

Northern Ireland, the Backstop and No Deal

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Introduction

Of all the challenges posed by the Brexit negotiations, arguably none did more to frustrate Theresa May's efforts to secure parliamentary support for the Withdrawal Agreement or was a bigger factor in the end of her premiership than the Northern Ireland backstop. The question of what Brexit would mean for Northern Ireland and the border with the Republic received little attention from British politicians or the UK media ahead of the June 2016 referendum. Today, the backstop has become pivotal to the whole Brexit process, encapsulating not only the highly technical and legal challenges around the mechanisms of exit, but throwing into sharp relief more complex and difficult political questions around the UK's constitutional settlement and particularly the place of Northern Ireland within that. While the Northern Ireland referendum vote saw 55.8% supporting remain, in the subsequent negotiation process a representative Northern Ireland voice (as opposed to a specifically DUP Westminster voice) has been absent due to the suspension of power-sharing at Stormont since January 2017.

The Brexit vote and negotiation process have also politicised the EU in Northern Ireland to an extent not seen previously. Prior to the referendum EU membership was neither 'as contested [nor] as contentious' an issue in Northern Ireland as in other parts of the UK, while the relationship with the EU was 'relatively harmonious', being largely functional and transactional.² At the same time, the

referendum campaign and negotiations have placed considerable strain on the two main communities. At its heart, the referendum was about sovereignty and Northern Irish voters were therefore required to 'confront issues that exposed deep-seated differences between them'.³ This was reflected in the breakdown of the vote: 85% of Catholics who voted opted for remain while only 40% of Protestants did so; meanwhile, 88% of those identifying as 'Irish' voted remain versus 38% of those identifying as 'British'.⁴ Two decades since the signing of the *Belfast (Good Friday) Agreement (GFA)*, deep divisions remain in circumstances of 'relative peace but minimal reconciliation'.⁵

Although the backstop is intended to minimise any negative impacts of Brexit on the island of Ireland, it has served as a catalyst for discussions about Northern Ireland's future relationship with – and indeed place in – the rest of the UK. It is also affecting discussions in London about what a post-Brexit Britain will look like and how it will engage with both the EU and the wider world. As Dominic Grieve MP, a leading remain-supporting Conservative put it, 'this goes to the very root of the country's identity'.⁶

This policy brief analyses some of the main political questions that arise from the backstop and the potential implications of a no deal Brexit for Northern Ireland.

The response to the referendum in Northern Ireland

Following the referendum it initially appeared that the complex range of Northern Irish concerns could be represented by the devolved administration in Belfast. In a joint letter to the Prime Minister in August 2016, then-First Minister Arlene Foster, leader of the DUP, and Martin McGuinness, her Sinn Féin (SF) deputy, emphasised several issues, particularly the border and the risk to Northern Ireland's economy. They also made clear that Northern Irish involvement and representation 'in the negotiations on the terms of our future relationships with the EU and other countries' was a 'fundamental prerequisite' if those negotiations were to be 'meaningful and inclusive'.⁷ However, the collapse of power-sharing as a consequence of the Renewable Heat Initiative scandal in 2017 left Northern Ireland without its own voice in the discussions.⁸ While London has emphasised the importance of restoring devolution, to date there has been little progress, despite a renewed effort following the murder by dissident Republicans of the journalist Lyra McKee in April this year. Crucially, Brexit has made the two parties 'even more cautious' about returning to power-sharing,⁹ with their opposing views on Brexit instead 'exacerbating the centrifugal forces' at play in Northern Irish politics.¹⁰

These tensions were compounded following the May 2017 General Election which left the Conservative Party without a majority and reliant on the DUP's 10 MPs. This raised significant concerns within Northern Ireland over the 'appropriateness' of the DUP's potential leverage over the UK government and the latter's capacity to remain impartial, despite its commitments in the confidence-and-supply agreement.¹¹ Furthermore, it seems that on fundamental elements of Brexit, the DUP 'are out of line with the majority' in Northern Ireland who opted for remain and now seek the softest form of Brexit.¹² This point was underlined by the European Parliamentary election results which saw two of Northern Ireland's three seats go to SF and the Alliance Party which both reject a hard Brexit.

The DUP's priorities

For the DUP, the maintenance of the Union is paramount. Nigel Dodds MP, DUP leader in Westminster, described the 'UK's constitutional integrity [as] of such importance to us that it remains sacrosanct and above everything else'.¹³ Similarly,

following the publication of the Joint Report in December 2017, Arlene Foster declared that 'Northern Ireland must leave the EU on the same terms as the rest of the [UK]. We will not accept any form of regulatory divergence which separates [them] economically or politically.'¹⁴ This has remained the basis of the party's position throughout the negotiations with the EU27.

The DUP therefore refused outright to accept proposals for a Northern Ireland-only backstop and have rejected the final UK-wide arrangements which include 'differentiated arrangements for Northern Ireland' to ensure no regulatory barriers across the Irish border and prevent any border down the Irish Sea.¹⁵ (This is despite the existence already of checks on livestock between Northern Ireland and Great Britain.¹⁶) They consider the backstop 'toxic'¹⁷ and 'worse than no deal'.¹⁸ Their refusal to soften their stance on the backstop was a factor in Theresa May's decision to delay Meaningful Vote 1 until January 2019. It was also the primary reason the DUP voted against the government in subsequent attempts to pass the Withdrawal Agreement.¹⁹

Wider Unionist fears

The DUP's commitment to maintaining the Union is unsurprising. Underpinning it are several inter-linked additional concerns. The first concerns the status of Northern Ireland and any attempts (real or perceived) that Brexit could become a means for nationalists to pursue a unification agenda. Considerable DUP anger over the backstop has been directed at Dublin, reflecting fears over attempts to unify Ireland by 'stealth',²⁰ even though there is 'little appetite' for such a discussion currently – indeed, the priority in Dublin is to ensure 'the least disruptive Brexit' possible.²¹

This fear is combined in some quarters with a difficulty in accepting – and even resentment towards – Dublin's elevated importance and influence in the negotiations and the unity shown by the EU27. For example, DUP MP Ian Paisley Jnr declared that if he were 'the German chancellor or the French president I would be saying to Mr Varadkar, 'Listen mate, you have had enough fun with the politics of this; it is now time to get on with the real deal'.²² Meanwhile, in November 2018 Robin Swann, leader of the Ulster Unionist Party (UUP), the DUP's main unionist competitor, declared that the Irish government had effectively given unionists 'a poke in the eye' in its approach to Brexit.²³

Underlying this is a deeper concern over the possibility of the betrayal of unionism by London. Whatever the claims of Brexiter MPs such as Boris Johnson, Dominic Raab and Jacob Rees-Mogg, the DUP fear that they could ‘abandon Northern Ireland if it meant a clean Brexit for the rest of the UK’.²⁴ The spectacle of former Brexit ultras such as Johnson, Raab and Rees-Mogg abandoning their opposition to the Withdrawal Agreement following the Theresa May’s promise on 28 March to resign if it passed only strengthened this impression.²⁵ One DUP supporter even described it as ‘stab[bing] them in the back’.²⁶ Indeed, the DUP will be closely watching the competition for the leadership of the Conservative Party, hoping Theresa May will be replaced by someone more sympathetic to their position and willing to seek the re-opening of the Withdrawal Agreement.²⁷ That said, current frontrunner Boris Johnson has been revealed to have supported – albeit reluctantly – checks on goods moving between Northern Ireland and Great Britain to ensure a soft border following Brexit.²⁸

Dissatisfaction with the DUP’s Brexit strategy

Even if the DUP retains the support of a majority of unionist voters currently, they do not necessarily agree with its rejection of the backstop. While most DUP supporters voted to leave the EU, many also support remaining in the single market and customs union to avoid any new border arrangements ‘either on the island [...] or down the Irish Sea’.²⁹ Meanwhile, the DUP’s handling of the negotiations with London has received significant criticism. In a Irish Times/Ipsos MRBI poll conducted in Northern Ireland, 67% of all voters said the DUP was ‘doing a bad job of representing Northern Ireland at Westminster’, while 69% – including 57% of those from a Protestant background – were dissatisfied with Arlene Foster.³⁰ 67% overall supported a very soft Brexit involving the UK remaining in the single market and customs union to avoid any border checks, with 57% saying they would accept a special arrangement for Northern Ireland even it required additional checks between it and the rest of the UK. A no deal scenario (see below) raises the additional challenge of a potential border poll. In December 2018, while 44% of the population indicated they would support leaving the EU without a deal, a corresponding 55% indicated they would either ‘probably’ or ‘certainly’ support a united Ireland in that context.³¹

Such polling data underlines the risks inherent in the DUP’s anti-backstop strategy. It has traditionally presented itself as the party of business, but now finds itself ‘out of step with [...] farmers and business,

constituencies which are traditional friends’.³² Northern Ireland’s business community, fearful, amongst other things, of disruptions to the supply chains upon which their livelihoods depend, are also broadly in favour of the Withdrawal Agreement and backstop arrangements. Groups including *Manufacturing NI*, the *Northern Ireland Retail Consortium* and the *Northern Ireland Food and Drink Association* have all voiced their support.³³ While this has angered some leading figures in the party – DUP MP Sammy Wilson described business as being ‘the puppets of the Northern Ireland Office’³⁴ – the DUP has placed itself increasingly at odds with key business constituencies in Northern Ireland even as it has sought to maximise leverage in London.

Sinn Fein and a border poll

Unsurprisingly, SF – which now occupies a position of dominance within the nationalist community akin to that of the DUP among unionists – has sought to exploit the DUP’s difficulties whilst claiming the mantle of pro-remain champions. They have been strongly critical of London for forcing Northern Ireland out of the EU ‘against the expressed wishes of its people’, something which ‘fundamentally undermines the principle of consent’ inherent in the GFA,³⁵ and urged voters to use the European Parliamentary elections to ‘reject Brexit’.³⁶ They consider the Withdrawal Agreement ‘the least worst outcome’, a perspective shared by the SDLP, Alliance and Greens.³⁷ Since the referendum they have demanded Northern Ireland be given a designated ‘special status within the EU’, thereby remaining in the EU with the Republic.³⁸

However, SF have not lost sight of the longer-term goal of unification, a possibility that is now ‘firmly back [on] the political agenda’.³⁹ While there is no majority in favour of a border poll currently, ‘the topic is now everywhere’ despite it being barely discussed ‘in any realistic terms’ between 1998 and 2016.⁴⁰ Indeed, the willingness of Peter Robinson, former leader of the DUP and First Minister of Northern Ireland from 2008 to 2016, to broach the subject in a warning to a unionist audience in August 2018 is an indicator of just how much more mainstream the idea has become.⁴¹ SF have also demanded that Dublin push for a border poll as part of its no deal planning.⁴² An important caveat is that holding such a poll does not mean a majority would support unification. Furthermore, the experience of Brexit demonstrates that such a poll could not be held without significant planning by and cooperation between London and Dublin to prepare for a possible vote in support of unification.

Longer-term challenges

The changing dynamics of Northern Irish politics longer term also matter. Whilst the DUP has been the predominant voice of unionism since supplanting the UUP in 2003, it only narrowly maintained its status as the largest party overall in the 2017 Assembly elections. Having won 38 seats the previous year, giving it a 10-seat lead over SF, its nearest rival, it found itself on 28 seats compared to SF's 27, a consequence in part of the ongoing RHI scandal but also of its Brexit stance. This was the first election since partition in 1921 in which unionists did not win a majority of seats and indicates that the DUP's dominant position over the longer-term can no longer be assumed. Indeed, there is now a very real prospect of SF overtaking the DUP as the largest single party in the Assembly at the next election, while smaller, more progressive parties, particularly the Alliance, are also encroaching on traditionally supportive areas.

This underlines that it is not just the DUP's perceived intransigence in the face of Northern Ireland's remain-/soft-Brexit supporting majority that matters. It is also being negatively impacted for its position on a range of other issues. The party's role in the collapse of power-sharing and a sense of unease among more progressive voters at its social conservatism – especially when set against the more socially progressive direction of the Republic in recent years – have also contributed to the perception that the DUP is increasingly out of touch and unable to offer a positive vision for the future at a time when 'Northern Irish politics and society are in flux'.⁴³

In a different situation where the DUP was not in a position of power vis-à-vis London and power-sharing had been restored, it is not impossible to imagine Northern Ireland's main parties moving together towards a joint position advocating some form of special status. Indeed, as Mary C. Murphy argues, it would be 'exceptionally difficult for the UK and Irish governments and the EU to resist such a proposal'.⁴⁴ However, given how the Brexit process has played out today that seems all but impossible. Indeed, Mike Nesbitt, a former UUP leader, went so far as to suggest that Brexit could prove 'to be the biggest own goal in 100 years from unionists'.⁴⁵

The ramifications of a No Deal Brexit

While the UK government and EU27 have repeatedly emphasised their determination to avoid a no deal outcome, the possibility has become increasingly likely, with both sides intensifying no deal preparations. On 13 November 2018 the European Commission published its *Contingency Action Plan* and subsequently a series of legislative acts were adopted enacting this.^{46,47} On 13 March 2019, the *Oireachtas* (Irish Parliament) passed the so-called *Brexit Omnibus Bill* to prepare for a possible no deal and involving almost 60 pieces of legislation agreed in a debate 'characterised by strong cross-party cooperation and consensus'.⁴⁸ For its part, since August 2018 the UK Department for Exiting the European Union (DExEU) has produced a series of guidance documents on no deal preparations,⁴⁹ although David Sterling, head of the Northern Ireland Civil Service, has warned on several occasions of the lack of preparedness for and impact of no deal in Northern Ireland.⁵⁰

In March, DExEU outlined how the UK would seek to avoid a hard border in the event of no deal. This involved a 'strictly unilateral, temporary approach to checks, processes and tariffs' and 'not introducing any new checks or controls on goods at the land border [...] including no customs requirements for nearly all goods'.⁵¹ It was in effect saying the UK would not impose controls in Northern Ireland, thereby 'leaving part of its border swinging wide open' whilst hoping no-one would notice.⁵² Whilst this might provide some immediate short-term mitigation, over the longer-term it is unsustainable and 'there is no clarity on what comes next',⁵³ thereby underscoring David Sterling's fears. In the absence of a longer-term solution, the UK could even face legal action from other WTO members. Ultimately it would involve, in the words of Leo Varadkar, the 'supreme irony' of treating Northern Ireland differently from the rest of the UK.⁵⁴

How would the EU respond?

For the EU, a no deal outcome means the issues thought settled in the Withdrawal Agreement, including the backstop, would remain outstanding. In this context, especially if it occurs acrimoniously, the EU would have 'little incentive' to maintain frictionless trade with the UK,⁵⁵ particularly given the necessity to maintain the integrity of the single market and customs union.⁵⁶ In theory this would mean the immediate enforcement of the frontier between the Republic and Northern Ireland involving

the application of up to 63 checks and controls.⁵⁷ In practice a more pragmatic and managed approach is likely. This would reflect the practicalities of seeking to implement the ‘full gamut’ of EU internal market and customs rules;⁵⁸ but it would also highlight the balance of risk involved in terms of monitoring goods crossing the border – something that would increase the longer there was no agreed solution with the UK – and the political impact of doing so.

The requirement to introduce checks and controls and impose tariffs would need to be balanced with a desire to minimise, in the short-term at least, the disruption these would cause and the inevitable physical infrastructure required, even if this was established away from the border, which itself raises multiple complex questions. It would also reflect a desire to ensure Dublin, for whom discussion of the border ‘has long been the great taboo’, has time to determine how this question should be managed.⁵⁹ This would become more imperative were a no deal situation to last more than a short time. In this case, the EU would have no choice but to put pressure on Dublin to implement customs checks.⁶⁰ What is clear, though, is that the EU has no truck with suggestions by some of agreeing a ‘managed no deal’: any mitigation will be to limit the damage to the EU27 while pressure is maintained on London.

How would the Republic respond?

For Dublin, no deal would mean the expected negative impact from Brexit happening in ‘a much shorter timescale, requiring a crisis management response’.⁶¹ Politically, the Irish Government is walking a tightrope between its long-stated position that it is not preparing to implement a hard border that would threaten the basis of the GFA, and the need nonetheless to do so.⁶² It is likely Dublin would prefer to wait for the UK to implement any customs checks first – preferably in the Irish Sea – not least to minimise the inevitable political blame; but there remains the risk of a rift between Dublin and its EU partners were it to drag its heels in imposing a land-based customs border should that be required.⁶³ Dublin’s studied ambiguity belies extensive activity behind the scenes, including detailed discussions with the European Commission, and a sense that plans have been worked out but in ‘very small circles’.⁶⁴

With ‘hard questions’ being posed at recent European Council meetings, Dublin has conceded that there will be ‘difficult discussions’ ahead with the European Commission if no deal occurs.⁶⁵ The

hope will be that the pressure on the UK will be such that there will be a quick return to the negotiating table; for example, a refusal to agree a future EU-UK Free Trade Agreement without guaranteeing an open border in Ireland. The Irish Government may also look to allies on Capitol Hill in Washington for support. Concerns there over the impact of a hard border on the GFA are rising. Congressman Richard Neal, chair of the House Ways and Means Committee, which has authority over trade deals, has said ‘any negotiation of a bilateral trade agreement with the UK [...] needs a firm commitment on no hard border’.⁶⁶ This was reiterated by Nancy Pelosi, the Speaker of the US House of Representatives, on a recent visit to the UK when she declared that ‘if there’s any harm to the Good Friday accords – no trade treaty’.⁶⁷ Absent an agreement with the UK, though, border checks ‘may become a necessity’.⁶⁸

What would a No Deal mean for Northern Ireland?

While the entire UK will be significantly impacted by no deal, Northern Ireland will suffer the most serious consequences. This reality was confirmed by DExEU which stated that ‘the cumulative impact is expected to be more severe [...] than in Great Britain, and to last for longer’.⁶⁹ The head of Danske Bank UK considers no deal ‘the biggest risk to the Northern Ireland economy in a generation’ with smaller businesses, the ‘lifeblood of the economy’, most vulnerable.⁷⁰ Meanwhile, the CBI forecasts no deal could cost the Northern Irish economy approximately £5 billion over 15 years, with manufacturing and the agri-food sector ‘particularly exposed’.⁷¹ The impact on integrated supply chains is a major risk, with DExEU expecting the disruption and increased costs this would entail as likely to ‘affect the viability of many businesses’.⁷² The example of Northern Ireland’s dairy farmers is particularly stark. The introduction of a possible 19p/litre tariff and disruption to cross-border tanker collections would challenge their financial viability, particularly along the border region.⁷³

There is anxiety more generally among border communities over the consequences of a hard border. Sam Lowe of the Centre for European Reform highlights the risks inherent in this approach: ‘Any solution that assumes that a border community that is predominantly Irish nationalist, and against leaving the EU, will readily accept the existence of a new customs and regulatory divide faces an uphill struggle’.⁷⁴ Meanwhile, research for the Irish Central Border Area Network by Dr Katy Hayward of Queens University Belfast shows a deep concern among

residents of ‘a step back in the peace process [...] and [...] going back to the ‘old days’ (of the Troubles).⁷⁵

Indeed, this possibility is arguably the greatest concern in the event of a no deal outcome. Despite the peace process, violence remains ever present in Northern Ireland’s ‘post-conflict environment’.⁷⁶ In 2017, there were 88 ‘security-related incidents’, 5 of which were against ‘national security targets’; 58 were shootings and 30 were bombing incidents.⁷⁷ Senior police officers have warned against any kind of physical border infrastructure. George Hamilton, outgoing Chief Constable of the Police Service of Northern Ireland, said in 2018: ‘We wouldn’t want to see anything that looks like physical infrastructure at the border primarily because we assess that could become the focus of attention and targeting by violent dissident groups’.⁷⁸

Meanwhile, on 20 January 2019, a car bomb was detonated outside the courthouse in Londonderry by dissident republicans who, in the view of journalist Peter Taylor who covered the Troubles extensively, are now seeking to use Brexit and the issue of the border to galvanise support for a new armed campaign to achieve a united Ireland.⁷⁹ MI5 have considered the threat from dissident republican groups as severe in recent years and any increase in republican violence would almost inevitably see a loyalist reaction.⁸⁰ This highlights first and foremost the potential for a no deal Brexit to result in a toxic combination of political, social and economic disruption in a community that continues to struggle with the legacy of the Troubles. The murder of journalist Lyra McKee on 19 April by the so-called ‘New IRA’ underscores just how fragile peace remains and the risks inherent in taking it for granted.

Conclusion

It is in Northern Ireland that the consequences of Brexit and the trade-offs implicit in delivering it are most starkly revealed. The UK Government’s policy of withdrawing from the EU’s customs union and single market and pursuing an independent trade policy demand the establishment of hard borders and an end to frictionless trade with its EU partners. The challenge, though, is how to achieve that whilst continuing to observe and respect the principles of the GFA and particularly the open and invisible border underpinning it.

To date, no satisfactory solution to this conundrum has been found apart from the backstop, which would see Northern Ireland treated differently from the rest of the UK. This remains unacceptable to many, particularly in the Conservative Party and the DUP upon whose votes they rely to maintain them in government. Parliament’s inability to support the Withdrawal Agreement, or to date demonstrate majority support for any feasible alternative, means that, absent another extension, the default setting remains a no deal exit on 31 October, with all the disruption that entails, particularly for Northern Ireland. Moreover, extensions to the Article 50 process are not an end in themselves: the onus remains on the UK government to develop a clear and workable position for which it can ensure a parliamentary majority.

Brexit has shone a light on the challenges Northern Irish communities continue to face economically and politically more than two decades after the GFA was signed. The removal of the border as a symbol of physical division alongside the affirmation of the principle of democratic consent for any change in Northern Ireland’s constitutional status vis-à-vis the Republic have been vital for peace, but this remains a society with some distance still to travel in terms of reconciliation. The risk is that any political, economic and social disruption caused by Brexit – and particularly of no deal – will damage that process, perhaps irreparably. It will almost certainly lead to greater pressure for a border poll which, if held, brings with it the possibility, however remote, of the break-up of the United Kingdom which would itself be hugely challenging and disruptive.

Negotiating an outcome that protects the GFA and minimises the negative impact of Brexit on the island of Ireland is therefore in the interests of all involved. However, achieving this must be done at a time when the UK’s structures of government and governance

are under enormous pressure as they struggle to deliver on the result of the referendum. For their part, the EU27 must also overcome significant hurdles in managing the UK's departure, with Brussels, Dublin and the other capitals themselves facing potentially difficult decisions in the coming weeks and months. The longer-term impact of this process on diplomatic relations between the UK and its EU partners remains to be seen and there are growing concerns around the effect on Anglo-Irish relations, so crucial to maintaining stability on the island of Ireland whatever the ultimate outcome.

Wisdom, leadership and sensitivity will be needed if a toxic Brexit legacy for Northern Irish politics is to be avoided.

Endnotes

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