

The Irish Backstop: Nothing has changed? It has actually



A Policy Exchange Research Note

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- While the Withdrawal Agreement itself has not changed, the potential practical functioning and probable duration of any future backstop has been significantly changed in the course of recent negotiations.
- Having ignored the issue for too long, the UK Government has finally begun to invest in a serious consideration of the technology that might render the backstop meaningless in practical terms.
- Crucially, the Government has now admitted the point that there are circumstances in which the backstop may *undercut* the 1998 Good Friday Agreement rather than *protect* it, as it is *intended* to do. This could constitute the 'socially destabilising effect' by which certain provisions of the Withdrawal Agreement might be 'disapplied'.
- While a temporary backstop for a short period is acceptable to all parties (including the DUP), it is clear that the prospect of an enduring structure, with expanding and dynamic functions, is untenable in the long run and could lead to socially disturbing effects and potential instability. It would be unpalatable for both Northern Ireland and the Republic of Ireland.
- As a result of this shift in position, the UK Government is now correct in asserting the right, *in extremis*, to appeal to international law under the Vienna Convention.

Not a word of Mrs May's Withdrawal Agreement of November 2018 – so heavily defeated twice in Parliament – has been changed. But we are now closer to acceptance of the same agreement. A widespread war weariness on all sides is a significant factor. But the Government has succeeded in securing substantive changes that *will* affect and limit the impact of the Irish backstop, if it is ever put in place at the end of the transitional period. The chances of the Prime Minister getting the deal through Parliament have improved.

Three sets of changes are notable. First, technological solutions to the Irish border question – not seriously considered by either the UK government nor the EU in November 2018 – have become 'mainstream'. This is to use the phrase of Dr. Andrew Murrison, chair of the Northern Ireland Affairs Select Committee in the House of Commons, which has been examining the issue closely. The UK is *at last* committing serious material and political resources to this project. Senior experts in the world of international customs have expressed wry amusement at the apparent passionate determination of the UK government not to help itself on this issue. But now at least, the refusal to pay attention to experts, a

characteristic that was once said to be only apparent among Leavers only, has come to an end.

Second, there is the return of paragraph 50 from the December 2017 joint agreement with the EU¹. It insisted on unfettered trade between the UK and Northern Ireland. It placed the Northern Ireland Assembly at the centre of future developments on this. Michel Barnier disliked paragraph 50 and it was explicitly dropped in the final text of the November Withdrawal Agreement². The UK Government has been saying privately since November that paragraph 50 would return in the legislation embodying the Withdrawal Agreement to come before Parliament. It is now likely to do so in a rather more full-blooded fashion than was suggested even then. This adds fibre.

Third, and most importantly, the UK Government has stepped away from the view of the role of Good Friday Agreement that it had passively accepted from the EU/Irish negotiators. It has returned to the rather more obvious and correct view that the Agreement – the clue is in the word ‘agreement’ – is the possession of both communities in Northern Ireland: Unionist as well as Nationalist. This has opened up the possibility of a deal with the DUP.

Such views have not always been so controversial. Ironically, the UK Government has simply come to accept the wisdom of Bertie Ahern, a former Irish prime minister, who played such a positive role at the time of the Good Friday Agreement. In his evidence to the House of Lords EU committee 25 October 2016: ‘I know that in the first instance people said that everything had to be dealt with through Europe, but there is the small matter of an international agreement – the Good Friday agreement – which says different. You cannot stand that down, whether you like it or not.’³

The UK Government is increasingly probing the implications of its commitment to this prior agreement of 1998. It is right to do so. As Ireland’s most renowned public economist, Dan O’Brien, said in the *Sunday Independent* 10 March 2019, ‘It is quite clear that Dublin and Brussels did not think through the constitutional dimension of the backstop when they dramatically put it on the table sixteen months ago.’ All too slowly but getting there in the end, the Government has come to see that the democratic consent of the people of Northern Ireland for any new imposed arrangements by the EU is a crucial issue. That is why the Attorney General has been discussing in Brussels the Mathews/Gibraltar ECHR case of 1999 which raised the same issue in a different context.

More dramatically, the Attorney General has stated that if the backstop had a ‘socially destabilising effect on Northern Ireland’, this would be considered a

fundamental change of circumstance affecting the essential basis of the Treaty on which the UK's consent had been given. The Attorney General has also made it clear that harm to the principles of the Good Friday Agreement might constitute such a socially destabilising effect.

This is a claim which has surprised and disconcerted some observers. But in fact such surprise is not warranted. The text of the Withdrawal Agreement is replete with references to the potentially destabilising effects of the backstop. Article 18 states explicitly that 'if the application of this Protocol leads to serious economic, societal or environmental difficulties liable to persist, or to diversion of trade, the Union or the United Kingdom may unilaterally take appropriate measures'. The EU accepts that such measures will 'disturb' the functioning of the Protocol though it hopes such disturbance will be limited.

The new text of March 2019 declaration⁴ states that 'the United Kingdom records its understanding that nothing in the Withdrawal Agreement would prevent it from instigating measures that could ultimately lead to disapplication of obligations under the Protocol'. There is one proviso here and that is that the UK will continue to uphold its obligations under the 1998 Good Friday Agreement to avoid a hard border between the two parts of Ireland. We can assume that the EU accepts this language because it briefed that it would not accept anything in this March statement that it could not live with. But in doing so it has *de facto* accepted a radically new British proposition: that the protection of the Good Friday Agreement may be entirely independent from the functioning of the Irish backstop.

What is new here is the way in which the UK sees it is possible to uphold the Good Friday Agreement whilst disapplying obligations under the Northern Ireland and Ireland Protocol, contained in the Withdrawal Agreement. In December last year, the UK Government insisted that the Protocol was necessary to uphold the Good Friday Agreement. In January it insisted that there was no contradiction between the Good Friday Agreement and the Protocol. In March, with the EU's tacit acceptance, we now say there *can* be such a contradiction and that the UK will be justified in taking unilateral steps to deal with such an issue.

As the Brexit Secretary Stephen Barclay explained in the Commons on 12 March, the position is emphatically clear: if the UK took the reasonable view that the Protocol was not protecting the Good Friday Agreement in all its dimensions, it would be 'clear in those exceptional circumstances that

international law provides the United Kingdom with a right to terminate the withdrawal agreement'. He made reference to Article 62 of the Vienna Convention as providing a basis for such a move,⁵ as explored in the recent Policy Exchange paper, *A Second Look*, by Professor Guglielmo Verdirame, Sir Stephen Laws and Professor Richard Ekins⁶.

Some distinguished lawyers are certain that Article 62 is a high bar. They point out that it has not been used since 1969. On the other hand, Lord Pannick, the QC whose arguments on legal matters have had the most impact in Parliament in recent years, agrees with the Attorney General's view. Lord Pannick has no ideological dog in this fight. Mr Barclay's statement is therefore something that the EU will have seriously to take into account.

The Attorney General's concerns about potential social disorder are in no way surprising. Two points about the potential impact of the backstop, which are currently the subject of conversation in Northern Ireland, are worth mentioning here. First, will Unionist farmers happily accept that their sick cattle cannot be tested by UK authorities but only in the EU (that is, effectively in the Republic of Ireland)? In three separate places, the Protocol prohibits the use of UK laboratories in such an event. Symbolically, of course, this top-down imposition replaces the consensual bottom up approach of the Good Friday Agreement to matters of animal health and food safety.

Second, will Ulster shoppers accept higher prices in supermarkets if the checks requested by the EU between Northern Ireland and the UK in the new proposed *third country trading relationship* do not work smoothly and there is a delay to 'just in time deliveries'?

More generally, of course, Northern Ireland is a divided and fraught place and both communities are fabulously adept in turning small grievances into large ones. Only the most naïve person could believe that, in the application of the hundred and fifty-plus pages of regulations in the Protocol, there will not be potential for socially disturbing effects. To take another potential eventuality, consider the possible public reaction to the news that senior world customs experts declare that there exist systems of technology that can support a frictionless border but the EU refuses to accept this.

Again, the Protocol (Annex 2; Article 4) asserts 'nothing in this annex' shall 'prevent the Union or the United Kingdom from taking any action which it considers necessary for the protection of its essential security interests'. Here it is important to recall the United Nations security Council resolution 1373 – supported by Ireland as a temporary member of the Security Council – which

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mandates intelligent-led policing on the border. The EU has indicated its support in the past for this resolution. This view is replicated in the UK's recent own Border Security Bill. Sadly, the fact is that there will in the future be issues of smuggling and terrorism on the border – however frictionless – as there has been in the period before Brexit.

All of this suggests that a backstop that functions for more than a short period of time – and the DUP has indicated in Parliament that it could live with a short backstop – is likely to be an extremely unstable affair. If it does not negotiate a trade deal with the UK in the next year or so, the EU is also likely to become increasingly aware that the Protocol will give it nothing but grief as it gets sucked into the Northern Ireland quagmire. In this quagmire, the UK Government (which has the support of the majority of the population in Northern Ireland and which pays the subvention which subsidises the entire society), holds most of the cards.

Endnotes

¹[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/665869/Joint report on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom s orderly withdrawal from the European Union.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/665869/Joint_report_on_progress_during_phase_1_of_negotiations_under_Article_50_TEU_on_the_United_Kingdom_s_orderly_withdrawal_from_the_European_Union.pdf)

²[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25 November Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf)

³<https://www.parliament.uk/documents/lords-committees/eu-select/Brexit-UK-Irish-Evidence-Volume.pdf>

⁴[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785124/2019-03-11 Unilateral Declaration.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785124/2019-03-11_Unilateral_Declaration.pdf)

⁵[https://hansard.parliament.uk/Commons/2019-03-12/debates/5F35A04D-1C6E-4D7D-87B6-C06EE8AEE3F5/EuropeanUnion\(Withdrawal\)Act?highlight=vienna#contribution-0A0DA128-87E3-4784-A83C-4D37CAF78E20](https://hansard.parliament.uk/Commons/2019-03-12/debates/5F35A04D-1C6E-4D7D-87B6-C06EE8AEE3F5/EuropeanUnion(Withdrawal)Act?highlight=vienna#contribution-0A0DA128-87E3-4784-A83C-4D37CAF78E20)

⁶<https://policyexchange.org.uk/wp-content/uploads/2019/03/A-Second-Look.pdf>