

The NI Protocol. Fraying at the Edges or Beginning to Collapse?

By Graham Gudgin

The signs are not good for the EU on the Northern Ireland Protocol. Collapse is in the air but of course the EU wants to maintain an evolving fiction that the UK's legal obligations will be fully realized once a few tweaks are negotiated to make trade flow more easily across the Irish Sea border. Meanwhile, the UK has been on a 'go slow' in implementing the Protocol ever since it came into force at the start of 2021. A unilateral grace period was imposed by Lord Frost to suspend EU checks of food products and a ban on imports of chilled meat. The EU took legal action but with not much to gain in practice little has subsequently been heard of the legal case. Further grace periods were agreed by the EU in mid-2021 to avoid the threat of further unilateral action.

The EU negotiator, Maros Sefcovic has continually complained that the UK is not fulfilling its legal obligations and has demanded full implementation of the Protocol rules before any permanent easements can be agreed. A paper from the Commission's Directorate General for Health and Food Safety last October detailed the concerns. Based on an audit inspection of SPS checks at customs posts in NI undertaken in June 2021, it complained that staffing levels, including vets, were inadequate and that further recruitment had been stopped. Further checks on animals were inadequate and monitoring of destinations was not being applied. None of the required checks on personal luggage or pets were being undertaken. The audit concludes *"This Commission control identified several critical factors which collectively and critically undermine the credibility of guarantees given by the United Kingdom Government in respect of its obligations to implement Union law"*.

Unenthusiastic implementation has now been followed by an attempt from the DUP to stop SPS checks altogether at the border control posts in Northern Ireland. Despite the Protocol's preamble itself underlining the EU and UK's *"shared aim of avoiding controls at the ports and airports of Northern Ireland, to the extent possible in accordance with applicable legislation"*, border posts were constructed in NI. These became a target of earlier loyalist protests and the minister responsible for their construction and operation, the DUP Agriculture minister Edwin Poots, sought to prevent them functioning. His first attempts were stymied by internal legal advice that UK law prevented such action. Most recently he managed to obtain a legal opinion from a former NI Attorney General that his action to close the border posts was legal.

The experienced DUP leader, Jeffrey Donaldson knew all along that this attempt would be overthrown by the courts and this is what happened. Poots ordered the cessation of work at the border posts but his civil servants ignored the order on the grounds that it was illegal. A high court injunction quickly supported the civil servants but a full hearing is yet to occur. As a direct result the DUP First Minister of NI, Paul Givan then resigned, taking the Sinn Fein Deputy First minister with him, as required by the Good Friday rules. The Executive thus no longer operates, but the Assembly and individual Ministers can stay in place for six weeks. An Assembly Election due in May will go ahead as planned but the DUP have said they will not take their seats unless the Protocol is substantially reformed.

The DUP's key demand is that customs declarations and border checks be removed for goods flowing from GB into destinations in NI. The real aim of Poot's action was to highlight unionist opposition to the Protocol and to undermine the EU's fatuous claim that the Protocol protected the Good Friday Agreement in all its dimensions. In fact, the protocol only protected nationalist interests and in Lord Trimble's words 'rode a coach and horses through the Good Friday Agreement'. All

unionist parties in NI are now against the Protocol and unionist public opinion has followed suit, with only 2% of unionist voters in a recent poll supporting the Protocol in its current form.

Significantly, Foreign Secretary, Liz Truss, now responsible for the Protocol negotiations, declined to override Poots, saying that his move was a matter for the NI Assembly. Meanwhile negotiations between the UK and EU continue, with the EU increasingly frustrated that their hope that Truss would be more malleable than her predecessor Frost has not materialised. UK aims, as described in Frost's 2021 Command Paper, remain fully in place. Similarly, the threat to use the Protocol's Article 16 to disable large parts of the Protocol, remains a live threat.

David Frost always regarded Article 16 as a narrow option and much preferred to use it as a potent threat to persuade the EU to renegotiate the Protocol. It now seems increasingly unlikely that the nuclear option of article 16 will be used. A more likely path is that the UK will simply refuse to fully operate the Protocol, extending grace periods to suspend key aspects of customs checks. In the meantime, the DUP will continue to argue for legal powers to avoid running the customs posts and will refuse to allow the NI Assembly to operate, even after the May elections (which may well return Sinn Fein as the largest party and potential First Minister).

The Protocol is thus doing the opposite of EU intentions. Northern Ireland has been destabilised and the Good Friday Agreement undermined. The unionist population is solidly opposed and the undemocratic basis of the Protocol has been highlighted. Arguments for the Protocol are crumbling but the EU still needs adequate protection for its single market border in Ireland. The obvious alternative is the 'honesty box' approach involving mutual enforcement of trade rules by both sides. The EU protests that this is unprecedented, but then so is an EU trade border inside the UK which patently does not work.