

# Legislative Consent Memorandum

## Northern Ireland Protocol Bill

### Introduction

1. The Northern Ireland Protocol Bill (“the Bill”) was introduced to the House of Commons on 13 June 2022. It passed its Second Reading on 27 June 2022. No amendments were accepted during the Committee stages, which took place as a Committee of the whole House on 14, 19, and 20 July 2022, and the Bill passed its Third Reading on 20 July 2022. The Bill unilaterally disapplies, or affords the UKG powers to disapply, parts of the legislation that implement the Northern Ireland Protocol (“the Protocol”) in the UK. The Bill extends to England and Wales, Scotland and Northern Ireland.
2. This Memorandum has been lodged by Angus Robertson, Cabinet Secretary for the Constitution, Europe, and External Affairs under Rule 9B.3.1 (a) of the Parliament’s Standing Orders. The Bill can be found on the UK Government’s website.<sup>1</sup>
3. This Memorandum relates to the Bill as introduced.
4. The EU, multiple individual member states, and several of their international partners have reacted with consternation to the introduction of the Bill, with many EU leaders - and legal commentators - maintaining that it constitutes a breach of international law.<sup>2</sup> The EU Commission has re-activated the infringement procedure it originally launched against the UK Government in March 2021 for breaches of the Protocol. The EU Commission has taken this proceeding to its second stage by issuing a Reasoned Opinion.

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<sup>1</sup> [Northern Ireland Protocol Bill - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/bills/northern-ireland-protocol-bill)

<sup>2</sup> See for example: Maroš Šefčovič, European Commission Vice President -15 June - <https://inews.co.uk/news/politics/eu-illegal-changes-to-northern-ireland-protocol-launches-legal-action-against-uk-1687722> “Let there be no doubt: there is no legal, nor political justification whatsoever for unilaterally changing an international agreement. Opening the door to unilaterally changing an international agreement is a breach of international law as well. Let's call a spade a spade: this is illegal.”

Simon Coveney, Ireland’s Foreign Minister - 13 June - <https://www.irishexaminer.com/news/politics/arid-40894568.html> “We are forced because of UK action to respond to what we certainly see as a breach of international law. If you are legislating to set aside elements of an international treaty, which is international law, well, then you're breaking international law.”

Jonathan Jones QC, ex-head of Govt Legal Dept- 13 June <https://twitter.com/SirJJQC/status/1536417826034130945> “The government’s legal statement, relying on the doctrine of necessity, is surely hopeless.”

Mark Elliott, Professor of Public Law, University of Cambridge - 13 June - [The Northern Ireland Protocol Bill – Constitutional Law Matters](https://www.cam.ac.uk/research/news/the-northern-ireland-protocol-bill---constitutional-law-matters) “By announcing its intention to enact this legislation, and by accompanying it with a ‘legal justification’ that engenders ridicule, the Government has once again signalled its willingness to play fast and loose with the rule of law.”

5. The EU Commission has also launched six new infringement proceedings against UK Government for failing to:

- carry out obligations under the EU's sanitary and phyto-sanitary (SPS) rules, in particular not carrying out the necessary controls, and failing to ensure adequate staffing and infrastructure, at Border Control Posts in Northern Ireland;
- provide the EU with certain trade statistics data in respect of Northern Ireland, as required under the Protocol. This is monthly aggregated data on certain GB-NI flows;
- comply with the applicable customs requirements, supervision requirements and risk controls on the movement of goods from Northern Ireland to Great Britain;
- notify the transposition of EU legislation laying down general EU rules on excise duties, which will become applicable from 13 February 2023;
- notify the transposition of EU rules on excise duties on alcohol and alcoholic beverages, which facilitate access for small and artisan producers to lower excise duty rates, among other provisions; and
- implement EU rules on Value Added Tax (VAT) for e-commerce, namely the Import One-Stop Shop (IOSS).

6. The UK Government maintains that it would prefer a negotiated solution to the political and economic challenges it argues have arisen as a result of implementing the Protocol in its current form. However, the UK Government is currently refusing to return to negotiations unless and until the EU Commission seeks a new mandate that would enable it to change the text of the Protocol itself. The EU Commission instead has argued that alterations can be made to the current text that would resolve many of the practical difficulties encountered to date, tabling proposals to that effect in October 2021 that it argues the UK Government has failed to fully consider.

7. A total impasse therefore remains a real possibility. Both sides are making preparations for this situation, with possible scenarios ranging from further legal proceedings to the imposition of tariffs, or even suspension of the UK/EU Trade and Cooperation Agreement ("the TCA").

8. The Scottish Government is extremely concerned about the potential damage such a dispute could do to Scotland's vital interests, both in terms of trade and through exclusion from prestigious funding and cooperation opportunities such as the EU Horizon Programme.

9. The Scottish Government therefore lodged a motion in the Scottish Parliament on 27 June 2022 calling on the UK Government to withdraw the Bill, and to resume meaningful negotiations with the EU in order to resolve issues arising from the implementation of the Protocol. It also called on the UK Government to recognise the vital interests of Scotland in matters surrounding the Protocol, and to engage meaningfully and immediately with the Scottish Government to ensure that devolved interests and concerns are properly represented and fully respected in the UK's dealings with the EU over this issue. The Parliament agreed the motion without the need for a division.

10. The Scottish Government believes that the Scottish Parliament should similarly not consent to this Bill. The Scottish Government cannot support a Bill that may well be found to break international law and could lead to a trade dispute that would be very harmful to Scotland, at a time when the country is facing a cost of living crisis and the risk of recession.

11. The Scottish Government does not therefore intend to lodge a legislative consent motion in relation to the Bill. In line with Rule 9B.3.3(d) of Standing Orders, the Scottish Government's reasons for not including a draft motion are set out in paragraphs 36 to 42 below.

## Background

### The Withdrawal Agreement and the Protocol

12. The Protocol is an integral part of the Withdrawal Agreement agreed between the UK and the EU ("the Withdrawal Agreement").<sup>3</sup> The purpose of the Protocol is to avoid a hard border on the island of Ireland and protect the peace process. It does so by providing that certain parts of EU law which relate to the Single Market for goods continue to apply in Northern Ireland.

13. Under the terms of the Protocol, Northern Ireland is formally outside the EU, but is in effect part of the EU Single Market for goods. This enables goods to move freely over the Irish border with no checks or controls required. Instead, the Protocol establishes a requirement for checks and controls on goods moving between Great Britain and Northern Ireland.

14. The Withdrawal Agreement, including the Protocol, was negotiated and agreed by the UK Government and the EU in late 2019. Prime Minister Boris Johnson called the Agreement's January 2020 ratification a 'fantastic moment' which would enable the UK to 'move forward as one country.'

15. The Withdrawal Agreement, including the Protocol, became a binding international treaty between the UK and the EU on 31 January 2020. The UK and the EU then entered into a transition period that ended on 31 December 2020 (known as "IP completion day") during which the UK continued to apply EU rules and standards. On IP completion day, the transition period ended and the Withdrawal Agreement, including the Protocol, came into effect.

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<sup>3</sup> The Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community is available at <https://www.legislation.gov.uk/eut/withdrawal-agreement/contents/adopted>. Article 182 of the Withdrawal Agreement provides, "The Protocol on Ireland / Northern Ireland, the Protocol relating to the Sovereign Base Areas in Cyprus, the Protocol on Gibraltar, and Annexes I to IX shall form an integral part of this Agreement."

## The Protocol in the UK's domestic law

16. While the Withdrawal Agreement, including the Protocol, was being agreed, the UK Government introduced legislation to implement it. The Protocol is given effect in the UK's domestic law by the European Union (Withdrawal) Act 2018 ("the EUWA"), as amended by the European Union (Withdrawal Agreement) Act 2020. Section 7A of the EUWA gives direct effect to the Withdrawal Agreement, including the NI Protocol, as required by Article 4 of the Withdrawal Agreement.

17. Accordingly, section 7A of the EUWA applies to, "*(a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and (b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement.*" Section 7A(2) provides that those rights, powers (etc.) are to be, "*(a) recognised and available in domestic law, and (b) enforced, allowed and followed accordingly.*" It is complemented by section 7C, which obliges UK courts to interpret the law so as to be compatible with the Withdrawal Agreement.

18. In other words, the Protocol has force in UK law by virtue of sections 7A and 7C of the EUWA.

## Further negotiations on the Protocol ("grace periods")

19. Following IP completion day, concerns were raised by Northern Ireland's Unionist community, and by the UK Government, about elements of the Protocol. These included customs checks; plant and animal health (known as sanitary and phyto-sanitary, or SPS) controls; VAT and subsidy rules; and governance, including the role of the Court of Justice of the European Union (the "CJEU").

20. In an attempt to ease these concerns, "grace periods" were negotiated between the UK and EU that temporarily set back the full implementation of the Protocol in the UK. However, in March 2021 the UK unilaterality extended the grace periods for a second time. The EU raised proceedings in terms of a breach of Article 167 of the Withdrawal Agreement (good faith) and substantive provisions of the Protocol itself, including Article 5.

21. These proceedings were paused to enable the parties to reach a negotiated solution. The EU's view is that practical difficulties arising from implementation of the Protocol can be addressed within the existing framework. In October 2021 the EU presented a package of proposals for achieving this - including simplified customs arrangements, simplified SPS certification requirements, and an 80% reduction in SPS checks on goods moving from Great Britain to be consumed in Northern Ireland.

22. Despite this offer, further discussions and a change in negotiators, formal EU-UK negotiations failed to achieve significant progress between October 2021 and February 2022. The UK originally indicated that it would seek to invoke Article 16 of the Protocol, which would have allowed it to take (targeted) unilateral safeguarding measures on the basis, it said, of the social difficulties it was having in

Northern Ireland, in particular the Unionist community and the Irish Sea Border that is now considered to be in place between Northern Ireland and Great Britain.

23. However, on 17 May 2022 Foreign Secretary Liz Truss announced the UK Government's intention to legislate to make changes to the Protocol unilaterally. On 13 June 2022 the Northern Ireland Protocol Bill was introduced in Parliament, with the stated purpose, "to fix parts of the Northern Ireland Protocol, to restore stability and protect the Belfast (Good Friday) Agreement." The UK Government has released its legal position, which justifies the Bill on the grounds of "necessity."<sup>4</sup>

24. The UK Government did not involve the Scottish Government in the preparation of the Bill, and the Scottish Government was provided with a copy of it only two hours before it was introduced.

## Overview of the Bill

25. The Bill was introduced in the House of Commons on 13 June 2022. The Bill provides that many parts of the Protocol are to be treated as 'excluded provision' with no effect in domestic law, and that sections 7A and 7C of the EUWA do not apply in respect of them. The Bill confers powers on UK Ministers to make "new law" to replace the parts of the Protocol that are to cease to have effect in domestic law.

26. The parts of the Protocol that are to be 'excluded' include provisions dealing with the movement of goods, including customs duties, between Great Britain and Northern Ireland (clause 4), and subsidy control (or 'state aid') rules (clause 12). The Bill also treats as 'excluded provision' any parts of the Protocol or the Withdrawal Agreement that confer jurisdiction on the CJEU in relation to the Protocol, or related provisions of the Withdrawal Agreement.

27. In addition to the concerns that the Bill undermines an international agreement, the Bill is also concerning for the breadth of powers that it confers on the UK Government. The Bill will enable UK Ministers to create broad swathes of "new law" to replace the provisions of the Protocol which are dis-applied. Cambridge University Professor of European Law Catherine Barnard has criticised these measures as, 'eye wateringly broad.'<sup>5</sup>

## Requirement for legislative consent

28. The Bill is a relevant Bill within Rule 9B.1.1 of the Standing Orders as it makes provision applying to Scotland for purposes within the legislative competence of the Parliament; it makes provision which alters the legislative competence of the Scottish Parliament; and it makes provision which alters the

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<sup>4</sup> <https://www.gov.uk/government/publications/northern-ireland-protocol-bill-uk-government-legal-position/northern-ireland-protocol-bill-uk-government-legal-position#:~:text=The%20Government%27s%20assessment%20that%20the%20situation%20in%20Northern%20Ireland%20constitutes,or%20to%20diversion%20of%20trade.>

<sup>5</sup> [The Northern Ireland Protocol Bill and its constitutional implications - UK in a changing Europe \(ukandeu.ac.uk\)](http://ukandeu.ac.uk)

executive competence of the Scottish Ministers.

29. Firstly, the Bill alters the legislative competence of the Scottish Parliament by its modification of sections 7A and 7C of the EUWA. When the European Union (Withdrawal Agreement) Act 2020 was enacted, it inserted sections 7A and 7C into the EUWA. The EUWA is a protected enactment under Schedule 4 of the Scotland Act 1998. The addition of sections 7A and 7C to the EUWA triggered an LCM on the basis that it altered the legislative competence of the Scottish Parliament by narrowing it.<sup>6</sup>

30. The effect of this Bill is to provide that certain parts of the Protocol and Withdrawal Agreement are “excluded provision”. The Bill provides for the cessation of the effect of sections 7A and 7C in respect of excluded provision. Where an excluded provision touches on matters that are within the legislative competence of the Scottish Parliament, this constitutes a corresponding change to the Scottish Parliament’s legislative competence.

31. Secondly, the Protocol has the effect of conferring certain functions on the Scottish Ministers. The disapplication of these functions by the Bill constitutes a change to the executive competence of the Scottish Ministers. The Bill also enables the Scottish Ministers to incur preparatory expenditure, which is a change to the Scottish Ministers’ executive competence.

32. Finally, the Bill contains a number of provisions that confer delegated powers on UK Ministers which are exercisable in devolved areas. The Scottish Parliament could delegate these powers itself in devolved areas, and so these provisions are within the Scottish Parliament’s legislative competence to that extent.

33. For these reasons, the Scottish Government considers that the following clauses of the Bill require legislative consent from the Scottish Parliament:

- a. Clause 2 (Limitation of general implementation of the Northern Ireland Protocol)
- b. Clause 3 (Other limitations in interpretation of law)
- c. Clause 4 (Movement of goods (including customs): excluded Protocol provisions)
- d. Clause 5 (Movement of goods: new law about matters other than customs)
- e. Clause 8 (Regulation of goods: excluded Protocol provision)
- f. Clause 9 (Regulation of goods: new law)
- g. Clause 10 (Meaning of “regulation of goods”)
- h. Clause 11 (Regulation of goods: supplementary provision)
- i. Clause 13 (Implementation, application, supervision and enforcement of the Protocol)
- j. Clause 14 (Provision of the Protocol etc applying to other exclusions)
- k. Clause 15 (Changes to, and exceptions from, excluded provision)
- l. Clause 16 (Additional excluded provision: new law)
- m. Clause 17 (Value added tax, excise duties and other taxes: new law)

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<sup>6</sup> [European Union \(Withdrawal Agreement\) Bill - Parliamentary Business : Scottish Parliament](#)

- n. Clause 18 (Other Ministerial powers)
- o. Clause 19 (New agreements amending or replacing the Northern Ireland Protocol)
- p. Clause 20 (The role of the European Court in proceedings)
- q. Clause 21 (Preparatory expenditure)
- r. Clause 22 (Regulations)
- s. Clause 23 (Making regulations under this Act: general provisions)
- t. Clause 25 (Interpretation)

34. A full discussion of each clause, and the associated requirement for an LCM, is available at Annex A.

35. In a 13 June letter to the Cabinet Secretary for Constitution, External Affairs and Culture, the Foreign Secretary stated that, “the Bill includes powers and provisions which are capable of being exercised or applied in a manner which relate to devolved matters and or are capable of altering the legislative competence and or executive functions of the Scottish Parliament and Government.” The Foreign Secretary has sought the legislative consent of the Scottish Parliament for the Bill. The Explanatory Notes that have been published alongside the Bill set out a table showing the provisions which the UK Government consider to engage the legislative consent process of the Scottish Parliament.<sup>7</sup> There are a number of clauses which the Scottish Government consider to require the legislative consent of the Scottish Parliament, but which the UK Government do not.<sup>8</sup> These clauses are included in this Legislative Consent Memorandum as the Scottish Government considers them to be relevant provisions under Rule 9B of the Scottish Parliament’s Standing Orders.

## Scottish Government view

36. The Scottish Government believes that the Parliament should not give consent to the Bill, for three reasons – its potential illegality; the impact it is already having on Scottish interests; and its potential future impact, in the event of further escalation in the UK Government’s associated dispute with the EU.

## Legality

37. The Bill has been the subject of considerable public and academic legal debate. The Bill modifies the effect of the Protocol in domestic law. This will make the UK’s domestic law incompatible with its international obligations under the Protocol.

38. The UK Government has published an extract of its legal position on the Bill, which justifies this incompatibility on the grounds of necessity.<sup>9</sup> Questions of legality

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<sup>7</sup> The Explanatory Notes are available at: <https://bills.parliament.uk/bills/3182/publications>

<sup>8</sup> These are: Clause 8 (Regulation of goods: excluded Protocol provision), Clause 10 (Meaning of “regulation of goods”), Clause 11 (Regulation of goods: supplementary provision), Clause 17 (Value added tax, excise duties and other taxes: new law), Clause 18 (Other Ministerial powers), Clause 23 (Making regulations under this Act: general provisions), Clause 25 (Interpretation)

<sup>9</sup> [Northern Ireland Protocol Bill: UK government legal position - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/legal-position-northern-ireland-protocol-bill)

are ultimately for the Courts (domestic or international). However, multiple EU Leaders and legal commentators have already robustly challenged the UK Government's legal position. For example, on 15 June 2022 European Commission Vice President Maroš Šefčovič stated that, "there is no legal, nor political justification whatsoever for unilaterally changing an international agreement...Let's call a spade a spade: this is illegal." Jonathan Jones QC, former Head of the UK Government's Legal Department, has called the legal position "hopeless", whilst Mark Elliott, Professor of Public Law at the University of Cambridge, has noted that the UK Government's legal justification, "engenders ridicule."

39. Several prominent UK parliamentarians have voiced similar views, including the former Prime Minister Theresa May, who noted during a debate on the Bill in the House of Commons on 27 June 2022 that, "if the necessity argument is to hold, this Bill must be the only way to achieve the Government's desires, yet the Government's legal position paper itself accepts that there are other ways... Article 16 is referred to in the legal position paper, but when I read that I thought it was referred to in a way that seemed to try to say that the existence of article 16 somehow justifies the introduction of this Bill. Article 16 does not justify this Bill; the very existence of article 16 negates the legal justification for the Bill."

40. The Scottish Government cannot recommend providing legislative consent for a Bill that reneges on a legally binding international treaty that the UK Government signed less than two years ago, and which poses so great a risk of breaking international law.

## Current impact on Scottish interests

41. The impasse caused by the tabling of the Bill has already had a direct impact on Scottish interests, in the form of ongoing uncertainty for business and border control in Scotland. It has also had a much wider impact, insofar as it has brought all substantive progress towards resolving outstanding issues within the TCA to a halt. Scotland has significant interests at stake in a range of TCA areas including: association to the EU's prestigious 95.5 billion euro research and development programme, Horizon; agrifood exports; fisheries; and justice cooperation. The Protocol dispute is a serious obstacle to constructive engagement at every level.

## Potential future impact on Scottish interests, in the event of further escalation

42. If the dispute between the UK Government and the EU that the Bill has provoked continues to escalate, the impact on Scottish interests could be deeply damaging. The full extent of that impact will depend on the exact nature of UK action, and the EU's reaction. The EU has already re-instituted infringement action against the UK, which had been paused, and has also started new proceedings (summarised at paragraph 5 above). Possibilities for further escalation include, for example:

- trade measures – the impact of EU tariffs on Scottish goods exports could be severe; analysis indicates that Scottish food and drink and fishing exports

- could be particularly exposed;
- EU withdrawal of data protection ‘adequacy’ – serious disruptions to UK-EU data flows and major costs for Scottish businesses would be likely; and
- EU withdrawal of financial services ‘equivalence’ – the impact of losing market access for Scotland’s financial services sector could be significant.

## Draft legislative consent motion

43. Under Rule 9B.3.3(d) of the Parliament’s Standing Orders, if a member of the Scottish Government does not propose to include a draft motion in the Memorandum, the Memorandum must explain why not. Paragraphs 36 to 42 set out the Scottish Government’s reasons for not including a draft motion in this Memorandum for the purposes of that rule.

44. The Scottish Government notes that the Parliament approved a motion on 29 June 2022 that expressly condemned the Bill and called on the UK Government to withdraw it.

Scottish Government  
August 2022

## Annex A

### Northern Ireland Protocol Bill: requirement for legislative consent

#### Clause 2 (Limitation of general implementation of the Northern Ireland Protocol)

1. Clause 2 of the Bill is the main substantive provision which sets out how the Bill will alter the effect of the Protocol in domestic law. Clause 2(1) provides that section 7A of the EUWA does not apply to any part of the Protocol which is ‘excluded provision’. The term “excluded provision” is defined by clause 25(1) to be any part of the Protocol or other part of the Withdrawal Agreement “*so far as it is excluded provision by virtue of this Act*”. Subsequent clauses in the Bill set out which parts of the Protocol and the Withdrawal Agreement are excluded provision.
2. The legal mechanism by which clause 2 alters the effect of the Protocol is by modifying section 7A of the EUWA. There are two modifications in this clause. The first, in clause 2(1), is a non-textual modification which changes the effect of section 7A without amending it. It does so by providing that section 7A(2) does not apply to “rights, powers, liabilities, obligations and restrictions” which are created or arise under excluded provision. In other words, those parts of the Protocol cease to have direct effect. Clause 2(2) clarifies this by explicitly stating that those rights, powers etc. are not to be recognised in domestic law or enforced, allowed or followed. In other words, the parts of the Protocol and Withdrawal Agreement which are designated as excluded provision by this Bill will no longer have any legal force in the UK.
3. The second modification which clause 2 makes to section 7A of the EUWA is a textual amendment which signposts the provisions of this Act in section 7A itself.
4. This clause modifies the legislative competence of the Scottish Parliament by limiting the effect of section 7A of the EUWA. It modifies the executive competence of the Scottish Ministers to the extent that it removes the basis in domestic law for functions which are exercisable in accordance with the Protocol.

#### Clause 3 (Other limitations in interpretation of Law)

5. Clause 3 qualifies section 7C of the EUWA. Section 7C places an obligation on the Courts to interpret “relevant separation agreement law” in accordance with the Withdrawal Agreement. Clause 3 modifies this requirement by dis-applying section 7C “*so far as it would require any question as to the validity, meaning or effect of any relevant separation agreement law (including this Act and any regulations made under it) to be decided in a way which is incompatible with (a) any provision made by or under this Act, or (b) any conduct under section 18(1)*”.
6. The term “relevant separation agreement law” is defined by section 7C(3) of

the EUWA to include anything which has direct effect by virtue of section 7A. It therefore includes the Protocol and the EU law annexed to it.

7. Clause 3 modifies the legislative competence of the Scottish Parliament and the executive competence of the Scottish Ministers by limiting the effect of section 7C of the EUWA.

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

8. Clause 4(1) establishes that the first and second subparagraphs of Article 5(1), and Article 5(2) of the Protocol are excluded provision thus dis-applying them. The specified paragraphs of Article 5(1) provide for customs duties to be paid on goods moving between Great Britain and Northern Ireland where those goods are "*at risk of being subsequently moved into the Union*". Article 5(2) sets out the test which will be applied when deciding whether a good is at risk of being subsequently moved into the Union.

9. Clause 4(2) provides that Article 5(3), Article 5(4) and Annex 2 of the Protocol are excluded provision to the extent that they apply to "qualifying movements" of goods. Articles 5(3) and 5(4) apply a defined body of EU law to goods entering Northern Ireland. The effect of clause 4(2) is to dis-apply that body of law to goods entering Northern Ireland where they do so as part of a "qualifying movement". Clause 4(4) to (6) define what is meant by a qualifying movement and confers powers on the UK Government to alter that definition.

10. Clause 4 modifies the legal effect of section 7A of the EUWA and so it is outwith the Scottish Parliament's legislative competence.

11. Clause 4(2) provides for the movement of goods between Great Britain and Northern Ireland. Import and export control is reserved by Head C5 of Schedule 5 of the Scotland Act 1998 subject to the following exception:

### *"Exceptions*

#### *Prohibition and regulation of movement into and out of Scotland of:*

*(a) food, animals, animal products, plants and plant products for the purposes of protecting human, animal or plant health, animal welfare or the environment or observing or implementing obligations under the Common Agricultural Policy, and*

*(b) animal feeding stuffs, fertilisers and pesticides [F33(including anything treated as if it were a pesticide by virtue of section 16(16) of the Food and Environment Protection Act 1985)] for the purposes of protecting human, animal or plant health or the environment".*

12. This means that while the Scottish Parliament couldn't itself enact clause 4 as it would be modification of section 7A of the EUWA, it nevertheless relates to

matters which are within devolved competence.

13. Clause 4 alters the legislative competence of the Scottish Parliament and the executive competence of the Scottish Ministers.

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

14. Clause 5 confers a power on UK Ministers to make provision in connection with “*any provision of the Northern Ireland Protocol to which section 4 [clause 4] relates*”. Clause 5(2) provides that this power cannot be used to make provision about customs matters (as this is provided for by clause 6) and clause 5(3) provides a non-exhaustive list of matters which ministers may regulate for. This list includes provision of checks, controls and administrative procedures.

15. The power conferred on UK Ministers by clause 5 could be used to regulate the movement between Great Britain and Northern Ireland (for example by creating checks) of the products specified in the Head C5 exception in Schedule 5 of the Scotland Act 1998. Prior to the enactment of this Bill, it would not be within the legislative competence of the Scottish Parliament to do so as it would modify section 7A of the EUWA. However, when clause 4 of the Bill comes into force, section 7A will cease to apply to “qualifying movements” of goods (as defined in clause 4). Therefore, due to the modifications that clause 4 makes to section 7A of the EUWA, clause 5 would be within the legislative competence of the Scottish Parliament.

## Clause 8 (Regulation of goods: excluded Protocol provision)

16. Clause 8 provides that Article 5(4) and Annex 2 of the Protocol are excluded provision so far as they would prevent clause 7 from having effect. Clause 7 allows the option to choose between a UK and an EU regulatory route and so, in effect, this clause dis-applies the Protocol (and EU law referred to in it) where a person chooses a UK regulatory route.

17. Clause 8 limits the effect of section 7A of the EUWA and so modifies the legislative competence of the Scottish Parliament and the executive competence of the Scottish Ministers.

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

18. Clause 9(1) confers powers on UK Ministers to make regulations about “*regulation of goods which the Minister considers appropriate in connection with the Northern Ireland Protocol*”. Clause 9(2) provides that the powers may be used to make regulatory routes available under clause 7 or modify clauses 7 and 8. This is a non-exhaustive list of the provisions that regulations made under this power can contain.

19. The power in clause 9 applies to “the regulation of goods”. That term is

defined in clause 10 by reference to a wide list of actions taken on the supply chain from production, to putting on the market, to use and import of goods. The power is not limited to the regulation of goods in Northern Ireland, but rather to the regulation of goods in connection with the Protocol. The Explanatory Notes for this clause indicate that the power could be used to adjust regulatory regimes so that there is clarity for the dual routes set out in clause 7. The power could therefore be used to modify the rules which regulate goods in Scotland (provided it is for the purposes of the Protocol). As such this clause would be within the legislative competence of the Scottish Parliament to the extent that it may be exercised in Scotland.

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

20. This clause defines “regulation of goods” for the purposes of the Bill, including clause 9. As clause 9 is within the legislative competence of the Scottish Parliament, this clause is as well.

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

21. Clause 11 confers a power on UK Ministers to make regulations about the application of clause 7. This clause is within the legislative competence of the Scottish Parliament.

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

22. Clause 14 extends the excluded provisions to include parts of the Withdrawal Agreement and Protocol which relate to provisions which are excluded elsewhere in the Bill. Clause 14(4) confers a power on UK Ministers which could be exercised in a way which modifies the legislative competence of the Scottish Parliament and the executive competence of the Scottish Ministers.

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

23. Clause 13 alters the jurisdiction of the Court of Justice of the European Union (the “CJEU”) in the UK under the Withdrawal Agreement and Protocol. It confers on UK Ministers a power to make additional provision. This clause modifies section 7A of the EUWA and so it modifies the legislative competence of the Scottish Parliament.

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

24. Clause 15 confers a power on UK Ministers to provide for other parts of the Withdrawal Agreement or Protocol to become excluded provisions in certain circumstances. This clause modifies section 7A of the EUWA and so is outwith the legislative competence of the Scottish Parliament.

25. The power in clause 15 enables UK Ministers to broaden (or otherwise amend) the scope of excluded provisions for a number of “permitted purposes” which are set out in clause 15(1). These include animal, plant or human welfare and health, the environment and other purposes which fall within devolved matters. This power could be exercised in a way which changes the legislative competence of the Scottish Parliament and the executive competence of the Scottish Ministers.

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

26. Clause 16 confers a power on UK Ministers to make regulations which “the Minister considers appropriate in connection with additional excluded provision” (parts of the Withdrawal Agreement or Protocol which are excluded by regulations made under clause 15). This power could be exercised in an area which is within the legislative competence of the Scottish Parliament.

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

27. Clause 17 confers a power on the Treasury to make regulations about VAT and other taxes in connection with the Protocol. Fiscal policy, including taxation is reserved subject to a number of exceptions by Head A1 of Schedule 5 of the Scotland Act 1998. The exceptions relate to “devolved taxes” which are set out in Part 4A of the Scotland Act 1998, and local taxes to fund local authority expenditure. Clause 17(2) provides that the power may be used to “lessen, eliminate or avoid difference between … (c) any other tax in Northern Ireland and Great Britain (including difference in the incidence of tax”). This power could therefore be exercised to change the level of devolved taxes and local taxes in Scotland and so is within the legislative competence of the Scottish Parliament.

### **Clause 18 (Other Ministerial powers)**

28. Clause 18 confers a power on UK Ministers to engage in “conduct” in relation to any matter dealt with in the Protocol. The Explanatory Notes accompanying the Bill explain that this could include issuing guidance. This power could be exercised in devolved areas, for example in relation to animal or plant health checks between Northern Ireland and Scotland, and so is within the legislative competence of the Scottish Parliament.

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

29. Clause 19 confers a power on UK Ministers to implement a relevant agreement. Clause 19(2) defines a relevant agreement as an agreement between the UK and the EU which modifies, supplements or replaces the Protocol.

30. Foreign affairs is reserved by paragraph 7 of Part 1 of Schedule 5 of the Scotland Act 1998. However, the implementation of international agreements is

excluded and so devolved. As such, this provision would be within the legislative competence of the Scottish Parliament insofar as the implementation of a “relevant agreement” would touch upon devolved matters.

## Clause 20 (The role of the European Court in proceedings)

31. Clause 20 applies to court proceedings which relate to the Protocol, the Withdrawal Agreement or related domestic law. Clause 20(2) provides that the domestic courts are not bound by the principles of the CJEU when making determinations. It also provides that the domestic courts cannot refer matters to the CJEU. Clause 20(3) and (4) confers a further power in this regard on UK Ministers.

32. Article 13(2) of the Protocol provides that *“the provisions of this Protocol referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union.”* This is given effect by section 7A of the EUWA. Consequentially, clause 20 is a modification of the EUWA and so is a modification of the legislative competence of the Scottish Parliament and the executive competence of the Scottish Ministers.

## Clause 21 (Preparatory expenditure)

33. Clause 21 enables Ministers of the Crown, government departments and devolved authorities to incur expenditure for purposes which relate to the Bill. A devolved authority includes the Scottish Ministers. This clause would be within the legislative competence of the Scottish Parliament so far as it confers authority on the Scottish Ministers. It also alters the executive competence of the Scottish Ministers by conferring a function on them.

## Clause 22 (Regulations)

34. This clause makes provision about the regulation making powers conferred under the Bill. A number of these powers can be exercised within devolved competence and so this clause is within the legislative competence of the Scottish Parliament.

## Clause 23 (Making regulations under this Act: general provisions)

35. This clause makes further provision about regulations under the Bill. For the reasons set out for clause 22 above this clause is within the legislative competence of the Scottish Parliament.

## Clause 25 (Interpretation)

36. This clause sets out the defined terms which are used in the Bill. The definitions include terms which are used in clauses of the Bill which are subject to legislative consent.

This Legislative Consent Memorandum relates to the Northern Ireland Protocol Bill (UK legislation) and was lodged with the Scottish Parliament on 19 August 2022

## Northern Ireland Protocol Bill – Legislative Consent Memorandum

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