



# **Human Rights and Equality in Northern Ireland: Implications of the Northern Ireland Protocol Bill**

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**QUEEN'S  
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## Article 2 of the Ireland-Northern Ireland Protocol

Human rights and equality protections are included in Article 2 of the **Ireland-Northern Ireland Protocol** ('the Protocol') to prevent the diminution of rights in Northern Ireland after Brexit, and to provide remedies in local courts for breaches of this obligation.

The UK Government has claimed that its **Northern Ireland Protocol Bill** ('the Bill') does not undermine Article 2 of the Protocol. That is not the case. This document explains why.

## Introduction

Concerns about human rights and equality have been at the heart of the conflict in Northern Ireland. Much work over many years has gone into addressing these problems, resulting in the development of significant legal remedies.

The importance of these issues was recognized in the **Belfast-Good Friday Agreement** ('GFA') concluded in 1998. It sought to stabilize the situation after decades of conflict. Human rights and equality issues were central to the GFA, which provided for the development of further legal protections.

As a result, the GFA recognizes a set of human rights and equality rights in a special part of the Agreement entitled '*Rights, Safeguards and Equality of Opportunity*.' There has been considerable concern that the UK's exit from the European Union ('EU') may weaken these existing human rights and equality mechanisms in Northern Ireland. Trying to prevent these damaging effects was a significant element in the negotiations leading to the UK's exit from the EU.

The Ireland-Northern Ireland Protocol ('the Protocol') is an integral part of the UK's **Withdrawal Agreement** with the European Union. The Protocol is designed to both protect economic interests on the island of Ireland and in the EU but also to preserve the GFA 'in all its dimensions' including its human rights and equality protections. Article 2 of the Protocol ensures the non-diminution of the wide range of rights set out in the GFA.

In June 2022, the UK government introduced the Northern Ireland Protocol Bill ('the Bill') into Parliament. This would limit the role of the Protocol in Northern Ireland. Much of the focus, both in the media and the public, has been on the economic and trade implications of this Bill.

But there are also many worrying implications of the Bill for human rights and equality protections in Northern Ireland. These are in danger of being overlooked. This document highlights immediate and future dangers to Article 2 human rights protections under the new legislation.

It sets out what the Protocol (and Article 2 specifically) seek to do. Article 2 is a complex provision, the meaning of which is sometimes contested and will remain so unless and until the courts are asked to make definitive rulings on what it means.

## The Basics

### *What does the Protocol do?*

- The Protocol is the part of the EU-UK Withdrawal Agreement ('WA') that attempted to deal with several specific problems that Brexit generated: for relations between Ireland and the United Kingdom; between Northern Ireland and (the Republic of) Ireland; and within Northern Ireland.
- Overall, the Protocol has three main objectives:
  - To preserve the integrity of the EU's Single Market, ensuring that Ireland's relations with the rest of the UK remained significantly unaffected
  - To prevent the creation of a hard border between Ireland and Northern Ireland
  - To protect the GFA in 'all its dimensions'
- As part of protecting the GFA, the Protocol aims to ensure that there is 'no diminution of rights, safeguards, or equality of opportunity' as set out in the part of the 1998 Agreement that deals with these issues.



### *Design of the Protocol:*

- The Protocol can be enforced at both the international and Northern Ireland legal levels, but in different ways.
- At the international level, the Joint Committee, the decision-making body of the Protocol that is responsible for its implementation and application, can resolve disputes via consensus and mutual agreement. If this fails, cases may go to an international arbitration panel which can refer questions of EU law to the Court of Justice of the European Union.
- These obligations on the UK need to be enforceable if they are to be effective. And they need to be enforceable in Northern Ireland, and not some distant international body.
- The Protocol has also been brought into the law of Northern Ireland and can therefore be enforced in the Northern Ireland courts by individuals and bodies.
- Article 2 is an integral part of the Protocol and depends for its effective enforcement on several provisions of the Protocol that are ‘common provisions’, meaning that they also apply to the interpretation and enforcement of the trade and customs provisions of the Protocol.
- For example, Article 5 of the Withdrawal Agreement requires that the EU and the UK are subject to a ‘good faith, etc’ obligation, and this applies also to the interpretation and application of Article 2 of the Protocol.

### *Enforcing the human rights and equality provisions of the Protocol:*

- As we’ve seen, **Article 2** provides that the UK has important continuing obligations regarding human rights and equality in Northern Ireland.
- It provides that there shall be ‘no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity’ resulting from the UK’s withdrawal from the EU.
- Article 14(c) of the Protocol provides that the UK-EU Specialised Committee on the Protocol shall ‘consider any matter of relevance to Article 2 of this Protocol brought to its attention by the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland, and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland’. The two Northern Ireland Commissions are authorised in domestic law to bring matters to the Committee under the Northern Ireland Act 1998, sections 78A(9) and 78B(9).
- ‘No diminution’ means that the rights people in Northern Ireland had before the UK finally left the EU (31 December 2020) cannot be reduced as a result of Brexit; rights can only stay the same or advance; they cannot regress.
- Article 2 also provides that there shall be no diminution of the protections against discrimination on various grounds (including race, ethnicity, age, sex, disability, and sexual orientation) that EU law previously provided.
- In the Protocol, six EU Equality Directives are laid out in Annex 1; these are explicit pieces of EU law that protect a range of rights around race, gender, religion and belief, disability, age and sexual orientation.
- We’ve explained this in more detail in our previous Guide to Article 2 and won’t repeat this here but there are several issues you need to be aware of in how Article 2 works before we set out how the new Bill will impact Article 2.

## Dynamic alignment

- Article 2 does not stand alone. It is supported by, and must be interpreted in light of, several other provisions of the Protocol and of the Withdrawal Agreement itself.
- In particular, there is an obligation on the UK of what is known as ‘dynamic alignment’ in certain situations. This means that there is an obligation to keep Northern Ireland law ‘up to date’ with EU law developments.
- As far as Article 2 is concerned, ‘dynamic alignment’ has several particularly important consequences.
- **Article 13(3)** of the Protocol provides for dynamic alignment by requiring that any amendment to, or replacement by the EU on or after 1 January 2021 of a Directive listed in Annex 1 must be given effect to in Northern Ireland law.
- The jurisprudence of the Court of Justice is given an important role, although this differs depending on what particular element of Article 2 is in issue: there is a difference between how the ‘general’ requirements of Article 2 and the specific requirements regarding anti-discrimination law are applied.
- **Articles 4(4) and (5)** of the Withdrawal Agreement provide that any EU law relevant for the operation of Article 2 needs to be interpreted in conformity with the jurisprudence of the Court of Justice of the EU in place before 31 December 2020.
- Article 2 includes an overarching guarantee that GFA-protected rights that are underpinned by EU law may not be diminished as a result of Brexit. This sets the baseline of rights and safeguards to those that applied on or before 31 December 2020.
- Therefore, in line with Article 4(4) of the Withdrawal Agreement, the interpretation and application of these rights must, as a minimum, conform with the standards set by the body of Court of Justice jurisprudence, including general principles and the **EU Charter of Fundamental Rights**, as they were on 31 December 2020.
- But Article 13 of the Protocol goes further. The provisions of the Protocol referring to EU law or to EU law concepts must also be interpreted in conformity with the relevant case law of the Court of Justice even if that case law appeared *after* 31 December 2020.
  - Because Article 2 refers directly to EU law in Annex 1, CJEU case law will continue to play an important role in the application and interpretation of its rights and safeguards, particularly with regards to the rights underpinned by the Equality Directives listed in Annex 1.
  - The interpretation of the Equality Directives in Annex 1 must therefore continue to be informed by future Court of Justice case law as well as general principles of EU law, the EU Charter of Fundamental Rights, and relevant EU Treaty provisions.
  - There is, also, a plausible argument that the obligation in Article 13 is even broader and means that there is an obligation to interpret *all* EU law relevant for the purposes of Article 2, and not just the Annex 1 Equality Directives, in conformity with CJEU post-transition period jurisprudence (we’ll refer to this as the broad interpretation).
- The jurisprudence of the CJEU is also relevant in another important respect. Where a dispute between the UK and the EU is unresolved and is referred to international arbitration under Article 174 of the WA, where the dispute relates to the interpretation of EU law, the arbitration panel must ask the CJEU to provide its interpretation and the CJEU’s interpretation will be binding.

# Northern Ireland Protocol Bill

We turn now to the impact of the Northern Ireland Protocol Bill on all of this. The wider issues that the Bill raises, particularly in the context of the provisions dealing with trade in goods and customs, are important. However, attention also needs to be given to the danger that the Bill presents to the protection of rights provisions under Article 2. There are two basic points to bear in mind.

The first key takeaway point is this: Whilst Article 2 is explicitly protected from (some) ministerial interference under the Bill, other provisions of the Bill will in practice gut many of the provisions which underpin the effectiveness of Article 2 in domestic law.

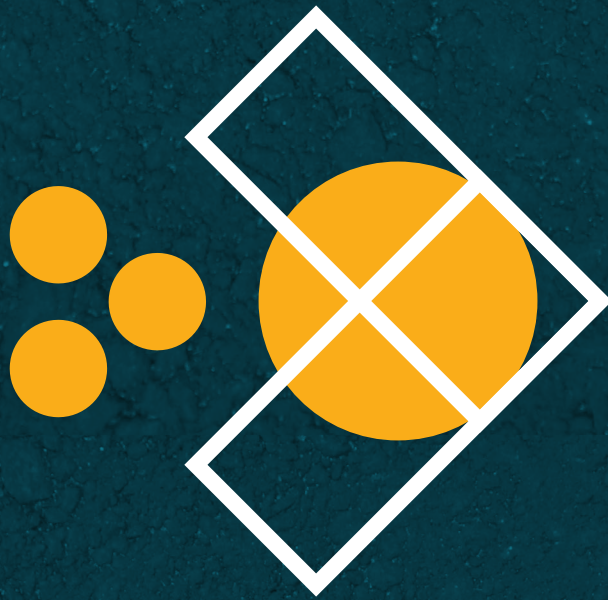
One of the most pressing dangers presented by the Bill is the attempt to roll back on the extent of dynamic alignment. We have seen that the future status of European law and jurisprudence is of vital importance to Northern Ireland because it is these evolving European standards that the Protocol requires should be incorporated into Northern Ireland's domestic law.

Future dangers include the excessively wide powers granted to Ministers, which would allow them to further undermine Article 2's practical operation, permitting Ministers to hold Article 2 to ransom. If Article 2 proves to be a useful mechanism for holding the UK Government and Parliament to account, the Bill provides extraordinary powers to permit Ministers to roll back on these protections.

The second key takeaway point is this: The legislation clearly breaches the provisions of the Protocol, and the UK is thus acting contrary to international law, unless the UK can offer a justification for this breach. The UK Government has not, however, offered any remotely convincing, or even plausible, justification for the provisions of the Bill. The attempt to ground such a justification in 'necessity' fails, providing no justification in international law for the Bill as a whole, or those provisions undermining Article 2.

To understand how the Bill adversely affects Article 2, we need first to understand the overall approach that the Bill adopts towards the Protocol. We need, second, to appreciate the methods the Bill adopts for getting rid of the trade and customs provisions of the Protocol. Then, thirdly, we need to understand how the Bill ranges more widely than only undermining the trade and customs provisions of the Protocol. Once we understand these points, we may identify more clearly how and why the Bill undermines Article 2 specifically.





**Overall Approach Adopted  
in the Northern Ireland Protocol Bill**



### *The central strategy adopted in the Bill:*

- One central purpose of the Bill is to disapply the trade and customs provisions of the Protocol that effectively require a 'border down the Irish Sea'.
- Doing this, however, is clearly contrary to international law and would also amount to a breach of UK law under the Withdrawal Agreement Act 2018, which (in section 7A of that Act) gave the Protocol its preeminent legal status in UK law.
  - Section 7A allowed the provisions of the Protocol to become part of UK law without the need to pass any further domestic legislation.
  - Section 7A also gave the WA and the Protocol 'direct effect' and supremacy over conflicting domestic UK law.
  - 'Direct effect' is a principle of EU law that allows private parties to invoke their rights as outlined in the WA before UK domestic courts.
- In order to avoid the provisions of the Bill being challenged in domestic judicial review proceedings using section 7A, the Government has concluded that it needed to amend the 2018 Withdrawal Act.
- The most important immediate effect of the Bill becoming law, therefore, would be that section 7A of the Withdrawal Agreement Act, would no longer apply to certain provisions of the Protocol that are now to be termed 'excluded provisions'.
  - Provisions that are 'excluded' from the ambit of Section 7A under the Bill no longer have direct effect, so the UK is no longer obligated to act on them as far as UK law is concerned.
  - As a result, the actions of the Government in disapplying large sections of the Protocol relating to trade and customs would not be able to be challenged in local courts.
  - The limits placed on the operation of Section 7A are directly contrary to the obligation in Article 4 of the Withdrawal Agreement to implement the Protocol in UK domestic law, and to provide the opportunity for direct access to the domestic courts to challenge acts that breach the Protocol.
- Not surprisingly, most of the provisions of the Protocol that govern trade in goods and customs arrangements are now labeled as 'excluded provisions' (Clauses 9 and 10) and would therefore not be enforceable in UK law.
- The Bill delegates powers to Ministers to terminate the operation of specific Protocol provisions in the UK and to implement any new agreement with the EU if one is reached.

*'extraordinarily sweeping powers that this Bill would give to ministers.'*

*Theresa May (Conservative), 27 June 2022*



## *Beyond Customs and Trade*

- The Bill goes considerably beyond disapplying the trade in goods and customs provisions of the Protocol. The Bill also gives powers to Ministers to make other significant changes to the Protocol in Northern Ireland domestic law.
- The Government's logic is that since the trade and customs provisions of the Protocol are nested in a series of other provisions of the Protocol and the Withdrawal Agreement that provide for their interpretation, status and enforcement, these 'common provisions' also need to be got rid of or significantly limited.
- Clause 13(1) provides that any provision of the Protocol or Withdrawal Agreement is an 'excluded provision' so far as it confers jurisdiction on the CJEU in relation to the Protocol or related provisions of the Withdrawal Agreement.
- Clause 14 of the Bill provides that Article 13(3) of the Protocol (on dynamic alignment) is disapplied immediately in so far as it relates to any other provision of the Protocol that is an excluded provision.
- Clause 14(4) provides, in addition, that 'A Minister of the Crown may, by regulations, make any provision which the Minister considers appropriate in connection with any provision of the Northern Ireland Protocol and other parts of the EU withdrawal agreement to which this section relates.'
- Clause 15(2) provides that 'A Minister of the Crown may, by regulations, provide for any provision of the Northern Ireland Protocol or any related provision of the EU withdrawal agreement ... to become excluded provision wholly or to any other extent, (b) to be excluded provision to any greater extent ... if the Minister considers that it is necessary to do so for, or in connection with, one or more of the permitted purposes.'
- Clause 20(2) provides that in proceedings relating to the Protocol, a court or tribunal 'is not bound by any principles laid down, or any decisions made, on or after the day on which this section comes into force by the European Court'.

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## **Effects of these provisions on the operation of Article 2**

- Since Article 2 is not explicitly included within the scope of these earlier provisions disabling Section 7A, Article 2 continues to be included within the scope of protection of Section 7A.
- Why is it necessary, then, to understand these provisions of the Bill in order to appreciate the effects of the Bill on Article 2?
- The reason is that the 'common provisions' of the Withdrawal Agreement and the Protocol that are to be limited do not only apply to the trade and customs provisions of the Protocol but also, to a significant extent apply to Article 2.
- The Bill recognizes that scrapping these 'common provisions' has implications for Article 2 and some limited but insufficient protections have been inserted.

### *Limited protection for Article 2:*

- The key protection for Article 2 is provided in Clause 15(3). We have seen that Clause 15(2) provides Ministers with broad powers to expand the list of ‘excluded provisions’. Clause 15(3) prevents this broad power being used to make Article 2 an ‘excluded provision’. It provides that ‘a Minister of the Crown may not exercise the power conferred by subsection (2) to provide for any of the following articles of the Northern Ireland Protocol to cease to have effect in the United Kingdom to any extent— (a) Article 2 (rights of individuals)’
- This is the key provision preventing Ministers from using their powers in Clause 15(2) to exclude Article 2 from the scope of Section 7A, but the protection only applies to limit the exercise of Ministerial powers *under this clause of the Bill*.
- To reiterate the point: the protection for Article 2 in Clause 15(3) only protects against the operation of the power to exclude Article 2 under Clause 15(2), not the specific ministerial powers granted in earlier or later clauses. If they apply, then Article 2 can be weakened in its scope and/or enforcement.
- Nor does the protection of Clause 15(3) protect Article 2 from other provisions of the Bill that would limit the scope of Article 2 immediately the Bill is brought into force, particularly those relating to dynamic alignment. We’ll examine both these problems in the next two sections. As we’ll see, one of the key points is the Bill’s treatment of dynamic alignment. We have seen above that there are several aspects of dynamic alignment: the requirement that the continuing development of relevant CJEU jurisprudence since the UK exited the EU be reflected in Northern Ireland, the requirement that changes introduced into relevant EU legislation after the UK exited the EU also be introduced in Northern Ireland. These aspects of dynamic alignment are affected differently by the Bill, as we’ll explain later on.

### *Ministerial powers that could be used to override the implementation of Article 2:*

- **Clauses 9 and 10** provide Ministerial powers regarding trade in goods and customs. These appear to be broad enough to authorise Ministers to override measures that would otherwise be protected by Article 2. By itself, however, this clause does not override the protection given to Article 2 by section 7A of the WA 2018, since there is no provision earlier in the Bill that lists Article 2 as an excluded provision.
  - However, it is then necessary to consider the effect of Clause 22(2)(d) of the Bill. Clause 22 provides that regulations under this Act ‘may make any provision that could be made by an Act of Parliament (including provision modifying this Act)’. It goes on to provide that ‘regulations under this Act may, in particular — (a) make provision notwithstanding that it is not compatible with the Northern Ireland Protocol or any other part of the EU withdrawal agreement; (b) suspend or repeal, or make alternative provision to, domestic law so far as it gives effect to the Northern Ireland Protocol or any other part of the EU withdrawal agreement...’
  - This would appear to enable the Ministerial powers provided by Clause 9 to disable the protection of Article 2 by section 7A, unless clause 15(3)(a) is taken to limit the otherwise wide scope of Clause 22.

- **Clause 14** provides that Article 13(3) is disapplied immediately in so far as it relates to any other provision of the Protocol that is disapplied. That does not include Article 2, and therefore the requirement of dynamic alignment would appear to continue.
  - Clause 14(4) provides, however, that ‘A Minister of the Crown may, by regulations, make any provision which the Minister considers appropriate in connection with any provision of the Northern Ireland Protocol and other parts of the EU withdrawal agreement to which this section relates.’
  - This is ambiguous. It is unclear whether it means that the Minister may make any provision relating to Article 13 irrespective of whether it relates to another provision of the Protocol that is disapplied.
  - For example, could a Minister by regulation under Clause 14(4) provide that Article 13(3) is disapplied in general? If so, it could be used to prevent the Equality Directives in Annex 1 from being subject to dynamic alignment. On its face, the power described in Clause 14(4) appears to be sufficiently broad to permit the overriding of any safeguards provided by the other parts of clause 14.
  - It is unclear whether it means that the Minister can make any provision relating to WA Article 4(4) irrespective of whether it relates to another provision of the Protocol that is disapplied. For example, could a Minister by regulation under Clause 14(4) provide that WA Article 4(4) is disapplied in general?
  - It is also unclear whether it means that the Minister can make any provision relating to WA Articles 170-181 irrespective of whether it relates to another provision of the Protocol that is disapplied. For example, could a Minister by regulation under Clause 14(4) provide that WA Articles 170-181 are disapplied in general, including with regard to disputes concerning Article 2?
- **Clause 15(2):** We have seen that Article 5 WA requires that the EU and the UK are subject to a ‘good faith, etc.’ obligation, and this applies to the interpretation and application of Article 2 of the Protocol.
- It does not appear that Article 5 WA has been disapplied immediately, even in so far as it relates to another provision of the Protocol that is disapplied.
  - However, Clause 15(2) provides that ‘A Minister of the Crown may, by regulations, provide for any provision of the Northern Ireland Protocol or any related provision of the EU withdrawal agreement — (a) to become excluded provision (...)’ It would appear from this that the Minister could disapply Article 5 WA under this provision in so far as it applied to Article 2 of the Protocol.
- Clause 15(2) may also be used to limit the current powers of the ECNI and the NIHRC to refer matters to the Specialised Committee under Article 14(c) of the Protocol. Whilst domestic legislation cannot and does not affect the ability of the Specialist Committee to receive such references, Clause 15(2) appears to permit Ministers to prevent the Commissions from making such references by designating Article 14(c) of the Protocol an ‘excluded provision’.



### *Immediate adverse effects on Article 2: disabling dynamic alignment*

- **Clause 20(2)** provides that in proceedings relating to the Protocol, a court or tribunal ‘is not bound by any principles laid down, or any decisions made, on or after the day on which this section comes into force by the European Court’. This provision means at least that a significant element of the Northern Ireland courts’ obligation under Article 2, to interpret the Equality Directives listed in Annex 1 ‘in conformity’ with CJEU case law, ends on the day this section enters into force, without any further ministerial action being necessary.
- It is unclear how much of an effect Clause 20(2) will have beyond this. If a broad interpretation of the application of Article 13(2) of the Protocol is adopted – applying the obligation to follow post-transition period CJEU jurisprudence whenever EU law is relevant for the operation of Article 2, then Clause 20 would also mean that Article 2 would be limited in ways that went beyond the limits on the interpretation of the Annex 1 Equality Directives.
- The effect of **Clause 13(1)** is unclear. On the one hand, it appears that there is an attempt to cut back considerably on the extent to which the CJEU has any role in the operation of the Protocol. The principal effect will be to preventing domestic courts from submitting references to the CJEU, but since such references are not possible regarding the operation of Article 2, this particular restriction does not cause any particular problems for Article 2. However, we have seen above that arbitration panels also have a role in referring cases to the CJEU. Clause 13(1), as domestic legislation, does not and cannot restrict how the arbitration panel operates – its jurisdiction is established by the Withdrawal Agreement, not domestic law, and so it is unclear whether the Government intends Clause 13(1) to have any effect on the operation of the arbitration system and, if so, how.



**Is it Lawful?**

# Is it Lawful?

The UK Government does not try to argue that the Bill conforms with the Withdrawal Agreement or the Protocol. Implicitly, it recognises that the provisions of the Bill would breach both the Withdrawal Agreement and the Protocol – otherwise why limit the application of Section 7A of the Withdrawal Agreement Act 2018? Instead, it argues that the Bill is in conformity with international law because its international legal obligations under the Withdrawal Agreement and the Protocol are subject to a general exception in international law: the doctrine of ‘necessity’.

So, what is the doctrine of ‘necessity’ and does it apply here? Putting it simply, ‘necessity’ is a ‘get out of jail free card’, which makes an otherwise unlawful breach of an international treaty lawful. ‘Necessity’, in other words, precludes wrongfulness, but it is subject to rigorously applied limits, because otherwise a state would be able to evade international obligations which the state itself had agreed to earlier just because it felt like it.

According to the United Nations International Law Commission, necessity may not be invoked by a state unless the action taken by the state:

- is the only way for the State to safeguard an essential interest against a grave and imminent peril
- does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole

Necessity may **not** be invoked by a state as a ground for precluding wrongfulness if the State has itself contributed to the situation of necessity.

## Necessity: the limits

In practice, this means:

- Necessity may only be invoked to justify the temporary non-performance of an international treaty obligation.
- To invoke the doctrine of necessity, the State breaking its international obligations must show:
  - that it is acting to protect an essential interest
  - that this essential interest is threatened by grave and imminent peril
  - that this is the only means by which the State can protect the essential interest
  - that the interests being sacrificed by the non-performance of the obligation are of lesser value than the essential interest being safeguarded
- Essential interests include economic, political, social, and environmental circumstances.
- The plea of necessity is excluded if there are lawful means available to protect the essential interest of the State that would not result in a breach of the State’s international obligations.
- The plea of necessity is excluded if the State seeking to invoke it is itself responsible for producing the circumstances resulting in the threat to its essential interests.



## Is ‘necessity’ a convincing justification for the breach of international law in the Bill in general?

No. There is now an overwhelming consensus among international lawyers who have considered carefully the Government’s arguments on ‘necessity’ that its use of the ‘necessity’ justification for the Bill as a whole is entirely unconvincing.

There has been no significant rebuttal provided by the Government of these judgments. The Government’s claim of necessity as a basis for the Bill does not meet the necessary conditions for the justification to be valid. The UK Government is not advancing the Bill on an urgent basis; indeed, the Government appears to be holding the Bill back, making progress dependent on the restoration of power-sharing in Northern Ireland. None of the provisions are being advanced with the urgency that would reflect a ‘grave and imminent peril,’ nor has the Government invoked alternative methods that would not breach international law, including in particular the triggering of Article 16 of the Protocol.

*‘The hon. and learned Lady knows that there is not a serious Queen’s Counsel in the country who would support the use of the doctrine of necessity in the way in which the Government have sought to use it’*

*David Lammy (Labour), 27 June 2022*

*‘If the situation is as bad as some Ministers would have this House believe, one has to ask why they have not used the emergency brake of article 16.’*

*Simon Hoare (Conservative), 27 June 2022*

*‘There is nothing urgent about the Bill. It has not been introduced as emergency legislation. It is likely to take not weeks, but months to get through Parliament.’*

*Theresa May (Conservative), 27 June 2022*

## Necessity and Article 2 of the Northern Ireland Protocol

The UK Government's legal justification, based on 'necessity', does not mention or attempt to justify the adverse impact on the operation of Article 2. This is probably because there has so far been no recognition that Article 2 is adversely affected. No doubt, if pressed, the Government would draw attention to the 'protection' of Article 2 in Clause 15(3).

We have seen, however, that this 'protection' is more apparent than real and that in significant respects Article 2 will be adversely affected in ways that breach the Protocol and the Withdrawal Agreement prohibit. Could the UK Government nevertheless convincingly argue that the breaches of the Withdrawal Agreement and the Protocol in respect of Article 2 are justified by 'necessity'?

Several of the justifications advanced by the UK government to justify its invocation of necessity as regards other provisions of the Bill, even if they were convincing, which they are not, simply do not apply to Article 2, including the claimed adverse economic side-effects of the Protocol.

Do the other arguments that the Government has advanced justify the adverse effects on Article 2? Here's a deeper dive into how the Bill fails to meet the standards as regards the adverse effects on Article 2 in three particular respects.

### 1. No 'essential interests' are engaged

Nothing that the UK Government has said so far indicates what essential interest would be being protected by limiting the scope of Article 2, and it is difficult to imagine what those essential interests might be. To the extent that the Bill is attempting to meet the concerns of the Democratic Unionist Party (DUP) and thereby nudge the Party back into the Northern Ireland Executive, there is no evidence that any Party, unionist, nationalist, or other, has expressed any concern as to whether Article 2 should be fully implemented as it is at present. The 'essential interests' that are said to be protected involve the protection of the Belfast-Good Friday Agreement, but Article 2 is wholly based on the protection of the rights and safeguards provisions of that Agreement.

### 2. No 'grave or imminent peril' is identifiable

It is impossible to understand how these criteria could be satisfied. In July 2021, in its own Command Paper (at paragraph 37), the Government described the operation of Article 2 as 'not controversial'. The UK government's decision in Clause 15 to exclude Article 2 from some of the provisions in the Protocol Bill appears to show that, at the moment, Article 2 does not present a 'grave and imminent peril' to the government's essential interests. The UK government has not identified how any of the ways in which Article 2 is supposed to operate, such as the requirements of dynamic alignment, themselves present grave and imminent peril to the economic, social, and/or political interests of the state such as to justify each of the limits on the application of Article 2.

### 3. Alternative lawful means which the Government could use to protect its essential interests have not been engaged

The Government must have exhausted other lawful means of safeguarding its essential interests before resorting to the doctrine of 'necessity'. The UK Government has never raised any difficulty with the EU as to how Article 2 is operating. In any event, Protocol Article 16 provides a mechanism for unilateral 'safeguard measures' after consultation via the Joint Committee. Having failed to exhaust that procedure it is not open to the government to rely on the doctrine of necessity.

# Conclusion

- There are two main problems for Article 2 arising from the Bill:
  - Immediately the Bill comes into effect the local courts will no longer be under an obligation to apply the jurisprudence of the Court of Justice of the European Union, contrary to the requirements of the Protocol.
  - Ministers will have extensive powers in the future to remove the other provisions in the Protocol that Article 2 relies on to be effective.
- It is correct that the Bill provides limited protection for Article 2: the Bill excludes Article 2 from some of the powers that the Bill provides to Ministers to limit provisions of the Protocol. But this apparent protection is limited and inadequate. (See *Limited protection of Article 2*, pg 10)
- The problem arises because the Bill does not protect the operation of Article 2 in several other critical respects, particularly as regards the ‘dynamic alignment’ requirements of the Protocol.
  - First, the Bill would explicitly prevent the domestic courts from following the decisions (or ‘jurisprudence’) of the Court of Justice of the European Union in relevant areas of EU law, such as on issues of discrimination, including decisions that arise after the end of the transition period. (see *Immediate adverse effects on Article 2: disabling dynamic alignment*, pg 12)
  - Second, UK Ministers will have discretionary powers to remove the UK’s obligation to remain aligned with future changes to EU anti-discrimination legislation itself. (see *Ministerial powers that could be used to override the implementation of Article 2*, pg 10 and *Immediate adverse effects on Article 2: disabling dynamic alignment*, pg 12)
  - Third, and going beyond the problem of dynamic alignment, the Bill does not protect Article 2 from the use of many other discretionary powers in the Bill: UK Ministers will be able to remove all of the other provisions of the Protocol which give Article 2 its effectiveness in domestic law. (see *Ministerial powers that could be used to override the implementation of Article 2*, pg 10)
- In short, Article 2 might formally remain but would be gutted of its essential supports.
- There are neither credible political nor plausible legal justifications for the Bill’s approach to Article 2 as a whole. In particular, the UK Government’s claim of necessity has no legal basis in general and none in respect of Article 2. (see *Is it lawful?* pg 13-16)



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