



HM Government

UK Government Legal Position: The Windsor Framework

27 February 2023

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Background

Following the referendum and the democratic decision of the people of the United Kingdom to leave the European Union, several years of negotiations culminated in the conclusion of the Withdrawal Agreement between the UK and EU, which included the Northern Ireland Protocol. The Protocol aimed to protect the integral position of Northern Ireland within the United Kingdom and the Belfast (Good Friday) Agreement. The European Union (Withdrawal Agreement) Act was enacted by Parliament in 2020 and the Withdrawal Agreement and Protocol thereby given effect in UK law.

The Protocol has never been fully implemented, but even its partial implementation has created significant problems in Northern Ireland and, separately, between the UK and the EU. Against that background, the UK sought in its July 2021 Command Paper to set out proposed new arrangements with the EU in order to resolve these difficulties. The “standstill” arrangements have operated in the period since, but were not intended as a permanent arrangement and significant elements remain subject to extant infraction proceedings. When a new agreement could not be found with the EU, the Government introduced draft primary legislation in the form of the Northern Ireland Protocol Bill to set out its solution, although it was clear that the preference remained a negotiated outcome.

The Northern Ireland Protocol Bill

The legal justification for the Northern Ireland Protocol Bill was summarised in a statement on 13 June 2022. The Government set out that the Bill would be justified through invocation of the international law doctrine of necessity without prejudice to the right to take safeguarding measures under Article 16 of the Protocol.

The doctrine of necessity provides a clear, temporary basis in international law to justify the non-performance of international obligations in certain exceptional circumstances. It can only ever be a temporary basis while the situation of necessity persists and the stringent conditions for its invocation are met. These include that the course of action is the “only way” to address a “grave and imminent peril” to an “essential interest” of the state, and that the state invoking it cannot have contributed to that situation. Moreover, the invoking state continues to be bound by international obligations and may be liable to pay compensation for its non-performance of the obligations to which it agreed, even if the situation of necessity is upheld. The Bill would leave the jurisdiction of the European Court of Justice unaffected in international law, meaning its judgments would remain binding at the international level on the United Kingdom.

At the time of introduction of the Northern Ireland Protocol Bill, the Government considered the situation in Northern Ireland to justify invocation of necessity and that the conditions for its exercise were met. In particular, because discussions with the EU had failed to lead to the prospect of comprehensive and commonly acceptable solutions capable of addressing the full range of issues and generating sustained arrangements, the Government considered that there was no other way of temporarily safeguarding the essential interests at stake than through the Northern Ireland Protocol Bill. At that time, the UK urged the EU to negotiate arrangements which could address the full range of issues, and stated that its “clear preference remains a negotiated solution with the EU to address the situation of necessity that has arisen.”

The Windsor Framework

The Windsor Framework is an international arrangement between the UK and the EU under which the parties commit to binding international law obligations, including changes to the Protocol itself. The UK and EU have made clear in the Political Declaration accompanying the Windsor Framework that the amended Protocol is governed by the Vienna Convention on the Law of Treaties.

The Windsor Framework addresses the Government's position as set out in the July 2021 Command Paper. It respects the Act of Union and the Belfast (Good Friday) Agreement and deals with the everyday issues people and businesses in Northern Ireland had faced as a result of the operation of the Protocol. The proposed measures are fully aligned with and advance the UK's commitments and responsibilities under the Belfast (Good Friday) Agreement and the Act of Union, 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.

An agreement between the parties in this way provides for a durable and secure basis both to safeguard the Belfast (Good Friday) Agreement and ensure respect for the Act of Union, as opposed to reliance on domestic primary legislation that would be temporary; only justified by a basis in the doctrine of necessity that would have to be continually under review; and which would be exposed to litigation in arbitration proceedings or before the Court of Justice of the EU.

Effect of the Windsor Framework on the Northern Ireland Protocol Bill

As envisaged by the UK Government in June 2022, given the terms of the Windsor Framework and the clear availability of a durable negotiated solution, there would now be no legal justification for enacting the Northern Ireland Protocol Bill. With the Windsor Framework, implemented as envisaged, the Bill will no longer be the "only way" in which the issues caused by the previous Protocol arrangements can be resolved. This statement and this assessment is without prejudice to any future situation which may arise, or the UK's rights under international law to protect its interests.