

# Defending the Union

## *Amending the Northern Ireland Protocol Bill*

02 August 2022

### Introduction

This concise paper outlines the requirement for some amendments to the Protocol Bill, and as an addendum provides the draft text of suggested amendments. It always refers to the relevant legislation as a Bill, despite the fact that post Royal Assent it becomes an Act<sup>1</sup>. This paper takes that approach in line with the objective to present what are deeply complex legal matters in accessible terminology.

### The Act of Union

The Bill *on balance* cures the present breach of the Act of Union. There remains an arguable point as to whether the existence of a dual regulatory scheme, offering NI businesses the choice of following the EU or UK regulatory route is compatible with the equal footing provision. This is deeply technical doctrinal debate.

The present *prima facie* curing of the breach of the Act of Union is expressly set out in Clause 1 (3) and in practice takes place via Clause 2 in conjunction with Clause 4 (1). In Clause 2 the supremacy of section 7A of the European Union (Withdrawal) Act 2018 is stripped out in relation to 'excluded provision' of the Protocol. Clause 4 (1) excludes Article 5 (1) and (2) of the Protocol. It is Article 5 of the Protocol which causes the breach of the Act of Union.

Accordingly, at the point Clause 2 and Clause 4 receive Royal Assent *and* is subject to the necessary commencement order, the supremacy of the Act of Union is restored, because section 7A can no longer have the effect of ensuring Article 5 prevails over of the Act of Union.

The excluded Protocol provisions are replaced as a matter of domestic law by regulations made by a Minister of the Crown. These are called enabling powers.

However, the enabling powers in the Bill (the general provisions of which are set out in Clause 22) do not (i) prevent a Minister of the Crown in exercising the relevant powers to make regulations doing so in a manner incompatible with the Act of Union in the future; and (ii) do not prevent the powers in Clause 15 from being used to undo the exclusion of Article 5, therefore once again subjugating the Act of Union.

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<sup>1</sup> Until the point of Royal Assent the legislation is referred to as a 'Bill' and its provisions are called 'Clauses'. At the point of Royal Assent the Bill becomes an 'Act' and the Clauses become 'sections'. In this paper there are instances whereby the legislation is envisaged in a post-Royal Assent period, and others whereby it is addressing the pre-Royal Assent period. Rather than alternate between the two and potentially confuse the reader, this paper for clarity simply sticks to the terminology of the 'Bill' and 'Clauses'.

It may be said that the simple answer to (i) is that Parliament is sovereign, so in the future could once again simply pass legislation to breach the Act of Union, and no Parliament could bind its successor to prevent this occurring. That is true in so far as it goes, but it fails to appreciate that we are dealing here with enabling powers to make secondary legislation. The power is vested not in Parliament, but in a Government Minister.

In those circumstances, an amendment is necessary to prevent a Minister of the Crown from taking such a constitutionally consequential action. If Parliament was minded to once again subjugate or impliedly repeal the Act of Union, then it should be a requirement that Parliament must squarely confront this and pass primary legislation to do so.

In regards (ii), the same broad principle applies. A Minister of the Crown could, in theory, put Article 5 (or any other provision) back into domestic law by ordering that it ceases to be excluded provision pursuant to Clause 15. There should be a safeguard to prevent the exercise of this power in a manner which would occasion a breach of the Act of Union.

### **The Commencement of the Bill**

The core provisions of the Bill (Clauses 1-20) do not in fact come into effect at the point of Royal Assent (see Clause 26 (3)). A commencement order provision is not unusual and is contained within the majority of Bills. There is good reason for this, primarily to ensure the orderly transition of the legal landscape.

It is therefore not true to say that this is some unique deceptive provision put into the Bill to render it ultimately impotent.

It is however true to say that the commencement order provision *could* be used in a manner to frustrate the implementation of the Bill. This is true of all commencement provisions.

However, in this circumstance *on the Government's own case* there is a necessity due to ongoing political and societal difficulties, which persist and present a risk to peace and thus national security. This sits alongside the economic damage to the national interest of the United Kingdom being caused by the Protocol.

Therefore, it seems that any delay in implementing the Bill would only further compound the grave peril to the United Kingdom's national interests. It can not in those circumstances, applying the Government's own yardstick, be credibly suggested that there is not an urgency to bring the Bill into force.

In balancing this, with the practical requirement of ensuring an orderly transition and a clear legal landscape, it is suggested that Clause 26 (3) be amended to require all provisions to be brought into force in a period not exceeding three months from the date of Royal Assent.

There are concerns that the powers to make the regulations may never in fact be used. However, by bringing into force the excluded provision Clauses within the Bill via commencement order, this will by practical necessity compel the making of regulations. This is so because once the offensive provisions of the Protocol are excluded in domestic law, there must be something to replace them. In that circumstance the Minister would have to use the power to make regulations, otherwise there would be a gaping legal lacuna.

## **Conclusion**

The issues identified require to be remedied. The suggested means of doing so, by the draft amendments attached, would in substance deal with the outstanding issues.

After that, the remaining issue is the conducting of checks on goods going into the EU at NI points of entry. Whilst this may be tolerable- if implemented to ensure it is only goods clearly going into the EU- as a practical arrangement to appear reasonable in the short term in order to get the Protocol Bill into law and operative, once that happens unionism should then mount a campaign to have these checks pushed back to the land border.

It may be this will happen anyway. If the EU do not accept the UK's arrangements for protecting the EU Single Market, then it will be for the EU to protect their own Single Market, which may well compel them to instruct Ireland to conduct checks at the land border.

This Bill is a complex and technical piece of legislation. It requires detailed explanation, and indeed may well yet change in some technical ways.

The shared unionist/loyalist endorsement of the relevant amendments would display unity of purpose and ensure a shared collective message. The effect of these amendments can be summarised in two points:

- (i) Require Ministers exercising future powers under the Protocol Act to do so in a manner compatible with the Act of Union.
- (ii) Ensure that as a legal requirement all the key provisions of the Protocol Act come into force within a period not exceeding three months from the date of Royal Assent.

It is obvious to point out that no one who genuinely agreed with the intent of the Bill could reasonably object to such amendments.

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**2 August 2022**

**Draft Amendments- NI Protocol Bill 2022**

Clause 15, page 9, after line 17, insert:

*“(5) A Minister may not exercise any power under this section if the effect of the exercise of such power would create an incompatibility with the Act of Union (Ireland) 1800 or the Union with Ireland Act 1800”*

**Explanatory Note:** This amendment would prevent a Minister of the Crown from providing by regulations that an excluded provision, which conflicts with the Act of Union (Ireland) 1800 and/or the Union with Ireland Act 1800 may cease to be excluded provision.

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Clause 22, page 11, line 16, leave out subsection (1) and insert:

*“(1) Regulations under this Act may make any provision that could be made by an Act of Parliament (including a provision modifying this Act), but may not amend, repeal, or create an incompatibility with the Act of Union (Ireland) 1800 and/or the Union with Ireland Act 1800.”*

**Explanatory Note:** This amendment prevents by regulation a Minister of the Crown making provision which has the effect of repealing, subjugating or otherwise interfering with the United Kingdom’s foundational constitutional statutory framework.

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Clause 26, page 15, line 43, leave out subsection (3) and insert:

*“(3) (a) Subject to paragraph (b), the other provisions of this Act come into force at the end of the period of three months from the day this Act is passed.);*

*(b) A provision of this Act falling within subsection (3) may be brought into force on such earlier day than that in paragraph (a) as a Minister of the Crown may, by regulations, direct.*

**Explanatory Note:** This amendment brings into force all the relevant provisions of the Act three months following the day the Act is passed. A Minister of the Crown may by regulation specify an earlier day or days whereby the provisions come into force.