

Safety Net, Trap or Trampoline – Will the Backstop Lead to a No Deal Brexit?

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Following yesterday's announcement that the UK and the EU have agreed a [revised text of the draft Withdrawal Agreement](#), the political fallout in the UK has begun with the UK Brexit Secretary Dominic Raab's resignation from the Government. In his [resignation letter](#), it is the so-called 'backstop' arrangements to avoid a hard border on the island of Ireland that appears to be the primary cause of discontent.

The backstop is intended to be a safety net not to be deployed insofar as the UK and the EU reach an agreement on a future relationship and provided that agreement meets the commitment to avoid a hard border on the island of Ireland. The Preamble to the draft Withdrawal Agreement makes clear the ambition on both sides is, 'to the extent possible', for new agreements to apply before the end of the transition period. In other words, the backstop is redundant if during the transition period negotiators translate the aspirations set out in the [outline joint Political Declaration](#) into concrete legal text which can be agreed and ratified and come into effect. This is put into more concrete legal form in the [Protocol on Ireland and Ireland](#) that contains the backstop. Article 184 of the draft Withdrawal Agreement and Article 2 of the Protocol contains a 'best endeavours' obligation to put in place a future agreement by the end of the transition period, in which case, the Protocol shall not apply or shall cease to apply once new arrangements have been agreed.

There are two sets of difficulties that relate: to the capacity to reach an agreement on the future relationship before the end of the transition period, and what happens if the backstop is deployed.

Avoiding Deploying the Safety Net

The first risk is simply that negotiations may take longer than anticipated and exceed the length of the transition period. Article 126 states that the transition period ends on 31 December 2020. The only way of avoiding the backstop being triggered would be for the transition period to be extended. Article 132 of the Agreement now provides a mechanism for extending transition if the Joint Committee established under the Agreement makes a decision before the end of July 2020 to extend the transition period. However, the text does not specify a potential end date for this extension, simply stating instead 'up to [31 December 20XX]'. This implies that it would be an extension of at least a year or some other period of time terminating at the end of a calendar year. During this period the UK would not be in the EU budget but it would make financial contributions.

Article 3 of the Protocol reiterates that before the end of July 2021, the UK may request an extension of the transition period and the Article 132 mechanism will be

triggered to avoid the need for the backstop to be deployed. While this extension of transition does create more time for negotiations, it does not completely de-risk the potential for the transition period to end without a new future relationship in place.

The second risk is that negotiations fail to reach an agreement on the future relationship. Although there appears to be optimism in Brussels that the negotiations could be much more rapid than those on other trade agreements which the EU has negotiated, it is important to recognise that the outline joint Political Declaration anticipates that this will be a more ambitious agreement than other EU trade agreements. That could make it harder to reach an agreement. But perhaps more significantly, as is clear from the internal political debates in the UK, it is simply not clear that the UK side can present a settled view to the EU on what it wants. It is not inconceivable that there could be a change of government in the UK and that a new government might have a very different view of that future relationship. That lack of clarity and consensus on the UK side is a substantial risk to a new agreement being in place before the end of the transition period.

The third risk is that even if negotiators agree a text, that text will need to be approved both by the European Parliament and within the domestic constitutional orders of the EU27 and the UK. Ratification problems in national systems have in the past at least delayed the entry into force of EU agreements raising the risk of the backstop having to be deployed.

The only way of avoiding the backstop being triggered would be for the UK to remain in a transition period in which Union law remains applicable to the entirety of the UK unless and until new arrangements are in place that ensure no hard border on the island of Ireland. Indeed, [a more open transition](#) would be one way of avoiding a backstop at all, but it would need some means and mechanism for the Joint Committee to end the transition period in the same way as it could extend the period in the way that is envisaged by Article 132.

Safety Net, Trap or Trampoline?

All that being said, it is becoming clear that there are concerns about the backstop itself. Although the draft Agreement contains a backstop that is different from that originally proposed by the EU – keeping Northern Ireland in a ‘common regulatory area’ – the new proposal for a ‘single customs territory’ is also controversial. There are 3 key issues.

The first is whether the backstop is really a temporary safety net or a more permanent trap. Article 1(4) of the Protocol on Ireland and Northern Ireland make clear that the backstop is not to be a permanent arrangement – it couldn’t be legally with Article 50 TEU as a legal basis – and if deployed is only temporary until it is superseded by a future agreement between the UK and the EU. Nonetheless, if it is deployed it is because there is no alternative arrangement in place and the issue becomes whether it could end other than through supersession by a new agreement. Article 20 of the Protocol creates a review mechanism by which the Joint Committee which oversees the application and implementation of the Agreement

may decide that the Protocol – in whole or in part – is no longer necessary. Either side can trigger the process, with the Joint Committee making a decision within six months of notification. Any such decision is taken jointly between the UK and the EU meaning that the UK has no unilateral power to exit the arrangement. As some have observed, this is different from the Article 50 TEU right to unilaterally withdraw from the EU. There is clearly a risk that deadlock could mean that what is meant to be temporary becoming instead an enduring legal framework. While this would be contrary to the use of Article 50 TEU as a legal basis, there is no mechanism for resolving conflict. An additional stage may need to be built in which would deal with deadlock. Borrowing from Article 50 TEU itself, this could say that if no joint decision can be reached, the United Kingdom may notify its intention to withdraw from the Protocol with the Protocol ceasing to have effect one year following notification or if the Protocol is superseded by a new agreement. Although this would remove the safety net it would produce the same effect as if the UK left the EU on 29 March 2019 without a deal. It would create a penalty default that ought to encourage negotiators to make their final and best endeavours to reach an agreement on a future relationship.

The second problem is substantive and relates to the degree to which the UK as a whole and Northern Ireland specifically will be bound by customs and regulatory obligations. The single customs territory is UK-wide but to avoid the need for regulatory checks at the Irish border, a series of annexes details the particular EU single market rules that will also apply to trade on the island of Ireland. As controversially, the UK as a whole will also be bound by certain level playing field obligations to prevent distortions to competition in respect of state aid and competition policy as well as obligations on non-regression on environmental standards. When combined with the absence of a mechanism for the backstop to end, the extensive nature of these obligations has heightened political anxieties about agreeing to this backstop at all rather than merely relying on a transition period with a fixed (albeit extendable) endpoint.

The third difficulty is the sense that the backstop isn't just a safety net but a trampoline propelling negotiators towards a specific agreement on the future relationship. Conceptually, it was always going to be odd to imagine how the content of a backstop would actually differ from that of a future economic arrangement that would seek to achieve the same aims. Indeed, the difficulty of negotiating this backstop highlights that there are probably not that many means of achieving the same objectives. With there being real controversy over what sort of future relationship the UK should seek to have with the EU, politicians have reacted badly to the idea that the backstop could actually bounce the UK into a particular type of future relationship before those negotiations got underway. The source of the tension is the Preamble to the Protocol on Ireland and Northern Ireland which states that the UK and the EU have the 'common objective of a close future relationship, which will establish ambitious customs arrangements that build on the single customs territory provided for in this Protocol'. This has underscored the fears of Brexiteers that the backstop isn't a temporary safety net but instead risks becoming an additional transitional framework leading towards a close economic relationship that Brexit

supporters do not believe live it up to the commitment for the UK to leave the Customs Union and the Single Market.

A Looming No-Deal Brexit

Following her Cabinet's approval of the text of the draft Withdrawal Agreement, in a statement to the House of Commons, the Prime Minister emphasized that this was not the final text. With discontents being voiced on all sides of the House, it seems impossible for the current text to be approved by Parliament as is required under Section 13 of the [European Union \(Withdrawal\) Act 2018](#). Yet it also seems impossible for the EU to drop the backstop. Making the transition period more open, or creating a revised exit mechanism for the backstop together with finessing the relationship between the content of the backstop and that of the future economic relationship – emphasizing instead the outline joint Political Declaration on the framework of future cooperation – might go some way to meeting concerns. However, the most likely scenario remains that the UK Parliament will fail to approve a Withdrawal Agreement heightening the risk of a No Deal Brexit.

