

After the UK introduces legislation changing the Northern Ireland Protocol, the EU warns about consequence & launches new infringement proceedings



British Foreign Secretary Elizabeth Truss introducing Northern Ireland Protocol Bill
House of Commons, June 13, 2022

In December, Prime Minister Boris Johnson announced that Foreign Secretary Elizabeth Truss would take over ministerial responsibility from Lord David Frost for the UK's relationship with the EU and, in that capacity, would serve as the UK's lead negotiator on the Protocol on Ireland/Northern Ireland contained in the EU-UK Withdrawal Agreement as well as the UK's 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. While their meetings took place in a cordial atmosphere, 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 in late March of the election campaign for the Northern Ireland Assembly.

By mid-March, Truss was reportedly sufficiently frustrated by the lack of progress in her discussions with Šefčovič, and the subsidiary discussions of their officials, 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 on May 6 and reportedly told officials to prepare in case it became necessary to invoke the Article 16 “Safeguards” clause of the Protocol. That article allows either party to unilaterally take “appropriate safeguard measures” if the application of the Protocol “leads to serious economic, societal or

environmental difficulties that are liable to persist, or to diversion of trade.” And armed with a legal opinion from Suella Braverman, the Attorney General for England and Wales and Advocate General for Northern Ireland, that the UK could unilaterally decide not to apply certain provisions of the Protocol because the EU’s implementation had been “disproportionate and unreasonable” and, by creating a trade barrier in the Irish Sea, had not only resulted in a diversion of trade that had adversely affected producers in Great Britain and distributors and consumers in Northern Ireland but had also undermined the Belfast Good Friday Agreement and contributed to civil unrest in Northern Ireland, Truss also directed officials to prepare legislation that would give the government the power to unilaterally disregard certain provisions of the Protocol covering customs duties, the movement of goods from Great Britain to Northern Ireland, value-added and excise taxes, and other related issues.

On Monday, citing the “doctrine of necessity” that, it claimed, “provides a clear basis in international law to justify the non-performance of international obligations under certain exceptional and limited conditions,” the UK government introduced the Northern Ireland Protocol Bill. The bill introduces a number of modifications of the rules in the Protocol in regard to the movement of goods from Great Britain to Northern Ireland, the regulations that apply to goods sold in Northern Ireland, the application of EU state aid rules and VAT and excise taxes in Northern Ireland, and the resolution of disputes. For example, in regard to the movement of goods from Great Britain to Northern Ireland, the Bill would create two “channels” – a “green channel” for goods that are to be consumed in Northern Ireland and a “red channel” for goods that are to be consumed in Ireland or elsewhere in the EU. Goods arriving in the “green channel” would no longer require the burdensome paperwork and customs procedures currently required under the terms of the Protocol and would not have to meet the EU’s sanitary and phytosanitary (SPS) standards, while those arriving in the “red channel” and destined for Ireland or elsewhere in the EU would be subject to EU customs and SPS rules and paperwork. In addition, the Bill would exempt those goods moving to Northern Ireland from Great Britain and destined for consumption in Northern Ireland from the regulations to which they would be subject if sold in the EU. The Bill would also allow the UK to apply UK rules, rather than EU rules, in regard to value-added and excise taxes and subsidies for companies and consumers in Northern Ireland. And importantly, the Bill would provide that disputes arising under the Protocol would be dealt with by arbitration rather than by the Court of Justice of the EU.

In introducing the Bill, Truss said, “This Bill will uphold the Belfast (Good Friday) Agreement and support political stability in Northern Ireland. It will end the untenable situation where people in Northern Ireland are treated differently to the rest of the United Kingdom, protect the supremacy of our courts and our territorial integrity. This is a reasonable, practical solution to the problems facing Northern Ireland. It will safeguard the EU Single Market and ensure there is no hard border on the island of Ireland. We are ready to deliver this through talks with the EU. But we can only make progress through negotiations if the EU are willing to change the Protocol itself – at the moment they aren’t. In the meantime the serious situation in Northern Ireland means we cannot afford to allow the situation to drift. As the government of the whole United Kingdom, it is our duty to take the necessary steps to preserve peace and stability.”

Needless to say, the EU disagreed. Later on Monday, Šefčovič issued a lengthy statement in which he said the relationship between the EU and the UK “must be based on the full respect of

the legally binding commitments that we have made to one another... The Protocol on Ireland/Northern Ireland, an integral part of the Withdrawal Agreement, protects the 1998 Good Friday (Belfast) agreement in all its dimensions. It respects the constitutional position of Northern Ireland within the UK. It avoids a hard border on the island of Ireland and protects the integrity of the EU Single Market. After countless hours of intensive, line-by-line negotiations, it was the one and only solution we could jointly find to protect the hard-earned gains of the peace process in Northern Ireland, while addressing the challenges created by Brexit, and the type of Brexit chosen by the UK government.” Renegotiating the Protocol is “unrealistic,” he said: “No workable alternative solution has been found to this delicate, long-negotiated balance. Any renegotiation would simply bring further legal uncertainty for people and businesses in Northern Ireland. For these reasons, the EU will not renegotiate the Protocol.” But he offered an olive branch, noting that the EU has shown an understanding of the practical difficulties of implementing the Protocol and, based on our extensive engagement with a wide range of stakeholders in Northern Ireland, the Commission had put forward far-reaching, bespoke arrangements, especially to facilitate the movement of goods between Great Britain and Northern Ireland. With political will and commitment, the full potential of the flexibilities put forward should be explored – and the European Commission remains keen to do that with the UK government as soon as possible.”

But while holding out an olive branch, Šefčovič made it clear that there will be consequences if the UK proceeds with its Bill: “The Protocol provides business operators in Northern Ireland with access to the EU Single Market for goods. The UK government’s approach puts this access – and related opportunities – at risk. Our aim will always be to secure the implementation of the Protocol. Our reaction to unilateral action by the UK will reflect that aim and will be proportionate. As a first step, the Commission will consider continuing the infringement procedure launched against the UK government in March 2021. We had put this legal action on hold in September 2021 in a spirit of constructive cooperation to create the space to look for joint solutions. The UK’s unilateral action goes directly against this spirit. The Commission will also consider launching new infringement procedures that protect the EU Single Market from the risks that the violation of the Protocol creates for EU businesses and for the health and safety of EU citizens.” In concluding, Šefčovič noted, ominously, that unilaterally altering the Protocol could have serious consequences for the UK’s trade relationship with the EU: “The Commission recalls that the conclusion of the Withdrawal Agreement was a pre-condition for the negotiation of the Trade and Cooperation Agreement. Today’s decision by the UK government undermines the trust that is necessary for bilateral EU-UK cooperation within the framework of the Trade and Cooperation Agreement. We call on the UK government to engage with us on joint solutions. The Commission stands ready to play its part – as it has from the outset.”

Yesterday, the Commission moved forward with several infringement proceedings against the UK for not complying with significant parts of the Protocol. It decided to take the infringement proceeding launched in March 2021 as a result of the UK failing to properly implement the Protocol in regard to the certification requirements for the movement of agri-food to the next stage by issuing a Reasoned Opinion. If the UK doesn’t reply within two months, the Commission will consider taking it to the European Court of Justice, which, among other things, has the power to impose a lump-sum penalty. The Commission also launched two new infringement proceedings against the UK. One concerns the UK’s failure to carry out its

obligations under the EU's sanitary and phytosanitary rules, its failure to carry out the necessary controls and ensure adequate staffing and infrastructure at Border Control Posts in Northern Ireland, and its issuance of guidance that has the effect of disapplying EU law. The other concerns the UK's failure to provide the EU with certain trade statistics data pertaining to Northern Ireland that are required under the Protocol.

Yesterday, in a statement announcing the new infringement proceedings, Šefčovič said, "On Monday, the UK government tabled legislation, confirming its intention to unilaterally break international law. More precisely, to break an agreement that protects peace and stability in Northern Ireland – an agreement that we reached together only two years ago. Let there be no doubt: there is no legal, nor political justification whatsoever for unilaterally changing an international agreement. Opening the door to unilaterally changing an international agreement is a breach of international law as well. Let's call a spade a spade: this is illegal. This UK bill is extremely damaging to mutual trust and respect between the EU and the UK. It has created deep uncertainty and casts a shadow over our overall cooperation... We have been withholding this legal action over the last year because we wanted to create a constructive atmosphere to find solutions. The UK government's decision has left us with no choice but to act... Despite today's legal action, our door remains open to dialogue. We want to discuss these solutions with the UK government. Given that the UK hasn't sat down at the table with us since February, I think it's high time to show some political will to find joint solutions... I am convinced that with political will we can find solutions for people and businesses in Northern Ireland. But this must be done jointly."

The UK has some legitimate grievances about the consequences of the Protocol on the movement of goods from Great Britain to Northern Ireland. Most if not all of them could be resolved through negotiation with the Commission rather than by unilaterally amending the Protocol and running the risk of jeopardizing the UK's trade with the EU. But of course, in bringing the Bill forward, the British government wasn't motivated just by a concern about facilitating the movement of goods from Great Britain to Northern Ireland. It was also motivated by politics – in particular, by the fact that the Democratic Unionist Party of Northern Ireland had strongly objected to the Protocol and has refused to participate in a new government – one that would, as a result of the May election, be headed by Michelle O'Neill, the Sinn Féin Vice President and leader in Northern Ireland – until the British government addressed its concerns with the Protocol. (Under the terms of the Northern Ireland (St Andrews Agreement) Act 2006, a new government cannot take office without the support of both the largest nationalist party – Sinn Féin – and the largest unionist party – the DUP.) It was therefore somewhat ironic that on Tuesday 52 of the 90 members of the Legislative Assembly of Northern Ireland wrote to Johnson, stating that they "reject in the strongest possible terms your Government's reckless new protocol legislation, which flies in the face of the expressed wishes of not just most businesses, but most people in Northern Ireland." Evidently, a majority of the Assembly doesn't matter for the UK government – unless it includes the DUP.

David R. Cameron
June 16, 2022