

THE VIEW FROM BRUSSELS: IDEAS TO FIX THE BACKSTOP - INCLUDING ENHANCED EXTRADITION

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Legal Briefings - By **Eric White and James Palmer**

The position of the EU changed almost imperceptibly over the summer from that which we noted in [June 2019](#) of “the Withdrawal Agreement is not open for renegotiation” to “where is your proposal?”

There have been talks but, so far, the UK has not made any proposal - at least not in writing. This is a matter of concern since completing the approval processes for an amended withdrawal agreement before 31 October will be a major challenge and require unprecedented acceleration of procedures.

In this View from Brussels we examine from a legal perspective some of the ideas that have been put forward to break the deadlock and make a further original suggestion of our own - that increased customs and regulatory cooperation across the border could include enhanced extradition arrangements.

THE IDEAS THAT HAVE BEEN ADVANCED

The debate has focussed on the Protocol on Northern Ireland (“the Backstop”), which the UK Prime Minister has described as “antidemocratic”. It is indeed difficult to say whether the greater sin of the Backstop is that it locks the whole UK into a customs union and close regulatory alignment with the EU without the right to participate in EU decision-making or that it divides the sovereignty of the UK by imposing even closer customs and regulatory alignment on Northern Ireland - in both cases “unless and until” the EU considers that a more satisfactory arrangement has been agreed. In reality, the greatest problem with the Backstop is that it will create exactly the problem on the Irish border that it professes to seek to avoid - by rendering a withdrawal agreement impossible.

The new UK Prime Minister started off by saying that the Backstop must be "deleted", without indicating what would replace it, although he did refer some interlocutors to the proposal drawn up by the [Alternative Arrangements Commission](#) (a non-government body financed by the British think tank Prosperity-UK and advised by Herbert Smith Freehills) that explored the alternative arrangements that could be used. The Alternative Arrangements Commission's report contains draft legal text that would amend the Withdrawal Agreement to provide that the Backstop would not enter into force if certain conditions were fulfilled by the UK and specified the more limited obligations to be contained in an alternative Protocol on Northern Ireland. (Prosperity-UK has also made a series of textual proposals to change other elements of the draft [Withdrawal Agreement](#) and [Political Declaration](#) in order to satisfy other objections raised against these documents in the UK).

The Alternative Arrangements Commission proposal on the Backstop provides in particular for the use of transit procedures and trusted trader schemes on both sides of the border that would be mutually recognised by the parties and for continued close cooperation on customs matters. To eliminate the need for sanitary and phytosanitary ("SPS") controls at the border it provides for continued alignment of the UK with EU rules and that if the UK should diverge from EU SPS rules, the Northern Ireland executive and assembly would be able to decide whether to stay aligned with the EU or diverge along with the UK.

The UK Prime Minister took this idea one step further by speaking in Dublin about the creation of an [all-Ireland agri-food area](#) which would seem to extend the alignment obligation also to customs duties on agri-food products. This is presumably to meet the concern that the issue of smuggling will be particularly acute for agri-food products if the UK diverges from the EU's Common Agricultural Policy and reduces the very high tariffs currently applicable to the import of such products from outside the EU. The agri-food sector is also the area in which the Northern Irish economy is most integrated with that of the rest of Ireland.

The Alternative Arrangements Commission proposal would not eliminate smuggling but would limit and control it. A further [proposal](#) put forward by a group of eminent lawyers including the UK's former top official in the European Commission, Sir Jonathan Faull, went further by proposing the setting up of one-stop-shops away from the border where all border formalities could be accomplished and to make it a "a violation of UK Law backed up by severe penalties (including if so wished criminal liability) knowingly to export, through the frontier between the North and the Republic, goods which do not comply with the regulatory standards of the EU." It is added that "naturally" Ireland would adopt a similar regime for goods moving in the opposite direction.

The one-stop-shop proposal introduces an additional element of customs facilitation and can only be welcomed. The more revolutionary idea in this proposal however relates to enforcement. It is to require one State to directly enforce the law of another State over which it has no control. That constitutes a level of international cooperation that has not to our knowledge been achieved anywhere, not even in the European Union. One could argue that it is "antidemocratic" since citizens will be subjected to penalties for violating rules imposed on them by an external power. The current draft of the Backstop does the same but this proposal would make the obligation reciprocal and require mutual recognition of laws. The EU has resisted agreeing to "mutual recognition" under the draft Withdrawal Agreement and the Political Declaration and often states that it cannot entrust the enforcement of single market rules to third countries. Additionally, in the EU, criminal liability is a closely-guarded national competence.

A NEW IDEA - ENHANCED EXTRADITION ARRANGEMENTS

We suggest a new means of overcoming the constitutional difficulties arising out of the application of foreign law. Our proposal is to replace the direct enforcement of another State's rules with an agreement on extradition. This would constitute a development of customs cooperation rather than mutual recognition of rules. The extraditing State would not so much be enforcing another State's law as allowing and facilitating enforcement of the law of that other State on that other State's territory for an offence committed on that other State's territory (illegal importation).

While the EU does not provide for one Member State's laws to be enforced by another Member State it has developed the [European Arrest Warrant](#) which provides for automatic extradition between Member States. Under the European Arrest Warrant there is, in many cases, including for customs offences, no requirement that the offence alleged to have been committed should also exist in the extraditing State. The UK and the EU would therefore simply be maintaining and possibly developing in the area of customs an arrangement that they already have through the European Arrest Warrant.

This proposal gives the EU an added means for protecting its single market and builds on the cross-border cooperation that the UK and Ireland committed to in signing the Good Friday or Belfast Agreement. It could also become a model for developing customs facilitation for the rest of Europe and elsewhere.

CONCLUSION

The Backstop is the main reason why the negotiated text of the Withdrawal Agreement has been rejected three times by the UK Parliament and why it has no chance of being accepted in its current form. Even the EU now accepts that it needs to be amended in some way.

The conflicting red lines are difficult to reconcile and some creative thinking is called for. Ideas for amending the Withdrawal Agreement have been advanced and we have attempted to further develop them in this note with our proposal for enhanced extradition arrangements for customs and related offences. The EU has so far been able to resist reacting to them in any detail by pointing out that the UK government has not tabled any formal proposal. If Brexit is to occur, or even if the terms of withdrawal agreed, by 31 October it is more than urgent that proposals be tabled and given due consideration.

[More on Brexit](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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