

Brexit and the backstop:

everything you need to know



The **UK** in a
Changing Europe

Foreword

If I'd have said three years ago that the scale of sanitary and phyto-sanitary checks on sheep moving from Cairnryan to Larne would be at the crux of our political debate, you'd have questioned my sanity. That is, if you weren't one of the many experts, including the contributors to this report, who foresaw just how contentious these issues could become in the event of a vote to leave the European Union.

In what follows, we provide a guide to what the Irish backstop is, why it's needed, what the concerns are with it and what alternatives there might be. In many ways, the backstop debate is a proxy for other grievances: personal, party political and, even in some cases, principled. We hope this report will be a one-stop shop for everything you need to know about the backstop: how it came to be, why it came to be and why, almost certainly, it is here to stay if we want to leave the EU with a Withdrawal Agreement in place.

The UK in a Changing Europe is not a traditional think tank. We do not see it as our role to propose or promote specific policy outcomes. Rather, we give our dispassionate assessment of key issues based on our research. Our aim is not to advocate but to inform.

I am delighted that we have been able to gather some of the best minds working on these questions to make this contribution to the debate at this crucial time. As ever, I am immensely grateful to all those who contributed to this report at unreasonably short notice. They have tolerated my questions and comments with efficient good humour. Particular thanks go to Katy Hayward who helped put this whole report together, and to Matthew Bevington, who not only contributed two chapters but also helped oversee the entire process. Lizzie Parker was invaluable in co-ordinating the report. Ben Miller also worked incredibly hard on the report's design and publication (don't tell him I said that).

I hope it proves both useful and interesting.

Professor Anand Menon

The UK in a Changing Europe



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Introduction

Anand Menon and Katy Hayward

The backstop. It's everything and nothing when it comes to the Brexit process, as this report underlines. And yet, there are signs that this most intractable of issues is going to prove to be tractable after all (in the next chapter David Phinnemore provides a neat explanation of what the backstop is).

The backstop has, of course, become a key plank of the EU's approach to the talks. As Matthew Bevington and I underline, this was in no small part because of the effectiveness of the Irish government early on in the Brexit process, making sure that the unique circumstances of the Irish border were known and understood by the European Commission and the other 26 member states.

Consequently, the EU has maintained an impressive unity around the need to preserve the backstop. And, as the Prime Minister's joint statement with Jean-Claude Junker made clear, it will not be reopened. However, as Matthew Bevington has argues, not reopening is not the same as not revisiting for the EU. Simon Usherwood also cogently explains that there might in fact be more flexibility in the EU's position than is often assumed. It is not beyond the bounds of possibility that a handy codicil might yet be delivered.

Which brings us to the politics. Not all the politics, because, as Mary Murphy illustrates, the backstop is actually pretty popular amongst significant sections of the population in Northern Ireland. But the politics in Westminster, where the backstop has come to dominate debate over Brexit and the Withdrawal Agreement. Yet the irony here is that, for most MPs, the issue is either a second order one or a proxy for their wider discontent about the Withdrawal Agreement. The subsequent feeling of powerlessness and frustration among many in Northern Ireland is one that has worrying historical precedent.

And yet, as if blithely unaware of the enormity of their responsibility, that same backstop now apparently enjoys the official support of both main parties. If it were voted on in isolation, Theresa May would presumably support an arrangement she described as 'the best possible deal' back in November, and which she now accepts can't be reopened.

Meanwhile, the Labour leader has been on his own journey. On 7 December, he [told](#) an audience of European socialists that, if Labour were to shape a Brexit deal 'there certainly wouldn't be a backstop from which you can't escape'. And following his decision to meet the prime minister last week, he continued to [insist](#) that Labour could negotiate away the backstop.

However, the disconnect between Corbyn's pronouncements and the position of his Shadow Brexit Secretary was unsustainable. On a visit to Belfast, Keir Starmer declared that it is 'impossible to see a way forward without a backstop'.

And so, Jeremy Corbyn's latest offer to the Prime Minister made clear that he too would now support it: 'any withdrawal agreement would need to include a backstop to guarantee no return to a hard border on the island of Ireland.'

The gradual shift was, of course, inspired by politics. Labour strategists believed – following a much-heralded confidence vote that turned into something of a damp squib – that there was little hope in trying to leverage the opposition of the Democratic Unionist Party (DUP) to the backstop. Now they're coming to believe that they stand more chance of forcing the election they crave via the DUP losing confidence in the government if a deal containing the backstop goes through. In other words, the backstop debate within the Labour Party is not about solving a diplomatic rift between the UK and Ireland, but, rather, about exposing one on the right of British politics.

In this febrile atmosphere, it is perhaps unsurprising that strains are beginning to show within the DUP itself, as it attempts to balance Westminster politicking and bravado with ground-level consequences and realism.

Returning to the May-Junker statement, perhaps its key point was that they would revisit progress on an addendum or codicil to the Withdrawal Agreement at the end of February. This is near-enough confirmation that Theresa May's deal won't be voted until sometime in March.

And Theresa May benefits from this in two ways. First, the ticking clock. The more time taken over a codicil, the more likely it can be sold as a hard-won concession to Tory MPs looking for an excuse to reverse their public opposition to a deal. And a legally binding codicil, as originally [called for](#) by Sir Graham Brady, would unlock the majority of Tory dissidents.

Second, the more time taken, the more likely it is, too, that backbench Labour MPs, in the absence of an alternative, will drift towards the deal. Lisa Nandy has said that between 40 and 60 Labour MPs could ultimately be amenable to voting for the Withdrawal Agreement even if the Labour frontbench continued to oppose it. Some 25 Labour MPs defied their whip to vote against Yvette Cooper's recent amendment which aimed to delay Article 50. It is not a huge leap to imagine that at least 40 could end up supporting May's deal. Given the way the numbers in Parliament stack up, even without the DUP's support, she could then afford a near-equal number of her own MPs to oppose. If 60 Labour MPs ultimately back the deal, 60 Tories could rebel. This number is larger than most estimates of the size of the European Research Group's core membership.

The impasse created by a supposedly time-limited backstop, then, might be overcome by the passage of time. EU flexibility at the margins, significant support for the backstop in Northern Ireland and the political calculations of the parties in Westminster are conspiring to suggest that a deal may yet get through.

What is the backstop?

David Phinnemore

The ‘backstop’, the ‘Irish backstop’, the ‘Northern Ireland backstop’, the ‘temporary backstop’, the ‘all-weather backstop’... that ‘bloody backstop’. Everybody has heard of the backstop. But what is it?

Simply put, the backstop is a set of arrangements contained in a dedicated Protocol on Ireland/Northern Ireland annexed to the Withdrawal Agreement. These will generally enter into force only if the terms of the UK-EU relationship to be negotiated during the transition period fail to deliver on the shared UK and EU commitments ‘to address the unique circumstances on the island of Ireland, maintain the necessary conditions for continued North-South cooperation, avoid a hard border and protect the 1998 [Belfast/Good Friday] Agreement in all its dimensions’. In this sense, the arrangements are an insurance policy.

They cover a range of issues, including: the rights of individuals; the Common Travel Area between the UK and Ireland; customs; regulatory alignment to ensure the free movement of goods; the maintenance of north-south co-operation; and the single electricity market on the island of Ireland. The Withdrawal Agreement also provides for dedicated institutional arrangements involving the UK-EU Joint Committee, a Specialised Committee and Joint Consultative Working Group. These will address issues related to the implementation of the Protocol including its review.

Assuming the Withdrawal Agreement enters into force, and in the absence of alternative arrangements being agreed in time, the Protocol’s backstop provisions will apply from 1 January 2021, or—given the option of a two-year extension to the transition period—1 January 2023. In the intervening period, the UK and the EU are committed to finding ‘alternative arrangements’ so that there is no need for the backstop to kick in.

Strictly speaking, there isn’t one backstop, but a series of backstop arrangements addressing each of the issues noted above. However, most people think of the backstop as the arrangements in place to avoid a hard border and specifically to avoid checks and controls on the movement of goods. Even here, however, there are really two elements: one relating specifically to Northern Ireland and the movement of goods across the Irish border, and the other to the UK and focused on minimising customs checks and controls on goods moving between the UK and the EU.

The Northern Ireland-specific element—if it entered into force—would see Northern Ireland being treated as part of the EU customs territory and maintaining alignment with those EU regulations required to maintain the free movement of goods across the border into Ireland and the EU’s internal market. There would, despite the UK’s withdrawal from the EU, be no requirement for additional checks and controls, and so a hardening of the border would be avoided.

The downside of this arrangement is that, with the rest of the UK outside the EU customs territory and potentially diverging from the EU in terms of, for example, product standards, some checks

and controls would be required on the movement of goods from the rest of the UK into Northern Ireland. Efforts would be made to keep these to a minimum, but there would be an increase. Worth noting is that certain controls (for example on the movement of animals and animal products into Northern Ireland) already exist

Conversely, no checks or controls are envisaged on the movement of goods from Northern Ireland to the rest of the UK. This is because the Withdrawal Agreement commits the United Kingdom to ensuring ‘unfettered market access for goods moving from Northern Ireland to the rest of the United Kingdom’s internal market’. Reinforcing this commitment is the UK government’s statement that it will introduce ‘strong protections in law that guarantee [such] unfettered access’.

The desire to minimise checks and controls provides an important rationale for the UK-wide element of the backstop: the ‘single customs territory’ between the UK and the EU. As a backstop arrangement, this would involve the UK remaining in a customs union arrangement with the EU after the transition period has expired. Customs checks would be reduced to a minimum. Goods moving to Northern Ireland from the rest of UK would, however, need to be checked to ensure they meet EU standards. Here, in an attempt to ‘avoid any preventable barriers’ the UK government has committed to ensuring ‘no divergence in the rules applied in Great Britain and Northern Ireland in areas covered by the Protocol’.

The EU and the UK intend for the backstop arrangements not to be used. If they do enter into force, the commitment is to ensure that they are only temporary and will be replaced by other arrangements. With regard to the movement of goods, this includes the option of ‘facilitative arrangements and technologies’. Although such arrangements and technologies have been developed and feature prominently in the Malthouse plan (as Graham Gudgin and Katy Hayward discuss in this report), the UK government and certainly the EU are far from being convinced that their deployment would deliver on the shared ‘guarantee of avoiding a hard border, including any physical infrastructure or related checks and controls’. Their positions may change as new arrangements and technologies are developed.

Provision therefore exists to review whether the backstop arrangements are still required. Any decision that the Protocol should cease to apply, in whole or in part, is to be taken jointly by the UK and the EU. There is currently no time limit on the application of any of the backstop arrangements and nor is there provision for a unilateral withdrawal from any of them.

Where did the backstop come from?

Anand Menon and Matthew Bevington

17 January 2017. On this day, at Lancaster House, the Irish backstop was born. Not that we realised it at the time. It was the Prime Minister's first major [speech](#) on Brexit. She mentioned Ireland only in a passing reference to the Common Travel Area. Northern Ireland was only discussed in the context of the other devolved institutions. So far, so straightforward, it seemed.

Not so. The speech was an exercise in marking red lines. And the Prime Minister went to town. By baldly asserting her desire to leave the single market and the customs union, she was simultaneously creating the need for a harder border between the North and the Republic, though, of course, this wasn't acknowledged.

And yet, in just her second week as prime minister, May insisted during a visit to Northern Ireland that 'nobody wants to return to the borders of the past'. This was a message she [reiterated](#) in Dublin in January 2017, two weeks after the Lancaster House speech. This position was formalised in the [Joint Report](#) in December 2017: 'The United Kingdom also recalls its commitment to the avoidance of a hard border, including any physical infrastructure or related checks and controls.'

So how to square this circle? Thinking in London seemed to suggest that a mixture of technology and positive thinking could provide the answer. A government position [paper](#) from August 2017 argued that 'waivers from security and safety declarations, and ensuring there is no requirement for product standards checks or intellectual property rights checks at the border' would do the trick. However, it failed to explain how checks might be avoided in practice (a trick revisited in the Malthouse proposal, as Katy Hayward underlines in this report).

Meanwhile, the Irish government had been on the case for a while. A [paper](#) produced in May 2017 stated that there 'will need to be a political and not just a technical solution.' Indeed, what became Paragraph 49 of the December Joint Report—the backstop in embryonic form—was [first drawn up](#) by Commission and Irish negotiators in a working paper later in November 2017. The Irish understanding of the border solution was front and centre. As Tony Connelly [remarks](#), 'the meaning was clear. In order to avoid a hard border ... Northern Ireland, to all intents and purposes, would have to remain in the single market for goods and the customs union.'

For the British government, this was unacceptable. All the more so given that, between Lancaster House and the appearance of the Commission's proposals, Theresa May had suffered humiliation at the hands of the electorate and been forced to rely on the support of the Democratic Unionist Party (DUP) to form a government. The latter vehemently objected to any suggestion of anything that implied the creation of an internal border in the UK.

While the UK government's position had always been to ensure there were no physical borders either on the island of Ireland or in the UK, the DUP's influence led to much more explicit commitments. As Arlene Foster [commented](#) at the time, "Northern Ireland will not

be separated constitutionally, politically, economically or regulatory [sic] from the rest of the United Kingdom.” The prime minister’s red lines were underlined in DUP [blood red](#).

The first practical attempt to square these circles came when the government began its consideration of two different ideas: a facilitated customs arrangement (FCA) and ‘max fac’, or maximum facilitation. Both attempted to avoid the need for a border in Northern Ireland while allowing the UK to pursue an independent trade policy.

In the case of the FCA, this was to be achieved by the UK treating its external border as a UK border for goods destined for the UK and as an EU border for goods destined for the EU, applying the appropriate tariffs and standards in each case.

Max fac was inspired by a [report](#) produced by Lars Karlsson for the European Parliament in November 2017, involving maximising (hence ‘max’) technical means of monitoring the border, such as reaching an agreement with the EU to allow the exchange of risk data, pre-registering goods vehicles and people, and using mobile inspection units and CCTV.

The eventual FCA included in the Chequers white paper contained elements of max fac, such as use of automation, streamlined procedures and simplified customs declarations. However, Michel Barnier’s [response](#) was pretty unequivocal: ‘The EU cannot—and will not—delegate the application of its customs policy and rules, VAT and excise duty collection to a non-member, who would not be subject to the EU’s governance structures.’

Max fac has undergone a [revival](#) in recent weeks, repackaged as the Malthouse Compromise, which contains many of the same features. The main difference is Malthouse contains a ‘Plan B’ if, and most likely when, the max fac-style solutions prove insufficient (more on that below).

But it’s worth remembering why the plan was seen as inadequate in the first place. Karlsson never suggested his proposals would lead to a friction-free border. Indeed, his conclusion is that smart borders can ‘create secure and low-friction borders.’ But low friction is not no friction, which is the mutual aim of both sides. And that’s not to mention the extra £20 billion a year HMRC [forecast](#) it would cost businesses.

This is why the backstop—a legal guarantee that whatever happens there will be no hard border in Northern Ireland—is seen as necessary, both by the EU and [Theresa May](#). There are technical solutions and ideas out there, and they can certainly help. No one could question the logic of making border procedures less intrusive and more efficient. But, as things stand, they simply cannot achieve what is required of them: checks of some kind remain an inevitability.

Which brings us to the Malthouse Compromise (for more details, see the pieces by Graham Gudgin and Katy Hayward). This suggests redesigning the backstop in a way that would be compatible with a future, unfettered UK-EU free trade agreement. The trouble is that this plan, too, doesn’t even aim to avoid all checks and controls, it just moves them inland from the borderline.

So the basic dilemma remains: how do you maintain a completely open border between two legal jurisdictions? The only solution found to date—after many months of careful negotiation in Brussels, if not in Westminster—is the backstop.

Will the EU budge? Lessons from history

Matthew Bevington

The EU has a track record of making last-minute changes to get deals approved. This has led [some](#) to assume that the same will be the case with Brexit. Is this a reasonable assumption? To find out, it's worth considering three notable occasions when the EU has attempted to assuage concerns expressed by or within member states in order to secure approval for a deal: the Maastricht Treaty, the Lisbon Treaty and the Comprehensive Economic and Trade Agreement (CETA) with Canada.

Each case suggests that there's no automatic reason to think the EU wouldn't be open to revisiting the Withdrawal Agreement to help get it through the House of Commons. What they also suggest, however, is that any such changes will adhere to certain principles: the existing text will not be reopened and any additions must be compatible with it.

There is a significant difference between where the UK now finds itself and the historical examples discussed here. In those cases, the problem seemed relatively manageable. The Danish public [rejected](#) the Maastricht treaty by 51% to 49%, and the Irish said [no](#) to the Lisbon Treaty by 53% to 47%. With CETA, almost three-quarters of lawmakers in the Walloon regional assembly in Belgium [voted](#) against the deal the first time. However, the regional president Paul Magnette made clear the ultimate intention was not to veto the agreement, and it eventually passed with the support of over 90% of Walloon MPs.

In stark contrast, the prime minister lost the meaningful vote on the Withdrawal Agreement by a whopping 230 votes. A decisive number in her party seem intent on voting down the deal whatever changes might be made to it. Her first task, therefore, is to convince EU leaders that it is worth the effort to try to find a compromise.

Assuming she succeeds, what could the EU do? With Denmark in 1992, the member states agreed European Council conclusions—later [deposited](#) by each member state at the United Nations—reaffirming the inviolability of national citizenship and underlining that the euro and defence initiatives would not apply to Denmark. Their task was made significantly easier by the fact that the Danes had produced a paper setting out the specific areas that needed addressing.

Similarly with Ireland in 2009, European Council conclusions—later translated into a [protocol](#) to the Lisbon Treaty—simply clarified that the treaty did not affect competences relating to taxation and Ireland's military neutrality, and that each member state would continue to have a commissioner. Again, they had a sense of what was needed. Following the no vote, the Commission ran a flash [survey](#) of public opinion to see why the treaty was rejected. The results centred on a lack of understanding of the treaty itself (22%) and protecting Irish identity (12%). Military neutrality (6%), losing a commissioner (6%) and protecting the tax system (6%) were also concerns which, helpfully, implied actionable changes that could be made.

Finally, with Belgium and CETA, similar features appear. A legally binding ‘Joint Interpretive Statement’ was added to the trade agreement which emphasised the rights of member states and Canada to regulate their markets as they saw fit. The member states and institutions also submitted 38 separate non-binding explanatory [statements](#) regarding CETA. The most important of these, from the Belgian government, reiterated the right of each regional parliament to withhold consent, underlined concerns in some regions regarding the investment dispute mechanism in CETA and restated its understanding that the agreement would not affect EU rules on farming issues like GM crops.

In each case, the solutions adhered to the two criteria set out above: they did not reopen the original text of the treaty and the solutions were fully compatible with it. Rather than changing the substance of the agreements, each set of compromises was an exercise in drawing explicit boundaries and limiting the scope of the agreements.

Moreover, there is less momentum behind this renegotiation than there was then. Unlike the examples above, the Withdrawal Agreement hasn’t already been ratified elsewhere. With Maastricht, Lisbon and CETA, altering the texts could have meant restarting the ratification process in dozens of countries and parliaments, hence why the member states and institutions bent over backwards not to have to do so. This suggests that, in fact, the EU has somewhat less incentive to make further concessions.

There are also risks for the UK in reopening the agreement. Doing so could bring up areas for negotiation the UK has so far managed to avoid—a risk that is little talked about in Westminster. The Greek crisis in 2015 offers a cautionary tale. Greek prime minister Alexis Tsipras rejected the initial [terms](#) offered, which included the controversial abolition of the 30% VAT discount on the islands, only to sign up to [conditions](#) including the abolition of that discount under duress a few weeks later. The prevailing view in Parliament is that reopening the Withdrawal Agreement would yield better terms, but this overlooks the fact that more demands may come from the EU, especially if there’s no deal.

Finally, it seems unrealistic to expect the EU to go further for the UK than it has for member states. It has not reopened treaty texts in the past, even though it has made other last-minute concessions to help get them ratified. There is certainly some room for manoeuvre if these kinds of changes would bear fruit in the House of Commons, but a change as fundamental as rewriting or removing the backstop would be without recent precedent. And, as we have seen in the negotiations themselves, precedents count for a lot when accommodating the varied and often conflicting interests of 27 different governments.

Will the EU budge? The current negotiations

Simon Usherwood

A popular view in the UK is that the EU is implacable and immovable on the question of the backstop. But a more careful reading of statements from senior EU officials and from figures in the member states suggests that there is some room for manoeuvre, albeit within carefully prescribed limits.

There are three roots to the backstop concept: one principled, one legal and one pragmatic. The principled motivation is the desire to protect the interests of member states. The value of collective action at a European level comes with a requirement to ensure that no member is disadvantaged in relation to non-members. The failure of the UK to recognise that, practically at least, it has moved from member to non-member status is a wider issue in the Article 50 process. This is not least because it means that the concerns of Dublin will always carry more weight than those of London.

This runs into the legal concern. The EU is a rules-based organisation—it cannot rely on informal and emotive buy-in for its work from its citizens—and so it values the commitments made. Thus, the obligations of the Good Friday Agreement on the Irish government count for a considerable amount, as do the EU's own requirements for market integration. These preclude internal barriers to free movement under the single market between member states, even as World Trade Organisation commitments require checks and controls at the edge of that market. Seen in this light, the backstop is an effort to square the multiple circles of different legal constraints.

All of this is reinforced by the pragmatic aspect: in Brussels, the UK is not seen a reliable partner, given its endless vacillations over Article 50, in both procedural and substantive terms. Coupled with this, the numerous public statements from senior British politicians intended to create the strong impression that words might be one thing but they would have to be in binding legal terms to have any value has further eroded trust. Theresa May's support for the Brady amendment on 29 January merely confirmed for many in the EU that there is a significant danger of discussions on the backstop poisoning the entire Withdrawal Agreement.

Which brings us back to the question of whether and how the EU might move on this issue. If the three roots point towards inflexibility, then it is important to recall that the EU is not an enthusiastic supporter of the backstop on its own terms: instead, it is tolerated as the least worst option given the constraints. Most obviously, the UK-wide temporary customs arrangement was a substantial concession to the British government, while all involved on the EU side of negotiations have repeatedly stressed their desire to see the backstop used only as a last resort and only until another arrangement can be found.

If another proposal were to be put on the table that satisfied the EU's various needs—protection of its members' interests and the integrity of EU policies on trade and regulation—then it would certainly be discussed and considered seriously. However, after two years of research

and negotiation, the Commission and member states do not see any viable alternative given the UK's stated preference to leave the single market and customs union (as Anand Menon and Matthew Bevington discuss in this report).

This comes back to the uncertainty over the UK's intentions. Movement on the preferred form of the future EU-UK relationship (for example, to include participation in a full customs union or in the single market) would be the most obvious factor that could change, affecting the nature and extent of the backstop. However, any policy change by the British government would need to be backed by a solid majority in Parliament.

And this is the key barrier to EU flexibility. At present, the British political system looks blocked. Concessions on even one part of the backstop might turn out to be the thin end of a thick wedge: Tory backbenchers might feel emboldened to require the government to return for more re- negotiations to gain yet more. Without a clear and definitive line from the UK, the EU is liable to keep its counsel and hold its line.

Why is the backstop needed?

Colin Harvey

The Protocol on Ireland/Northern Ireland is a modest and reasonable exercise in conservation and protection in the context of the detrimental impact on the island of Ireland of the UK's withdrawal from the EU. Its portrayal in the Brexit debate has been, at times, quite remarkable. Rather than being an imposition from either side, the Protocol flows from existing agreements. It has been shaped by extensive input from the UK, as well as the EU. Like all such measures, it is a compromise, informed by considered reflection and a desire to limit the negative consequences of Brexit.

There continues to be acceptance and recognition in the negotiations that the circumstances of the island of Ireland are unique. Brexit turns the land border on the island (the only such border within the UK) into an external border of the EU. This also makes it an open border with an EU member state. Common EU membership eased tensions on the island and helped to render the border invisible. There is extensive and ongoing North-South co-operation and significant daily movements of people and goods. The impact on businesses on the island is well known and well documented. But people also lead increasingly complex lives in, for example, border areas. EU membership assists in making this possible.

There are three themes to note in thinking about why the backstop is needed: first, as a measured insurance policy; second, the three-stranded rationale for its inclusion; and, third, the reasons why it is not going away.

First, the participants in the negotiations have repeatedly stressed that the backstop provisions in the Protocol are intended to be replaced by 'alternative arrangements' that would achieve the same objectives. The intention is that the backstop is temporary and will be superseded by the agreement to follow. However, it is sensible and logical that there is an 'unless and until' element. What comes next must be robust and effective enough to meet the agreed objectives of both the EU and the UK. It would be silly not to include something like the Protocol in an agreement of this nature. It remains difficult to see how the Protocol could be any clearer on these matters.

Second, there are three broad strands in the rationale for its inclusion: avoidance of a hard border, protection of the Belfast/Good Friday Agreement in all its parts and ensuring ongoing North-South co-operation. Much of this is self-evidently sensible. There is a real risk that Brexit will eventually result in the return of physical infrastructure on the border and the gradual hardening of that border over time.

And while much of the debate about the border has focused on the EU's priorities (with respect to the integrity of the single market), there is another side to this story which requires care when discussing the future of the border. The referendum debate about 'taking back control' encompassed issues related to border control. Should Ireland and the EU really be asked to

take it on faith that a project inspired by anxieties over immigration will not lead over time to demands to restrict movement?

The Protocol is a legally credible attempt to ensure that this hardening of the border does not happen. Common membership of the EU was a background assumption of the peace process and the EU is mentioned in the Belfast/Good Friday Agreement. Everyone wants to protect that agreement, and it is commendable that the Protocol seeks to do so, including with a welcome recognition of the potential impact on the human rights and equality aspects.

It is worth observing too that the Protocol explicitly includes reference to the ‘principle of consent’ and the ‘territorial integrity’ of the UK. The fact that the EU has stretched itself to recognise the concerns of the UK (and unionism) is badly neglected in the current conversation. The acknowledgement of the need to conserve the benefits of North-South co-operation is also significant. This has been vital to the evolving peace process and the socio-economic development of the island (especially in border areas). Almost all participants agree on the objectives. The virtue of the backstop is that it provides much needed detail and clarity in the face of much fuzzy thinking. It is a defensible legal answer to a range of complex and difficult political questions.

Finally, the conduct of the negotiations, and the realities of the UK constitution, confirm precisely why a guarantee like this is necessary. It would be unwise of either the EU or the UK—given the volatility of political life—to make too many assumptions about what might happen next. Given historical relations, and the scope for mutual misunderstanding, no Irish government could simply rely on political assurances that everything will be fine or that solutions (so far absent) will suddenly appear. What has been adopted in the Protocol flows from existing agreements, and much of it results directly from the UK’s own interests and demands. It is needed and the reasons underpinning its inclusion will not go away.

Perspectives on the backstop

Mary C. Murphy

The Irish backstop has become one of the, it not the, most disputed aspects of Brexit. It exposes pronounced differences not only between the UK government, the Irish government and the EU, but also within and between political parties both in Westminster and across Northern Ireland.

For Brexit supporters, the backstop is seen as tying the UK indefinitely to the EU by preventing unilateral withdrawal from the EU customs union unless a future UK-EU trade agreement has been agreed. Remaining in the customs union would mean that the UK could not credibly pursue free-trade deals around the world. For the European Research Group (ERG) of Eurosceptic Conservative MPs in particular, the triggering of the backstop would undermine this key ambition for life outside the EU. It is unacceptable to them because it would effectively keep the UK within the EU's orbit until such time as both jointly decided on a future relationship. There will be some capacity for the UK to pursue service deals with other countries after Brexit, but these types of agreements are rare and exceptionally difficult to negotiate and conclude.

The 'Northern Ireland and Ireland protocol' attached to the Withdrawal Agreement also require Northern Ireland to align with specific EU rules across a range of sectors. This effectively means that, should Britain diverge from those rules, there will need to be checks on goods moving from Britain to Northern Ireland. The EU has resisted Theresa May's proposal to create a 'common rulebook' allowing the UK some say over the formulation of EU rules after it leaves the EU.

The Labour Party's position on the backstop is less clear. The party voted against the Withdrawal Agreement although this was not motivated by opposition to the backstop. However, following a meeting with prime minister Theresa May, Jeremy Corbyn signalled dissatisfaction with the Irish backstop because of the lack of a unilateral exit clause. Key party figures moved swiftly to reassure the Irish government and Northern Ireland businesses that the Labour party does not dispute the need for a backstop. Corbyn's five conditions for Labour party support for the government's Brexit deal includes a UK-wide customs union with the EU which would effectively eliminate the need for a backstop. [Scottish National Party \(SNP\) leader Nicola Sturgeon](#) has expressed support for the Irish government in its quest to maintain the backstop.

In Northern Ireland, the backstop means fundamentally different things to different people. In particular, it has revealed stark differences of interpretation between unionist and nationalist political parties.

The core unionist constituency in Northern Ireland feels deeply aggrieved by the backstop. Opposition to it is most visibly represented by unionist political parties – the Democratic Unionist Party (DUP), the smaller Ulster Unionist Party (UUP) and the even smaller minor party, Traditional Unionist Voice (TUV). Their objections are numerous.

First, unionists are concerned that the backstop impinges on the constitutional integrity of the UK by introducing more checks between Northern Ireland and the rest of the UK. Second,

unionists fear that the backstop has the potential to see Northern Ireland [‘drift \[legislatively\] farther away from the UK’](#), as the province will be required to align with EU rules even if these conflict with British rules.

Third, they see the backstop as resulting in a diminished role for the (currently collapsed) Northern Ireland Assembly, which would be compelled to accept some EU law without contributing to its formulation. And fourth, unionists interpret the backstop as being contrary to the principle of consent, a cornerstone of the 1998 Belfast/Good Friday Agreement, although this has been disputed by both the UK attorney-general and the prime minister.

However, the unionist interpretation is not one shared by other political, economic, sectoral and civic constituencies in Northern Ireland. [Four of Northern Ireland’s political parties](#) support the backstop. This includes the two nationalist parties – the Social Democratic and Labour Party (SDLP) and Sinn Féin – and two smaller middle-ground parties, the Alliance Party of Northern Ireland and the Green Party.

A significant section of civil society in Northern Ireland, representing both sides of the political divide, support the backstop. The list of organisations includes the [Confederation of British Industry](#) Northern Ireland, and the [Irish Congress of Trade Unions](#) (ICTU). Key sectoral interests also support the backstop. In his response to the Withdrawal Agreement, Retail NI chief executive Glyn Roberts stated: [‘Nearly every Northern Ireland business organisation and sector of the economy is supporting this deal. MPs in all parties need to listen to what we are saying.’](#) Those sectoral organisations include, among others, [Manufacturing Northern Ireland](#), the [Northern Ireland Food and Drink Association](#) and Northern Ireland’s largest farming union, the [Ulster Farmers’ Union](#) (UFU).

A key Brexit stakeholder, the [Irish government](#), clearly also supports the backstop. And, crucially, a majority of public opinion in Northern Ireland does so as well (as John Garry describes).

There is an understanding in Ireland that the backstop is an insurance policy – a practical and temporary means of preventing a hard border on the island of Ireland in the event that no future EU-UK relationship is agreed. Rather than being interpreted as a threat to Northern Ireland, it is seen as allowing Northern Ireland access to the benefits and opportunities offered by both the EU and UK markets.

However, claims that it offers ‘the best of both worlds’, that it is a position of ‘last resort’ and EU assurances that it will only be triggered for the [shortest possible period](#) have done little to assuage the concerns of those who view the backstop as a nefarious attempt either to keep the UK tied to the EU indefinitely or to undermine Northern Ireland’s constitutional position within the UK.

During her recent visit to Northern Ireland, Theresa May reiterated that she does not want to remove the backstop from the Withdrawal Agreement, although she does want changes to it. But this strikes at the most fundamental problem of all: there are no obvious, acceptable alternatives to it in its current form.

What do the public think about the backstop?

John Garry

Is the Brexit borders puzzle in Northern Ireland a zero-sum game, in which one side's win implies another's loss? It certainly seems so. Unionist politicians desperately want to avoid any kind of economic border down the Irish Sea that may be triggered by the dreaded 'backstop'. Nationalists fear that succumbing to unionist demands to eradicate the backstop would open the door to a hardening of the north-south border.

However, as is often the case with seemingly intractable winner-takes-all squabbling, there does exist a compromise solution both supported by the public, and under which everyone could be a winner. Research from a detailed report on public attitudes in 2018 showed both communities in Northern Ireland were supportive of the kind of soft UK-wide Brexit that would obviate any north-south or east-west border concerns. This would involve the UK leaving the EU, but remaining in the (or a) customs union and single market. This exit option was supported, as shown in Table 1, by 61% of all respondents, including almost identical proportions of Catholics (61%) and Protestants (62%), and was by far the preferred type of exit favoured by Remain voters (69%) and marginally the most preferred by Leave voters (44%).

Table 1: Preferred type of exit

	All	Protestants	Catholics	Leave Voters	Remain Voters
A 'hard' <i>Brexit</i> for all of the UK	15.2	24.4	5.3	42.9	3.8
A 'soft' <i>Brexit</i> for all of the UK	61.3	61.9	60.6	44.3	69.4
A 'hard' <i>Brexit</i> for Great Britain but a 'soft' <i>Brexit</i> for Northern Ireland	23.6	13.7	34.1	12.8	26.8

[Source: Northern Ireland and the UK's exit from the EU](#)

Such an (ultra) soft Brexit is, however, seen by many Brexiters across the UK, and indeed many hard-core Remainers campaigning for a further referendum, as the worst of all possible worlds. The UK would have to follow EU rules but wouldn't have any say over the creation of the rules – hence this option being characterised as BRINO (Brexit in Name Only). But it could equally be called HEH (Happily Exiting Homogenously) in the Northern Ireland context, because the debate about the integrity of unionism is so much more salient in Northern Ireland than in Great Britain. Such a departure strategy would treat all of the UK the same and would hence please unionist leavers, or at least those unionist leavers who prioritise the best possible unionism over the cleanest possible leaving.

If an ultra-soft exit doesn't gain UK-wide traction, how popular are the other exit options in Northern Ireland? Of particular interest is that Protestants and Leavers' second favourite option was a hard UK-wide Brexit (no customs union or single market). And their least favourite option

was an exit in which Northern Ireland remained aligned to the EU but Great Britain did not, an option that would result in the feared economic border down the Irish Sea.

In contrast to the concerns of Catholics and nationalists over the potential hardening of the north-south border, Protestant anxieties over the possible emergence of an east-west economic border are arguably less understood, appreciated and empathised with. A common interpretation is that there are already differences between Northern Ireland and Great Britain and so why would some additional differences be so threatening? Northern Ireland is a distinct component of the UK, made more distinctive than the other devolved regions by the undertaking in the 1998 Belfast/Good Friday Agreement that it can re-unify with the rest of Ireland if a majority wish to do so.

Consequently, making Northern Ireland a bit more different – by having it potentially aligned closer to the EU than Great Britain on rather mundane regulatory matters – shouldn't be seen as spelling the end of the UK's economic and constitutional integrity. Rather, such 'special status' for Northern Ireland would surely represent merely an increased loosening of the ties binding the UK together, a further stretching rather than snapping of the UK constitutional elastic.

However, the concern is that EU alignment would represent a leap into a new era in which an external actor – the EU – would be driving the nature and extent of differences between the component parts of the UK, hence posing an existential threat to the union.

Box 1: Concerns about the emergence of an NI-GB border

"...no because I don't want Northern Ireland separated from the rest of the UK."

Female, 60+, ABC1, Protestant, Leave

"We'd feel alienated in a way I think."

Female, 45-59, ABC1, Protestant, Remain

"Flag protests again and it could escalate if they were forced into a hard border... non violent to start off with, then it will be blocking roads."

Male, 30-44, C2DE, Protestant, Leave

"I do, I think a border in the Irish Sea is a united Ireland through the back door, which is tearing up the Good Friday Agreement. So I think protests are justified. It would be a united Ireland through the back door."

Male, 30-44, ABC1, Protestant, Leave

[Source: Northern Ireland and the UK's exit from the EU](#)

Examples of the way in which Protestant citizens articulate their anxieties about this possible new economic border are reported in Box 1. Potential alienation and separation from Great Britain are seen as anxiety inducing. Also, analogous to possible protests against a hardening of the north-south border, citizens voice the possibility of active protest against the emergence of NI-GB differences. These would be similar to previous protests over flag displays in public buildings, and would likely to given greater momentum by fears of an emerging united Ireland.

In contrast to Protestants and Leavers, the second favourite exit option of Catholics and Remainers is one in which Northern Ireland is more closely aligned to the EU than Great Britain is. And their least favourite option is a UK-wide hard Brexit. These contrasting views of Catholics and Protestants on the relative merits of a hard UK-wide exit or a (potentially) differential Northern Ireland exit map onto the current wrangle between the prime minister and the EU on a Withdrawal Agreement with or without a clearly defined backstop. Whoever blinks first will determine the result of Northern Ireland's ongoing zero-sum game.

What is the 'Malthouse plan'?

Graham Gudgin

The recent vote in parliament attempting to prevent a no deal outcome on Brexit was counter-productive and non-binding. Any attempt to hobble the government's negotiating hand would have been a self-inflicted wound. It was also irrelevant, since virtually no-one in the UK is advocating no deal. The preference of the European Research Group (ERG) of Conservative Eurosceptic MPs has always been for what is usually called a 'Canada-plus' free trade agreement. Everyone also supports sensible side deals on such issues as aircraft landing rights, air and vehicle safety certification, and truckers' licences. It may not be the Withdrawal Agreement signed off by Theresa May, but it is a perfectly coherent UK offer, especially if accompanied by undertakings on the Irish border.

It is entirely logical for Brussels to play hardball at this stage of the talks. The EU still sees some prospect of Parliament reversing its rejection of the Withdrawal Agreement and are, of course, fully aware of the non-binding vote on no deal. However, the EU's current refusal to re-open the Withdrawal Agreement is unlikely to be a guide to the endgame in March.

It would nevertheless be logical for the EU to offer Parliament a sweetener in the form of a codicil attached to the Withdrawal Agreement. This codicil could suggest that the EU will try hard to ensure that the backstop is either never used or will be used for only a short period (see Matthew Bevington's piece for examples of where the EU has done similar things in the past). However, this is unlikely to work since prominent ERG MPs have said that they will reject any formulation that does not replace the current wording of the Withdrawal Agreement with a clear get-out clause from the backstop. The likelihood is thus that the deal will once again be rejected if it returns to parliament.

The prime minister's first preference is clearly still to get an amended Withdrawal Agreement through Parliament. Her strategy all along has been to give Leave supporters a formal exit from the EU and control over EU migration, but to give companies an outcome very close to the customs union and single market. The recent Nissan decision not to build the new X-Trail model in the UK will have strengthened this resolve.

The voting strength of the ERG, however, means that a fall-back position is now under consideration – the 'Malthouse Compromise'. This is close to the ERG's longstanding preferred option, with the involvement of prominent Remainers giving the plan a far higher profile than we might otherwise have expected. These MPs find the Withdrawal Agreement unacceptable. They also share a survival instinct and wish to prevent their party from fracturing and losing the next election. If and when the Withdrawal Agreement fails again to pass in Parliament, the plan is to have a compromise which the Malthouse group hope will command sufficient Tory and DUP support (together with up to forty Labour MPs from leave-voting constituencies) to provide majority backing in parliament. This can then be presented to the EU who will need to choose between this and no deal.

The Malthouse Compromise is based on a free-trade agreement with no tariffs or quotas. A commitment to avoid new infrastructure on the Irish border is supported by proposals for advanced

customs and trade facilitation measures of the sort already in use on, for instance, the Swiss border. Regulatory equivalence of the type that currently exists for meat imports from New Zealand are proposed to remove the need for sanitary and phytosanitary checks for food and animal imports. Non-regression clauses of the sort common in modern free trade agreements are proposed to address EU concerns over unfair competition. Provisions on citizens' rights and payments to the EU would be carried forward from the Withdrawal Agreement.

The Malthouse plan could involve an extended transition period agreed under Article 50 to allow time to negotiate a free trade agreement (FTA), which should not be difficult between two entities which already have free trade. Additional payments would accompany an extended period. Alternatively, the free trade negotiation could be conducted without a formal transition period through making use of the provisions of GATT Article 24 as long as the EU agreed that formal FTA talks could begin soon after 29 March. Article 24 allows countries engaged in formal free trade negotiations to suspend the most favoured nation rule of the WTO and to continue with the existing tariff-free trade arrangements. In either case, the period would finish by December 2021 at the latest.

The EU is likely to resist consideration of this alternative for several weeks, but once the Withdrawal Agreement has sunk without trace, and both sides face no deal, there are three strong reasons why it might accept the Malthouse Compromise. First, an agreement secures the £39 billion (or more) promised in the Withdrawal Agreement. Secondly, an agreement avoids potentially high tariffs for EU exporters into the UK. The EU currently sells £55 billion of products in high-tariff food and vehicle sectors into the UK. Exports from the UK into the EU in these sectors are lower at £21 billion.

But the most pressing reason is to secure a frictionless border in Ireland. The UK has guaranteed no new border infrastructure, deal or no deal, but without a deal there will be a problem on the Irish side to maintain the integrity of the EU single market. It is obviously better for Ireland and the EU to accept some deal on the Irish border rather than no deal at all, even if that deal were inferior to the backstop in their eyes. The UK will also prefer to avoid no deal but can live with tariffs and side deals.

Would the 'Malthouse plan' work?

Katy Hayward

Given that the process of the UK's Withdrawal from the EU has so far been beleaguered with indecision, it is perhaps appropriate that the so-called Malthouse Compromise involves no fewer than two plans (see the piece by Graham Gudgin).

Plan A is quite ambitious. It would entail remodelling the Withdrawal Agreement along the lines of the appealingly-titled document: 'A Better Deal'. Coming in at a comparatively modest 59 pages, this paper (produced with no institutional affiliation or publisher mentioned, just the names of the three authors led by Shanker Singham) is intended to offer an alternative to the Protocol by making a future UK-EU free trade agreement compatible with 'avoiding a hard border'.

Plan B is equally ambitious, albeit in a somewhat anarchistic way. It would not bother with a Withdrawal Agreement (if negotiations fail) but instead constructs a quasi-transition period (i.e. one lacking any formal legal framework) in preparation for WTO rules kicking in on 1 January 2021. It references GATT Article XXIV to justify what it portrays as a smooth glide path towards free trade. However, it should be noted that this Article in fact describes what happens during a legally-agreed transition period to a legally-agreed new relationship. Plan B, then, is a dead-end.

Malthouse appeals to a spectrum of Conservative MPs because it claims to realise two of their core demands. First, it sets a clear exit day. Transition would end by January 2021, come what may. And it promises a future Free Trade Agreement straight afterwards – no waiting for future rounds of negotiation or for the Irish to be happy with arrangements. The deadline is intended to focus minds. In reality, however, it simply nudges the cliff edge just a short distance further rather than avoiding it altogether. The purpose of the Protocol is, of course, to hedge against that very cliff edge when it comes to the island of Ireland.

But what would Plan A look like in practice? Malthouse wants the UK out of the customs union, Single Market and 'all EU rule-making'. The unavoidable consequence of this is that customs procedures have to be applied to goods crossing the Irish border. Plan A doesn't sugar-coat that pill for those moving goods across the Irish border. The Union Customs Code will have to apply as well as whatever UK customs policy will be in play.

The 'A Better Deal' paper makes reassuring noises as to how this can be handled, talking of 'advanced customs and trade facilitation measures' which include 'specific solutions' for the Irish border'. In practice, as the paper acknowledges, there is no getting around the fact that a whole new raft of procedures will come into play: customs declarations, technical checks, random checks, and inspections on premises. In fact, the only concession to avoiding a hard border is to have these checks away from the borderline and to promise no physical infrastructure there. When it comes down to it, talking of 'simplified' or 'expedited' procedures is of little solace to those who currently do not have to comply with any such procedures at all. This would not be a border anywhere near to being as 'frictionless' as it is now.

And note that this customs facilitation scheme relies on ‘self-assessment for importers to declare imports periodically and account for duties payable’. The incentives for simply not registering – especially items subject to high tariffs – are admittedly large, and the disincentives minimal, especially if the chances of getting caught are low.

A second consequence of the Malthouse Compromise’s unwillingness to compromise on the red lines of leaving the single market and customs union is that there will no longer be a level playing field between the UK and Ireland when it comes to applying the rules that enable goods from each jurisdiction to move freely. Its promise that there need be no regulatory checks on borders around Northern Ireland centres on the principles of ‘regulatory recognition’ based on ‘deemed equivalence’. Much of the force of argument here is that the UK and EU ‘we will be identical on day one’. The obvious question for the EU, of course, is what happens in the weeks and months to follow afterwards. Malthouse relies on the EU trusting that UK’s rules on such things as food quality standards remain the same indefinitely. There is, however, no legal let alone political guarantee of this, and the EU is very aware that regulatory diversion was one of the stated objectives of many Brexit supporters.

One of the favoured sales pitches for Malthouse is that it doesn’t rely on future ‘technological solutions’ but on existing systems. This is true, specifically the existing systems that the UK currently benefits from through EU membership, such as TRACES (Trade Control and Expert System) for ensuring safe food products, and VIES (VAT information exchange system) for VAT refunds. These are currently useful electronic systems for easing the movement of goods around the EU.

However, once the UK is outside the EU, however, access to these systems is in doubt, and impossible in a severe ‘no deal’ scenario. Furthermore, Malthouse assumes the continued existence of inter-agency cooperation and information sharing between the UK and Ireland, together with recognition of the other party’s inspections and documents for certification of conformity. Again, such things will be more difficult in legal and practical terms after Brexit and the framework to enable them requires careful negotiation. The scope for bilateral cooperation here is limited.

The Malthouse Compromise is not designed as a serious solution for the Irish border but as a means of downplaying the consequences of a hard Brexit. As such, it is a compromise between Conservative MPs on different wings of the parliamentary party. But it is not designed as a compromise at the point where the problem lies, i.e. between the two negotiating sides of the UK and the EU. And it entails no compromise of the intention to create a UK-EU Free Trade Agreement in the future with no single market or customs union strings attached.

As such, it is best understood as a sticking plaster over divisions within the Conservative Party, rather than as a serious proposal to revise the Withdrawal Agreement vis-à-vis the complex and sensitive issue of the post-Brexit Irish border.

Are there alternatives to the backstop?

Catherine Barnard and Georges Baur

Given the fights there have been over the backstop, are there no conceivable alternatives to it? The hunt for such alternatives inevitably leads to examples of other borders and it is usually only a matter of time before someone volunteers the Switzerland-France border as a model. Switzerland is in Schengen (so no need for passport checks) and regulations on goods are broadly aligned with those of the EU. But Switzerland is not in the EU's customs union nor its VAT regime, and that means border checks are required. Its watches and cuckoo clocks literally run like clockwork, so, the argument goes, must its borders.

But it's not as simple as that. As the [Swiss Federal Customs Administration](#) makes clear, even though they have the latest technology and much paperwork is done away from the border, there is still some physical infrastructure and delays of up to four hours if a lorry is searched.

In 2018 Switzerland launched a new IT-based customs transformation [programme](#). This programme aims to simplify, harmonise and fully digitise customs tax and duty collection processes. It should be in place by 2026. However, this programme will not make controls at the border redundant. Quite the opposite. Because routine administrative work and bureaucratic procedures will be replaced by IT-based solutions, personnel will be freed up. These people will be used to strengthen security, especially for control functions and reinforcement of criminal prosecution. Some of these functions will continue to apply at the border. Hence, even with a highly technologically advanced customs management system, controls at the border will not become obsolete and nor will customs infrastructure vanish.

What about another favoured example, the Norway-Sweden border? Norway is not in the customs union either, so the origin of goods must be checked. Again, [Norwegian Customs](#) make clear what is required. Although it is technologically advanced, there is still a delay. The [average time](#) from when a lorry arrives at the border to when it leaves is about 20 minutes. This includes roughly ten minutes waiting time, three to six minutes of handling time, and the time spent coming off the road to complete the customs process. And there's physical infrastructure too. All this despite existing agreements on customs facilitation, transit and rules of origin between the EU and the European Free Trade Association states, of which Norway is one.

Less often talked about are Andorra and San Marino. Both are small European nations that are in a customs union with the EU. Although Andorra's treaty only covers goods, its borders with Spain and France are strictly controlled. This is due to the fact that Andorra has no VAT (yet) and is known as low tax territory. Thus, smuggling has always been a concern of the neighbouring countries. The customs union with San Marino covers all goods except coal and steel. It has traditionally kept an open border without checks at its frontier with Italy. However, it levies an import tax, at 17%.

The Bulgaria-Turkey border is [worse](#). Turkey is in a customs union with the EU, which removes tariffs and quantitative restrictions in bilateral trade between EU member states and Turkey for the goods covered. It also sets a single external tariff for both the EU and Turkey, so they charge the same duties on imports from non-EU countries.

Unlike the customs union covering EU member states, the EU-Turkey agreement is incomplete. It covers industrial goods but not agricultural products (except certain processed agricultural products), coal and steel products, or public procurement.

Finally, the border between Turkey and the EU is bureaucratic and lengthy. Lorry drivers need an export declaration, a customs permit, invoices for the products they are transporting, insurance certificates and a transport permit for each EU nation they will drive through. The queues at the border can be up to 17 kilometres long and the wait as much as 30 hours. While Turkey has invested significantly in modernising its border, with checks taking place an hour inland, Bulgarian officials check the paperwork for every truck and x-ray all refrigerated lorries.

Which brings us to the US-Canada border. Again, much resource has been put into streamlining this border but there are still delays – the length can be seen [online](#). All of this indicates that regardless of the technological capabilities of the EU's neighbouring countries, there will be checks and the borders and this means infrastructure.

What happens to the border if there's no deal?

Katy Hayward

The commitment to 'avoiding a hard border' on the island of Ireland has been repeatedly made by both the UK government and the EU since the Article 50 clock was set ticking, as Anand Menon and Matt Bevington underline elsewhere in this report. As was set out clearly in the December 2017 Joint Report, and then confirmed in the Protocol on Northern Ireland/Ireland in the Withdrawal Agreement, this aim is inseparable from three other priorities: addressing unique circumstances on the island of Ireland, maintaining the necessary conditions for continued north-south cooperation, and protecting the 1998 Agreement in all its dimensions.

Although this adds complexity to an already knotty problem, it is imperative to acknowledge that people on the island of Ireland do not have the luxury of considering what happens at the Irish border as a merely technical exercise around customs and trade facilitation. When people of all generations and communities on the island think about the future Irish border, their views are unavoidably infused with memories of past conflict, awareness of opposing views on the constitutional status of Northern Ireland and fears about the potential re-emergence of violence. In a Lord Ashcroft [poll](#) in 2018, two thirds of respondents in Northern Ireland thought that a hard border would lead to increased paramilitary activity.

When a hard border is discussed in British media and politics, however, the debate is generally couched in terms of trade. The real issue, however, is how it might be possible to avoid, at the UK-EU land border, any negative consequences generated by the UK leaving the EU for the common ground between rival parties that EU membership has generated.

What might these consequences be? First, there are obviously implications for trade. If the UK is not in a customs union with the EU, the Irish border becomes a customs border. This means that those trading across it would have to be registered to do so. They would also have to make customs declarations on all goods being transported. In many instances, tariffs would have to be applied to these goods. These can be 'ad valorem', charged as a percentage of the value of the goods; unit-based charges, by quantity or weight; or both. As well as tariffs, excise duties and VAT will have to be paid on entry to the other jurisdiction – another layer of bureaucracy for traders to manage. WTO rules don't get around any of this.

What they do mean is that, if the UK decides to waive tariffs and quotas for goods coming from the EU, then it would have to do the same from goods from virtually all other countries too. This may lead to cheaper goods, but it would also be a severe blow to local manufacturing and production. And let us not forget that the EU will still impose tariffs on goods coming from UK – so goods crossing that border would still have to undergo customs procedures.

The challenge of managing a customs border is multi-layered. Not only do we have to be able to facilitate legitimate trade (e.g. make customs declarations and the payment of tariffs as smooth

as possible), we also have to be able to tackle the illegitimate movement of goods. The greater the divergence between the UK and the EU (i.e. the higher the tariffs), the greater the incentive for smuggling. This means losses to public revenue in terms of unpaid duties, but, more important, is the harm caused to legitimate traders, whose prices would be undercut by contraband goods. It also poses risks to consumers through unchecked goods coming onto the market and contributes to the funding of criminal activity. The fact that smuggling is already a problem in the Irish border region should mean we prioritise the protection of legitimate businesses after Brexit, rather than adopting a blasé attitude that increased smuggling won't really matter.

Secondly, if the UK is outside the single market, it means that there can be no automatic assumption that UK goods are of adequate standard to be sold in the EU. For example, if there are divergent regulations between the UK and the EU on food standards, animal feed, energy, medicines, medical equipment, food labelling, etc., this will lead to the need for checks on goods being produced in Northern Ireland making their way into the wider single market. The consequences of this are particularly onerous for agri-food and agricultural products. Strictly speaking, many of these will have to enter the other jurisdiction through Border Inspection Posts, which would need to be created.

And that is not the only challenge. As the no deal preparatory notices issued in recent months starkly demonstrate, EU membership has implications across a wide range of sectors in society. Many of these have a direct impact on daily life in the Irish border region. For example, the Single Electricity Market on the island of Ireland operates within the framework of common EU rules and mobile phone roaming will, as we have recently heard, be affected by a no deal outcome

Bilateral arrangements can help smooth the transition in areas in which the two governments retain competence, and good progress has been made on these already. But they can only get so far. The truth is that both the UK and EU will be required to manage the Irish border according to the conditions of international law and norms that will apply. And these would have a brutal effect on what is, currently, both a remarkably open and a stubbornly contentious state border.

It is sensitivity to this fact, and awareness of the practical and political complexity that has made the UK, the EU Commission and Ireland so loathe to spell out what would have to be done to manage the Irish border in a no deal scenario.

It is not that they could simply choose not to do so, but rather that only fools would rush in.



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