



The Centre for  
Cross Border Studies

# Briefing Note:

## The Secretary of State's Changes to Amendment 25 to the EU (Withdrawal) Bill

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13 June 2018

In light of the current debate in the House of Commons, this Briefing Note reflects on the proposed amendment to the EU (Withdrawal) Bill introduced by Lord Patten and others,<sup>1</sup> which would have meant inserting into the Bill (before Clause 10) the following new Clause:<sup>2</sup>

#### **Continuation of North-South cooperation and the prevention of new border arrangements**

- (1) In exercising any of the powers under this Act, a Minister of the Crown or devolved authority must—
- (a) act in a way that is compatible with the terms of the Northern Ireland Act 1998, and
  - (b) have due regard to the joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 of the Treaty on European Union.
- (2) Nothing in section 7, 8, 9 or 17 of this Act authorises regulations which—
- (a) diminish any form of North-South cooperation across the full range of political, economic, security, societal and agricultural contexts and frameworks of cooperation, including the continued operation of the North-South implementation bodies, or
  - (b) create or facilitate border arrangements between Northern Ireland and the Republic of Ireland after exit day which feature—
    - (i) physical infrastructure, including border posts,
    - (ii) a requirement for customs or regulatory compliance checks,
    - (iii) a requirement for security checks,
    - (iv) random checks on goods vehicles, or
    - (v) any other checks and controls,

that did not exist before exit day and are not subject to an agreement between Her Majesty's Government and the Government of Ireland.

The Centre for Cross Border Studies welcomed the suggested changes above as they offered due emphasis to the importance of North-South cooperation on the island of Ireland and aimed to ensure that it is not diminished after Brexit, either by regulatory divergence between the two sides of the UK-Ireland border, or by the creation of any new physical infrastructure, checks or controls at the border 'that did not exist before exit day'. However, we are concerned at the suggestions for amendment further introduced by the Secretary of State for exiting the European Union, David Davis MP,<sup>3</sup> which were accepted in the House of Commons on 13 June 2018, as follows:

- That in the text of Article 2 above:
  - Section 8 should be left out. This refers to Clause 8 ('Complying with international obligations') of the EU Withdrawal Bill (EUWB), as originally introduced in Parliament. The Clause gives UK Government ministers the powers (for up to 2 years after exit day) to make secondary legislation in order to prevent or remedy any breach of the UK's international obligations that might arise from leaving the EU. It is among the group of clauses<sup>4</sup> popularly referred to as Henry VIII powers which have attracted criticism for allowing the Government to make "such regulations as the Minister considers

<sup>1</sup> This Briefing Paper was authored by Milena Komarova and Anthony Soares.

<sup>2</sup> House of Lords (2018) European Union (Withdrawal) Bill. Lords amendments. Amendments proposed by Lord Patten of Barnes, Lord Murphy of Torfaen, Baroness O'Neill of Bengarve, Baroness Suttie, <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0212/hcb212withoutendorsement.1-7.html>

<sup>3</sup> House of Commons (2018) Notices of amendments given up to and including Thursday 7 June 2018. Consideration of Lords amendments. European Union (Withdrawal) Bill, [https://publications.parliament.uk/pa/bills/cbill/2017-2019/0212/amend/eu\\_rm\\_ccla\\_0607.pdf](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0212/amend/eu_rm_ccla_0607.pdf)

<sup>4</sup> That includes clauses 7 and 9.

- appropriate”.<sup>5</sup> Thus, since the Belfast (Good Friday) Agreement comprises an international treaty, (i.e. the British-Irish Agreement), regulations under Clause 8 ‘could theoretically be used to prevent or remedy breaches of that Agreement arising from EU withdrawal, including by amending the Northern Ireland Act that implements the Agreement’.<sup>6</sup> It is unclear, therefore, why Clause 8 should be omitted from the text above, particularly as this proposed new clause aims to prevent the diminution of ‘any form of North-South cooperation’ and avoid the creation and facilitation of ‘border arrangements between Northern Ireland and the Republic of Ireland after exit day... that did not exist before exit day’. The Secretary of State’s amendment to this new clause, we suggest, could be read as possibly weakening remedies for potential breaches of the international (British-Irish) Agreement of 1998. It could also be seen as making it easier for UK ministers, after Brexit, to introduce secondary legislation that could potentially diminish by accident or design the scope and nature of North-South cooperation, and introduces new border control arrangements and infrastructure. The Centre for Cross Border Studies would argue for the inclusion of Clause 8.
- Section 17 should be left out and replaced instead by ‘17(1) or (5) respectively’. The two sub-clauses of 17(1) and (5) are powers seeking to delegate legislative authority to the Government to, respectively: make consequential provision (i.e. enable the relevant Minister to make such secondary legislation as they consider “appropriate” in consequence of the provisions in the EU Withdrawal Bill);<sup>7</sup> and transitional, transitory or saving provision. For comparison, Clause 17(2) (which the Secretary of State proposed to be omitted from art 2 above) provides that secondary legislation made under the power can “modify” primary legislation.<sup>8</sup> It is, in this sense, an arguably stronger power than provided for by 17(1) or (5). While on the whole, it is unclear why the Secretary of State proposed the omission of the entirety of Clause 17 from Article 2 above and what the potential consequences of such an omission may be, it could be suggested that it creates a potential to use Clause 17(2) of the EUWB, for instance, to diminish forms of North-South co-operation and facilitate additional border arrangement non-existent before exit day. In order to avoid this, the Centre for Cross Border Studies would urge for the entirety of Section 17 of the Bill to be referred to here.
  - The Secretary of State, David Davis MP, also suggested that in Article 2(a) above the text from “co-operation” to “or” (underlined by us above) be left out and substituted instead with “provided for by the Belfast Agreement (as defined by section 98 of the Northern Ireland Act 1998)”. In this respect the Belfast (Good Friday) Agreement states (in Annex) that:

‘Areas for North-South co-operation and implementation may include the following:

1. Agriculture - animal and plant health.
2. Education - teacher qualifications and exchanges.
3. Transport - strategic transport planning and waste management.
5. Waterways - inland waterways.

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<sup>5</sup> HoC Library Briefing Paper, Number 8170 11 (2017) ‘The European Union (Withdrawal) Bill: Clauses 9, 8 and 17’, p. 37, <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8170#fullreport>

<sup>6</sup> HoC Library Briefing Paper, Number 8170 11 (2017) ‘The European Union (Withdrawal) Bill: Clauses 9, 8 and 17’, p. 43, <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8170#fullreport>

<sup>7</sup> HoC Library Briefing Paper, Number 8170 11 (2017) ‘The European Union (Withdrawal) Bill: Clauses 9, 8 and 17’, p. 47, <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8170#fullreport>

<sup>8</sup> E.g., as clarified in Clause 14(1) of the EUW Bill, to amend, repeal or revoke such legislation.

6. Social Security/Social Welfare - entitlements of cross-border workers and fraud control.
7. Tourism - promotion, marketing, research, and product development.
8. Relevant EU Programmes such as SPPR, INTERREG, Leader II and their successors.
9. Inland Fisheries.
10. Aquaculture and marine matters
11. Health: accident and emergency services and other related crossborder issues.
12. Urban and rural development’.

This amendment (accepted by the House of Commons) to Lord Patten’s text, while much more specific in terms of outlining spheres of cooperation, would potentially restrict its scope and range. This is because issues, such as cooperation in law enforcement, administration (including customs administration), cooperation in judicial matters and cooperation in civil and commercial matters and so on, which have long characterised the relationship between the two jurisdictions on the island of Ireland are hereby omitted. It is further unclear how such a specific, but inexhaustive, list of areas of co-operation (which does not take into account the realities of expanded practices of cooperation since the signing of the Belfast/Good Friday Agreement) compares to the mapping exercise of areas of North-South cooperation that has been undertaken as a result of EU-UK Brexit negotiations,<sup>9</sup> the results of which are yet to be released. It is essential, therefore, that in order not to reduce the scope for North-South cooperation post-Brexit there should be further revisions to the Bill which would retain the spirit of the amendment brought by Lord Patten.

- Additionally, the Secretary of State proposed that in Article 2(b) above the text “physical infrastructure, including border posts, or checks and controls” is inserted in the place of
  - (i) physical infrastructure, including border posts,
  - (ii) a requirement for customs or regulatory compliance checks,
  - (iii) a requirement for security checks,
  - (iv) random checks on goods vehicles, or
  - (v) any other checks and controls’

Clearly, such a substitution has diminished the level of detail and, therefore, of the specific requirements that could be placed on any new infrastructure, checks and controls introduced at the UK-Ireland border after exit day. Consequently, such an amendment will directly diminish the protection of the border against a process of hardening that would have been offered by the amendment as proposed by Lord Patten, and this needs to be remedied before the final EU (Withdrawal) Bill is enacted.

- Finally, the Secretary of State also proposed that in Article 2(b) above the text ‘subject to an agreement between Her Majesty’s Government and the Government of Ireland’ is replaced with “in accordance with an agreement between the United Kingdom and the EU”. This proposal is restrictive to the role or the influence of the Irish Government in matters relating to the future of the UK-Ireland border. It should not be forgotten that the Government of Ireland is a co-guarantor of the Good Friday/Belfast Agreement and has a central role, alongside the UK Government in the operation of Strand III (East-West co-operation) of the 1998 Agreement, which include the institutions of the British-Irish Council and the British Irish Intergovernmental

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<sup>9</sup> As described in European Commission (2017) Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union’, [https://ec.europa.eu/commission/sites/beta-political/files/joint\\_report.pdf](https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf)

Conference. The Centre for Cross Border Studies suggests instead that in recognition of the essential role of all sides in ensuring the avoidance of a hard border on the island of Ireland after exit day, the names of each – the UK Government, the Government of Ireland and the EU – are included in Article 2 above.