# How to Exit the Backstop

A Policy Exchange research note

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# Political Responsibility and the Permanence of the Backstop

On 11 December, the House of Commons must vote on whether to approve the Withdrawal Agreement and the Political Declaration setting out the framework for the future relationship between the UK and the EU. At this point, it seems there is no majority for the Agreement and the Political Declaration. For many MPs, the main concern with the Agreement is the feasibility of the UK exiting from the backstop, i.e. the Protocol on Ireland/Northern Ireland to the Withdrawal Agreement. The backstop is expressly "*intended to apply only temporarily*". However, in its current form, the Protocol makes no provision for a right of unilateral withdrawal, even though this right is not uncommon in treaties (Article 50 of the Lisbon Treaty is an obvious example).

While Parliament is not able to enact a right to withdraw from the backstop – the right would have to arise under international law – Parliament might be able to secure some strengthening of the UK's position on the termination of the backstop. This paper outlines the legal position as it stands, and explains how Parliament and Government jointly could mitigate the risk that the backstop becomes a permanent feature of the UK's future relationship with the EU: the risk that the UK will be unable to escape it.

In brief, the House of Commons motion to approve the Agreement and Political Declaration might be amended to identify specific and feasible changes in connection with the Agreement and its ratification that could strengthen the hand of the Prime Minister on any return to Brussels that the passage of an amended motion would probably require. The Parliamentary proceedings on the Bill to implement the Withdrawal Agreement will also provide an opportunity for Parliament to require the Government to put the UK in a stronger position as regards the backstop.

The clearest way for the Government to address Parliament's concern would be by reopening with the EU the question of a unilateral right to withdraw from the backstop, and seeking an amendment of the Withdrawal Agreement to this effect. Alternatively, the Government could make a unilateral interpretative declaration to clarify and strengthen the UK's right, under the Vienna Convention on the Law of Treaties, to suspend or terminate the Protocol in certain circumstances.

Whatever one's views of the merits of the Agreement and Political Declaration more generally, the national interest requires MPs to give serious attention to

whether what appear to be the objectionable elements of the Agreement can be overcome or at least improved. The risk that the backstop may prove permanent is probably the most critical of these elements. It is important to be clear about the precise nature of this risk and how, even at this late stage, it might be mitigated. Even those MPs who would rather the UK remained in the EU and those who would rather the UK left on WTO terms need to understand whether and to what extent the deal currently on offer could be made more acceptable to them.

# The position under the Vienna Convention on the Law of Treaties

There are two Vienna Conventions on the Law of Treaties: the main one from 1969; and a further one, concluded in 1986, dealing specifically with treaties between States and International Organizations or between International Organizations. The provisions relevant to our analysis carry the same numbering in both treaties, and are materially identical. They are, moreover, generally viewed as reflecting customary international law. So, references to the VCLT below can be taken as references to both treaties.

In the absence of an express right of unilateral withdrawal, the rule set forth in Article 56 of the VCLT applies:

> *1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:*
>
> > *(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or*
> >
> > *(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.*
>
> *2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.*

It may be difficult for the UK to rely on paragraph 1(a). Sam Coates of *The Times* has reported that the UK team had prepared a draft termination clause but this was never formally tabled during the negotiations for fear that it would be unacceptable to the EU.[1] Whether or not this is an accurate account of what

[1] https://twitter.com/samcoatestimes/status/1068153841252737027?s=21

happened behind closed doors, what is known about the EU's position offers very little (if any) support to the view that the EU ever intended to admit the possibility of unilateral withdrawal.

The position under paragraph 1(b) may be slightly better for the UK, particularly in light of the terms of Article 1(4) of the Protocol which provides:

> *The objective of the Withdrawal Agreement is not to establish a permanent relationship between the Union and the United Kingdom. The provisions of this Protocol are therefore intended to apply only temporarily, taking into account the commitments of the Parties set out in Article 2(1). The provisions of this Protocol shall apply unless and until they are superseded, in whole or in part, by a subsequent agreement.*

The commitments in Article 2(1), to which this provision refers, are to the "*best endeavours*" obligation to conclude "*an agreement which supersedes this Protocol in whole or in part*".

It is the express requirement for the Protocol to be temporary that has been relied on by the Prime Minister – but, so far at least, apparently unsuccessfully – to reassure those who are concerned that the backstop could continue permanently. The UK might seek to argue that it would have an implied right of unilateral withdrawal in terms of Article 56(1)(b) of the VCLT, should the EU subsequently proceed in a manner that results in the Protocol being applied otherwise than temporarily.

However, there is clearly an unresolved tension in Article 1(4) of the Protocol between the "temporary" nature of the backstop and the last sentence of that provision. Many in Parliament are understandably uneasy about that and, given what is known about the negotiations on the duration of the backstop, the argument that a unilateral right to withdraw should be implied in the Protocol would be faced with formidable difficulties. So, it seems, the legal advice to the Government has declared. On the other hand, principle requires that both parts of Article 1(4) need to be given some substantive meaning; and there may still be an opportunity to resolve the tension and to secure that the temporary nature of the Protocol (which is also a requirement of any agreement entered into under Article 50 of the Lisbon Treaty) is not effectively rendered meaningless by the requirement that it is to apply until superseded by another agreement.

But unilateral withdrawal is not the only way in which a treaty may be terminated. The VCLT also guarantees the right of a party to suspend or

terminate a treaty in other circumstances, including in response to a material breach of the treaty by the other party. Article 60(1) of the VCLT provides:

> *"A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part."*[2]

Article 60(3)(b) of the VCLT provides that a material breach consists in "*violation of a provision essential to the accomplishment of the object or purpose of the treaty*".

There can be little doubt that the "*best endeavours*" obligation is essential to the accomplishment of the object and purpose of the Northern Ireland Protocol and the Withdrawal Agreement in general. EU conduct in breach of such an obligation and indefinitely prolonging the application of the Protocol could thus amount to a material breach of the Withdrawal Agreement and the Protocol. Faced with this situation, the UK would be entitled to invoke this material breach as a ground for the suspension or termination of the Withdrawal Agreement and the Protocol.

It must be noted that both the Withdrawal Agreement and the Protocol make detailed provision for consultative processes, review mechanisms (including a specific review mechanism for Northern Ireland), as well as binding arbitration. A material breach of the 'best endeavours' obligation would have crystallised over a period of time, and the UK would have had to take all necessary steps to raise the matter with the EU and ensure compliance with the obligation in Article 167 "*to make every attempt, through cooperation and consultations, to arrive at a mutually satisfactory resolution*". It would also be open to the UK or the EU to refer the matter to arbitration under Article 170 of the Agreement. While the existence of binding dispute settlement procedures under the Agreement means that in practice (albeit not necessarily) a dispute about the UK's right to

[2] There is a difference in the VCLT rules on material breach between bilateral and multilateral treaties. The Withdrawal Agreement (unlike the EEA Agreement) seems, on its face, to be a bilateral treaty between the UK and the EU, as member States of the EU do not have the status of parties under it.

terminate (or suspend) under Article 60 of the VCLT would be referred to arbitration, the existence of such procedures does not, by itself, remove or diminish the UK's rights under Article 60.

Whether the UK would want to terminate the entire Withdrawal Agreement (of which the Protocol is an integral part) or just suspend its operation in whole or in part would depend on the circumstances. The bulk of the Withdrawal Agreement falls to be performed before the end of the transition period but there are provisions – e.g. the dispute settlement clause and citizens' rights – that are designed to extend beyond and which the UK might not want to terminate.

# Meaningful Votes and the Withdrawal Agreement

It would be open to the House of Commons to approve the Withdrawal Agreement subject to the right of the UK to denounce the Protocol unilaterally should it turn out to be more than temporary or to suspend or terminate it for breach of the "*best endeavours*" obligation. It would also be open to the House, in the course of rejecting the Agreement, to make clear that it would not accept any alternative Agreement which did not protect the UK's right to exit the backstop.

An amendment about the UK's rights under the VCLT has already been tabled by Sir Edward Leigh MP, although his amendment relates to rights in respect of a "*fundamental change of circumstances*", which seems to be a less easily arguable basis for termination than, as set out in the previous section, termination in response to a material breach of the "*best endeavours*" obligation. In international law, a fundamental change of circumstances is normally understood as relating to something external to the treaty. Moreover, the party invoking fundamental change of circumstances must also show that the change "*was not foreseen by the parties*" (Article 62(1), VCLT). In this case, the possibility of the backstop becoming permanent is already foreseen and is indeed already causing concern. On the other hand, this foresight is also in tension with the stated intention that the Protocol is to apply only temporarily.

Sir Edward's amendment is in the following terms

> *At end add "notes that the Northern Ireland backstop is intended to be temporary; notes that the Vienna Convention on the Law of Treaties makes it absolutely clear that a sovereign state can abrogate any part of a treaty with an international body in case of a fundamental change of circumstances since the Treaty was agreed; notes that making the Northern Ireland backstop permanent would constitute such a fundamental change of circumstances; and therefore calls for an assurance from the Government that, if it becomes clear by the end of 2021 that the European Union will not agree to remove the Northern Ireland backstop, the United Kingdom will treat the indefinite continuation of the backstop as a fundamental change of circumstances and will accordingly give notice on 1 January 2022 to terminate the Withdrawal Treaty so that the United Kingdom of Great Britain and Northern Ireland shall become an independent country once again."*

If that amendment (or another amendment, along the lines we suggest, referring to the UK's other rights under the VCLT) were successful, the question would arise whether the resolution resulting from the amended motion had satisfied the requirements of section 13(1)(b) of the EU (Withdrawal) Act 2018. Initially this would involve the Government having to decide whether the amendment triggered the requirements for the Government to bring forward proposals and to make time for them to be debated, in accordance with section 13(4) and (6) of the 2018 Act. However, in the long run, the question (so far as relating to the UK's capacity to ratify) could be made irrelevant by the Act to implement the Agreement.

Under section 13(1)(d) of the 2018 Act, the Withdrawal Agreement cannot be ratified unless Parliament has passed an Act containing provision for implementing it. It would be quite possible for the Bill for that Act to contain provision imposing an obligation on the Government to take steps to protect its rights under the VCLT, and also, as Thomas Sharpe QC,[3] amongst others, has suggested to make the implementing provisions subject to a sunset provision, perhaps with an annual renewal mechanism by affirmative order, which would give Parliament a regular opportunity to consider if the time had come to exercise the UK's withdrawal rights.

The Bill for that Act would also be able to resolve any doubts about whether the requirements of section 13 had been complied with by the House of Commons approval resolution and the Act itself. It could say expressly that the requirements are to be conclusively presumed to have been complied with or it could repeal section 13 from a time before ratification, or both.

[33] https://www.telegraph.co.uk/authors/thomas-sharpe-qc/

## Renegotiation or a Unilateral Interpretive Declaration

Parliament is not itself able to change the terms of the Agreement or the obligations the UK would undertake by ratification. However, it is able to make it a condition of the Government's freedom to ratify the Agreement that measures be taken to strengthen the UK's rights of withdrawal under the VCLT.

As mentioned before, the clearest measure would, of course, be an amendment of the Ireland/Northern Ireland Protocol to include a right of withdrawal subject only to a notice period, but it will likely be very difficult to secure EU agreement to such an amendment at this late stage.

Another option that might constitute a compromise would be the inclusion in the Protocol of a more limited right of withdrawal, under which the UK would agree, for example, not to withdraw from the Protocol so long as the parties are continuing to use their best endeavours to conclude an agreement that will supersede the Protocol in terms of Article 2(1). A similar proposal has been made by Nick Boles in the context of his Norway+ plan[4] and by Open Europe in relation to the current plan.[5] The attractiveness of this solution is that it holds the parties to their "*best endeavours*" commitments, and expressly recognises the UK's right to exit should those commitments not be met. It would be self-contradictory for the EU to insist that the UK should remain locked into the backstop even in the circumstances of a failure on their part to use best endeavours. Moreover, as mentioned above, it is certainly plausible that, if it were faced with a material breach, the UK would in any event have a right to suspend or terminate the Protocol under the VCLT.

[4] https://www.thetimes.co.uk/article/norway-offers-way-out-of-the-brexit-maze-9chp66603
[5] https://www.theguardian.com/commentisfree/2018/nov/20/brexit-deal-eu-theresa-may-rejected-parliament-brussels

Such a limited right of unilateral withdrawal would be suboptimal, in that the UK's exit would be dependent on establishing the EU's non-compliance with the "*best endeavours*" obligation. However, there are two important considerations here. First, the "*best endeavours*" obligation in Article 2(1) is not open-ended but includes reference to a time-frame. Article 2(1) provides:

> *"The Union and the United Kingdom shall use their best endeavours to conclude, by 31 December 2020, an agreement which supersedes this Protocol in whole or in part."* (emphasis added).

The proper interpretation of this provision is that, should no agreement be reached by December 2020, efforts will need to be intensified and the conclusion of the agreement pursued with an even greater sense of urgency.

Secondly, as a matter of international law, the EU could not hope to discharge its obligation under Article 2(1) simply by appearing to engage in discussions or making unrealistic proposals. In the *Advisory Opinion on the Legality of Nuclear Weapons*, the International Court of Justice found that the obligation, under the Nuclear Non-Proliferation Treaty, to negotiate in good faith towards the conclusion of a treaty on nuclear disarmament is not a mere obligation of conduct.[6] The Court explained:

> *"The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result - nuclear disarmament in all its aspects - by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.*[7]

[6] Article VI of the Nuclear Non-Proliferation Treaty provides as follows:
"*Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.*"
[7] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1. C.J. Reports 1996, p. 226, para. 99.

The obligation in Article 2(1) of the Protocol is in some ways more robust than the obligation in relation to which the Court made the above finding because of (a) the reference to a precise timeframe; and (b) the fact that it is formulated in terms of "*best endeavours*" rather than mere negotiations.

Should there be no room for amending the Withdrawal Agreement through renegotiation, the UK could strengthen its rights under the VCLT by making an interpretative declaration on the Ireland/Northern Ireland Protocol (and in particular on Articles 1, 2 and 20 thereto). Some treaties prohibit reservations or interpretative declarations, but the Withdrawal Agreement contains no such general prohibition. The UK has indeed dealt with Spain's demands on Gibraltar by making an interpretative declaration in relation to Article 184.[8]

The interpretative declaration could be that the UK will regard a breach by the EU of the "*best endeavours*" obligation, such that it would render the backstop more than temporary, as a material breach of the Withdrawal Agreement, and perhaps also include a statement that the UK would also regard itself as entitled to suspend or terminate the Protocol if other circumstances indicated that it could no longer be regarded as temporary. It might be expected that a UK Government would wish to supplement any such declaration, with whatever non-binding commitments it felt appropriate to give about protecting the people of Northern Ireland from the creation of a hard border with the Republic and continuing to respect the Belfast Agreement.

The EU could choose to accept the UK's declaration, object to it, or remain silent. Acceptance would naturally produce the best outcome. But an objection, depending on its terms, would not necessarily preclude ratification unless the EU indicated otherwise. The UK would be wise, of course, to discuss the situation in advance with the EU, and secure either acceptance or silence. In other words,

8 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759015/HMG_letter_to_the_Secretary-General_of_the_Council_of_the_European_Union_on_Article_184.pdf

while the interpretative declaration is a unilateral statement, it would still in practice involve some negotiation.

An objection by the EU would of course be problematic, and call into serious question the EU's commitments and even its good faith. It is undeniable that the temporary nature of the backstop is a central aspect of the treaty and that UK consent to be bound by it fundamentally depends on it. If the EU objected to the UK's interpretative declaration, the UK might then have no choice but to decline ratification, particularly if bound to do so by the approval resolution or by the Act for implementing the Agreement.

It is worth noting that the leaked diplomatic note from the EU's Deputy Negotiator, Sabine Weyand, rather worryingly indicates that the EU may not be taking the "*best endeavours*" obligations as seriously as it ought to.[9] Ms Weyand's suggestion that the Protocol is in effect permanent and requires the customs union as the basis for the future relationship is flatly inconsistent with a good faith interpretation of the EU's obligations under the Protocol. This only adds to the need for the UK, if ratifying the agreement, to put the centrality and materiality of this obligation beyond any doubt.

[9] https://www.thetimes.co.uk/edition/news/may-accused-of-betrayal-as-she-unveils-brexit-deal-ks9frvbwz

# Conclusion

Many in Parliament and the wider public are understandably concerned that the backstop will be permanent in practice. Even in the absence of an amendment of the Withdrawal Agreement, the UK may be in a better legal position under the VCLT than many assume. But the strength of this position depends on the centrality of the "*best endeavours*" obligation and on the UK making it entirely clear that it will not hesitate to suspend or terminate the treaty if faced with a breach by the EU of this obligation. Attempts by Brussels to play down this obligation, as Ms Weyand's leaked memo suggests, may already be underway and need to be vigorously challenged if they are not to prevail. There was a similar process in connection with the interpretation of the backstop in the December declaration. In that case London acquiesced early on in an interpretation, favoured by Brussels and Dublin, that went way beyond the ambiguous language in the Declaration. It would be a serious mistake to do the same again with the ambiguity in Article 1(4) of the Protocol.

The Withdrawal Agreement and the Political Declaration are part of a negotiation that involves great legal complexity. The terms of the Withdrawal Agreement provide the context for the further negotiation of the matters in the Political Declaration. Whether they support the deal or not, MPs also need to secure, in the national interest, that the context for negotiating the detail of any future relationship with the EU puts the UK in the strongest possible position.