

EU and UK agree to work on resolving dispute over Northern Ireland Protocol



EU Commission Vice President Maroš Šefčovič and UK Foreign Secretary James Cleverly meeting Monday in London.

The UK left the EU at 11 p.m. (midnight Brussels time) on Jan. 31, 2020 and the “transition period,” during which the UK remained, after its exit, in the EU’s Single Market, ended on Dec. 31, 2020. Since then, the UK and EU have disagreed vehemently and repeatedly about the implementation of the Protocol on Ireland/Northern Ireland contained in the 2019 Withdrawal Agreement – indeed, to such an extent that the EU initiated several infringement procedures against the UK last year for violating the terms of the Protocol and last June the UK introduced legislation that would amend the Protocol, notwithstanding the fact that the Protocol, as an integral part of the Withdrawal Agreement, cannot be unilaterally amended by either party.

The Protocol, which, including annexes, is 45 pages in length in the Official Journal of the EU, sets out the arrangements the EU and UK agreed would be necessary after the UK’s exit in order to address the unique circumstances on the island of Ireland— specifically, those needed to maintain North-South cooperation, avoid a hard land border between the Republic and Northern Ireland, and protect the 1998 Good Friday/Belfast Agreement in all its dimensions. The arrangements, agreed by Prime Minister Boris Johnson in the autumn of 2019 after an earlier version of the Withdrawal Agreement negotiated by Theresa May’s government in 2018 had been rejected three times by the House of Commons, included most notably—and controversially—Northern Ireland continuing to adhere to the rules and regulations of the EU’s Single Market and continuing to apply the EU’s customs code and border procedures to all goods arriving from Great Britain. In effect, the Protocol created a border in the Irish Sea for goods

moving from Great Britain to Northern Ireland in order to avoid creating a hard land border between Northern Ireland and the Republic.

In July 2021, the British government issued a Command Paper, entitled “Northern Ireland Protocol: the way forward,” which called for new talks aimed at amending the Protocol and establishing a “new balance” in regard to the movement of goods between Great Britain and Northern Ireland. It noted that, while the Joint Committee responsible for implementing the Withdrawal Agreement had agreed on time-limited grace periods for some goods moving from Great Britain to Northern Ireland, the default assumption—that all goods moving from Great Britain to Northern Ireland would be subject to the full checks and controls that apply to goods moving from third countries into the EU—remained in effect, even for goods from Great Britain destined for consumption in Northern Ireland. It claimed that supply chains had been disrupted, costs to businesses had increased, at least 200 companies in Great Britain had stopped supplying the Northern Ireland market, resulting in a substantial diversion of trade to Ireland, plants and trees long sourced from Great Britain could no longer be stocked in nurseries and garden centers, supermarkets had reduced their product lines because of delays and shortages, medicines produced in Great Britain were at risk of discontinuation, and pet owners and those relying on assistance dogs encountered difficulties in travel within the UK. All in all, the paper concluded, “the current situation is not sustainable. The way the Protocol is working needs to change.”

The paper argued the circumstances—in particular, the significant disruption in trade between Great Britain and Northern Ireland and the significant diversion from Great Britain to Ireland as a source of goods for Northern Ireland, coupled with the societal and economic impact and the political and community instability that had occurred as a result—would justify the UK making use of the Article 16 “safeguard” clause of the Protocol. That clause allows either party to “unilaterally take appropriate measures” 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 paper argued, “Article 16 was designed precisely with such circumstances in mind, allowing for either party to act unilaterally with appropriate measures, in a proportionate way and in a manner necessary to remedy the situation.”

In October 2021, talks focused on the problems created by the Protocol for the movement of goods from Great Britain to Northern Ireland began between teams headed by European Commission Vice President Maroš Šefčovič and Lord David Frost, Minister of the Cabinet Office. After Frost resigned from the government in late 2021, the talks continued with the British side led by Foreign Secretary Liz Truss. She met in person or by video with Šefčovič on several occasions last January and February to discuss the issues raised by the Command Paper. While their meetings took place in a cordial atmosphere, she made it clear that she wanted an agreement by the end of February, in large part so it could be formally approved prior to the start in late March of the campaign for the election of the Northern Ireland Legislative Assembly on May 5. Given the complexity of the issues and the firmness of the EU position, that timeline was of course wildly unrealistic. Nevertheless, Truss was reportedly sufficiently frustrated by the lack of progress in her discussions with Šefčovič and the discussions between 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 and told officials to prepare in case it became necessary to invoke the Article 16 “Safeguards” clause of the Protocol. She 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.

The talks continued, but with little progress, and on May 5, Sinn Féin won an historic victory in the Northern Ireland election which meant it would, under the terms of the Northern Ireland (St. Andrews Agreement) Act 2006 which amended the Northern Ireland Act 1998, nominate the First Minister of the Northern Ireland Executive. But the Democratic Unionist Party, the loudest opponent of the Protocol, refused to support the election of a Speaker of the new Assembly, which meant Michelle O’Neill, the leader of Sinn Féin, couldn’t be elected First Minister. The DUP also made it clear that, even if a Speaker were elected, it wouldn’t nominate a deputy First Minister, meaning that, under the complex power-sharing rules in effect, the Assembly wouldn’t be able to form the Executive and O’Neill wouldn’t take office as First Minister.

Last June, citing the ‘doctrine of necessity’ that “provides a clear basis in international law to justify the non-performance of international obligations under certain exceptional and limited conditions,” Truss introduced the Northern Ireland Protocol Bill. The bill proposed 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. One notable proposal would involve creation of two “channels” – a green one for goods that will be consumed in Northern Ireland and a red one for goods that will 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 proposed exempting goods moving from Great Britain to Northern Ireland for consumption in Northern Ireland from the regulations to which they would be subject if sold in the EU. The bill also proposed allowing 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, it would require that disputes arising under the Protocol be dealt with by arbitration rather than by the Court of Justice of the EU.

The EU, perhaps not surprisingly, challenged not only the legal basis on which the UK claimed it could unilaterally amend the Protocol but the specific changes proposed as well. 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, he said, is “unrealistic. 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 did offer an olive branch, noting that the EU understood the practical difficulties of implementing the Protocol and had put forward far-reaching “bespoke” arrangements to facilitate the movement of goods between Great Britain and Northern Ireland. The full potential of the flexibilities put forward by the EU should, he said, be explored, and the European Commission wanted to do that with the UK government as soon as possible.

But while holding out an olive branch, Šefčovič also made it clear there would be consequences if the UK enacted the bill introduced by Truss: “The Protocol,” he said, “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.” And he 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 [to introduce the legislation] 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.”

The next day, as if to underscore what Šefčovič said, the Commission moved forward with several infringement proceedings against the UK for not complying with significant parts of the Protocol. Several hours later, he issued a statement on behalf of the Commission in which 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 urgently-needed medicines produced in Great Britain – modifications that were approved the previous month 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 raised “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.”

Soon thereafter, however, for reasons not related to the Protocol, Boris Johnson resigned; the Conservatives went through a protracted process of choosing a new leader and hence, given their majority in the House of Commons, prime minister; Liz Truss was elected party leader and became prime minister in early September only to resign in late October; and Rishi Sunak was elected several days later party leader and prime minister. The bill introduced by Truss last June has quietly been set aside and Sunak, a former chancellor of the exchequer who understands better than most the economic importance of the EU-UK relationship and the TCA, has directed his government to resume negotiations with the EU in regard to the implementation of the Protocol. On Monday, British Foreign Secretary James Cleverly and Šefčovič met in London, and for the first time since the UK announced last spring its intention to amend the Protocol there is reason to believe the UK and EU may resolve their prolonged dispute over its implementation. In their joint statement after the meeting, they said they “took stock of work to find joint solutions to the concerns raised by businesses and communities in Northern Ireland. The meeting was cordial and constructive. They underlined the EU and UK’s shared commitment to protect the Belfast (Good Friday) Agreement in all its parts, while protecting the integrity of both the EU Single Market and the UK internal market. They agreed that while a range of critical issues need to be resolved to find a way forward, an agreement was reached today on the way forward regarding the specific question of the EU’s access to UK IT systems. They noted this work was a critical prerequisite to building trust and providing assurance, and provided a new basis for EU-UK discussions. EU and UK technical teams will work rapidly to scope the potential for solutions in different areas on the basis of this renewed understanding, and the Foreign Secretary, the Northern Ireland Secretary and Vice President Šefčovič would take stock of progress on 16

January.” If they conclude on Monday that there has been progress, they will presumably enter a negotiating “tunnel,” precluding further public statements until the negotiation is concluded.

After the meeting, Šefčovič tweeted, “Glad to meet James Cleverly and Chris Heaton-Harris [the Secretary of State for Northern Ireland]. We agreed on the way forward on the EU’s access to UK IT systems. This means a new basis for discussions on the Protocol. Our teams will work rapidly to scope potential for solutions in different areas.” The next day Šefčovič met in Brussels with Micheál Martin, the Irish Taoiseach [head of government] from 2020-22 and now the Tánaiste [deputy head of the government] and minister of foreign affairs and defense in the government headed since December by Leo Varadkar. After the meeting, he tweeted, “Great to speak with Tánaiste Micheál Martin today in Brussels. We discussed yesterday’s IT database agreement – positive news. We are committed to finding joint solutions that work for all communities in Northern Ireland. I appreciate Ireland’s support.” Martin for his part tweeted, “Very useful discussion on the Protocol with Maroš Šefčovič today. He has our full support as hard work continues to find joint solutions in the EU-UK discussions. Encouraged by the new positive momentum.”

Monday’s agreement is only an agreement in principle to work intensively on resolving the issues that have arisen in the implementation of the Protocol. Nevertheless, after 18 months of disagreement over the consequences of the Protocol and only a few ad hoc adjustments in its implementation, Monday’s agreement is an important first step in the right direction for the EU, the UK and, most importantly, the people of Northern Ireland.

David R. Cameron
January 12, 2023