

# A Second Look



## The UK's legal position in relation to the backstop

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## Executive Summary

1. The Attorney General's advice on the UK's legal position stood out for both clarity and candour. However, in the speed with which that advice had to be received and debated, a number of important points may have been lost, overlooked, or not fully appreciated. In particular:
  - the meaning of the "good faith" obligation in the Withdrawal Agreement (WA) has a particular meaning in international law and it is not fanciful to suggest that the UK would be able to establish that the EU was in breach of that obligation if it persistently and unreasonably refused to conclude an agreement that would replace or supersede the backstop;
  - the "best endeavours" obligation that the Protocol imposes on the UK and EU is a weighty obligation, which constrains the freedom of the parties in important ways, minimising the risks that negotiations will become intractable or that the backstop will become permanent by default;
  - the risk that the EU will try to make the backstop permanent by default in order to secure leverage in negotiations with the UK has been sharply reduced;
  - the priority of the Good Friday Agreement (GFA) within the Protocol warrants attention, as does the legal risk – to the UK, EU and Ireland – that the backstop's default permanence would constitute a breach of the GFA; indeed, if an incompatibility between key elements of the GFA and the continuing application of the backstop were to emerge sharply and be confirmed, particularly in court rulings, a fundamental internal contradiction to the Protocol would arise which might arguably constitute a ground on which to bring it to an end; and
  - the obligation of "good faith" in the WA does not fall to be authoritatively interpreted or applied by the Court of Justice of the EU.

2. Some of these points have been overlooked or misunderstood not only because of the extremely truncated timeframe in which critical new documents were published, and advice circulated, but also because many lawyers and others have understandably but wrongly considered the changes by analogy to domestic law.
3. Notably, important questions about the tension between the GFA and the backstop, if the backstop were to become permanent by default, only arose in final exchanges in the House of Commons minutes before the meaningful vote. The risk that a “permanent by default” backstop would violate the GFA, and the significance of this for the UK’s obligations in relation to the backstop, were not fully discussed. Nor has the scope of the obligations of “best endeavours” and “good faith”, as clarified and amplified in the Joint Instrument, been fully appreciated. While these obligations do not amount to a unilateral right of exit at a time of the UK’s choosing, they do provide the UK with ample legal comfort, and considerably more than seems to be understood by many. These issues are relevant to understanding the final paragraph of the AG’s advice, which many MPs and others wrongly took to establish that the UK could, and perhaps even would, indeed be trapped in the backstop. Such an assessment was premature and should be rethought.

## The meaning of “good faith” obligations in international law

4. It appears to have been assumed by many that a breach of the principle of good faith in Article 5 will require evidence equivalent to what is required under domestic law to prove dishonesty, fraud or deceit. This is not so, as should be evident from the terms of Article 5 of the Withdrawal Agreement:

*Good faith*

The Union and the United Kingdom shall, in full mutual respect and good faith, assist each other in carrying out tasks which flow from this Agreement.

They shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this Agreement and shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement.

This Article is without prejudice to the application of Union law pursuant to this Agreement, in particular the principle of sincere cooperation.

5. A failure to take "*all appropriate measures ... to ensure fulfilment of the obligations arising from this Agreement*" can therefore potentially amount to a breach of the principle good faith as articulated in Article 5. The same holds true for measures which could jeopardise the attainment of the objectives of the Agreement,
6. Moreover, as a matter of general international law, good faith in the performance and interpretation of international obligations (e.g. Articles 26 and 31 of the VCLT) is already clearly understood to include, in particular, elements such as reasonableness and the doctrine of abuse of right. See for example:
  - The International Court of Justice in *Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), Judgment, I. C. J. Reports 1997, p. 7, para. 142:

*"What is required in the present case by the rule pacta sunt servanda, as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the cooperative context of the Treaty. Article 26 combines two elements, which are of equal importance. It provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." This latter element, in the Court's view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to*

*apply it in a reasonable way and in such a manner that its purpose can be realized.”*

[emphasis added]

- WTO Appellate United States – Import Prohibition of Certain Shrimp and Shrimp Products paras. 158-159:

*“The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of abuse de droit, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it **must be exercised bona fide, that is to say, reasonably.** An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting.”*

[emphasis added]

- R. Gardiner, *Treaty Interpretation* (2008) p. 157 (citing the ICJ's *Nicaragua case*, [1984] ICJ Reports 420, para. 63);
- R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (9<sup>th</sup> edn. 1992), p. 1272;
- B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953), p. 125:

*“... A reasonable and bona fide exercise of a right in such a case is one which is appropriate and necessary for the purpose of the right (i.e. in further of the interests which the right is intended to protect). It should at the same time be fair and equitable as between the parties and not one which is calculated to procure for one of them an unfair advantage in the light of the obligations assumed. A reasonable exercise of the right is regarded as compatible with the obligation. But the exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with the bona fide execution of the treaty obligation, and a breach of the treaty.”*

[emphasis in the text]

7. In the context of the Withdrawal Agreement, Protocol and associated documents, this dimension of the 'good faith' principle is amplified and reinforced by, *inter alia*, the following:
  - a) the separate 'best endeavours' obligation in Article 2(1) of the Protocol;
  - b) the EU-UK agreement in para. 4 of the Joint Instrument that "*a systematic refusal to take into consideration adverse proposals or interests would be incompatible with their obligations under Article 2(1) of the Protocol and Article 5 of the Withdrawal Agreement*";
  - c) the further specific operational obligations in the Joint Instrument, e.g. in paras. 5-8;
  - d) The EU-UK agreement in para. 12 of the Joint Instrument

*"that it would be inconsistent with their obligations under Article 5 of the Withdrawal Agreement and Article 2(1) of the Protocol for either party to act with the objective of applying the Protocol indefinitely".*

8. In light of the above, mere invocation by the EU of an objective different from the (expressly impermissible) objective of indefinite application of the Protocol, e.g. the protection of its customs union, would certainly not suffice on its own for purposes of establishing compliance by the EU with its obligations under Article 5 of the Withdrawal Agreement (and 2(1) of the Protocol). That is, the EU could not establish that it had complied with its obligations simply by introducing an objective that in practice precluded agreement with the UK. This is relevant to the likelihood in practice of intractable disagreement arising.
9. The conclusion that establishing a breach of the good faith obligations in the WA (and best endeavours in the Protocol) would not be a "credible possibility" is not right (see para. 3 of the so-called 'Star Chamber' Opinion). How good a case the UK would have would of course depend on the facts and circumstances at the time, but the framework of obligations in place, as properly understood in international law and as

reinforced by the Joint Instrument, does provide the UK with ample legal comfort to successfully resist any attempt to use the backstop as a “trap”.

## The significance of the “best endeavours” obligation

10. Relatedly, as a matter of international law, the obligation of ‘best endeavours’ in Article 2(1) is weighty. 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.”*

11. This obligation has two key obligatory elements: a) conduct (‘best endeavours in good faith’); and b) a specific result. Both of these elements are amplified and strengthened by a number of factors, *inter alia* the object and purpose of the WA/Protocol, and the timeline and other operational elements in the Joint Instrument.

12. There is no basis for the suggestion that the UK would have to establish ‘bad faith’ in a common law sense on the part of the EU in order to establish a breach of Article 2(1).

13. The reference to a specific result, rather than a generic obligation to engage in discussions, is particularly important, as noted by the International Court of Justice in the advisory opinion on *Nuclear Weapons (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, p. 226, para. 99)*:

*“99. In these circumstances, the Court appreciates the full importance of the recognition by Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of an obligation to negotiate in good faith a nuclear disarmament. This provision is worded 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.”*

*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."*

14. For the reasons discussed before, the WA and the Protocol create a stronger obligation than Article VI of the NPT, considered by the Court in *Nuclear Weapons*.

15. It is also settled that unreasonable or abnormal delays, even in the context of a simple obligation to negotiate (rather than the robust and result-oriented one in the WA/Protocol), would be contrary to the obligation to negotiate in good faith. A former judge of the International Court of Justice put this point as follows:

*"Good faith in negotiation can also be evaluated by examining whether the parties...show a willingness to consider promptly adverse proposals or interest...By contrast, a State will be in breach of this obligation if it engages in...abnormal delays."*

(H. Owada, "Pactum de Contrahendo, Pactum de Negotiando", *Max Planck Encyclopaedia of Public International Law*, online at 1451).

16. Indeed, as noted in AG's advice, "it would ... be sufficient to show a pattern of unjustified delay by the EU, having regard to the urgency agreed to be necessary by the parties, to raise a *prima facie* case of breach".

17. Furthermore, even under a general obligation to negotiate, parties are obliged to enter into meaningful negotiations:

*"...the meaning of negotiations for the purposes of dispute settlement, or the obligation to negotiate, has been clarified through the jurisprudence of the Court and that of its predecessor, as well as arbitral awards.... States must conduct themselves so that the 'negotiations are meaningful'. This requirement is not satisfied, for example, where either of the parties 'insists upon its own position without contemplating any modification of it'."*

*Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011, I.C.J. Reports 2011, p. 644, para. 132.*

18. An important factor here is that the EU is fully apprised of the fact that the UK's present objective is to leave the Single Market and the Customs Union. The EU has accepted in the Political Declaration that the final agreement will have to "*ensure the sovereignty of the United Kingdom and the protection of its internal market*" as well as respect "*the result of the 2016 referendum including with regard to the development of its independent trade policy and the ending of free movement of people between the Union and the United Kingdom.*" (para. 4). Having assumed an obligation of best endeavours to conclude an agreement that replaces in whole the backstop, an argument to the effect that the EU would not advance any proposals other than those amounting to UK membership of the Single Market/Customs Union would create, particularly over time, a very serious risk of breach by the EU of its obligation under Article 2(1) considered in its full context (including para. 12 of the Joint Instrument noted above).
19. It is of course also the case that the UK has accepted that the future relationship will have to respect "*the autonomy of the Union's decision making and be consistent with the Union's principles, in particular with respect to the integrity of the Single Market and the Customs Union and the indivisibility of the four freedoms*" (para. 4). The UK would thus have to advance proposals that take due account of these objectives.
20. It would be a breach of the principle of good faith (as it applies both to negotiations and to the performance of international obligations) for the UK and the EU to enter into the obligations in Article 5 of the WA and Article 2(1) of the Protocol while considering that their fulfilment in a manner consistent with each side's objectives is not realistic. Also in light of the further more specific provisions in the Joint Instrument, it must therefore be assumed that both the UK and the EU are entering into these obligations in the belief that an agreed solution can be found and will be found timeously.

21. It is theoretically possible that, notwithstanding best efforts and good faith on each side as well as compliance with the various operational aspects of their obligations and agreements, this belief might change and both sides come to the *bona fide* realisation that there is no viable solution. In those circumstances, it would be very difficult and unattractive for the EU to resort to the argument that the UK has no choice but to remain in the backstop indefinitely. Even if that situation were to arise, depending on the specific circumstances, the UK may have a number of *prima facie* credible arguments, including for example the argument that the parties' realisation, tested over time, that no solution exists is itself a fundamental change of circumstances and that such change meets the two key requirements in Article 62 of the VCLT, in that a) the circumstances constituted an essential basis for UK consent to be bound by the treaty and b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty. As mentioned, this scenario is theoretical, not least because, in the reality of such disputes, both sides are likely to insist that solutions do exist but cannot be agreed due to the other party's failure to make compromises that are reasonable in light of the obligations they have assumed.

## The reduced risk of the backstop being used as leverage

22. Following from the last point, while the AG's assessment on legal risk for the UK in the event of EU compliance with its obligations (and absent a fundamental change of circumstances) is correct, the risk of the backstop being used as leverage for the next phase of the negotiations in order to lock the UK into a backstop-like arrangement indefinitely has receded significantly. In particular, it would be clearly incompatible with its obligations under the Withdrawal Agreement, Protocol, and Joint Instrument, for the EU to adopt a negotiating stance that boils down to the position that only 'backstop 2.0' can replace the current backstop. In

this regard, the clarification in para. 10 of the Joint Instrument is significant in that it states expressly that alternative arrangements that replace the Protocol are not required to replicate its provisions in any respect, provided that the underlying objectives continue to be met. For similar reasons, it would be inconsistent with its obligations for the EU to adopt a stance in negotiations that reflects the position attributed to President Macron, i.e. that the UK would have to pay a price (e.g. in terms of access to fisheries) to leave the backstop. The UK should indicate, in no uncertain terms, that it would regard an approach by the EU to negotiations on such basis (or on the basis of the leaked Weyand memorandum from last November) as incompatible with the EU's obligations under the WA/Protocol and, more so, as clarified and amplified in the Joint Instrument.

## The significance of the Good Friday Agreement

23. The relationship between the Protocol and the GFA remains an area of legal risk for the UK, Ireland, and the EU, especially in light of para. 15 of the Joint Instrument. From the beginning, the UK ought to have been firmer in stressing the importance of the GFA to the intended point and meaning of the Protocol. While a temporary application of the backstop may be viewed as appropriate (or perhaps even required) to protect the GFA, its indefinite application – its permanence by default – may undermine it. If the EU were to pursue negotiating objectives that did not prioritise protection of the GFA, including by precluding the backstop from becoming permanent by default, this would be strong evidence of a breach of both the good faith obligation in Article 5 of the Withdrawal Agreement and the 'best endeavours' obligation in Article 2(1) of the Protocol.

24. If a clear tension, *a fortiori* an inconsistency, between the GFA and/or human rights obligations on the one hand, and the backstop (or aspects thereof) on the other, were to crystallise, for example in one or more

rulings by international courts or tribunals, such as to undermine UK and Irish compliance with the GFA, a fundamental internal inconsistency within the Protocol would arise. Such a ruling might for example rely on *Matthews v United Kingdom* (1999) 28 EHRR 361 (ECHR), in which Gibraltar's subjection to EU law without representation in the European Parliament was held to violate Article 3 of Protocol 1 of the ECHR. Additionally, or alternatively, a situation might arise where the Stormont Assembly chooses to make its view consistently clear that the backstop has become permanent by default, and that this is incompatible with the continuing consent of people in Northern Ireland. Given the importance of the GFA as recognised by the UK and the EU, and its central role in the Protocol and Joint Instrument, it would not be far-fetched to characterise such developments as fundamental changes in circumstances. In the first instance at least, the consequence would be that the parties' obligation to conclude an agreement would acquire even greater force and urgency.

## Disputes about “good faith” and the Court of Justice of the EU

25. With respect, it is difficult to understand why some (Anderson QC, Coppel QC, Aughey) take the view that “since the good faith obligation under Article 5 of the Withdrawal Agreement raises issues of EU law, the arbitration panel would likely be required to refer the matter to the Court of Justice of the European Union (Article 164 of the Withdrawal Agreement).” The good faith obligation in Article 5 will be an international law obligation applying to UK-EU relations. Its interpretation and application are governed by international law. The fact that EU law too has a concept of good faith (as do most legal systems) is irrelevant.

26. The “without prejudice” reference, in the last paragraph of Article 5, to the application of EU law “pursuant to this Agreement” and to the EU law principle of “sincere cooperation” does not, and cannot, recharacterize

good faith in Article 5 as a question of EU law to be referred to by the Arbitration Panel for determination by the Court of Justice of the European Union pursuant to Article 174 of the Withdrawal Agreement.

27. In fact, the “without prejudice” reference strongly implies the contrary, viz. that the meaning and application of good faith is not otherwise for determination by the Court of Justice. This reading is reinforced by the terms of Article 2(1) of the Protocol and by the Joint Instrument. Interpreting the WA to make “good faith” subject to adjudication by the Court of Justice, which is the court of only one party to the agreement, is manifestly inconsistent with the logic and point of the agreement and the intentions of the parties, and with the provisions on dispute settlement (as referred to in paras. 12-14 Joint Instrument in relation to disputes over the continued application of the backstop).

## The Attorney General’s advice

28. The final paragraph of the Attorney General’s advice, para. 19, states:

*“However, the legal risk remains unchanged that if through no such demonstrable failure of either party, but simply because of intractable differences, that situation does arise, the United Kingdom would have, at least while the fundamental circumstances remained the same, no internationally lawful means of exiting the Protocol’s arrangements, save by agreement.”*

29. On several occasions during his defence of his opinion in the House of Commons, the Attorney General made the point that it was the substance not form that was important. That indeed seems to have been the underlying message of his final paragraph, as well as of what he was saying to the House. It appears that MPs may have underappreciated the point the Attorney was making and misunderstood him. The balance of the Attorney’s advice makes clear that the risk he outlines in this final paragraph has been greatly reduced – that is, it is less likely to arise because the UK and EU are subject to ever more stringent obligations.

While the form of the WA suggested there remains a legal risk, the risk was in a sense only a theoretical one that would exist in a situation that was, at the very least, unlikely to arise in practice. The Attorney General indicated as much in an answer to Dame Caroline Spelman in the House on Tuesday.

30. Specifically, the theoretical risk assumes a situation in which there would be intractable difficulties in negotiations. It would clearly be a breach of the good faith obligations in the WA and 'best endeavours' obligation in the Protocol for the EU or Republic of Ireland to attempt in the negotiating process to impose conditions unrelated to the 1998 Agreement on the UK or Northern Ireland. The same issue would arise in relation to any suggestion by the EU or the Republic of Ireland that they are entitled unilaterally to prescribe what is needed to secure compliance with the 1998 Agreement or the absence of a hard border. So, any intractable difficulties relating to such matters would give rise to an arbitrable question about good faith. The proviso in the Unilateral Declaration puts the 1998 agreement and the commitment to no hard border before any obligations under the WA.

31. It follows that the only other matter in relation to which intractable difficulties might be thought to be capable of arising would be in relation to what is required to protect the 1998 Agreement and secure the absence of a hard border. Questions about UK proposals for that would also be arbitrable under the WA, not least for the purpose of demonstrating that opposition to them is not in bad faith, and would not for those purposes give rise to any question capable of being submitted to the CJEU. In any event, in circumstances in which there appear to be intractable differences about how the backstop should be replaced in a way that protects the GFA and secures the absence of a hard border, the

parties will remain subject to continuing obligations to negotiate and to conclude an agreement.

32. As the only matters in relation to which it is possible to imagine difficulties occurring are those capable of being resolved by independent arbitration, it is difficult to see how they could ever be truly regarded as “intractable” and capable of keeping the UK or NI in the backstop indefinitely.

33. Ultimately, the issue whether any differences appearing to be intractable are due to a failure of one side or the other would itself be arbitrable. If, as mentioned before, the conclusion is reached (by the parties or the tribunal) that, notwithstanding full compliance with the obligations and agreements under the Withdrawal Agreement, Protocol and Joint Instrument, no solution genuinely exists, such a situation (which it cannot be emphasised enough is extremely unlikely and not currently anticipated by the parties) might itself credibly amount to a fundamental change of circumstances.

34. In our view, it would be a grave mistake for MPs and others to let their decision on the vote depend on the legal risk in the extreme scenario outlined above in which, in any event, the UK may still have credible legal arguments and remedies. In deciding how much weight to give to this legal risk, it is, furthermore, important not to lose sight of the legal risks of the alternatives to the current Withdrawal Agreement.