

## THE NORTHERN IRELAND PROTOCOL BILL

### Memorandum from the Foreign, Commonwealth and Development Office to the Delegated Powers and Regulatory Reform Committee

#### A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Northern Ireland Protocol Bill (“the Bill”). The Bill was introduced in the House of Commons 13 June 2022.
2. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.
3. The Department has considered the use of powers in the Bill as set out below and is satisfied that they are necessary and justified.

#### B. PURPOSE AND EFFECT OF THE BILL

##### *Background*

4. The people of the United Kingdom and Gibraltar decided by referendum on 23 June 2016 to leave the EU.
5. The terms of the UK’s departure from the EU were agreed and set out in the UK-EU Withdrawal Agreement (“Withdrawal Agreement”). This included a Protocol on Ireland/Northern Ireland (“the Northern Ireland Protocol”) setting out unique arrangements for Northern Ireland. On 19 October 2019, the Government laid the Withdrawal Agreement and the Political Declaration 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.
6. 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.

7. The Northern Ireland Protocol was intended to meet several overall policy objectives: to avoid a hard border on the island of Ireland; 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.
8. In recognition of these concerns, the Government has taken a series of 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.
9. 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, 'Northern Ireland Protocol: the way forward' (CP 502). 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 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.
10. 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.

11. 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 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*

12. 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.
13. 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.
14. 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.
15. 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.

### C. DELEGATED POWERS

#### *General commentary on the delegated powers in the Bill*

16. The Bill takes a number of delegated powers to allow Ministers to implement changes to the way in which the objectives of the Northern Ireland Protocol are delivered in domestic law.
17. While it is recognised that some of the delegated powers provided for in this Bill are necessarily broad, the concerns previously raised by Parliament regarding the appropriate degree of scrutiny on the exercise of delegated powers, particularly where they may amend an Act of Parliament or make retrospective provision, have been carefully considered and have informed the approach taken to the delegated powers in this Bill.
18. The general position, therefore, is that where the powers in the Bill may be exercised so as to amend an Act of Parliament or to make retrospective provision, regulations may not be made unless they are first approved by each House of Parliament (or the House of Commons for provision relating to customs matters or tax). While not all amendments to an Act of Parliament will always substantively affect those Acts, this approach has been adopted 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.
19. The only exception to this general rule relates to the exercise of the powers in cases of urgency. This is to ensure that such provisions are flexible enough to account for unseen circumstances whereby provisions need to be brought into force sooner than the draft affirmative procedure would permit. The “made affirmative” procedure is therefore adopted in the Bill for this purpose. However, even in such a scenario, the relevant regulation will fall away if it is not subsequently approved by each House of Parliament (or the House of Commons) within a set period of time.
20. The Government has not taken the decision to seek powers lightly but considers them 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.
21. The Committee will note that the drafting approach taken to many of the powers in the Bill is by reference to a test of appropriateness (i.e. the powers can be exercised to make choices between different appropriate policies). The Government

acknowledges previous views of the Committee that powers should be restricted by a test of necessity. This issue was considered at length in the passage of the European Union (Withdrawal) Act 2018, the European Union (Withdrawal Agreement) Act 2020, and the European Union (Future Relationship) Act 2020. All three Acts contain delegated powers for Ministers of the Crown to make regulations subject to an appropriateness test setting out the details of legislative regimes to deliver the policy objectives of the Bill.

22. It is nevertheless the case that the majority of powers taken by the Bill are deliberately drafted, and constrained, by reference to the policy area within the Northern Ireland Protocol which they are seeking to deliver differently, where the issues have been well-documented since the Northern Ireland Protocol came into force (including in the Government's Command Paper '*Northern Ireland Protocol: The Way Forward*' of July 2021 and the statement made by the Foreign Secretary to the House of Commons on 17 May 2022).
23. For these reasons, the Government considers that the powers taken by this Bill are suitably constrained by their function, while ensuring the Government is able to fulfil its duties to the people of Northern Ireland. It is worth noting though that the test of necessity is nonetheless included in some areas of the Bill - most notably in clause 15(2).
24. Despite the exceptional context in which this Bill is introduced to Parliament, the Government welcomes the views of the Committee and will consider its recommendations carefully to ensure that the delegated powers taken by this Bill are no more than is appropriate for the purpose for which they are sought.

#### *Summary of the delegated powers*

<b>Clause</b>	<b>Power conferred on</b>	<b>Purpose</b>	<b>Parliamentary procedure</b>
Clause 4(3)	A Minister of the Crown to make provision for the exclusion in clause 4(2) to apply only to prescribed descriptions of qualifying movements of UK or non-EU destined goods.	Clause 4(3) provides powers to prescribe descriptions of “qualifying movements of UK and non-EU destined” goods to which the exclusion in clause 4(2) applies.	Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister’s opinion it is necessary by reason of urgency.
Clause 4(5)	A Minister of the Crown to make provision for the “definition of UK or non-EU destined goods”.	Clause 4(5) provides powers to define the goods to which the exclusion in clause 4(2) applies.	Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister’s opinion it is necessary by reason of urgency.
Clause 5(1)	A Minister of the Crown to make provision which the Minister considers appropriate in connection with the provisions of the Northern Ireland Protocol to which clause 4 relates.	Clause 5(1) provides a power to allow a Minister of the Crown to make regulations in relation to the movement of goods.	Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister’s opinion it is necessary by reason of urgency.

<b>Clause</b>	<b>Power conferred on</b>	<b>Purpose</b>	<b>Parliamentary procedure</b>
Clause 6 (1)	The Treasury or HMRC to make provision about customs matters which they consider appropriate in connection with the Northern Ireland Protocol (including any exclusion).	Clause 6(1) provides the Treasury and HMRC powers to make provisions about customs matters. This will give the Treasury and HMRC the ability to make regulations ensuring the operability and proper functioning of the UK's customs regime.	Draft affirmative procedure before the House of Commons only where amending an Act of Parliament or making retrospective provision, with the possibility of made affirmative procedure before the House of Commons only in urgent cases; otherwise subject to the negative procedure.
Clause 9(1)	A Minister of the Crown may, by regulations, make provision about the regulation of goods in connection with the Northern Ireland Protocol.	Clause 9(1) provides powers to make any provision about the regulation of goods in connection with the Northern Ireland Protocol, including provision modifying the UK regulatory route or the EU regulatory route, and provision amending clauses 7 and 8.	Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister's opinion it is necessary by reason of urgency.
Clause 10(4)	A Minister of the Crown may, by regulations, make provision about the meaning of references in this Bill to regulation of goods (including provision that changes the effect of any other provision of this section, whether by amending it or otherwise).	Clause 10(4) provides powers to change the scope of what constitutes the regulation of goods, for the purposes of this legislation.	Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister's opinion it is necessary by reason of urgency.

Clause	Power conferred on	Purpose	Parliamentary procedure
Clause 11(1)	A Minister of the Crown may, by regulations, provide for clause 7 to apply only in relation to regulated classes of goods that are prescribed or regulatory routes that are prescribed, provide for exceptions from the application of clause 7, or modify the effect of clause 7(2) in respect to a regulated class of goods.	Clause 11(1) provides powers for a minister to adjust the operation of the relevant aspect of the dual regulatory regime as it applies to a particular class of goods. This has the practical effect of being able to turn the dual regime on or off for specific types of goods. This could be used to make any bespoke adaptations as may be required for a particular class of goods, to apply the approach to part or all of a category of goods or to some or all of the required regulatory route.	Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister's opinion it is necessary by reason of urgency.
Clause 12(3)	A Minister of the Crown may, by regulations, make provision which the Minister considers appropriate in connection with the exclusion in clause 12.	Clause 12(3) provides powers to make such Regulations as are appropriate in relation to the exclusion of the EU State Aid obligations in Article 10 and Annexes 5 and 6 of the Northern Ireland Protocol.	Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister's opinion it is necessary by reason of urgency.



<b>Clause</b>	<b>Power conferred on</b>	<b>Purpose</b>	<b>Parliamentary procedure</b>
Clause 13(4)	A Minister of the Crown may, by regulations, make provision which the Minister considers appropriate in connection with any provision of the Northern Ireland Protocol to which clause 13 relates.	Clause 13(4) provides powers to make provision in connection with the exclusions in clause 13, including supervision and sharing information with the EU.	Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister's opinion it is necessary by reason of urgency.
Clause 14(4)	A Minister of the Crown may, by regulations, make provision which the Minister considers appropriate in connection with the provisions of the Northern Ireland Protocol and other parts of the Withdrawal Agreement to which clause 14 relates.	Clause 14(4) provides powers to make provision in connection with the exclusions in clause 14 of ancillary and horizontal provisions of the Northern Ireland Protocol and Withdrawal Agreement.	Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister's opinion it is necessary by reason of urgency.
Clause 15(2)	A Minister of the Crown to provide for any provision of the Northern Ireland Protocol to become : "excluded provision" wholly or to any other extent; to any greater extent; to any lesser extent; or to cease to be "excluded provision".	Clause 15(2) provides powers to alter the scope of "excluded provision" of the Northern Ireland Protocol or Withdrawal Agreement.	Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister's opinion it is necessary by reason of urgency.
Clause 15(4)	A Minister of the Crown to provide for	Clause 15(4) provides powers to make discrete	Draft affirmative procedure where

Clause	Power conferred on	Purpose	Parliamentary procedure
	exceptions from any exclusion.	exceptions to be made to “excluded provision” of the Northern Ireland Protocol.	amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister’s opinion it is necessary by reason of urgency.
Clause 16(1)	A Minister of the Crown to make provision which the Minister considers appropriate in connection with any additional “excluded provision”.	Clause 16(1) provides powers to make regulations required in connection with parts of the Northern Ireland Protocol being, or becoming “excluded provision”, including creating alternative domestic arrangements where that is required.	Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister’s opinion it is necessary by reason of urgency.
Clause 17(1)	The Treasury to make provision about - (a) value added tax (including imposing or varying the incidence of the tax), or (b) any excise duty (including imposing or varying the incidence of any excise duty), or (c) any other tax in Northern Ireland and Great Britain (including difference in the incidence of the tax) which they consider appropriate in connection with the Northern Ireland	Clause 17(1) provides powers to allow the Treasury to make provisions about taxation which they consider appropriate in connection with the Northern Ireland Protocol. These may include, but are not limited to, provisions to reduce the difference between NI and GB regimes for both VAT and excise.	Draft affirmative procedure before the House of Commons only when amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure before the House of Commons only. Made affirmative procedure available where in the Treasury’s opinion it is necessary by reason of urgency.

Clause	Power conferred on	Purpose	Parliamentary procedure
	Protocol (including any exclusion).		
Clause 19(1)	A Minister of the Crown to make such provision as the Minister considers appropriate— (a) to implement any relevant agreement, or (b) otherwise for the purposes of dealing with matters arising out of, or related to, any relevant agreement.	Clause 19(1) provides powers to swiftly implement a relevant agreement, if such an agreement were to be agreed with the EU.	Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister’s opinion it is necessary by reason of urgency.
Clause 20(3)	A Minister of the Crown may, by regulations, make provision which the Minister considers appropriate in connection with clause 20(2).	Clause 20(3) provides powers to make provision relating to the removal of the role of the CJEU under the Bill. This power could also provide a domestic law basis for a new mechanism for domestic courts to make references to the CJEU in relation to questions of the interpretation of EU law.	Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister’s opinion it is necessary by reason of urgency.
Clause 22(6)	A Minister of the Crown may, by regulations, (a) provide for any other power to make regulations conferred by this Bill to be exercisable by a devolved authority instead of a Minister of	Clause 22(6) provides powers to sub-delegate the exercise of the powers in this Bill to the devolved administrations.	Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative

Clause	Power conferred on	Purpose	Parliamentary procedure
	the Crown or concurrently or jointly with any other person by whom it is exercisable; (b) provide for scrutiny of regulations made by a devolved authority.		procedure available where in the Minister's opinion it is necessary by reason of urgency.
Clause 26(3)	A Minister of the Crown may by regulations provide for clauses of the Bill other than clause 21 to 25 to come into force on a given day or days.	To bring provisions of the Bill into force.	No procedure.
Clause 26(4)	A Minister of the Crown may by regulations make incidental, supplementary, consequential, transitional, transitory or saving provision in connection with the coming into force of any section of the Bill.	To make minor and technical provision, and transitional, transitory or saving provision, to ensure the smooth coming into force of Bill's provisions.	No procedure.

*General provisions applying to all the powers in the Bill*

25. Regulations made under the Bill are all to be made by statutory instrument, as provided for by clause 23(3), clause 24(3) and clause 26(5)(a). Statutory instruments, or drafts thereof containing regulations under this Bill, are never to be treated as being hybrid instruments as provided in clause 22(5).
26. All the powers in the Bill are subject to a restriction in clause 22(3) that the regulations under this Bill may not create or facilitate border arrangements at the border between Northern Ireland and the Republic of Ireland which feature physical infrastructure, including border posts, or checks and controls, that did not exist before exit day.

27. Subject to the constraints of their purpose, the powers in the Bill may make any provision that could be made by an Act of Parliament (including modifying the Bill itself), as set out in clause 22(1). Examples of such provision are provided in clause 22(2). Powers in the Bill may make retrospective provision and extend to making regulations containing provisions that are incompatible with the Northern Ireland Protocol or the Withdrawal Agreement.
  
28. For regulations other than tax or customs regulations or regulations where the only provision they contain is under clause 26, the procedures apply in accordance with clause 23. Where powers are exercised in relation to taxation only the Treasury may make these regulations whilst only HMRC and the Treasury may make regulations about customs matters. Tax or customs regulations are subject to scrutiny before the House of Commons only.

## **Clause 4(3): Movement of goods (including customs): excluded Protocol provision**

*Power conferred on:* A Minister of the Crown

*Power exercised by:* Regulations

*Parliamentary Procedure:* Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister's opinion it is necessary by reason of urgency.

### Context and Purpose

29. 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.
30. The first and second subparagraphs of Article 5.1 and Article 5.2 of the Northern Ireland Protocol, which sets out that no customs duties on goods shall be charged on goods moved to Northern Ireland unless they are at risk of subsequently being moved to the EU, are excluded by this provision in their entirety. Article 5.3 of the Northern Ireland Protocol, which sets out that goods moving between Great Britain and Northern Ireland, or entering Northern Ireland from non-EU countries, face EU customs requirements; and Article 5.4 and Annex 2, 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, of the Northern Ireland Protocol are excluded provision so far as it relates to qualifying movements of UK or non-EU destined goods.
31. Clause 4(3) provides a Minister of the Crown with the power, by regulations, to make provision for the exclusion in subsection 4(2) to apply only to prescribed descriptions of qualifying movements of UK or non-EU destined goods, so as to provide the basis to refine the differentiated goods treatment proposed by the Government.

32. Clause 4(4) provides examples of the matters to which the prescribed descriptions of qualifying movements may relate to in regulations under clause 4(3). For example, regulations may provide that movements are prescribed movements based on whether the goods are being moved for commercial or non-commercial purposes, or whether the movement is a direct movement from one place to another.

#### Justification for taking the power

33. The power is intended to ensure that a Minister of the Crown has the flexibility to provide for the exclusion in clause 4(2) to apply only to certain descriptions of qualifying movements. For example, this would allow a Minister to provide that non-commercial movement of goods, such as those moved by a passenger in their baggage or non-commercial pets, is a movement to which the exclusion should apply.
34. The rules and requirements relating to movement of goods and SPS checks require a significant level of technical and administrative detail, much of which is operationally focused or deals with the processes to be applied by the relevant government departments, such as HMRC or DEFRA. This type of technical, administrative or operational detail is most appropriately provided in secondary legislation. It is also anticipated that there will need to be flexibility to make changes to adapt rules and processes to future developments in these arrangements.

#### Justification for the procedure

35. Where the power in clause 4(3) is being used to make provision which amends an Act of Parliament or make retrospective provision, the draft affirmative procedure will apply unless, for reasons of urgency, a Minister of the Crown relies on the made affirmative procedure instead.

## **Clause 4(5): Movement of goods (including customs): excluded Protocol provision**

*Power conferred on:* A Minister of the Crown

*Power exercised by:* Regulations

*Parliamentary Procedure:* Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister's opinion it is necessary by reason of urgency.

### Context and Purpose

36. This clause provides for the treatment of goods for customs and regulatory purposes. This means a model where "qualifying movements" of "UK and non-EU destined" goods, as clarified in clause 4(5), do not face the requirements placed on them under the Northern Ireland Protocol. Goods that are considered to be destined for the EU will continue to face full EU requirements.
37. Clause 4(2) provides that Article 5.3 (which sets out that goods moving between Great Britain and Northern Ireland, or entering Northern Ireland from non-EU countries face EU customs requirements) and Annex 2 (which applies various EU legislation including SPS controls to Northern Ireland, and thereby on entry to Northern Ireland of goods moved from Great Britain to Northern Ireland) of the Northern Ireland Protocol is excluded provision so far as it relates to qualifying movements of UK or non-EU destined goods.
38. Clause 4(5) provides a Minister of the Crown with the power, by regulations, to set out a more detailed description of "UK or Non-EU destined", which otherwise takes its natural meaning. 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.

### Justification for taking the power

39. The power is intended to ensure that a Minister of the Crown has the flexibility to provide for the exclusion in clause 4(2) to apply only to certain types of goods. This will enable regulations to allow controls to continue to apply to the movement of goods where, for example, they are moved by a trader not registered in a 'trusted trader' scheme.



40. The rules and requirements relating to movement of goods and SPS checks require a significant level of technical and administrative detail, much of which is operationally focused or deals with the processes to be applied by the relevant government departments, such as HMRC or DEFRA. This type of technical, administrative or operational detail is most appropriately provided in secondary legislation. It is also anticipated that there will need to be flexibility to make changes to adapt rules and processes to future developments in these arrangements.

Justification for the procedure

41. Where the power in clause 4(5) is being used to make provision which amends an Act of Parliament or make retrospective provision, the draft affirmative procedure will apply unless, for reasons of urgency, a Minister of the Crown relies on the made affirmative procedure instead.

## **Clause 5(1): Movement of goods: new law about matters other than customs**

*Power conferred on:* A Minister of the Crown

*Power exercised by:* Regulations

*Parliamentary Procedure:* Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister's opinion it is necessary by reason of urgency.

### Context and Purpose

42. This clause enables a Minister of the Crown to make regulations in connection with any provision of the Northern Ireland Protocol to which clause 4 relates (except for customs matters), if the Minister considers it appropriate to do so.
43. It is intended to ensure that a Minister of the Crown has the flexibility to provide for alternative regimes, including necessary processes on UK or non-EU destined goods, the application of pre or post movement requirements for those movements, and the ability to undertake any checks or controls necessary to safeguard animal, plant and human health. Such powers may also be used to grant competent authorities in Northern Ireland new powers of entry and allow for the creation of new legal obligations or offences (criminal or civil penalties) to be imposed on businesses to prevent non-EU destined goods from being moved into the EU. A Minister of the Crown could also rely on this provision to provide for the ability to share information with the EU, or between UK government departments.

### Justification for taking the power

44. The power is intended to ensure that a Minister of the Crown has the flexibility to provide for alternative regimes, in relation to areas covered by the Northern Ireland Protocol which are "excluded provision" - for example in this case to provide the component parts of the 'trusted trader' scheme whereby qualifying traders will be able to move goods within the UK without unnecessary controls (including appropriate penalties to manage the risks of abuse). Taking a power to provide for the regime is required because the precise detail of the regime will be properly subject to consultation with stakeholders.
45. It is also anticipated that there will need to be changes to adapt rules and processes to future developments in these arrangements. It is also possible that the ways in which trader behaviour changes will require a corresponding means of monitoring and control that may require changes to legislation in the area.

46. The rules and requirements relating to movement of goods and SPS checks require a significant level of technical and administrative detail, much of which is operationally focused or deals with the processes to be applied by the relevant government departments, such as HMRC or DEFRA. This type of technical, administrative or operational detail is most appropriately provided in secondary legislation.

Justification for the procedure

47. Where the powers in clause 5 are being used to make provision which amends an Act of Parliament or makes retrospective provision, the draft affirmative procedure will apply unless, for reasons of urgency, a Minister of the Crown relies on the made affirmative procedure instead.

## **Clause 6(1): Customs matters: new law**

*Power conferred on:* The Treasury or HMRC

*Power exercised by:* Regulations

*Parliamentary Procedure:* Draft affirmative procedure where amending an Act of Parliament or making retrospective provision, with the possibility of made affirmative in urgent cases; otherwise subject to the negative procedure. Commons-only.

### Context and Purpose

48. This clause confers powers on the Treasury and HMRC to make provisions about “customs matters” where they consider it appropriate in connection with the Northern Ireland Protocol, including any “excluded provision” under the Bill.
49. Customs matters include but are not limited to subject matters dealt with in the Union Customs Code (UCC). The power therefore allows the Treasury and HMRC to bring forward legislation in relation to duty and non-duty elements of the UK’s customs rules. This will give HMRC and the Treasury the power to make regulations to ensure the operability and proper functioning of the UK’s customs regime.
50. The power expressly provides that it can be used to make regulations providing for the imposition or variance of any customs duty; checks, controls and administrative processes; imposing restrictions on the movement of non-EU destined goods into the EU; and, providing for the treatment of goods which cease to be UK and non-EU destined goods. However, the exercise of this power is subject to the restriction that regulations may not create or facilitate border arrangements between Northern Ireland and the Republic of Ireland which feature physical infrastructure.

### Justification for taking the power

51. The power is intended to ensure that the Treasury and HMRC have the flexibility to provide for alternative regimes, for example to deliver the new ‘trusted trader’ regime. For example, the express ability to make provisions for checks, controls and administrative processes, allowing flexibility to ensure that the correct level of control can be applied to different types of movements.
52. It is not possible to make such provisions on the face of the Bill because it is necessary for the UK to have the ability to implement future UK customs policy as in response to changing requirements. It is anticipated that there will need to be changes to adapt rules and processes to future developments in these arrangements.

It is also possible that the ways in which trader behaviour changes will require a corresponding means of monitoring and control that may require changes to legislation in the area.

53. The customs checks, controls and administrative processes relating to goods will require a significant level of technical and administrative detail, much of which is operationally focused or deals with the processes to be applied by HMRC. This type of technical, administrative or operational detail is most appropriately provided in secondary legislation.

#### Justification for the procedure

54. Where the power in clause 6 is being used to make provision which amends an Act of Parliament or makes retrospective provision, the draft affirmative procedure will apply unless, for reasons of urgency, the Treasury or HMRC (whichever is exercising the power) relies on the made affirmative procedure instead. The procedure will be one-house, so the statutory instrument must be approved by resolution of the House of Commons.
55. Where the power in clause 6 is being used to make provision which does not amend primary, the negative procedure will apply. The procedure will be one-house, so the statutory instrument will be subject to annulment in pursuance of a resolution of the House of Commons.
56. This will provide that appropriate scrutiny by the House of Commons of the changes relating to customs matters. The secondary legislation made under these powers is anticipated to largely consist of procedural, administrative or technical changes to ensure that customs and regulatory procedures, including customs checks, controls and administrative processes, are fit for purpose and ensure the correct level of control for different types of movements, and can be updated to ensure compliance with, or give effect to, any international obligation or arrangement to which the United Kingdom is a party.

## **Clause 9(1): Regulation of goods: new law**

*Power conferred on:* A Minister of the Crown.

*Power exercised by:* Regulations

*Parliamentary Procedure:* Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister's opinion it is necessary by reason of urgency.

### Context and Purpose

57. Clause 7 establishes a default dual regulatory regime for manufactured goods, medicines and agri-food, among other types of goods. This means businesses will have a choice as to which regulatory route to follow, UK, EU or both where this is possible, when supplying these goods in Northern Ireland.
58. The power in clause 9(1) enables a Minister of the Crown to make any provision about the regulation of goods which that Minister considers is appropriate in connection with the Northern Ireland Protocol. This includes provision which the Minister of the Crown considers appropriate in connection with a UK regulatory route being available in accordance with section 7 (including provision modifying that UK regulatory route or the EU regulatory route), and provision amending section 7 or 8.
59. The power can be used to modify both the UK regulatory route and the EU regulatory route to make sure that there is appropriate provision in respect of each class of goods including ensuring that goods remain compliant until they reach their end user whichever route is chosen. The power also ensures that the dual regulatory regime can be amended to ensure it works effectively for different types of goods. This would provide the flexibility to adjust the default operation of the dual regulatory regime, for example should it be required in relation to specific highly regulated sectors, to ensure that relevant regimes can function effectively. The dual regulatory regime may also develop over time and in consultation with stakeholders.

### Justification for taking the power

60. This power is required as 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 change over time to reflect how UK and EU regulatory regimes evolve.

#### Justification for the procedure

61. Where regulations under this power amend an Act of Parliament, or make retrospective provision they will be subject to the draft affirmative procedure, or the made affirmative in cases of urgency. They will otherwise be subject to the negative procedure.
62. Clause 9(1) could be used to make technical clarifications to the way in which dual regulatory regimes are intended to operate.
63. A more substantive use of the power in clause 9(1) could be to provide changes to the regulatory regimes, where that is necessary beyond the provisions included on the face of the Bill and to adapt to changing circumstances. The regulation - or regulations - that need to be made in connection with that provision are likely to be more substantive and far-reaching; some amendment to primary legislation may be required. Where regulations make an amendment to an Act of Parliament it would be appropriate for Parliament to vote on such regulations before they come into force.
64. As with other powers in the Bill, the 'made affirmative' procedure is available if, in the Minister's opinion, a prior vote is not possible by reason of urgency. This is to account for any circumstances which require the regulation to be brought into force immediately. However, in such circumstances, parliamentary approval would still need to be secured subsequent to the regulations being brought into force (to avoid the regulations falling away).

## **Clause 10(4): Meaning of “regulation of goods”**

*Power conferred on:* A Minister of the Crown

*Power exercised by:* Regulations

*Parliamentary Procedure:* Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister’s opinion it is necessary by reason of urgency.

### Context and Purpose

65. Clause 10 explains what “regulation of goods” refers to within the Bill, so that it is clear which types of goods and which regulatory activities are covered by the dual regulatory regime. Goods regulation is a broad topic and different types of goods are regulated in different ways, reflecting their relative levels of harm to people, animals and the environment, for instance, but it is distinct from customs and tax matters which are dealt with under separate provisions of the Bill.
66. The purpose of clause 10 is therefore to provide a non-exhaustive list of the types of regulatory activity that fall under the dual regulatory regime, for instance activity in connection with making goods available on the market, putting goods into service, production of goods or their use and import.
67. In addition to a non-exhaustive list of regulatory activity, clause 10(4) includes a power for a Minister of the Crown to make provision about the meaning of references in the Bill to regulation of goods. This includes amendments or additions to the non-exhaustive list.

### Justification for taking the power

68. While every effort has been made to provide a comprehensive list of regulatory activity covered by the dual regulatory regime, these regimes are complex and may evolve over time and new activity could become regulated. These regulatory activities may also need to be covered by the dual regime and so a power is required to update clause 10 and the meaning of regulation of goods as required.

### Justification for the procedure

69. We have opted for a dual approach to procedure, with any regulations amending an Act of Parliament, or making retrospective provision, subject to the draft affirmative procedure while other regulations are subject to the negative procedure.



70. As with other powers in the Bill, the 'made affirmative' procedure is available if, in the Minister's opinion, a prior vote is not possible by reason of urgency. This is to account for any circumstances which require the regulation to be brought into force immediately. However, in such circumstances, parliamentary approval would still need to be secured subsequent to the regulations being brought into force (to avoid the regulations falling away).

## **Clause 11(1): Regulation of goods: supplementary provision**

*Power conferred on:* A Minister of the Crown

*Power exercised by:* Regulations

*Parliamentary Procedure:* Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister's opinion it is necessary by reason of urgency.

### Context and Purpose

71. Clause 7 establishes a default dual regulatory regime for manufactured goods, medicines and agri-food, among other types of goods. This means businesses will have a choice as to which regulatory route to follow - UK, EU or both where this is possible - when supplying these goods in Northern Ireland. It means that a lawnmower, for example, can be sold in Northern Ireland if that product meets either UK rules, EU rules or both.
72. The powers in clause 11 can be used to modify this default to change how the dual regime applies on a product-by-product basis, for example turning it off for certain types of goods or to require businesses to follow only certain regulatory routes (for example to establish a UK-only regime). This will be necessary to reflect the complexities and nuances of highly regulated goods and the results of consultation with industry.

### Justification for taking the power

73. This power is required as the dual regulatory regime will need to be adjusted in light of consultation with stakeholders on the operation of the regime, and may be necessary to reflect the complexities within certain highly regulated types of goods. The operation of the dual regulatory regime will also need to be able to adjust over time and it is not possible on the face of the Bill to set out exactly how multiple regimes will work in practice.

### Justification for the procedure

74. We have opted for a dual approach to procedure, with any regulations amending an Act of Parliament, or making retrospective provision, subject to the draft affirmative procedure while other regulations are subject to the negative procedure.

75. The power in clause 11(1) could be used to make technical adjustments to the way in which dual regulatory regimes are intended to operate.
76. A more substantive use of the power in clause 11(1) could be to provide changes to the regulatory regimes, where that is necessary beyond the provisions included on the face of the Bill and to adapt to changing circumstances. The regulation - or regulations - that need to be made in connection with that provision are likely to be more substantive and far-reaching; some amendment to primary legislation may be required. Where amendments are made to an Act of Parliament, it would be appropriate for Parliament to vote on such regulations before they come into force.
77. As with other powers in the Bill, the 'made affirmative' procedure is available if, in the Minister's opinion, a prior vote is not possible by reason of urgency. This is to account for any circumstances which require the regulation to be brought into force immediately. However, in such circumstances, parliamentary approval would still need to be secured subsequent to the regulations being brought into force (to avoid the regulations falling away).

## **Clause 12(3): Subsidy control**

*Power conferred on:* A Minister of the Crown

*Power exercised by:* Regulations

*Parliamentary Procedure:* Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister's opinion it is necessary by reason of urgency.

### Context and Purpose

78. Article 10 of the Ireland/Northern Ireland Protocol in the Withdrawal Agreement ("the Northern Ireland Protocol") applies the EU State aid rules to UK measures which affect goods and wholesale electricity trade between Northern Ireland and the EU. Annex 5 of the Northern Ireland Protocol lists the provisions of EU State aid law which apply to the UK by virtue of Article 10.
79. Clause 12(1) of the Bill excludes Article 10 and Annexes 5 and 6 of the Northern Ireland Protocol. Clause 12(2) amends the Subsidy Control Act 2022 so that the UK's subsidy control regime applies in all circumstances where Article 10 of the Northern Ireland Protocol would have applied the EU State aid rules.
80. The power in clause 12(3) enables a Minister of the Crown to make regulations concerning the exclusion of Article 10 and Annexes 5 and 6 of the Northern Ireland Protocol, as appropriate. This is to take account of any possible future developments in this policy area.

### Justification for taking the power

81. While the Bill would extend existing UK subsidy control policy across the whole of the UK, the power will allow Ministers to make appropriate provision in connection with this, including but not limited for example to adjusting other elements of the domestic statute book as required to reflect the changes made in the bill.

### Justification for the procedure

82. The nature of any future arrangements could not be determined at this stage. If such provisions amend an Act of Parliament, it would be appropriate for the regulations to be made under the 'draft affirmative' procedure, giving Parliament a vote before they come into force.

83. However, where for reasons of urgency a prior vote is not possible, the 'made affirmative' procedure is available. In such circumstances, parliamentary approval would still need to be secured subsequent to the regulations being brought into force (to avoid the regulations falling away).
84. Where the regulations do not amend an Act of Parliament or make retrospective provision the negative procedure is available.

## **Clause 13(4): Implementation, application, supervision and enforcement of the Protocol**

*Power conferred on:* A Minister of the Crown

*Power exercised by:* Regulations

*Parliamentary Procedure:* Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister's opinion it is necessary by reason of urgency.

### Context and Purpose

85. This power provides Ministers with the ability to make provision which they consider appropriate in connection with any provision of the Northern Ireland Protocol to which clause 13 relates.
86. Clause 13(1) sets out that any provision of the Northern Ireland Protocol or Withdrawal Agreement is excluded so far as it confers jurisdiction of 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.
87. Clause 13(2) sets out that Article 12.2 and 12.3 of the Northern Ireland Protocol are "excluded provision". These are related to the right of EU representatives to be present during activities of UK authorities, the provision of relevant information relating to such activities, and the practical working arrangements relating to the exercise of those rights.
88. Clause 13(3) notes that any other or further provisions relating to the implementation, application, supervision and enforcement of the Northern Ireland Protocol are "excluded provision".
89. Clause 13(4) provides Ministers with the power to make provision which they consider appropriate in connection with any provision of the Northern Ireland Protocol to which clause 13 relates; namely the jurisdiction of the European Court in relation to the Northern Ireland Protocol, or related provision of the Withdrawal Agreement.
90. Clause 13(5) notes that regulations made under these powers may make provision about arrangements with the EU relating to the operation of the Northern Ireland Protocol, including in relation to supervision of its operation or information sharing under such arrangements.

### Justification for taking the power

91. Similar to other areas of the Bill, the power in clause 13(4) is taken in recognition of the fact that simply making provisions of the Northern Ireland Protocol “excluded provision” is not necessarily sufficient to create a coherent new domestic regime. The full details of the new regime will reflect further discussions as to the appropriate arrangements in this area. This includes the Government’s ongoing commitment to provide for data-sharing and cooperation 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.
92. The power in clause 13(4) is inherently limited in that it can only be used in connection with provision of the Northern Ireland Protocol to which clause 13 relates.

### Justification for the procedure

93. We have opted for a dual approach to procedure, with any regulations amending an Act of Parliament, or making retrospective provision, subject to the draft affirmative procedure while other regulations are subject to the negative procedure.
94. Clause 13(4) could be used to make minor technical clarifications to the way in which the exclusion of the supervisory matters in clause 13 is intended to operate.
95. A more substantive use of the power in clause 13(4) could be to provide for the information sharing processes which the Government intends to maintain with the EU, in connection with Article 12.2 and 12.3 of the Northern Ireland Protocol being made “excluded provision”. The regulation - or regulations - that need to be made in connection with that provision are likely to be more substantive and far-reaching, and may require amendments to primary legislation. Where regulations make amendments to an Act of Parliament, it would be appropriate for Parliament to vote on such regulations before they come into force.
96. As with other powers in the Bill, the ‘made affirmative’ procedure is available if, in the Minister’s opinion, a prior vote is not possible by reason of urgency. This is to account for any circumstances which require the regulation to be brought into force immediately. However, in such circumstances, parliamentary approval would still need to be secured subsequent to the regulations being brought into force (to avoid the regulations falling away).





## **Clause 14(4): Provision of the Protocol etc applying to other exclusions**

*Power conferred on:* A Minister of the Crown

*Power exercised by:* Regulations

*Parliamentary Procedure:* Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister's opinion it is necessary by reason of urgency.

### Context and Purpose

97. This power provides Ministers with the ability to make provision which they consider appropriate in connection with any provision of the Northern Ireland Protocol and other parts of the withdrawal agreement to which clause 14 relates.
98. Clause 14(1) makes any provision of the Northern Ireland Protocol or any other part of the Withdrawal Agreement "excluded provision" so far as it applies in relation to any other "excluded provision". Subsection (2) outlines some of the Articles of the Northern Ireland Protocol and Withdrawal Agreement to which subsection (1) applies, and subsection (3) lists some of the matters to which subsection (2) applies.
99. Therefore, the power in clause 14(4) could be used to clarify the way in which parts of the Northern Ireland Protocol or Withdrawal Agreement are "excluded provision" in relation to other "excluded provision" (if such clarification were necessary).

### Justification for taking the power

100. Similar to other areas of the Bill, the power in clause 14(4) is taken in recognition of the fact that making provisions of the Northern Ireland Protocol "excluded provision" provides the basis for, but does not itself prescribe, the full new domestic regime. The full details of the new regime will reflect discussions with stakeholders.
101. In addition, the power in clause 14(4) accounts for the fact that the provisions of clause 14 will entail further steps to ensure legal certainty for courts and tribunals, if that is necessary beyond the provisions included on the face of the Bill and to adapt to changing circumstances.

### Justification for the procedure

102. We have opted for a dual approach to procedure, with any regulations amending an Act of Parliament, or making retrospective provision, subject to the draft affirmative procedure while other regulations are subject to the negative procedure.
103. Clause 14(4) could be used to make a minor technical clarification to the way in which the exclusion of the ancillary matters in clause 14 is intended to operate.
104. A more substantive use of the power in clause 14(4) could be to provide legal certainty to courts and tribunals, if that is necessary beyond the provisions included on the face of the Bill and to adapt to changing circumstances. The regulation - or regulations - that need to be made in connection with that provision are likely to be more substantive and far-reaching, and are more likely to require amendments to primary legislation. Where regulations amend an Act of Parliament, it would be appropriate for Parliament to vote on such regulations before they come into force.
105. As with other powers in the Bill, the 'made affirmative' procedure is available if, in the Minister's opinion, a prior vote is not possible by reason of urgency. This is to account for any circumstances which require the regulation to be brought into force immediately. However, in such circumstances, parliamentary approval would still need to be secured subsequent to the regulations being brought into force (to avoid the regulations falling away).

## **Clause 15(2): Changes to, and exceptions from, excluded provision**

*Power conferred on:* A Minister of the Crown

*Power exercised by:* Regulations

*Parliamentary Procedure:* Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister's opinion it is necessary by reason of urgency.

### Context and Purpose

106. The Bill overall introduces the concept of "excluded provision", which refers to parts of the Northern Ireland Protocol whose effect has been 'switched off' in domestic law (as given effect by the European (Withdrawal) Act 2018, as amended).
107. Whilst some parts of the Northern Ireland Protocol are made "excluded provision" on the face of the Bill, the power in clause 15(2) allows:
  - a. other parts of the Northern Ireland Protocol to be subsequently made "excluded provision" wholly or to any other extent;
  - b. parts of the Northern Ireland Protocol which are "excluded provision" to be made "excluded provision" to a greater extent;
  - c. parts of the Northern Ireland Protocol which are "excluded provision" to be made "excluded provision" to a lesser extent;
  - d. parts of the Northern Ireland Protocol to cease to be "excluded provision".
108. This takes account of the potential need to adapt to, for example, a change in the external context to alter the parts of the Northern Ireland Protocol which are "excluded provision" including excluding additional matters if this is necessary.
109. An area of the Northern Ireland Protocol can be made "excluded provision" "wholly or to any other extent", "to a greater extent", or "to a lesser extent" which is intended to provide Ministers with the flexibility to be very precise about which specific area of the Northern Ireland Protocol is to be made "excluded provision", even if for example that area is very narrow.
110. Clause 15(1) sets out the purposes for which the power can be used, 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, acknowledging the

Government's stated commitment to provide appropriate protections.

#### Justification for taking the power

111. A delegated power is necessary because the scope of what is "excluded provision" of the Northern Ireland Protocol may need to change after the Bill reaches Royal Assent, should any aspect otherwise put at risk the sustainable operation of the Northern Ireland Protocol.
112. The Bill is clear that this power cannot be exercised to alter the scope of "excluded provision" of the Northern Ireland Protocol for any reason. Ministers can only use this power to alter the scope of "excluded provision" if it is necessary to do so for the purposes outlined at clause 15(1).

#### Justification for the procedure

113. We have opted for a dual approach to procedure, with any regulations amending an Act of Parliament, or making retrospective provision, subject to the draft affirmative procedure while other regulations are subject to the negative procedure. Where the power is used to amend the Act to change the scope of the exclusions provided for on the face of the Bill, even to a minor degree, this will ensure that such SIs are subject to the draft affirmative procedure.
114. In all other cases, the regulations will be subject to the negative procedure.

## **Clause 15(4): Changes to, and exceptions from, excluded provision**

*Power conferred on:* A Minister of the Crown

*Power exercised by:* Regulations

*Parliamentary Procedure:* Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister's opinion it is necessary by reason of urgency.

### Context and Purpose

115. The Bill overall introduces the concept of "excluded provision", which refers to parts of the Northern Ireland Protocol whose effects have been 'switched off' in domestic law (as given effect by the European (Withdrawal) Act 2018, as amended).
116. The power in clause 15(4) is intended to provide such flexibility to allow certain elements of the Northern Ireland Protocol to be excepted from being made "excluded provision", even if they are part of a wider provision which (in general) is being, or has been, made "excluded provision".
117. This accounts for the complexity of the operation of the Northern Ireland Protocol, and reflects the fact that there might need to be exceptions in areas where, for the most part, provisions of the Northern Ireland Protocol are made "excluded provision".
118. There may be some inevitable overlap between this power and the power at clause 15(2), but we consider that on some occasions it may be more appropriate to express something as an exception rather than cut down the scope of the exclusion (for example, where what needs to be excepted is particularly complex, focused, or time-limited).

### Justification for taking the power

119. There are two main reasons why this provision needs to be in the form of a delegated power:
  - a. first, as we operationalise the new arrangements as set out under the Bill, we will need the power to adapt where the situation in Northern Ireland evolves and to reflect discussions with stakeholders; and

- b. second, if the powers in the Bill are utilised to make new areas of the Northern Ireland Protocol “excluded provision”, then exceptions may be required as part of that process in order to properly target the intended provisions.

120. This power is inherently limited in that it can only provide exceptions to that which has already been, or is in the process of being, made “excluded provision”. In addition, the process of making a part of the Northern Ireland Protocol “excluded provision” will have already itself been subject to parliamentary scrutiny (either by being included on the face of the Bill, or being the subject of its own regulations).

121. This power is also explicitly limited by clause 15(3), which provides 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.

122. In addition, like all other powers in the Bill, regulations cannot be made under this power which create or facilitate border arrangements between Northern Ireland and the Republic of Ireland which feature physical infrastructure, including border posts, or checks and controls, that did not exist before exit day. This is outlined in clause 22(3).

#### Justification for the procedure

123. We have opted for a dual approach to procedure, with any regulations amending an Act of Parliament, or making retrospective provision, subject to the draft affirmative procedure while other regulations are subject to the negative procedure. Where the power is used to amend the Act to change the scope of the exclusions provided for on the face of the Bill, even to a minor degree, this will ensure that such SIs are subject to the draft affirmative procedure.

124. In all other cases, the regulations will be subject to the negative procedure.

## **Clause 16(1): Additional excluded provision: new law**

*Power conferred on:* A Minister of the Crown

*Power exercised by:* Regulations

*Parliamentary Procedure:* Draft affirmative procedure where amending an Act of Parliament or make retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister's opinion it is necessary by reason of urgency.

### Context and Purpose

125. The power in clause 16(1) gives Ministers the power to make any provision which the Minister considers appropriate in connection with any "additional excluded provision".
126. This acknowledges the fact that the provisions of the Bill will necessarily be supplemented with further provision to put appropriate new arrangements in place regarding the operation of the Northern Ireland Protocol, in connection with any "additional excluded provision".
127. The Bill provides a range of similar powers in various policy areas to make regulations in connection with provisions of the Northern Ireland Protocol becoming "excluded provision" (see, for example, clause 5 and clause 6). However, it is possible that these individual powers - whilst covering the majority of the policy areas that we wish to make regulations in - do not cover all possible permutations of what might be made "excluded provision" in future, thus necessitating the inclusion of this cross-cutting power.

### Justification for taking the power

128. This is required as a delegated power because the power at clause 15(2) may be used to make new areas of the Northern Ireland Protocol "additional excluded provision" following Royal Assent. This power would then allow Ministers to put appropriate new arrangements in place of Northern Ireland Protocol arrangements that become "additional excluded provision".
129. This power is inherently limited in that it can only be used in connection with provisions which have already been, or are in the process of being, made "additional excluded provision". In addition, the process of making a part of the Northern Ireland Protocol "additional excluded provision" will also be subject to parliamentary scrutiny in its own regulations.

## Justification for the procedure

130. Given the range of ways in which this power could be deployed - from the more substantive to the minor and technical - we have opted for a dual approach to procedure, with any regulations amending an Act of Parliament or making retrospective provision subject to the draft affirmative procedure while other regulations are subject to the negative procedure.
131. Clause 15(2) could be used to make a minor part of the Northern Ireland Protocol “additional excluded provision”, such as a technical piece of EU delegated legislation under one of the regulations of directives included in the Northern Ireland Protocol Annexes. Consequently, the regulation that needs to be made in connection with that technical piece of EU delegated legislation being made “excluded provision” might itself be very technical, with little substantive interest.
132. A more substantive area of the Northern Ireland Protocol might be made “excluded provision” in future under regulations made under the power in clause 15, which Parliament will have had the opportunity to scrutinise. The regulation - or regulations - that need to be made in connection with that area of the Northern Ireland Protocol being made “excluded provision” are likely to be more substantive and far-reaching, and may require amendments to primary legislation. Where amendments are required to an Act of Parliament it would be appropriate for Parliament to vote on such regulations before they come into force.
133. As with other powers in the Bill, the ‘made affirmative’ procedure is available if, in the Minister’s opinion, a prior vote is not possible by reason of urgency. This is to account for any circumstances which require the regulation to be brought into force immediately. However, in such circumstances, parliamentary approval would still need to be secured subsequent to the regulations being brought into force (to avoid the regulations falling away).



## **Clause 17(1): Value added tax, excise duties and other taxes: new law**

*Power conferred on:* The Treasury

*Power exercised by:* Regulations

*Parliamentary Procedure:* Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Commons-only. Made affirmative procedure available where in the Treasury's opinion it is necessary by reason of urgency.

### Context and Purpose

134. Clause 17(1) allows the Treasury by regulations to make provisions about value added tax, excise duty, or other taxes which they consider appropriate in connection with the Northern Ireland Protocol.

### Justification for taking the power

135. It is not possible to make such provisions on the face of the Bill because it is necessary for the UK to have the ability to respond to future changes and implement future UK VAT, excise and tax policy. The Treasury intends to exercise this power to make provision which the Treasury considers appropriate to lessen, eliminate or avoid differences in VAT, excise and other taxes between Northern Ireland and Great Britain.

### Justification for the procedure

136. In order to ensure that the scrutiny applied to the exercise of delegated powers is proportionate to the public interest, the Bill provides, variously, for the application of the draft affirmative, made affirmative and negative procedures.
137. When the power in clause 17 is used to amend an Act of Parliament or makes retrospective provision, the draft affirmative procedure should be used unless the Treasury is of the opinion that, by reason of urgency, it is necessary to make it without being subject to draft affirmative procedure, in which case the made affirmative procedure can be used. This is to ensure that the UK can ensure that relevant rules are set out in legislation in an appropriate and timely way.
138. In all other cases, the regulations will be subject to the negative procedure.

## **Clause 19(1): New agreements amending or replacing the Northern Ireland Protocol**

*Power conferred on:* A Minister of the Crown

*Power exercised by:* Regulations

*Parliamentary Procedure:* Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister's opinion it is necessary by reason of urgency.

### Context and Purpose

139. This provides Ministers with the power to implement a "relevant agreement", or deal with matters arising from or related to such an agreement. A "relevant agreement" is defined in clause 19(2) as any agreement made between the United Kingdom and the EU which modifies, supplements or replaces the whole or any part of the Northern Ireland Protocol.
140. The power is included in the Bill to reflect the fact that the Government's preference remains a negotiated solution with the EU. In parallel with this legislation being introduced, we will remain open to further talks if we can achieve the same objectives through a negotiated settlement. In the scenario that such an agreement is reached, this Bill provides a power for Ministers to implement that agreement.

### Justification for taking the power

141. These provisions cannot be included on the face of the Bill because such an agreement with the EU has not yet been reached. If such an agreement were to remedy the issues currently being faced in Northern Ireland, it may not be expedient to pass an entirely new piece of primary legislation to implement those remedies given the urgency of resolution.
142. This power does not affect Parliament's ratification process - outlined in Part 2 of the Constitutional Reform and Governance Act. It is simply about providing the means to implement what is agreed, at the appropriate time.

### Justification for the procedure

143. Given the range of ways in which this power could be deployed - from the more substantive to the minor and technical - we have opted for a dual approach to procedure, with any regulations amending an Act of Parliament or making

retrospective provision subject to the draft affirmative procedure while other regulations are subject to the negative procedure.

144. Clause 19(1) could be used to implement a range of elements in any relevant agreement, from the minor to the more substantive. Any more substantive regulations are more likely to be far-reaching, and are thus more likely to require amendments to primary legislation. Where regulations amend an Act of Parliament it would be appropriate for Parliament to vote on such regulations before they come into force.

145. As with other powers in the Bill, the 'made affirmative' procedure is available if, in the Minister's opinion, a prior vote is not possible by reason of urgency. This is to account for any circumstances which require the regulation to be brought into force immediately. However, in such circumstances, parliamentary approval would still need to be secured subsequent to the regulations being brought into force (to avoid the regulations falling away).

## **Clause 20(3): Role of the European Court in court and tribunal proceedings**

*Power conferred on:* A Minister of the Crown

*Power exercised by:* Regulations

*Parliamentary Procedure:* Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister's opinion it is necessary by reason of urgency.

### Context and Purpose

146. This power provides Ministers with the ability to make provision which they consider appropriate in connection with clause 20(2), which provides that principles and judgments of the CJEU are not binding on any court or tribunal as far as they relate to the Northern Ireland Protocol, related provision in the Withdrawal Agreement or related domestic law, and that courts and tribunals may not refer any matter to the CJEU in those regards.

### Justification for taking the power

147. In light of the complexity of this area, the power in clause 20(3) provides Ministers with 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.

148. Amongst other matters this power could also provide a domestic law basis for a new mechanism for domestic courts to make references to the CJEU in relation to questions of the interpretation of EU law.

### Justification for the procedure

149. Given the range of ways in which this power could be deployed - from the more substantive to the minor and technical - we have opted for a dual approach to procedure, with any regulations amending an Act of Parliament or making retrospective provision subject to the draft affirmative procedure while other regulations are subject to the negative procedure.

150. Any more substantive regulations made in relation to the provision in clause 20(2) are more likely to be far-reaching, and are thus more likely to require amendments to an Act of Parliament. Where the power is used to amend an Act of Parliament, it would be appropriate for Parliament to vote on such regulations before they come into force.

151. As with other powers in the Bill, the 'made affirmative' procedure is available if, in the Minister's opinion, a prior vote is not possible by reason of urgency. This is to account for any circumstances which require the regulation to be brought into force immediately. However, in such circumstances, parliamentary approval would still need to be secured subsequent to the regulations being brought into force (to avoid the regulations falling away).

## **Clause 22(6): Regulations**

*Power conferred on:* A Minister of the Crown

*Power exercised by:* Regulations

*Parliamentary Procedure:* Draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure. Made affirmative procedure available where in the Minister's opinion it is necessary by reason of urgency.

### Context and Purpose

152. This power provides Ministers with the ability to make provision for the other powers to make Regulations under this Bill to be exercised to any extent by a devolved authority; or to provide for scrutiny of regulations to be made by a devolved authority.

### Justification for taking the power

153. The division of responsibilities in implementing the new arrangements replacing excluded elements of the Northern Ireland Protocol will depend on policy decisions yet to be taken, including as a result of consultations with stakeholders.
154. Where a matter would normally fall within the legislative competence of the devolved administrations and the passage of devolved primary legislation would not be appropriate, or timely it may be appropriate to create a new devolved delegated power by exercise of this power.

### Justification for the procedure

155. Given the range of sub-delegation which this power could entail - from the more substantive to the minor and technical- we have opted for a dual approach to procedure, with any regulations amending an Act of Parliament or making retrospective provision subject to the draft affirmative procedure while other regulations are subject to the negative procedure. Any more substantive sub-delegation is more likely to be far-reaching, and may require amendments to primary legislation. Where regulations amend an Act of Parliament, it would be appropriate for Parliament to vote on such regulations before they come into force.
156. Regulations under sub-delegated powers will also be subject to appropriate procedure before the relevant devolved legislature.

157. As with other powers in the Bill, the 'made affirmative' procedure is available if, in the Minister's opinion, a prior vote is not possible by reason of urgency. This is to account for any circumstances which require the regulation to be brought into force immediately. However, in such circumstances, parliamentary approval would still need to be secured subsequent to the regulations being brought into force (to avoid the regulations falling away).

### **Clause 26(3): Extent, commencement and short title**

*Power conferred on:* A Minister of the Crown

*Power exercised by:* Regulations

*Parliamentary Procedure:* No procedure.

#### Context and Purpose

158. The power at 26(3) provides Ministers with the power to appoint the day (or days) in which the clauses of the Bill other than clauses 21 to 25 come into force.

#### Justification for taking the power

159. It is usual and regular for Bill provisions to come into force by commencement order. In this specific case, given the volume of secondary legislation that will need to be passed under the powers in the Bill in preparation for the exclusions reflecting the changed operation of the Northern Ireland Protocol, it would be sensible to give Ministers the power to bring the substantive provisions of the Bill into force on an appointed day, in order to provide legal certainty.

160. The power can only be used to provide the date on which provisions come into force (rather than any of the substance of the provisions).

#### Justification for the procedure

161. As is usual with commencement powers, regulations providing for the coming into force of the remainder of the provisions of the Bill are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at the appropriate time.



## **Clause 26(4): Extent, commencement and short title**

*Power conferred on:* A Minister of the Crown

*Power exercised by:* Regulations

*Parliamentary Procedure:* No procedure.

### Context and Purpose

162. This power allows Ministers to 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.

### Justification for taking the power

163. The transitional, transitory or savings power is a standard power to make transitional, transitory or saving provision in connection with the bringing into force of provisions in the Bill. The purpose of such powers is to ensure a smooth transition between existing law and the law as it will look after the provisions of the Bill come into force.

164. Any such power will be construed strictly as in connection with the bringing into force of provisions in the Bill.

### Justification for procedure

165. The transitional power is subject to no procedure. There is substantial precedent for this type of power to attract no procedure (e.g. in the Taxation (Cross-border Trade) Act 2018 and the EU (Withdrawal Agreement) Act 2020).

**Foreign, Commonwealth and Development Office**

**13 June 2022**