

EXPLANATORY MEMORANDUM TO
THE PROTOCOL ON IRELAND/NORTHERN IRELAND (DEMOCRATIC
CONSENT PROCESS) (EU EXIT)) REGULATIONS 2020

2020 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Northern Ireland Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The purpose of this instrument is to implement in domestic law the mechanism for obtaining democratic consent in Northern Ireland to the continued application of Articles 5 to 10 of the Protocol on Ireland/Northern Ireland to the Agreement on the withdrawal of the United Kingdom from the European Union (“the Protocol”). The mechanism is set out in Article 18 (Democratic consent in Northern Ireland) of the Protocol and in the UK Government’s unilateral declaration of 17 October 2019 (“the unilateral declaration”).¹

3. Matters of special interest to Parliament

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.1 The territorial application of this instrument is limited to Northern Ireland.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the whole of the United Kingdom.
4.2 The territorial application of this instrument is Northern Ireland.

5. European Convention on Human Rights

- 5.1 The Secretary of State for Northern Ireland, the Rt Hon Brandon Lewis MP, has made the following statement regarding Human Rights:

“In my view the provisions of the Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 This instrument implements the democratic consent process which will apply in the Northern Ireland Assembly as set out in Article 18 of the Protocol and the accompanying unilateral declaration. It does this by including the provision within the Northern Ireland Act 1998 (which establishes the devolution settlement for Northern Ireland). Further explanation is given in the policy background section below.

¹ Both documents are available at <https://www.gov.uk/government/publications/new-protocol-on-irelandnorthern-ireland-and-political-declaration>

7. Policy background

What is being done and why?

- 7.1 The Protocol and accompanying unilateral declaration set out the United Kingdom's obligation to implement in domestic law the democratic consent process.
- 7.2 The Government considers that any solution in Northern Ireland can only be lasting if it has democratic support. That is why the Protocol allows the Assembly to vote to either extend or end Northern Ireland's alignment with EU law four years after the end of the transition period.
- 7.3 The consent mechanism ensures that Articles 5 to 10 of the Protocol will cease to apply if Northern Ireland's political representatives conclude they are no longer desirable. The first consent process will take place in late 2024, and will be repeated every four or eight years depending on whether consent (if given) is given on a simple majority or a cross-community basis.

Relevant dates

- 7.4 The Regulations set out in paragraph 3 of a new Schedule 6A to the Northern Ireland Act 1998 a series of dates, which are relative to the end of the "current period". In 2024, the current period will end on Tuesday 31 December (four years after the end of the transition period). On that basis, the relative dates in paragraph 4 will correspond to the following calendar dates in 2024:

Relative period	First day of period in 2024
Final two months of the current period	Friday 1 November
Final one month of the current period	Sunday 1 December
Final 25 days of the current period	Saturday 7 December
Final 15 days of the current period	Tuesday 17 December
Final 5 days of the current period	Friday 27 December

Notification by the Secretary of State

- 7.5 If the First Minister and deputy First Minister are in office at the start of the day before the final two months of the current period (ie on 31 October), then the default procedure applies. The Secretary of State must then initiate the process by notifying the First Minister, the deputy First Minister and the Presiding Officer.
- 7.6 If the First Minister and deputy First Minister are not in office at that time, then the alternative procedure applies. The Secretary of State must then initiate the process by notifying the Presiding Officer and the clerk to the Assembly.
- 7.7 In either case, the Presiding Officer must then bring the notification to the attention of members of the Assembly.

Default process: motion tabled by FM & dFM

- 7.8 Under the default process, following notification by the Secretary of State, there will be one month (from 1 November until 30 November) during which the First Minister and deputy First Minister, acting jointly, can table a consent resolution. A consent resolution is a resolution of the Assembly in this form—

“That Articles 5 to 10 of the Protocol on Ireland/Northern Ireland to the withdrawal agreement (within the meaning of the European Union (Withdrawal) Act 2020) should continue to apply during the new continuation period (within the meaning of Schedule 6A to the Northern Ireland Act 1998).”

- 7.9 The Assembly may then consider the motion in line with normal practice and procedure. The First Minister and deputy First Minister must provide members of the Assembly with relevant explanatory material.

Default process: if motion not tabled by FM & dFM, or not decided in time

- 7.10 If before the start of the final one month (that is, before 1 December), the First Minister and deputy First Minister have not tabled a motion for a consent resolution, then any member of the Assembly can table a consent motion before the final 25 days (ie between 1 and 6 December inclusive). If a motion is tabled by a member of the Assembly in this period then the Secretary of State must provide the relevant explanatory material.
- 7.11 If a motion for a consent resolution has been tabled (whether by the First Minister and deputy First Minister or by a member of the Assembly) but has not been decided before the final 15 days (ie before 17 December), then the Assembly must then sit on the first day during the final 15 days which is not a weekend or public holiday in Northern Ireland (“the required sitting day”) to decide the motion. The motion will be moved by the Presiding Officer if no other MLA moves it. On the required sitting day, the Assembly must sit at noon (whether or not it would otherwise be doing so) and must take the motion as the first item of business (except for election of a Presiding Officer and deputies, if necessary).
- 7.12 The question on a motion for a consent resolution must be put either at 6pm or, if it follows the election of a Presiding Officer, 6 hours after it is moved. The Assembly cannot be adjourned until the vote has been taken, and if the vote is not taken that day, it must sit on the next day which is not a weekend, bank holiday or public holiday in Northern Ireland and undertake the process then.

Alternative democratic consent process

- 7.13 The alternative process operates on the same basis as the default process, except as follows.
- 7.14 Any MLA may table a consent resolution from the beginning of the two-month period. The Secretary of State must provide the relevant explanatory material.
- 7.15 If no motion is tabled before the start of the final month, (or a motion is tabled but before the start of the final 25 days the question on it hasn’t been decided) then the Presiding Officer must summon the Assembly to sit to consider the motion on the required sitting day. In the alternative process, the required sitting day is the first day which is not a weekend, public holiday or bank holiday in the final 25 days.

Alternative democratic consent process: interim Presiding Officer

- 7.16 If the Assembly meets on the required sitting day and must, as its first business, elect a Presiding Officer and deputies but fails to do so, then the Assembly must then elect an interim Presiding Officer.
- 7.17 The oldest member of the Assembly presides over the election of an interim Presiding Officer (unless they are themselves seeking election as interim Presiding Officer, in which case the next oldest presides, and so on).
- 7.18 An interim Presiding Officer is elected by simple majority, and ceases to hold office once they have notified the Secretary of State of the outcome of the democratic consent process. An interim Presiding Officer only holds office to enable the Assembly to consider the motion for a consent resolution.

Outcome of the democratic consent process

- 7.19 If the Assembly resolves not to pass the consent resolution, by a simple majority, then Northern Ireland's alignment with EU law will come to an end two years later. If the Assembly passes the consent resolution, then Northern Ireland's alignment with EU law will continue.
- 7.20 If the consent resolution is passed on the basis of a simple majority, a further consent decision will be required within four years. If the resolution is passed on the basis of cross-community support, a further consent process will be required within eight years.
- 7.21 If the Assembly passes the consent resolution by simple majority, the Government will commission an independent review into the functioning of the Northern Ireland Protocol, to report within two years of the relevant vote. This requirement is included in the draft regulations. The unilateral declaration further sets out that the review will make recommendations to the Government, including with regard to any new arrangements it believes could command cross-community support. It will include close consultation with the Northern Ireland political parties, businesses, civil society groups, representative organisations (including of the agricultural sector) and trade unions.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

- 9.1 This instrument does not consolidate previous instruments.

10. Consultation outcome

- 10.1 The Government has not held a consultation on this instrument.

11. Guidance

- 11.1 The Northern Ireland Office does not consider it necessary to issue any guidance specifically in relation to this instrument.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because there is no, or no significant, impact on business, charities, voluntary bodies or the public sector.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The Secretary of State for Northern Ireland will monitor the functioning of the implementation of the democratic consent mechanism in Northern Ireland to ensure that the United Kingdom's international obligations are properly discharged.
- 14.2 This regulation does not include a statutory review clause.

15. Contact

- 15.1 Luke Montague at the Northern Ireland Office (telephone: 0207 210 0262 or email: luke.montague@nio.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Paul Flynn (Deputy Director, Political Affairs) at the Northern Ireland Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Secretary of State for Northern Ireland can confirm that this Explanatory Memorandum meets the required standard.