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Policy paper

Northern Ireland Protocol Bill: UK government legal position

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The Foreign Secretary has outlined the Government's plans for primary legislation to address elements of the Northern Ireland Protocol (the "Protocol"). This statement summarises the position of the Government that such legislation is lawful under international law.

Relevant rules of international law

The doctrine of necessity provides a clear basis in international law to justify the non-performance of international obligations under certain exceptional and limited conditions. It has been accepted by the International Court of Justice and is reflected in the International Law Commission's 2001 Articles on State Responsibility, which successive UK governments have regarded as generally reflective of customary international law. By way of summary, the term 'necessity' is used in international law to lawfully justify situations where the only way a State can safeguard an essential interest is the non-performance of another international obligation. Under conditions defined in Article 25, the action taken may not seriously impair the essential interests of the other State(s), and cannot be claimed where excluded by the relevant obligation or where the State invoking it has contributed to the situation of necessity.

In addition, the Protocol contains an emergency clause, Article 16, which permits a party to take safeguard measures if the application of the Protocol leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade. Safeguard measures must be limited to what is strictly necessary to remedy the situation, with priority given to those measures that least disturb the functioning of the Protocol.

The situation in Northern Ireland

The maintenance of stable social and political conditions in Northern Ireland, the protection of the 1998 Belfast (Good Friday) Agreement, the effective functioning of the unique constitutional structures created under that Agreement, and the preservation and fostering of social and economic ties between Northern Ireland and the rest of the United Kingdom, are essential interests of the United Kingdom.

Having reached a difficult compromise on the final text of the Protocol, the Government expected the European Union to recognise that the Protocol had to be applied and administered in a way that took full account of the unique context of Northern Ireland, of its exceptional constitutional make-up, and of the identities and sensitivities of its different communities.

In July 2021, however, the Government assessed in the Command Paper that, as a result of both diversion of trade and serious societal and economic difficulties occasioned by the Protocol, the conditions for the exercise of the rights provided for under Article 16 of the Protocol were already met. The Government proposed solutions which could be agreed jointly to resolve those concerns. However, these discussions with the EU have not led to comprehensive and commonly acceptable solutions capable of generating sustainable arrangements, and the Protocol currently stands as a barrier to forming a new Executive in Northern Ireland. The Government's preference remains a negotiated outcome.

In the meantime, the strain that the arrangements under the Protocol are placing on institutions in Northern Ireland, and more generally on socio-political conditions, has reached the point where the Government has no other way of safeguarding the essential interests at stake than through the adoption of the legislative solution that is being proposed. There is, therefore, clear evidence of a state of necessity to which the Government must respond to.

Further, the Belfast (Good Friday) Agreement has provided the foundation for peace, security, stability and reconciliation in Northern Ireland since it was signed in 1998. It is reflected in the Protocol, whereby the EU and the UK affirmed that it should be “protected in all its parts” and in Article 1 of the Protocol, which sets out the Protocol’s objectives as follows:

1. This Protocol is without prejudice to the provisions of the 1998 Agreement in respect of the constitutional status of Northern Ireland and the principle of consent, which provides that any change in that status can only be made with the consent of a majority of its people.
2. This Protocol respects the essential State functions and territorial integrity of the United Kingdom.
3. This Protocol sets out arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions.

In its application, the Protocol is not operating to protect the prior commitments and responsibilities under the Belfast (Good Friday) Agreement. It is clear that the Protocol is without prejudice to the Belfast (Good Friday) Agreement. The proposed measures are fully aligned with and advance the UK’s commitments and responsibilities under the Belfast (Good Friday) Agreement, including protecting the economic rights of the people of Northern Ireland and ensuring just and equal treatment for the identity, ethos and aspirations of both communities.

It is the Government’s assessment that the legislation is currently the only way to provide the means to alleviate the socio-political conditions, while continuing to support the Protocol’s objectives, including supporting North-South trade and cooperation, and the interests of both the EU and the UK. It is the Government’s assessment that these measures will alleviate the imbalance and socio-political tensions without causing further issues elsewhere in the Northern Ireland community, including by ensuring that East-West connections are restored, without diminishing existing North-South connections. It is also assessed that the legislation will not seriously impair an essential interest of the state or states towards which the obligations exist, or of the international community as a whole. Nor do the relevant international obligations contained in the Withdrawal Agreement and/or the Protocol exclude the possibility of invoking necessity. Further, the UK has not contributed to the situation of necessity relied upon. The UK exercised its sovereign choice to leave the EU single market and customs union and the peril that has emerged was not inherent in the Protocol’s provisions.

The Government recognises that necessity can only exceptionally be invoked to lawfully justify non-performance of international obligations. This is a genuinely exceptional situation, and it is only in the challenging, complex and unique circumstances of Northern Ireland, that the Government has, reluctantly, decided to introduce legislative measures which, on entry into force, envisage the non-performance of certain obligations. It is the Government’s position that in light of the state of necessity, any such non-performance of its obligations contained in the Withdrawal Agreement and/or the Protocol as a result of the planned legislative measures would be justified as a matter of international law. This justification lasts as long as the underlying reasons for the state of necessity are present. The current assessment is that this situation and its causes will persist into the medium to long term.

The Government’s clear preference remains a negotiated solution with the EU to address the situation of necessity that has arisen. The Protocol contemplates the possibility of being

superseded, in whole or in part, by subsequent agreements (Article 13(8)). Moreover, the Parties agreed to include in the Withdrawal Agreement a time-limited mechanism for making amendments necessary to “address omissions or other deficiencies, or to address situations unforeseen when this Agreement was signed” (Article 164(5)(d)). This mechanism is available to the Parties for a period of four years from the end of the transition period.

The issues giving rise to the situation of necessity need to be addressed urgently, and the UK deeply regrets that it has not been possible, so far, to find mutually agreed ways of resolving this situation. The UK urges EU Member States to provide a new negotiating mandate to the Commission, wide enough to change the terms of the Protocol to respond to the full range of issues addressed by this legislation.

The Government’s assessment that the situation in Northern Ireland constitutes a state of necessity is without prejudice to the UK’s right to take measures under Article 16 of the Protocol to safeguard against serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade.

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