

Dissecting the Backstop – an IEA Briefing

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The draft withdrawal agreement was published on 14 November 2018. It includes a protocol on Ireland/Northern Ireland (the “Protocol”). This note focuses on the content of the Protocol. Unless otherwise specified, references to articles are to articles of the Protocol.

Summary

- The provisions of the Protocol deliver what has become known as the ‘backstop’ for the Irish border. They come into effect if no other agreement that addresses the issues in connection with the Irish border has been reached by the end of the Transition Period on 31 December 2020, or any extension of that period. Although it is described as temporary, it would then apply indefinitely, unless and until another agreement is reached. Neither party has a right to terminate or amend it without the agreement of the other.
- Although both sides claim to want to avoid it, there is a real prospect of the backstop being activated, given that the parties have been unable to reach common ground on other solutions that would ensure no physical infrastructure on the Irish border.
- The Protocol comprises the whole of the UK being in a customs union with the EU, and Northern Ireland being directly part of the EU customs territory and subject to EU single market regulation on goods.
- The UK would also be subject to ‘level playing field’ provisions on tax, environmental, labour, competition and state aid laws. Northern Ireland would have more direct provisions on top of this in state aid, electricity, VAT and others.
- The effect of this will be to introduce trade barriers between Northern Ireland and Great Britain – by far Northern Ireland’s largest trading partner for exports and imports, as well as threatening the constitutional integrity of the United Kingdom by having Northern Ireland subject to the laws and institutions of the EU.
- It would also eliminate the ability of the UK to unilaterally pursue free trade by reducing tariffs, or negotiate trade agreements with other countries, as trading partners would not be able to know when, if ever, the UK would be in a position to change its tariffs, quotas or regulations. The Political Declaration and wording in the Withdrawal

Agreement indicate an intention for the future relationship to continue the single customs territory in any event.

- The UK's hands would also be tied in the WTO, as negotiations would have to be conducted in cooperation with the EU, and not with full independence.
- The Court of Justice of the European Union would have direct jurisdiction in Northern Ireland and would also have the final say on legal disputes under the Withdrawal Agreement with respect to the rest of the UK.
- Fully leaving the common fisheries policy appears to be at risk, as tariff and quota free access to the EU market for fisheries and aquaculture has been made subject to reaching agreement on access to UK waters for EU fishing boats.

1. The Framework under the Protocol

The Protocol would come into effect at the end of the Transition Period. The Protocol's introduction recalls the intention for the backstop solution that it sets out to be replaced by a subsequent agreement that "establishes alternative arrangements for ensuring the absence of a hard border on the island of Ireland on a permanent footing" and notes that the UK and the EU have a "common objective of a close future relationship, which will establish ambitious customs arrangements that build on the single customs territory provided for in this Protocol". The Withdrawal Agreement is accompanied by a political declaration that is still under negotiation and is intended to set out further negotiating objectives and outline politically agreed principles, with a view to negotiating a permanent agreement such that the provision of the backstop will not come into effect, or will cease to apply, as the case may be.

There is a specific reference to the Joint Report of December 2017, noting the Protocol is based on the third of the three scenarios envisaged: maintaining full alignment with those rules of the Union's internal market and the customs union which, now or in the future, support North South cooperation, the all-island economy and the protection of the 1998 Agreement. This will apply until an alternative arrangement implementing another scenario can be agreed. The alternative scenarios were in paragraph 49 of the Joint report and comprised dealing with the Irish border specificities as part of the wider UK EU relationship, and deploying specific solutions.

Article 1 provides that the provisions of the Protocol are "intended to apply only temporarily", but there is no specific time limit or right to terminate for either party. Article 1 continues: "the provisions of this protocol shall apply unless and until they are superseded, in whole or in part, by a subsequent agreement".

Article 2 provides that the parties are to "use their best endeavours to conclude, by December 2020, an agreement which supersedes this Protocol in whole or in part". This clearly means that the arrangement set out in the Protocol is binding on both parties, and neither can terminate without the agreement of the other.

Extension of the Transition Period is provided for in Article 132 of the Withdrawal Agreement and referred to in Article 3 of the Protocol. This has been misleadingly presented in UK guidance as an option to extend, preserving the UK's sovereign choice as to whether to enter into the backstop. This is not the case. Any extension would be subject to the agreement of the EU; the UK has a right to request it and it would be at the discretion of the EU whether to agree to it or to allow the backstop to come into effect.

Article 20 provides for a review of the Protocol at any time during the transition period. Either party may notify the other if it considers that the Protocol is no longer necessary to achieve the objectives of addressing the unique circumstances of the island of Ireland, maintaining north/south cooperation, avoiding a hard border and protecting the Belfast Agreement. If both parties agree, the protocol or relevant parts of it will cease to apply. Once again this is a right

for the UK to request that the EU consider suspending or removing the backstop. It is possible that this could be used in the future if the UK wished to proceed with a separate free trade agreement for Great Britain, by switching off the UK wide customs union provisions.

2. The Backstop – Customs Union

Article 6 provides that, until the future relationship becomes applicable (i.e. indefinitely) there will be a single customs territory comprising:

1. the EU customs territory; and
2. the UK Customs Territory.

Annexes 2 and 3 set out the form and substance of the single customs territory. Article 3 of Annex 2 specifies that the UK is to align its tariffs and applicable rules to the EU's common external tariff, rules of origin and rule on valuation. It is explicit that the UK may not under any circumstances "apply to its customs territory a customs tariff which is lower than the Common Customs Tariff for any good or import for any third country", or apply more preferential rules of origin.

It should be noted that the customs territory of the EU will, for the purposes of the Withdrawal Agreement and the Protocol include Northern Ireland (Article 6(2) and 15(1)). Relevant legislation such as the Union Customs Code ("UCC") will have direct effect in Northern Ireland. This would appear to entail customs declarations between GB and NI as well as regulatory checks. The EU's 'Questions and Answers' on the Protocol reiterates that Northern Ireland will be in the same customs territory as the UK, but states that "under the backstop... Northern Ireland businesses can place products on the EU's internal market without restriction. Placing goods on the internal market that come from outside of Northern Ireland requires that the processes provided for in the Union Customs Code will have to be applied". This is not clear from the UK government note that says no tariffs quotas or checks on rules of origin, but does not say no documentation or formalities. Annex 3 of the Protocol provides that the Union Customs Code and the UK equivalent shall apply in trade in goods between the two parts of the single customs territory – which are the EU and Northern Ireland on the one part, and Great Britain on the other. This is to be expected, as being in a customs union does not, in and of itself, remove the need for customs declarations, as evidenced by the treatment of imports from Turkey. This is why, in order to remove the need for formalities between Northern Ireland and Ireland, Northern Ireland has to be deemed to be part of the EU customs territory under the UCC.

Article 4 provides that in accordance with Article XXIV GATT, the UK is to harmonise its commercial policy and other regulation of commerce (that fall under article X:1 GATT) with the common commercial policy and applicable regulations of the EU. It provides that the EU's trade defence regime shall apply to the UK customs territory. It also compels the UK to ensure that

its schedules of concessions under article II GATT are “fully aligned with” the EU’s, and that commitments on tariff rate quotas are compatible with the EU’s. The UK and the EU are to cooperate on WTO matters on the apportionment of TRQs and to the extent necessary for the functioning of the single customs territory. This is likely to further curtail the UK’s activities in its own right in the WTO even before the backstop comes into effect and further diminishes the practical value of the right under Article 129 of the Withdrawal Agreement to enter into trade negotiations during the Transition Period.

3. The Level Playing Field

Annex 4 sets out the “level playing field” commitments that apply to the whole of the UK. These cover:

- Taxation – UK commits to continue to apply certain EU Directives;
- Environmental protection – UK commits to non-regression from the common standards applicable as at the end of the Transition Period in specified areas, including adherence to the precautionary principle;
- Labour and social standards, where the commitment to not fall below the level of protection provided by common standards applies to fundamental rights at work, occupational health and safety, fair working conditions and employment standards, information and consultation rights and restructuring;
- State aid rules, where the UK has agreed to the direct application of all of the EU’s state aid laws and regulations listed in Annex 8 insofar as they relate to the trade between parts of the single customs territory, which is in effect, all trade in goods except potentially fisheries. This does not apply to agricultural support where the UK will be able to diverge from the EU approach up to a level to be agreed. Northern Ireland will also have a directly applicable EU regime for state aid rules as set out in Annex 8;
- Competition, where the UK commits to maintain a competition law framework covering agreements between undertakings, abuse of a dominant position, concentrations of undertakings, state owned undertakings, special rights and privileges and designation monopolies.

4. The Fish

Article 6 specifically excludes fishery and aquaculture products from the provision of the single customs territory unless an agreement on access to waters and fishing opportunities is reached. This would mean that unless the UK continues to allow EU fishermen fishing rights in UK territorial waters, fishery and aquaculture products will be subject to tariffs and quotas. Because Northern Ireland would be directly in the EU’s customs territory, those tariffs would apply between Great Britain and Northern Ireland, and vice versa, which, as well as creating

further trade frictions within the United Kingdom (because full customs declarations would be required and presumably checks would be stepped up in light of the risk of smuggling), would be a serious blow for consumers and food businesses in Northern Ireland.

5. The Regulations

Annex 5 sets out a list of EU laws that are to have direct effect in Northern Ireland. This includes the UCC and all customs related regulations, trade defence instruments (underlining that Northern Ireland will be part of the EU customs territory), regulations and directives on goods (including SPS and food regulations including GMO), medicines and chemicals, the VAT Directive and associated measures, and excise. In respect of VAT and excise, it is intended that HMRC will still be responsible for setting rates and collecting amounts due, but the framework will be underpinned by EU law.

Annex 7 applies regulations relevant to the single electricity market with direct effect in Northern Ireland.

Article 7 of the Protocol acknowledges that “nothing shall prevent the UK from ensuring unfettered market access for goods moving from Northern Ireland to the rest of the UK’s internal market”. It is agreed “the EU and the UK shall use their best endeavours to facilitate...the trade between [Northern Ireland] and the other parts of the territory of the UK. The Joint Committee shall... adopt recommendations with a view to avoiding, to the extent possible, controls at the ports and airports for Northern Ireland”. This underlines that there will be barriers to trade between Great Britain and Northern Ireland. A likely consequence is also that the UK will retain all of the EU laws that Northern Ireland is subject to in order to minimise the divergence between Great Britain and Northern Ireland.

Article 8 provides that while Northern Ireland will be deemed to be part of the EU for most purposes under article 15, this does not extend to the right for authorities in Northern Ireland to be treated as a Member State for the purposes of technical regulations, assessments, registrations, certificates, approvals and authorisations issued by the authorities of another Member State, or by a body established in another Member State. It states that “references to Member States in provisions of Union law made applicable by this Protocol shall not be read as including the United Kingdom in respect of Northern Ireland as regards technical regulations, assessments, registrations, certificates, approvals and authorisations issued by the authorities of the United Kingdom or by bodies established in the United Kingdom.”

This does not apply to “registrations, certifications, approvals and authorisations of sites, installations or premises in Northern Ireland issued by competent authorities of the United Kingdom, where the registration, certification, approval or authorisation may require an inspection of the sites, installations or premises or to veterinary certificates, and official labels

for plant reproductive material, required in provisions of EU law made applicable by this protocol.”

It also does not prevent qualified persons in Northern Ireland from testing and releasing medicines imported into or manufactured in Northern Ireland for the purposes of being placed on the market in the EU. So this does not amount to full access to the EU single market for Northern Ireland goods that need to be tested and certified, other than in specific cases that involve local inspections.

6. Enforcement and Jurisdiction

Under Article 14 the UK will be responsible for implementing the provisions of EU law required for Northern Ireland under the Protocol. The EU will have the right to oversee this. Its institutions, including the Court of Justice of the European Union (“CJEU”), will have the relevant powers conferred on them under EU law in relation to the UK and persons residing or established in the UK. In effect, the CJEU and other institutions of the EU will have jurisdiction over Northern Ireland in respect of the laws that are applied in Northern Ireland pursuant to the Protocol in the same way that they do now in respect of member states. The article seems to suggest that this will also apply to the UK and British people and businesses who are involved in trade with Northern Ireland.

The UK’s adherence to the level playing field commitments will be subject to dispute settlement under the arbitration mechanism in the Withdrawal Agreement. This entails matters of law being referred to the CJEU for binding determination.

Conclusion

The Backstop contains significant commitments by the UK, with legal and constitutional implications, particularly as regards Northern Ireland. If it comes into force, there would be strong pressures for the entirety of the UK to follow the rules set for Northern Ireland in order to minimize border checks and regulatory friction within the United Kingdom. Given the slow progress of negotiations thus far, it seems feasible that the backstop would be called upon. Governments and businesses in third countries would be doubtful of the UK’s ability to negotiate a future settlement outside the EU’s customs territory and regulatory sphere within a foreseeable timeframe, and this would make it difficult to initiate serious trade deals.

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