

Welsh Parliament

**Culture, Communications, Welsh Language, Sport, and
International Relations Committee**

Report on the Legislative Consent Memorandum on the Northern Ireland Protocol Bill

November 2022



1. Introduction

1. The Northern Ireland Protocol Bill (the “Bill”) was introduced in the House of Commons on 13 June 2022. It is sponsored by the Foreign, Commonwealth and Development Office.

2. The Bill is scheduled for committee stage in the House of Lords on 25 October 2022. Following this will be a number of additional amending stages in the House of Lords, including report stage and third reading.

3. The long title of the Bill states that it is a Bill to:

Make provision about the effect in domestic law of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement, about other domestic law in subject areas dealt with by the Protocol and for connected purposes

4. The Legislative Consent Memorandum (the “LCM”) was laid by the Welsh Government on 29 September 2022. This was 15 weeks after the Bill was introduced. Under Standing Order 29.2(i), an LCM must normally be laid within two weeks after a relevant Bill is introduced by the UK Government. On 27 June 2022, the Minister for the Economy, Vaughan Gething MS wrote to the Llywydd stating:

“[G]iven the complete absence of meaningful engagement by the UK Government ahead of introduction and the complexity of the issues raised in the Bill, it has not yet been possible to consider properly the devolution consequences of what is being proposed. Additionally, I have major concerns that the Bill has the potential to breach international obligations and further analysis is required to inform our position. [...] I intend to lay a Legislative Consent Memorandum before the Senedd as soon as we have a clear picture of the devolution consequences of the proposed legislation. However, this will be outside the normal two-week Standing Order 29 deadline.”

5. The LCM was referred to the Culture, Communications, Welsh Language, Sport, and International Relations Committee on 4 October 2022, with a reporting deadline of 7 November 2022.

2. The Welsh Government's Legislative Consent Memorandum

- 6.** Paragraphs 4 to 12 of the LCM summarise the Bill and its policy objectives. Paragraphs 13 to 20 set out the provisions in the Bill for which the Welsh Government considers that consent is required.
- 7.** Paragraphs 22 to 29 outline the Welsh Government's concerns with the Bill.
- 8.** Paragraph 33 of the LCM sets out the Welsh Government's conclusion. The LCM notes that Welsh Ministers recommend withholding consent for the Northern Ireland Protocol Bill.

3. Provisions which require consent

9. The Welsh Government considers that all of the Bill's provisions require the consent of the Bill, except for clause 1, which is an overview provision.. The Welsh Government disagrees with the UK Government's assessment of which clauses require consent. A list of clauses can be accessed on [Senedd Research's interactive tool](#).

Consent sought by the UK Government

10. The Bill's [Explanatory Notes](#) contains a table illustrating the provisions which the UK Government considers engage the legislative consent process. This provides that Senedd consent is required in respect of the following clauses:

- 2-5;
- 9;
- 13-16;
- 19; and
- 21-22

11. The Welsh Government agrees with the UK Government that legislative consent is required in respect of these clauses. Its rationale for this determination is contained in Annex 1 of the LCM.

Additional clauses the Welsh Government deems require consent

12. In addition to the clauses listed in paragraph 10 Welsh Government's LCM provides that Senedd consent is also required in respect of the following additional clauses:

- 6-8;
- 10-12;
- 17-18;
- 20; and
- 23-26

13. In effect therefore, the Welsh Government's position is that Senedd consent is required in respect of the whole Bill, save for clause 1 (which is a non-operative overview provision).

4. Reasons for withholding consent

- 14.** The Welsh Government recommends that the Senedd withholds consent to the Bill on a number of grounds.
- 15.** In both the LCM and a written statement on 29 September 2022, the Minister for the Economy raises concerns about the “underlying rationale for the Bill”. It also notes that Welsh Government was not involved in the development of the Bill.
- 16.** Instead of unilaterally amending the effect of the Protocol in domestic law via the Bill, the LCM states that the Welsh Government has “repeatedly requested that the UK Government returns to negotiations with the EU to seek an agreed solution to the issues arising from the Protocol”. The written statement notes that proceeding with the Bill “would risk a further escalation of measures by the European Union and, potentially, a trade war” which “is not in the best interests of the businesses and people of Wales who depend on trade with the EU”. The Minister for Economy has warned that a deterioration in UK-EU relations is in “nobody’s interests”, especially as it risks worsening the cost-of-living crisis.
- 17.** The LCM also recommends withholding consent on the basis that many of the regulation powers in the Bill are “so broad that they lack any real clarity of purpose” which makes it “impossible to ascertain both how the powers would be exercised, and the potential implications and effect that the related provisions will have for Wales and [the] devolution settlement”.
- 18.** The Welsh Government are also “unwilling” to recommend consent to the Bill on the basis that it has the potential to breach international law. In this context, the alleged breach of international law is the non-performance of international obligations resulting from unilaterally suspending parts of the Protocol in domestic law.
- 19.** The UK Government published a legal position paper on 13 June 2022 arguing that any such non-performance would be justified under the international law doctrine of ‘necessity’. The LCM describes this prospect as “doubtful” and cites academics who assess the defence of necessity in this context as being “weak”.
- 20.** Connected to the potential breach of international law set out in the LCM, the Welsh Government states that recommending consent for the Bill could call into question the adherence of Welsh Ministers to the Ministerial Code, which states:

The ministerial code should be read against the background of the overarching duty on ministers to comply with the law, including international law and treaty obligations, and to protect the integrity of public life.

5. Committee consideration and conclusion on LCM

21. The Committee considered the LCM at its meetings on 13 and 26 October 2022. The Committee agrees with the Welsh Government that all clauses to the Bill, except for clauses 1 and 12, require the Senedd's consent under Standing Order 29. The Committee shares the concerns raised by Welsh Government in their LCM.

22. The Committee is concerned by the far reaching delegated powers contained within the Bill. As currently drafted, the Bill makes provision enabling Ministers of the Crown to make any changes they deem appropriate to the Bill, both in the future and in retrospect. Any subordinate legislation made under such powers may potentially modify the Senedd's legislative competence or make devolved provision without any involvement by the Welsh Government and its Ministers, nor the Senedd.

23. The Committee is also concerned about the Bill's potential to breach international law.

24. The Committee would also like to reiterate comments it has previously made to the Senedd's Business Committee in relation to the LCM timetable.

25. Given the serious implications arising from the Bill, the Committee is of the view that the timetable for reporting has been insufficient to allow for full consideration of the issues at large, nor for further consideration of its impact on Wales. The Committee had been keen to undertake evidence sessions with relevant Welsh and UK Government ministers, as well as stakeholders.

26. The Committee feels that the amount of time provided for scrutiny is minimal in comparison with the time available to the Welsh Government to consider the Bill. The Bill was introduced in Westminster on 13 June 2022 but it was not referred to Senedd Committees until 4 October 2022. While the Committee accepts the Welsh Government's reasons for the delay, it has been allowed a substantial amount of time to consider the Bill's implications compared with the time allocated to the Senedd.

6. Committee view

27. As the Committee responsible for International Relations at the Senedd, we wish to make a number of observations. .

International reputation

28. The Committee notes that prior to the Bill's introduction on 13 June 2022, the First Minister warned the then Prime Minister of the reputational risks involved and urged him to continue talking to the EU. Following the Bill's introduction, the First Minister said the Bill "damages our standing in the rest of the world" and noted that a majority of the Northern Ireland Assembly had rejected the legislation "in the strongest possible terms".

29. The Minister for Economy said that the Bill risks doing "lasting damage" to international and EU relations. The Counsel General said that the UK is "in grave danger of destroying its international reputation", its "credibility in international law" and that the Bill represents "a gross failure of diplomacy and statesmanship".

30. The Committee also notes that the Bill has attracted global attention, particularly in the United States and Ireland. Irish Taoiseach, Micheál Martin, said the Bill was "profoundly dispiriting" and a "damaging moment".

Conclusion 1. We are seriously concerned that the Bill poses a risk to the UK's international reputation and its credibility in international law. The Committee agrees with the Welsh Government that the Bill represents a "gross failure of diplomacy and statesmanship."

UK-EU impact

31. The Bill represents the UK Government's intention to unilaterally change the effect of the Protocol, related provisions in the Withdrawal Agreement and other separation agreement legislation in domestic law to address the situation in Northern Ireland.

32. If passed it would:

- End the effects of certain parts of the Protocol in domestic law, enable Ministers to disapply related aspects and to put alternative arrangements in place;
- Change the rules for trade in goods, specifically for the movement of goods between Great Britain and Northern Ireland and for the regulation of goods, and give powers to Ministers to make other arrangements;

- Change other rules agreed with the EU, including for subsidy control, VAT and customs and give powers to Minister to make other arrangements;
- Give broad regulation making powers to Ministers to implement changes to the Protocol agreed with the EU, or any new agreement that might replace it; and
- Significantly reduce the role of the European Court of Justice, including removing its jurisdiction in relation to the Protocol in domestic law.

33. In addition to issues directly related to the Protocol, the Bill calls into question the UK's compliance with other unrelated provisions of the Withdrawal Agreement, and could jeopardise cooperation under the Trade and Cooperation Agreement.

34. The EU has made it clear that the Withdrawal Agreement forms the "necessary foundation for the Trade and Cooperation Agreement". It has also said that the UK-EU relationship must:

be based on the full respect of the legally binding commitments that we have made to one another.

35. The Committee notes the EU's response to the introduction of the Bill, including its launch or continuation of seven infringement proceedings against the UK.

36. The First Minister and the Minister for the Economy have both described the EU as Wales' "most important trading partner". With regards to the Bill, the Minister for Economy has also warned that a deterioration in UK-EU relations is in "nobody's interests", especially as it risks worsening the cost-of-living crisis.

37. The First Minister has repeatedly said that Wales has a "direct interest" on matters which might affect Welsh businesses and in "anything" which affects NI-GB trade flows, given the strategic importance of its west-facing ports, particularly Holyhead. He reiterated this on 13 October ahead of the Wales-Ireland Forum.

38. In June 2022, the First Minister told us that:

[W]e're very lucky that, on the whole, people in the European Union are willing to distinguish Wales from the poor state of relations with the United Kingdom, but we can't just escape from it either.

39. We are concerned that the Bill marks a deterioration in UK-EU relations which could in turn impact the delivery of the Welsh Government's international strategy and Wales-EU

relations. We urge both parties to urgently seek a negotiated solution to the issues raised by the Protocol.

40. The Committee agrees with the Welsh Government's view, that Wales has a direct interest in the Protocol, including on all matters affecting Welsh businesses and NI-GB trade flows given the strategic importance of its west-facing ports.

Conclusion 2. We are concerned that the Bill marks a deterioration in UK-EU relations which could in turn impact the delivery of the Welsh Government's international strategy and Wales-EU relations. We urge both parties to urgently seek a negotiated solution to the issues raised by the Protocol.

Conclusion 3. We agree with the Welsh Government's view, that Wales has a direct interest in the Protocol, including on all matters affecting Welsh businesses and NI-GB trade flows given the strategic importance of its west-facing ports.

Wales – Ireland impact

41. The Committee is also concerned that the Bill could affect how Wales-Ireland cooperation is delivered and implemented in future. The Welsh Government's international strategy, describes Wales-Ireland relations as follows:

Ireland is our closest European neighbour. For several years, we have maintained an office in Dublin in recognition of the importance of this special relationship. We were very pleased to see the Irish Consulate reopen its office in Wales in May 2019 and we will encourage other nations to follow this lead.

42. Ireland is also listed in Wales' top 10 FDI Donor Markets and top 10 Visitor Markets, and is identified as a priority market in raising Wales' global profile.

43. In March 2021, the Welsh and Irish governments published a Shared statement and joint action plan 2021-2025 which set out their "joint commitment to bringing Wales and Ireland closer together". The actions plans set out six areas for: Political and Official Engagement; Climate and Sustainability; Trade and Tourism; Education and Research; Culture, Language and Heritage; Communities, Diaspora and Sport. The plans establish a system of annual review, a new Ireland-Wales Forum, and pay tribute to the British-Irish Council, established by the Belfast (Good Friday) Agreement.

44. The Committee is concerned that the Bill could impact how Wales-Ireland cooperation is delivered as part of the Welsh Government's international strategy.

Conclusion 4. The Committee is concerned that the Bill could impact Wales-Ireland cooperation.