

NORTHERN IRELAND PROTOCOL BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Northern Ireland Protocol Bill as brought from the House of Commons on 21 July 2022 (HL Bill 52).

- These Explanatory Notes have been prepared by the Foreign, Commonwealth and Development Office in order to assist the reader of the Bill. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

Table of Contents

Subject	Page of these Notes
Overview of the Bill	3
Policy background	4
The Bill	5
Legal background	6
Territorial extent	7
Devolution	7
Commentary on provisions of Bill	8
Clause 1: Overview of main provisions	8
Clause 2: Limitation of general implementation of the Northern Ireland Protocol	8
Clause 3: Other limitations in interpretation of law	8
Clause 4: Movement of goods (including customs): excluded Protocol provision	8
Clause 5: Movement of goods: new law about matters other than customs	9
Clause 6: Customs matters: new law	10
Clause 7: Regulation of goods: option to choose between dual routes	10
Clause 8: Regulation of goods: excluded Protocol provision	11
Clause 9: Regulation of goods: new law	11
Clause 10: Meaning of “regulation of goods”	11
Clause 11: Regulation of goods: supplementary provision	11
Clause 12: Subsidy control	12
Clause 13: Implementation, application, supervision and enforcement of the Protocol	12
Clause 14: Provision of the Protocol etc applying to other exclusions	13
Clause 15: Changes to, and exceptions from, excluded provision	13
Clause 16: Additional excluded provision: new law	14
Clause 17: Value added tax, excise duties and other taxes: new law	14
Clause 18: Other Ministerial powers	14
Clause 19: New agreements amending or replacing the Northern Ireland Protocol	15
Clause 20: Role of the European Court in court and tribunal proceedings	15
Clause 21: Preparatory expenditure	15
Clause 22: Regulations	15
Clause 23: Making regulations under this Act: general provisions	16
Clause 24: Regulations relating to tax or customs matters	17
Clause 25: Interpretation	17
Clause 26: Extent, commencement and short title	18
Commencement	19
Financial Matters	19
Compatibility with the European Convention on Human Rights	19

Environmental law provisions	19
Related documents	20
Annex A – Territorial extent and application in the United Kingdom	21

Overview of the Bill

- 1 The Northern Ireland Protocol Bill (“the Bill”) has 26 clauses. A summary of, and background to, the Bill is provided below.
- 2 The Bill will provide the basis to amend the operation of the Protocol on Ireland/Northern Ireland (“the Northern Ireland Protocol”) included in the UK-EU Withdrawal Agreement (“Withdrawal Agreement”) in the domestic law of the UK. It will disapply elements of the Northern Ireland Protocol, and provide delegated powers to Ministers to make new law in connection with the Northern Ireland Protocol (including where provision ceases to have effect in the UK). Additionally, the Bill will provide delegated powers for Ministers to provide that other provisions of the Northern Ireland Protocol should cease to have effect in the UK, as well as to implement any agreement with the European Union (“EU”) regarding the Northern Ireland Protocol.

Policy background

- 3 The people of the United Kingdom and Gibraltar decided by referendum on 23 June 2016 to leave the EU.
- 4 The terms of the UK's departure from the EU were agreed and set out in the Withdrawal Agreement. This included the Northern Ireland Protocol setting out unique arrangements for Northern Ireland. On 19 October 2019, the Government laid the Withdrawal Agreement and the Political Declaration¹ before Parliament; and on 23 January 2020 the European Union (Withdrawal Agreement) Act 2020 received Royal Assent. This enabled the United Kingdom to leave the European Union at 11pm (UK time) on 31 January 2020.
- 5 The Withdrawal Agreement provided for a time-limited transition period which ended at 11pm (UK time) on 31 December 2020. During 2020 the United Kingdom engaged in discussions which culminated in the UK-EU Trade and Cooperation Agreement, establishing the terms of the UK's future relationship with the EU. Alongside the Withdrawal Agreement, several elements of the operation of the Northern Ireland Protocol were left to be discussed and agreed by the Withdrawal Agreement Joint Committee. An agreement regarding those issues was reached at the Joint Committee meeting on 17 December 2020. This included several grace periods and easements before the application of the full requirements of the Northern Ireland Protocol, to avoid disruption for businesses and citizens. In addition significant work was undertaken by the Government to deliver the underpinning arrangements for the operation of the Northern Ireland Protocol, including IT systems and a new Trader Support Service. Following those preparations, the Northern Ireland Protocol came into force at the end of the transition period.
- 6 The Northern Ireland Protocol was intended to meet several overall 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 and its 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 disruption and burdens in practice.
- 7 In recognition of these concerns, the Government has taken steps to avoid further disruption. These include the extension of several easements in March 2021 and the application of "standstill" arrangements in September 2021, which have continued to operate the initial set of grace periods and easements in the period since. These have 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.
- 8 The Government has also looked to work with the EU to find joint solutions to the underlying challenges posed by the Northern Ireland Protocol and propose ways forward to operate the Northern Ireland Protocol sustainably. These discussions have proceeded since January 2021. As part of those discussions, in July 2021 the Government set out a proposed approach in a Command Paper.² In turn the EU Commission set out proposals in October 2021 in four areas covered by the Northern Ireland Protocol. Though talks proceeded intensively, on 21

¹ *Withdrawal Agreement and Political Declaration*, October 2019. <https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration>

² 'Northern Ireland Protocol: the way forward' (CP 502)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1008451/CCS207_CCS0721914902-005_Northern_Ireland_Protocol_Web_Accessible_1_.pdf

February 2022 the Co-Chairs of the Withdrawal Agreement Joint Committee took stock of the talks that had taken place, and noted that agreement had not been possible at that point.

- 9 In parallel there have been ongoing political developments in Northern Ireland linked to the Northern Ireland Protocol. On 8 February 2022, Paul Givan, at the time the First Minister of the Northern Ireland Executive, resigned, meaning the offices of First Minister and deputy First Minister were vacated. On 5 May 2022 elections were held for the Northern Ireland Assembly. Following those elections, there has been no agreement to nominate a Speaker to enable the Assembly to sit; nor have Ministers been nominated to enable a new Northern Ireland Executive to form. Issues with the Northern Ireland Protocol have been cited as a barrier to progress in both regards.
- 10 Taken together, 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 cannot await such an agreement. As a result, the Foreign Secretary set out to the House of Commons on 17 May 2022 that primary legislation would be brought forward to address the operation of the Northern Ireland Protocol and revise its arrangements in order to fulfil its objectives.

The Bill

- 11 The purpose of the Bill is to provide Ministers with the power to make changes to the operation of the Northern Ireland Protocol in domestic law which protect the Belfast (Good Friday) Agreement and to safeguard peace and stability in Northern Ireland.
- 12 The Bill makes certain provisions of the Northern Ireland Protocol "excluded provision". Where provision is excluded, clause 2 provides that section 7A(2) of the European Union (Withdrawal) Act 2018 no longer applies to it, and the provision will not be applicable in domestic law. Clause 3 provides that section 7C of the European Union (Withdrawal) Act 2018 does not apply so far as it would produce an effect which is incompatible with any provision made by or under the Bill.
- 13 The Bill specifies which elements of the Northern Ireland Protocol are "excluded provision", particularly in relation to the movement of goods; the regulation of goods in Northern Ireland so far as necessary to allow goods in Northern Ireland to meet either UK or EU rules based on the choice of producers; subsidy control; and the governance arrangements under the Northern Ireland Protocol. Where provisions of the Bill create "excluded provision" they are accompanied by a delegated power to make appropriate new provision in domestic law. Powers are also provided in relation to VAT and excise.
- 14 The Bill also provides powers to reflect in domestic law the disapplication of additional elements of the Northern Ireland Protocol and to make new law as appropriate in connection with this. Finally, the Bill provides a power to implement a new agreement with the EU concerning the Northern Ireland Protocol, if one is reached.

Legal background

- 15 The Northern Ireland Protocol is an integral part of the Withdrawal Agreement.
- 16 Section 7A of the European Union (Withdrawal) Act 2018 (“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 (including the availability of Francovich damages).
- 17 Section 7C 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.
- 18 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 (e.g. regulations, decisions) flow into domestic law without the need for any further implementing legislation.
- 19 Although directives are not generally capable of direct application, to the extent they contain directly effective rights, those provisions are also capable of flowing through into domestic law. For provisions of directives and other EU law made applicable by the Withdrawal Agreement that are not directly applicable, EUWA provides powers to implement them. Section 8C EUWA provides powers to implement the Northern Ireland Protocol and to supplement the effect of section 7A in relation to the Northern Ireland Protocol.
- 20 The Withdrawal Agreement Joint Committee (“Joint Committee”) is responsible for the implementation and application of the Withdrawal Agreement, including the Northern Ireland Protocol. The Joint Committee can take binding decisions in respect of all matters for which the Withdrawal Agreement so provides and Joint Committee decisions have the same legal effect as the Withdrawal Agreement pursuant to Article 166.2. Article 13.4 of the Northern Ireland Protocol gives the Joint Committee powers to take a decision to add a new EU act which is within the scope of the Northern Ireland Protocol to one of the Northern Ireland Protocol’s Annexes, provided that the act neither amends nor replaces an EU act made applicable by the Northern Ireland Protocol, following a procedure set out in Article 13.4.
- 21 Article 6.3 of the Withdrawal Agreement provides that references to provisions of EU law made applicable by the Withdrawal Agreement include “relevant Union acts supplementing or implementing those provisions”. This means that any implementing and delegated acts enacted under the EU acts included in the annexes to the Northern Ireland Protocol apply to the United Kingdom. By virtue of Article 13.3 of the Northern Ireland Protocol, EU law made applicable by the Northern Ireland Protocol is also to be read as including amendments to the EU acts and replacements of such EU acts. It is not specified further how “amendments and replacements” is to be understood. Where these new acts are directly applicable, they will also be given effect by section 7A which in accordance with section 7A(1) gives effect to all rights, obligations etc “from time to time created or arising by or under the Withdrawal Agreement”.

Territorial extent

- 22 The territorial extent and application of the Bill is UK-wide. Clause 26 sets out the territorial extent of the Bill.

Devolution

- 23 There is a convention that Westminster will not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament, Senedd Cymru or the Northern Ireland Assembly without the consent of the legislature concerned.
- 24 The Bill contains provisions which cover devolved or transferred matters. Where the Bill engages the Legislative Consent Motion process, the UK Government has written to the Scottish and Welsh Governments to seek consent to legislate in the normal manner. At the time of introduction into the Lords the Northern Ireland Assembly and Executive were not formed, but the Permanent Under Secretary at the Foreign, Commonwealth and Development Office has written to the Head of the Northern Ireland Civil Service setting out the Government's intention to seek consent from the Northern Ireland Assembly as soon as possible.

Commentary on provisions of Bill

Clause 1: Overview of main provisions

- 26 Clause 1 summarises the effect of the Bill. It sets out that the Bill ends the effect of - i.e. disapplies - specific areas of the Northern Ireland Protocol in domestic law; provides Ministers with powers to disapply further areas of the Northern Ireland Protocol according to specific purposes; and provides Ministers with powers to make new law related to the Northern Ireland Protocol, putting in place suitable domestic arrangements where needed.
- 27 Subsection (1)(c) makes clear that where other enactments are subject to the Northern Ireland Protocol in domestic law, this ceases where the Northern Ireland Protocol is excluded under the Bill - as for example with respect to Article VI of the Act of Union (Ireland) 1800 and Act of Union with Ireland 1800.

Clause 2: Limitation of general implementation of the Northern Ireland Protocol

- 28 Clause 2 allows the rest of the Bill to take effect. It removes the effect (in domestic law) of “excluded” provisions of the Northern Ireland Protocol and of the Withdrawal Agreement, which are currently given effect by section 7A of the EUWA.
- 29 Many of these provisions are EU law provisions that currently apply automatically in domestic law, without any further enactment. This is because section 7A of the EUWA allows them to retain their EU law characteristics of direct application, direct effect and supremacy.
- 30 Subsections (1) and (2) address section 7A of the EUWA to provide clarity in domestic law on the disapplication of the “excluded” provision of the Northern Ireland Protocol and Withdrawal Agreement, allowing new domestic law to operate clearly.
- 31 Subsection (3) amends section 7A of the EUWA to reflect this.

Clause 3: Other limitations in interpretation of law

- 32 Clause 3 has ancillary function to clause 2, limiting the relevant part of the EUWA that would otherwise require domestic courts to interpret domestic law in light of relevant separation agreement law (i.e. the Withdrawal Agreement, EEA-EFTA Separation Agreement and Swiss Citizens’ Rights Agreement). 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.
- 33 Subsection (1) provides for the necessary change to section 7C of the EUWA, and subsection (2) amends the EUWA to reflect this.

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

- 34 Clause 4 provides for a default exclusion for both UK and non-EU destined goods moving between Great Britain and Northern Ireland. The result is that these goods (including animals) do not face the requirements placed on them under the Northern Ireland Protocol. This clause, 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. This will allow for significantly revised arrangements for goods moving and remaining within the United Kingdom. For example, UK-destined goods could be moved as part of a new ‘green channel’ arrangement; while goods destined for the EU could enter a ‘red channel’ and be required to meet full EU requirements, including customs requirements and the payment of duty, where applicable.
- 35 Subsection (1) disapplies parts of Article 5.1 and Article 5.2 of the Northern Ireland Protocol. These provisions set out that customs duty would only be due on goods entering Northern

Ireland that were “at risk” of entering the EU. Subsection (1) removes the effect of these in domestic law as this “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.

- 36 Subsection (2) sets out the customs requirements within this model which apply to goods moving between Great Britain and Northern Ireland, or entering Northern Ireland from non-EU countries. Subsection (2)(a) sets out that Article 5.3 of the Northern Ireland Protocol does not apply for “qualifying movements” of goods from Great Britain that are UK destined (or otherwise not destined for the EU). Subsection (2)(b) also sets out that Article 5.4 and Annex 2 of the Northern Ireland Protocol (which applies various EU legislation including Sanitary and Phytosanitary (“SPS”) controls to Northern Ireland, and thereby on entry to Northern Ireland of goods moved from Great Britain to Northern Ireland), and Article 5.4 which applies it in Northern Ireland, is disapplied in domestic law in relation to “qualifying movements”. Subsection (2) as a whole therefore removes customs requirements, tariffs, and certain regulatory requirements such as SPS controls on “qualifying movements” including those from Great Britain into Northern Ireland.
- 37 Subsection (3) provides that a Minister of the Crown may, by regulations, provide prescribed descriptions of those “qualifying movements” that could benefit from any arrangements (such as a ‘green channel’) by being UK or non-EU destined. Without further definition, qualifying movements are as set out in subsection (6).
- 38 Subsection (4) sets out what prescribed descriptions of “qualifying movements” could relate to in future regulations. For example, if they are commercial or non-commercial movements, or whether they are moved into Northern Ireland directly. This would allow a Minister to provide that non-commercial goods (such as those moved by a passenger in their baggage or non-commercial pets) would always be “qualifying movements”. This provides the basis for the operation of a regime which could distinguish between UK destined and EU destined goods.
- 39 Subsection (5) provides that a Minister of the Crown may, by regulations, make provision about the meaning of “UK or non-EU destined”. This 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. For example, that they are declared so in accordance with a prescribed scheme, such as a ‘trusted trader’ scheme. In absence of any such regulations, the term “UK or non-EU destined” would take its natural meaning.
- 40 Subsection (6) defines the term “qualifying movement” within this clause.

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

- 41 Clause 5 allows a Minister of the Crown to make regulations in relation to clause 4. This clause enables a Minister to make provision for UK and EU destined goods to be distinguished, for example by providing for different requirements as to the checks and controls that will apply in respective cases.
- 42 Subsection (1) provides that a Minister of the Crown may, by regulations, make appropriate provision in connection with any provision of the Northern Ireland Protocol to which clause 4 relates.
- 43 Subsection (2) clarifies that subsection (1) cannot be used to make provision about customs matters, which are instead covered by clause 6.
- 44 Subsection (3) provides clarity that regulations made under subsection (1) may include provision for appropriate arrangements to apply to goods, regardless of destination. For

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

Clause 6: Customs matters: new law

- 45 Clause 6 allows the Treasury and HMRC to bring forward legislation in relation to customs matters including duties and the administration and enforcement of customs. This is in line with standard legislative procedure in relation to legislating for the collection and administration of duties.
- 46 Subsection (2) provides clarity regarding elements that such regulations could include. As with clause 5, this provides the means to establish the underpinnings of any future 'green' and 'red channel' regime, and accompanying 'trusted trader' scheme, and enable it to function effectively.

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

- 47 Clause 7 introduces a dual regulatory regime in Northern Ireland for regulated classes of goods to which any provision of Annex 2 of the Northern Ireland Protocol applies. This includes manufactured goods, medicines and agri-food goods. This will mean that businesses will have a choice as to which regulatory route to follow - whether following UK requirements or EU law requirements - when supplying these goods in or to Northern Ireland. For the avoidance of doubt, where the relevant requirements allow, it will also be possible for the same product to simultaneously comply with both sets of requirements. This may be the case where, for example, EU and UK requirements are substantially the same for a type of goods. Goods that can lawfully be placed on the market in the rest of the UK will need to continue to meet requirements in the relevant legislation, when placed on the market in Northern Ireland, and demonstrate their conformity where required.
- 48 This will create new options compared to the existing arrangements, whereby goods are required to comply with the relevant EU requirements that are listed in Annex 2 of the Northern Ireland Protocol - meaning that goods that only meet UK requirements and not the applicable EU requirements cannot currently be placed on the market in Northern Ireland.
- 49 Importers, manufacturers and producers will remain liable for placing goods on the market in accordance with the correct rules; goods being placed on the market in the EU would need to meet EU rules, just as they do now. The powers in the Bill would provide the ability to introduce stringent penalties for traders found to have broken these rules.
- 50 Subsection (1) clarifies that this section of the Bill allows for the option to supply goods in Northern Ireland via a UK regulatory route, or an EU regulatory route, or both where this is technically possible. It also clarifies that the regulated class of goods - to which this section applies - includes manufactured goods, medicines and agri-food, as well as the further regulatory matters provided in clause 10.
- 51 Subsection (2) sets out that either a UK route, an EU route or both routes must be complied with (with the choice of route or routes being a matter for the relevant person).
- 52 Subsection (3) defines a regulated good as those goods regulated under the relevant provisions of EU law listed in Annex 2 to the Northern Ireland Protocol.
- 53 Subsection (4) defines the UK regulatory route as the law of the UK, that applies to that class of goods. It defines an EU regulatory route as being the relevant separation agreement law that applies to that class of goods, which includes any domestic law giving effect to the relevant EU law listed in Annex 2 of the Northern Ireland Protocol. This includes those that

apply directly, as well as relevant domestic law further implementing particular aspects of EU law.

Clause 8: Regulation of goods: excluded Protocol provision

- 54 Clause 8 provides clarity in domestic law that the relevant provisions of Article 5.4 of, and Annex 2 to, the Northern Ireland Protocol are disapplied to the extent that they would prevent the choice of regulatory routes set out in clause 7 having effect in Northern Ireland. This ensures that the dual regime can function in practice.

Clause 9: Regulation of goods: new law

- 55 Clause 9 provides powers to make provisions through secondary legislation to ensure the effective working of the dual regulatory routes in Northern Ireland. For example, certain goods regimes may need to be adjusted so that there is clarity for businesses on how the regulatory routes apply in practice. This is needed in order to safeguard the interests of consumer safety, biosecurity arrangements, and maintain appropriate public health standards.
- 56 Subsection (1) sets out the power available for a Minister of the Crown to make appropriate provisions in connection with the regulation of goods in Northern Ireland.
- 57 Subsection (2) clarifies that these regulations can be used in connection with the operation of the UK or EU regulatory routes, and can also be used to amend clauses 7 and 8.

Clause 10: Meaning of “regulation of goods”

- 58 Clause 10 provides definitions in relation to the dual regulatory regime established in this Bill.
- 59 Subsection (1) clarifies that “regulation of goods” in this Bill means regulation of making goods available on the market; putting goods into service; production of goods (whether by manufacture or any other process); and use and import of goods. This subsection also makes clear that regulation of goods includes any matter relevant to the regulation of goods including matters that occur before or after goods are made available on the market, put into service, or produced.
- 60 Subsection (2) sets out a further non-exhaustive list of what these regulatory matters may include.
- 61 Subsection (3) makes clear that in the case of placing goods on the market or putting goods into service, those matters may also include production of goods (whether by manufacture or any other process).
- 62 Subsection (4) provides that a Minister of the Crown may, by regulations, make provision about the meaning of regulation of goods in this Bill, including changing the effect of other provisions in this section.

Clause 11: Regulation of goods: supplementary provision

- 63 Clause 11 has the practical effect of being able to turn the dual regime on or off for specific types of goods, as needed.
- 64 Subsection (1) provides a power for a Minister of the Crown to have clause 7 (the default assumption that all goods follow a dual regulatory route) apply only to prescribed classes of regulated goods, or prescribed regulatory routes. This subsection allows a Minister to prescribe whether the dual regime should no longer apply to a specific class of regulated goods. It also provides a power for a Minister of the Crown to modify the different regulatory routes available in Northern Ireland.
- 65 Subsection (2) clarifies that the power can be applied to all or some of the specified regulatory

route, or all or some of the regulated class of goods. This has the practical effect of allowing Ministers to create a UK-only regulatory route and furthermore to apply this approach to part or all of a category of goods or to some or all of the required regulatory route.

- 66 Subsection (3) clarifies that the “regulatory route” can refer either to a “UK regulatory route” or an “EU regulatory route”, and that definitions of “UK regulatory route” and “EU regulatory route” are the same as in clause 7.

Clause 12: Subsidy control

- 67 Clause 12 provides the basis for a single UK-wide subsidy control policy, rather than two separate regimes as currently provided for under the Northern Ireland Protocol. The clause provides clarity in domestic law on the disapplication of Article 10 (including the obligation to notify measures currently in scope of the Northern Ireland Protocol to the European Commission).
- 68 Subsection (1) excludes Article 10 and Annexes 5 and 6 of the Northern Ireland Protocol from the provisions given effect in domestic law under section 7A(2) of the EUWA.
- 69 Article 10 of the Northern Ireland Protocol applies EU State aid rules to the UK with regard to measures which affect trade in goods and wholesale electricity between Northern Ireland and the EU. Annex 5 of the Northern Ireland Protocol lists the substantive State aid rules which apply as part of the application of Article 10, and Annex 6 provides the procedures by which Article 10.2 is applied.
- 70 Subsection (2) of this clause makes consequential amendments to the Subsidy Control Act 2022. Section 42(8)(d) of the Subsidy Control Act ensures that the calculation of Minimal Financial Assistance (“MFA”) and Services of Public Economic Interest (“SPEI”) Assistance includes *De Minimis* aid given under Article 10 the Northern Ireland Protocol. The disapplication of Article 10 means that MFA and SPEI Assistance can exclude the calculation of *De Minimis* aid given under Article 10 of the Northern Ireland Protocol. Subsection (2) of this clause therefore amends Section 42(8)(d) of the Subsidy Control Act to confirm that this calculation is only necessary until Article 10 is disappplied and this Bill comes into force.
- 71 Subsection (2) of this clause also amends section 48(3) of the Subsidy Control Act so it ceases to disapply UK subsidy control rules where the State aid rules apply by virtue of Article 10 of the Northern Ireland Protocol. This will extend UK subsidy control rules to Northern Ireland once Article 10 is disappplied and this Bill comes into force.
- 72 Subsection (3) of this clause provides that a Minister of the Crown may, by regulations, make appropriate provision in connection with any provision of the Northern Ireland Protocol to which this clause relates.

Clause 13: Implementation, application, supervision and enforcement of the Protocol

- 73 Clause 13 disapplies the effect in domestic law of provisions relating to implementation and enforcement of the Northern Ireland Protocol.
- 74 Subsection (1) sets out that any provision of the Northern Ireland Protocol or Withdrawal Agreement is excluded so far as it confers jurisdiction of the Court of Justice of the European Union (“CJEU”) in relation to the Northern Ireland Protocol or related provision of the Withdrawal Agreement. That is the case whether the CJEU jurisdiction relates to excluded provisions or any other matter.
- 75 Subsection (2) sets out that Article 12.2 and 12.3 of the Northern Ireland Protocol are “excluded provision”.
- 76 Subsection (3) sets out that other provision relating to the implementation, application,

supervision and enforcement of the Northern Ireland Protocol is excluded under clause 14.

- 77 Subsection (4) provides that a Minister of the Crown may, by regulations, make appropriate provision in connection with any provision of the Northern Ireland Protocol to which this clause relates.
- 78 Subsection (5) notes that, for example, this power could be used to make arrangements for sharing information with the EU relating to the operation of the Northern Ireland Protocol. This could be used, for example, in support of the Government's stated commitment to share data with the EU as a core part of the revised operation of the Northern Ireland Protocol. This could also allow for arrangements to be made regarding the representation of EU officials in Northern Ireland - though this would be a matter for determination by Ministers rather than a matter arising from obligations under the Northern Ireland Protocol.

Clause 14: Provision of the Protocol etc applying to other exclusions

- 79 Clause 14 disapplies other ancillary provisions in the Northern Ireland Protocol and Withdrawal Agreement, insofar as they might otherwise apply in relation to the provisions of the Northern Ireland Protocol and Withdrawal Agreement that are disapplied by this Bill.
- 80 Subsection (1) makes clear that, in domestic law, other provision of the Northern Ireland Protocol and Withdrawal Agreement does not apply, insofar as they otherwise would apply in relation to a provision that has been disapplied by this Bill.
- 81 Subsection (2) then provides examples of the ancillary provision that is covered by subsection (1). For example, this includes parts of the Withdrawal Agreement that govern how references to EU law in the Northern Ireland Protocol should be read.
- 82 Subsection (3) sets out that the matters which may be disapplied by this clause, so far as they apply in relation to other provision of the Protocol that has been disapplied, this includes the responsibility of the authorities of the UK to implement EU law and the requirement that such provision is to be interpreted in conformity with the methods and general principles of EU law and relevant EU case law.
- 83 Subsection (4) provides that a Minister of the Crown may, by regulations, make appropriate provision related to the aspects of the Northern Ireland Protocol and other parts of the Withdrawal Agreement that are disapplied by this clause.

Clause 15: Changes to, and exceptions from, excluded provision

- 84 Clause 15 describes how Ministers may change which elements of the Northern Ireland Protocol or the Withdrawal Agreement are "excluded provision".
- 85 Subsection (1) defines the purposes for which Ministers may disapply further areas of the Northern Ireland Protocol. These purposes include ensuring the effective flow of trade between Northern Ireland and another part of the United Kingdom; safeguarding animal, plant or human welfare or health; and lessening, eliminating or avoiding difference between tax or customs duties in Northern Ireland and Great Britain (amongst other purposes). Safeguarding the integrity of the EU Single Market is also included as a purpose, in acknowledgement of the fact that, for example, EU requirements would be applied to 'red channel' goods moving onto the EU. Subsections (1)(i)(i) and (1)(i)(ii) make clear that the international obligations included in subsection (1)(i) do not include the Northern Ireland Protocol or the Withdrawal Agreement.
- 86 Subsection (2) provides that a Minister of the Crown may, by regulations, make provision that amends the extent of "excluded provision". Subsections (2)(a) and (2)(b) make clear that this power can be used either to exclude additional provisions or to increase the extent to which an

already-excluded provision is excluded, whilst subsections (2)(c) and (2)(d) make clear that this power can be used either to decrease the extent to which an already-excluded provision is excluded or to cease exclusion of a provision.

87 Subsection (3) provides a limit to the power in subsection (2). It states that the power may not be exercised to provide for Article 2, Article 3, or Article 11 of the Northern Ireland Protocol to become excluded provision to any extent.

88 Subsection (4) provides that a Minister of the Crown may, by regulations, make provision to create exceptions from “excluded provision”.

Clause 16: Additional excluded provision: new law

89 Clause 16 describes how Ministers may make new law in connection with provisions of the Northern Ireland Protocol or Withdrawal Agreement which are additional “excluded provision” by virtue of the powers in clause 15.

90 Subsection (1) provides that a Minister of the Crown may, by regulations, make appropriate provision in relation to parts of the Northern Ireland Protocol or Withdrawal Agreement that are made “excluded provision” using the powers in clause 15.

91 Subsection (2) clarifies that the power to make regulations contained in this clause is not limited in any way by the other powers in the Bill.

92 Subsection (3) defines “additional excluded provision” as provisions made excluded under the powers in clause 15(2)(a) to 15(2)(c). This includes where that exclusion is subsequently precluded to a greater or lesser extent.

Clause 17: Value added tax, excise duties and other taxes: new law

93 Clause 17 provides that the Treasury may make provision related to VAT and excise law, and any other taxes, which they consider appropriate in connection with the Northern Ireland Protocol. This includes, but is not limited to, implementing VAT and excise measures UK-wide that might otherwise not be permitted in Northern Ireland under the Northern Ireland Protocol. As such, it provides Ministers with the ability to ensure that VAT, excise and other tax policy can be applied throughout the entirety of the UK where appropriate, including Northern Ireland.

94 Subsection (1) provides the Treasury with the power to make provision about VAT, excise duty and other taxes in relation to the Northern Ireland Protocol. It makes clear that this can include changes that would impose or vary the incidence of VAT, excise duty, and any other tax.

95 Subsection (2) clarifies that the Treasury may use this power in particular where doing so is necessary to lessen, eliminate, or avoid differences in VAT, excise duties or other taxes between Northern Ireland and Great Britain.

Clause 18: Other Ministerial powers

96 Clause 18 clarifies the relationship between powers provided by this Bill and those arising otherwise, including by virtue of the Royal Prerogative.

97 Subsection (1) provides that Ministers can engage in conduct (i.e. sub-legislative activity, such as producing guidance) relevant to the Northern Ireland Protocol if they consider it appropriate in connection with one or more of the purposes of this Bill.

98 Subsection (2) clarifies that this Bill does not affect powers otherwise provided to Ministers of the Crown, including any power to make subordinate legislation or powers under the Royal Prerogative.

Clause 19: New agreements amending or replacing the Northern Ireland Protocol

- 99 Clause 19 provides that a Minister of the Crown may, by regulations, make appropriate provision to implement a new agreement with the EU which amends or replaces the Northern Ireland Protocol.
- 100 Subsection (1) provides Ministers with the power to make legislative changes which they consider appropriate for the purposes of implementing an approved relevant agreement with the EU, or for dealing with matters arising from, or relating to, an approved relevant agreement.
- 101 Subsection (2) defines a “relevant agreement” by relation to the parties involved (the EU and UK); its effect on the Northern Ireland Protocol (modifying, supplementing or replacing the whole or any part of it).

Clause 20: Role of the European Court in court and tribunal proceedings

- 102 Clause 20 makes provision regarding the effect in domestic law of rulings of the CJEU and provides a power which could provide for a future reference procedure to the CJEU where a UK court or tribunal considers it necessary to seek a view from the European Court on a question of interpretation of EU law which would then be fed back into the UK court processes.
- 103 Subsection (1) establishes the scope of clause 20, outlining that it applies to proceedings so far as they relate to: the Northern Ireland Protocol; related provision of the Withdrawal Agreement; or domestic law relating to the Northern Ireland Protocol or related provision of the Withdrawal Agreement.
- 104 Subsection (2) provides that domestic courts and tribunals are not required in domestic law to follow the jurisprudence of the CJEU, and cannot refer cases to it in relation to the Northern Ireland Protocol or related provision of the Withdrawal Agreement.
- 105 Subsection (3) provides that a Minister of the Crown may, by regulations, make appropriate provision related to subsection (2).
- 106 Subsection (4) sets out that such regulations may provide for a future reference procedure to the CJEU where a court or tribunal considers it necessary to seek a view from the European Court on a question of interpretation of EU law.

Clause 21: Preparatory expenditure

- 107 Clause 21 provides that Ministers of the Crown, government departments, or devolved authorities may properly incur expenditure in preparation for action undertaken under this Bill, for the making of statutory instruments under this Bill, or under other Acts or statutory instruments as modified by or under this Bill.

Clause 22: Regulations

- 108 Clause 22 sets out the general scope and nature of the powers contained in the Bill.
- 109 Subsection (1) confirms that regulations under this Bill can make any provision that can be made by an Act of Parliament; this includes amending this Bill or making retrospective provision.
- 110 Subsection (2) gives further non-exhaustive examples of what regulations under this Bill may do, including making provision notwithstanding that provision’s incompatibility with the Northern Ireland Protocol or any other part of the Withdrawal Agreement.
- 111 Subsection (3) provides that regulations under this Bill may not create or facilitate border

arrangements between Northern Ireland and the Republic of Ireland which feature at the border either physical infrastructure (including border posts), or checks and controls, which did not exist before exit day.

- 112 Subsection (4) sets out that regulations under this Bill which are considered to be appropriate in relation to an exclusion, continue to be exercisable if said exclusion is modified or removed using the powers under clause 15(2)(b-d).
- 113 Subsection (5) provides that regulations brought forward under the powers in this Bill are never to be treated as hybrid instruments.
- 114 Subsection (6) provides that a Minister of the Crown may, by regulations, make the other powers under this Bill exercisable exclusively, concurrently or jointly with Devolved Administrations, and may provide for Devolved Administration scrutiny of said regulations.
- 115 Subsection (7) provides that the ability of regulations to make different provision for different purposes or areas; making incidental, supplementary or consequential provision; and making transitional or transitory provision or savings, as set out in subsection (2)(e), does not apply to regulations made under clause 26(3) which is intrinsically about the making of making different provision for different purposes or areas; making incidental, supplementary or consequential provision; and making transitional or transitory provision or savings in relation to the provisions of the Bill coming into force.

Clause 23: Making regulations under this Act: general provisions

- 116 Clause 23 sets out the process and parliamentary procedure for the regulations made under the Bill.
- 117 Subsections (1) and (2) set out that the processes in clause 23 apply to regulations made under the Bill, excluding tax or customs regulations and regulations made solely under clauses 26.
- 118 Subsection (3) sets out that regulations under the Bill are to be made by statutory instrument.
- 119 Subsection (4) sets out that statutory instruments are subject to the negative procedure (i.e. subject to annulment in pursuance of a resolution of either House of Parliament) except where they amend an Act of Parliament or make retrospective provision.
- 120 Subsection (5) sets out that where a statutory instrument amends an Act of Parliament or makes retrospective provision, it is subject to the draft affirmative procedure unless the instrument contains a declaration from the Minister that urgency requires it be subject to the made affirmative procedure.
- 121 Subsection (6) provides that a draft affirmative statutory instrument can only be made once a draft of the instrument has been laid before, and approved by a resolution of both Houses of Parliament.
- 122 Subsection (7) provides that once made, a made affirmative statutory instrument must be laid before Parliament and it will cease to have effect after 28 days (starting with the day on which the instrument is made) unless within those 28 days the instrument is approved by a resolution of each House.
- 123 Subsection (8) states that in calculating the above 28 day period, no account is to be taken of periods when Parliament is dissolved, prorogued, or when either House is adjourned for more than four days.
- 124 Subsection (9) sets out that, if regulations cease to have effect as a result of not receiving approval by a resolution of each House within 28 days under subsection (7)(b), that does not affect the validity of anything previously done under the regulations or prevent the making of

new regulations.

Clause 24: Regulations relating to tax or customs matters

- 125 Clause 24 relates to tax or customs regulations under this Bill.
- 126 Subsection (1) confirms only the Treasury may take forward regulations relating to tax using a relevant power in this Bill.
- 127 Subsection (2) confirms only the Treasury or HMRC may take forward regulations relating to customs using a relevant power in this Bill.
- 128 Subsection (3) confirms that tax or customs regulations are to be made by statutory instrument.
- 129 Subsection (4) sets out that statutory instruments are subject to the negative procedure before the House of Commons only (i.e. subject to an annulment in pursuance of a resolution of the House of Commons), except where they amend an Act of Parliament or make retrospective provision.
- 130 Subsection (5) sets out that where a statutory instrument amends an Act of Parliament or makes retrospective provision, it is subject to the draft affirmative procedure before the House of Commons only, unless the instrument contains a declaration from the minister that urgency requires it be subject to the made affirmative procedure.
- 131 Subsection (6) sets out that where a statutory instrument is subject to the draft affirmative procedure before the House of Commons only, it is only to be made once a draft of the instrument is laid before, and approved by a resolution of, the House of Commons.
- 132 Subsection (7) provides that where a statutory instrument is subject to the made affirmative procedure before the House of Commons only, it must, once made, then be laid before the House of Commons and it will cease to have effect after 28 days (starting on the day the instrument is made) unless within those 28 days the instrument is approved by a resolution of the House of Commons.
- 133 Subsection (8) states that in calculating the above 28 day period, no account is to be taken of periods when Parliament is dissolved, prorogued, or when the House of Commons is adjourned for more than four days.
- 134 Subsection (9) sets out that where regulations cease to have effect as a result of not receiving approval by a resolution of the House of Commons within 28 days under subsection (7)(b), this does not affect the validity of anything previously done under the regulations or prevent the making of new regulations.
- 135 Subsection (10) provides that the relevant parts of this clause does not apply to regulations made in combination with regulations made using powers under other legislation where that legislation requires the statutory instrument containing those regulations to be made under the draft affirmative procedure and approved by a resolution of either the House of Commons or both Houses of Parliament.
- 136 Subsection (11) provides that a relevant power is any power in the Bill other than clauses 6 and 17 which are designed to relate to customs and tax respectively; and clause 26(3) which provides for making different provision for different purposes or areas; making incidental, supplementary or consequential provision; and making transitional or transitory provision or savings in relation to the provisions of the Bill coming into force. Subsection (11) also defines tax or customs provision and tax or customs regulations.

Clause 25: Interpretation

137 Clause 25 provides the definition of relevant terms in the Bill, including by cross reference to their definition in other pieces of legislation.

138 Subsection (1) lists and defines a number of key terms in the Bill.

139 Subsection (2) defines what is meant by references in the Bill to provision of the Northern Ireland Protocol that does not have effect in the United Kingdom; and to an enactment being affected by provision of the Northern Ireland Protocol.

Clause 26: Extent, commencement and short title

140 Clause 26 makes a number of final provisions in the Bill.

141 Subsection (1) provides that the Bill extends to the legal jurisdictions of England and Wales, Scotland and Northern Ireland.

142 Subsections (2) and (3) deal with commencement, outlining that clauses 21 to 25 come into force on the day on which the Bill is passed, and that otherwise the Bill comes into force on such day, or days as a Minister of the Crown may, by regulations, appoint.

143 Subsection (4) provides that a Minister of the Crown may, by regulations, make incidental, supplementary or consequential provision, or transitional or transitory provision or savings, in connection with the coming into force of any provision of this Bill. This is a standard power whose purpose is to ensure a smooth transition between existing law and the law as it will apply after the provisions of the Bill come into force.

144 Subsection (5) sets out that regulations under this clause are to be made by statutory instrument and may make different provision for different purposes or areas.

145 Subsection (6) sets out the short title of the Bill (the Northern Ireland Protocol Act 2022).

Commencement

146 Clause 26 provides that the provisions of the Bill come into force on such day or days as a Minister of the Crown may appoint by regulations, other than clauses 21 to 25 which come into force on Royal Assent.

Financial Matters

147 The Bill does not authorise the incurring of public expenditure, save for preparatory expenditure for relevant purposes, or the raising of revenue. Regulations made under the delegated powers in the Bill enable both the creation of charges on the public purse and the raising of public revenue. The House of Commons passed Money and Ways and Means resolutions on 27 June 2022 to provide parliamentary approval for expenditure and revenue raising under the powers in the Bill.

Compatibility with the European Convention on Human Rights

148 Lord Ahmad of Wimbledon, Minister of State at the Foreign, Commonwealth and Development Office is satisfied that the Bill is compatible with the Convention. The government's analysis shows that where this Bill engages or has the potential to engage the Convention rights, particularly A1P1 and Article 14, this does not amount to substantive interference with the Convention, and powers in the Bill are limited to the extent strictly necessary to deliver the objectives of the Bill.

149 However, in order to aid the consideration of the Joint Committee on Human Rights (JCHR), the Foreign Secretary has written to the JCHR setting out the limited number of provisions in the Bill that might be considered to engage Convention Rights, and explaining why the Bill is compatible with the Convention Rights.

Environmental law provisions

150 Lord Ahmad of Wimbledon, Minister of State at the Foreign, Commonwealth and Development Office is of the view that the Bill as introduced into the House of Lords does not contain provision which, if enacted, would be environmental law for the purposes of section 20 of the Environment Act 2021. Accordingly, no statement under that section has been made.

Related documents

151 The following documents are relevant to the Bill and can be read at the stated locations:

- Protocol on Ireland/Northern Ireland:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf
- Command Paper, Northern Ireland Protocol: The way forward:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1008451/CCS207_CCS0721914902-005_Northern_Ireland_Protocol_Web_Accessible_1_.pdf

Annex A – Territorial extent and application in the United Kingdom

152 The Bill will provide the basis to amend the operation of the Northern Ireland Protocol in the domestic law of the UK, including where elements of the Protocol are disapplied. EU and other foreign affairs matters are reserved to the UK Government and Parliament and the devolved legislatures do not have the competence to make provision relating to or dealing with the Northern Ireland Protocol in this way.

153 The Bill also alters the effect in domestic law of sections 7A and 7C EUWA and provides delegated powers to Ministers to make new law in connection with the Northern Ireland Protocol (including where provision ceases to have effect in the UK). To the extent that the effect that sections 7A and 7C currently have on devolved competence will be removed by the Bill, the Bill can be said to alter both legislative and executive competence. Some of the powers may also be used to make provision in areas of devolved legislative competence. The consent of the devolved legislatures is being sought on that basis as set out in the table below.

Provision	England	Wales		Scotland		Northern Ireland	
	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Legislative Consent Motion process engaged?	Extends and applies to Scotland?	Legislative Consent Motion process engaged?	Extends and applies to Northern Ireland?	Legislative Consent Motion process engaged?
Clause 1	Yes	Yes	No	Yes	No	Yes	No
Clause 2	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 3	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 4	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 5	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 6	Yes	Yes	No	Yes	No	Yes	No
Clause 7	Yes	Yes	No	Yes	No	Yes	Yes
Clause 8	Yes	Yes	No	Yes	No	Yes	Yes
Clause 9	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 10	Yes	Yes	No	Yes	No	Yes	No
Clause 11	Yes	Yes	No	Yes	No	Yes	No
Clause 12	Yes	Yes	No	Yes	No	Yes	No
Clause 13	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 14	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 15	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 16	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 17	Yes	Yes	No	Yes	No	Yes	No
Clause 18	Yes	Yes	No	Yes	No	Yes	No
Clause 19	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 20	Yes	Yes	No	Yes	Yes	Yes	Yes
Clause 21	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 22	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 23	Yes	Yes	No	Yes	No	Yes	No
Clause 24	Yes	Yes	No	Yes	No	Yes	No

Provision	England	Wales		Scotland		Northern Ireland	
	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Legislative Consent Motion process engaged?	Extends and applies to Scotland?	Legislative Consent Motion process engaged?	Extends and applies to Northern Ireland?	Legislative Consent Motion process engaged?
Clause 25	Yes	Yes	No	Yes	No	Yes	No
Clause 26	Yes	Yes	No	Yes	No	Yes	No

NORTHERN IRELAND PROTOCOL BILL

EXPLANATORY NOTES

These Explanatory Notes relate to the Northern Ireland Protocol Bill as brought from the House of Commons on 21 July 2022 (HL Bill 52).

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