



The Centre for
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MEDIA WATCH

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Brexit: A brief history of the backstop

The backstop was born on 8 November 2017.

It entered the world weighing just 66 words, one bullet point of six at the bottom of a "working paper" circulated that morning by Michel Barnier's team to officials from the 27 member states.

The bullet point read: "It consequently seems essential for the UK to commit to ensuring that a hard border on the island of Ireland is avoided, including by ensuring no emergence of regulatory divergence from those rules of the internal market and the Customs Union which are (or may be in the future) necessary for meaningful North-South cooperation, the all-island economy and the protection of the Good Friday Agreement."

This innocuous-sounding paragraph was the infant that would grow into the single most intractable source of conflict in the negotiations.

The Irish issue is, before our very eyes, determining the trajectory of Brexit; the more pronounced that trajectory becomes, the more hostile fire Ireland draws from Brexiteers.

This week's Spectator cover declares "Divide and Rule: how the EU used Ireland to take control of Brexit".

In November 2017, it wasn't called the backstop. Back then, few in the Brexit-sphere were paying any attention to Ireland, fixated as they were on citizens' rights and the exit bill.

But suddenly the bullet point catapulted Ireland centre stage.

What happened?

Off-the-record interviews with British, Irish and EU sources last autumn revealed a persistent dichotomy over the politics and methodology of solving the Irish border.

Despite the public harmony about no return to a hard border, when the negotiations began there was a fundamental mismatch over how to achieve it.

Britain was saying: We do not want a hard border in Ireland, and we will achieve that by having a very close economic relationship to the EU in the future.

Ireland was saying: Maybe, but we don't trust that outcome, so we need to lock a solution into the divorce.

"On reflection, we were totally talking past each other," recalls one senior British negotiator.

"Even right up to the wire the conversations were ships passing in the night. Each side was coming away with an impression that they'd been making progress with the other side."

Ultimately, that ships-in-the-night dynamic meant that when bullet point number six was conveyed on 8 November, London was horrified.

Dublin's response was: What were you expecting?

All that summer British, Irish and EU officials had been getting to grips with the border issue. Ministerial bilaterals came and went, papers were exchanged, lofty aspirations about protecting the Good Friday Agreement were issued, forensic research was done on the risk to north-south cooperation.

But below the surface the divergence was widening.

London wanted multiple technical fixes and the future relationship to fix the border, Ireland and the EU wanted "principles" and "commitments" this side of the divorce.

This was nowhere more apparent than in the 28-page position paper on Northern Ireland on 16 August.

It spoke of technical solutions that would make the land border "as seamless and as frictionless as possible" by "streamlining" customs arrangements, waiving the need for entry and exit declarations, exempting SMEs, and expanding "trusted trader" schemes.

All this could "only properly be finalised in the context of the new, deep and special partnership that the UK wishes to build with the EU".

A companion paper recommended a new "customs partnership", so that goods moving between the UK and the EU "would be treated as they are now for customs purposes".

However well meaning both sounded, there were at least three major problems for Brussels and Dublin.

Firstly, London was positing the full resolution of the border through the future relationship, not the divorce.

Secondly, it was highlighting technology, and technology required infrastructure.

Thirdly, it was widening the scope of the solution, so it was not simply Ireland-specific but UK-EU, raising suspicions that Britain was using the Irish question as a Trojan Horse to get a favourable trade deal down the line.

Both papers were dismissed by two senior EU officials as "magical thinking".

The EU's formal response came on 6 September. It took the form of six "guiding principles" and was just three-and-a-half pages long.

The clue was in Paragraph 3.

"The onus to propose solutions which overcome the challenges created on the island of Ireland by the United Kingdom's withdrawal from the European Union and its decision to leave the customs union and the internal market remains on the United Kingdom."

In other words, multiple technical fixes will not do. What is needed is an over-arching solution.

The October summit, 12 months ago this week, was a deadline for the UK to have made "sufficient progress" on money, citizens' rights and Ireland, so the talks could progress to phase two.

But sufficient progress on Ireland had not been achieved. British officials were frustrated.

"We'd been talking all summer about how to solve the border issue," recalls one senior negotiator. "All the indications were that what we'd put out there already, our summer paper, their principles paper, showed progress. We said to them, your six principles, given one or two technical tweaks here and there, we can live with them."

"Yes, there were huge issues to resolve. But the trajectory that we were both on was that we would make big political commitments in phase one, with the detail in phase two."

But Dublin and Brussels wanted commitments and detail in phase one.

"When we produced the guiding principles paper," recalls one EU diplomat, "the British said, okay, great, where do we sign? That'll be sufficient progress. That sort of dynamic was always there. We weren't getting tangible, written commitments."

The October summit came and went. Sufficient progress had not been made.

Dublin was worried about a sense of drift. London signing up to principles was one thing; acting on them was another. EU member states had had nothing to get to grips with on Ireland.

"The British were not taking things seriously," says one senior Irish figure. "When [British officials] said we can sign up to the Guiding Principles paper, there were alarm bells. It was meaningless."

Irish and Task Force officials started working on a new text. It would become the 8 November working paper.

"The working paper was a way of saying, the guiding principles have an ask," says one Irish official. "So that was the first articulation of the ask."

When the 8 November paper was finally leaked the reaction was explosive.

Despite the arcane language ("... including by ensuring no emergence of regulatory divergence ... etc"), the meaning was clear. In order to avoid a hard border, and to protect north-south cooperation and the all-island economy, Northern Ireland, to all intents and purposes, would have to remain in the single market for goods and the customs union.

Even then, British officials were told this was not a benchmark.

"We were assured by the commission this was not a requirement for sufficient progress," recalls one British official. "I don't know if they were misleading us. They're negotiators."

So how did the bullet point, which later became the backstop, become the main demand of the EU and Ireland?

In off-the-record briefings, both Irish and Task Force agreed that the bullet point was not initially seen as the "sufficient progress" threshold.

Another process, however, had been under way that summer and was coming to fruition.

Back in July, at Dublin's bidding, the Barnier Task Force had asked London to explore all areas of north-south cooperation, the so-called mapping exercise, so London could spell out what it meant by protecting such cooperation.

By September, London had identified 142 areas of across-the-board cooperation that flowed from the Good Friday Agreement.

British and Irish officials travelled to Brussels to sift through all 142 areas to see where they relied upon, or were facilitated by, mutual EU membership.

The more they looked, the more it became clear – at least to the Task Force – that Brexit either explicitly or implicitly disrupted cross-border cooperation.

The cross-border health care that had flourished with the peace process, for example, was facilitated by the fact that ambulance regulations, medical devices, professional qualifications were all harmonised on both sides of the border because of EU rules.

The Task Force believed that a holistic solution was therefore needed, not a multiplicity of mini bilateral agreements, what the former Tory leader William Hague described as "a granular matching of problem with solution".

"Where do we put the benchmark for reaching sufficient progress?" asked one Task Force official. "In the end it became very clear, that to make this meaningful – to make this commitment – you have to say what's going to happen with north-south cooperation. How far short of 'no regulatory divergence', or 'full regulatory alignment' can you stop and say something meaningful about how you really protect the Good Friday Agreement?"

But that argument was lost in the increasingly divisive politics. Theresa May was already coming under pressure from her backbenchers over the money issue.

Now, suddenly the EU seemed to be making an outrageous demand.

David Davis denounced the 8 November paper. "We recognise the need for specific solutions for the unique circumstances of Northern Ireland," he said. "But it cannot amount to creating a new border inside the UK."

Theresa May's survival depended on the DUP. With that in mind, either she deliberately framed the bullet point as a constitutional threat, knowing the DUP would give her cover to do so, or this was a genuinely held conviction.

Dublin was equally furious. The constitutional status of Northern Ireland was settled by the Good Friday Agreement. Secondly, British officials must have known all along that this was the direction of travel.

(London has, in the 12 months since, not wavered an iota from the line that the backstop is a constitutional assault on the UK.)

On 15 November, there was a stormy meeting in Brussels involving Task Force, British and Irish officials.

Both sides were angry over the other's perception of the bullet point. London was still insisting the border could only be solved in the future trade talks; Dublin believed that the border would simply become a pawn in those talks, with the UK essentially saying, give us a frictionless free trade deal, or look what will happen in Ireland.

For London, the Irish issue was starting to hinder Theresa May's vision of a future trade relationship that honoured her Lancaster House speech: free and frictionless, yet one which allowed Britain to do its own trade deals around the world.

There was a chilly bilateral between Theresa May and Leo Varadkar on the margins of a summit in Gothenburg. British officials still believed that since both London and Dublin wanted the same outcome, there shouldn't be a problem.

Varadkar levelled with May: You decided to take the single market and customs union off the table; well, now we're taking a hard border off the table.

May's response was that leaving the single market and customs union was simply honouring the result of the referendum. Varadkar said Ireland was not going to take a leap in the dark. He needed a guarantee of no hard border, and it would have to be in the Withdrawal Agreement.

British officials still managed to leave Gothenburg not realising that when the Taoiseach was talking about guarantees, he was talking about the bullet point.

From that moment, the bullet point became the Irish veto.

No-one within the Brexit ecosystem had ever dreamed that Dublin would suddenly wield so much influence. The opprobrium that rained down from sections of the British media was venomous.

"It's tempting to ask young Leo to shut his beak, respect the UK's decision and get on with his job," said a Sun editorial.

But London had little option but to metabolise the notion of Northern Ireland somehow remaining part of the customs union and single market.

Theresa May was still adamant that a future trade deal, and/or technology could do the job of avoiding a hard border, but pressure was mounting.

Jean-Claude Juncker set a lunchtime rendezvous with Theresa May on 4 December as the deadline for a deal.

A joint Irish-Task Force paper was tabled early on 30 November. All three sets of officials - Irish, British, Task Force - worked throughout the day, producing four different drafts.

Dublin was keeping a hard line, insisting the option of no regulatory divergence from the rules of the single market and customs union for Northern Ireland.

But what was not reported at the time, was that Irish officials agreed to accept language to the effect that a future trade agreement and technology could work to avoid a hard border, even if they did not believe it.

"We basically found a fix for London," recalled one official. "The fix was to cast the text in a way that gave them the political space to continue to say that in the future relationship we will solve this. We said, okay, maybe you will. We will now give you the benefit of the doubt.

"So that's what that text did. But the text also gave us the guarantee. A backstop."

In other words, Dublin could make the offer because London's aspirations were political, whereas the backstop would have legal weight.

Throughout the weekend before the Monday deadline there was still deadlock, with Theresa May adamant she could not accept the notion of "no regulatory divergence" for Northern Ireland, and Dublin insisting on it.

By late Sunday night, 3 December, a compromise was agreed that "no regulatory divergence" could be swapped for "maintaining alignment", a piece of sophistry that seemed to be acceptable to both sides.

Of course, shortly before the Juncker-May lunch the DUP saw reports on RTÉ of a leaked draft of the text, and the deal collapsed.

But by the following Friday an amended version was agreed. Paragraph 49 still had "maintaining continued alignment", while to reassure the DUP, Paragraph 50 promised "no new regulatory barriers ... between Northern Ireland and the rest of the UK," with the UK continuing "to ensure the same unfettered access for Northern Ireland's businesses to the whole of the United Kingdom internal market".

The deal was done. But there was no shortage of constructive ambiguity.

[Read more](#)

The Guiding Principles EU-UK Joint Report Temporary Customs Arrangement

Dublin viewed the first two solutions in Paragraph 49 – a future FTA and, failing that, technology/exemptions ("specific solutions") - as a necessary concession that would give Theresa May political cover.

The third solution was the backstop itself (known as Option C until the term backstop seemed to stick).

"In the absence of agreed solutions," Paragraph 49 declared, "the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement".

The ambiguity dwelt in the fact that London could later interpret Paragraph 49 as literally meaning the UK as a whole aligning (something Dublin disputes to this day), while Dublin and Brussels saw the commitment in Paragraph 50 as purely a promise from London to Northern Ireland (and not an EU obligation).

When the Joint Report was first drafted into a legal text at end of February London was, once again, horrified.

The Withdrawal Treaty would "hereby establish ... [a] common regulatory area" between the EU and Northern Ireland, one "without internal borders in which the free movement of goods is ensured and North-Southcooperation protected".

It continued: "The territory of Northern Ireland [would be] part of the customs territory of the [European] Union."

Theresa May told the House of Commons: "The draft legal text ... would undermine the UK common market and threaten the constitutional integrity of the UK by creating a customs and regulatory border down the Irish Sea, and no UK prime minister could ever agree to it."

Having reluctantly signed up to the political deal in December, the British government was unable to stomach its legal outworking in February.

In March, Theresa May wrote to Donald Tusk, the European Council President, saying she was "committed to agreeing in the Withdrawal Agreement operational legal text for at least the so-called 'backstop option' set out in the Joint Report, in parallel with discussions of ... other scenarios".

But March turned to April, and April turned to May. Having rejected the first draft, London was expected to come up with something better, but nothing had appeared.

In June, Downing Street finally issued its response, a Temporary Customs Arrangement (TCA).

Repeating the preference for a future trade deal to solve the border problem, London was nonetheless accepting the need for "an appropriate backstop solution for the Northern Ireland land border ... that would only come into force in limited circumstances", if there was a narrow gap between the end of the two-year transition, and the beginning of the future relationship.

The TCA would effectively slot into the backstop and look after the customs element of it.

But it would not be limited to Northern Ireland. This would be a customs arrangement between the EU and UK as a whole, with no tariffs, quotas, rules of origin or customs declarations.

The UK would still apply the EU's common external tariff, but could still "negotiate, sign and ratify free trade agreements (FTAs) with rest of world".

There were two conditions: the TCA had to be time-limited, and it would only take effect if there was a gap between the transition and the big new FTA.

Instead of any reference to Northern Ireland forming part of the customs territory of the EU, the UK as a whole "would form part of the EU's customs territory," or both sides could even create "a new customs territory" by combining the territories of both.

There were two other stand-out aspects.

Firstly, the paper did address the "continued regulatory alignment" requirement of the Joint Report. It simply said: "An approach on regulatory standards ... will also need to be addressed."

Secondly, the TCA, if deployed, was "expected" to expire by the end of December 2021 "at the latest", to be overtaken by the free trade deal.

So, the backstop probably wouldn't be needed, but if it ever was then a UK-wide customs backstop would avoid customs controls on the land border, and on the Irish Sea.

Michel Barnier ▼ took just 24 hours to slap it down. It could not qualify as a backstop since "full regulatory alignment" was absent.

The idea of London wanting to continue benefiting from EU FTAs simply wouldn't work.

Calling it "temporary" undermined the need "to secure the absence of a hard border in all circumstances".

EU businesses would have to make "several adaptations".

The backstop was supposed to be specific to Northern Ireland's unique situation; what might work for such a tiny economy would not work for a behemoth the size of the UK.

London pressed on regardless.

The vision of a deep and comprehensive EU-UK relationship was set out in Chequers, but it prompted high profile resignations. But as far as Downing Street was concerned, the government was meeting the requirements of the Joint Report.

In simple terms, the optimum sequencing was as follows: exit on 29 March, start the two-year transition, negotiate the future relationship by the end of the transition, and if was not negotiated by then, usher in the TCA-flavoured backstop in the meantime.

As far as Dublin and Brussels were concerned, these efforts fell far short. This brings us to the present moment.

London has not shifted in its view that commission's initial backstop draft would impose an intolerable requirement for customs and regulatory checks along the Irish Sea.

Michel Barnier's ▼ response is to "de-dramatize" those checks. Using scanning and barcode technology on electronically pre-cleared customs declarations would minimise not just the customs elements, but also VAT and excise.

Regulatory checks for some agrifood products and industrial goods going to Northern Ireland from Britain could be done by market operators, while a dual-certification process for goods produced in Northern Ireland could clear them as safe to circulate in both Britain and throughout the EU single market (the "best of both worlds" idea).

Checks for live animals happen anyway, although they would have to be scaled up to begin with. And a substantial percentage of GB-NI goods could undergo checks in Dublin Port, where potentially 60% of consignments are transited North (the port is expanding anyway to anticipate the future FTA, so it will have the infrastructure).

By last weekend, none of these de-dramatization efforts were gaining any traction with UK negotiators (or the DUP). But there were other major differences.

The Task Force insists the original backstop remains the final safety net and that any other ideas would only be complementary, not a replacement.

London was demanding that the backstop be time-limited, yet Dublin said it had to be "all-weather", applying "unless and until" something better came along.

By Sunday night the talks were stuck. This week's summit - one of many deemed the "moment of truth" - came and went.

On Tuesday, Michel Barnier ▼ briefed member states in Luxembourg on what progress had been made, despite the breakdown.

While both negotiating teams had been working deliberately secretively, he was prepared to divulge one possible avenue - extending the two-year transition, while setting aside some of the difficulties the EU has with the TCA.

While this is not being described as a breakthrough, it has several merits.

Firstly, Theresa May's optimum sequencing, described above, is highly ambitious. If the transition was extended, she could more convincingly argue that either the full free trade deal would be concluded on time, or at least her Temporary Customs Arrangement could be sorted, and between them they would keep the hated backstop at bay.

So, where does that leave things?

Member states are open to the idea of a transition, although it has, of course, triggered a firestorm of protest within the Conservative Party.

Barnier has called it an extension, plus a two-tier backstop. But again, the TCA would not be a replacement for the original backstop.

A senior EU source explains: "You land on the first one, the TCA, so you don't need the second one. But the second one is still there."

One big point of contention is that, as we have seen, the TCA does not address the issue of regulatory checks; the Task Force is still working to de-dramatize those controls, and that nettle will have to be grasped in London.

Another problem is where the TCA would be located. The EU is reluctant to tuck it into the Withdrawal Agreement as that is seen, again, as pre-determining the future trade deal.

But London is adamant that if the TCA is a runner, it must be legally watertight and in the Withdrawal Agreement.

What negotiators may focus on in the coming weeks is to see if there can be a reference to the TCA - or elements of it - in the preamble to the Irish Protocol to the effect that both sides will endeavour to negotiate it during the transition.

It could also be spelled out in the Political Declaration that sits alongside the Withdrawal Agreement. But it could prove a double-edged sword for Theresa May.

Member states are thought to be open to the idea of a Temporary Customs Arrangement only if it is not just a quick fix to avoid the backstop.

In other words, the UK can't simply pull on the TCA jersey as a prop that keeps it close to the EU's customs sphere, and then pull it off again to head off in a different direction in the trade agreement.

If the TCA is accepted by the EU, they will want it to show the direction of travel of the UK's long-term customs relationship with the EU. And the closer it is, the more treacherous the path becomes for Theresa May.

But because of the Irish border, this is the Hobson's Choice she is left with.

Source: RTE