

Northern Ireland Protocol Bill

Research Briefing

September 2022



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Welsh Parliament
Tŷ Hywel
Cardiff Bay
CF99 1SN

Tel: **0300 200 6472**

Email: **Sara.Moran2@senedd.wales**

Twitter: **[@SeneddResearch](https://twitter.com/SeneddResearch)**

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Author:

Sara Moran



The Northern Ireland Protocol Bill would disapply parts of the Northern Ireland Protocol and the Withdrawal Agreement in domestic law, empower UK Ministers to disapply more parts in future and to put new arrangements in place without the EU's consent or input.

The Bill would also:

- Give UK Ministers broad powers to legislate, which could be passed on to Welsh Ministers, including to suspend or repeal Senedd legislation, which could be exercised by Welsh Ministers;
- Change the rules for trade in goods between Great Britain and Northern Ireland, and give powers to UK Ministers to make different rules in future;
- Change other rules agreed with the EU for Northern Ireland for subsidy control, VAT and customs, and give UK Ministers powers to make other arrangements;
- Give UK Ministers powers to implement amendments to the Protocol, or any new agreement that might replace it; and
- Remove the role and jurisdiction of the Court of Justice of the European Union (CJEU).

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1. Introduction

This briefing provides an overview of the **Northern Ireland Protocol Bill** by theme. Annexed to this summary is a chronological list of provisions at a glance.

Important features of the Bill

The Bill contains important features which are simplified for the purpose of this briefing. These are key to understanding the Bill and are explained in this section.

The Bill won't change the Protocol

The Protocol is part of the Withdrawal Agreement, a treaty and instrument of international law.

The UK Parliament cannot legislate to change international law. Rather, the Bill seeks to change the effects of the Protocol, the Withdrawal Agreement and other related legislation in domestic law, and to enable Ministers to make more changes to their effects in future.

The Bill will not absolve the UK of its international obligations, as noted by **the Counsel General**.

The Bill creates 'excluded provision'

The Bill turns parts of the Protocol and Withdrawal Agreement into 'excluded provision' in domestic law, effectively switching them off. The Bill also gives Ministers broad powers to make more parts of the Protocol and Withdrawal Agreement 'excluded provision' in part or in full, to different degrees and to reverse their decision.

This means that in future, Ministers could switch more parts of the Protocol and the Withdrawal Agreement on/off, and could dial their effects up/down.

For ease, this briefing uses the terms 'disapply', 'switch off' and other similar terms when referring to parts of the Protocol and Withdrawal Agreement which would become excluded provision under the Bill or in future via Ministerial powers.

Ministerial powers

The Bill would grant sweeping powers to UK Ministers, including to amend Acts of Parliament and repeal or suspend legislation, including Senedd legislation. UK

Ministers could give almost all of the Bill's regulation-making powers to Welsh Ministers, to be used either instead of them, or jointly or concurrently with UK Ministers.

The Bill's **Delegated Powers Memorandum** states that "some of the delegated powers provided for in this Bill are **necessarily broad**". It further states the UK 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.

It later describes the powers granted by the Bill to be "suitably constrained" to certain parts of the Protocol it seeks to "deliver differently", where issues have arisen.

2. Purpose

The Bill states that its purpose is to:

Make provision about the effect in domestic (UK) law of the Protocol, about other domestic law in subject areas dealt with by the Protocol, and for connected purposes.

The Bill's **Delegated Powers Memorandum** adds that its purpose is to empower Ministers to make changes to the Protocol's operation "which protect the Belfast (Good Friday) Agreement and safeguard peace and stability in Northern Ireland."

Clause 1 provides more detail on the Bill's purpose which is to:

- disapply the effect of parts of the Protocol in the UK;
- give Ministers powers to disapply the effect of other parts of the Protocol;
- ensure that other legislation isn't affected by the disapplication of the Protocol's effect. It gives two examples - the Union with Ireland Act 1800 and the Act of Union (Ireland) 1800; and
- give Ministers powers to make new law in connection with the Protocol. This includes to put new arrangements in place where the Protocol has been disapplied.

3. Changes to the Protocol's effect

The Bill changes parts of the Protocol's effect via clauses 2, 3 and 14 described in this section.

Background

Currently, **the Withdrawal Agreement**, which sets the terms of the UK's separation from the EU, is given effect in domestic law by the EU (Withdrawal) Act 2018 ("the 2018 Act"). The 2018 Act was amended by the EU (Withdrawal Agreement) Act 2020.

As part of Brexit, the UK reached **other separation agreements** with the non-EU European countries of Norway, Iceland, Liechtenstein and Switzerland. These agreements are known as 'separation agreements'. Specifically they are the **EEA EFTA separation agreement** and the **Swiss citizens' rights agreement**.

'Separation agreement law' refers to these agreements, the Withdrawal Agreement and accompanying domestic law.

The Bill's clauses limits the implementation of the Protocol, the Withdrawal Agreement and separation agreement law by disapplying and amending parts of the 2018 Act, particularly sections 7A and 7C.

Section 7A acts as a conduit so that the rights, powers etc provided by the Withdrawal Agreement are available in domestic law. Through section 7A, they have supremacy over conflicting domestic law and have direct effect, meaning they confer rights on citizens that are recognised and enforced by domestic courts.

Section 7C requires separation agreement law to be read in accordance with the Withdrawal Agreement and sets out how to interpret relevant separation agreement law.

Clause 2 disapplies parts of the Protocol and Withdrawal Agreement in domestic law by changing how the EU (Withdrawal) Act 2018 works. The 2018 Act gives effect to both in domestic law.

It does this by disapplying and amending the EU (Withdrawal) Act 2018.

Clause 2 makes three changes to **section 7A of the 2018 Act**.

First, it switches off any rights, powers, liabilities, obligations or restrictions, remedies or procedures (“rights, powers etc”) provided by or under the Protocol and Withdrawal Agreement.

Second, it doesn’t allow these rights, powers, etc to be:

- recognised or available in domestic law; or
- enforced, allowed or followed; and
- prohibits other related legislation from being read or given effect in accordance with section 7A(2), regardless of when it was passed.

Third, it amends section 7A so as to:

- make it subject to the Northern Ireland Protocol Act (“the NIP Act”), effectively granting supremacy to the NIP Act over section 7A; and
- add future regulations made under the NIP Act to a list of items for consideration when interpreting the Withdrawal Agreement. This means that regulations under the NIP Act can take priority over section 7A insofar as they are incompatible with it.

Clause 3 limits the effect of separation agreement law so that it must be read in accordance with the Bill and not the Withdrawal Agreement, as is currently required.

This includes limiting the effect of the Withdrawal Agreement, the EEA EFTA separation agreement and the Swiss citizens’ rights agreement.

Clause 3 does this by making changes to **section 7C of the 2018 Act**. Section 7C requires separation agreement law to be read in accordance with the Withdrawal Agreement and sets out how to interpret relevant separation agreement law. Clause 3:

- disapplies section 7C of the 2018 Act so that separation agreement law cannot

be interpreted in a way that is incompatible with provision made by or under NIP Act, and any conduct under section 18(1); and

- amends section 7C of the 2018 Act so that the NIP Act is added to a list of items for consideration in the general implementation of relevant separation agreement law.

Clause 14 disapplies parts of the Protocol and Withdrawal Agreement which relate to already-disapplied parts. It also gives Ministers powers to legislate for new arrangements.

Currently, UK authorities are responsible for implementing and applying EU law, the Protocol and the Withdrawal Agreement in accordance with EU law and CJEU case law. Where parts of the Protocol or Withdrawal Agreement have been disapplied already, leaving other related parts in force, the related parts are also disapplied by clause 14. It also empowers Ministers to legislate to make new law that they deem appropriate.

Clause 14(1) disapplies any provision of the Protocol or Withdrawal Agreement insofar as they relate to other disapplied provision of the Protocol or Withdrawal Agreement. The Bill's explanatory notes explain that this is to disapply related "other ancillary provisions". However, the examples listed below in clause 14(2) extend the disapplication beyond related provision to even "concepts" of EU law found in CJEU case law.

Clause 14(2) lists examples of these from the Protocol and Withdrawal Agreement, as follows:

- i. Article 12 Protocol on implementation, application, supervision and enforcement (apart from paragraphs 2, 3 and 4);
- ii. Article 13 Protocol on common provisions, including interpreting EU law and its concepts in line with CJEU case law;
- iii. Article 4 Withdrawal Agreement on methods and principles relating to the effect, the implementation and the application of the agreement;
- iv. Article 6 Withdrawal Agreement on references to EU law;
- v. Article 170-181 Withdrawal Agreement on dispute resolution by the arbitration panel; and
- vi. any Protocol articles insofar as they relate to Protocol Annexes which are disapplied.

Clause 14(3) states that this section applies to the:

- a. responsibility of UK authorities for implementing and applying EU law; and
- b. requirement for the Protocol and Withdrawal Agreement to be interpreted and applied in accordance with the methods and general principles of EU law and in conformity with the relevant case law of the CJEU.

Clause 14(4) gives Ministers powers to make any provision which they consider appropriate in connection with any provision of the Protocol or Withdrawal Agreement relating to this section.

4. Future changes to the Protocol's effect by Ministers

The Bill gives Ministers powers to change the Protocol's effects in future via clauses 15 and 16, described in this section.

Clause 15 sets out how Ministers can change which parts of the Protocol or Withdrawal Agreement are switched on/off, and to what extent, providing one of two conditions is met. Important exceptions apply so that changes cannot be made to the Protocol articles designed to protect parts of the Good Friday (Belfast) Agreement 1998 on citizens' rights, North-South cooperation, and the UK-Ireland Common Travel Area. However, these protections could be overridden in future by Ministers.

Clause 15(2)(a)-(d) gives Ministers powers to disapply any provision of the Protocol or Withdrawal Agreement (with the exception of articles listed in clause 15(3)), in whole or in part to any extent, or to cease to be disapplied (i.e. so that the provision is reapplied).

To do this, one of two conditions must be met. The Minister either must consider it necessary **or** it must be in connection with one or more "permitted purposes".

Clause 15(1) defines nine "permitted purposes", as follows:

1. safeguarding social or economic stability in Northern Ireland;
2. ensuring the effective flow of trade between (i) Northern Ireland and another part of the UK, or (ii) a part of the UK and anywhere outside the UK;
3. safeguarding the UK's territorial or constitutional integrity;

4. safeguarding the functioning of the Belfast (Good Friday) Agreement;
5. safeguarding animal, plant or human welfare or health;
6. safeguarding biosecurity or the environment;
7. safeguarding the integrity of the EU single market;
8. lessening, eliminating or avoiding difference between tax or customs duties in NI and GB; and
9. securing compliance with, or giving effect to, any international obligation or agreement to which the UK, except for (i) the Protocol or any other part of the Withdrawal Agreement, or (ii) any obligation under them.

Clause 15(3) states that Ministers cannot use the powers granted in Clause 15(2) to cease the effect of certain Protocol articles to any extent. This protects the Protocol's articles on the:

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

However, clause 15(4) provides that Ministers may, by regulations, provide for exceptions from “any” exclusion. This means that Ministers could override this protection and disapply provisions in the Protocol relating to the rights of individuals, common travel area and other areas of North-South co-operation, should they fall within any “exceptions”.

Clause 16 empowers Ministers to make new laws where appropriate in connection with changing the application of the Protocol and Withdrawal Agreement, as per clause 15.

Clause 16(1) gives Ministers the powers to make new law which they consider appropriate in connection with disapplying the Protocol and Withdrawal Agreement (as permitted under clause 15(2), described above).

Clause 16(2) states that such provision will not be limited by any other powers provided by this Act.

Clause 16(3) defines the term “additional excluded provision”, used to describe more parts of the Protocol or the Withdrawal Agreement which Ministers have disapplied using clause 15, as described above.

5. Ministerial conduct

Clause 18 authorizes Ministers to engage in conduct relating to the Protocol where appropriate, even if it's not authorised by the NIP Act. Producing guidance is listed as an example in the Bill's notes but conduct isn't defined (nor limited) by the NIP Act.

Clause 18(1) authorises Ministers to “engage in conduct in relation to any matter dealt with in the Protocol” if they consider it “appropriate to do so in connection with one or more purposes of this Act”, even where it's not provided for elsewhere in the NIP Act. “Conduct” is not defined by the Bill but its **explanatory notes** give sub-legislative activity, such as producing guidance, as an example.

Clause 18(2) provides that nothing in this Act affects other Ministerial powers not found in this Act.

6. Powers to implement a new Protocol

Clause 19 gives Ministers powers to implement any UK-EU agreement that modifies, supplements or replaces the Protocol, and to legislate on related matters.

Clause 19(1) gives Ministers powers for the purpose of:

- a. implementing any relevant agreement; or
- b. dealing with matters arising out of, or related to, any relevant agreement.

Clause 19(2) defines ‘relevant agreement’ as a UK-EU agreement that modifies, supplements or replaces the Protocol, in whole or in part.

7. Welsh Ministers and the Senedd

The Bill's final provisions contain important provisions for the devolved governments and legislatures. They empower UK Ministers to grant regulating powers to Welsh Ministers, and give UK Ministers the power to determine scrutiny procedures for regulations made by Welsh Ministers. They also provide that domestic legislation could be suspended or repealed by UK Ministers, which would include Welsh legislation. Clauses 21-25 would come into force on the day the NIP Act is passed.

Clause 21 authorises UK and Welsh Ministers to spend money for the purpose of, or in connection with, “anything” needed in preparation of regulations being made under this Act.

Welsh Ministers will be able to incur expenditure to prepare to put new arrangements in place.

Clause 22 is one of the most significant clauses in the Bill. It sets parameters for regulations, including that UK Ministers could give Welsh Ministers regulation making powers to carry out the Act, and UK Ministers could determine which scrutiny procedure are used in the Senedd. Clause 22 also authorises regulations made under this Act to suspend, repeal or change domestic law, including any legislation made by the Senedd which gives effect to the Protocol or Withdrawal Agreement.

The [Hansard Society](#) says that clause 22 also means that:

... powers in the NIP Bill are specifically permitted to make provision that is incompatible with the Northern Ireland Protocol or any other part of the Withdrawal Agreement.

What regulations could do

Clause 22(1) provides that regulations made under this Act can make any provision which could be made by an Act of Parliament, including to modify this Act.

Clause 22(2) provides a list detailing what regulations made under this Act could do, as follows:

- a. make provision as long as it is compatible with the Protocol or any other part of the Withdrawal Agreement;
- b. suspend, repeal or make alternative provision to domestic law which gives effect to the Protocol **or any other part** of the Withdrawal Agreement;
- c. make provision for any EU law to form part of domestic law, including provision corresponding to certain parts of the 2018 Act;
- d. make provision restating or modifying the effect which any EU law has by virtue of section 7A of the 2018 Act; or
- e. make (i) different provision for different purposes or areas; (ii) incidental, supplementary or consequential provision; (iii) transitional or transitory provision or savings.

Regulations can't create or facilitate NI/Ireland border arrangements

Clause 22(3) prohibits regulations made under this Act from creating or facilitating border arrangements between Northern Ireland and the Republic of Ireland, which did not exist before the UK's exit day from the EU (on 31 December 2020). This applies to:

- a. physical infrastructure, including border posts; or
- b. checks and controls.

Further regulation making powers in connection with the Protocol

Clause 22(4) provides that regulation making powers granted to Ministers to make appropriate provision in connection with the Protocol is exercisable in connection to which that section:

- a. relates (by virtue of regulations under section 15(2)(b) or (c)); and
- b. ceases to relate (by virtue of regulations under section 15(2)(d)).

Regulations can't be considered hybrid instruments, and so would bypass a special UK parliamentary procedure that allows those negatively affected by regulations to present their arguments against them

Clause 22(5) provides that instruments, or draft instruments, containing regulations under this Act should not be treated as hybrid instruments, where they would usually be treated as such under UK Parliament standing orders.

In practice, this circumvents the following procedure:

Some statutory instruments (SIs) which need to be approved by both Houses (affirmative instruments) are ruled to be hybrid instruments because they affect some members of a group (be it individuals or bodies) more than others in the same group. Hybrid instruments are subject to **a special procedure which gives those who are negatively affected by them the chance to present their arguments against the SI** to the Lords Hybrid Instruments Committee and then, possibly, to a Select Committee charged with reporting on its merits. The hybrid instrument procedure is unique to the House of Lords and the process must be completed before the SI can be approved by both Houses.

Powers to Welsh Ministers and scrutiny arrangements

Clause 22(6) provides regulation making powers to UK Ministers to:

- a. grant regulating-making powers to devolved Ministers, either (i) instead of a UK Minister, or (ii) concurrently or jointly with UK Ministers or other devolved authorities.; and
- b. decide the scrutiny of regulations made by devolved authorities.

The **Delegated Powers Memorandum** provides two justifications for this. First:

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.

And second:

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.

Hansard Society analysis of clause 22(6)

The **Hansard Society's analysis** (see pages 12-14) highlights a number of issues with the approach taken by the Bill to devolved powers.

The analysis explains how not conferring devolved powers on the face of the Bill is unusual, as is omitting their accompanying scrutiny arrangements. They explain:

The approach that has been taken in the NIP Bill is to confer on UK Ministers the power to make regulations that can further delegate legislative powers to devolved administrations.

This is in effect 'legislative sub-delegation' and the power that would be exercised by the devolved administration would be a 'sub-delegated power' to make 'tertiary legislation'.

In the absence of accompanying scrutiny arrangements, the Hansard Society says "the important link between those empowered to make law and their accountability to Parliament" is broken. Furthermore, legislation made by devolved Ministers could escape scrutiny altogether, even if it amends primary legislation.

The Hansard Society says the UK Government has failed to explain:

why 'tertiary legislation' made by virtue of clause 22(6) is not subject to the same level of scrutiny as is applicable to regulations made under the

Bill; and

why it is a UK Minister that decides whether and to what extent legislative power is conferred, and not Parliament, on the face of the Bill.

It recommends that parliamentarians may wish to consider:

- removing clause 22(6);
- conferring powers on devolved Ministers on the face of the Bill; and
- specifying on the face of the Bill the level of scrutiny applicable to the exercise of such powers.

Clause 22(7) provides that clause 22(2)(e) does not apply to regulations under clause 26(3) (but see clauses 26(4) and (5)). This ensures that only UK Ministers can bring provisions into force at a future date, and prevents this power from being delegated to devolved Ministers. Clause 26 provides Ministers with regulation making powers to bring other provisions of the Act into force, and provides Ministers with regulation making powers to make incidental, transitional etc provisions in connection with the coming into force of any provisions.

8. Court of Justice of the European Union (CJEU)

Clauses 13 and 20 of the Bill make changes to the role of the CJEU, described in this section. Combined, they significantly reduce its role.

Background

The Protocol provides a role for the CJEU in ways which enable the court's jurisdiction to be preserved for as long as the Protocol remains in force i.e. possibly indefinitely. As outlined by [Professor Catherine Barnard](#), the role of the CJEU in respect of the Protocol is threefold:

1. via Article 12(4) of the Protocol on the application of **EU remedies in Northern Ireland**, including that NI courts can make references to the CJEU and NI businesses can challenge provisions of EU law;
2. via the Withdrawal Agreement's **dispute resolution** procedure, whereby questions concerning the interpretation of EU law must be referred to the court; and

3. via Article 131 of the Withdrawal Agreement, whereby the EU can bring **infringement proceedings** against the UK for breaches which occurred during the Brexit transition period up to 31 December 2024.

Clause 13 removes the jurisdiction of the CJEU, the powers of EU representatives and some powers of the Withdrawal Agreement’s governing structures. It also gives Ministers powers to legislate for new arrangements, including those agreed with the EU for supervision and information sharing.

Clause 13(1) disapplies any provision of the Protocol or any other part of the Withdrawal Agreement which gives any jurisdiction to the CJEU in relation to:

- the Protocol; and
- related provisions of the Withdrawal Agreement.

Clause 13(2) disapplies paragraphs 2 and 3 of Article 12 of the Protocol.

Paragraph 2 governs the presence and powers of EU representatives, including their right to be present during any activities where UK authorities apply EU law, and their right to receive information from the UK.

Paragraph 3 provides powers to the Withdrawal Agreement’s Joint Committee and Specialized Committee on the Protocol to determine the practical working arrangements of EU representatives in exercising their rights.

Clause 13(3) states that other provisions in this area are disapplied by Clause 14.

Clause 13(4) gives Ministers powers to make any provision which they consider appropriate in connection with any provision of the Protocol relating to this section.

Clause 13(5) says that such provision could include arrangements with the EU relating to the Protocol’s operation, including the supervision of its operation or information sharing under those arrangements.

Clause 20 makes more changes to the role of the CJEU so that domestic courts are prevented from following CJEU principles or decisions, and from referring cases to the CJEU. Clause 20 also gives Ministers two new powers – first, to make new arrangements for domestic courts, and second, to have the option of allowing courts to refer matters to the CJEU in future but only to ask for assistance with interpreting EU law.

Clause 20(1) sets out that this section applies to proceedings relating to:

- a. the Protocol;
- b. related provision of the Withdrawal Agreement; or
- c. domestic law relating to (i) the Protocol, or (ii) related provision of the Withdrawal Agreement.

Clause 20(2) states that, in these proceedings, a court or tribunal:

- a. is not bound by any principles or any decisions by the European Court from the day this Act comes into force; and
- b. cannot refer any matter to the European Court.

Clause 20(3) provides regulation making powers to Ministers to make any provision they consider appropriate in connection with subsection (2).

Clause 20(4) provides that such regulations could establish a procedure whereby a court or tribunal may refer a question of interpretation of EU law to the European Court where:

- a. the question arises in proceedings before the court or tribunal, and
- b. the court or tribunal considers that they need the European Court to deal with that question before they can conclude their proceedings.

9. Trade

Background

The UK and EU agreed in the Protocol that Northern Ireland would continue to follow some EU rules, while the rest of the UK (as Great Britain) could change its rules.

Among other things, this requires that EU checks on products entering its **Single Market** must now be carried out on arrival in Northern Ireland from Wales, England and Scotland. This is sometimes referred to as a 'border in the Irish Sea'.

Post-Brexit arrangements require Welsh ports to set up new border control posts, **described by the Welsh Government** as "one of the largest and most complex infrastructure delivery programmes" that it is involved in. The project has been subject to **several delays** and the **Minister for Economy, Vaughan Gething**, told the Senedd on 28 June that the soonest Wales' first site could be operational is the end of 2023.

Clauses 4-7 of the Bill switch off parts of the Protocol so that its requirements would be removed in domestic law. They also give Ministers broad powers to put new arrangements in place without the EU's input or consent.

Some new arrangements are set out in the Bill, although it mainly provides Ministers with powers to legislate for future arrangements.

Changes to rules for the movement of goods and customs

Clause 4 disapplies the Protocol's requirements for the movement of goods and customs and gives UK Ministers powers to change this approach.

Clause 4(1) disapplies the provisions which guarantee that customs will not be charged for goods moving from GB-NI unless they are destined to move on to the EU, and the rules for how this works.

How the Bill achieves this

Clause 4(1) disapplies the first and second subparagraphs of Article 5(1) and (2) of the Protocol.

These subparagraphs provide that customs will not be charged for goods moving from GB-NI unless they are destined to move on to the EU and establish rules for how this works.

Clause 4(2) removes customs and certain regulatory requirements, such as Sanitary and Phytosanitary (SPS) controls.

How the Bill achieves this

Clause 4(2) disapplies Articles 5(3), 5(4) and Annex 2 of the Protocol so far as they relate to qualifying movements of UK or non-EU destined goods. This also removes the power of the Withdrawal Agreement's overarching body, the Joint Committee, to set conditions for the exemption of duties of fisheries and aquaculture products, as described below.

- Article 5(3) grants powers to the Withdrawal Agreement's Joint Committee to establish conditions for when fisheries and aquaculture products brought by UK-flagged vessels registered to Northern Irish ports will be exempt from duties;
- Article 5(4) provides that the EU law listed in Annex 2 will apply to Northern Ireland; and
- Annex 2 lists EU law and procedures that apply to Northern Ireland.

Clause 4(3) and 4(4) give Ministers regulation making powers to apply clause 4(2) to any of the following, so that Ministers could change the UK's approach to:

- a. the purpose for which goods are being moved, be it commercial or non-commercial;
- b. the manner in which the goods are being moved;
- c. the person or service being used to move the goods;
- d. whether or not the movement is a direct movement from one place to another;
- e. the place where the goods are being moved from or to;
- f. the place where the goods are destined to remain or move to after a qualifying movement; and
- g. the nature of the goods.

These are referred to as "prescribed descriptions of qualifying movements of UK, or non-EU, destined goods" in clause 4(3).

Clause 4(5) gives UK Ministers regulation-making powers to change the meaning of “UK or non-EU destined”. In particular, these regulations could:

- a. set conditions or criteria to determine whether goods are “UK or non-EU destined”, including where traders state that goods are so in accordance with a prescribed scheme (i.e. self-declaration);
- b. provide for goods to be treated as UK or non-EU destined (i.e. without criteria or conditions);
- c. provide for the question of whether goods are UK or non-EU destined to be determined by reference to circumstances after a qualifying movement of the goods (i.e. to determine this after the movement).

Clause 4(6) defines “qualifying movement” broadly, so as to include movements to/ from Northern Ireland from any non-EU destination, and movements within the UK, as follows:

- **movement to NI** from Great Britain, the Isle of Man, any of the Channel Islands and any other place outside the EU. Where goods originate from the sea, movement of the goods from the sea to a port or other place in Northern Ireland. The “sea” is also defined in the broadest possible manner in international law, encompassing the territorial sea and Exclusive Economic Zone (EEZ) of any country or territory, and the high seas. In reality, this means all goods arriving in NI from any part of any sea;
- **movement from NI** to Great Britain, the Isle of Man, any of the Channel Islands and any other place outside the EU; and
- movement within the UK.

Ministerial powers for new movement of goods law

Clause 5 empowers Ministers to legislate for new movement of goods rules.

Clause 5(1) gives Ministers the power to make regulations they consider appropriate in connection with any provision of the Protocol to which Clause 4 relates.

Clause 5(2) provides an exception to this for customs matters, which come under clause 6.

Clause 5(3) provides that regulations may:

- a. provide for checks, controls and administrative processes (whether applicable
-

before or after a movement of goods), including powers of search, examination and entry;

- b. restrict or prohibit the movement of UK or non-EU destined goods into the EU; and
- c. make provision about the treatment of goods which cease to be, or become, UK or non-EU destined goods.

HMRC and Treasury powers for new customs law

Clause 6 empowers the HMRC and the Treasury to regulate customs.

Clause 6(1) gives powers to the HMRC or the Treasury to make any provision about customs matters which they consider appropriate in connection with the Protocol.

Clause 6(2) provides that regulations may:

- d. impose or vary the incidence of any customs duty;
- a. provide for checks, controls and administrative processes (whether applicable before or after a movement of goods), including powers of search, examination and entry;
- b. restrict or prohibit the movement of UK or non-EU destined goods into the EU; and
- c. make provision about the treatment of goods which cease to be, or become, UK or non-EU destined goods.

New rules for the regulation of goods

Clauses 7-10 establishes new rules for the regulation of goods. They:

- provide the option to choose between compliance with UK or EU regimes;
- disapply the Protocol where it conflicts with this new dual regime;
- gives Ministers new powers to legislate; and
- defines 'regulation of goods' broadly and gives Ministers powers to change this definition.

More detail is provided below.

Dual regulatory route

Clause 7 establishes a dual regulatory regime in Northern Ireland and the option to choose between compliance with UK or EU requirements, or both.

Clause 7(1) provides the option to choose compliance with either the UK's regulatory route or the EU's regulatory route, or both. This applies to regulated classes of goods, including manufactured goods, medicines and agri-food.

Clause 7(2) provides that the individual or company must choose which regulatory route they want to comply with.

Clause 7(3) defines a 'regulated good' as any class of goods regulated by Annex 2 of the Protocol. Annex 2 lists EU law and procedures that apply to Northern Ireland.

Clause 7(4) defines the UK regulatory route as that contained in UK domestic law and the EU regulatory route as that contained in relevant separation agreement law.

Regulation of goods: disapplying the Protocol

Clause 8 disappplies the provisions that mean EU law applies to Northern Ireland where they prevent clause 7 from having effect.

Clause 8 provides that Article 5(4) and Annex 2 of the Protocol are disappplied insofar as they prevent clause 7 from having effect.

Articles 5(4) sets out that the EU law listed in Annex 2 will apply to Northern Ireland.

Annex 2 lists EU law and procedures that apply to Northern Ireland.

Regulation of goods: powers to make new law

Clause 9 empowers Ministers to legislate for the regulation of goods in connection with the Protocol if they consider it appropriate.

Clause 9(1) gives Ministers powers to make any regulation about the regulation of goods which they consider appropriate in connection with the Protocol.

Clause 9(2) provides that regulations may:

- a. make any provision Ministers consider appropriate in connection with the UK regulatory route being available; and
- b. amend clauses 7 or 8.

Meaning of regulation of goods and powers to change it

Clause 10 defines the ‘regulation of goods’ then gives Ministers the power to change this.

Clause 10(1) defines ‘regulation of goods’ as including

- a. making goods available on the market;
- b. putting goods into service;
- c. the production of goods (whether by manufacture or any other process); and
- d. use and import of goods.

These references are broadened further by including:

... any matter that is relevant to regulation of goods, which may include matters that occur before or after goods are made available on the market, put into service or produced.

12 matters are listed as suggestions in clause 10(2), including placing on the market, supply, marketing and sale, advertising, provision of information and packaging. More may be included, as determined by Ministers.

Clause 10(3) provides that the production of goods may also be included, by manufacture or any other process, in cases of making goods available on the market or putting goods into service.

Clause 10(4) gives further powers to Ministers to change the references to the regulation of goods, including changing their effects.

More Ministerial powers to establish a dual regulatory regime

Clause 11 gives additional powers to Ministers in relation to clause 7 on the dual regulatory regime, such as to provide exceptions.

Clause 11(1) gives Ministers powers to:

- a. apply clause 7 to regulated classes of goods or regulatory routes that are prescribed;

- b. provide exceptions to clause 7; and
- c. modify the effect of clause 7(2) as respect a regulated class of goods (relating to a person's choice to follow either the UK or EU regulatory route, or both). Clause 11(2) states that this applies to all or some of the route or class of goods.

Clause 11(3) states that 'regulatory route' means a UK or EU regulatory route within the meaning of section 7.

10. Subsidy control

The Bill disapplies the Protocol's provisions in relation to state aid/subsidy control, the role of the Court of Justice of the EU (CJEU) and other rules of implementation and application.

Background

The Protocol provides that certain EU law applies to Northern Ireland after Brexit. One such area of EU law is state aid, or subsidy control.

Internationally, different states use different terms for state aid/subsidy control, depending on their ideology and approach. 'State aid' is the term used by the EU. 'Subsidy control' is the term used by the UK.

Clause 12 disapplies the Protocol's state aid provisions and gives Ministers powers to put new arrangements in place.

Article 10 provides that the EU law listed in Annex 5 shall apply to NI. It also explains the role of the UK and EU in supporting the production of and trade in agricultural products in NI.

Annex 5 sets out applicable EU law and rules on state aid which continue to apply in Northern Ireland.

Annex 6 sets out the powers and procedures of the Withdrawal Agreement's Joint Committee in determining the levels of support allowed.

Clause 12(1) disapplies Article 10 on state aid, and Annexes 5 and 6 of the Protocol.

Clause 12(2) amends the Subsidy Control Act 2022 to take account of this,

Clause 12(3) gives powers to Ministers to make any provision which they consider appropriate in connection with any provision of the Protocol to which this section relates.

11. VAT and excise duties

Background

The Protocol sets arrangements for VAT and excise in Northern Ireland in Article 8.

It provides that the EU law listed in Annex 3 will apply to Northern Ireland but will be applied and implemented by UK authorities.

Revenue resulting from these actions will not be remitted to the EU and the UK can apply VAT exemptions and reduced rates that exist in Ireland to NI.

Article 8 gives powers to the Withdrawal Agreement's Joint Committee to regularly discuss its implementation, to review its application and to adopt measures.

Clause 17 gives broad powers to the Treasury to regulate VAT, excise and any other tax in connection with the Protocol, including to reduce or remove differences between NI and GB.

Clause 17(1) gives powers to the Treasury to make regulations they consider appropriate in connection with the Protocol about:

- a. VAT (including imposing or varying the incidence of the tax);
- b. any excise duty (including imposing or varying the incidence of any excise duty);
or
- c. any other tax (including imposing or varying the incidence of any tax) which they consider appropriate in connection with the Protocol.

Clause 17(2) gives the Treasury powers to make regulations where it considers appropriate to lessen, eliminate or avoid difference in these three taxes between Northern Ireland and Great Britain.

See also clause 24, described in section 9 below, which sets requirements for tax and customs regulations made under this Act by the Treasury and HMRC.

12. Procedural rules for regulation-making

Clause 23 sets procedural rules for regulations made under this Act.

Clause 23(2) states this section does not apply to:

- a. tax or customs regulations; and
- b. regulations that fall exclusively under section 26 (on extent, commencement and short title).

Clause 23(3) requires regulations to be made by statutory instrument (SI).

Clause 23(4) states that such SIs can be annulled by a resolution passed in either House of Parliament unless the regulations:

- a. amend an Act of Parliament; or
- b. retrospective provision.

Where this is the case, clause 23(5) requires the SI to be subject to either the:

- a. draft affirmative procedure; or
- b. made affirmative procedure, if the Minister believes that it is necessary not to use the draft affirmative procedure for reasons of urgency.

For SIs that are subject to the draft affirmative procedure, clause 23(6) prohibits SIs from being made unless a draft of the instrument has been laid and approved by a resolution of each House of Parliament.

For SIs that are subject to the made affirmative procedure, clause 23(7):

- a. requires them to be laid before Parliament after being made; and
- b. provides that they cease to have effect after 28 days of being made, unless both Houses approve them by resolution;

Clause 23(8) states that, in calculating the period of 28 days, no account should be taken of time during which (a) Parliament is dissolved or prorogued, or (b) either House is adjourned for more than four days.

Clause 23(9) provides that, if regulations cease to have effect as a result of subsection (7)(b), this does not (a) affect the validity of anything previously done under the regulations, or (b) prevent the making of new regulations.

Clause 24 sets rules for tax and customs regulations made under this Act.

Clause 24(1)-(9) makes the same provision as clause 23 for tax and customs matters, exercisable by the Treasury (in relation to tax) or the Treasury and HMRC (in relation to customs).

Clause 24(10) disapplies the procedural requirements set out in subsections (4) to (9) in circumstances where tax or customs regulations contain provisions made under another Act.

Clause 24(11) defines terms used in this section.

13. Practical clauses on commencement, extent, etc

Interpretation

Clause 25 defines terms used in this Act.

Extent, commencement and short title

Clause 26 determines this Act's territorial extent, when it comes into force and its title. This provides that its section on Final provisions (contained in clauses 21-25) come into force on the day the Act is passed, while its remaining provisions come into force on days appointed by UK Ministers in regulations.

Clause 26(1) provides that the Act extends to England, Wales, Scotland and Northern Ireland.

Clause 26(2) provides that sections 21-25 come into force on the day the Act is passed.

Clause 26(3) provides that its other provisions come into force on the day or days appointed by UK Ministers in regulations.

In connection with the coming into force of any provision of this Act, clause 26(4) provides UK Ministers may make

- a. incidental, supplementary or consequential provisions; and

b. transitional or transitory provision or savings.

Clause 26(5) states that regulations under this section must be made by SI and may make different provision for different purposes or areas.

Clause 26(6) states that this Act may be cited as the Northern Ireland Protocol Act 2022.

Annex: provisions at a glance

Clause 1 provides an overview of the Bill's main provisions.

Clause 2 disapplies parts of the Protocol and Withdrawal Agreement in domestic law by changing how the *EU (Withdrawal) Act 2018* works. The 2018 Act gives effect to both in domestic law.

Clause 3 limits the effect of separation agreement law so that it must be read in accordance with the Bill and not the Withdrawal Agreement, as is currently required.

Clause 4 disapplies the Protocol's requirements for the movement of goods and customs and gives Ministers powers to change this approach.

Clause 5 empowers Ministers to legislate for new movement of goods rules.

Clause 6 empowers the HMRC and the Treasury to regulate customs.

Clause 7 establishes a dual regulatory regime in Northern Ireland and the option to choose between compliance with UK or EU requirements, or both.

Clause 8 disapplies the provisions that mean EU law applies to Northern Ireland where they prevent clause 7 from having effect.

Clause 9 empowers Ministers to legislate for the regulation of goods in connection with the Protocol if they consider it appropriate.

Clause 10 defines the 'regulation of goods' then gives Ministers the power to change this.

Clause 11 gives additional powers to Ministers in relation to clause 7 on the dual regulatory regime, such as to provide exceptions.

Clause 12 disapplies the Protocol's state aid provisions and gives Ministers powers to put new arrangements in place.

Clause 13 removes the jurisdiction of the CJEU, the powers of EU representatives and some powers of the Withdrawal Agreement's governing structures. It also gives Ministers powers to legislate for new arrangements, including those agreed with the EU for supervision and information sharing.

Clause 14 disapplies parts of the Protocol and Withdrawal Agreement which relate to already-disapplied parts. It also gives Ministers powers to legislate for new arrangements.

Clause 15 sets out how Ministers can change which parts of the Protocol or Withdrawal Agreement are switched on/off, and to what extent, providing one of two conditions is met. Important exceptions apply so that changes cannot be made to the Protocol articles designed to protect parts of the Good Friday (Belfast) Agreement 1998 on citizens' rights, North-South cooperation, and the UK-Ireland Common Travel Area. However, these protections could be overridden in future by Ministers.

Clause 16 empowers Ministers to make new laws where appropriate in connection with changing the application of the Protocol and Withdrawal Agreement, as per clause 15.

Clause 17 gives broad powers to the Treasury to regulate VAT, excise and any other tax in connection with the Protocol, including to reduce or remove differences between NI and GB.

Clause 18 authorizes Ministers to engage in conduct relating to the Protocol where appropriate, even if it's not authorised by this Act. Producing guidance is listed as an example in the Bill's notes but conduct isn't defined (nor limited) by the Act.

Clause 19 gives Ministers powers to implement any UK-EU agreement that modifies, supplements or replaces the Protocol, and to legislate on related matters.

Clause 20 makes more changes to the role of the CJEU so that domestic courts are prevented from following CJEU principles or decisions, and from referring cases to the CJEU. Clause 20 also gives Ministers two new powers – first, to make new arrangements for domestic courts, and second, to have the option of allowing courts to refer matters to the CJEU in future but only to ask for assistance with interpreting EU law.

Clause 21 authorises UK and Welsh Ministers to spend money for the purpose of, or in connection with, “anything” needed in preparation of regulations being made under this Act.

Clause 22 is one of the most significant clauses in the Bill. It sets parameters

for regulations, including that UK Ministers could give Welsh Ministers regulation making powers to carry out the Act, and UK Ministers could determine which scrutiny procedure are used in the Senedd. Clause 22 also authorises regulations made under this Act to suspend, repeal or change domestic law, including any legislation made by the Senedd which gives effect to the Protocol or Withdrawal Agreement.

Clause 23 sets procedural rules for regulations made under this Act.

Clause 24 sets rules for tax and customs regulations made under this Act.

Clause 25 defines terms used in this Act.

Clause 26 determines this Act's territorial extent, when it comes into force and its title. This provides that its section on final provisions (clauses 21-25) come into force on the day the Act is passed, while its remaining provisions come into force on days appointed by UK Ministers in regulations.