



Law Society
of Scotland

Second Reading Briefing

Northern Ireland Protocol Bill

House of Lords Second Reading Briefing

October 2022



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

We are concerned about the impact of the Bill on the rule of law. Since its introduction the Bill has attracted attention in respect of those provisions which many consider to be inconsistent or incompatible with international law (and relevant domestic laws).

General Comments

Provisions of the Bill which are inconsistent with international law

The Bill appears to be inconsistent with the international obligations of the UK in Article 4 of the Withdrawal Agreement to give effect to the Agreement, including the NI Protocol. This is because clause 2 of the Bill will not give effect to parts of the NI Protocol referred to as “excluded provisions” and disapplies section 7A of the European Union (Withdrawal) Act 2018 (EUWA) which provides for general implementation of the remainder of the Withdrawal Agreement. This means that the rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned under the NI Protocol, or any other part of the EU Withdrawal Agreement are “not to be—

- (i) recognised or available in domestic law, or
- (ii) enforced, allowed or followed accordingly”.

See *Northern Ireland Protocol Bill* by Professor Mark Elliott [The Northern Ireland Protocol Bill – Public Law for Everyone](#) .

These include provisions dealing with the movement of goods, including customs duties, between Great Britain and Northern Ireland (see clause 4) and subsidy control (or ‘state aid’) rules (clause 12).

In particular, we are concerned about clauses 13, 14 and 20. Clause 13 treats as ‘excluded provisions’ any parts of the Protocol or Withdrawal Agreement that confer jurisdiction on the Court of Justice of the European Union (CJEU) (whether or not relating to other “excluded provisions”). Clause 14 also treats as “excluded provisions” any parts of the Protocol or Withdrawal Agreement relating to such provisions including the obligation on the courts to implement and apply EU law or to interpret provisions of the Protocol or Withdrawal Agreement in accordance with EU law and case law. Clause 20 provides that UK courts are not bound by any principles or case law of the ECJ and cannot refer matters to the ECJ in any proceedings relating to the Protocol or related provisions in the Withdrawal Agreement.

Do these provisions breach international law?

The Government does not rely on Article 16 of the NI Protocol to justify the Bill. That Article would entitle the UK Government to take unilateral “safeguard measures” in certain circumstances but those measures

“...must be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation”.

Instead, the Government argues that these provisions do not breach international law because the situation in NI is such that, under the doctrine of necessity in international law, any:

“non-performance of its obligations contained in the Withdrawal Agreement and/or the Protocol as a result of the planned legislative measures would be justified as a matter of international law”

[Northern Ireland Protocol Bill: UK government legal position - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/northern-ireland-protocol-bill-uk-government-legal-position).

The Government cites Article 25 of the [International Law Commission's Draft Articles of State Responsibility](#), which makes it clear that the doctrine only applies in exceptional cases where the non-performance of an international obligation by a State

“is the only way for the State to safeguard an essential interest against a grave and imminent peril” [and cannot be invoked if] “the State has contributed to the situation of necessity”

On the other hand, it is arguable,

- that the current situation in NI does not constitute “a grave and imminent peril” to an essential interest of the UK;
- but if there is such a necessity the UK Government has contributed to it by entering into the Withdrawal Agreement and the NI Protocol in the knowledge that it would give rise to such difficulties;
- that the Bill is not the only way in which the difficulties can be resolved, given the willingness of the EU to enter into agreements to mitigate the trade problems; and
- that the Bill goes beyond what is necessary to resolve the trade problems and instead seeks to rewrite provisions in the Withdrawal Agreement and NI Protocol, such as those in clauses 13, 14 and 20.

Necessity for adherence to international law

The UK Government should, as a matter of principle, comply with public international law and the rule of international law, *pacta sunt servanda* (agreements are to be kept) should be honoured.

Adherence to the rule of law underpins our democracy and our society. We believe that to knowingly break with the UK's reputation for following public international law could have far-reaching economic, legal and political consequences and should not be taken lightly.

The Government should explain what clause 18 means in relation to the discretion to Ministers to “engage in conduct” in relation to the NI Protocol.

In relation to clause 19 we take the view that it is inappropriate to implement international agreements by regulation. That approach departs from the precedents set by the EU (Withdrawal Agreement) Act 2020 and the EU (Future Relationship) Act 2020.

Regulation Making Powers

We are also concerned about the broad Ministerial Regulation making powers in the bill. These powers occur throughout the bill and can be used to implement the new arrangements for the movement of goods between GB and NI (clauses 5 and 6), implement the dual regulatory regime (clause 9) and provide for subsidy control (clause 12) and enforcement of the Protocol (clause 13), Provision of the Protocol etc. applying to other exclusions (clause 14), Additional excluded provision: new law (clause 16), Value added tax, excise duties and other taxes: new law (clause 17) and Role of the European Court in court and tribunal proceedings (clause 20).

Clauses 22, 23 and 24 make further provision for regulation making. Regulations may “make any provision that could be made by an Act of Parliament (including provision modifying this Act)”.

This wide power extends to:

- (a) making a regulation notwithstanding that it is not compatible with the Northern Ireland Protocol or any other part of the EU withdrawal agreement;
- (b) suspending or repealing, or making alternative provision to, domestic law so far as it gives effect to the Northern Ireland Protocol or any other part of the EU withdrawal agreement;
- (c) making provision for any EU law to form part of domestic law (with or without modifications), including provision corresponding to sections 3 to 6 of, and Schedule 1 to, the European Union (Withdrawal) Act 2018;
- (d) making provision restating or modifying the effect which any EU law has by virtue of section 7A of the European Union (Withdrawal) Act 2018;

Regulations which will amend an Act of Parliament or have effect retrospectively are subject to affirmative or made affirmative procedure.

As a matter of principle regulations should not be deployed to depart from the terms of an international agreement.

If these provisions remain in the bill, we take the view that ministers must consult on such regulations with such persons as the minister considers appropriate. Made affirmative regulations should not be used in this context.



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For further information, please contact:

Michael P Clancy

Director, Law Reform

Law Society of Scotland

DD: 07785 57833

michaelclancy@lawscot.org.uk