

Submission by Jim Allister QC MLA on behalf of Traditional Unionist Voice to Northern Ireland Affairs Committee Inquiry into the Implications of the EU Withdrawal Agreement and the backstop for Northern Ireland.

Whereas the draft Withdrawal Agreement and its Backstop has been resoundingly rejected by the House of Commons, ongoing efforts by stealth to resuscitate it gives this Inquiry continuing relevance.

It is self-evident that the backstop would have far-reaching and serious constitutional and economic consequences for Northern Ireland.

On 19th November last year I wrote to the Attorney General making the following points about the Protocol pertaining to Northern Ireland:

i. Whereas, all of the UK, until otherwise agreed, will be part of “a single customs territory” (Art 6(1)), only Northern Ireland will legally be defined as part of the customs territory of the EU. This is of immense constitutional significance, in that it conveys a part of the United Kingdom into the customs territory of another in circumstances where it cannot escape without the consent of that other, namely the EU.

ii. The EU Customs Code (UCC) will apply to Northern Ireland, but not to Great Britain (Art 6(2)). So, EU customs legislation - over which we would have no say – would apply only to Northern Ireland. EU tariffs and laws would be our lot.

iii. Ultimately, it would be possible for the UK to make an EU-approved deal to supersede the above whereby GB alone would exit the “single customs territory” with the EU, meaning Northern Ireland could be no part of any subsequent trade deals with third countries because we would be part of a different customs union and territory.

iv. The very act of retaining Northern Ireland as formally and legally part of the customs territory of the EU creates a distinction which does not sit comfortably with Section 55 of the Taxation (Cross-Border Trade) Act 2018. The fact that the rest of the UK (at least in the interim) will be part of a single EU/UK customs territory does not alter the legal reality that Northern Ireland alone would be part of the customs union of the EU. Our status in law and in practice would be different. So, how is that compatible with the aforesaid Section 55?

My concerns were confirmed when Rt Hon Geoffrey Cox QC MP’s advice to Her Majesty’s Government was published.

That advice presented a devastating insight into the extent to which Northern Ireland would be annexed permanently into the EU, despite false promises to the contrary.

i. Paragraph 7 of the advice is very clear: “Northern Ireland remains in the EU’s Customs Union, and will apply the whole of the EU’s customs acquis, and the Commission and CJEU will continue to have jurisdiction over its compliance with those rules...”

ii. Paragraph 8 of the advice quantifies this to mean Northern Ireland will be subject to 300 different legal instruments applicable only to this part of the UK and over which the EU will have total jurisdiction.

iii. Paragraph 7 goes on to make clear that GB will be in a “separate” customs territory with the EU, whereas Northern Ireland would be in the Customs Union. Whereas, for now the whole UK will be in the same “customs territory” with the EU that may change, as anticipated in para 17 where it speaks of the addition of GB to the EU customs territory as a “temporary ‘bridge to the future’ ” that the EU will not want to sustain. Indeed, at paragraph 26, the Attorney General anticipates circumstances where the EU could “submit a formal notification to the Joint Committee arguing that the protocol was no longer necessary in part and that the GB elements of the customs union should fall away, leaving only Northern Ireland in the EU customs territory..”

All of the UK for now would be held in a customs territory with the EU, but only Northern Ireland would be legally part of the EU Customs Union, where we would stay indefinitely even if GB was released. This is utterly incompatible with the constitutional and economic integrity of the United Kingdom.

Right from Article 4 it is clear this Agreement is built on the supremacy of EU law and continuing subservience to the ECJ. A manifestation of the importance of this arises with particular relevance for Northern Ireland at Article 14 of the NI Protocol where the determining jurisdiction of the ECJ is expressly proclaimed. Thus we would remain wholly subservient not just to the rules of the EU’s single market (in which we will have no say), but to their exclusive interpretation by the ECJ. We would not have left the EU but become a Brussels protectorate in the worst of colonial traditions.

In due course GB can leave the EU Customs territory (when Brussels agrees) and develop its own single market rules, but not Northern Ireland. We would be abandoned to the machinations of Brussels, including being locked into its VAT regime (Art 9 of Protocol) and EU state aid rules (Art 12 of Protocol).

Leaving Northern Ireland entrapped in both the Customs Union and the EU single market on goods in perpetuity while the rest of the UK leaves means that the resulting border down the Irish Sea is inevitable. The crippling of Northern Ireland’s GB-linked economy will follow.

It is important to note that whereas there is proclaimed (Art 7 of Protocol) a right to unfettered access for NI goods to GB, very significantly, there is no such assurance of unfettered access for goods from GB to NI. Such excludes NI from the benefit of any UK negotiated trade deals and induces divergence of our economies.

It is abundantly clear from Art 7 of the Protocol that an Irish Sea border is intended, with the only commitment being to attempt “to the extent possible” to avoid controls at Irish Sea ports.

The whole premise of the backstop is to prevent a border on the island of Ireland. In order to achieve that the backstop breaks up the single market of the UK.

On a purely economic front this makes no sense.

NISRA publish data annually as part of their Northern Ireland Broad Economy Sales and Exports Statistics. Its analysis of purchases and imports from trade partners split by goods and services for 2016 showed that

- The total purchases from Great Britain in goods was £10,989 million while the purchases of services from Great Britain was £2,432 million.
- The total imports from the Republic of Ireland in goods was £1,995 million while the purchases of services from the Republic was £293 million.

In fact, the total purchases in goods from Great Britain (£10,989 million) dwarfed the total purchases in goods from the Republic and the rest of the EU combined (£3,959 million).

(Source: [Table 2 here https://www.nisra.gov.uk/sites/nisra.gov.uk/files/publications/BESES%20Purchases%20and%20imports%20Publication%202016%20-%20Headline%20results.pdf](https://www.nisra.gov.uk/sites/nisra.gov.uk/files/publications/BESES%20Purchases%20and%20imports%20Publication%202016%20-%20Headline%20results.pdf))

So, for sake of unfettered access of £1,995 million of goods from ROI the Withdrawal Agreement proposes to fetter £10,989 million goods from GB - the very goods that stock our supermarket shelves and are part of the vital supply chain to our industry.

There being no economic logic or reason for this approach the motivation can only be political. The purpose is clear: annex Northern Ireland from the UK and detain it within the EU customs and single market orbit.

In truth the way Northern Ireland has been treated suggests that the reports which the former Brexit Secretary Dominic Raab heard through diplomatic channels that losing Northern Ireland would be the price that the UK would pay for Brexit were accurate. This also explains the irrational rejection of smart technology and allied proposals on the Irish border, though same could be embraced for an Irish Sea border! The chicanery is obvious.

The case for the Backstop is built on such sophistry. The idea that it is essential to avoid a 'hard border' is a hoax. The core question, which remains unanswered, is "Who would build this hard border?" Ireland says not it. The UK says the same. So who? The EU Commission has equivocated, but it is one thing for a spokesman to articulate the theory that No Deal means a hard border, but quite something else to translate such into the reality of border infrastructure. It won't happen, unless the EU makes the Dublin Government physically partition Ireland. How likely is that?

Yet, to prevent something which is never going to happen the Backstop was contrived to break up the UK. What a fraud! Moreover, what folly for the EU to sacrifice a withdrawal agreement for such. And what supine posturing for the Prime Minister to try and sell the

pernicious Backstop on the basis that she is fulfilling a promise of no hard border. A policy constructed on a myth is devoid of substance and deserving only of excoriation.

It is my view that this situation was created by the wrongheaded way in which the negotiations were approached. Only once the trade deal between the UK and the EU has been agreed is it possible to work out what checks, if any, are required at the Irish border and therefore it is logical to discuss trade before coming to the issue of the border.

Instead, we had the cart put before the horse and then a dishonest clothing of the devised machinations in bogus 'defence' of the Belfast Agreement.

The Belfast Agreement barely mentions the EU, nor are its various strands and institutions dependent on EU membership. It is not an EU creation. Every one of its institutions operate whether or not the UK is in the EU. So far as it was at the time an agreement between two member states of the EU, membership is not a condition precedent to its operation. Neither its north/south or east/west components, nor internal Northern Ireland institutions, are reliant on mutual EU membership.

Yet, we have had constant but false propaganda about the threat of Brexit to the Belfast Agreement, with even the Prime Minister falling into this trap.

Moreover, there is nothing in the Belfast Agreement antithetical to the existence of an EU border on the island of Ireland. Indeed, the very consent principle is all about the existence of the UK/ROI border. There is no mandate in the Belfast Agreement, or elsewhere, for the EU to meddle in the existence or operation of the border.

Nor does the Belfast Agreement require regulatory or customs alignment.

Indeed, it is worth noting that in Art 4(2) TEU the EU commits to respecting "the national identities" of member states "inherent in their fundamental structures, political and constitutional" and pledges to ensure "the territorial integrity of the State".

Art 4(2) TEU: The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

Yet, in this draft Agreement we have the calculated dismantling of the UK proposed and its territorial integrity trashed. Such is intolerable and must continue to be rejected.

I have long maintained that talk of 'special status' for NI as a means of avoiding a visible Irish border was misdirected and that it was Republic, not Northern Ireland, that needed the special concessions, because it will be ROI that is subject to the EU single market and CU requirements.

Hopefully with the prospect of 'No Deal' this reality is now dawning in Dublin. Last month Reuters reported that when asked if the Republic would need any derogations to avoid a hard border their Foreign Minister replied:

“That will be an ongoing conversation. We don’t have anything like a conclusion to that discussion yet.

“If a no deal Brexit becomes a more likely outcome, of course we will have to have very detailed discussions with the Commission”.

<https://uk.reuters.com/article/uk-britain-eu-ireland-coveney/ireland-may-ask-for-derogations-from-some-eu-rules-in-no-deal-brexid-idUKKCN1OI2MM>

Thus, contemplation now by ROI of seeking derogations from some EU requirements is sensible. The first such significant derogation they might need to seek is exemption from the Treaty obligation on a frontier state to establish and maintain the EU border. Such derogation, if not total, might involve mitigations to allow checks away from the border in ROI.

Derogations on types and quantum of checks on imports might also be appropriate.

It is worth noting that since it will be Republic and not the UK which is obligated to meet EU requirements it is entirely logical and right that the onus is on Dublin to come up with solutions.

If common customs arrangements are necessary, then, again the onus for alignment falls on Dublin. If they want to advocate and be part of a British Isles customs territory, then, let them make that case to Brussels. We already have a Common Travel Area for people. If the Republic, in order to protect its UK-dependent economy, wants a Common Travel Area for goods, then, we should look at it.

I believe these are matters for Dublin to champion. Indeed, if, instead of overstressing its demands to the point that they secured a Withdrawal Agreement which is unsustainable, Dublin had worked with the UK to secure special arrangements for the Republic, then we probably wouldn't be in the present impasse.

We are where we are, but continued rejection of the proposed Backstop is imperative for the constitutional and economic survival of Northern Ireland as an integral part of the United Kingdom. If because of EU intransigence such leads to a 'No Deal' then so be it. Indeed, I believe, that would quickly become the catalyst that would bring Brussels to the table in a more realistic frame of mind, not least because the Republic of Ireland, and particularly its agri-food industry, can least afford a no deal.