

A Brief Guide to Brexit and the Irish Border Problem

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Brexit has an apparently inexhaustible capacity to throw up all manner of problems that offer no easy solutions or happy outcomes. Perhaps chief among them is the “Irish border problem” which has dogged the UK’s process of withdrawing from the EU right from the very outset and could still frustrate attempts to reach a negotiated settlement between the two parties. This short paper will describe the nature of the problem and explain why finding a workable and acceptable answer is proving so elusive.

The Nature of the Problem

To begin with, it is important to locate the Irish border problem within the context of the broader EU-UK withdrawal process. That process consists of one set of formal negotiations, which should culminate in a legally binding treaty; plus one set of exploratory talks, which should end in a political declaration to accompany that treaty. The formal negotiations concern the arrangements that are needed to ensure that the very act of the UK’s forthcoming separation from the EU takes place in an orderly and managed manner (including provision for a transitional period which would allow public authorities and private actors more time to prepare for the consequences). The exploratory talks are seeking to agree an outline for what the future EU-UK relationship might look like – paving the way for negotiations-proper to begin, though only after the UK’s withdrawal has been completed. The two parties had hoped to agree that combined “withdrawal package” at the European Council meeting in October 2018. That timescale has now slipped to November or even December 2018 – leaving barely enough time for the necessary parliamentary approvals to be secured in both the EU and the UK (even assuming any final withdrawal package can be agreed at all).

The Irish border belongs among the formal negotiations for a legally binding treaty on the UK’s orderly withdrawal from the EU. It is important to recall that the border is not the only challenge facing Ireland (North and South) as a result of Brexit: there is little doubt that, out of all the regions of the UK, Northern Ireland stands to be most seriously damaged by withdrawal; or that, among all the remaining Member States of the EU, the Republic is most vulnerable to negative

fallout from the UK's departure. But it is the border question – or, to be more precise, the prospect of a physical frontier for the movement of goods between Northern Ireland and the Republic – which has attracted the most concern and attention. Now, the latest fashion in Leave propaganda is to portray the Irish border as a problem deliberately and falsely manufactured by the evil Europeans so as to punish and harm the UK; or by wicked Remainers hell-bent on trying to keep the UK tied into the Single Market and the Customs Union in some form of hellish perpetuity. In reality, of course, every rational and responsible actor agrees that this is both a very serious and a very difficult challenge.

The prospect of a physical border for the movement of goods across the island of Ireland causes concern: partly because of the potential economic impact (e.g. on highly integrated agricultural and manufacturing processes and supply chains); partly also for the likely social disruption (especially to border communities accustomed to a life free from border checkpoints); and partly for sheer logistical reasons (not least the difficulty of effectively policing over 200 formal crossing points across over three hundred miles of frontier).

But most of all, the idea of a return to some physical manifestation of the border between Northern Ireland and the Republic carries enormous political significance. Part of the genius of the Good Friday Agreement – which has created a period of relative stability and peace after decades of turmoil and violence – is that it allows both Unionists and Nationalists to feel that the existing constitutional settlement serves their respective (though often differing) interests. For Unionists, the Agreement promises that Northern Ireland will remain part of the UK for as long as a majority of its population so desires. Nationalists can regard reunification with the Republic as a long term aspiration – but in the meanwhile, one can move freely across the island, with the only obvious difference being the change on road signs from miles to kilometres. Put simply: the absence of a physical frontier is a crucial part of a wider political settlement that helps secure and maintain cross-community support for the peace process. That process is already under strain from the continuing inability of Northern Ireland's politicians to cooperate in running an effective devolved administration in Belfast. The deep divisions and negative consequences inherent in the very process and final act of Brexit were always bound to make the challenges more acute. The added prospect of a return to past borders can only risk pouring oil on the fire.

The imbroglio is entirely of the UK Government's making. After the 2016 referendum, the Government announced that the UK would be leaving the Single Market and the Customs Union.[1] That inevitably means having a customs and regulatory frontier with the EU – including the Republic of Ireland. But the Government also promised there would be no return to a hard border on the island of Ireland – which the Government has consistently defined as having no physical infrastructure or indeed related checks and controls.[2] The only feasible way to deliver that promise is for Northern Ireland to remain (de facto) within the Customs Union and at least parts of the Single Market (even if the rest of the UK does not). Yet the Government repeatedly insists that Northern Ireland will be leaving the Customs Union and the Single Market along with the rest of the UK and there will be no new trade barriers erected within the UK itself[3] – a prospect the Government describes in increasingly apocalyptic terms as an existential threat to British constitutional, territorial and economic integrity.[4]

In other words: the UK Government has been promising irreconcilable things to different groups of people; but assuring all of them, over and over again, that they will each get what they have been promised. The situation is made all the more complicated by the fact that a clear majority of the population in Northern Ireland voted to remain within the EU during the 2016 referendum; and yet, since the UK's 2017 general election, the minority Conservative Government in London has been propped up in power only through the support of the (hardline unionist, hard right politics, Europhobic and fervently pro-Leave) Democratic Unionist Party from Northern Ireland. Indeed, it is fair to say that the UK Government has dropped even the slightest pretence of acting as an "honest broker" between the two main communities in Northern Ireland; its dependence on the parliamentary support of the DUP has offered the latter disproportionate influence over the way that the UK approaches negotiations with the EU – not least over the Irish border question.

The Search for a Solution

That brings us to the "Joint Report" of December 2017, in which the Union negotiator and the UK Government set out their agreed approach to the challenges facing Ireland / Northern Ireland in general, and the issues surrounding the physical border for goods in particular.[5] It is worth pointing out that it was solely on the basis of the promises made by the UK Government in that Joint Report, that the leaders of the EU27 decided to allow negotiations to proceed (as the UK so desperately wanted) beyond the issues surrounding an orderly separation, on to the crucial topics of a transitional period and the overall shape of future EU-UK relations.

The Joint Report laid down a three-tiered strategy to try to find some solution to the conundrum of the Irish border. It is worth quoting in full:

"49. The United Kingdom remains committed to protecting North-South cooperation and to its guarantee of avoiding a hard border. Any future arrangements must be compatible with these overarching requirements. The United Kingdom's intention is to achieve these objectives through the overall EU-UK relationship. Should this not be possible, the United Kingdom will propose specific solutions to address the unique circumstances of the island of Ireland. In the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the 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.

50. In the absence of agreed solutions, as set out in the previous paragraph, the United Kingdom will ensure that no new regulatory barriers develop between Northern Ireland and the rest of the United Kingdom, unless, consistent with the 1998 Agreement, the Northern Ireland Executive and Assembly agree that distinct arrangements are appropriate for Northern Ireland. In all circumstances, the United Kingdom will continue to ensure the same unfettered access for Northern Ireland's businesses to the whole of the United Kingdom internal market."

The UK Government is pinning its hopes on the first option set out in the Joint Report: finding a solution to avoid the return of customs and regulatory checks at the Irish border simply as part of the overall future relationship between the UK and the EU. The problem is that the UK has so far proved incapable of offering any credible and acceptable solutions pitched at the level of that

overall EU-UK relationship. The Government's White Paper of July 2018 (the so-called "Chequers Plan") proposed a "free trade area for goods" which would see the UK continue to apply certain EU rules on trade in goods (those necessary to avoid literal border checks); as well as the creation of a de facto joint customs territory between the UK and the EU (in which the UK can simultaneously apply and enforce the EU's tariffs and regulations alongside its own potentially divergent tariffs and regulations).[6] But observers will know that the Chequers Plan has been dismissed as unworkable by the EU27 and as unacceptable by large numbers of UK MPs across both the Government and the opposition ranks.

Whatever the UK Government's hopes for the overall EU-UK relationship, the Joint Report promised that the withdrawal agreement must in any case contain a default option: a legally binding "backstop solution" which would prevent the return of an Irish border in any event – for example, in case no final agreement on the future EU-UK relationship can be reached within the time available; or in a scenario where such an agreement does get off the ground but then falls apart at some later stage.

When it comes to the backstop, the EU's proposals were first published in February 2018.[7] Those proposals would effectively continue to treat Northern Ireland as part of the Union's own customs territory for all relevant fiscal and regulatory purposes (and require checks on goods travelling by sea and air between Northern Ireland and Great Britain). As we already noted above, UK Government has declared itself implacably opposed, indeed positively hostile, to the EU's proposals. That opposition is based on the idea that Northern Ireland cannot be treated any differently from the rest of the UK – an idea which deserves to be regarded with a degree of scepticism. After all, Northern Ireland is self-evidently already treated differently from the rest of the UK for all manner of financial and regulatory purposes (one need only think of abortion rights and marriage equality, or longstanding plans for a special corporate tax regime). And of course, it is manifestly easier to conduct customs and regulatory controls at or en route between a relatively small number of ports and airports, rather than on road traffic across the entire Irish land border.

Scepticism can easily turn into outright frustration when one considers that, while rejecting the EU's plans out of hand, the UK's own proposals for an alternative backstop (published in June 2018) have themselves been dismissed as seriously inadequate.[8] For example, the UK's plans only deal with the issue of customs in a strict sense, not the broader and more complex question of the enforcement of regulatory standards: in effect, the UK's alternative plan only addresses half of the actual border challenges. Moreover, the UK proposal was explicitly presented as merely a temporary arrangement – not the long term or permanent solution that any default plan is meant and needs to provide.

The most recent developments prove that, despite some positive words and a few minor concessions, neither the EU nor the UK have yet shifted their fundamental positions on the Irish border. In October 2018, the Union negotiator suggested ways to minimise the burden and visibility of customs and regulatory checks between Northern Ireland and Great Britain – but remained of the view that the most effective and efficient solution is for Northern Ireland to remain linked to the Customs Union and relevant elements of the Single Market.[9]

For its part, the UK Government has still failed to publish any more developed backstop plans. Recent statements from the Prime Minister do at least offer some insight into Government thinking: for example, even the backstop should be defined in terms which cover the entire UK territory (not just Northern Ireland); but there should also be an option to extend the proposed post-withdrawal, status quo transitional period (as an alternative to triggering that UK-wide backstop);[10] though either such model would then have to contain provisions allowing for its termination (since anything more indefinite would be unacceptable to Leave supporters).[11]

The problem is: the UK Government is floating those ideas on the assumption that a solution to the Irish border problem can be and will soon be found at the level of the overall future EU-UK relationship – so that either the backstop or an extended transition are guarantees that might only be needed for a few months (if they are ever needed at all). That assumption flies in the face of every rational analyst’s view – that frictionless trade (of precisely the sort required to avoid a hard border in Ireland) is simply not possible once the UK leaves the Customs Union and the Single Market; and that no alternative future relationship (no matter how close and certainly not the fantastical “Chequers Plan”) can deliver the same result.

Final Remarks

Of course, the underlying problem is that few of the people who campaigned or voted for Leave in 2016 gave so much as a second’s thought to Northern Ireland. And for a long time, the UK Government has tried to conceal the real nature and scale of the Irish border problem by simply promising the undeliverable – all the while captive to the highly partisan demands of the DUP, in order to maintain its own parliamentary majority.

It came as no surprise when the European Council, meeting on 17 October 2018, confirmed that no decisive progress had yet been achieved.[12] But at some point very soon, the conundrum will have to be solved. Because as the EU has made clear: without a workable and acceptable backstop, the entire negotiations could break down. And if that happens: it means no withdrawal agreement; no transitional period; and the prospects for a reasonably prompt negotiation on the future EU-UK relationship set back considerably.

Yet such a “no deal” scenario is perhaps the worst possible outcome for Northern Ireland and the Republic – since it risks precisely the prospect of an immediate customs and regulatory border and a direct threat to economic, social and political stability – something the UK’s contradictory promises in the Joint Report would then do precious little to help. To add insult to injury, should that nightmare scenario materialise, one can already foresee the reaction of the UK Government as well as their DUP allies: responsibility will lie firmly with everyone else in the world – everyone apart from the Leave campaigners whose uncompromising ideological belief system caused this entire mess in the first place...

For more on the Irish border problems raised by Brexit, see M Dougan, “The ‘Brexit’ Threat to the Northern Irish Border: Clarifying the Constitutional Framework” in M Dougan (ed), *The UK After Brexit: Legal and Policy Challenges* (Intersentia Publishing, Cambridge, 2017).

- [1] E.g. Theresa May's Lancaster House Speech on 17 January 2017: <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>. Also: White Paper, *The United Kingdom's exit from and new partnership with the European Union* (February 2017): <https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper>.
- [2] E.g. Theresa May's Florence Speech on 22 September 2017: <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>.
- [3] E.g. Theresa May, *Commitments to Northern Ireland* (8 December 2017): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/665870/prime-ministers-commitments-to-northern-ireland.pdf.
- [4] E.g. from Theresa May, Speech on our future economic partnership with the European Union of 2 March 2018: <https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union>; through, e.g. Theresa May, Belfast Speech of 20 July 2018: <https://www.gov.uk/government/speeches/pm-belfast-speech-20-july-2018>; to, e.g. PM Brexit negotiations statement of 21 September 2018: <https://www.gov.uk/government/news/pm-brexit-negotiations-statement-21-september-2018>.
- [5] Joint Report of 8 December 2017: https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf.
- [6] White Paper, *The Future Relationship between the United Kingdom and the European Union* (July 2018): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf.
- [7] Draft Withdrawal Agreement between the EU and the UK, Protocol on Ireland / Northern Ireland (28 February 2018): https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf.
- [8] HM Government, *Technical Note: Temporary Customs Arrangement* (7 June 2018): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714656/Technical_note_temporary_customs_arrangement.pdf.
- [9] Speech by Michel Barnier at the closing session of Eurochambre's European Parliament of Enterprises 2018 (10 October 2018): http://europa.eu/rapid/press-release_SPEECH-18-6089_en.htm.
- [10] See Part Four of draft Withdrawal Agreement of 19 March 2018: https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf. See further, e.g. M Dougan, "An airbag for the crash test dummies? EU-UK negotiations for a post-

withdrawal ‘status quo’ transitional regime under Article 50 TEU” (2018) 55 *Common Market Law Review (Special Issue)* 57.

[11] PM’s Statement on European Council (22 October 2018):

<https://www.gov.uk/government/speeches/pms-statement-on-european-council-22-october-2018>. Note also PM Statement on Brexit (15 October 2018):

<https://www.gov.uk/government/speeches/pm-statement-on-brexit-15-october-2018>.

[12] See <https://www.consilium.europa.eu/en/meetings/european-council/2018/10/17/art50/>.