

Brexit: is a backstop compromise still possible?

- **UK Prime Minister Boris Johnson faces a stark choice:** He will either have to resign in late October or ask the EU for another Brexit extension despite his claim that he would “rather be dead in a ditch”. He could only escape his own trap if he strikes a Brexit deal with the EU at the 17-18 October EU summit. If the UK parliament then ratifies the deal on 19 October, the UK would be heading for an orderly Brexit on 31 October. Johnson would be spared any self-inflicted indignities. We see a probability of no more than 12.5% for such a soft Brexit on 31 October. Instead, the UK seems likely to delay Brexit once again and settle the issue in a [Brexit referendum 2.0](#) in the form of snap elections or a formal new referendum during another Brexit extension period.
- **Stopped out by the “Irish backstop”.** The guarantee to keep the Irish border open come what may (“Irish backstop”) remains the key issue. With his demand to “ditch it”, Johnson has nourished the impression that he has a limited grasp of the issues and/or is more interested in setting the stage for likely snap elections rather than securing a deal.
- **A sliver of hope remains:** By finally travelling to Dublin on Monday to meet Irish Taoiseach Leo Varadkar, Johnson signalled that he may now take the issue more seriously. His support for a common “agrifoods area” between Northern Ireland and the Republic of Ireland after Brexit can also be seen as a baby step in the right direction. Whether all this is just part of the blame game along the lines of “I tried hard but the other side didn’t budge” remains to be seen, however.
- **A solution is possible – if the UK takes a close look at the issues.** In this report, we discuss how the backstop dispute may – or may not – be resolved. We conclude that, if the focus is on the actual substance rather than the toxic politics around it, a deal should be possible in principle. However, passions are running high on all sides of the UK’s domestic debate. The probability that the UK will judge potential clarifications to the backstop on their merit and accept them remains very low.
- **A legitimate concern:** The UK worries that the EU could abuse the backstop to trap the UK in the EU customs union forever. This concern is legitimate. While the EU regards it as unfounded, it plays a key role in the UK debate. To further allay this concern, the EU and the UK could put even more emphasis on an independent arbitration mechanism to resolve disputes. De facto, an independent jury could be asked to make the final judgement whether alternative solutions to keep the Irish border open have become feasible. That would make it even more obvious that the backstop is just a backstop and not a tool to tie the UK to the EU.

Four potential solutions

In principle, the backstop dispute could be resolved in one of four ways.

- **Dublin** gives up its demand for a permanent guarantee against a hard border between Northern Ireland and the Republic of Ireland. However, caving in to London might spell the end of Varadkar’s minority coalition in Dublin. The probability is very low.
- **Johnson** backs down and asks the UK parliament just ahead of the 19 October deadline to ratify a marginally amended agreement with the EU (maybe using a new term for the “backstop” without changing its contents very much). Ahead of likely snap elections later this year, such a U-turn could amount to political suicide for Johnson, however. His rhetoric seems to have made this virtually impossible.
- **The “backstop” is applied only to Northern Ireland**, not the mainland UK. The idea has been touted repeatedly. However, it remains difficult for the UK to accept because it would drive a wedge between Northern Ireland and the UK mainland. This option seems highly unlikely but not fully impossible.
- **The “backstop” is clarified in a way that addresses the UK’s key concern** about being “trapped” in the EU customs union forever without changing its nature meaningfully. If the UK acts in good faith, this should be possible. We examine this option in more detail in this report. However, it would still require such a verbal climbdown from Johnson that the chances of success are slim, to put it mildly.

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The nature of the backstop

Although Johnson has upped the ante by confronting Brussels with a series of new demands, the guarantee to keep the Irish border open come what may (“Irish backstop“) remains the key bone of contention between the EU27 and the UK. Both parties have emphasised consistently that they want to keep the Irish border open after Brexit.

As the UK wants to set its own tariffs and standards for goods, this makes checks on goods crossing the border inevitable after the end of a post-Brexit transition period in late 2020 (or late 2022, if both sides agree to extend the transition period). To avoid any physical infrastructure at the border (and thus “keep the border open“), controls have to be conducted in a decentralised way. So far, the technology, systems and procedures for such decentralised checks do not exist or have not yet been proven to work. Both sides hope that such solutions will be ready by the end of the transition period. However, if this not yet the case, the backstop would keep the entire UK in the EU customs union. In addition, Northern Ireland would remain subject to parts of the EU27 single market regulations until such decentralised checks have become feasible.

To avoid activating the backstop or to end it fully or in part, a Joint Committee of the EU and the UK at ministerial level would have to rule that decentralised controls work. The UK could not unilaterally exit from the backstop. On the UK side, these provisions have raised the concern that the “backstop“ could permanently trap the UK in a customs union with the EU. If so, the UK could not conclude trade deals for goods with other countries. This concern is legitimate. However, it is also unfounded.

In political terms, the EU27 has no interest whatsoever to tie the UK against its will to the EU customs union and common market. In technical terms, the Withdrawal Agreement (WA) already addresses these concerns: If one side (the UK) believes that the other side is not acting in good faith, it can ask an independent arbitration panel to examine the issue. This arbitration panel can issue a binding judgement which both sides have to accept. The EU27 could not abuse the backstop to trap the UK indefinitely inside the EU customs union.

For the EU, UK demands to ditch the backstop, to be able to exit it unilaterally or to put a time limit on the backstop are a code for saying that the UK is ready to accept a hard border in Ireland eventually. A guarantee that one side can breach unilaterally would not be a guarantee in the first place. From the EU27’s point of view, Johnson’s proposal to remove almost the entire backstop from the WA in favour of unspecified “alternative solutions“ to keep the Irish border open is a contradiction in terms. If such alternative solutions exist and can be shown to work, the backstop would never be activated. It would be irrelevant. If so, why would the UK need to threaten the EU with a hard Brexit for the sake of removing some useless fine print? However, if such alternative solutions do not yet exist, the backstop merely describes the way in which the Irish border would be kept open until such alternatives work.

Beyond economic logic

Economic logic may suggest that Ireland should back down in the end and accept the risk of a hard border after the transition period or upon reaching a hypothetically agreed time limit for the backstop. After all, certain chaos in case of a hard Brexit should be worse for Dublin than the tail risk of such chaos some time later.

However, Brexit has never been primarily about economic logic. For the UK, neither a soft nor a hard Brexit makes any economic sense. The UK economy has thrived within the EU’s single market which the UK itself had helped to shape decisively in the late 1980s and early 1990s. Instead, Brexit largely expresses a surge in English nationalism against all economic logic – just like Donald Trump’s trade wars and obsession with bilateral trade balances ignore economic logic. The supremacy of politics and the perceived national interest also applies to Ireland. Whereas we do not rule it out, we see no sign that Dublin will budge in the end.

The easiest change to the backstop would be to limit the customs union to Northern Ireland, leaving the UK mainland free to apply its own tariffs and product standards while the backstop is in operation. This would imply more extensive border checks between mainland UK and Northern Ireland than the current veterinary checks. The EU would certainly not object. As Johnson has lost his majority in parliament anyway, he may not longer be held back by the Northern Irish DUP. So far, however, he has not signalled that he would want such a change – which the UK parliament would probably not ratify

anyway. To complicate matters, Northern Ireland does not even have a legislature at the moment which London could ask for its opinion on the matter.

A possible solution

Apart from accepting a potential hard border in Ireland or border controls between Northern Ireland and the UK mainland, the easiest way out would be to strengthen the guarantees that the EU27 cannot use the backstop as means to tie the UK indefinitely to the EU's customs union.

In the Strasbourg declaration of 11 March 2019, the EU already made a major concession to then-prime minister Theresa May: the EU27 emphasised its commitment to resolve any backstop disputes fast and to accept the ruling of an independent arbitration panel on such issues. It should be possible for the EU27 to clarify this further by stating explicitly that the independent arbitration committee can judge not just whether the EU27 is acting in good faith. Instead, the arbitration committee could also be asked to decide whether technical arrangements, systems and procedures for decentralised border controls are working well enough to make the backstop redundant. That should remove the last shred of suspicion that the EU could ever mis-use the backstop.

In a similar vein, Johnson's assertion that the backstop is "undemocratic" because it would force Northern Ireland to accept future changes in EU standards without having any say on them could also be dealt with easily. The Northern Irish government, or London's Secretary for Northern Ireland in case Belfast does not have its own administration, could be given the same consultation rights which the EU has granted to Norway. Norway also applies EU rules without being part of the EU.

In terms of substance, clarifying these two issues would not change the backstop much. They would help to address what the UK claims are its main concerns. Being an excellent salesman, Johnson could market such EU clarifications as a major change. He could argue that they detoxify the backstop to such an extent that it would no longer be the backstop which Brexiteers seem to be afraid of.

Unfortunately, Brexiteers including Johnson had largely ignored the Strasbourg declaration ahead of the original Brexit date of 31 March. In the current, even more heated atmosphere in the UK, it seems highly unlikely that hardline Brexiteers will take a thorough look at the actual substance instead of just rejecting the WA wholesale. With Johnson seemingly caring more about winning snap elections soon than about the best way to solve the Irish issue, such a sensible compromise does not seem to be in the air.

All in all, we see a 12.5% probability that the EU and the UK can agree on a deal or declaration in October and that the UK parliament would ratify it in time for an orderly Brexit on 31 October; of course, it would be a huge challenge to actually ratify a deal – any deal – on both the UK and the EU27 side by 31 October.

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