

## **After the DUP blocks power sharing in Northern Ireland, the UK announces intention to amend the Protocol**



Foreign Secretary Liz Truss updating the House of Commons today on government's intention to introduce legislation making changes in Northern Ireland Protocol

Last Friday, shortly before the 90 members elected to Northern Ireland's Legislative Assembly gathered for their first meeting, Sir Jeffrey Donaldson, the leader of the Democratic Unionist Party, announced the DUP would not support the election of a new Speaker. Earlier, he had indicated the DUP wouldn't nominate a deputy First Minister, which meant that, even if the Assembly had elected a Speaker and had begun the process of forming a new government, Michelle O'Neill, the leader of Sinn Féin, would not, under the terms of the Northern Ireland (St Andrews Agreement) Act 2006 which amended the Northern Ireland Act 1998, be able to take office as First Minister. But the announcement that the DUP would not support election of a Speaker also meant the Assembly wouldn't be able to form the Executive, which includes the other ministers in addition to the two First Ministers, and wouldn't be able to meet in committees, discuss and vote on legislation, and oversee the government departments. In short, the announcement put devolved government on hold.

In announcing the DUP's decision, Donaldson, who is strongly opposed to the Protocol on Ireland/Northern Ireland that is part of the EU-UK Withdrawal Agreement, said, "I believe that we need to send a very clear message to the EU and to our government that we are serious about getting this protocol sorted out. Because of the harm it is doing, undermining political stability, damaging the agreements that have formed the basis of political progress made in Northern Ireland, to our economy, contributing to the cost of living crisis, this matter needs to be dealt with. While others sit on their hands we are not prepared to do that. We need decisive action taken by the government. It will not be words that determine how we proceed, it will be actions. I've used the term decisive action, that is what we are looking for." Anticipating the decision, the day before O'Neill had, not surprisingly, said it would be "incredulous" for the DUP to block the election of the Speaker: "I don't think that's acceptable when they've just been before the electorate and the people have voted to have politics working for them. Our Assembly will sit

tomorrow; all parties should turn up, all parties should nominate and we should have an Executive up and running.”

Meanwhile, as that was happening, Liz Truss, the British Foreign Secretary, was putting the finishing touches on new legislation that would amend certain provisions of the Protocol. After Lord David Frost tendered his resignation in December, Prime Minister Boris Johnson announced that Truss would take over ministerial responsibility for the UK’s relationship with the EU and would serve as the UK’s lead negotiator on the Protocol, its co-chair of the Joint Committee that oversees implementation of the Withdrawal Agreement, and its co-chair of the Partnership Council that oversees implementation of the EU-UK Trade and Cooperation Agreement. She met in person or by video with EU Commission Vice President Maroš Šefčovič on several occasions in January and February to discuss the issues raised by the UK in its Command Paper last July in regard to the impact of the Protocol on the movement of goods from Great Britain to Northern Ireland – in particular, on goods intended for distribution and consumption in Northern Ireland – and the measures put forward by the EU last October to address those issues. By all accounts, the meetings took place in a cordial atmosphere. But Truss made it clear that she wanted an agreement by the end of February, in large part so it would be formally approved prior to the start of the election campaign for the Assembly in late March.

While Truss and Šefčovič and their officials continued their discussions, the DUP ministers in the Northern Ireland Executive, evidently frustrated with the lack of progress in resolving those issues, took matters into their own hands. On Feb. 2, Edwin Poots, Northern Ireland’s Minister of Agriculture and a former leader of the DUP, ordered an immediate halt to SPS (sanitary and phytosanitary) checks on agri-food goods arriving from Great Britain at the ports of Belfast and Larne. However, his order was not immediately implemented as officials within the department “considered the wider implications of fulfilling the minister’s requests.” Donaldson, the current DUP leader, said, “Now is the moment when we say ‘Enough’. We are clear that the Protocol represents an existential threat to the future of Northern Ireland’s place within the Union. The longer the Protocol remains, the more it will harm the Union itself.” On Feb. 3, Paul Givan, the DUP First Minister, resigned in protest against the requirement that, under the terms of the Protocol, goods arriving in Northern Ireland from Great Britain and destined for consumption in Northern Ireland must nevertheless be checked. Under the terms of the Northern Ireland (St Andrews Agreement) Act 2006, his resignation meant that Michelle O’Neill, the Sinn Féin deputy First Minister, would no longer hold that office. On Feb. 4, a High Court judge in Belfast granted an interim injunction against Poots’ decision, noting that the checks had been in effect since the Protocol took effect in January 2020 and that it was unclear why they should stop now. He referred the matter for further consideration at a later hearing.

A week later, before another meeting with Šefčovič, Truss underscored the need to address the issues involving the Protocol: “Fixing the Northern Ireland Protocol is an absolute priority for me. We have a shared responsibility with the EU to work towards solutions as quickly as possible that deliver for the people of Northern Ireland.” By mid-March, she was reportedly sufficiently frustrated by the lack of progress in her discussions with Šefčovič that she urged Johnson to warn the EU that the UK was prepared to suspend parts of the Protocol if there was no agreement on modifying it before the Northern Ireland election scheduled for May 5. She reportedly told officials to prepare in case it became necessary to invoke the Article 16 “Safeguards” clause in the Protocol which Frost had, on several occasions, warned the UK might

invoke. That clause states, “If the application of this Protocol leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade, the Union or the United Kingdom may unilaterally take appropriate safeguard measures. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Protocol.”

Truss also directed the officials to prepare legislation that would, if adopted, give the government the power to unilaterally disregard certain provisions of the Protocol – specifically, Articles 5-10 covering customs duties, the movement of goods from Great Britain to Northern Ireland, technical regulations, assessments, registrations, approvals, authorizations, VAT and excise taxes, and other related issues. The legislation would reportedly not only eliminate checks on goods moving from Great Britain to Northern Ireland intended for distribution and consumption there but would also remove all requirements for businesses in Northern Ireland to follow EU regulations and would exclude the European Court of Justice from any role in regard to the movement of goods between Great Britain and Northern Ireland. Suella Braverman, the Attorney General for England and Wales and Advocate General for Northern Ireland, reportedly advised the government that such legislation would be legal because the EU’s implementation of the Protocol has been and remains “disproportionate and unreasonable.” She concluded the implementation of the Protocol, by creating a trade barrier in the Irish Sea, has not only resulted in a diversion of trade that has adversely affected both producers in Great Britain and distributors and consumers in Northern Ireland but has also undermined the Belfast Good Friday Agreement by creating a trade barrier in the Irish Sea that has contributed to civil unrest. That agreement, she said, has “primordial significance” and is more important than the Protocol.

In a statement last Tuesday, Truss criticized the proposals put forward by the EU to resolve the continuing dispute over the Protocol: “The current EU proposals fail to properly address the real issues affecting Northern Ireland and in some cases would take us backward. Prices have risen, trade is being badly disrupted, and the people of Northern Ireland are subject to different laws and taxes than those over the Irish Sea [i.e., in Great Britain], which has left them without an executive and poses a threat to peace and stability. The answer cannot be more checks, paperwork and disruption. Our preference has always been for a negotiated solution but we will not shy away from taking action to stabilize the situation in Northern Ireland if solutions cannot be found.” Last Thursday, she warned that if the EU doesn’t show the “requisite flexibility” in regard to implementation of the Protocol, the UK would have “no choice but to act alone.” Today, in a statement to the House of Commons, Truss announced the government intends to introduce legislation to make changes to the Protocol.

Notwithstanding Braverman’s legal analysis, the British Cabinet is reportedly divided over the idea of unilaterally amending the Protocol. Braverman’s analysis clearly supports the position of Truss and others who believe such legislation is needed. But a number of Cabinet members are understandably concerned about the possible adverse consequences for British trade with the EU and, more broadly, future relations between the UK and EU. As a result, the legislation announced today has not yet been formally approved by the Cabinet and tabled for consideration by the House of Commons, and the Protocol remains in effect. Nevertheless, in her statement today to the House of Commons, Truss made it very clear that the government intends to introduce such legislation “in the coming weeks.” Noting that its first priority is to uphold the

Belfast Good Friday Agreement and its desire to see a First Minister and deputy First Minister in place in Northern Ireland, she noted that the EU customs procedures for moving goods within the UK have resulted in significant costs and paperwork and have diverted trade, have prevented some in Northern Ireland from benefitting from rules on taxation of some products that are available to citizens in other parts of the UK, and, as a result of the EU's sanitary and phytosanitary rules, have imposed restrictions on producers selling food products in Northern Ireland. The government, she said, has "concluded that without resolving these and other issues, we will not be able to re-establish the [Northern Ireland] Executive and preserve the hard-won progress sustained by the Belfast Good Friday Agreement. We need to restore the balance in the Agreement." She noted, importantly, that "our preference is to reach a negotiated outcome with the EU. We have worked tirelessly to that end and will continue to do so... The UK has proposed what we believe to be a comprehensive and reasonable solution to deliver on the objectives of the Protocol... Our proposed solution would meet both our and the EU's original objectives for the Protocol. It would address the frictions in East-West [i.e., Great Britain–Northern Ireland] trade, while protecting the EU Single Market and the Belfast Good Friday Agreement. The challenge is that this solution requires a change in the Protocol itself, as its current drafting prevents it from being implemented, but the EU's mandate does not allow the Protocol to be changed. This is why their current proposals are not able to address the fundamental concerns. In fact, it is our assessment that they would go backward from the situation we have today with the standstill. As the Prime Minister said, our shared objective has to be to find a solution that can command the broadest possible cross-community support for years to come and protect the Belfast Good Friday Agreement in all its dimensions. That is why I am announcing our intention to introduce legislation in the coming weeks to make changes to the Protocol. Our preference remains a negotiated solution with the EU. In parallel with the legislation being introduced, we remain open to further talks if we can achieve the same outcome through negotiated settlement... However, to respond to the very grave and serious situation in Northern Ireland we are clear that there is a necessity to act to ensure the institutions can be restored as soon as possible.... The Government is clear that proceeding with the Bill is consistent with our obligations in international law – and in support of our prior obligations in the Belfast Good Friday Agreement... I want to be clear to the House that this is not about scrapping the Protocol. Our aim is to deliver on the Protocol's objectives. We will cement those provisions which are working in the Protocol... whilst fixing those elements that aren't: on the movement of goods, goods regulation, VAT, subsidy control, and governance. The Bill will put in place the necessary measures to lessen the burden on East-West trade and to ensure the people of Northern Ireland are able to access the same benefits as the people of Great Britain.."

Concluding, Truss said, "I will publish more detail on these solutions in the coming weeks. And let me be crystal clear that even as we do so, we will continue to engage with the EU... We remain open to a negotiated solution, but the urgency of the situation means we can't afford to delay any longer. The UK has clear responsibilities as the sovereign government of Northern Ireland to ensure parity of esteem and the protection of economic rights. We are clear that the EU will not be negatively impacted in any way – just as we have ensured the protection of the EU Single Market since the existence of the Protocol. We must restore the primacy of the Belfast Good Friday Agreement in all its dimensions as the basis for the restoration of the Executive. We will do so in a way that fundamentally respects both unions: that of the UK and of the EU."

Several hours later, Šefčovič issued a statement on behalf of the Commission. He said the EU wishes to have a “positive and stable relationship” with the UK, one that is based on the full respect of the legally-binding commitments made by the two sides in the two agreements – the Withdrawal Agreement and the Trade and Cooperation Agreement – they negotiated and ratified. He pointed out, once again, that the Protocol, part of the Withdrawal Agreement, is the agreed-upon solution that reconciles the challenges created by Brexit, and by the type of Brexit the UK had chosen, by avoiding a hard border on the island of Ireland, protecting the Good Friday Belfast Agreement, and ensuring the integrity of the EU’s Single Market. He said the EU had shown an understanding of the difficulties the UK faced in implementing the Protocol – for example, by coming up with modifications of its rules to ensure the supply in Northern Ireland of medicines produced in Great Britain – modifications that were approved in April by the European Parliament and the Council – and by proposing additional bespoke arrangements to facilitate the flow of goods from Great Britain to Northern Ireland, such as an “express lane” with greatly reduced and simplified customs procedures on an unprecedented scale. He made it clear the Commission stood ready to continue discussions with the UK to identify solutions within the framework of the Protocol that would benefit people and businesses in Northern Ireland and suggested the potential flexibilities proposed by the Commission had not yet been fully considered.

But he also made it clear that the UK’s plan to table legislation that would, in effect, disapply and amend the Protocol raises “significant concerns” – first, because the Protocol is the solution the EU and UK agreed upon to address the challenges posed by the UK’s withdrawal from the EU for the island of Ireland and to protect the gains of the peace process; second, because the Protocol is an international agreement negotiated and agreed by the EU and UK, and “unilateral actions contradicting an international agreement are not acceptable;” and third, because the Withdrawal Agreement and its Protocol are the “necessary foundation for the Trade and Cooperation Agreement, which the EU and UK have agreed upon to organise their overall relationship after the UK’s withdrawal.” And lest anyone miss the point of his reference to the TCA, Šefčovič said, “Should the UK decide to move ahead with a bill disapplying constitutive elements of the Protocol as announced today by the UK government, the EU will need to respond with all measures at its disposal.” He concluded by saying, “Our overarching objective is to find joint solutions within the framework of the Protocol. That is the way to ensure legal certainty and predictability for people and businesses in Northern Ireland. With political will and commitment, practical issues arising from the implementation of the Protocol in Northern Ireland can be resolved. The European Commission stands ready to continue playing its part, as it has from the outset.”

David R. Cameron  
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