



BRIEFING PAPER

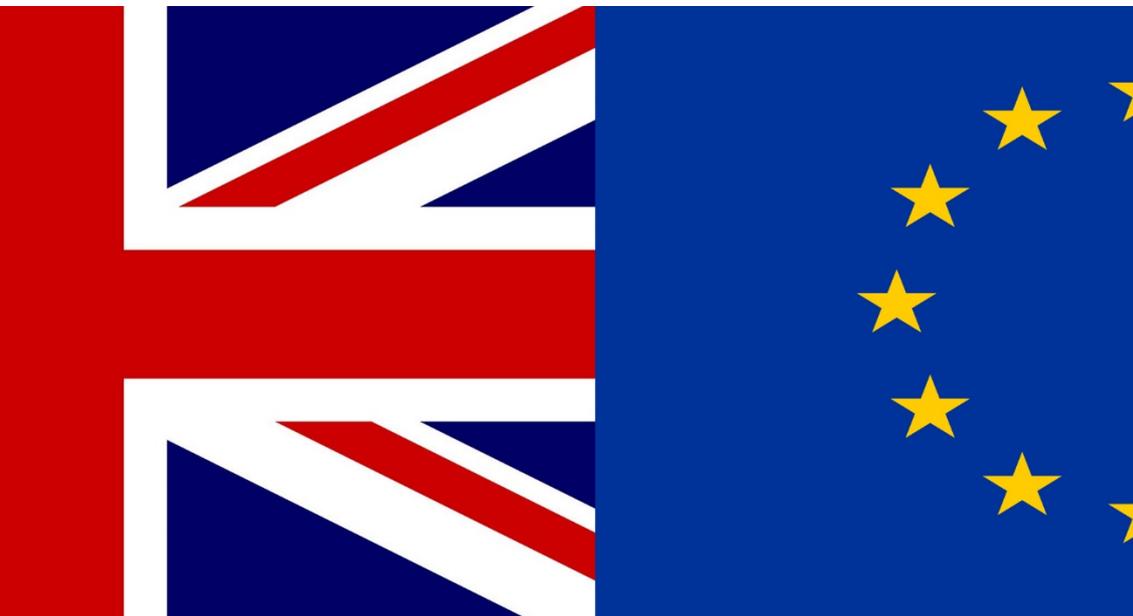
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Withdrawal Agreement Bill: The Protocol on Ireland/Northern Ireland

By John Curtis

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Summary

Northern Ireland has been at the epicentre of the debates about Brexit. Particular attention has been focused upon its relationship with the EU post-Brexit and how this will affect its border with Ireland.

The status of Northern Ireland was the most contested part of the renegotiations between the UK and the EU on the new Withdrawal Agreement.

This Briefing Paper looks at that Agreement. It will also examine the [European Union \(Withdrawal Agreement\) Bill](#) – the piece of legislation (law) that the Government has just published which attempts to enshrine that Agreement into domestic law. This paper will answer the following questions:

- What powers have the Government given itself?
- What limits are there on the use of those powers?
- How can Parliament scrutinise them coming into force? And
- What doesn't the Bill do or set out?

The Protocol on Ireland/Northern Ireland (the Protocol) is part of the [Withdrawal Agreement](#) (WA). It lays out the relationship Northern Ireland will have with both the European Union and Great Britain (the rest of the UK) at the end of transition period.

Clauses 21 to 24 of the Withdrawal Agreement Bill, along with Schedule 3, are the parts of the WAB that deal with the Protocol.

Clause 21

Clause 21 of the WAB, amends the [European Union \(Withdrawal\) Act 2018](#), and creates a significant set of powers that will enable the Protocol.

These clauses will empower Ministers to make regulations with the power of primary legislation, including the power to amend the Act itself. This is often referred to as an 'Henry VIII Clause'.

A Minister, therefore, can make rules relating to the Protocol which have the same force and effect as an Act of Parliament. Although those regulations would still have to be approved in draft by both Houses before they can be made (under the "[affirmative procedure](#)") MPs and Peers would be unable directly to amend those proposals. The time available for scrutiny would also typically be less than is the case for Bills before Parliament.

The use of these regulations will be restricted by Section 10 of the [European Union \(Withdrawal\) Act 2018](#).

Clause 22

Clause 22 gives devolved authorities or devolved authorities acting jointly with a Minister (where relevant), a similar power as the UK Government to make laws by regulation (Henry VIII powers), in order to enact the Protocol. These must be used for the same purposes as set out Clause 21(1).

Clause 23 & Schedule 3

Clause 23 and schedule 3 give effect to Article 2(1) of the Protocol which provides that there shall be "no diminution of rights, safeguards or equality of opportunity" as set out in the relevant section of the Belfast/Good Friday Agreement, as a result of Brexit.

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It ensures that six EU directives relating to equality and discrimination that are listed in the Protocol will continue to apply in Northern Ireland in perpetuity. Schedule 3 does this by restricting the legislative competence of the Northern Ireland Assembly, and giving the Human Rights bodies in Northern Ireland increased powers to monitor and protect the application of those equality directives.

Clause 24

Clause 24 prevents the Government from agreeing to any recommendation in the Joint Committee that would alter arrangements for North-South cooperation as provided for in the Belfast/Good Friday agreement, or establish a new North-South implementation body or change an existing body.

What is not in the Bill?

The WAB does not itself legislate for the 'consent mechanism' for the Northern Ireland Assembly in relation to aligning with certain EU rules post-Brexit (as set out in the Protocol). However, the Government could use its delegated powers, under clause 21, giving effect to the consent mechanism through regulations instead of by an Act of Parliament.

Neither does the WAB set out the details of how VAT and Customs will work in Northern Ireland, these decisions will be made by the Joint Committee, made up of representatives from the EU and the UK.

The WAB does not set out what role, if any, the Northern Ireland Executive and Assembly would have in the decision whether to extend the transition period.

1. Background and overview

Introduction

Northern Ireland has been at the epicentre of the debates about Brexit. Particular attention has been focused upon, its relationship with the EU post-Brexit and how this will affect its border with Ireland.

The status of Northern Ireland was the most contested part of the renegotiations between the UK and the EU on the new Withdrawal Agreement.

This Briefing Paper will look at that Agreement.

It will also examine the [European Union \(Withdrawal Agreement\) Bill](#) – the piece of legislation (law) that the Government has just published which attempts to enshrine that Agreement into domestic law.

This paper will answer the following questions:

- What powers have the Government given itself?
- What limits are there on the use of those powers?
- How can Parliament scrutinise them coming into force? And
- What doesn't the Bill do or set out?

Background – The Protocol on Ireland/Northern Ireland

The Protocol on Ireland/Northern Ireland (the Protocol) is part of the [Withdrawal Agreement](#) (WA). It lays out the relationship Northern Ireland will have with both the European Union and Great Britain (the rest of the UK) at the end of transition period.

Our [briefing paper](#) on the WA sets out in detail what is in the Agreement. In summary, the Protocol will see Northern Ireland following EU Single Market rules for goods, remain aligned to EU rules on customs and VAT, while still remaining part of the UK's customs territory and VAT area, and still able to benefit from UK trade agreements. There will also be a 'consent mechanism', with the Northern Ireland assembly given an opportunity to periodically vote on whether it wants this set of arrangements to continue.

The Withdrawal Agreement Bill

The WA is a form of international law known as a treaty. The [European Union \(Withdrawal Agreement\) Bill](#) (WAB) exists to give that Agreement effect in British domestic law.

This Bill, therefore, should provide a clear picture of how Northern Ireland will relate to the EU and Great Britain post-Brexit, and how the Government will put into action what it has negotiated in the Protocol.

Little of what is in the Protocol, is reproduced in the WAB, however. Partly this is because not all provisions of the Protocol require legislation, for example, Ireland and the UK continuing to operate the Common Travel Area. That notwithstanding, the main reason for this lack of detail is that the Government have chosen to enact most of the Protocol

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through one sweeping all-encompassing power to put the Protocol provisions into law.

The biggest omission from the Bill is any legislation to enact the consent mechanisms for the Northern Ireland Assembly.

2. In detail: Clauses 21-24 and Schedule 3 of the WAB

2.1 Clause 21 - the main 'enabling' power

Overview

Clauses 21 to 24 of the Withdrawal Agreement Bill, along with Schedule 3, are the parts of the WAB that deal with the Protocol.

Clause 21(1) of the WAB, amends the [European Union \(Withdrawal\) Act 2018](#), creating a new section 8C. The first subsection creates a significant set of powers that will enable the Protocol:

- (1) A Minister of the Crown may by regulations make such provision as the Minister considers appropriate—
 - (a) to implement the Protocol on Ireland/Northern Ireland in the withdrawal agreement,
 - (b) to supplement the effect of section 7A in relation to the Protocol,
- or
- (c) otherwise for the purposes of dealing with matters arising out of, or related to, the Protocol (including matters arising by virtue of section 7A and the Protocol).

(Regulations are secondary or delegated legislation, for more explanation see [here](#).)

Clause 21(2) adds that:

21(2) Regulations under subsection (1) “may make **any provision that could be made by an Act of Parliament (including modifying this Act).**”

This is a very broad delegated power to enact the Protocol. It can be used for a wide range of purposes with few limits other than the ends it is trying to achieve. Those ends are themselves broader than merely enacting the Protocol and can also include dealing with “matters arising out of or related to” it.

These clauses will empower Ministers to make regulations with the power of primary legislation, including the power to amend the Act itself. This is often referred to as an ‘Henry VIII Clause’.

A Minister, therefore, can make rules relating to the Protocol which have the same effect as laws made by Parliament, but without having to go through the usual scrutiny and consent that laws made by Parliament are subjected to.

Restrictions on the enabling power

Beyond the purpose of the power set out by Clause 21(1), the other restrictions on its use and approval come from the Parliamentary procedure to make the regulations, and restrictions on what the enabling powers can do.

Procedure

A [Memorandum](#) on delegated powers under the WAB, published by the Government alongside the Bill, sets out that if the powers are used to do any of the following things that the '[draft affirmative procedure](#)' must be used:

[A]mends, repeals or revokes primary legislation or retained direct principal EU legislation; establishes a public authority; relates to a fee in respect of a function exercisable by a public authority in the UK; creates, or widens the scope of, a criminal offence; creates or amends a power to legislate; or facilitates the access to the market within Great Britain of qualifying Northern Ireland goods.

The procedure will also be required for the power to define 'qualifying Northern Ireland goods' under new section 8C(6).

The [draft affirmative procedure](#) is set out in more detail on the UK Parliament Website, but in brief means that the regulations will have to be laid in both houses in Parliament, scrutinised and voted on before becoming into force. This is still a quicker and lighter touch procedure than what is required to pass primary legislation in Parliament.

All other SI's made under this new section of the [European Union \(Withdrawal\) Act 2018](#), will be made using the [negative procedure](#).

Other restrictions on the use of the power

The other limit to the exercise of these enabling powers is already set out by Section 10 of the [European Union \(Withdrawal\) Act 2018](#). This was the result of an amendment put down by Lord Patten. Section 10 mandates that Ministers or devolved authorities must

- "act in a way that is compatible with the terms of the Northern Ireland Act 1998", and
- have "due regard" to the joint report signed between the EU & the UK in December 2017.

It also prevents Ministers from authorising regulations under the Act that

- "diminish any form of North-South cooperation provided for by the Belfast Agreement," and
- "create or facilitate border arrangements between Northern Ireland and the Republic of Ireland after exit day which feature physical infrastructure, including border posts, or checks and controls, that did not exist before exit day and are not in accordance with an agreement between the United Kingdom and the EU."

The only other limits on this power are that this power can't be used to affect Article 11(1) of the Protocol which allows for the continuation of North-South cooperation between Ireland and Northern Ireland, or curb new arrangements that build on those in the Belfast Agreement (new Section 8C(7) of the 2018 Act).

2.2 In detail: Clause 22 - powers for the devolved institutions

Clause 22, adds a new Schedule to the [European Union \(Withdrawal\) Act 2018](#). It gives devolved authorities (e.g. the Scottish Parliament or Northern Ireland Assembly) or devolved authorities acting jointly with a Minister (where relevant), a similar power as the UK Government to make laws by regulation (Henry VIII powers), in order to enact the Protocol. These must be used for the same purposes as set out Clause 21(1).

A devolved authority, therefore, can amend an Act of Parliament by regulation, as long as the regulation is in the devolved authorities' legislative competence – Clause 11N(1).

The provisions in Clause 22 specifically reference Scottish, Welsh and Northern Irish devolved authorities, suggesting that all three will need to act in order to take steps to implement the Protocol.

This means that the UK Parliament and the devolved authorities could all amend the same piece of legislation in different ways, which may result in a very complex set of arrangements for enacting the Protocol UK-wide.

2.3 In detail: Clause 23 & Schedule 3 - Protection of rights

Individual & equality rights in the Protocol

Article 2(1) of the Protocol provides that there shall be “no diminution of rights, safeguards or equality of opportunity” as set out in the relevant section of the Belfast/Good Friday Agreement, as a result of Brexit.

It provides further that six EU directives relating to equality and discrimination including the Race Equality Directive and the Employment Equality Directive, will continue to apply in Northern Ireland in perpetuity.

Article 2(1) says this guarantee will be implemented “through dedicated mechanisms”.

Clause 23 and Schedule 3 (schedules are put at the end of Bills/Acts and ordinarily spell it in more detail how provisions of the legislation will work in practice), provide for this dedicated mechanism.

Enshrining these rights into the WAB

Schedule 3 amends the [Northern Ireland Act 1998](#) (the piece of legislation that put the Belfast/Good Friday Agreement into domestic law), and ensures these pieces of EU equality legislation will continue to apply in Northern Ireland by:

- restricting the legislative competence (i.e. what areas it can make laws/decisions on) of the Northern Ireland Assembly, Ministers and Northern Ireland department so that they cannot do anything that is incompatible with Article 2(1) of the Protocol.

- Giving the Northern Ireland Human Rights Commission (NIHRC) and Equality Commission for Northern Ireland (ECNI) oversight powers to
 - monitor the implementation of Article 2(1) and report to the Secretary of State and Executive Office in Northern Ireland when asked to and proactively.
 - require the Secretary of State or Executive Office to reply to any recommendations; and
 - advise the Assembly whether a Bill is compatible with Article 2(1).
- Giving both the NIHRC and ECNI powers to bring or intervene in judicial review proceedings related to a potential breach of Article 2(1).

2.4 In detail: Clause 24 - North-South co-operation

Clause 24 amends Section 10 of the European Union (Withdrawal) Act 2018 and prevents the Government from agreeing to any recommendation in the Joint Committee that would alter arrangements for North-South cooperation as provided for in the Belfast/Good Friday agreement, or establish a new North-South implementation body or change an existing body.

Current North-South [implementation bodies](#) include organisations such as the [Special European Union Programmes Body](#) that oversees EU funding programmes in the region, and [InterTradeIreland](#), a business and trade promotional body.

Section 10(2)(a) of the 2018 Act already prevents regulations being made under that Act which would “diminish any form of North-South cooperation provided for by the Belfast Agreement.”

3. What is not in the Bill?

3.1 Consent mechanism

A procedure to allow the Northern Ireland Assembly a vote on continuing to adhere EU rules on goods and customs, the Single Electricity Market, VAT and state aid, was included in Article 18 of the Protocol, and in more detail in a separate [Declaration](#) published alongside the Withdrawal Agreement.

The WAB gives no specific provision for the consent mechanism to operate. Giving the NI Assembly this power should require primary legislation, however, the enabling Henry VIII powers would allow the UK Government to do this by regulation. Enacting the mechanism this way would reduce the scope for Parliamentary scrutiny of these provisions.

The earliest opportunity for Northern Ireland's democratic institutions to have their say would be 2024, that is if the transition period isn't extended in December 2020 (the transition period can be extended for a further one or two years – so either to December 2021 or 2022). There is time, therefore, for the details to be proposed by the Government. However, considering that the consent mechanism was central to the Government's renegotiation of Protocol, MPs might wish to know more about these powers now.

3.2 How Customs and VAT will work in Northern Ireland

The principles of how VAT, Customs procedures and regulatory checks will operate in Northern Ireland, and for goods moving north-south between Northern Ireland and Ireland and East-West (and vice versa) were set out in the Protocol. However, the exact functioning of these regimes will be 'fleshed out' by the Joint Committee – the body made up of representatives from the EU & the UK that will come into operation post-Brexit, during the transition period.

It is not clear at present how the Northern Ireland devolved institutions will be able to input into such discussions.

3.3 Extension of the Implementation/transition period:

Our Insight on [Implementing the transition period](#), includes an analysis of Clause 30 of the WAB. This Clause sets out how the UK Parliament will approve an extension of the transition period but does not give a role to the devolved institutions, including the Northern Ireland Assembly.

A [policy paper](#) published in January 2019 by Theresa May's Government set out a series of commitments for oversight and consultation by the Northern Ireland democratic institutions over the 'backstop', including to "provide in law for a mandatory process of consultation with the

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Northern Ireland Assembly in that scenario,”¹ and that “the Assembly would be given an opportunity, ahead of any Parliamentary scrutiny, to express its views by debating and voting on the question”.²

The Government also committed in the paper to agreeing to a Memorandum of Understanding with a future Northern Ireland Executive setting out arrangements for the Executive’s role in respect of the Joint Committee, the Specialised Committee and the Joint Consultative Working Group in relation to Northern Ireland specific issues.³ (Para 27).

The Government may well argue that with the Protocol in the October 2019 WA altered significantly from Protocol in the November 2018 WA – that was called the backstop and that the new Protocol is narrower in scope, so therefore this level of consultation isn’t required.

¹ Department for Exiting the European Union ‘[UK Government commitments to Northern Ireland and its integral place in the United Kingdom](#)’, 9 January 2019, Para 18.

² *Ibid* Para 19.

³ *Ibid* Para 27.

4. Further reading

- Commons Library Briefing Paper (CBP 8713) [The October 2019 EU-UK Withdrawal Agreement](#)
- Commons Library Briefing Paper (CBP 8714) [Revisions to the Political Declaration on the framework for future EU-UK relations](#)
- Commons Library Briefing Paper (CBP 8453) [The UK's EU Withdrawal Agreement](#) (Paper on the November 2018 WA)
- Commons Library Insight: [Implementing the transition period.](#)

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