

The Backstop Trap: A view from Ireland

Professor Anthony Coughlan, Associate Professor Emeritus in Social Policy at Trinity College Dublin, explains why the Irish backstop is a trap designed to bind the UK to the EU with no means of escape, and what the UK can do to get out of it.

How many people really understand the full implications of the Irish Protocol, aka the backstop?

The backstop as it stands must be unacceptable to any genuine democratically minded person, whether British or Irish. As undemocratic as the EU is, it is at least possible for a country to leave it of its own free will, under the terms of Article 50 of the Treaty on European Union. But with the proposed Irish backstop in place, the UK could not legally leave the EU Single Market, Customs Union or European Court of Justice (ECJ) jurisdiction without the permission of the EU, including Ireland.

There are only two ways out of the backstop for the UK. The problem is, both of them are dead ends.

The first is for the backstop to be superseded by a permanent agreement between the UK and EU, one compatible with the principle of 'no hard border including no physical infrastructure or related checks and controls'. But the EU has already insisted that the only way to achieve this 'guarantee' is by Northern Ireland *de facto* remaining in the Single Market and Customs Union. So, no way out there.

The only other way out is via a review procedure. But this is simply another trap from which there is no escape, as

explained in a recent letter by former Irish ambassador Ray Bassett, former Special Adviser to the First Minister in the Northern Ireland Assembly Dr Graham Gudgin, Lord David Trimble and others:

“The review procedure lists four Protocol objectives which must be met, only one of which is ‘the avoidance of a hard border’. The others are much wider and in the case of ‘addressing the unique circumstances on the island of Ireland’ and ‘protecting the Good Friday Agreement in all its aspects’ are impossibly vague...

“The fourth condition, only slightly less all-encompassing, is to ‘maintain the conditions for north-south co-operation’. In the December 2017 Joint Progress Report the UK conceded that such maintenance ‘relies to a significant extent on the EU common legal and policy framework’. The [UK] National Audit Office has subsequently contradicted this for health co-operation, but the damage was already done.”

The Irish backstop is therefore effectively a device that has been concocted by the EU Commission, the Irish Government and some of the UK's own Remainers to frustrate Brexit and, if possible, prevent it altogether. It seeks to set aside the vote of the British people to get back their basic democratic right to make their own laws and decide their own governmental policies – a right that Ireland has surrendered to the EU, despite all its public rhetoric about valuing democracy, sovereignty and national independence.

Moreover, Bassett *et al*'s letter points out that the backstop as it stands actually undermines the principle of consent in the Good Friday (Belfast) Agreement:

“An obvious consequence of all of this is that the EU's common legal and policy framework must be followed permanently in Northern Ireland if the conditions for

continued north-south co-operation as defined in the Withdrawal Agreement are to be maintained. This means Northern Ireland remaining permanently within the EU Customs Union and the Single Market as described in the backstop and in a way that undermines the Good Friday Agreement itself."

There are perfectly reasonable alternatives to the backstop that would avoid a hard North-South border in Ireland while respecting the UK's sovereignty and the Good Friday Agreement. For example, the UK Government could give an undertaking to the EU that it will not allow its territory to become a source of non-compliant goods leaking into the EU Single Market. Such an undertaking could be underpinned by a licensing system for UK exporters to the EU, that would force them to meet EU requirements or suffer penalties under UK law. EU officials could be invited to assist in investigations.

This would address the fact that what matters for the integrity of the EU Single Market is not what goods are in circulation within Northern Ireland – which should be no business of the EU once the UK had left – but only what goods cross the land border into the Irish Republic. Full regulatory alignment between the North and South of Ireland, or between the UK as a whole and the Republic, is not necessary for this purpose.

The problem is, of course, that the backstop was never intended as a reasonable solution, but as a trap to bind the UK to the EU with no legal means of escape. Why UK chief negotiator Oliver Robbins agreed to it is hard to understand. One has to wonder if Prime Minister May herself realised its implications when she went along with it, before the UK Parliament refused to approve it. At what point (if at all) will the EU and Irish government let go of their trap and start looking at workable alternatives that do not compromise the sovereignty of any of the parties involved?