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**The Withdrawal Agreement
and its “Rioters’ Charter”:
Dangerous Flaws in the
Brexit Deal**

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Introduction

The most contentious element of the Withdrawal Agreement (WA) relates to the Protocol on Ireland/Northern Ireland, known in shorthand as the “Backstop”.

In particular, a critical concern has been over the prospect of this default becoming a permanently locked arrangement. This is because of the lack of unilateral escape clause, coupled with the absence of a deadline to deliver on an encompassing end deal.

The uncertain duration of the Backstop has been recognised by the Government. The Attorney General told Parliament on 3 December 2018, “There is therefore no unilateral right for either party to terminate this arrangement. This means that if no superseding agreement can be reached within the implementation period, the protocol would be activated and in international law would subsist even if negotiations had broken down.”¹

What has not been widely reported so far, however, is an element of the text that has troubling ramifications. On close review there is a flawed part of the deal that does generate an escape clause – but only if civil disorder breaks out.

In a further twist, the very same clauses also disprove claims made that Northern Ireland can gain competitive advantage by being in a double customs union, with both the EU and with GB. It turns out that the Commission has the power to unilaterally undermine such competition.

The critical element is in Article 18 of the Protocol. This is the *Safeguards Clause*, identifying when either party can suspend the agreement.

What Happens

The Clause can be triggered by London or Brussels in the event of “serious economic, societal or environmental difficulties liable to persist, or to diversion of trade”.

¹ <https://hansard.parliament.uk/commons/2018-12-03/debates/67B4BC40-0578-417D-9467-F737BDD5079C/WithdrawalAgreementLegalPosition>

Taking such action then allows the other party to reciprocally adjust how they manage the agreement to “remedy” any “imbalances” – in practical terms this allows for the Commission to suspend some or all of the agreement in response to any action taken by London, and vice versa.

There is an obligation to consult to find commonly acceptable solutions, generating a one month grace period. However, even this may be circumvented in “exceptional circumstances requiring immediate action”. So any action can be done quickly and unilaterally by simply interpreting those preconditions as to be in play.

The ‘Rioters’ Charter’

In the absence of any proper escape clause, there is a risk that either Nationalists or Unionists, unhappy at the status quo and being locked into the Backstop, down the line decide to pursue the one route open to them – by generating for themselves “serious societal difficulties” in order to ‘break’ the treaty.

Geoffrey Cox Also Proven Wrong

In trying to sell the Backstop, the Government’s line was that it might even create an economic advantage for Ulster. The Attorney General Geoffrey Cox MP, in the debate of 3 December 2018, contrasted a NI business who would have direct access to both GB and EU markets “while its EU competitor — whether situated in the Republic of Ireland or elsewhere in the single market — would not.” He continued, “Hundreds of single market traders throughout the European Union are going to resent the fact that the goods of a Northern Ireland business situated one mile north of the border can flow smoothly into the single market and smoothly into Great Britain, while theirs cannot.”

This was cited as a reason why he believed the EC would not want the Backstop to continue and would strive to negotiate a replacement. But in fact, in any area where those EU27 competitors complained to the Commission, the Commission might then simply decide to suspend the Backstop in a narrow business area.

The Primary Texts

The Safeguards Clause can be found on p 327 of the Government document. Annex 10, which is cross-referenced, can be found on p 473. These are copied out below for ease of reference.²

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf

ARTICLE 18

Safeguards

1. If the application of this Protocol leads to serious economic, societal or environmental difficulties liable to persist, or to diversion of trade, the Union or the United Kingdom may unilaterally take appropriate measures. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Protocol.

2. If a safeguard measure taken by the Union or the United Kingdom, as the case may be, in accordance with paragraph 1 creates an imbalance between the rights and obligations under this Protocol, the Union or the United Kingdom, as the case may be, may take such proportionate rebalancing measures as are strictly necessary to remedy the imbalance. Priority shall be given to such measures as will least disturb the functioning of this Protocol. 3. Safeguard and rebalancing measures taken in accordance with paragraphs 1 and 2 shall be governed by the procedures set out in Annex 10 to this Protocol.

ANNEX 10

PROCEDURES REFERRED TO IN ARTICLE 18(3)

1. Where the Union or the United Kingdom is considering taking safeguard measures under Article 18(1) of this Protocol, it shall, without delay, notify the Union or the United Kingdom, as the case may be, through the Joint Committee and shall provide all relevant information.

2. The Union and the United Kingdom shall immediately enter into consultations in the Joint Committee with a view to finding a commonly acceptable solution.

3. The Union or the United Kingdom, as the case may be, may not take safeguard measures until one month has elapsed after the date of notification under point 1, unless the consultation procedure under point 2 has been concluded before the expiration of the state limit. When exceptional circumstances requiring immediate action exclude prior examination, the Union or the United Kingdom, as the case may be, may apply forthwith the protective measures strictly necessary to remedy the situation.

4. The Union or the United Kingdom, as the case may be, shall, without delay, notify the measures taken to the Joint Committee and shall provide all relevant information.

As can be seen from both these sections, while there are certain limiting features on deploying Article 18 included in the document, these can in effect be unilaterally abrogated by either party.

Conclusion

The absence of a formal break clause allowing either side to formally denounce the Backstop, coupled with the inclusion of a clause that allows denunciation if certain preconditions have been triggered, perversely risk acting as an incentive towards generating those very conditions. The Withdrawal Agreement itself dangerously risks activating the very scenario its supporters say it's intended to prevent: escalating political tensions and civil strife.

Introducing from the outset the commitment that led to the Backstop was the biggest mistake of these negotiations, an error made by the EU side. The second biggest was Whitehall's error in accepting it then trying to finesse it while denying the implications. The precise form of the future physical border in Ireland, and the mechanisms to keep infrastructure away from it, could only really have been determined following - rather than preceding - an agreement on the type of trade deal to be reached; its practical consequences could then have been mitigated or avoided by applying special provision. Instead, a principle was established first, without any idea of the practical consequences that would follow. This generated an end deal that was politically undeliverable, and indeed ran contrary to the core demands of the referendum vote by being associated with a form of regulatory and customs union that had been ruled out by the designated campaign.³

Historians will hunt for motives amongst all the parties. One that might end up being counted against Dublin Government is that, in a WTO default scenario, the Republic gets hit by an extra €1.5 billion bill from the Commission because of the way the EU budgetary contributions are calculated.⁴ So simple altruism and the pursuit of peace may not entirely be at play.

³ See http://www.theredcell.co.uk/uploads/9/6/4/0/96409902/eea_pledge-.pdf and http://www.theredcell.co.uk/uploads/9/6/4/0/96409902/uncustomary_zeal.pdf

⁴ http://www.theredcell.co.uk/uploads/9/6/4/0/96409902/black_hole.pdf, p7

