

LEGISLATIVE CONSENT MEMORANDUM

Northern Ireland Protocol Bill

1. This Legislative Consent Memorandum is laid under Standing Order (“SO”) 29.2.(i). SO 29 prescribes that a legislative consent memorandum must be laid, and a legislative consent motion may be tabled, before Senedd Cymru if a UK Parliamentary Bill makes provision in relation to Wales for any purpose within, or which modifies, the legislative competence of the Senedd.
2. On 27 June the Minister for Economy wrote to the Llywydd outlining concerns with the Bill and stating that, because of the absence of meaningful engagement by the UK Government prior to introduction and the complexity of the issues raised in the Bill, it would not be possible to respond within the normal two-week period set out in SO 29.
3. The Northern Ireland Protocol Bill (“the Bill”)¹, was introduced in the House of Commons on 13 June and completed committee stage on 20 July. No amendments were made to the Bill, and third reading took place on 20 July. The Bill had its first reading in the House of Lords on 21 July. Second reading is scheduled for 11 October.

Policy Objective(s)

4. The terms of the UK’s departure from the EU are set out in the UK-EU Withdrawal Agreement (“the Withdrawal Agreement”), of which the Protocol on Ireland and Northern Ireland (“the Protocol”) forms part. The Protocol sets out unique arrangements for Northern Ireland, intended to protect the Belfast (Good Friday) Agreement, to prevent a hard border on the island of Ireland, to enable continued unfettered access for Northern Ireland businesses to its most important markets and put in place protections needed for the EU Single Market.
5. However, since 2020, the UK Government has been claiming that the Protocol creates unacceptable barriers to trade within the UK internal market and has been seeking changes². The EU disagreed with the UK Government’s view and, in October 2021, published its own proposals in response³, to reduce the level of checks and controls, subject to a number of conditions and safeguards. The UK and the EU entered into discussions on changes to the Protocol in the Joint Committee – the body responsible for overseeing the implementation of the Protocol – and elsewhere but the two sides have been unable to come to an agreement.
6. The UK Government’s stated policy objectives for the Bill are, in its view, to solve problems arising from the Protocol which, in the UK Government’s words, include “*trade disruption and diversion, significant costs and bureaucracy for traders and areas where people in Northern Ireland have not*

¹ The Northern Ireland Protocol Bill <https://publications.parliament.uk/pa/bills/cbill/58-03/0012/220012.pdf>

² UK Government Command Paper [The Northern Ireland Protocol - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/the-northern-ireland-protocol)

³ European Commission, Protocol on Ireland and Northern Ireland - EU October 2021 Package [Protocol on Ireland and Northern Ireland | European Commission \(europa.eu\)](https://ec.europa.eu/eu-external-press/en/protocol-ireland-northern-ireland)

been able to benefit fully from the same advantages as those in the rest of the United Kingdom”⁴.

7. In the Explanatory Notes⁵ to the Bill, the UK Government states, “*The purpose of the Bill is to provide Ministers with the power to make changes to the operation of the Northern Ireland Protocol in domestic law which protect the Belfast (Good Friday) Agreement and to safeguard peace and stability in Northern Ireland.*”

Summary of the Bill

8. The Bill is sponsored by the Foreign, Commonwealth and Development Office.
9. Article 4 of the Withdrawal Agreement provides that the Withdrawal Agreement and the provisions of EU law which it makes applicable are to have “the same legal effects” in the UK as those which they produce within the EU and its Member States, including direct effect and supremacy. Section 7A of the European Union (Withdrawal) Act 2018 (“EUWA”) currently gives effect to this, by providing that rights, liabilities, obligations, restrictions, remedies and procedure arising by or under the Withdrawal Agreement are to be recognised/available and enforced in domestic law; and that that every enactment is to be read and have effect subject to this. Section 7C directs courts to interpret relevant separation agreement law (i.e., the Withdrawal Agreement, EEA-EFTA Separation Agreement and Swiss Citizens’ Rights Agreement) in accordance with the Withdrawal Agreement.
10. The Bill makes certain parts of the Protocol ‘excluded provision’. Where a provision is excluded, then the Bill provides that section 7A and 7C of EUWA (as outlined above) no longer applies to it, meaning that the provision will not be applicable in domestic law.
11. The parts of the Protocol that the Bill specifies as ‘excluded provision’ include provisions in relation to the movement of goods (including customs), between Great Britain and Northern Ireland (clause 4), the regulation of goods in Northern Ireland so far as necessary to allow goods in Northern Ireland to meet either UK or EU rules (clauses 7 and 8) and subsidy control rules (clause 12). The Bill also treats as ‘excluded provision’ any parts of the Protocol or the Withdrawal Agreement that confer jurisdiction on the Court of Justice of the European Union (“CJEU”) in relation to the Protocol, or related provisions of the Withdrawal Agreement.
12. Where provisions of the Bill create ‘excluded provision’, they are accompanied by a power conferred on Ministers of the Crown to make ‘new provision’ in domestic law.

⁴ The Northern Ireland Protocol: The UK’s solution [Northern Ireland Protocol: the UK’s solution - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/northern-ireland-protocol-the-uk-solution)

⁵ The Northern Ireland Protocol Bill Explanatory Notes: <https://bills.parliament.uk/publications/47565/documents/2189>

Provisions in the Bill for which consent is required

13. The Bill is a relevant Bill within SO 29 as it makes provision in relation to Wales within the legislative competence of the Senedd and modifies the legislative competence of the Senedd and the executive competence of the Welsh Ministers (“relevant provision” for the purposes of SO 29).
14. Firstly, to the extent that the Bill alters the effect that sections 7A and 7C of EUWA currently have on the legislative competence of the Senedd, then the Bill modifies the legislative competence of the Senedd. This is because while EUWA is and will remain a protected enactment under paragraph 5 of Part 2 of Schedule 7B of the Government of Wales Act 2006 (“GOWA”), the effect of the Bill will be that Welsh legislation will no longer have to be read so as to give direct effect and supremacy to provisions of the Protocol that are excluded by the Bill and so, to this extent, the legislative competence of the Senedd is modified.
15. Secondly the Welsh Ministers have a number of functions in relation to the implementation of the Protocol in areas of devolved competence, including those functions created by section 22 of the EU (Withdrawal Agreement) Act 2018, which inserted Part 1C into Schedule 2 of EUWA. To seek to modify the way in which such functions, in relation to matters within the legislative competence of the Senedd are exercised, by excluding certain provision of the Protocol from section 7A and 7C EUWA, is to make provision within the legislative competence of the Senedd, which in itself also therefore modifies the executive competence of the Welsh Ministers.
16. Finally, the Bill contains a number of provisions that confer delegated powers on Ministers of the Crown which are exercisable in devolved areas, and further enable Ministers of the Crown to delegate some or all of those functions to Welsh Ministers in some instances. The Senedd could legislate to delegate these powers itself in devolved areas, and so these provisions are within the Senedd’s legislative competence to that extent.
17. However, the Welsh Government considers that the whole Bill also has regard to the non-reserved area of the implementation of international agreements and/or economic development. For this reason, taking account of section 107(6) of the GOWA which provides that “...it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Senedd”, the Welsh Government considers that it is appropriate for the legislative consent of the Senedd to also be sought for all remaining provisions of the Bill (save for clause 1, which is a non-operative provision of the Bill).
18. The individual clauses as they relate to devolved competence are set out below:

Under SO 29.1(i) for clauses within the legislative competence of the Senedd:

 - Clause 5 (Movement of goods: new law about matters other than customs)
 - Clause 9 (Regulation of goods: new law)

- Clause 10 (Meaning of “regulation of goods”)
- Clause 16 (Additional excluded provision: new law)
- Clause 17 (Value added tax, excise duties and other taxes: new law)
- Clause 19 (New agreements amending or replacing the Northern Ireland Protocol)
- Clause 21 (Preparatory expenditure)
- Clause 22 (Regulations)
- Clause 23 (Making regulations under this Act: general provisions)
- Clause 25 (Interpretation)
- Clause 26 (Extent, commencement and short title)

Under SO 29.1(ii) for clauses which modify the legislative competence of the Senedd:

- Clause 2 (Limitation of general implementation of the Northern Ireland Protocol)
- Clause 3 (Other limitations in interpretation of law)
- Clause 4 (Movement of goods (including customs): excluded Protocol provisions)
- Clause 13 (Implementation, application, supervision and enforcement of the Protocol)
- Clause 14 (Provision of the Protocol etc applying to other exclusions)
- Clause 15 (Changes to, and exceptions from, excluded provision)

Remaining clauses that have regard to the non-reserved area of the implementation of international agreements and/or economic development taking account of section 107(6) of the GOWA combined with SO 29.1(i):

- Clause 6 (Customs matters: new law)
- Clause 7 (Regulation of goods: option to choose between dual routes)
- Clause 8 (Regulation of goods: excluded Protocol provision)
- Clause 11 (Regulation of goods: supplementary provision)
- Clause 12 (Subsidy control)
- Clause 18 (Other Ministerial powers)
- Clause 20 (Role of the European Court in court and tribunal proceedings)
- Clause 24 (Regulations relating to tax or customs matters)

19. A full description of each clause, and the associated requirement for an LCM, is available at **Annex 1**.
20. The Explanatory Notes that have been published alongside the Bill set out a table showing the provisions which the UK Government considers engage the legislative consent process. These clauses are included in this Legislative Consent Memorandum as the Welsh Government considers them to be relevant provisions under SO 29.2.

The Welsh Government's position on the Bill as introduced

21. The UK Government has sought consent on the basis that the Bill contains provisions which cover devolved matters. Those clauses for which the UK Government consider that consent is required for are contained within Annex A to the Explanatory Notes to the Bill, as published on 21 July 2022.
22. The Welsh Government has concluded that it is unable to recommend to the Senedd that it gives consent to the Bill as currently drafted. We are recommending withholding consent to the Bill on the following grounds:
 - a. The Welsh Government was not involved in the development of this Bill and does not agree with the rationale for making these provisions. We have repeatedly requested that the UK Government returns to negotiations with the EU to seek an agreed solution to the issues arising from the Protocol.
 - b. Many of the regulation making powers drafted in the Bill are so broad that they lack any real clarity of purpose. This 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 our devolution settlement. In addition, clause 22(6) confers a power on a Minister of the Crown to make regulations that give Devolved Governments any of the regulation making powers conferred by the Bill. This means that Ministers of the Crown may decide not only what powers in the Bill may be exercised by the Welsh Ministers (or another Devolved Government), but also the extent to which those powers may be exercised, whether and how they will be shared with the UK Government or other Devolved Governments and what the scrutiny process would be. There are no restrictions on the powers that could be conferred on the Welsh Ministers (for example to ensure alignment with devolved areas).
23. As outlined above, the Welsh Government considers that the consent of the Senedd is required for the whole Bill (save for clause 1), on the basis that all remaining provisions of the Bill have regard to the non-reserved area of the implementation of international agreements and/or economic development. As such, the above reasons for recommending that consent is withheld apply across the Bill as a whole, and not only to those provisions within the scope of SO 29.

International Obligations

24. The Welsh Government has further concerns about the Bill regarding its potential, if enacted and implemented, to result in a breach of international law.
25. Certain acts of a state would be considered a wrongful act in international law unless there are circumstances that can serve as justification for not conforming with an international obligation. The UK Government is seeking to rely on the international law doctrine of 'necessity' to justify its "non-

performance” of international obligations under both the Protocol and the Withdrawal Agreement, as envisaged by the Bill.⁶ However, necessity is a very controversial way of escaping international obligations, and as such is interpreted extremely restrictively by the courts.

26. Notable legal scholars⁷ have commented that the UK Government’s international law defence of necessity for its breaching of international obligations is weak.
27. Unless the UK Government can successfully justify the “non-performance” of some of the obligations under the Protocol which, on the basis of the information available to us, appears doubtful, then the Bill will place the UK in breach of its international treaty obligations. Ultimately, it would be a matter for the CJEU to determine whether the requirements for the defence of necessity are justified if infringement proceedings are initiated by the EU, based on the evidence put forward by the UK Government at such time.
28. On such matters, which should be decided by the Courts and are clearly still developing, it is not for the Welsh Ministers to agree a course of action until the defence of necessity, which the UK Government deploys for this Bill, is fully explored and is the subject of a ruling.
29. As such, the Welsh Government is unwilling to recommend consent to a Bill that has the potential to breach international law on an unjustifiable basis. Relevant to this conclusion is the Ministerial Code⁸ that Welsh Ministers follow, which states that “*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.*” Consequently, recommending consent to this Bill could call into question Ministers’ adherence to the Code, particularly with regard to how the Welsh Ministers could exercise any regulation making powers (if conferred upon them) under the Bill in compliance with international obligations.

Financial implications

30. The financial implications will be associated with the consequences of implementing the provisions in the Bill and primarily relate to operations at ports, which will mainly be in Northern Ireland. However, there will be implications for Welsh ports directly operating in conjunction with Northern Irish ports. The cost implications are unknown.

⁶ [Northern Ireland Protocol Bill: UK government legal position - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/northern-ireland-protocol-bill-uk-government-legal-position)

⁷ Jonathan Jones KC – Ex-head of UK Government Legal Department – 13 June - “*It’s a quite extraordinary Bill. Goes much further than 2020 Internal Market Bill. Turns off/neutralises great chunks of the Protocol - customs rules, state aids, role of ECJ, enforcement, implementation, dispute resolution provisions.*” <https://twitter.com/SirJJQC/status/1536417826034130945>

Mark Elliott – Professor of Public Law, University of Cambridge – 14 June – “*Since I am not an international lawyer, I will venture no firm opinion on whether the bar of necessity, as it is understood in this context, is cleared by the UK Government’s arguments concerning Northern Ireland. It does, however, appear highly doubtful — and that is putting it mildly — whether the ‘grave and imminent peril test’ is satisfied.*” <https://constitutionallawmatters.org/2022/06/the-northern-ireland-protocol-bill/>

⁸ [Ministerial code | GOV.WALES](https://www.gov.uk/government/publications/ministerial-code)

31. Clause 21 also provides that a Minister of the Crown, government department, or devolved authority (which includes the Welsh Ministers) may incur expenditure for the purpose of, or in connection with, preparing for anything about which regulations under the Bill may make provision before any such provision is made.
32. There will be financial implications for the Welsh Government to resource and respond to the new arrangements to check goods. These are also unknown and will only become known as the functions of the Bill begin to become operational. It is, however, not known how this potential expenditure will be financed and this is of concern to the Welsh Government if there is to be a financial implication which is to be resourced out of routine Welsh Government funding.

Conclusion

33. For the above reasons, the Welsh Ministers recommend withholding consent for the Northern Ireland Protocol Bill.

Vaughan Gething MS
Minister for Economy
29 September 2022

Annex 1

Provisions of the Northern Ireland Protocol Bill for which consent is required

Under SO 29.1(i) for clauses within legislative competence of the Senedd:

- Clause 5 (Movement of goods: new law about matters other than customs)
 - Clause 9 (Regulation of goods: new law)
 - Clause 10 (Meaning of “regulation of goods”)
 - Clause 16 (Additional excluded provision: new law)
 - Clause 17 (Value added tax, excise duties and other taxes: new law)
 - Clause 19 (New agreements amending or replacing the Northern Ireland Protocol)
 - Clause 21 (Preparatory expenditure)
 - Clause 22 (Regulations)
 - Clause 23 (Making regulations under this Act: general provisions)
 - Clause 25 (Interpretation)
 - Clause 26 (Extent, commencement and short title)
1. **Clause 5** confers a power to allow a Minister of the Crown to make ‘new law’ in relation to the movement of goods, in connection with those provisions of the Protocol that have been excluded under clause 4. This clause enables a Minister of the Crown to make provision for UK and EU destined goods to be distinguished, for example by providing for different requirements as to the checks and controls that will apply in respective cases.
 2. Subsection (1) provides that a Minister of the Crown may, by regulations, make *‘any provision which the Minister considers appropriate in connection with any provision of the Protocol to which clause 4 relates’*.
 3. Subsection (2) clarifies that subsection (1) cannot be used to make provision about customs matters, which are instead covered by clause 6.
 4. Subsection (3) sets out a non-exhaustive list of what regulations made under subsection (1) may include.
 5. The power conferred under this clause is extremely wide in scope and may well include devolved areas. For instance, although the regulation of imports and exports is a reserved matter under paragraph 71 of schedule 7A GOWA, there are exceptions to this reservation which ensure that the Senedd is able to regulate the movement into and out of Wales of things listed for reasons connected with the exercise of functions within areas of devolved competence, such as environmental protection.
 6. Once clause 4 disapplies those elements of the Protocol relating to the movement of goods from section 7A of EUWA (in conjunction with clause 2), then the Senedd would have competence to legislate within devolved areas included within the scope of this power.

7. Therefore, consent is required under SO 29.1(i), as this provision is within the legislative competence of the Senedd to the extent that it applies to devolved areas.
8. **Clause 9**(1) confers a power to allow a Minister of the Crown to make ‘*any provision about regulation of goods which the Minister considers appropriate in connection with the Protocol*’, including modifying a UK or EU regulatory route made available under clause 7.
9. Subsection (2) clarifies that these regulations can be used in connection with the operation of the UK or EU regulatory routes and can also be used to amend clauses 7 and 8.
10. Once again, the power conferred under this clause is extremely wide in scope and may well include devolved areas. While paragraph 72(a) of Schedule 7A GOWA reserves the regulation of the sale and supply of goods and services to consumers, and various reservations relating to product standards, safety and liability are also contained within paragraphs 77-80 of Schedule 7A GOWA, there is an exception to ensure that the Senedd continues to have competence in relation to food safety (including packaging and other materials which come into contact with food) and the protection of interests of consumers in relation to food, agricultural and horticultural produce, animals and animal products, seeds, animal feeding stuffs, fertilisers and pesticides. As such, the Senedd would have competence to legislate in areas of devolved competence.
11. Once clause 4 disapplies those elements of the Protocol relating to the movement of goods from section 7A of EUWA (in conjunction with clause 2), then the Senedd would have competence to legislate within devolved areas included within the scope of this power.
12. Therefore, consent is required under SO 29.1(i), as this provision is within the legislative competence of the Senedd to the extent that it applies to devolved areas.
13. **Clause 10** provides definitions in relation to the “regulation of goods”, for the purpose of the Bill, which including clause 9. To the extent that clause 9 is within competence as outlined above, this clause is also within competence, and consent is required under SO 29.1(i),
14. **Clause 16** provides a power for a Minister of the Crown to make ‘*any provision which the Minister considers appropriate in connection with additional excluded provision*’, being provisions of the Protocol or Withdrawal Agreement, which become ‘excluded provision’ by virtue of the powers in clause 15.
15. The power within clause 16 is extremely broad, essentially to make ‘new law’ in connection with any additional provision of the Protocol that has been made “excluded provision” pursuant to clause 15 of the Bill. This power could be exercised in an area of devolved competence where the Senedd would have

competence to legislate, for instance, health, agriculture. Therefore, consent is required under SO 29.1(i), as this provision is within the legislative competence of the Senedd to the extent that it applies to devolved areas.

16. **Clause 17(1)** provides that the Treasury may make any provision related to VAT and excise duties, and any other taxes, which it considers appropriate in connection with the Protocol.
17. Subsection (2) clarifies that the Treasury may use this power in particular where doing so is necessary to lessen, eliminate, or avoid differences in VAT, excise duty or other taxes between Northern Ireland and Great Britain.
18. While paragraph 15 of Schedule 7A GOWA reserves fiscal, economic and monetary policy, including taxes and excise duties, there is an exception for devolved taxes and local taxes. Although there appears to be a focus on a UK-wide measures called out in the explanatory notes, the power provided to the Treasury is so wide in its scope, for instance 17(1)(c) extends to “any other tax”, which when read alongside clause 17(2)(c) could have the potential to extend to local and/or devolved taxes, which are within the legislative competence of the Senedd.
19. Consent is required under SO 29.1(i), as this provision is within the legislative competence of the Senedd to the extent that it applies to local and/or devolved taxes.
20. **Clause 19** provides that a Minister of the Crown may, by regulations, make appropriate provision to implement a new agreement with the EU which amends or replaces the Protocol.
21. While international relations are a reserved matter under paragraph 10(1) of Part 1 of Schedule 7A of GOWA, observing and implementing international obligations is not, pursuant to paragraph 10(3)(a) of Part 1 of Schedule 7A of GOWA.
22. As such, consent is required under SO 29.1(i), as this provision is within the legislative competence of the Senedd to the extent that it applies to the implementation of an international agreement.
23. **Clause 21** provides that a Minister of the Crown, government department, or devolved authority (which includes the Welsh Ministers) may incur expenditure for the purpose of, or in connection with, preparing for anything about which regulations under the Bill may make provision before any such provision is made. This clause is so broadly drafted it does not appear to matter whether Welsh Ministers actually have a regulation making power under the Bill; it may still be able to fall within this clause so as to justify incurring expenditure. The explanatory notes reflect that: ‘*Clause 21 provides that Ministers of the Crown, government departments, or devolved authorities may properly incur expenditure in preparation for action undertaken under this Bill, for the making of statutory instruments under this Bill, or under other Acts or statutory instruments as modified by or under this Bill*’ (emphasis added).

24. Consent is required under SO 29.1(i), as this provision is within the legislative competence of the Senedd to the extent that regulation making powers within the Bill are within the legislative competence of the Senedd.
25. **Clause 22** sets out the general scope and nature of the regulation making powers conferred by the Bill.
26. Subsection (1) confirms that regulations under this Bill can make any provision that can be made by an Act of Parliament; this includes amending this Bill or making retrospective provision.
27. Subsection (6) provides that a Minister of the Crown may, by regulations, make the other powers under this Bill exercisable exclusively, concurrently or jointly with Devolved Authorities (which includes the Welsh Ministers), and may provide for scrutiny of said regulations. As has been noted above, many of the regulation making powers provided to Ministers of the Crown within the Bill are wide in scope they could fall within devolved areas. It is also not clear what regulation making powers might be 'sub-delegated' to the Welsh Ministers under clause 22(6), or whether this would include matters considered to be within legislative competence only or might be used to confer executive functions which protrude beyond the boundaries of legislative competence.
28. Consent is required under SO 29.1(i); to the extent that any regulation making powers within the Bill are within the legislative competence of the Senedd, it would similarly be within competence to set out the scope and nature of such powers.
29. **Clause 23** sets out the process and parliamentary procedure for the regulations made under the Bill. Consent is required under SO 29.1(i); to the extent that any regulation making powers within the Bill are within the legislative competence of the Senedd, it would similarly be within competence to set out the scrutiny procedure for such regulations.
30. **Clause 25** sets out the defined terms which are used in the Bill. Consent is required under SO 29.1(i); to the extent that these definitions apply to clauses within the Bill within the scope of SO 29, this clause would also require consent.
31. **Clause 26** makes a number of final provisions in the Bill, relating to extent, commencement and short title.
32. Consent is required under SO 29.1(i); to the extent that this clause provides for the commencement of other clauses in the Bill which require consent, this clause would also require consent.

Under SO 29.1(ii) for clauses which modify legislative competence of the Senedd:

- Clause 2 (Limitation of general implementation of the Northern Ireland Protocol)

- Clause 3 (Other limitations in interpretation of law)
- Clause 4 (Movement of goods (including customs): excluded Protocol provisions)
- Clause 13 (Implementation, application, supervision and enforcement of the Protocol)
- Clause 14 (Provision of the Protocol etc applying to other exclusions)
- Clause 15 (Changes to, and exceptions from, excluded provision)

33. **Clauses 2 and 3** allow the rest of the Bill to take effect.

34. Clause 2 removes the effect (in domestic law) of ‘excluded provisions’ of the Protocol and of the Withdrawal Agreement, which are currently given effect by section 7A of EUWA.

35. Subsections (1) states that section 7A of EUWA does not apply to rights, powers, liabilities, obligations and restrictions, or remedies or procedures which are created or arise under any ‘excluded provision’ of the Protocol and Withdrawal Agreement. Subsection (2) states that such rights etc will not be recognised or enforced in domestic law. Essentially, these clauses combined mean that excluded provisions of the Protocol will no longer have direct effect or supremacy. Subsection (3) amends section 7A of EUWA to reflect this.

36. Clause 3 has an ancillary function to clause 2, limiting section 7C of EUWA that would otherwise require domestic courts to interpret domestic law in light of relevant separation agreement law (as indicated above, the Withdrawal Agreement, EEA-EFTA Separation Agreement and Swiss Citizens’ Rights Agreement).

37. Sections 7A and 7C of EUWA are protected enactments under paragraph 5 of Schedule 7B of GOWA. Therefore, the Senedd does not have competence to legislate in this area. However, to the extent that these clauses alter the effect that sections 7A and 7C currently have on the legislative competence of the Senedd, then the Bill can be said to modify the legislative competence of the Senedd. For instance, as Welsh legislation will no longer have to be read so as to give direct effect and supremacy to excluded provision of the Protocol within devolved areas, then legislative competence in is modified.

38. Welsh Ministers have a number of functions in relation to the implementation of the Protocol in areas of devolved competence. To seek to modify the way in which such functions, in relation to matters within the legislative competence of the Senedd are exercised, by excluding certain provision of the Protocol from section 7A and 7C EUWA, also therefore modifies the executive competence of the Welsh Ministers.

39. Therefore, consent is required under SO 29.1(ii) for clauses 2 and 3, as this provision modifies the legislative competence of the Senedd and the executive competence of the Welsh Ministers.

40. **Clause 4(1)** provides that parts of Article 5.1 and Article 5.2 of the Protocol (which set out that customs duties would only be due on goods entering

Northern Ireland that were “at risk” of entering the EU) are excluded provision, thus disapplying their effect in domestic law.

41. Subsection (2) sets out that Articles 5.3 and 5.4 of the Protocol (customs legislation applicable to and in the United Kingdom in respect of Northern Ireland, and provisions of EU law that are applicable to and in the United Kingdom in respect of Northern Ireland) are excluded provision so far as they relate to “qualifying movements” of UK or non-EU destined goods (defined in clause 4(4)). Subsection (2) as a whole, therefore, removes customs requirements, tariffs, and certain regulatory requirements such as SPS controls on “qualifying movements” including those from Great Britain into Northern Ireland.
42. The Senedd does not have legislative competence to exclude provisions of the Protocol (as it would first be necessary to also override section 7A of EUWA, which cannot be done in an Act of the Senedd as outlined at clauses 2 and 3 above due to EUWA being a protected enactment), and also when considering that the regulation of international trade and international relations are reserved matters under paragraph 10(1) of schedule 7A GOWA.
43. However, these provisions provide for the movement of goods between the United Kingdom and Northern Ireland, and touch on matters within devolved competence. For example, while the regulation of imports and exports is a reserved matter under paragraph 71 of schedule 7A GOWA, there are exceptions to this reservation which ensure that the Senedd is able to regulate the movement into and out of Wales of things listed for reasons connected with the exercise of functions within areas of devolved competence, such as protection of animal or plant health or the environment. As such, to the extent that the effect that sections 7A and 7C EUWA currently have on devolved competence will be removed for “excluded provision”, then this clause (when read with clauses 2 and 3) can be said to modify both legislative and executive competence within devolved areas.
44. Consent is required under SO 29.1(ii), as this provision modifies the legislative competence of the Senedd and the executive competence of the Welsh Ministers.
45. **Clause 13** removes the jurisdiction of the CJEU in the UK in relation to the Protocol and related provisions in the Withdrawal Agreement and sets out that articles 12.2 and 12.3 of the Northern Ireland Protocol are “excluded provision”. While the Senedd does not have legislative competence to exclude provisions of the Protocol (as further explained at clauses 2,3 and above), to the extent that the effect that sections 7A and 7C currently have on devolved competence will be removed with regard to “excluded provision”, this clause (when read with clauses 2 and 3) can be said to modify legislative competence within devolved areas.
46. Consent is required under SO 29.1(ii), as this provision modifies the legislative competence of the Senedd.

47. **Clause 14** disapplies parts of the Protocol and Withdrawal Agreement that relate to other “excluded provisions” and provides a power to a Minister of the Crown to make any provision considered appropriate in connection with any provision of the Protocol and other parts of the Withdrawal Agreement to which this section relates. As such, to the extent that the effect that sections 7A and 7C EUWA currently have on devolved competence will be removed for “excluded provision”, then this clause (when read with clauses 2 and 3) can be said to modify both legislative and executive competence within devolved areas
48. Consent is required under SO 29.1(ii), as this provision modifies the legislative competence of the Senedd and the executive competence of the Welsh Ministers.
49. **Clause 15** confers a broad power for a Minister of the Crown to make regulations that make other parts of Protocol or the Withdrawal Agreement excluded provision (apart from articles of the Protocol on individual rights, the common travel area and North–South cooperation), if considered necessary, for a range of ‘permitted purposes’. These permitted purposes include devolved matters, such as safeguarding animal, plant or human welfare or health, safeguarding the environment. As such, to the extent that the effect that sections 7A and 7C EUWA currently have on devolved competence will be removed for “excluded provision”, then this clause (when read with clauses 2 and 3) can be said to modify both legislative and executive competence within devolved areas.
50. Consent is required under SO 29.1(ii), as this provision modifies the legislative competence of the Senedd and the executive competence of the Welsh Ministers.

Provisions which have regard to devolved matters given the impact on economic development and/or implementation of international agreements for which the consent of the Senedd consent is required by virtue of section 107(6) GOWA 2006:

- Clause 6 (Customs matters: new law)
 - Clause 7 (Regulation of goods: option to choose between dual routes)
 - Clause 8 (Regulation of goods: excluded Protocol provision)
 - Clause 11 (Regulation of goods: supplementary provision)
 - Clause 12 (Subsidy control)
 - Clause 18 (Other Ministerial powers)
 - Clause 20 (Role of the European Court in court and tribunal proceedings)
 - Clause 24 (Regulations relating to tax or customs matters)
51. **Clause 6** provides that the Treasury or HMRC may, by regulations, make any provision about customs matters, including duties and the administration and enforcement of customs, which they consider appropriate in connection with the Protocol.

52. It is not considered that this provision would fall within the legislative competence of the Senedd, noting in particular that paragraph 15 of Schedule 7A GOWA reserves fiscal, economic and monetary policy, including taxes and excise duties (with the exception of devolved taxes and local taxes).
53. However, taking account of section 107(6) of the GOWA, this provision has regard to devolved matters, given the impact on the non-reserved area of economic development and/or implementation of international agreements, and therefore the consent of the Senedd is required.
54. **Clause 7** introduces a dual regulatory regime in Northern Ireland for regulated classes of goods to which any provision of Annex 2 of the Northern Ireland Protocol applies. **Clause 8** provides that the relevant provisions of Article 5.4 of, and Annex 2 to, the Northern Ireland Protocol are disapplied to the extent that they would prevent the choice of regulatory routes set out in clause 7 having effect. **Clause 11** supplements clause 7 and confers a power on UK Ministers to make regulations about the application of clause 7.
55. It is not considered that these provisions would fall within the legislative competence of the Senedd. The Senedd does not have legislative competence to exclude provisions of the Protocol (as already outlined at clause 4 above). In addition, the overarching purpose of these provisions is the regulation of goods in Northern Ireland, and the regulation of international trade and international relations are reserved matters under paragraph 10(1) of schedule 7A GOWA.
56. However, taking account of section 107(6) of the GOWA, this provision has regard to devolved matters, given the impact on the non-reserved area of economic development and/or implementation of international agreements. In addition, many of the regulated goods affected by these provisions may be of direct relevance to devolved areas (for instance, health, agriculture). Therefore, the consent of the Senedd is required.
57. **Clause 12** brings Northern Ireland under the UK's new subsidy control regime, rather than the EU's state aid regime with respect to trade in goods.
58. It is not considered that this provision would fall within the legislative competence of the Senedd. Subsidy control is a reserved matter under section C18 of Schedule 7A to GOWA 2006 (distortive or harmful subsidies).
59. However, taking account of section 107(6) of the GOWA, this provision has regard to devolved matters, given the impact on the non-reserved area of economic development, and therefore the consent of the Senedd is required.
60. **Clause 18** permits a Minister of the Crown to "engage in conduct" in relation to matters dealt with in the Protocol considered appropriate to do so in connection with one or more of the purposes of the Bill. It is not considered that this provision would fall within the legislative competence of the Senedd. The primary purpose of the provision is conduct in relation to any matter dealt with in the Protocol, and as such "relates to" the reserved matter of international trade and/or international relations (section 108A(2)(c)).

However, the lack of clarity as to what such 'conduct' entails makes the potential implications for devolved areas hard to predict.

61. Taking account of section 107(6) of the GOWA, this provision has regard to devolved matters, given the impact on the non-reserved area of economic development and/or implementation of international agreements, and possibly other devolved areas due to the scope of the provision, and therefore the consent of the Senedd is required.
62. **Clause 20** makes provision regarding the effect in domestic law of rulings of the CJEU, by providing that, in proceedings related to (i) the Protocol; (ii) related provisions of the Withdrawal Agreement; or (iii) domestic law relating to Protocol or related provisions of the Withdrawal Agreement, UK courts are not bound by decisions of the CJEU and cannot refer matters to the CJEU.
63. It is not considered that this provision would fall within the legislative competence of the Senedd. The primary purpose of the provision is international trade and/or international relations; and the single legal jurisdiction of England and Wales, which are reserved matters under paragraphs 10(1) and 8(1) of schedule 7A GOWA respectively.
64. However, taking account of section 107(6) of the GOWA, this provision has regard to devolved matters, given the impact on the non-reserved area of economic development and/or implementation of international agreements, and possibly other devolved areas due to the scope of the provision, and therefore the consent of the Senedd is required.
65. **Clause 24** relates to tax or customs regulations under the Bill.
66. It is not considered that this provision would fall within the legislative competence of the Senedd, for the same reasons outlined at clause 6 above.
67. However, taking account of section 107(6) of the GOWA, this provision has regard to devolved matters, given the impact on the non-reserved area of economic development and/or implementation of international agreements, and therefore the consent of the Senedd is required.