

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

November 2022

## Introduction

1. On 29 September 2022 the Welsh Government laid a Legislative Consent Memorandum (LCM) on The Northern Ireland Protocol Bill (the “Bill”) before the Senedd. The Business Committee referred the LCM to the Economy, Trade and Rural Affairs Committee, the Culture, Communications, Welsh Language, Sport, and International Relations Committee, and the Legislation, Justice and Constitution Committee, on 4 October 2022 with a reporting deadline of 7 November 2022.
2. As this LCM has been referred to three Committees, this report will focus on the elements of the LCM which fall within this Committee’s remit. Specifically the economy and international trade.

## Background of the Bill

3. The Bill was introduced in the House of Commons on 13 June 2022. It is sponsored by the Foreign, Commonwealth and Development Office. The long title states the Bill is 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”*.

## Timing of the LCM and reporting deadline

4. The LCM was laid over 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 Gethin 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.** Delyth Jewell MS, Chair of the Culture, Communications, Welsh Language, Sport, and International Relations Committee, wrote to the Llywydd, in her capacity as Chair of the Business Committee, to request an extension to the reporting deadline to give her Committee time to take evidence from a Minister on the matter. However on 25 October the Llywydd responded noting that:

*Unfortunately, on the basis that a debate on the LCM has been scheduled by the Government in Plenary on 8 November as a result of the timetable for the Bill at Westminster, Business Committee concluded that it is currently not possible for the reporting deadline to be extended past 7 November. However, the Trefnydd indicated that, should the timetable for the Bill in the UK Parliament change, the Government would be willing to revisit the timetable for scrutiny of the LCM.*

## Overview of the Bill

**6.** The Protocol on Ireland and Northern Ireland forms part of the UK-EU Withdrawal Agreement. The LCM describes the protocol as setting 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."*

**7.** The LCM notes the UK Government's stated policy objective for the Bill is to *"solve problems arising from the Protocol which include trade disruption and diversion, significant costs and bureaucracy for traders and areas where people in Northern Ireland have not been able to benefit fully from the same advantages as those in the rest of the United Kingdom"*. The UK Government's explanatory notes to the Bill sets out that *"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."*

**8.** The LCM states that since 2020, the UK Government has said the Protocol creates unacceptable barriers to trade within the UK internal market and has been seeking changes. The LCM goes on to say the EU disagreed with this view and published its own proposal to reduce the level of checks and controls, subject to a number of conditions and safeguards. Despite their differences, the UK and EU agree that the Protocol has led to issues in Northern Ireland and they want a resolution.

### **Provisions which require consent**

**9.** The Bill's Explanatory Notes contain a table illustrating the provisions which the UK Government considers requires the Senedd's consent. The table states Senedd consent is required in respect of clauses 2-5, 9, 13-16, 19 and 21-22.

**10.** In the LCM, Welsh Government agrees consent is required for the clauses set out above. The LCM additionally states Welsh Government view clauses 6-8, 10-12, 17-18, 20 and 23-26 as requiring consent. The end result is Welsh Government believe every clause in the Bill save for clause 1 (a non-operative overview provision) requires consent. Senedd Legal Services consider that all clauses of the Bill require consent, save for clauses 1 and 12 (which relates to the subsidy control regime in Northern Ireland).

**11.** As noted above, this LCM is being considered by three Committees and as such this report will focus on the clauses relating to the economy and trade. Below is a brief summary of those provisions.

**12.** Clause 4 disapples the Protocol's requirements for the movement of goods and customs into Northern Ireland and gives UK Ministers powers to change this approach.

**13.** Clause 5 empowers UK Ministers to legislate for new movement of goods rules.

**14.** Clause 6 empowers HMRC and HM Treasury to make new laws regulating customs matters.

**15.** Clauses 7-11 establishes new rules for the regulation of goods. They:

- provide the option to choose between compliance with UK or EU regimes, or both (referred to by the UK Government as green or red routes);
- disapply the Protocol where it conflicts with this new dual regulatory regime;

- give Ministers new powers to legislate for the regulation of goods in connection with the Protocol; and
- define 'regulation of goods' broadly and give Ministers powers to change this definition.

## Financial implications

**16.** The LCM states that implementing the Bill will impact Welsh ports which directly operate in conjunction with ports in Northern Ireland. However it states that the implications of this are unknown.

**17.** The LCM notes that there will be *"financial implications for the Welsh Government to resource and respond to the new arrangements to check goods."* It goes on to say these costs will only become known as the functions of the Bill become operational and that the Welsh Government are concerned that this unknown cost may need to be resourced from routine Welsh Government funding.

**18.** The LCM also notes that devolved authorities (which includes the Welsh Ministers) may incur expenditure under Clause 21 of the Bill for the purposes of, or in connection with *"preparing for anything about which regulations under the [Bill] may make provision"*.

## The Welsh Government's position on the Bill and legislative consent

**19.** The LCM recommends the Senedd withhold consent to the Bill on a number of grounds.

**20.** The Welsh Government has set out its disquiet around the Bill both in a written statement which was issued on 29 September 2022 and in the LCM. In the written statement the Minister for Economy said *"The Bill was introduced without any prior engagement with the Devolved Governments and contains provisions which initiate the legislative consent process."* The LCM and the written statement both raise concerns about the *"underlying rationale for the Bill"*.

**21.** The LCM states the Welsh Government 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"*. 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"*.

**22.** The LCM 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".*

**23.** The LCM also states *"Welsh Government is unwilling to recommend consent to a Bill that has the potential to breach international law"*. In this context, the alleged breach of international law is the non-performance of international obligations agreed in the Withdrawal Agreement and related legislation.

**24.** 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 likelihood of a successful use of the defence of necessity in the current circumstances as *"weak"*.

**25.** Connected to the potential breach of international law alleged in the LCM, the Welsh Government raises concerns that recommending consent for the Bill could call into question their adherence 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.*

## Delegated Powers

**26.** Clause 22 sets out the scope and nature of the delegated powers contained in the Bill:

- Subsection (1) confirms that regulations under this Bill may make any provision that can be made by an Act of Parliament; this includes amending this Bill or making retrospective provision.
- Subsection (2) gives further non-exhaustive examples of what regulations under this Bill may do, including making provision notwithstanding that provision's incompatibility with the Protocol or any other part of the Withdrawal Agreement.

**27.** As drafted, the Bill gives no delegated powers to the Welsh Ministers directly. Clause 22(6) provides that powers may be delegated if a Minister of the Crown decides to do so by regulation.

**28.** The scope for Welsh Government or Senedd involvement in the scrutiny of any delegated powers is very limited. The Bill does not currently give Welsh Ministers any power of veto if the Minister of the Crown decided to exercise their delegated power exclusively. The Bill also gives

no guaranteed role for the Senedd in scrutiny of future regulations unless the Minister of the Crown decides to allow such scrutiny.

## The Committee's view

**29.** The Committee considered this LCM at its meeting on 27 October 2022. The Bill was introduced in the UK Parliament on 13 June however the LCM was not remitted to this Committee until 4 October 2022 with a reporting deadline of 7 November. This gave the Committee less than four sitting weeks to consider the Bill. As such the timetable for scrutiny of this LCM did not give Members sufficient time to arrange and take evidence on the matter, so the Committee is limited in the conclusions it can draw.

**30.** Members also find it hard to come to firm conclusions as the Bill itself creates uncertainty. The Bill as introduced allows UK Government Ministers to make future unspecified changes to the operation of the Protocol in domestic law. As such it is impossible for Members to draw conclusions on the impact of this Bill on Welsh trade or Wales' economy.

**31.** Members are concerned about the financial implications of the Bill. The LCM sets out that the Bill will create additional unspecified costs, particularly in relation to Welsh ports. Members share the Welsh Government's concern that both the level of additional costs, and how the burden of them will fall, are unknown.

**32.** Whilst Members have not had enough time to take the evidence they would need to fully assess the Bill's potential impact, the Committee believes that retaining a good trading relationship between the UK, Ireland and the rest of the EU is important for the Welsh economy. As such Members were concerned to see warnings of a "*trade war*" in the Welsh Government's written statement on the Bill. Members strongly believe that all parties involved in the negotiations around the Protocol must work hard to avoid that outcome and urgently seek a negotiated solution. We note that this has been described as the preferred option for both the UK and EU.

**Conclusion 1.** . The Bill, if enacted, would result in changes to the Protocol's operation in domestic law and enable UK or Welsh Ministers to make future changes that are currently unknown. For this reason, Members are unable to draw conclusions on the full impact of the Bill on the Welsh economy. The UK Government should provide clarity on the intended use of the powers conferred to Ministers under this Bill to assist our understanding of its potential impact.

**Conclusion 2.** The Welsh Government's LCM explains that the Bill will incur unknown costs, particularly in relation to Welsh ports, and that it is unknown how these will be funded. Members share the concerns of the Welsh Government in this regard. The UK Government

should provide clarity on the financial impact of this Bill, including confirming whether the Welsh Government would receive additional funding to cover implementing its requirements or if they would be expected to finance this from existing budgets.

**Conclusion 3.** Members urge all parties to urgently seek a negotiated solution to the issues raised by the Protocol.

**Conclusion 4.** The Welsh Government's LCM was laid in the Senedd 15 weeks after the Bill's introduction in the UK Parliament on 13 June 2022. It was remitted to this Committee on 4 October 2022 with a reporting deadline of 7 November 2022 less than four sitting weeks later. While Members understand the need for thorough consideration of the Bill by the Welsh Government, this delay has meant that the Senedd has a severely reduced timetable to fully consider the Bill. As a result, the Committee did not have enough time to take evidence and make a recommendation as to whether or not the Senedd should agree a legislative consent motion for the Northern Ireland Protocol Bill.