from Great Britain to Northern Ireland as if they were going to another country”.<sup>85</sup> It has stated that the protocol “imposes burdensome bureaucracy and paperwork, including full customs processes and onerous SPS [sanitary and phytosanitary, that is animal and plant health] import requirements, even for goods staying in the UK”. The government is proposing instead a new green and red lane system that would treat goods going to Northern Ireland differently depending on whether they would be staying within the UK or going on to the EU from Northern Ireland.

Clause 4(1) would disapply the first and second sub-paragraphs of article 5(1) and article 5(2) of the Northern Ireland Protocol from domestic law (in other words, it would make them ‘excluded provision’). These provisions of the protocol mean that currently, goods moving from Great Britain to Northern Ireland have to pay customs duties if they are classed as being ‘at risk’ of subsequently moving into the EU.<sup>86</sup> Article 5(2) of the

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<sup>84</sup> [Explanatory notes](#), p 8.

<sup>85</sup> Foreign, Commonwealth and Development Office, [‘Northern Ireland Protocol: The UK’s solution’](#), 13 June 2022.

<sup>86</sup> Some goods that might otherwise be charged ‘at risk’ tariffs may be eligible for a waiver (HM Revenue and Customs, [‘Claim a waiver for duty on goods that you bring to Northern Ireland from Great Britain or countries outside the UK and EU’](#), 28 March 2022).

protocol provides that goods arriving in Northern Ireland from outside the EU are classed as being 'at risk' of entering the EU unless they:

- will not be subject to commercial processing in Northern Ireland
- fulfil the criteria set by the Joint Committee. The Joint Committee agreed in December 2020 that where the EU tariff is zero, goods will not be considered 'at risk'. Goods moved by an authorised firm registered with the government's UK trader scheme would also not be considered 'at risk'. All goods subject to the EU's trade defence measures are considered to be 'at risk'.<sup>87</sup>

The explanatory notes to the bill state that the 'at risk' test will be "replaced by an alternative model, where, for example, whether a good enters the 'red' or 'green' channel will determine its customs and tariff treatment".<sup>88</sup>

Clause 4(2) would disapply article 5(3), article 5(4) and annex 2 of the Northern Ireland Protocol from domestic law (in other words, make them 'excluded provision') for 'qualifying movements' of UK or non-EU destined goods.

Article 5(3) of the protocol applies EU customs law to Northern Ireland. Article 5(4) and annex 2 of the protocol apply the EU's single market rules for goods to Northern Ireland.

'Qualifying movements' are defined in clause 4(6). They would include:

- movements to Northern Ireland from anywhere outside the EU, including Great Britain
- movements from Northern Ireland from anywhere outside the EU, including Great Britain

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<sup>87</sup> See House of Commons Library, '[Joint Committee decisions on the Northern Ireland Protocol](#)', 23 December 2020, section 3.3 for further information about the Joint Committee decision on 'at risk' goods.

<sup>88</sup> [Explanatory notes](#), p 9.



- movements within the UK

The explanatory notes state that the effect of clause 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.<sup>89</sup>

Clauses 4(3) to 4(5) contain regulation-making powers to allow ministers to make further provisions about the types of movements that, as a matter of domestic law, would no longer be subject to EU customs and goods regulations. Clause 4(3) would give ministers the power to make regulations applying clause 4(2) to “prescribed descriptions of qualifying movements of UK or non-EU destined goods”. Clause 4(4) lists areas that could be covered by these ‘prescribed descriptions’, for instance: the purpose for which goods are being moved, the manner in which they are being moved, the ultimate destination of the goods or the nature of the goods. Clause 4(5) would allow ministers to make regulations about the meaning of “UK or non-EU destined”.

The government’s proposals for a new green and red channel system are not set out on the face of the bill. It has said that clause 4, along with clauses 5 and 6, “provides the basis for the government to administer a regime which provides different channels and requirements for goods depending on their destination”.<sup>90</sup> For instance, the government states in the explanatory notes that regulations made under clause 4(3) could set out which qualifying movements could benefit from arrangements such as a green channel.<sup>91</sup> Additionally, the power in clause 4(5) to make provision about the meaning of “UK or non-EU destined” would “enable a more refined definition such that it encompasses certain goods (such as those that would be eligible for the ‘green channel’) only if they meet certain conditions”. The explanatory notes say that an example of this could be, for instance, goods that are

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<sup>89</sup> [Explanatory notes](#), p 9.

<sup>90</sup> Foreign, Commonwealth and Development Office, ‘[Delegated powers memorandum: Northern Ireland Protocol Bill](#)’, June 2022, p 14.

<sup>91</sup> [Explanatory notes](#), p 9.

declared in accordance with a prescribed trusted trader scheme.

Clauses 5 and 6 provide further regulation-making powers which the government has said are intended to give the “flexibility to provide for alternative regimes” to replace the ‘excluded provision’ of the Northern Ireland Protocol.<sup>92</sup> Clause 5 would allow ministers to “make any provision which the minister considers appropriate in connection with any provision of the Northern Ireland Protocol to which section 4 relates”. Clause 5(3) specifies that in particular this could include:

- providing for checks, controls and administrative processes
- restricting or prohibiting the movement of UK or non-EU destined goods into the EU
- setting out how goods should be treated if they cease to be, or become, UK or non-EU destined goods

Clause 5(2) would prevent the clause 5 regulation-making power from being used to make provision about customs matters. Instead, this would be covered by the regulation-making power in clause 6, which would enable HMRC or the Treasury to make “any provision about customs matters which they consider appropriate in connection with the Northern Ireland Protocol”. Clause 6(2) specifies that this could include:

- imposing or varying customs duties
- providing for checks, controls and administrative processes
- restricting or prohibiting the movement of UK or non-EU destined goods into the EU
- setting out how goods should be treated if they cease to be, or become, UK or non-EU destined goods

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<sup>92</sup> Foreign, Commonwealth and Development Office, [‘Delegated powers memorandum: Northern Ireland Protocol Bill’](#), June 2022, pp 18 and 19.

## Regulation of goods (clauses 7 to 11)

Clauses 7 to 11 would enable a dual regulatory regime for goods to be established in Northern Ireland.

The government has argued that the protocol requirement for goods in Northern Ireland to comply with EU single market rules for goods is causing problems:

Regulated goods need to comply with EU rules to be placed on the market in Northern Ireland, even when they will never enter the EU single market.

These rules create significant burdens for businesses, especially those trading exclusively within the UK: they require firms to complete new paperwork and processes, or comply with specific product requirements—risking entire product lines being withdrawn or discontinued as EU regulations change.

[...] There is no mechanism to adapt or tailor goods rules for the Northern Ireland context—relying solely on unilateral EU changes, regardless of their impact on UK internal trade.<sup>93</sup>

Currently, goods that meet only UK requirements and not the applicable EU requirements cannot be placed on the market in Northern Ireland.<sup>94</sup>

Instead of the application of EU rules to all regulated goods in Northern Ireland, the government is proposing there should be a dual regulatory regime.<sup>95</sup> Under this system, it proposes that goods could be placed on the

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<sup>93</sup> Foreign, Commonwealth and Development Office, '[Northern Ireland Protocol: The UK's solution](#)', 13 June 2022.

<sup>94</sup> [Explanatory notes](#), p 10.

<sup>95</sup> Foreign, Commonwealth and Development Office, '[Northern Ireland Protocol: The UK's solution](#)', 13 June 2022.

market in Northern Ireland if they met UK rules, EU rules or both. Goods to be placed on the market in the EU would still have to comply with all relevant EU standards. The government says that “unfettered access” for Northern Ireland goods to the rest of the UK internal market would continue, whichever regulatory regime Northern Ireland businesses chose to comply with.<sup>96</sup>

The government has stated that its proposals would include “a robust set of safeguards” to protect the EU single market and prevent UK goods moving on to the EU market:<sup>97</sup>

- Businesses would remain liable for placing goods on the market in accordance with the correct rules and “stringent penalties” would apply for traders found not to have done so.
- Agrifood goods could move from Great Britain to Northern Ireland only in line with the UK trusted trader scheme, with “robust penalties” for violations.
- Intensified activity by market surveillance authorities to enforce product safety and compliance, with cooperation between UK, Republic of Ireland and EU authorities.

Clause 7 would allow for “the option to choose compliance with a UK regulatory route or the EU regulatory route (or both) as respects regulated classes of goods”. Clause 7(3) specifies that if any provision of annex 2 to the protocol applies to a class of goods, that means it is a ‘regulated’ class of goods. Clause 7(1) makes explicit that this includes manufactured goods, medicines and agri-food. Clause 7(2) specifies that for a regulated class of good in Northern Ireland, a UK regulatory route or the EU regulator route or both must be complied with. It further provides that “it is for the person complying to choose which regulatory route or routes” to comply with.

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<sup>96</sup> Foreign, Commonwealth and Development Office, [‘Northern Ireland Protocol: The UK’s solution’](#), 13 June 2022.

<sup>97</sup> Foreign, Commonwealth and Development Office, [‘Northern Ireland Protocol: The UK’s solution’](#), 13 June 2022.

The routes are defined in clause 7(4). The ‘UK regulatory route’ means domestic law that applies to regulation of that class of goods. The ‘EU regulatory route’ means ‘relevant separation agreement law’ that applies to regulation of that class of goods. The explanatory notes point out that this “includes any domestic law giving effect to the relevant EU law listed in annex 2 of the Northern Ireland Protocol”, both “those that apply directly [and] relevant domestic law further implementing particular aspects of EU law”.<sup>98</sup>

Clause 8 would make article 5(4) and annex 2 of the protocol ‘excluded provision’ to the extent that they would prevent clause 7 from having effect.

Clauses 9 to 11 all contain regulation making powers. Clause 9 would allow ministers to “make any provision about regulation of goods which the minister considers appropriate in connection with the Northern Ireland Protocol”. Clause 9(2) specifies that, in particular, such regulations could:

- make any provision which the minister “considers appropriate in connection with a UK regulatory route being available”
- amend clauses 7 or 8

The government argues this power is needed to set out further details on the dual regulatory regime and to allow future changes to be made:

[...] it is not possible on the face of the bill to set out all the different requirements that are engaged under the regulatory routes; nor is it possible to set out the exact options and regulatory routes for each type of good regulated under the dual regulatory regime in Northern Ireland. Therefore a power is needed to make clear what requirements need to be complied with if the UK regulatory route is chosen in respect of the NI market, so that there is clarity for businesses on how the regulatory routes apply in practice. This will need to reflect the results of consultation with businesses, and will need to be able to

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<sup>98</sup> [Explanatory notes](#), pp 10–11.

change over time to reflect how UK and EU regulatory regimes evolve.<sup>99</sup>

Clause 10 defines what is meant by “regulation of goods” in the bill. This includes specifying that “making goods available on the market or putting goods into service” may also include manufacturing or other means of producing goods. Clause 10(4) would give ministers a regulation-making power to make provision about the meaning of references in the bill to the regulation of goods, including changing the effect of other provisions in this clause. The government has said this power is needed so it can “ensure that the sale of goods made to UK rules in Northern Ireland is not prohibited due to a particular aspect of regulation falling outside the meaning of ‘regulation of goods’ in clause 7”.<sup>100</sup>

Clause 11 would give ministers the power to make regulations to:

- apply clause 7 to particular regulated classes of goods or particular regulatory routes
- create exceptions to the application of clause 7
- modify the effect of clause 7(2)—the ability to choose between regulatory routes—for a regulated class of goods

The operation of this power was questioned at the bill’s committee stage in the House of Commons. Michael Ellis, the then paymaster general, explained this power would “allow a minister to prescribe a single regulatory route for specific sectors, including a UK-only route with no application of EU law, for example”. He said the government considered this “vital in ensuring that the dual regulatory regime can be tailored to the needs of industry and ensure the smooth running of the new regime for all sectors”.<sup>101</sup> Hilary Benn (Labour MP for Leeds Central) questioned whether this conflicted with what Mr Ellis had said previously about businesses having a choice over whether

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<sup>99</sup> Foreign, Commonwealth and Development Office, [‘Delegated powers memorandum: Northern Ireland Protocol Bill’](#), June 2022, pp 22–3.

<sup>100</sup> [HC Hansard, 19 July 2022, col 879.](#)

<sup>101</sup> [HC Hansard, 19 July 2022, col 879.](#)

to comply with UK or EU rules. He suggested clause 11 would mean businesses would have “a free choice unless the government decide that it is not a free choice”.<sup>102</sup> In response, Mr Ellis denied this, maintaining that “businesses will not be obliged to follow any particular route”.<sup>103</sup>

Elsewhere, the government has suggested the ability to require businesses to follow only certain regulatory routes, such as a UK-only regime, was “necessary to reflect the complexities and nuances of highly regulated goods and the results of consultation with industry”.<sup>104</sup>

## **State aid and subsidy control (clause 12)**

Clause 12 would end, as a matter of domestic law, the application of EU state aid rules to Northern Ireland. It would make article 10 and annexes 5 and 6 of the Northern Ireland Protocol ‘excluded provision’.

Under article 10(1) of the protocol, EU state aid rules continue to apply to the UK “in respect of measures which affect that trade between Northern Ireland and the [European] Union which is subject to this protocol”. Annex 5 lists the specific EU law state aid provisions that this covers. These provisions of the protocol apply in domestic law through section 7A of EUWA. However, article 10(2) states that these provisions do not apply to agricultural subsidies in Northern Ireland up to a determined maximum amount each year, provided that a determined percentage complies with certain WTO rules. Annex 6 of the protocol sets out the procedures for agreeing on the determined amounts in the Joint Committee.

The EU defines state aid as “an advantage in any form whatsoever conferred by national public authorities to undertakings on a selective basis”.<sup>105</sup> Types of measures covered by this include grants, interest and tax reliefs,

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<sup>102</sup> [HC Hansard, 19 July 2022, col 880.](#)

<sup>103</sup> [HC Hansard, 19 July 2022, col 880.](#)

<sup>104</sup> Foreign, Commonwealth and Development Office, ‘[Delegated powers memorandum: Northern Ireland Protocol Bill](#)’, June 2022, pp 22–3.

<sup>105</sup> European Commission, ‘[State aid overview](#)’, accessed 11 July 2022.

guarantees, government holdings of all or part of a company, or providing goods and services on preferential terms. Conferring an advantage “on a selective basis” could mean for example to specific companies or industry sectors, or to companies located in specific regions.

Article 107 of the Treaty on the Functioning of the European Union generally prohibits state aid unless it is exceptionally justified. If an EU member state is contemplating a measure which could qualify as state aid, it must notify the European Commission and wait for approval before it can put the measure into effect. However, there are some exceptions to the mandatory notification requirement, if aid is covered by a block exemption, if it does not exceed €200,000 per undertaking over three fiscal years, or if it is granted under a scheme already approved by the European Commission.<sup>106</sup>

Initially, the government said that state aid provisions in the protocol would apply only narrowly because the protocol “is limited in scope to the movement of goods and wholesale electricity markets”.<sup>107</sup> However, it later acknowledged that the state aid provisions of the protocol could be interpreted more broadly.<sup>108</sup>

The House of Lords European Union Committee noted in its report on the protocol, published in June 2020, that its expert witnesses believed the scope of the protocol’s provisions on state aid could be broadly interpreted, such that a UK state aid provision applying to the UK in general could potentially be subject to EU intervention and judicial review.<sup>109</sup> The committee concluded “the only way for the UK to avoid EU intervention in its state aid decisions would be to ensure that its independent state aid policy does not allow for the level of support available to industry to exceed that available under the EU regime”.

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<sup>106</sup> European Commission, ‘[Competition: State aid procedures](#)’, July 2013.

<sup>107</sup> Cabinet Office, ‘[The UK’s approach to the Northern Ireland Protocol](#)’, May 2020, CP 226, p 15.

<sup>108</sup> [HC Hansard, 21 September 2020, col 652.](#)

<sup>109</sup> House of Lords European Union Committee, ‘[The Protocol on Ireland/Northern Ireland](#)’, 1 June 2020, HL Paper 66 of session 2019–21, p 51.



The government sought to address the issue of EU ‘reach-back’ through the United Kingdom Internal Market Bill. As introduced in the House of Lords in September 2020, the bill contained a clause—clause 45—through which the government sought to give itself the power to unilaterally determine the interpretation of article 10 of the protocol. Brandon Lewis, the then secretary of state for Northern Ireland, acknowledged that the powers in some clauses in part 5 of the bill, including clause 45, would “break international law in a very specific and limited way”.<sup>110</sup> The House of Lords removed part 5 of the bill, including clause 45, at committee stage. The government initially sought to reinstate the controversial clauses when the bill returned to the House of Commons. However, following progress in discussions with the European Commission in the Joint Committee, the government later agreed to the removal of these provisions from what became the United Kingdom Internal Market Act 2020.

One of the areas of progress in the Joint Committee related to state aid. Following the discussions in the Joint Committee, the European Commission issued a unilateral declaration on state aid in December 2020. This said that when applying state aid rules under the protocol, the European Commission would have “due regard to Northern Ireland’s integral place in the United Kingdom’s internal market”.<sup>111</sup> It also said that any effect on trade between Northern Ireland and the EU covered by the protocol could not be “merely hypothetical, presumed, or without a genuine and direct link to Northern Ireland”. However, legal commentators have suggested this unilateral declaration might not assist the government much in practice in preventing ‘reach back’.<sup>112</sup>

The government argues the continued application of EU state aid rules under the protocol creates “significant uncertainty and a two-tiered system

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<sup>110</sup> [HC Hansard, 8 September 2020, col 509.](#)

<sup>111</sup> HM Government, ‘[Unilateral Declarations by the European Union and the United Kingdom of Great Britain and Northern Ireland in the Withdrawal Agreement Joint Committee on Article 10\(1\) of the Protocol](#)’, 17 December 2020, p 2.

<sup>112</sup> See section 4.6 of House of Commons Library, ‘[Joint committee decisions on the Northern Ireland Protocol](#)’, 23 December 2020.

in the UK”.<sup>113</sup> It says this limits the level of support that may be granted in Northern Ireland, or who is eligible to receive it, without approval from the EU. For instance, under the Covid recovery loan scheme, the government made available support of up to £2mn per business group, but only up to £1mn for business groups in scope of the Northern Ireland Protocol.<sup>114</sup>

The government argues the situation has changed since the protocol was agreed in 2020. Its view is that the commitments in the UK-EU Trade and Cooperation Agreement (TCA) and the Subsidy Control Act 2022 “provide a more than sufficient basis to guarantee that there will be no significant distortion to goods trade between the UK and the EU, whether from Great Britain or Northern Ireland”.<sup>115</sup>

The government states in the explanatory notes to the bill that clause 12 would provide “the basis for a single UK-wide subsidy control policy, rather than two separate regimes as currently provided for under the Northern Ireland Protocol”.<sup>116</sup> Clause 12(1) of the bill seeks to exclude article 10 and annexes 5 and 6 to the protocol from applying in domestic law in future. Clause 12(2) would amend the Subsidy Control Act to:

- remove the provision that now excludes subsidies covered by the protocol from the scope of UK subsidy control requirements
- change the way that ‘minimal financial assistance’ and ‘services of public economic interest’ are calculated to take account of the fact that article 10 of the protocol would no longer apply

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<sup>113</sup> Foreign, Commonwealth and Development Office, ‘[Northern Ireland Protocol: The UK’s solution](#)’, 13 June 2022.

<sup>114</sup> HM Treasury and Department for Business, Energy and Industrial Strategy, ‘[Guidance: Recovery loan scheme](#)’, 3 March 2021, updated 31 August 2022.

<sup>115</sup> HM Government, ‘[Northern Ireland Protocol: The way forward](#)’, July 2021, CP 502, p 20. Further information about the UK’s new subsidy control regime is available in: Department for Business, Energy and Industrial Strategy, ‘[Draft statutory guidance on the United Kingdom subsidy control regime](#)’, July 2022 and House of Lords Library, ‘[Subsidy Control Bill](#)’, 13 January 2022. Further information about the TCA and subsidy control is available in: House of Commons Library, ‘[The UK-EU Trade and Cooperation Agreement: Level playing field](#)’, 20 May 2021.

<sup>116</sup> [Explanatory notes](#), p 12.

Clause 12(3) would give ministers the power to make regulations to make any provision they consider “appropriate in connection with any provision of the Northern Ireland Protocol to which this section relates”. The government has stated that this power is to “take account of any possible future developments in this policy area” and could, for example”, be used for “adjusting other elements of the domestic statute book as required to reflect the changes made in the bill”.<sup>117</sup>

### **Implementation, application, supervision and enforcement of the protocol: Role of European Court and other EU bodies (clause 13)**

Clause 13 seeks to change the role of the Court of Justice of the European Union (CJEU) and other EU bodies over the implementation, application, supervision and enforcement of the protocol.

Article 12(4) of the protocol gives the “institutions, bodies, offices and agencies” of the EU the same powers in the UK that they have in the EU in relation to:

- article 5 of the protocol (customs and movement of goods)
- articles 7 to 10 of the protocol (regulation of goods; VAT and excise; the single electricity market; state aid)
- article 12(2) of the protocol (sharing information on customs duties applicable to goods arriving in Northern Ireland and on goods considered ‘at risk’ of moving from Northern Ireland into the EU single market)

Article 12(4) states that in particular, in relation to these provisions of the protocol, the CJEU has the jurisdiction provided for in the EU Treaties. It provides that article 267 of the Treaty on the Functioning of the European Union (TFEU) applies to the UK in relation to these provisions, meaning that although the UK is not an EU member state, UK courts can (and in

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<sup>117</sup> Foreign, Commonwealth and Development Office, [‘Delegated powers memorandum: Northern Ireland Protocol Bill’](#), June 2022, p 28.

some cases must) refer questions about the interpretation of EU law in scope of the protocol to the CJEU for a preliminary ruling. The House of Lords European Union Committee concluded in 2020 that the effect of article 12 was that:

Northern Ireland’s compliance with EU rules in relation to customs and movement of goods, technical regulations, VAT and excise, the single electricity market and state aid will be policed and enforced by the European Commission, the EU’s executive agencies and the CJEU, including the possibility of infringement proceedings and the imposition of fines for state liability. Save for the UK’s right to participate in Northern Ireland-based CJEU proceedings, this enforcement will take place without the additional privileges inherent in EU membership, such as membership of and full participation in the EU’s institutions and agencies.<sup>118</sup>

The government argues that this creates “unequal dispute structures” because “disputes under the protocol can be taken to, and settled by, the Court of Justice of the European Union—a court of one of the parties”.<sup>119</sup> It draws a contrast between these arrangements for the protocol and what it calls the “normal international processes” that apply to the rest of the withdrawal agreement and the TCA, where there is an arbitration process for the settlement of disputes.<sup>120</sup> It argues that “ordinary international dispute settlement—with more balanced arrangements that look to manage issues through dialogue, and then through independent arbitration” should also apply to the protocol.

Clause 13(1) seeks to end the CJEU’s jurisdiction over the protocol. It would make any provision of the protocol or the withdrawal agreement

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<sup>118</sup> House of Lords European Union Committee, [‘The Protocol on Ireland/Northern Ireland’](#), 1 June 2020, HL Paper 66 of session 2019–21, p 66.

<sup>119</sup> Foreign, Commonwealth and Development Office, [‘Northern Ireland Protocol: The UK’s solution’](#), 13 June 2022.

<sup>120</sup> For further information about dispute settlement in the Withdrawal Agreement and the TCA, see: House of Commons Library, [“The UK-EU Withdrawal Agreement: Dispute settlement and EU powers”](#), 2 October 2020 and [‘The UK-EU Trade and Cooperation Agreement: Governance and dispute settlement’](#), 3 August 2021.

‘excluded provision’ in so far as it confers jurisdiction on the CJEU in relation to the protocol or related provisions of the withdrawal agreement. The House of Commons Library has assessed that the impact of this would be as follows:

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 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 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 other parts of the withdrawal agreement that are unrelated to the protocol (for example part 2 on citizens’ rights).<sup>121</sup>

Clause 13(2) also specifically makes articles 12(2) and 12(3) of the protocol ‘excluded provision’. These paragraphs of the protocol give EU

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<sup>121</sup> House of Commons Library, [‘Northern Ireland Protocol Bill 2022–23’](#), 24 June 2022, pp 44–5.

representatives the right to be present while UK authorities carry out activities relating to implementing and applying EU law under the protocol and the provisions of article 5 relating to customs and the movement of goods. The UK is obliged to give the EU representatives all relevant information they request relating to these activities, and to facilitate their presence.

Clause 13 also creates a regulation-making power that would allow ministers to make any provision they consider “appropriate in connection with any provision of the Northern Ireland Protocol to which this section relates”. In particular, this could include provision about arrangements with the EU relating to supervision of the operation of the protocol or information-sharing arrangements. The government argues this power is needed because “simply making provisions of the Northern Ireland Protocol ‘excluded provision’ is not necessarily sufficient to create a coherent new domestic regime”.<sup>122</sup> The government says it is committed to providing for data-sharing and cooperation with the EU “as an integral part of providing assurance on the operation of the new regime, while recognising that arrangements within the United Kingdom should be a matter for the UK government”.

### **Provision of the protocol etc applying to other exclusions (clause 14)**

Clause 14 would make any provision of the protocol or the withdrawal agreement ‘excluded provision’ as far as they relate to another provision which is itself ‘excluded provision’. The explanatory notes state that the intention of clause 14 is to disapply “ancillary provisions” in the protocol and withdrawal agreement to the extent they relate to ‘excluded provision’.<sup>123</sup>

Clause 14(2) lists some specific provisions of the protocol and withdrawal

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<sup>122</sup> Foreign, Commonwealth and Development Office, [‘Delegated powers memorandum: Northern Ireland Protocol Bill’](#), June 2022, p 31.

<sup>123</sup> [Explanatory notes](#), p 13.

agreement covered by clause 14. It appears that this list is not intended to be exhaustive; the explanatory notes state that the list contains “examples of the ancillary provision that is covered by clause (1)”. The provisions listed in clause 14(2) are:

- Parts of article 12 of the protocol: This includes an obligation for the UK authorities to implement and apply the provisions of EU law made applicable by the protocol. It also includes a provision that EU legislation applicable under the protocol has the same legal effect in the UK as in EU member states.
- Article 13 of the protocol: This sets out common provisions for the protocol. This includes a requirement for protocol provisions that refer to EU law to be interpreted in conformity with relevant CJEU case law. Also, article 13(3) provides that any references within the protocol to EU law must be read as referring to EU law as amended or replaced. As the House of Lords European Union Committee noted in its 2020 report on the protocol, this “provides for Northern Ireland to remain subject to EU law in the annexes to the protocol on a dynamic basis, as they are amended or replaced”.<sup>124</sup> The government argues that this creates a ‘democratic deficit’, where “rules applying under the protocol [...] take effect automatically once passed by EU bodies—with no say for NI representatives and no means to adapt them for the NI context”.<sup>125</sup>
- Article 4 of the withdrawal agreement: This requires directly applicable provisions of the withdrawal agreement to have the same legal effect in the UK that they would in EU member states.
- Article 6 of the withdrawal agreement: This requires references to EU law in the withdrawal agreement (except in the parts of the withdrawal agreement that cover the transition period and financial provisions) to be read as references to EU law as it stood on the last day of the transition period.

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<sup>124</sup> House of Lords European Union Committee, [‘The Protocol on Ireland/Northern Ireland’](#), 1 June 2020, HL Paper 66 of session 2019–21, p 59.

<sup>125</sup> Foreign, Commonwealth and Development Office, [‘Northern Ireland Protocol: The UK’s solution’](#), 13 June 2022.

- Articles 170 to 181 of the withdrawal agreement: These provisions set out the arrangements for referring disputes under the withdrawal agreement to an independent arbitration panel for binding adjudication. The arrangements include allowing a party to impose temporary remedies if the other party fails to comply with the panel’s ruling. Such temporary remedies could include suspending obligations under the TCA.<sup>126</sup>
- Articles of the protocol so far as they apply in relation to annexes of the protocol that is ‘excluded provision’.

Clause 14 would mean that, as a matter of UK domestic law, none of these provisions would apply in relation to ‘excluded provision’. Clause 14(3) states that clause 14 would apply to the UK authorities’ responsibility to implement and apply provisions of EU law, and the requirement for provisions of the protocol and the withdrawal agreement to be interpreted and applied in accordance with EU and CJEU case law. In other words, those requirements would no longer apply, as a matter of UK domestic law, to provisions that had been made ‘excluded provision’.

Clause 14(4) contains a regulation-making power to make any provision that ministers consider “appropriate in connection with any provision of the Northern Ireland Protocol and other parts of the EU withdrawal agreement to which this section relates”. The government has stated this power is needed to account for the fact that “further steps to ensure legal certainty for courts and tribunals” may be necessary “beyond the provisions included on the face of the bill and to adapt to changing circumstances”.<sup>127</sup>

## **Changes and exceptions to ‘excluded provision’ (clauses 15 and 16)**

Clause 15 would give ministers the power to make regulations to change

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<sup>126</sup> See House of Commons Library, “[The UK-EU Withdrawal Agreement: Dispute settlement and EU powers](#)”, 2 October 2020 and “[The UK-EU Trade and Cooperation Agreement: Governance and dispute settlement](#)”, 3 August 2021, p 40 for more about the withdrawal agreement dispute resolution process and the link to suspension of obligations under the TCA.

<sup>127</sup> Foreign, Commonwealth and Development Office, “[Delegated powers memorandum: Northern Ireland Protocol Bill](#)”, June 2022, p 33.



what provisions of the protocol or the withdrawal agreement are ‘excluded provision’. Under clause 15(2) they could:

- make a provision wholly or partly ‘excluded provision’
- increase or decrease the extent to which a provision is ‘excluded provision’
- provide that a provision is no longer ‘excluded provision’

The threshold for using the power would be that a minister considered it “necessary to do so for or in connection with, one or more of the permitted purposes” set out in clause 15(1). These permitted purposes are:

- safeguarding social or economic stability in Northern Ireland
- ensuring the effective flow of trade between Northern Ireland and another part of the UK, or between a part of the UK and anywhere outside the UK
- safeguarding the territorial or constitutional integrity of the UK
- safeguarding the functioning of the Belfast (Good Friday) Agreement
- safeguarding animal, plant or human welfare or health
- safeguarding biosecurity or the environment
- safeguarding the integrity of the EU single market
- lessening, eliminating or avoiding differences between tax or customs duties in Northern Ireland and Great Britain
- complying with or giving effect to any international obligation or agreement the UK is party to, except the Northern Ireland Protocol or the withdrawal agreement or any obligations under them.

However, clause 15(3) specifies that the power could not be used to disapply the effect in domestic law of three articles of the protocol, namely:

- article 2—rights of individuals

- article 3—common travel area
- article 11—other areas of North-South cooperation

The government has stated its view that “there are elements of the protocol which are operating well and should be preserved”, including the common travel area and North–South cooperation.<sup>128</sup>

An attempt to add article 18 of the protocol, which sets out a democratic consent mechanism for the Northern Ireland Assembly to vote on the continued application of parts of the protocol, to this list was defeated at committee stage in the House of Commons—see [section 5.2 of this briefing](#).

Additionally, clause 15(4) would allow ministers to make regulations to provide for exceptions from any exclusion. The government has stated that there may be “some overlap” between this power and the power in clause 15(2) that “on some occasions it may be more appropriate to express something as an exception rather than cut down the scope of the exclusion”.<sup>129</sup>

The government has argued that the power in clause 15(2) is necessary because the scope of what is ‘excluded provision’ may need to change after the bill has received royal assent.<sup>130</sup>

The House of Lords Delegated Powers and Regulatory Reform Committee said clause 15 “in essence allows ministers to rip up and rewrite an act of parliament”.<sup>131</sup> It argued that “particularly in the context of the UK’s international obligations, it seems wholly inappropriate for this to be done

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<sup>128</sup> Foreign, Commonwealth and Development Office, [‘Northern Ireland Protocol: The UK’s solution’](#), 13 June 2022.

<sup>129</sup> Foreign, Commonwealth and Development Office, [‘Delegated powers memorandum: Northern Ireland Protocol Bill’](#), June 2022, p 37.

<sup>130</sup> Foreign, Commonwealth and Development Office, [‘Delegated powers memorandum: Northern Ireland Protocol Bill’](#), June 2022, p 36.

<sup>131</sup> House of Lords Delegated Powers and Regulatory Reform Committee, [‘Northern Ireland Protocol Bill’](#), 7 July 2022, HL Paper 40 of session 2022–23, p 9.

by means of subordinate legislation, particularly where that legislation is capable in certain circumstances of only requiring the negative procedure”.<sup>132</sup> It recommended clause 15(2) should be removed from the bill.

Clause 16 contains a further regulation-making power that follows on from clause 15. If ministers have used the power in clause 15(2) to make a provision (in whole or in part) ‘excluded provision’, clause 16 would enable them to make regulations to make any provision they considered “appropriate” in connection with the new ‘excluded provision’. Clause 16(2) states that this power is not limited by any other powers in the bill.

The government argues this cross-cutting power is necessary because it is possible that the powers in other clauses (eg clauses 5 and 6) to make regulations in connection with provisions of the protocol becoming ‘excluded provision’ “do not cover all possible permutations of what might be made ‘excluded provision’ in future”.<sup>133</sup> It acknowledges that the power could be used to make both “minor and technical” changes, for instance if the power in clause 15(2) were used to make a technical piece of EU delegated legislation ‘excluded provision’, and “more substantive” changes, including changes to primary legislation.<sup>134</sup>

## **VAT and excise duties (clause 17)**

Clause 17 would give the Treasury powers to make new law about VAT, excise duties and other taxes. It creates a regulation-making power that the Treasury could use when it considered it “appropriate in connection with the Northern Ireland Protocol”. The power could be used to impose or vary the incidence of VAT, excise duties and other taxes. Clause 15(2) specifies that “in particular”, the regulations could make any provision the

<sup>132</sup> House of Lords Delegated Powers and Regulatory Reform Committee, ‘[Northern Ireland Protocol Bill](#)’, 7 July 2022, HL Paper 40 of session 2022–23, p 10.

<sup>133</sup> Foreign, Commonwealth and Development Office, ‘[Delegated powers memorandum: Northern Ireland Protocol Bill](#)’, June 2022, p 39.

<sup>134</sup> Foreign, Commonwealth and Development Office, ‘[Delegated powers memorandum: Northern Ireland Protocol Bill](#)’, June 2022, p 40.

Treasury considered appropriate to lessen, eliminate or avoid differences between Northern Ireland and Great Britain in terms of VAT, excise duty and other taxes.

The government states in the explanatory notes that this would give ministers the ability to apply VAT, excise and tax policy “throughout the entirety of the UK where appropriate, including Northern Ireland”, where “that might not otherwise be permitted in Northern Ireland under the Northern Ireland Protocol”.<sup>135</sup>

The government has argued the protocol “restricts the UK from providing the same tax and spend policies in NI as the rest of the UK—with little room for flexibility”.<sup>136</sup> Although Northern Ireland is part of the UK’s VAT and excise territory, article 8 and annex 3 of the protocol continue to apply EU rules on VAT and excise to Northern Ireland in relation to goods. The government has said this has prevented people in Northern Ireland benefiting from its reliefs on energy-saving materials and new alcohol duty structures.<sup>137</sup>

### **Other ministerial powers (clause 18)**

Clause 18 provides that ministers may “engage in conduct in relation to any matter dealt with in the Northern Ireland Protocol (where that conduct is not otherwise authorised by this act)”. The minister could do so if they considered it “appropriate to do so in connection with one or more of the purposes of this act”.

Clause 18 is not covered in the bill’s delegated powers memorandum, which deals with the bill provisions that confer powers to make delegated legislation. The House of Lords Delegated Powers and Regulatory Reform

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<sup>135</sup> [Explanatory notes](#), p 14.

<sup>136</sup> Foreign, Commonwealth and Development Office, [‘Northern Ireland Protocol: The UK’s solution’](#), 13 June 2022.

<sup>137</sup> Foreign, Commonwealth and Development Office, [‘Northern Ireland Protocol: The UK’s solution’](#), 13 June 2022.

Committee inferred from its absence that “the government do not regard clause 18 as containing a delegation of legislative power (that is a power to make law of general application”.<sup>138</sup>

In the explanatory notes, the government stated that “conduct” means “sub-legislative activity, such as producing guidance”.<sup>139</sup> The Delegated Powers and Regulatory Reform Committee regarded this as “vague”. It noted there is no definition of “conduct” in the bill itself, and nothing on the face of the bill to prevent clause 18 from creating legally binding rules of general application.<sup>140</sup> It recommended the power be removed from the bill. An amendment seeking to do that was defeated at committee stage in the House of Commons. This is covered further in [section 5.2 of this briefing](#).

## **New agreements amending or replacing the Northern Ireland Protocol (clause 19)**

Clause 19 would give ministers the power to make regulations to implement an agreement made between the UK and the EU to replace or amend the Northern Ireland Protocol. The power could also be used to deal with matters arising from such an agreement.

As the UK is a dualist state, international treaties do not automatically become part of domestic law. Domestic legislation may be needed to implement the relevant treaty provisions into domestic law. Clause 19 would allow ministers to do this via secondary legislation. If an agreement between the EU and the UK to amend or replace the protocol were a substantive treaty, it would also be subject to the treaty scrutiny process laid out in the Constitutional Reform and Governance Act 2010.<sup>141</sup> The

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<sup>138</sup> House of Lords Delegated Powers and Regulatory Reform Committee, ‘[Northern Ireland Protocol Bill](#)’, 7 July 2022, HL Paper 40 of session 2022–23, p 11.

<sup>139</sup> [Explanatory notes](#), p 14.

<sup>140</sup> House of Lords Delegated Powers and Regulatory Reform Committee, ‘[Northern Ireland Protocol Bill](#)’, 7 July 2022, HL Paper 40 of session 2022–23, p 11.

<sup>141</sup> See House of Lords Library, ‘[Ratifying a deal with the EU: Role of the House of Lords](#)’, 22 December 2020 for further information about the treaty ratification process and the House of Lords’ role in it.

government has stated that the power in clause 19 does not affect Parliament's ratification process.<sup>142</sup>

The government has stated this power is included in the bill to reflect that its preference “remains a negotiated solution with the EU”. It said if a negotiated settlement could be reached that achieved the same objectives as the bill, clause 19 would give ministers the powers to implement it without having to pass an entirely new piece of primary legislation “given the urgency” of resolving the issues faced in Northern Ireland.<sup>143</sup>

## European Court (clause 20)

Clause 20 makes further provision connected with the CJEU. Both the withdrawal agreement and the Northern Ireland Protocol contain obligations that relate to CJEU case law and referring matters to the CJEU:

- Article 4(3) of the withdrawal agreement requires that provisions of the withdrawal agreement that refer to EU law shall be interpreted and applied in accordance with the methods and general principles of EU law. The general principles of EU law have been developed through the case law of the CJEU.<sup>144</sup>
- Article 4(4) of the withdrawal agreement requires that provisions of the withdrawal agreement that refer to EU law shall be interpreted in conformity with relevant CJEU case law handed down before the end of the transition period.
- Article 4(5) of the withdrawal agreement requires UK authorities to have “due regard” to relevant CJEU case law handed down after the end of the transition period in interpreting and applying the withdrawal agreement.

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<sup>142</sup> Foreign, Commonwealth and Development Office, '[Delegated powers memorandum: Northern Ireland Protocol Bill](#)', June 2022, p 42.

<sup>143</sup> Foreign, Commonwealth and Development Office, '[Delegated powers memorandum: Northern Ireland Protocol Bill](#)', June 2022, p 42.

<sup>144</sup> EUR-Lex, '[The non-written sources of European law: supplementary law](#)', 12 March 2018.

- Article 12(4) of the protocol specifies that the CJEU has the jurisdiction provided for in the EU Treaties over articles 5, 7 to 10 and 12(2) of the protocol. It also specifies that article 267 of the TFEU applies to the UK in relation to these provisions. Under article 267, domestic courts can request a preliminary ruling from the CJEU on questions about the interpretation of EU law, and domestic courts of last instance must refer questions about the interpretation of EU law to the CJEU.

However, clause 20 would provide that, as a matter of domestic law, UK courts and tribunals would not be bound by CJEU case law so far as it related to:

- the protocol
- protocol-related provision of the withdrawal agreement
- domestic law related to either of the above

It would also provide that, as a matter of domestic law, UK courts could not refer cases about the protocol or protocol-related provisions of the withdrawal agreement to the CJEU.

Clause 20(3) would give ministers a regulation-making power to make any provision they considered “appropriate” in connection with this. Clause 20(4) specifies that, in particular, such regulations could create a procedure under which the domestic courts could refer a question of interpretation of EU law to the CJEU if the court considered it “necessary” for the CJEU to deal with the question before the domestic court could conclude its proceedings. The government has stated that this power would give ministers “flexibility to deal with issues that may arise as the provisions of clause 20(2) are operated in practice and to provide certainty to the courts”.<sup>145</sup>

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<sup>145</sup> Foreign, Commonwealth and Development Office, [‘Delegated powers memorandum: Northern Ireland Protocol Bill’](#), June 2022, p 44.

## Final provisions (clauses 21 to 26)

Clause 21 would authorise preparatory expenditure by ministers, government departments and the devolved authorities on matters the bill would permit them to make regulations about before they had made the regulations.

Clauses 22 to 24 set out cross-cutting provisions governing the use of the bill's regulation-making powers. These clauses are covered in [section 4.2 of this briefing on delegated powers](#).

Clause 25 sets out definitions of certain terms used in the bill, including the term 'excluded provision'.

Clause 26 sets out the bill's extent, commencement and short title. The bill would extend to England and Wales, Scotland and Northern Ireland. Clauses 21 to 26 would come into force on the day on which the bill was passed; the other provisions would come into force on a date(s) to be appointed by ministers.

## 4.2 Delegated powers

The bill contains numerous delegated powers to make regulations. Many of these are widely drawn, enabling the making of "any provision which the minister considers appropriate in connection with" various aspects of the bill. Clauses 22 to 24 also set out cross-cutting provisions governing the scope of the bill's delegated powers and the applicable parliamentary procedure. The House of Lords Delegated Powers and Regulatory Reform Committee concluded that many of the bill's powers are inappropriately delegated and should be removed from the bill. Both it and the Hansard Society have criticised the government's general approach to delegated powers in the bill, but the government has argued it is justified.



## Scope

Clause 22(1) specifies that regulations made using the powers in the bill could make any provision that could be made by an act of parliament, including modifying the bill itself once it had become an act of parliament. The explanatory notes also state that the bill's powers could be used to make retrospective provision.<sup>146</sup>

The House of Lords Delegated Powers and Regulatory Reform Committee has described this provision as turning every power in the bill into “what might be called a super Henry VIII power”:<sup>147</sup>

Ordinary Henry VIII powers allow ministers to amend acts of Parliament. In some contexts Henry VIII powers allow ministers to make minor and consequential amendments to a narrow and technical area of law. That is not the case here. Every power in the bill allows ministers to make any provision that could be made by an act of parliament, including modifying by regulations the bill once enacted.<sup>148</sup>

Clause 22(2) specifies that, in particular, regulations under the bill could:

- make provision that was not compatible with the Northern Ireland Protocol or the withdrawal agreement
- suspend, repeal or replace domestic law that gives effect to the protocol or the withdrawal agreement
- change the extent to which any EU law has effect in domestic law, for example by effectively making it part of retained EU law or by modifying the operation of the ‘conduit pipe’ of section 7A of EUWA 2018 that brings applicable provisions of EU law into

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<sup>146</sup> [Explanatory notes](#), p 15.

<sup>147</sup> House of Lords Delegated Powers and Regulatory Reform Committee, ‘[Northern Ireland Protocol Bill](#)’, 7 July 2022, HL Paper 40 of session 2022–23, p 2.

<sup>148</sup> House of Lords Delegated Powers and Regulatory Reform Committee, ‘[Northern Ireland Protocol Bill](#)’, 7 July 2022, HL Paper 40 of session 2022–23, p 2.

## domestic law

Clause 22(3) would place a restriction on the use of the bill's powers: they could not be used to create or facilitate either physical infrastructure (including border posts) or checks and controls at the border between Northern Ireland and the Republic of Ireland that did not exist before exit day.

Clause 22(5) would prevent any regulations made under the bill from being treated as a hybrid instrument. Usually, an instrument is hybrid if it affects some members of a group, be they individuals or bodies, more than others.<sup>149</sup> Hybrid instruments are subject to a special parliamentary procedure which gives those who are negatively affected by them the chance to present their arguments against the instrument.

Clause 22(6) would allow ministers of the crown to delegate their regulation-making powers under the bill to a devolved authority (Scottish ministers, Welsh ministers or a Northern Ireland department) or to exercise the power jointly or concurrently with a devolved authority. They could also use the power in this clause to provide for the scrutiny of regulations made by a devolved authority.

## Parliamentary procedure

Clause 23 sets out the parliamentary procedure that would apply to regulations made under most of the powers in the bill. It would not apply to tax or customs regulations (which are dealt with in clause 24) or commencement regulations. The standard procedure would be for regulations to be made using the negative procedure.<sup>150</sup> If the regulations amended an act of parliament or made retrospective provision, they would

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<sup>149</sup> UK Parliament, '[Hybrid instruments](#)', accessed 7 September 2022.

<sup>150</sup> An instrument laid under the negative procedure becomes law on the day the minister signs it and automatically remains law unless a motion to reject it is agreed by either House of Parliament within 40 sitting days (UK Parliament, '[Negative procedure](#)', accessed 7 September 2022).

be subject to the draft affirmative procedure.<sup>151</sup> If the minister making the regulations declared it was “necessary” “by reason of urgency”, they could be made using the made affirmative procedure and would need to be approved by both Houses within 28 days to remain in force.<sup>152</sup>

Similar arrangements would apply to tax and customs regulations under clause 24. Only the Treasury would be authorised to make regulations relating to tax matters and only the Treasury or HMRC would be authorised to make regulations relating to customs matters. The standard procedure would be for regulations to be made using the negative procedure, but in this case only the House of Commons, and not the Lords, would have the power to annul them. Regulations that amended an act of parliament or made retrospective provision would be subject to the draft affirmative procedure, or in urgent cases to the made affirmative procedure. The approval of the House of Commons only, and not the Lords, would be required.

## **Justification by the government**

The government has described the bill’s delegated powers as “necessarily broad”, arguing that they are “appropriate given the grave and imminent situation in Northern Ireland and the need to ensure the government can act quickly and flexibly as appropriate to restore the balance of the institutions under the Belfast (Good Friday) Agreement”.<sup>153</sup>

The government said it had adopted the approach of requiring the approval of both Houses of Parliament (or the Commons only for customs and tax regulations) for amending acts of parliament and retrospective provisions

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<sup>151</sup> An instrument laid under the draft affirmative cannot be made into law unless it is approved by both Houses of Parliament (UK Parliament, [‘Draft affirmative procedure’](#), accessed 7 September 2022).

<sup>152</sup> Under the made affirmative procedure, an instrument is signed into law before Parliament has considered it, but cannot remain law unless Parliament approves it within a certain time period (UK Parliament, [‘Made affirmative procedure’](#), accessed 7 September 2022).

<sup>153</sup> Foreign, Commonwealth and Development Office, [‘Delegated powers memorandum: Northern Ireland Protocol Bill’](#), June 2022, p 4.

“given the exceptional context of the matters being provided for in the bill and the recognition that Parliament will want a greater role in scrutinising amendments to all such legislation”.<sup>154</sup> However, it argued the option of the made affirmative procedure for urgent cases was needed “to ensure that such provisions are flexible enough to account for unseen circumstances” where the draft affirmative procedure would take too long.

The threshold for the use of many of the regulation-making powers in the bill is that the minister considers it “appropriate”. The government has acknowledged that the Delegated Powers and Regulatory Reform Committee has previously argued powers should be subject instead to a test of necessity. As the government points out in its delegated powers memorandum on the bill, the issue of ‘appropriate’ vs ‘necessary’ was considered at length during the passage of previous major pieces of Brexit-related legislation, including the European Union (Withdrawal) Act 2018, the European Union (Withdrawal Agreement) Act 2020 and the European Union (Future Relationship) Act 2020. The government notes in the memorandum that a test of appropriateness was the threshold eventually agreed on by both Houses for these previous pieces of legislation.<sup>155</sup>

The government argues the majority of powers in the bill are “constrained by reference to the policy area within the Northern Ireland Protocol which they are seeking to deliver differently”.<sup>156</sup> It also points out the bill would apply a test of necessity in some places, notably when using the power in clause 15(2) to change what provisions are ‘excluded provision’.

## Criticism

There has been criticism of both individual provisions within the bill and its overall approach to the delegation of powers. The House of Lords

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<sup>154</sup> Foreign, Commonwealth and Development Office, [‘Delegated powers memorandum: Northern Ireland Protocol Bill’](#), June 2022, p 4.

<sup>155</sup> Foreign, Commonwealth and Development Office, [‘Delegated powers memorandum: Northern Ireland Protocol Bill’](#), June 2022, p 5.

<sup>156</sup> Foreign, Commonwealth and Development Office, [‘Delegated powers memorandum: Northern Ireland Protocol Bill’](#), June 2022, p 5.

Delegated Powers and Regulatory Reform Committee has described the bill as “unprecedented in its cavalier treatment of Parliament, the EU and the government’s international obligations”.<sup>157</sup> The committee set out 11 general concerns about the bill, arguing that:<sup>158</sup>

- It is a skeleton bill, the whole of which “can be read without discerning what the government wish to do with any of the powers it contains”.
- Unlike a similar power in section 8 of EUWA 2018, the “super Henry VIII powers” enabled by clause 22(1) would not be subject to a time limit or restrictions on, for instance, creating a serious criminal offence, making retrospective provision or imposing taxes.
- Making provision to disapply parts of the protocol and the withdrawal agreement is “highly controversial”, so “even assuming that the government are proposing to act lawfully [it] should (if at all) be for Parliament in primary legislation rather than for ministers in secondary legislation”.
- The government had “failed to explain and justify why the bill contains so many open-ended powers” for ministers to do what they regard as “appropriate”, with no requirements for pre-legislative scrutiny, consultation, time limits and the like.
- The government had provided “only cursory justification” in the bill’s delegated powers memorandum, with “an almost complete absence of examples of provision that could be made and a total absence of indicative regulations”. The committee said this was “regrettable in such an important bill”.
- Using the negative procedure as the default for every power, unless it was being used to amend primary legislation or make retrospective provision, was “unsatisfactory”. The committee said the government had made “no attempt [...] to justify the procedure that applies to each power by reference to its significance in policy terms”.

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<sup>157</sup> House of Lords Delegated Powers and Regulatory Reform Committee, ‘[Northern Ireland Protocol Bill](#)’, 7 July 2022, HL Paper 40 of session 2022–23, p 1.

<sup>158</sup> House of Lords Delegated Powers and Regulatory Reform Committee, ‘[Northern Ireland Protocol Bill](#)’, 7 July 2022, HL Paper 40 of session 2022–23, pp 2–4.

- The memorandum refers to powers being exercised to make “technical and detailed provision that is best suited to regulations” but “powers to unilaterally depart from a major international agreement in such a controversial area of law, and in such a controversial way, cannot be characterised as merely involving technical and detailed matters”.
- The bill “represents a serious challenge to the government’s commitment to the rule of law” because it would allow ministers to act inconsistently with the UK’s international legal obligations.
- A power that would allow ministers to make delegated legislation to disapply international law “does not sit easily alongside a duty under the ministerial code to comply with the law, including international law”.
- Article 5 of the withdrawal agreement requires the UK to act in good faith and fulfil the obligations arising from the agreement, but the bill “constitutes a repudiation of the government’s legal obligations in circumstances where they think it appropriate to do so”.
- The bill was “clear example of legislation preceding policy formulation rather than policy formulation preceding legislation”.

Turning to specific powers, the committee concluded that clauses 4(3), 4(5), 5(1), 6, 9, 12(3), 13(4), 14(4), 15(2), 17(1), 18(1) and 19 all contained inappropriate delegations of power and should be removed from the bill.<sup>159</sup> The committee’s detailed reasoning for these conclusions is set out in its report.

The Hansard Society raised similar points about the bill’s delegated powers. It argued that the “real operation of the bill and the implementation of its policy objectives will be entirely at the discretion of ministers”.<sup>160</sup> It also pointed out that clause 22(1) would enable: all regulation-making powers in the bill to function as Henry VIII clauses; retrospective provision; and the

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<sup>159</sup> House of Lords Delegated Powers and Regulatory Reform Committee, ‘[Northern Ireland Protocol Bill](#)’, 7 July 2022, HL Paper 40 of session 2022–23, p 1.

<sup>160</sup> Hansard Society, ‘[The Northern Ireland Protocol Bill: Delegated powers](#)’, 24 June 2022, p 5.

further delegation of powers to ministers and others (legislative sub-delegation). It said the bill's 'dual approach' to parliamentary procedure failed to consider that regulations that did not amend primary legislation or make retrospective provisions could still be "legally or politically significant, warranting active parliamentary approval". The Hansard Society argued that non-binding written or oral statements from the government on how it proposed to use the bill's "very broad" powers were "not a replacement for tighter drafting of the powers on the face of the bill".

The Hansard Society also highlighted the contrast between the "undemanding nature of the threshold for using these powers" (a test of appropriateness) and "the magnitude of the threshold" required to justify the international law doctrine of necessity (a course of action is the only way to safeguard an essential interest against a grave and imminent peril).<sup>161</sup> The Hansard Society concluded it was "surprising that a similarly high threshold is not applied to ministers' ability to change domestic law using powers under the bill to achieve the bill's policy objectives". It said the government's comparison of the 'appropriate' threshold in this bill to that in other pieces of Brexit legislation was flawed because:<sup>162</sup>

- Comparable powers in the other legislation had more constraints such as time limits, requirements for consultation on draft regulations and the parliamentary 'sifting' mechanism.
- Powers in the European Union (Withdrawal Agreement) Act were tied to implementation of the withdrawal agreement, so the scope of the powers was constrained by the scope of the agreement.
- The subjectivity of the 'appropriateness' threshold in the Northern Ireland Protocol Bill was "compounded by its linkage to the term 'in connection with'", however potentially tenuous that connection; the term 'in connection with' is not used for similar powers in the other legislation.

During the House of Commons stages of the bill, Labour tabled various

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<sup>161</sup> Hansard Society, ['The Northern Ireland Protocol Bill: Delegated powers'](#), 24 June 2022, pp 6–7.

<sup>162</sup> Hansard Society, ['The Northern Ireland Protocol Bill: Delegated powers'](#), 24 June 2022, pp 7–8.

amendments to change the threshold for the exercise of ministerial powers in the bill from “appropriate” to “necessary”, although none of these amendments was pushed to a division. Speaking to one of these amendments, Peter Kyle, shadow secretary of state for Northern Ireland, said he hoped the Lords would “have more time to ventilate these arguments, go into them in more detail and return with some more credible amendments for us to consider in this place”.<sup>163</sup>

Michael Ellis, the then paymaster general, said this question covered “well-trodden ground”.<sup>164</sup> He argued that imposing a test of ‘necessity’ could create potential legal difficulties:

The word ‘necessary’ [...] is a very strict legal test for a court to interpret. Where there are two or more choices available to ministers as to what provision is appropriate to address the issues that the protocol has created, arguably neither one is strictly necessary, because there is an alternative. Ministers need to be able to exercise their discretion to choose the most appropriate course. That is why the word ‘appropriate’ is the correct word.<sup>165</sup>

### 4.3 Compatibility with international law

The bill has given rise to discussion about whether it is compatible with international law and the UK’s international obligations under the withdrawal agreement. The government’s position is that the bill is consistent with international law, justified by the doctrine of necessity. However, many legal commentators are not convinced the government has made the case that a situation of ‘necessity’ exists to justify the non-performance of the UK’s international obligations.

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<sup>163</sup> [HC Hansard, 19 July 2022, col 929.](#)

<sup>164</sup> [HC Hansard, 13 July 2022, col 390.](#) See for instance House of Lords Library, ‘[European Union \(Withdrawal\) Bill: Lords report stage](#)’, 14 May 2018, pp 39–42.

<sup>165</sup> [HC Hansard, 13 July 2022, col 390.](#)



## Non-performance of international obligations

The withdrawal agreement contains obligations for the UK to implement that agreement in domestic law. Article 182 of the withdrawal agreement states that the protocol forms an integral part of the withdrawal agreement. Article 4 of the withdrawal agreement requires that the withdrawal agreement and the provisions of EU law which it makes applicable are to have “the same legal effects” in the UK as they would have in the EU, including direct effect and supremacy over domestic law.<sup>166</sup> It also requires the UK to ensure this through domestic primary legislation. Article 5 of the withdrawal agreement requires the UK (and the EU) to “take all appropriate measures [...] to ensure fulfilment of the obligations arising from this agreement” and to “refrain from any measures which could jeopardise the attainment of the objectives of this agreement”.

The bill would run counter to these obligations by expressly disapplying some provisions of the protocol from domestic law and giving ministers powers to exclude further protocol provisions from applying in domestic law.

The government’s position is that the legislation is lawful under international law. It set out its legal position in a statement published with the bill on 13 June 2022. It acknowledged that measures within the bill would “on entry into force, envisage the non-performance of certain obligations”.<sup>167</sup> However, it argued the doctrine of necessity “provides a clear basis in international law to justify the non-performance of international obligations under certain exceptional and limited conditions”.

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<sup>166</sup> [Explanatory notes](#), p 6.

<sup>167</sup> Foreign, Commonwealth and Development Office, [‘Northern Ireland Protocol Bill: UK government legal position’](#), 13 June 2022.

## Doctrine of necessity

The doctrine of necessity reflects a customary rule of international law.<sup>168</sup> The International Law Commission (ILC), a UN body, codified the concept of ‘necessity’ in its ‘Articles on the responsibility of states for internationally wrongful acts’ in 2001. The UN General Assembly adopted these in 2002. The articles seek to formulate the general conditions under international law for a state to be considered responsible for wrongful actions or omissions, and the resulting legal consequences.<sup>169</sup> On the concept of ‘wrongfulness’, Malgosia Fitzmaurice, professor of public international law at Queen Mary University of London, has explained that “an act of state would be considered a wrongful act in international law, a breach of international obligation, unless there are certain circumstances that can serve as justification for not conforming with an international obligation”.<sup>170</sup>

Article 25 of the ILC articles on the responsibility of states for internationally wrongful acts says that a state cannot invoke ‘necessity’ as the grounds for justifying an act that is not in conformity with the state’s international obligations unless:<sup>171</sup>

- it is the only way for the state to safeguard an essential interest against a grave and imminent peril
- it does not seriously impair an essential interest of the state(s) towards which the obligation exists, or of the international community as a whole

Article 25 also says that a state cannot invoke ‘necessity’ as a ground for

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<sup>168</sup> Max Planck Encyclopaedia of Public International Law (€), [‘Necessity, state of’](#), accessed 29 September 2022.

<sup>169</sup> International Law Commission, [‘Draft articles on responsibility of states for internationally wrongful acts, with commentaries’](#), 2001, p 31.

<sup>170</sup> House of Commons Public Administration and Constitutional Affairs Committee, [‘Oral evidence: The scrutiny of international treaties and other international agreements in the 21st century’](#), 21 June 2022, Q127.

<sup>171</sup> UN General Assembly Resolution 56/83, [‘Responsibility of states for internationally wrongful acts’](#), 28 January 2002.

precluding wrongfulness if the state has contributed to the situation of necessity.

In its commentary on the draft articles, the ILC emphasised that “the plea of necessity is exceptional”, “will only rarely be available to excuse non-performance of an obligation” and “is subject to strict limitations to safeguard against possible abuse”.<sup>172</sup> Professor Fitzmaurice has observed that “out of all the circumstances precluding wrongfulness, state of necessity is the most contentious and controversial”.<sup>173</sup>

The doctrine of necessity discussed here is an international law concept. This is different from debates about the delegated powers in the bill and whether the threshold for using them should be that the minister considers it is ‘necessary’ (rather than ‘appropriate’).

## **Government’s legal position statement**

In its legal position statement, the government set out its assessment of how the situation with the protocol met the conditions of ‘necessity’. It identified the following as “essential interests” for the UK:<sup>174</sup>

- maintenance of stable social and political conditions in Northern Ireland
- protection of the 1998 Belfast (Good Friday) Agreement
- effective functioning of the unique constitutional structures created under that agreement
- preservation and fostering of social and economic ties between Northern Ireland and the rest of the UK

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<sup>172</sup> International Law Commission, [‘Draft articles on responsibility of states for internationally wrongful acts, with commentaries’](#), 2001, p 80.

<sup>173</sup> House of Commons Public Administration and Constitutional Affairs Committee, [‘Oral evidence: The scrutiny of international treaties and other international agreements in the 21st century’](#), 21 June 2022, Q127.

<sup>174</sup> Foreign, Commonwealth and Development Office, [‘Northern Ireland Protocol Bill: UK government legal position’](#), 13 June 2022.

The government argued that the “strain” the protocol caused had “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”, in other words the bill. It said there was “clear evidence of a state of necessity to which the government must respond”.

The government also argued that the protocol was “not operating to protect the prior commitments and responsibilities under the Belfast (Good Friday) Agreement”. It said the proposed measures in the bill were “fully aligned with and advance” the UK’s commitments and responsibilities under that agreement.

The government stated its assessment was that the bill was “currently the only way to provide the means to alleviate the socio-political conditions, while continuing to support the protocol’s objectives [...] and the interests of both the UK and the EU”. It also said that the UK had not contributed to the situation of necessity and that “the peril that has emerged was not inherent in the protocol’s provisions”.

Having set out this case, the government reiterated its position that the bill was therefore justified in international law:

It is the government’s position that in light of the state of necessity, any such non-performances 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. This justification lasts as long as the underlying reasons for the state of necessity are present. The current assessment is that this situation and its causes will persist in the medium to long term.<sup>175</sup>

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<sup>175</sup> Foreign, Commonwealth and Development Office, ‘[Northern Ireland Protocol Bill: UK government legal position](#)’, 13 June 2022.

## Article 16 of the protocol

The government concluded its legal position statement by referring to article 16 of the Northern Ireland Protocol. It said its assessment that the situation in Northern Ireland constituted a state of necessity was without prejudice to the UK's right to take measures under article 16.

Article 16 of the protocol is conceived as a 'safeguards' mechanism. It allows either party to take temporary measures if the application of the protocol leads to "serious economic, societal or environmental difficulties that are liable to persist", or to "diversion of trade". If the safeguard measures create "an imbalance between the rights and obligations under the protocol", the other party may take rebalancing measures. Safeguard measures must be "restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation". Likewise, rebalancing measures are allowed where they are "proportionate" and "strictly necessary to remedy the imbalance". In both cases, "priority shall be given to such measures as will least disturb the functioning" of the protocol.

The use of safeguards or rebalancing measures is governed by the procedures set out in annex 7 to the protocol, which require consultations in the Joint Committee, the joint EU-UK body established to oversee the whole withdrawal agreement, "with a view to finding a commonly acceptable solution".

In July 2021, the government assessed in its command paper that because of both diversion of trade and serious societal and economic difficulties, it was "clear that the circumstances exist to justify using article 16". However, it concluded "that for the time being it is not appropriate" to exercise the UK's rights under article 16, because of the limitations on the actions that can be taken under the safeguard mechanism. The government noted that any unilateral measures under article 16 would be temporary and "subject to the uncertainty of an as yet untested dispute settlement process".

The House of Commons Library briefing on '[Northern Ireland Protocol: Article 16](#)' (26 November 2021) contains more detailed information about article 16.

## Legal commentary

Some legal commentators have questioned whether the government has demonstrated the situation meets all the limbs of the test of 'necessity'. Roman Cormacain of the Bingham Centre for the Rule of Law set out his analysis of problems in the government's legal position as follows:

It is impossible to see this bill as being the only way to proceed when the government has already reserved the right to proceed under article 16 of the protocol. Furthermore, even though negotiation with the EU is clearly difficult, it still represents another way to resolve these issues.

It is difficult to see antipathy by some in Northern Ireland to the protocol and a refusal by a minority of elected politicians to form an executive or assembly reaching the very high bar of constituting a grave and imminent peril.

The bill removes a great many protections from the protocol, and it is difficult to see how these do anything other than seriously impair the essential interests of the EU.

The existence of a formal and bespoke mechanism within the protocol for dealing with these kinds of emergencies implicitly precludes the possibility of also advancing necessity outside the terms of the protocol.<sup>176</sup>

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<sup>176</sup> Ronan Cormacain, '[Northern Ireland Protocol Bill: A rule of law analysis of its compliance with international law](#)', Bingham Centre for the Rule of Law, 17 June 2022.

George Peretz, a barrister specialising in state aid law, described the government's legal position as "unconvincing".<sup>177</sup> He said it failed to explain points such as:

- why the "strain" placed by the protocol on Northern Ireland's political institutions was a "grave and imminent peril"
- how the bill would alleviate these socio-political tensions given a majority of recently elected Northern Ireland Assembly members opposed it
- why removing the VAT, state aid and CJEU provisions was "necessary" to avoid "imminent and grave peril"
- why the government could not use article 16 to resolve the "grave and imminent peril"

Similarly, Sir Jonathan Jones, former head of the Government Legal Department, said the government's explanation was "hopeless".<sup>178</sup> He said it provided no evidence for the "extreme conclusion" that the protocol represented a grave peril, and no explanation for why the government had not attempted to use article 16 to address the situation. He also suggested that if the UK "really did face imminent peril", the government would be dealing with the situation more quickly than through a bill that was likely to take many months to get through Parliament.

Commentators also questioned the government's assertion that the UK had not contributed to a situation of 'necessity'. Mark Elliott, professor of public law at the University of Cambridge, said government documents showed the government was aware before it ratified the withdrawal agreement that the protocol could result in costs and disruption to businesses in Northern Ireland.<sup>179</sup> He concluded it was "positively risible" to argue that an

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<sup>177</sup> George Peretz, '[Invention is the mother of 'necessity': the Northern Ireland Protocol Bill](#)', EU Relations Law blog, 22 July 2022.

<sup>178</sup> [HC Hansard, 20 July 2022, col 1003](#); and Sir Jonathan Jones, '[The Northern Ireland Protocol Bill is one of the most extraordinary pieces of legislation I have ever seen](#)', Politics Home, 15 June 2022.

<sup>179</sup> Mark Elliott, '[The Northern Ireland Protocol Bill](#)', Public Law for Everyone blog, 13 June 2022.

“unforeseen peril” had arisen, and that instead “the situation that has eventuated is one that [the government] could have predicted and did in fact predict”. George Peretz made a similar point, additionally arguing unionist parties’ opposition to the protocol was “well-known” before the government ratified the withdrawal agreement.<sup>180</sup>

Mark Elliott and barristers Lord Anderson of Ipswich and Lord Pannick (both Crossbench members of the Lords) said in a joint letter to the Times that the bill was “a clear breach of international law”.<sup>181</sup> They said it was “impossible to understand” how the criteria could be satisfied for the government to rely on the doctrine of necessity. They said the bill showed “a lack of commitment to the rule of law and to a rules-based international order that damages the reputation of the UK”.

Alan Boyle, emeritus professor of public international law at the University of Edinburgh, took a different approach. He told the House of Commons Northern Ireland Affairs Committee the bill does not violate international law or the protocol.<sup>182</sup> This was based on his reading of the bill as “laying the groundwork for a notice of derogation [...] from a limited number of articles” of the protocol under article 16. He argued that “the government’s position is defensible, provided it is based fairly and squarely on article 16”.<sup>183</sup> However, he suggested the government would need to be explicit it was relying on article 16 and follow the requisite procedures.<sup>184</sup>

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<sup>180</sup> George Peretz, [‘Invention is the mother of ‘necessity’: the Northern Ireland Protocol Bill’](#), EU Relations Law blog, 22 July 2022.

<sup>181</sup> Mark Elliott, Lord Anderson of Ipswich and Lord Pannick, [‘Times letters: Bill to override the Northern Ireland Protocol’](#), Times, 15 June 2022.

<sup>182</sup> House of Commons Northern Ireland Affairs Committee, [‘Oral evidence: Brexit and the Northern Ireland Protocol’](#), 29 June 2022, Q1085.

<sup>183</sup> House of Commons Northern Ireland Affairs Committee, [‘Oral evidence: Brexit and the Northern Ireland Protocol’](#), 29 June 2022, Q1104.

<sup>184</sup> House of Commons Northern Ireland Affairs Committee, [‘Oral evidence: Brexit and the Northern Ireland Protocol’](#), 29 June 2022, Q1124.



## 5. Bill stages in the House of Commons

### 5.1 Second reading

The bill's second reading in the House of Commons took place on 27 June 2022. Liz Truss, the then foreign secretary, said the government was acting to uphold the Belfast (Good Friday) Agreement and to “address those political challenges and fix the practical problems the protocol has created”.<sup>185</sup> She said she could “absolutely confirm that this bill is both legal and necessary”.<sup>186</sup> She maintained the bill “fixes the specific problems that have been caused in Northern Ireland while maintaining those parts of the protocol that are working”. She explained her “first choice was and remains renegotiating the protocol text with the EU”, but the EU had said it would not do so.<sup>187</sup> Therefore, she said, the government was “pursuing this legislation as all other options have been exhausted”.

Ms Truss said the government had concluded that article 16 “would not resolve the fundamental issues in the protocol”.<sup>188</sup> She described it as “only a temporary measure” that would “only treat some of the symptoms without fixing the root cause of the problems, which are baked into the protocol text itself”. She said it could also lead to arbitration and litigation with the EU without “delivering sufficient change”. She said the government did not rule out using article 16 later “if the circumstances demand it”. However, Ms Truss believed “in order to fix the very real problems in Northern Ireland and get the political institutions back up and running, the only solution that is effective and provides a comprehensive and durable solution is this bill”.

David Lammy, the shadow foreign secretary, advanced three main arguments against the bill. First, he did not believe it would resolve the situation in Northern Ireland. He argued “only an agreement that works for

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<sup>185</sup> [HC Hansard, 27 June 2022, col 38.](#)

<sup>186</sup> [HC Hansard, 27 June 2022, col 38.](#)

<sup>187</sup> [HC Hansard, 27 June 2022, col 44.](#)

<sup>188</sup> [HC Hansard, 27 June 2022, col 45.](#)

all sides and delivers for the people and businesses of Northern Ireland will have durability and provide [...] political stability”.<sup>189</sup> Second, he argued the bill was not in the best interests of the UK, as “a game of brinkmanship with the European Union will only add to our economic problems”.<sup>190</sup> Third, he argued the bill was not compatible with the UK’s commitment to the rule of law. He said: “quite simply, the bill breaks international law”. In his view, one of the “most troubling aspects” of the bill was “the dangerous legal distortion that is used to justify it”. He believed that “undermining international law runs counter to Britain’s interest, damages Britain’s moral authority and political credibility, and risks emboldening dictators and authoritarian states”.<sup>191</sup> Additionally, he described the bill’s delegated powers as “brazen executive overreach”, “an act of disrespect to Parliament” and “a power grab so broad it would make Henry VIII blush”.<sup>192</sup>

Sir Jeffrey Donaldson, leader of the DUP, said the bill sought to “reset and restore Northern Ireland’s relationship with the rest of the United Kingdom, given the devastating impact of the protocol on the economic, constitutional, social and political life of Northern Ireland over the past 18 months”.<sup>193</sup> He argued that “if enacted, the bill will restore confidence in Northern Ireland [and] will restore the consensus essential to operate power sharing”.<sup>194</sup> He agreed with the government that “there is a necessity, and the necessity is peace and stability in Northern Ireland”.<sup>195</sup> He urged MPs to recognise the “vital nature” of the bill and not subject it to amendments that would wreck or “dilute” it.<sup>196</sup>

Claire Hanna of the SDLP said the bill failed “to reconcile the dilemmas that Brexit forces and the choices that the UK government have made with the

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<sup>189</sup> [HC Hansard, 27 June 2022, col 49.](#)

<sup>190</sup> [HC Hansard, 27 June 2022, col 50.](#)

<sup>191</sup> [HC Hansard, 27 June 2022, col 53.](#)

<sup>192</sup> [HC Hansard, 27 June 2022, col 54.](#)

<sup>193</sup> [HC Hansard, 27 June 2022, col 65.](#)

<sup>194</sup> [HC Hansard, 27 June 2022, col 66.](#)

<sup>195</sup> [HC Hansard, 27 June 2022, col 68.](#)

<sup>196</sup> [HC Hansard, 27 June 2022, col 69.](#)

reality of our geography”.<sup>197</sup> She rejected what she described as “truly mind-bending arguments put forth to justify the bill”. For instance, she rejected the view that the bill was about “consent and consensus” when “the majority of people in Northern Ireland have not consented to Brexit in any form, and a majority of voters and MLAs reject the bill in the strongest terms”. In response to allegations the protocol was damaging the Northern Ireland economy, she said “every credible business organisation in Northern Ireland is calling for the retention of the protocol”. She suggested that the bill would not resolve the issue of a ‘democratic deficit’:

We are told that the bill is about a democratic deficit. That is being protested against by removing the entirety of government from the people of Northern Ireland, and it will apparently be solved by handing over Henry VIII powers that allow the government to ride roughshod over everybody in Northern Ireland.

Steven Farry of the Alliance party said the bill would have “major consequences”, by threatening Northern Ireland’s access to the EU single market and risking a trade war with the EU.<sup>198</sup> He accused the government of being “disingenuous” in how it had defended the bill and argued there were alternatives the government had chosen not to pursue. These included looking for flexibilities within the protocol or negotiating supplemental agreements, such as a veterinary agreement.

Several senior backbench Conservative MPs were critical of the bill. For instance, former prime minister Theresa May set out several reasons why she did not welcome it:

First, do I consider it to be legal under international law? Secondly, will it achieve its aims? Thirdly, does it at least maintain the standing of the United Kingdom in the eyes of the world? My answer to all three questions is no. That is even before we look at the extraordinary

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<sup>197</sup> [HC Hansard, 27 June 2022, col 76.](#)

<sup>198</sup> [HC Hansard, 27 June 2022, col 97.](#)

sweeping powers that the bill would give to ministers.<sup>199</sup>

Simon Hoare, chair of the Northern Ireland Affairs Committee, said the Office of the Speaker's Council had provided a legal opinion to his committee that "raises enormous concerns about the legality of this bill".<sup>200</sup> He said the bill was based on arguments that were "flimsy at best and irrational at worst" and the bill itself risked "economically harmful retaliation" and "shredding our reputation as a guardian of international law and the rules-based system". Julian Smith, the former Northern Ireland secretary, feared the bill was "a kind of displacement activity from the core task of doing whatever we can to negotiate a better protocol deal".<sup>201</sup> He said it risked "creating an impression to unionism that a black-and-white solution is available when the reality is [...] compromise will ultimately be needed". At the same time, he feared the bill risked "toxifying further" discussions with the EU, as well as "prolonging instability for Northern Ireland business" and "putting the whole of the UK at risk of trade and tariff reprisals".

However, other senior Conservative backbenchers spoke in support of the bill. For instance, the former party leader Iain Duncan Smith argued that the bill was the only way to make the EU "realise that we mean business".<sup>202</sup> He did not believe the bill was a breach of international law, but rather was "critical" to the maintenance of the Belfast (Good Friday) Agreement. He also expressed hope the bill would lead the DUP to return to power-sharing. David Jones, a former minister in the Department for Exiting the European Union, argued the government had a "clear duty to take action".<sup>203</sup> In his view, the bill was "wholly necessary" and "crucial but proportionate". He said the government's proposals satisfied the EU's concerns "in every respect", while complying with the UK's obligations under the Belfast (Good Friday) Agreement and preserving Northern Ireland's status within the UK.

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<sup>199</sup> [HC Hansard, 27 June 2022, col 63.](#)

<sup>200</sup> [HC Hansard, 27 June 2022, col 55.](#)

<sup>201</sup> [HC Hansard, 27 June 2022, cols 69–70.](#)

<sup>202</sup> [HC Hansard, 27 June 2022, col 75.](#)

<sup>203</sup> [HC Hansard, 27 June 2022, col 79.](#)

The bill received its second reading by 295 votes to 221, a majority of 74.<sup>204</sup>

## 5.2 Committee of the whole House

The bill was considered in a committee of the whole House on 13, 19 and 20 July 2022. The debate covered issues such as:

- the bill's compatibility with the UK's international obligations ([amendment 26](#), [new clause 12](#))
- the extent of the delegated powers in the bill ([clause 15 and 16 stand part](#), [amendment 12](#))
- what should be 'excluded provision' on the face of the bill ([amendment 24](#))
- additional conditions to be met before making something 'excluded provision' or introducing a dual regulatory system ([new clause 10](#), [amendments 44 and 28](#))
- protecting the democratic consent mechanism in the protocol ([amendment 8](#))
- protecting the Belfast (Good Friday) Agreement ([amendment 49](#))
- the involvement of the Northern Ireland Assembly and bodies established by the Belfast (Good Friday) Agreement ([new clause 15](#), [amendment 3](#))

Divisions took place on a number of amendments that addressed these topics. However, no amendments were made to the bill.

The rest of this section of the briefing summarises the debate on all the amendments on which the House of Commons voted.

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<sup>204</sup> [HC Hansard, 27 June 2022, col 128.](#)

## Legal justification for altering the effect of the protocol in domestic law (amendment 26)

Layla Moran, the Liberal Democrat spokesperson for foreign and Commonwealth affairs, moved amendment 26 which would have required ministers to set out a legal justification for altering the effect of the protocol in domestic law. She described this as a paving amendment for new clause 8, which would have required the prime minister, the attorney general and the Lord Chancellor to lay before Parliament reports on legal advice relating to the bill.

Michael Ellis, the then paymaster general, said the amendment was not necessary as the government had already published a statement setting out its legal position that the bill was consistent with the UK's international obligations.<sup>205</sup> He said it was “in line with the practice of successive governments over several years” that the statement summarised the government's position but did not set out the full detail of the legal advice it had received.<sup>206</sup> He said it would “not be prudent” for the government to publish the full legal analysis, “particularly in advance of specific cases arising in potential future litigation”.

Layla Moran argued that it was “precisely because future litigation is quite likely that this House deserves to see the full legal advice”.<sup>207</sup> She suggested that if the government had “nothing to hide” it should trust the House of Commons to scrutinise the legal advice.<sup>208</sup>

Amendment 26 was defeated by 313 votes to 231, a majority of 82.<sup>209</sup>

Other MPs did not formally move their amendments relating to the bill's

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<sup>205</sup> [HC Hansard, 13 July 2022, col 383.](#)

<sup>206</sup> For background information on the conventions about publishing legal advice, see: House of Lords Library, '[Publishing government legal advice](#)', 6 December 2018.

<sup>207</sup> [HC Hansard, 13 July 2022, col 383.](#)

<sup>208</sup> [HC Hansard, 13 July 2022, col 406.](#)

<sup>209</sup> [HC Hansard, 13 July 2022, col 413.](#)

compatibility with international law but highlighted this as an issue they hoped the House of Lords would examine.

Sir Robert Neill (Conservative MP for Bromley and Chislehurst), chair of the House of Commons Justice Committee, tabled a pair of amendments that together would have required the approval of the House of Commons, and a debate to be tabled in the House of Lords, before the government could bring any of the bill's provisions into force. Sir Robert did not believe the government had yet made out the case that departing from the protocol was the “only means available” to “safeguard an essential interest against a grave and imminent peril”.<sup>210</sup> He argued the government should come back to the Commons and set out an evidence base to make the case before using the powers in the bill. Sir Robert did not move his amendments, as he said he hoped the bill would be made redundant by a negotiated solution with the EU. However, he suggested that the Lords look further at these issues if the bill came before them:

As the bill was not in an election manifesto, that revising chamber will be entitled to look with considerable care at the issues that I and others have ventilated in these debates.<sup>211</sup>

The Labour front bench raised similar concerns. Labour tabled new clause 11, which would have prevented the government from using the regulation-making powers in the bill to exclude provisions of the protocol unless it had laid before Parliament a report by a senior judge about whether this was consistent with the UK's international obligations. The House of Commons would have had to approve the report and the House of Lords would have had to debate the report before the government would have been able to make the regulations. Stephen Doughty, shadow foreign and Commonwealth affairs and development minister, said Labour would not press this new clause to a division, but he hoped the House of Lords would “look carefully at the government's legal justifications to see whether they

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<sup>210</sup> [HC Hansard, 13 July 2022, cols 365–9.](#)

<sup>211</sup> [HC Hansard, 20 July 2022, col 1050.](#)

stack up”.<sup>212</sup>

## **Democratic consent in Northern Ireland (amendment 8)**

The SDLP and Alliance tabled amendment 8, which would have prevented ministers from using powers in the bill to make article 18 of the protocol ‘excluded provision’. Article 18 of the protocol sets out a democratic consent mechanism that provides for votes to be held in the Northern Ireland Assembly on whether articles 5 to 10 of the protocol can continue to apply to Northern Ireland.<sup>213</sup>

Michael Ellis said this amendment was “entirely unnecessary” as the government had “no intention whatsoever to use the power in clause 15 to alter the operation of the domestic consent mechanism”.<sup>214</sup> He said the addition of the democratic consent process was one of the government’s “key negotiating successes” in the protocol, so it would make no sense to remove it.

Claire Hanna (SDLP MP for Belfast South) said the minister’s argument made the case for agreeing to the amendment.<sup>215</sup> She argued this and other amendments tabled by the SDLP would ensure “the wishes of the people of Northern Ireland would be protected”.

Amendment 8 was defeated by 308 votes to 230, a majority of 78.<sup>216</sup>

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<sup>212</sup> [HC Hansard, 20 July 2022, col 1048.](#)

<sup>213</sup> For further information about the democratic consent mechanism, see House of Lords Library, ‘[Brexit: Protocol on Ireland/Northern Ireland democratic consent regulations](#)’, 27 November 2020. The regulations mentioned in that briefing came into force on 10 December 2020.

<sup>214</sup> [HC Hansard, 13 July 2022, col 388.](#)

<sup>215</sup> [HC Hansard, 13 July 2022, col 404.](#)

<sup>216</sup> [HC Hansard, 13 July 2022, col 417.](#)



## **Clauses 15 and 16 stand part**

Richard Thomson, the SNP spokesperson on Northern Ireland, said he intended to put clause 15 of the bill to a vote, as it was “the heart of the bill”.<sup>217</sup> Clause 15 would give ministers powers to exclude any provision of the protocol (except articles 2, 3 and 11) or the withdrawal agreement from applying in domestic law if the minister considered it necessary to do so for one of the permitted purposes listed in clause 15(1).

Michael Ellis said that clause 15 was needed to ensure that the bill “can fully meet its objectives by granting powers to make clear where additional elements of the protocol and withdrawal agreement are excluded, subject to carefully defined purposes”.<sup>218</sup> He said clause 16 was “vital to ensure the functioning of the bill and prevent any gaps in the arrangements established underneath it”.

The House voted for clauses 15 and 16 to remain in the bill (‘stand part’ of the bill) by 308 votes to 231, a majority of 77.<sup>219</sup>

## **Conditions prior to excluding provisions of the protocol or withdrawal agreement (new clause 10)**

Labour moved new clause 10, which would have prevented provisions of the protocol or the withdrawal agreement from being ‘excluded provision’ unless ministers had either:

- agreed with the EU that the provision was ‘excluded provision’
- followed the procedure set out in article 16 of the protocol for unilaterally taking safeguard measures, and the safeguard measures being taken necessarily required the provision to become ‘excluded provision’

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<sup>217</sup> [HC Hansard, 13 July 2022, col 401.](#)

<sup>218</sup> [HC Hansard, 13 July 2022, col 380.](#)

<sup>219</sup> [HC Hansard, 13 July 2022, col 421.](#)

Michael Ellis described new clause 10 as a wrecking amendment. He said it would “undermine the ability to exclude elements of the protocol and therefore undermine the entire operation of the bill”.<sup>220</sup> He said making agreement with the EU a condition of using the powers in the bill was “unworkable” and “dysfunctional” because “negotiations with the EU have so far been incapable of delivering the solutions that are needed”. He maintained that article 16 contained “inherent limitations in its scope”, and while it could address some trade frictions, it was not suitable to address the “broader identified impacts of the protocol”.

Peter Kyle, the shadow Northern Ireland secretary, denied new clause 10 was a wrecking amendment.<sup>221</sup> Rather, he argued it would “ensure that the extraordinary powers in this bill, which will otherwise breach the terms of the protocol, are exercised only in accordance with the UK’s international obligations”. He dismissed the government’s case that the doctrine of necessity justified the bill.

New clause 10 was defeated by 300 votes to 229, a majority of 71.<sup>222</sup>

### **Movement of goods and customs: Excluded provision (amendment 24)**

Stephen Farry (Alliance MP for North Down) moved amendment 24, which would have amended clause 4 of the bill to remove the designation of articles 5(1) to 5(4) and annex 2 of the protocol as ‘excluded provision’. Articles 5(1) and 5(2) of the protocol require customs duties to be paid on goods brought into Northern Ireland from another part of the UK if they are defined as ‘at risk’ of subsequently being moved into the EU. Articles 5(3) and 5(4) and annex 2 require certain EU customs and single market rules for goods to apply to Northern Ireland.

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<sup>220</sup> [HC Hansard, 13 July 2022, cols 383–46.](#)

<sup>221</sup> [HC Hansard, 13 July 2022, col 396.](#)

<sup>222</sup> [HC Hansard, 13 July 2022, col 426.](#)

Mr Farry said article 5 was “the heart of the protocol” and his amendment would stop clause 4 from stripping it out of domestic law.<sup>223</sup> He said making key parts of article 5 ‘excluded provision’ would be “a unilateral breach of the protocol” that would “undermine Northern Ireland’s unfettered access to both the single market and customs union for goods”. He argued there was “scope to progress” many of the issues caused by the protocol without resorting to unilateral action, and this could be done within the European Commission’s existing mandate.<sup>224</sup> He warned the bill would make the prospect of a negotiated agreement harder, and that making changes through unilateral action was “not actually a genuine solution”.<sup>225</sup>

Mr Farry suggested the consequences of using clause 4 to exclude article 5 from domestic law would be:

[...] the undermining of the rules-based international system; setting a very bad precedent by breaching international law; and the risk of a very damaging set of EU retaliations, right through to a full-on trade war [...]

For Northern Ireland, the effects of clause 4 will be as follows: it will undermine our access to the single market and the customs union. It will create more and more uncertainty for businesses as to the legal regime under which they are operating. It will pose dilemmas to members of the Northern Ireland Executive about how they conduct their duties. Finally—I say this with a degree of trepidation—it will beg the question of how and where the interface between the UK economic zone and the European Union economic zone will be managed. The answer to that question may well pose even greater challenges and difficulties.<sup>226</sup>

Peter Kyle said Labour supported this amendment “because it would stop this unhelpful unilateral action in an area where there is a clear landing zone

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<sup>223</sup> [HC Hansard, 13 July 2022, col 432.](#)

<sup>224</sup> [HC Hansard, 13 July 2022, col 434.](#)

<sup>225</sup> [HC Hansard, 13 July 2022, col 432.](#)

<sup>226</sup> [HC Hansard, 13 July 2022, col 435.](#)

for a negotiated agreement”.<sup>227</sup> He agreed with Stephen Farry that agreement with the EU should be possible over red/green or express lanes and on a veterinary deal. He argued that unilateral domestic legislation for red and green lanes would not work because the proposal relied on sharing data and providing safeguards with the EU.

Sammy Wilson, the DUP spokesperson on Brexit, argued that “rather than addressing the problem of the protocol”, amendment 24 “seeks to ensure that the problem remains”.<sup>228</sup> He said it would not resolve the “democratic deficit”, whereby the protocol requires EU laws to continue to apply to Northern Ireland without giving politicians from Northern Ireland the opportunity to have any say on them.<sup>229</sup> He also said it would not remove the need for EU checks on goods entering Northern Ireland, “with all the impact that has on businesses in Northern Ireland”. Mr Wilson dismissed the idea that these issues could be resolved through negotiation with the EU.

Responding for the government, Lucy Frazer, financial secretary to the Treasury, said amendment 24 “would be contrary to one of the core purposes of the bill”.<sup>230</sup> She said it would also leave the ‘at risk’ test in place, which would mean some businesses moving goods between Great Britain and Northern Ireland would still be required to pay customs duty even when the goods remained in the UK. She argued clause 4 was central to the government’s plans for introducing a different regime based on red and green channels.<sup>231</sup> Ms Frazer rebutted Peter Kyle’s argument that it would be easy to reconcile the government’s red/green lane proposal with the EU’s express lane proposal.<sup>232</sup> She also said the UK would not commit to dynamic alignment with EU rules to secure a veterinary agreement.

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<sup>227</sup> [HC Hansard, 13 July 2022, col 438.](#)

<sup>228</sup> [HC Hansard, 13 July 2022, col 440.](#)

<sup>229</sup> [HC Hansard, 13 July 2022, cols 440–41.](#)

<sup>230</sup> [HC Hansard, 13 July 2022, col 448.](#)

<sup>231</sup> [HC Hansard, 13 July 2022, col 447.](#)

<sup>232</sup> [HC Hansard, 13 July 2022, col 448.](#)

Amendment 24 was defeated by 285 votes to 212, a majority of 73.<sup>233</sup>

### **Conditions for introducing dual regulatory routes (amendments 44 and 28)**

Stephen Farry (Alliance) moved amendment 44 which would have required three conditions to be fulfilled before clause 7 could apply. Clause 7 would establish a dual regulatory regime:

- appropriate consultation by the government with representatives of Northern Ireland business organisations on the option to choose between dual routes
- agreement with the EU on the option to choose between dual routes
- approval by the Northern Ireland Assembly on the option to choose between dual routes

Mr Farry argued dual regulation was “fundamentally a very bad idea”.<sup>234</sup> He maintained increasing numbers of Northern Ireland businesses were saying “that the protocol is working for them and they do not want those aspects to be compromised, undermined or ditched”.<sup>235</sup> He believed that if implemented, it would have “major consequences”, “create chaos in many sectors of the Northern Ireland economy” and “would mean Northern Ireland losing access to the single market for goods, both in practice, as companies in the Republic of Ireland or the rest of the EU would see Northern Ireland products as risky, and as a matter of law”.<sup>236</sup>

Mr Farry said products from Northern Ireland would only be able to continue to be sold in the EU internal market if they could certify all the inputs to that product were compliant with EU regulations and standards.

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<sup>233</sup> [HC Hansard, 13 July 2022, col 450.](#)

<sup>234</sup> [HC Hansard, 19 July 2022, col 869.](#)

<sup>235</sup> [HC Hansard, 19 July 2022, col 870.](#)

<sup>236</sup> [HC Hansard, 19 July 2022, col 873.](#)

He gave the example of milk produced in Northern Ireland and sent to the Republic of Ireland for processing. For this to continue, he said dairy farmers would need to be able to prove all grain and veterinary medicine given to the cows met applicable EU standards although the bill would allow products not produced to EU requirements to be on sale in Northern Ireland. He believed it would be “simply not realistic” to try to segregate inputs produced to different legal regimes.<sup>237</sup> He suggested this posed an “existential threat” to the Northern Ireland dairy sector, as establishing processing capacity within Northern Ireland was estimated to cost £200–250mn and take up to three years.<sup>238</sup>

He argued there would be similar issues in the manufacturing sector, whereby “any components in goods that are manufactured or processed in Northern Ireland that do not comply with the relevant parts of EU law will not be certified for export into the EU either for further processing or for final sale”.<sup>239</sup>

Mr Farry said his amendment would provide “significant safeguards against dual regulation in broad terms” but would also retain “the potential to facilitate dual regulation for any set of products or sectors where it makes sense”.<sup>240</sup> He argued agreement of the Northern Ireland Assembly was also necessary because it represented a “more balanced perspective of the political views of the people of Northern Ireland”.

In response, Michael Ellis said that providing a route to market in Northern Ireland for goods that comply with UK rules would “protect the integrity of the UK’s internal market”.<sup>241</sup> He argued it would enable more businesses to sell in Northern Ireland, without preventing businesses in Northern Ireland from selling in the EU.<sup>242</sup> Addressing the conditions proposed in Stephen

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<sup>237</sup> [HC Hansard, 19 July 2022, col 875.](#)

<sup>238</sup> [HC Hansard, 19 July 2022, col 876.](#)

<sup>239</sup> [HC Hansard, 19 July 2022, col 876.](#)

<sup>240</sup> [HC Hansard, 19 July 2022, col 877.](#)

<sup>241</sup> [HC Hansard, 19 July 2022, col 878.](#)

<sup>242</sup> [HC Hansard, 19 July 2022, cols 877–8.](#)

Farry's amendment, Mr Ellis said the government was already consulting stakeholder groups in Northern Ireland.<sup>243</sup> He reiterated the government's preferred outcome was a negotiated agreement but making dual regulation conditional on EU agreement would "risk tying the government's hand behind their back". He suggested requiring the Northern Ireland Assembly's approval could create a difficulty, given the assembly was not sitting. He argued it was "exactly because of the breakdown of the institutions in Northern Ireland that this bill is needed".

Peter Kyle, shadow secretary of state for Northern Ireland, also moved an amendment that was designed to impose conditions on the introduction of a dual regulatory system. Amendment 28 would have required the government to carry out an impact assessment and a stakeholder consultation before it could use the powers in clause 9 to make regulations for a dual regulatory regime. Mr Kyle argued the government was "ignoring the voices of most businesses" in introducing a dual regulatory system".<sup>244</sup> He believed "shift[ing] the burden of responsibility for ensuring that goods do not enter the EU" from government agencies on to individual businesses "might work for retailers" but for exporters and businesses with highly integrated supply chains across the island of Ireland, it was "an almost existential threat". He said his amendment would ensure there was an independent assessment of the impact on different sectors that might be affected by the legislation.<sup>245</sup>

Michael Ellis said Labour's amendment was unnecessary as the government was already engaging with stakeholders on the detail of how it would use the powers in the bill.<sup>246</sup> He said regulations introducing a new regime would include economic impact assessments where appropriate, and the normal parliamentary procedures would apply for scrutinising them.

Sir Jeffrey Donaldson said dual regulation represented a compromise

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<sup>243</sup> [HC Hansard, 19 July 2022, col 880.](#)

<sup>244</sup> [HC Hansard, 19 July 2022, col 885.](#)

<sup>245</sup> [HC Hansard, 19 July 2022, col 888.](#)

<sup>246</sup> [HC Hansard, 19 July 2022, cols 881–2.](#)

between applying British standards throughout the whole of the UK and the desire of some businesses and some political parties to protect cross-border trade with the EU.<sup>247</sup> He did not believe “the choice brought about by a system of dual regulation will harm the Northern Ireland economy in the long run”. On the contrary, he suggested it would “maximise the potential of dual market access” by enabling businesses and sectors to make commercial decisions about which markets they wished to serve. He said it would put businesses in Northern Ireland in the same position as those elsewhere in the UK—if they wanted to sell goods in the EU, they would have to comply with EU standards, and if they wanted to sell goods in the UK, they would have to comply with UK standards.<sup>248</sup>

Sir Jeffrey and Sammy Wilson, the DUP’s Brexit spokesperson, both argued having a dual regulatory system would address the “democratic deficit” caused by the protocol’s application of EU law to Northern Ireland without any say for UK or Northern Ireland politicians.<sup>249</sup>

Stephen Farry’s amendment 44 was defeated by 293 votes to 201, a majority of 92.<sup>250</sup>

Peter Kyle’s amendment 28 was defeated by 293 votes to 205, a majority of 88.<sup>251</sup>

## **UK-EU Joint Committee: Report to Parliament (new clause 15)**

Colum Eastwood (SDLP MP for Foyle) moved new clause 15. This would have required a minister to report to Parliament on discussions in the Joint Committee on the regulation of goods within 21 days of the meeting taking place. The report would have had to include information on how UK

<sup>247</sup> [HC Hansard, 19 July 2022, col 894.](#)

<sup>248</sup> [HC Hansard, 19 July 2022, col 889.](#)

<sup>249</sup> [HC Hansard, 19 July 2022, col 895](#) and [cols 898–9.](#)

<sup>250</sup> [HC Hansard, 19 July 2022, col 906.](#)

<sup>251</sup> [HC Hansard, 19 July 2022, col 910.](#)



representatives adhered to and sought agreement with EU representatives on relevant proposals agreed by strand one or strand two institutions of the Belfast (Good Friday) Agreement. Strand one of that agreement encompasses the Northern Ireland Executive and Northern Ireland Assembly.<sup>252</sup> Strand two established the North-South Ministerial Council and North-South implementation bodies that support co-operation between Northern Ireland and Ireland. The SDLP also tabled new clause 14, which would have required ministers to support proposals on the regulation of goods made by the strand two bodies in Joint Committee meetings.

Michael Ellis said new clauses 14 and 15 were “inappropriate” as they would “cede control over the UK government’s stance in the Joint Committee to a council on which the Irish government—the government of an EU member state—sits”.<sup>253</sup> He also dismissed requirements in the proposed new clauses requiring reports to Parliament as “unnecessary” as the government already made written ministerial statements following Joint Committee meetings.<sup>254</sup>

Sir Jeffrey Donaldson said the DUP could not accept “effectively almost hand[ing] a veto to the North South Ministerial Council” over discussions with the EU.<sup>255</sup> However, he said the council could be a forum for discussing practical issues with the Irish government. Colum Eastwood and Claire Hanna (SDLP MP for Belfast South) were critical of the DUP for blocking the functioning of the council.<sup>256</sup> The DUP announced in September 2021 that it would disengage from meetings of the North South Ministerial Council as part of its opposition to the protocol.<sup>257</sup>

New clause 15 was defeated by 292 votes to 204, a majority of 88.<sup>258</sup> New clause 14 was not put to a division.

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<sup>252</sup> Northern Ireland Office, ‘[The Belfast Agreement](#)’, 10 April 1998.

<sup>253</sup> [HC Hansard, 19 July 2022, col 882.](#)

<sup>254</sup> [HC Hansard, 19 July 2022, col 883.](#)

<sup>255</sup> [HC Hansard, 19 July 2022, col 895.](#)

<sup>256</sup> [HC Hansard, 19 July 2022, col 883, col 896 and col 900.](#)

<sup>257</sup> BBC News, ‘[DUP north-south boycott ‘abject breach of pledge’](#)’, 20 December 2021.

<sup>258</sup> [HC Hansard, 19 July 2022, col 914.](#)

## Ministerial powers in clause 18 (amendment 12)

Hilary Benn (Labour MP for Leeds Central) moved amendment 12, which would have removed clause 18(1) from the bill. This provides that:

A minister of the crown may engage in conduct in relation to any matter dealt with in the Northern Ireland Protocol (where that conduct is not otherwise authorised by this Act) if the minister of the crown considers it appropriate to do so in connection with one or more of the purposes of this Act.

Both Mr Benn and Stephen Doughty, shadow minister for foreign and Commonwealth affairs and international development, were critical of the breadth of this power. Stephen Doughty said the bill provided “no elaboration on what type of activities that ‘conduct’ could involve” and no justification for why the power was needed.<sup>259</sup> He noted that Sir Jonathan Jones, former head of the Government Legal Department, had described it as a “do whatever you like power”.<sup>260</sup> Mr Doughty also expressed disapproval that the threshold for using this power, as with other powers, including Henry VIII powers, throughout the bill, was when the minister considered it “appropriate”.

Michael Ellis said he believed the power in clause 18(1) had been “misconstrued, in some quarters, as an extraordinary power”.<sup>261</sup> He emphasised that it related to non-legislative activity and was intended to “ensure that actions not requiring legislation, such as issuing guidance to industry or providing direction to officials, can be taken in a timely manner”.

Hilary Benn said he had never heard of the concept of “sub-legislative activity”, the term used in the bill’s explanatory notes to describe the sort of

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<sup>259</sup> [HC Hansard, 20 July 2022, col 1002.](#)

<sup>260</sup> [HC Hansard, 20 July 2022, col 1003](#); and Sir Jonathan Jones, ‘[The Northern Ireland Protocol Bill is one of the most extraordinary pieces of legislation I have ever seen](#)’, Politics Home, 15 June 2022.

<sup>261</sup> [HC Hansard, 20 July 2022, col 1004.](#)

conduct to be covered by clause 18.<sup>262</sup> He also questioned why ministers would need to refer to legislation to be able to give instructions to civil servants.<sup>263</sup> He called on the government to explain “precisely what conduct is covered by clause 18(1)” and to amend the bill to make this explicit. He also asked for “a categorical assurance that this provision will not permit legally binding obligations to be made as a result of that conduct”.

Mr Benn suggested the lack of clarity in clause 18 was indicative of ministers wanting to give themselves “the power to do whatever they want in relation to the protocol [...] to be able to turn things on, turn them off and even turn them back on again whenever they feel like”.<sup>264</sup> But he said the “fundamental problem” was ministers were “not entirely clear how some of their proposals—for example a red customs lane and a green customs lane, or the dual regulatory regime [...]—will work in practice”. He argued the government would not need “so many of these Henry VIII powers [...] dotted throughout the bill” if it had a clear idea of how its proposed new regimes would work.<sup>265</sup>

Responding to Mr Benn’s points, Michael Ellis said that the power in clause 18(1) had been included to address possible interactions between protocol obligations given effect in domestic law and changes made because of the bill:

Normally, as he knows, the lawfulness of ministers’ non-legislative actions can be taken for granted or implied. The bill is slightly unusual in that it clarifies how new domestic obligations replace prior domestic obligations that stem from international obligations. Those international obligations are currently implemented automatically by section 7A of the European Union (Withdrawal) Act 2018. That conduit pipe currently constrains—and could cause confusion in future as to how—ministers can act in support of the bill. Clause 18 will remove that

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<sup>262</sup> [HC Hansard, 20 July 2022, col 1015.](#)

<sup>263</sup> [HC Hansard, 20 July 2022, col 1016.](#)

<sup>264</sup> [HC Hansard, 20 July 2022, col 1016.](#)

<sup>265</sup> [HC Hansard, 20 July 2022, col 1017.](#)

potential confusion.<sup>266</sup>

Amendment 12 was defeated by 277 votes to 197, a majority of 80.<sup>267</sup>

### **Protecting the Belfast (Good Friday) Agreement (amendment 49)**

The SDLP moved amendment 49, which would have added a general requirement to clause 18 for ministers to “have due regard for the principle that the Belfast Agreement, including its subsequent implementation agreements and arrangements, should be protected in all its parts”. The SDLP said this amendment was based on the fourth point in the preamble to the protocol, in which the UK and the EU affirm “that the Good Friday or Belfast Agreement of 19 April 1998 [...] including its subsequent implementation agreements and arrangements should be protected in all its parts”.<sup>268</sup>

Michael Ellis said the amendment was unnecessary.<sup>269</sup> He stated the government had an “overriding” and “absolute” commitment to protecting the Belfast (Good Friday) Agreement in all its dimensions.

Claire Hanna (SDLP MP for South Belfast) questioned why the government had “so forcefully rejected” codifying in the bill its commitment to the Belfast (Good Friday) Agreement.<sup>270</sup> She said amendment 49 would “give an opportunity to protect fully and truly the Good Friday Agreement with negotiated solutions”.<sup>271</sup> She argued the agreement was based on the idea that “consent should rest on the will of the majority of people in Northern Ireland [...] within the architecture and the institutions of the three-stranded approach in the agreement”. However, throughout the debate, she

<sup>266</sup> [HC Hansard, 20 July 2022, col 1031.](#)

<sup>267</sup> [HC Hansard, 20 July 2022, col 1032.](#)

<sup>268</sup> House of Commons, ‘[Northern Ireland Protocol Bill \(amendment paper\)](#)’, 20 July 2022, p 2.

<sup>269</sup> [HC Hansard, 20 July 2022, col 1005.](#)

<sup>270</sup> [HC Hansard, 20 July 2022, col 1020.](#)

<sup>271</sup> [HC Hansard, 20 July 2022, col 1022.](#)

implied the government was giving more weight to the views of unionists than those of other traditions in Northern Ireland. For instance, she called on the minister to acknowledge that all the non-unionist members of the Northern Ireland Assembly “reject this bill in the strongest possible terms” and to explain how there could be cross-community consent for its provisions “if they are rejected by two of the three traditions in Northern Ireland”.<sup>272</sup>

Stephen Farry, who also signed the amendment, made a similar argument. He believed that by arguing it had to proceed with the bill because unionists had withdrawn from Northern Ireland’s institutions, the government was “directly, openly and deliberately only addressing the concerns of a minority [...] of political representatives and of business representatives”.<sup>273</sup> He feared “Parliament is proceeding on a false pretence to pass this very dangerous and destructive legislation”.

Sir Jeffery Donaldson accused the SDLP and Alliance of paying “lip service” to unionist concerns while “at every opportunity” opposing “reasonable change” that would address them.<sup>274</sup> He said nationalist concerns needed to be heard, but he believed the government’s proposal addressed concerns on both sides of the community.<sup>275</sup> It would meet “the needs and sensitivities” of nationalists by avoiding a hard border on the island of Ireland, while at the same time meeting unionist concerns about removing impediments to trade between Northern Ireland and the rest of the UK.<sup>276</sup>

Amendment 49 was defeated by 278 votes to 196, a majority of 82.<sup>277</sup>

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<sup>272</sup> [HC Hansard, 20 July 2022, col 1006.](#)

<sup>273</sup> [HC Hansard, 20 July 2022, col 1026.](#)

<sup>274</sup> [HC Hansard, 20 July 2022, col 1008.](#)

<sup>275</sup> [HC Hansard, 20 July 2022, col 1010.](#)

<sup>276</sup> [HC Hansard, 20 July 2022, col 1011.](#)

<sup>277</sup> [HC Hansard, 20 July 2022, col 1035.](#)

### **Northern Ireland Assembly approval for commencement of bill provisions (amendment 3)**

Stephen Farry moved amendment 3 (also signed by the SDLP and the Liberal Democrats) which would have meant clauses 1 to 20 of the bill could come into force only if the Northern Ireland Assembly passed a resolution supporting the act.

Michael Ellis argued bringing the bill into force could not be dependent on the approval of the Northern Ireland Assembly, which was not sitting.<sup>278</sup> He said it was “exactly because of the breakdown” of Northern Ireland’s political institutions the bill was needed in the first place. He also argued it would not be right to allow the Northern Ireland Assembly to constrain the UK Parliament’s power to legislate on a reserved matter.

In response, Stephen Farry said his amendment would provide the DUP with a “huge incentive” to go back into power-sharing so that eventual consent or otherwise to the bill could be considered by the Assembly.<sup>279</sup> He suggested there could be discussion about whether such a vote should take place on a majoritarian or cross-community basis, but asserted that “either would be far better than a situation where we have a minority dictating an outcome”. He urged that “if the bill is genuinely about the good of Northern Ireland, respect will be given to the views of the Assembly”.

Amendment 3 was defeated by 275 votes to 194, a majority of 81.<sup>280</sup>

### **Adjudications of matters pertaining to international law (new clause 12)**

Labour moved new clause 12. This would have required that if any international court, tribunal or arbitration panel found any provisions of the

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<sup>278</sup> [HC Hansard, 20 July 2022, col 1046.](#)

<sup>279</sup> [HC Hansard, 20 July 2022, col 1052.](#)

<sup>280</sup> [HC Hansard, 20 July 2022, col 1053.](#)

bill or any actions taken by the government under the bill to be inconsistent with the UK's international legal obligations, a minister would have to report this to Parliament and set out what steps the government intended to take to ensure the UK complied with its international obligations.

Stephen Doughty argued that “a piece of legislation that runs even the remotest risk of breaching the UK's international obligations should never pass this House, but we must be prepared if it does”.<sup>281</sup> He said if the government's actions were found to be unlawful, it was right a minister should explain how the government would put it right. He argued the government should “not be afraid” of this amendment, because if its argument that the bill was consistent with international law held sway, the provision would never be used.<sup>282</sup>

Michael Ellis described the amendment as unnecessary, reiterating the government's position that the bill was consistent with the UK's obligations in international law and in support of the UK's prior obligations in the Belfast (Good Friday) Agreement.<sup>283</sup> He said the government would robustly defend its position in any legal proceedings, should they occur.

New clause 12 was defeated by 273 votes to 192, a majority of 81.<sup>284</sup>

### 5.3 Third reading

As the bill was considered by a committee of the whole House and not amended, it passed straight to third reading with no report stage.

Michael Ellis, the then paymaster general, described it as “reassuring” that opposition members agreed and accepted there were problems with the protocol, even if they did not accept the government had no choice but to

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<sup>281</sup> [HC Hansard, 20 July 2022, col 1048.](#)

<sup>282</sup> [HC Hansard, 20 July 2022, col 1049.](#)

<sup>283</sup> [HC Hansard, 20 July 2022, col 1046.](#)

<sup>284</sup> [HC Hansard, 20 July 2022, col 1057.](#)

act unilaterally. He said he took the lack of amendments as “a strong vote of support” for the government’s proposals.<sup>285</sup> On that basis, he urged the DUP to “continue their moves towards returning to power-sharing”.

Mr Ellis said the bill would provide “certainty that the elements of the protocol that have developed into problems will no longer apply in domestic law”.<sup>286</sup> It would also allow the government to “protect that which is working to maintain the economic and social framework for north-south traders and nationalists and [...] fix that which is undermining the lives and livelihoods of east-west traders and unionists”. He maintained that “in the absence of other comprehensive and durable solutions, the government and Parliament must act”.

Speaking for Labour, Stephen Doughty argued it was “clear that the bill does not address the challenges of the protocol”.<sup>287</sup> He said Conservative members had rejected amendments that would have ensured the bill would comply with the UK’s international legal obligations, prevented a “brazen ministerial power grab not just from this House but from the people of Northern Ireland” and ensured that changes to the protocol would have the consent of all the communities of Northern Ireland.<sup>288</sup> He believed the government was “damaging our reputation on the world stage” and “risking trade barriers during a cost of living crisis”.<sup>289</sup> He declared Labour would vote against the bill “to uphold the rule of international law and to protect our global reputation”.<sup>290</sup>

Sir Jeffrey Donaldson, leader of the DUP, argued the government was right to act.<sup>291</sup> He believed the bill would “deal with the real problems that the protocol has created” both for businesses and consumers in Northern

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<sup>285</sup> [HC Hansard, 20 July 2022, col 1060.](#)

<sup>286</sup> [HC Hansard, 20 July 2022, col 1061.](#)

<sup>287</sup> [HC Hansard, 20 July 2022, col 1062.](#)

<sup>288</sup> [HC Hansard, 20 July 2022, col 1061.](#)

<sup>289</sup> [HC Hansard, 20 July 2022, col 1062.](#)

<sup>290</sup> [HC Hansard, 20 July 2022, col 1063.](#)

<sup>291</sup> [HC Hansard, 20 July 2022, col 1065.](#)



Ireland and by “undermining the identity of the majority of people in Northern Ireland who want to remain part of the United Kingdom”. He warned members of the House of Lords, who he said might be “tempted to make radical changes” to the bill that “the choice is not merely one of determining whether the bill is a good thing or not”. Rather, he said, the bill “is essential to protect the Belfast or Good Friday Agreement, to protect political stability in Northern Ireland, to restore the political institutions in Northern Ireland and to restore the consensus that is at the heart of power-sharing”.

Colum Eastwood, leader of the SDLP, said the bill “clearly and blatantly breaks international law”.<sup>292</sup> He believed if it was “driven through, the only likely outcome is a trade war with the European Union”.<sup>293</sup> He maintained the people of Northern Ireland, their elected representatives and the representatives of business groups did not want the bill. He appealed to the DUP to return to power-sharing, and to the government not to “unilaterally rip up an agreement”.<sup>294</sup>

The bill received its third reading by 267 votes to 195, a majority of 72.<sup>295</sup>

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<sup>292</sup> [HC Hansard, 20 July 2022, col 1065.](#)

<sup>293</sup> [HC Hansard, 20 July 2022, col 1066.](#)

<sup>294</sup> [HC Hansard, 20 July 2022, col 1067.](#)

<sup>295</sup> [HC Hansard, 20 July 2022, col 1069.](#)

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