

EU and UK agree on new framework to resolve dispute over Northern Ireland Protocol



European Commission President Ursula von der Leyen and British Prime Minister Rishi Sunak at talks in Windsor today on the Protocol on Ireland/Northern Ireland.

The UK left the EU 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 the UK introduced legislation last June 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, supermarkets had reduced their product lines because of delays and shortages, and the supply of medicines produced in Great Britain and relied upon by citizens in Northern Ireland had been disrupted. 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. While their meetings took place in a cordial atmosphere, she made it clear that she wanted an agreement by the end of February 2022, 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, 2022. Truss soon became sufficiently frustrated by the lack of progress in the discussions 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 legislation that 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 involved creation of two "channels" – a green one for goods to be consumed in Northern Ireland and a red one for goods that could 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 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" 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. It 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 it proposed that disputes arising under the Protocol be dealt with by arbitration rather than by the European Court of Justice. The EU, not surprisingly, challenged not only the legal basis on which the UK claimed it could unilaterally amend the Protocol but also the specific changes proposed by the UK.

Early last July, for reasons not related to the Protocol, Johnson resigned and the Conservatives went through their protracted process of choosing a new party leader who, given their majority in the House of Commons, would become prime minister. In a vote conducted among the party membership last summer, Truss was elected leader and became prime minister in early September, only to resign in late October. Several days later, Rishi Sunak, her opponent in last summer's contest, was chosen to replace her as party leader and hence prime minister. The bill introduced by Truss last June was quietly set aside and Sunak, a former chancellor of the exchequer who understands better than most the economic importance of the EU-UK relationship, directed his government to resume negotiations with the EU in regard to the implementation of the Protocol. The talks, led by Šefčovič for the EU and Foreign Secretary James Cleverly for the UK, made good progress, and by January the two sides had entered a

negotiating “tunnel” that precluded any public statements until the negotiation had been completed.

Today, European Commission President Ursula von der Leyen and Sunak met in Windsor and announced “a political agreement in principle on the Windsor Framework.” This, the EU said, “constitutes a comprehensive set of joint solutions aimed at addressing, in a definitive way, the practical challenges faced by citizens and businesses in Northern Ireland....The joint solutions cover, amongst other things, new arrangements on customs, agri-food, medicines, VAT and excise, as well as specific instruments designed to ensure that the voices of the people of Northern Ireland are better heard on specific issues particularly relevant to the communities there. These new arrangements are underpinned by robust safeguards to ensure the integrity of the EU’s Single Market, to which Northern Ireland has a unique access.”

In the sanitary and phyto-sanitary (SPS) area, the solutions ensure that the same food will be available on supermarket shelves in Northern Ireland as in the rest of the UK. In practice, agri-food retail products for end consumption in Northern Ireland will be able to move from Great Britain to Northern Ireland with minimal certification requirements and controls and UK public health standards will apply to such goods. There will be new arrangements in the area of customs that will be based on an expanded trusted trader scheme open to businesses in Great Britain, thereby greatly simplifying procedures, including declarations. The system of red and green lanes for goods being sent from Great Britain to, respectively, the EU or Northern Ireland will be used to greatly simplify the documentation and paperwork required for such goods. An arrangement has been found that will ensure that people in Northern Ireland will have access to all medicines available to people in the rest of the UK at the same time and under the same circumstances. Value-added and excise taxes on goods that are for sale in Northern Ireland will be set by the UK. A solution, in the form of simple documentation, will allow people to travel with their pets from Great Britain to Northern Ireland. And a solution has been found that will allow plants, shrubs, trees and seeds to be moved easily from Great Britain to Northern Ireland, thereby supporting garden centers and farming.

Importantly, with regard to governance, the voices of Northern Ireland people and stakeholders will be better heard through regular engagement at each level of the Withdrawal Agreement structures and with enhanced engagement on Protocol-related matters, including new thematic subgroups within the Joint Consultative Working Group. And most importantly, there will be a new “emergency mechanism” – the Stormont Brake – which will allow the UK government, at the request of 30 members of the Legislative Assembly in Northern Ireland (Stormont), “to stop the application in Northern Ireland of amended or replacing provisions of Protocol-related EU law that may have a significant and lasting impact specific to the everyday lives of communities there.” The mechanism would be triggered only under the most exceptional circumstances and as a matter of last resort, in a very well-defined process to be set out in a Unilateral Declaration by the UK. Nevertheless, there is such a mechanism. On the other hand, as the EU insisted throughout the negotiation, the role of the Court of Justice as the final arbiter of EU law has not been modified; as the EU said today, “The Court of Justice of the European Union remains the sole and ultimate arbiter of EU law.”

The Commission and the UK will now proceed with the necessary steps to translate their joint solutions into legally binding instruments and then implement them. Toward that end, the EU-UK Joint Committee on the Withdrawal Agreement that is co-chaired by Šefčovič and Cleverly will meet in the near future. Today, the Commission submitted proposals to the Council for a Union position in regard to the decisions that will need to be adopted at that meeting, and it also tabled legislative proposals in regard to food, medicines, and other goods. As part of today's agreement, the UK agreed not to proceed with the Northern Ireland Protocol Bill the government brought forward last year and the EU agreed that when the arrangements announced today are implemented there will no longer be grounds for continuing with the seven infringement procedures the Commission initiated last year relating to the Protocol on Ireland/Northern Ireland.

Later today, Sir Jeffrey Donaldson, the leader of the Northern Ireland DUP, acknowledged that "significant progress" had been made but said there remain key issues of concern and the party will take time to study the text of the deal in detail. And Doug Beattie, the leader of the Ulster Unionist Party, likewise said the party will study the text and decide whether it is a good deal for Northern Ireland. The answer is obvious: It is; indeed, it's a very good deal for Northern Ireland.

David R. Cameron
February 27, 2023