

The UK's Northern Ireland Protocol Bill

The government of the United Kingdom (UK) introduced the 'Northern Ireland Protocol bill' in the House of Commons on 13 June 2022. If enacted, the bill provides that certain provisions of the Northern Ireland Protocol would no longer 'have effect in the UK'. The main fields concerned are i) customs and movement of goods, ii) regulation of goods, iii) State aid, and iv) application of EU law. On 15 June, the EU relaunched the infringement procedure against the UK for failing to properly implement the Protocol that it had paused in 2021.

Background

On several occasions since September 2020, the UK has sought to [renegotiate](#) the Protocol on Ireland / Northern Ireland ([the Protocol](#)) with the EU, or to enact laws giving powers to Ministers to [dis-apply](#) some of its provisions. The Protocol forms part of the EU-UK Withdrawal Agreement ([WA](#)) and was a negotiated compromise to meet a threefold objective: the UK demand to be outside the jurisdiction of EU law; preserving the Good Friday / Belfast Agreement of 1998 ([GFBA](#)); and protecting the EU single market. The UK has not yet fully [implemented](#) the Protocol, in particular the border controls between Northern Ireland and the rest of the UK, while the EU has put forward proposals aimed at finding a negotiated solution.

What the Northern Ireland Protocol bill would change

The Northern Ireland Protocol bill ([the bill](#)) provides that specific provisions of the Protocol do not have effect in the UK ('excluded provision'), and gives the UK government powers to provide that other provision of the Protocol do not have effect in the UK ([Clause 1](#)). In particular, it touches upon the following areas.

Movement of goods and customs: The largest part of the bill is dedicated to the exclusion of provisions in relation to customs and movements of goods entering Northern Ireland from Great Britain. In particular, customs duties on goods at risk of being moved to the EU ([Protocol Articles 5\(1\) and 5\(2\)](#)) are excluded provision, as well as customs legislation and application of EU law ([Protocol Articles 5\(3\) and \(4\)](#)) as far as it relates to 'qualifying movements' of UK or non-EU destined goods. The bill provides powers to the UK government to make provisions about 'UK or non-EU destined' goods and to define the 'qualifying movements' into Northern Ireland of these goods. The bill also provides that the UK government may regulate checks, controls and administrative processes, which cover search, examination and entry ([Clause 5](#)), and make new legislation on customs matters in connection with the Protocol ([Clause 6](#)). Such regulations may in particular make provisions about the 'treatment of goods which cease to be, or become, UK or non-EU destined goods' ([Clause 6\(2\)\(d\)](#)).

Regulation of goods: The bill addresses the regulation of goods, and a major feature of the bill is the option for traders to choose compliance with the UK or EU regulatory route (or both) – the 'dual routes' ([Clause 7](#)). The bill [creates](#) the conditions for a new system whereby goods destined for Northern Ireland will not face customs procedures (green lane), while goods destined for Ireland and the EU will go through four EU-style border procedures (red lane). It is for the person / enterprise to choose with which regulatory route(s) to comply. The UK government may also make new laws about the regulation of goods, specifically on making goods available on the market, putting goods into service, production of goods, and use and import of goods ([Clause 10](#)).

State aid: The bill excludes Protocol provisions providing that EU law on State aid is applicable to Northern Ireland ([Protocol Article 10](#), and Protocol Annexes [5](#) and [6](#)).

Court of Justice of the European Union (CJEU): The [bill's Clause 20](#) provides that in dispute settlements, a court or tribunal 'is not bound by any principles laid down, or any decisions' made by the CJEU, and cannot refer any matter to it.

Motivations and legal grounds of the bill, and implementation

At second reading in the House of Commons, the UK government [declared](#) that the bill would fix the specific problems that have been caused in Northern Ireland, while maintaining those parts of the Protocol



that are working. In [explanatory notes](#), the UK government explains that the purpose of the bill is to protect the GFBA and to safeguard peace and stability in Northern Ireland (11). In an additional [policy paper](#), it states its preference to negotiate a solution with the EU, but that talks so far have brought about no sustainable agreement. According to the note, Northern Ireland's place in the UK internal market is being undermined due to the 'unnecessary checks and paperwork imposed by the Protocol'.

The [legal grounds](#) for the bill put forward by the UK government rely on the 'doctrine of necessity' enshrined in the UN [Responsibility of States for Wrongful Acts](#) (2001), [Article 25](#) [Necessity].

1. *Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:*

(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. *In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:*

(a) the international obligation in question excludes the possibility of invoking necessity; or

(b) the State has contributed to the situation of necessity.

The response of the European Union, to date

On 15 June 2022, the European Commission [decided](#) to take [the infringement launched on 15 March 2021](#) to its second stage, by issuing a Reasoned Opinion. This infringement proceeding had been launched as a result of the UK failing to properly implement the Protocol, notably regarding the certification requirements for the movement of agri-food products. It was put on hold later in 2021 to give space for negotiation. If the UK government does not reply within two months, the Commission will consider taking the UK to the CJEU pursuant to [Protocol Article 12\(4\)](#). The same day, the Commission launched two new infringement proceedings against the UK for: i) failing to carry out its obligations under the EU's sanitary and phytosanitary (SPS) rules; and ii) failing to provide the EU with certain trade statistics data in respect of Northern Ireland, as required under the Protocol. On 22 July, the Commission launched [four further infringement procedures](#), concerning failure to comply with customs requirements on goods moving from Great Britain to Northern Ireland; failure to transpose rules on excise duties, including on alcohol; and failure to implement rules on VAT for e-commerce.

Views of experts and think-tanks

According to [Jonathan Jones](#), former senior UK government lawyer, writing for the Institute for Government, the UK government consulted a large number of legal advisers, to many of whom the UK's legal argument based on 'necessity' is 'weak'. They argue that the concept of 'necessity' applies only when the state must act to safeguard its essential interests against 'grave and imminent peril'. The fact that the UK willingly entered into the agreement, with strong support from the current government, also plays against the argument.

According to the British Law firm [Simons & Simons](#), the bill would amend the UK domestic [EU \(Withdrawal Agreement\) Act 2020](#) which implements the EU-UK WA in UK law, not the Protocol per se. To the EU, the bill is further evidence that the UK is not behaving in good faith as provided by [WA Article 5](#). The authors suspect that the bill may thus have 'wider implications' on investment and trade.¹

The bill was [presented](#) to the UK Parliament on 13 June, and the [third reading](#) in the House of Commons was completed on [20 July](#), with 267 voting in favour and 195 against the bill. The bill will be debated, and possibly amended, in the House of Lords after the summer recess. Once the Lords has completed its third reading, the two Houses vote in turn until they agree on a common text, in a process known as '[ping pong](#)'. When both Houses have agreed on the content of a bill, it is then presented to the monarch for Royal Assent.

¹ On 13 June, the House of Commons European Scrutiny Committee launched an enquiry, '[Regulating after Brexit](#)'.