



**UK TRADE & BUSINESS  
COMMISSION**



# NORTHERN IRELAND PROTOCOL BILL EVIDENCE IN BRIEF



# NORTHERN IRELAND PROTOCOL BILL

The UK Trade and Business Commission's hearing on the Northern Ireland Protocol Bill took place on the 7th July 2022.

## Introduction

In this session, the Commission took evidence on the political and legal implications of the Northern Ireland Protocol Bill. This Bill proposes to unilaterally reverse many of the provisions contained in Articles of the Northern Ireland Protocol that the UK jointly agreed with the EU just two years ago.

Witnesses provided evidence highlighting the effect the Bill is having on the UK's international reputation, while also offering comment on how the Bill could have damaging economic consequences for Northern Ireland and Great Britain.

## Key Recommendations

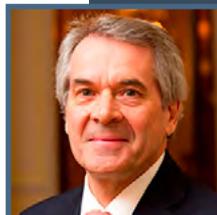
- 1 The Northern Ireland Protocol Bill threatens the foundation of the UK's Brexit agreement with the EU. Collapsing this agreement will increase prices for British people even more.
- 2 Unilaterally overriding the Northern Ireland Protocol will cause lasting damage to the UK's international reputation, diplomatic efforts and damage the prospect of future trade deals.
- 3 UK threats to renege on the Brexit deal could be used by authoritarian states to justify their own breaking of international law.
- 4 The UK Government should focus on rebuilding trust with the EU, and reach a negotiated solution. This is not possible with the Northern Ireland Protocol Bill on the table.
- 5 A caretaker Government should not be pursuing a Bill of such consequence to the UK's international standing and economy.

## SESSION WITNESSES



**Professor Katy Hayward**

Professor of Political Sociology  
Queen's University Belfast



**Sir Peter Westmacott KCMG, LVO**

Former UK Ambassador to the  
United States



**Martijn de Grave**

Special Adviser for the UK  
Office of Maroš Šefčovič



**Anton Spisak**

Senior Fellow  
Tony Blair Institute



**Professor Catherine Barnard**

Professor of EU, Employment and  
Competition Law  
University of Cambridge



**Frankie Devlin**

Resident Partner  
KPMG

# 1 THE LEGALITY OF THE BILL

One of the biggest issues is regarding the legality of the Northern Ireland Protocol Bill. The Bill unilaterally reverses an international agreement that the UK freely entered into only two years ago.

The UK Government has attempted to justify this under the 'Doctrine of Necessity', a legal argument which posits that breaches of international

agreements are justified if one party's vital interests are at grave risk of being jeopardised.

The Commission's witnesses examined this justification, largely concluding that the Bill constitutes a breach of international law and that the Doctrine of Necessity justification does not hold.

## KEY FINDINGS

**Necessity:** The current situation with regards to the Northern Ireland Protocol does not meet the threshold of 'necessity' as required by the 'Doctrine of Necessity'.

**Article 16:** Article 16 of the Protocol offers a legal and temporary solution if the UK feels its interests are being severely damaged by the Protocol.

## Necessity

The current situation with regards to the Northern Ireland Protocol does not meet the threshold of 'necessity' as required by the 'Doctrine of Necessity'.

**Professor Catherine Barnard:** *"This time round the Government has said it is not in breach of international law and they're relying on Article 25 of the International Law Commission Articles on State Responsibility, and Article 25 is about necessity, and the UK Government says it's necessary to have this Bill in order to deal with the problems on the ground in Northern Ireland which Katy Hayward has been discussing."*

*"The trouble is if you look at the text of Article 25 it sets the bar very high indeed, there's got to be grave and imminent peril and the fact that the Bill will take perhaps a year to get through Parliament suggests that there isn't grave and imminent peril. And therefore, most lawyers do not think that the Government's argument based on Article 25 holds water, and therefore they would argue, and I would agree with this, that there is a breach of international law."*

**Anton Spisak, Tony Blair Institute:** *"I think this conflict would really come into sharp focus if there was a dispute between the European Union and the United Kingdom over the legality of this action."*

*"So it's not inconceivable that the EU would challenge this Bill and seek an arbitration, seek to form an arbitration panel that would decide on what basis those changes that the Government has proposed are implemented and in that case it would be very, very difficult I think for the UK Government to argue that doctrine of necessity does provide sufficient justification for the changes that they seek."*

*"Most lawyers do not think that the Government's argument based on Article 25 holds water."*

**Professor Catherine Barnard**

## Article 16

Article 16 of the Protocol offers a legal and temporary solution if the UK feels its interests are being severely damaged by the Protocol.

**Professor Catherine Barnard:** *“Triggering Article 16 would not allow the UK to remove the role of the European Court of Justice - but the European Court of Justice has not so far been involved in any arbitrations under the Protocol, meaning that the UK has no legitimate recourse to remove it.*

*“Now Article 16 is in the Northern Ireland Protocol, and it does allow the Government to act if they think that there are societal, environmental or difficulties or trade diversion and for a long time the Government has been playing around with the idea of invoking Article 16. The problem is Article 16 is very limited in scope and it envisages a sort of surgical strike, rather than a wholesale rewriting of the Protocol..*

*“Had they relied on it for a surgical strike, that would have been lawful under international law and domestic law, but in order to use Article 16 to rewrite the Protocol that is beyond the scope of Article 16 and I think that’s why the Government rightly did not rely on Article 16, because Article 16 cannot be used for example*

*to remove the role of the European Court of Justice, because the European Court of Justice has not yet been engaged in anything under the Protocol, so it’s very difficult to argue that the role of the Court of Justice has caused societal difficulties, and indeed polling suggests that nobody in Northern Ireland has been worried about the role of the European Court of Justice, so therefore Article 16 cannot justify the breach of international law.”*

**Anton Spisak, Tony Blair Institute:** *“Catherine mentioned Article 16, it is the Article 16 for all its constraints is in the Protocol and is lawful mechanism for dealing with some of the immediate difficulties that arise from the implementation of the Protocol. So, I think that would be a very, very strong argument that would be very difficult to dismiss by Government lawyers and I think would create a real conflict between the obligations that the UK has on the international stage and domestic law.”*

## 2

## THE UK’S INTERNATIONAL REPUTATION

The Northern Ireland Protocol Bill and its progress through Parliament are being observed closely by other countries’ political establishments. The UK is seeking to build several free trade deals with countries around the world, including the US, and is therefore reliant on ensuring it retains credibility so that these countries continue to see Britain as a trusted potential partner.

We are also facing an international situation where several countries are breaking or are threatening

to break the rules-based international order. Russia has invaded Ukraine and there are fears over China’s intentions regarding Taiwan. Britain is also being watched closely by the rule-breakers of this world who, according to our witnesses, are realising that much of the UK’s moral posturing might just be hypocritical.

On the whole, witnesses concluded that the Bill is extremely damaging for how the UK is perceived internationally.

## KEY FINDINGS

**UK-US cooperation:** The US is particularly concerned by developments with the Northern Ireland Protocol Bill, putting at risk potential future UK-US cooperation.

**Economic consequences:** Reputational risks could have damaging economic consequences.

**Trust:** The UK risks losing the trust of several international partners.

**Setting an example:** The UK’s action could embolden rogue states.

## UK-US cooperation

The US is particularly concerned by developments with the Northern Ireland Protocol Bill, putting at risk potential future UK-US cooperation.

**Sir Peter Westmacott:** *"I know that the outgoing Prime Minister doesn't really like the argument that President Biden really cares a lot about Northern Ireland but he does, I've talked to him about it with him many times over the years and so does much of Congress, and so I think the short answer to your question is that Washington is very bothered about this and they will now be looking at the British political scene with considerable interest for lots of reasons.*

*"But one of them will be to see well what sort of a Government and what sort of a Prime Minister are we going to have, and will they be as determined as Mr Johnson and Liz Truss have been to push ahead with a unilateralist solution to the perceived problems of the Northern Ireland Protocol. Or will there be a different approach, and neither you nor I suspect you can yet answer that question."*

**Sir Peter Westmacott:** *"I mean first of all I think it follows from what I was trying to say earlier and if this Bill does become law more or less in its present form that there will be a pretty hostile reaction in Washington, there would certainly be a linkage to any negotiation that might be in progress on the comprehensive free trade agreement with the UK, but that seems to be pretty stuck at the moment."*

**Sir Peter Westmacott:** *"The United States feels a strong political, if not a formal legal responsibility for what happens and therefore is concerned about what's going on. Which is why we have seen senior members of the Biden administration saying that if anybody thinks they're going to get a free trade agreement while a coach and horses is being driven through the Northern Ireland Protocol, you know they've got another thing coming, my language not theirs."*

## Economic consequences

Reputational risks could have damaging economic consequences.

**Sir Peter Westmacott:** *"There is the question of whether the United Kingdom's international reputation as a Government/country which respects agreements that it signs is going to be damaging to our ability to conclude other deals or the willingness of other partners to conclude such deals with us."*

**Frankie Devlin, KPMG:** *"I think businesses in general would not be happy with trading on the basis of breaching international law because it's bad for*

*Northern Ireland's reputation in terms of selling into other markets, so that's not good."*

**Martijn de Grave, offering the perspective from Brussels:** *"We still feel that it is very disappointing because it will lead us to a way of constant uncertainty, the Bill will be adopted with Ministers being able to disapply parts of the Protocol as they please, instead of trying to find joint solutions together in order to get legal certainty and stability."*

## Trust

The UK risks losing the trust of several international partners.

**Martijn de Grave:** *"As a consequence of the Bill and if Ministers would actually make use of the confidence they would get under the Bill, it would mean basically the UK Government would decide what kind of goods would enter our internal market and if we read the Bill correctly, that's not only goods coming from Great Britain but goods coming from all around the World. And that is clearly something which is of grave concern to us because the unique feature of the Protocol is of course that for the first time we have outsourced the control of our external borders to a third country, the UK, which requires a great deal of trust as you can imagine and that trust is really put at very severe risk if it would be for the UK Government who would be in charge of controlling our internal market could decide themselves without any input of us what kind of goods would enter the internal market and which not."*

**Professor Catherine Barnard:** *"I've just had a look back at the text of Article 164 of the Withdrawal Agreement which is the powers of the Joint Committee and so that's the Joint Committee, that's the political body set up under the Withdrawal Agreement to address problems, and those powers do give the Joint Committee the power to prevent problems that arise under this agreement of resolving disputes and to adopt decisions and make recommendations. There is a reasonably broad amount of wriggle room I think under Article 164, no it doesn't mean you can rewrite the Protocol entirely and take out the role of the Court of Justice, but to deal with those ten or so very stubborn problems there is, I think there's quite a lot of flexibility but of course it requires a build up of trust, and as we know that is also the problem."*

## Setting an example

The UK's action could embolden rogue states.

**Anton Spisak, Tony Blair Institute:** *"I think there are huge reputational and diplomatic consequences for the UK as well, because you know trying to justify and legitimise a breach of international law by invoking a doctrine of necessity which is fairly broad and is contrary to the UK's own policy on implementation and application of international treaties is a very, very big thing and it does send a very strong signal to other countries and the international community more broadly about what is appropriate behaviour in with regards to international treaties."*

**Martijn de Grave:** *"I think we're extremely disappointed also because we feel that in this day and time when faced with Russian aggression in Ukraine we should stand shoulder to shoulder and also protect international obligations, defend a multilateral order based on rules, so with that said this is all very disappointing, but our door very much remains open to work together in a constructive way but not with the Bill as it is right now as a threat and as the only solution that the current UK Government would foresee."*

## 3 THE DAMAGE THE BILL COULD CAUSE

Witnesses were clear that the Northern Ireland Protocol Bill could have far-reaching consequences. Witnesses highlighted the potential for the Bill to lead to significant economic damage in Northern Ireland and other parts of the UK.

They also noted that the Bill is destabilising and causes high levels of uncertainty, ultimately having negative social and economic impacts.

## KEY FINDINGS

**Trade risks:** There could be serious consequences for UK trade as a result of the Bill, including the potential for the trade and cooperation agreement to break down.

**Business impact:** Businesses will be economically impacted by the Bill should it pass. Northern Ireland's economy is actually benefiting from the Protocol and this Bill would negate that benefit.

**Ireland:** The Bill does, and could continue to give rise to problems on the island of Ireland.

## Trade risks

There could be serious consequences for UK trade as a result of the Bill, including the potential for the trade and cooperation agreement to break down.

**Martijn de Grave:** *"I think what I can say is what the Vice President I think has consistently said when it comes to this issue, adoption of the Bill, and effectively disapplying the core elements of the Protocol is a very serious issue and it would mean that the European Union would use the means at its disposal and will not exclude anything at this moment, and as you are aware the philosophy of the trade and cooperation agreement is very much that it was founded on the Withdrawal Agreement including the Protocol on Northern Ireland, so if you take away the foundation something will happen with the trade and cooperation agreement, and I'm afraid that's all I can say for the moment."*

*"...effectively disapplying the core elements of the Protocol is a very serious issue and it would mean that the European Union would use the means at its disposal and will not exclude anything at this moment."*

**Martijn de Grave**

## Trade risks (cont.)

**Professor Catherine Barnard:** *“There’s a whole bunch of other things that the EU could do to respond to what the UK has done or will do, assuming the Bill becomes law, if you look at the TCA...there are a whole bunch of provisions that could still be engaged. For example, it’s possible for the EU to decide that because the UK has acted in such bad faith it’s just going to give 12 months’ notice and terminate the TCA, it doesn’t need to give a reason for it, it just needs to act unanimously.*”

*Or it could decide that it will just terminate the trade provisions of the TCA, which also means tariffs. Or it could decide that the use of the Northern Ireland Protocol Bill is such a fundamental breach of the rule of law that this is a breach of the essential safeguards and therefore the EU might decide to suspend the operation of the TCA. So, there’s a whole bunch of other steps it can take, there’s another half a dozen but I think those are the main ones that it may decide to use.”*

## Business impact

Businesses will be economically impacted by the Bill should it pass. Northern Ireland’s economy is actually benefiting from the Protocol and this Bill would negate that benefit.

**Frankie Devlin, KPMG:** *“The immediate priorities for businesses, it’s certainty and stability which is what they’ve been calling for throughout all of this because there have been a lot of significant changes, rule changes which businesses have been doing their best to get their heads around and putting in new resources, new systems to deal with that.*”

*“Because businesses will find solutions to problems, but again the uncertainty and instability is how long is the Protocol going to be in play, will this Bill override certain sections of it, so again that is not good for business, it’s not good for our local businesses, it’s not good for foreign direct investment opportunities, so really certainty and stability are the immediate priorities for business because they just want to get on with the day to day business.”*

**Anton Spisak, Tony Blair Institute:** *“But also you know what businesses want and Frankie I think described it really well is certainty and predictability and at the moment that all these very high stakes over the politics of the Protocol, it is very difficult I think for businesses to make long-term decisions on investment, on things which could benefit them and their easier access to the Single Market but also the UK market. So, I think the danger that we have at the moment is that we just don’t really know what will be the baseline scenario for the next couple of years and businesses are operating in quite a lot of uncertainty about what might or might not happen.”*

**Professor Katy Hayward:** *“And this is very concerning, not least because if we’re looking at polling, we see now 55% of people saying that as it is at the moment, the Protocol is positive for Northern Ireland’s economy and two thirds of people in Northern Ireland are saying that it brings economic opportunities for Northern Ireland that could benefit Northern Ireland if exploited. And that includes soft Unionists as well as others.”*

“Certainty and stability are the immediate priorities for business because they just want to get on with the day to day business.”

**Frankie Devlin**

## Ireland

The Bill does, and could continue to give rise to problems on the island of Ireland.

**Sir Peter Westmacott:** *“I think in Washington they take the view this can be fixed, the Commission has made proposals, the Irish Government has made proposals and that the UK does not need to take a unilateralist sledgehammer if you like to crack a big-ish nut, I of course accept that.*”

*“So, they’re nervous that this could be damaging to stability, peace, prosperity on the island of Ireland.”*

**Frankie Devlin, KPMG:** *“So our concern would be that if you attempt to unpick certain elements of the Protocol by disapplying certain parts unless the EU*

*agree that Article 55 which is the one that basically says if Northern Ireland can trade with the EU on the same terms effectively as other member states in goods, no tariffs, no customs formalities, unless the EU agree to that and that’s obviously within their gift that’s a big problem.*

*“And it brings up the question of a hard border in Ireland if you don’t have the border somewhere. Border is probably the wrong word to use because obviously that’s unhelpful but if checks and controls have to happen somewhere then you’ve got that problem.”*

## 4 A NEGOTIATED SOLUTION?

The question of whether by publishing this Bill the UK Government has gone too far in terms of restoring cooperation with the EU over Northern Ireland remains to be seen.

However, witnesses to the Commission highlighted that there is the potential for negotiations and that cooperation and negotiation is by far the preferred path of the EU.

### KEY FINDINGS

**Neogiation:** The EU seeks a negotiated solution and is keen to welcome the UK back to the negotiating table.

**Compromise:** Compromise has happened before - and it can happen again.

### Negotiation

The EU seeks a negotiated solution and is keen to welcome the UK back to the negotiating table.

**Professor Catherine Barnard:** *“I would say I think the encouraging thing is that the EU response to the Northern Ireland Protocol Bill so far has been measured and nuanced, I was in Brussels the week before last and we talked to some of the Commission officials and it’s quite clear that their game is not punishment, I know that’s become a narrative but it’s important to see it from their point of view that they see the Northern Ireland Protocol Bill is already a huge concession because it’s essentially contracting out part of the management of their external border to a third country, so they feel they’ve already made huge concessions as far as that’s concerned.”*

**Martijn de Grave, speaking from the perspective of the European Commission:** *“And a message on what it will do the restore trust is I think very much based on what I said before, a sincere hope from our side and belief that we should go back to the table again, look at the challenges, find joint solutions but not do it under the threat of the unilateral Bill which would set aside this important Protocol.”*

*“I think if we could find that bit of trust in dealing with it and political will from the UK Government’s side to deliver what they’ve promised to, I think a lot is still possible.”*

### Compromise

Compromise has happened before - and it can happen again.

**Professor Catherine Barnard:** *“If the UK was really serious about sorting out the problems on the ground with the Protocol, why they didn’t say you the EU are not cooperating, you the EU are not coming up with solutions and therefore we start this process, the dispute resolution process, and just to remind you of course there was a dispute resolution that the EU started against the UK over solar panels, nothing to do with the Northern Ireland Protocol, and that got resolved last week through the political dialogue stage. So, it is a way forward.”*

*“If we can find that bit of trust...and political will from the UK Government’s side to deliver what they’ve promised to, I think a lot is still possible.”*

**Martijn de Grave**

## Key Recommendations

- 1 The Northern Ireland Protocol Bill threatens the foundation of the UK's Brexit agreement with the EU. Collapsing this agreement will increase prices for British people even more.
- 2 Unilaterally overriding the Northern Ireland Protocol will cause lasting damage to the UK's international reputation, diplomatic efforts and damage the prospect of future trade deals.
- 3 UK threats to renege on the Brexit deal could be used by authoritarian states to justify their own breaking of international law.
- 4 The UK Government should focus on rebuilding trust with the EU, and reach a negotiated solution. This is not possible with the Northern Ireland Protocol Bill on the table.
- 5 A caretaker Government should not be pursuing a Bill of such consequence to the UK's international standing and economy.





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