

# Irish border backstop: many unanswered questions and considerable economic challenges



*What happens to Northern Ireland once the UK leaves the European Union has become one of the most complex issues in the Brexit negotiations. The problem stems from the fact that the [Good Friday Agreement](#) has been interpreted as precluding a [return to a hard border](#) – that is, any physical infrastructure – between the North and South of the island of Ireland. **Billy Melo Araujo (right) and Federico Lupo Pasini (Queen's University Belfast)** write that the so-called backstop option that is currently on the table is an imperfect solution that needs further work. They*

*conclude that many many unanswered questions persist and considerable challenges may still arise from that solution, especially economic ones.*

The lack of a hard border with the Republic of Ireland seems incompatible with some of the central goals, as identified by the British government, of Brexit. The UK wishes to leave the customs union so that it can carry out its own independent trade policy and negotiate its trade agreement and it also wishes to leave the single market to deviate from EU rules. However, leaving the customs union and the single market would inevitably mean that border checks would be required to, for example, collect tariffs and check regulatory compliance.

How to square such clearly irreconcilable goals has occupied much of time and attention of Brexit negotiators. In December 2017, the EU and UK issued a [Joint Report](#) outlining the progress of the Brexit negotiations where they set out three potentially solutions to Irish border conundrum. The first solution would be for the border issue to be resolved in the framework of a future EU-UK trade agreement. The second option would be for the issue to resolve through specific solutions. The third option would require the UK to commit to align itself with EU customs and internal market rules. This last option is typically referred as the 'back-stop option' and would be the last resort scenario that would only apply in case the first two options do not work and

For the first option to achieve the goal of avoiding a hard border, it would effectively require the UK to stay in the customs union and the single market. This would, of course, be politically a hard sell for the current UK government. The second option places much emphasis on the possibility of using technology to obviate the need for border controls. The evidence so far suggests that whilst technology could help in terms of reducing and facilitating border controls, [they would not be sufficient to remove the need for controls](#). And it is telling that the main proponent of the use of border technology – the UK – has so far not been particularly forthcoming with proposals tangible and workable technological solutions.

It is therefore no surprise that the EU has so far placed all its eggs on the backstop basket. In its recently published [Draft Withdrawal Agreement](#), the EU included a Protocol focusing exclusively on Northern Ireland which fleshed out the contours of the backstop option. The proposal is for Northern Ireland to become Common Regulatory Area (CRA) where Northern Ireland would continue to comply with EU customs rules, the free movement of goods and relevant EU internal market legislation relating to goods. Should it come to fruition, the CRA would place Northern Ireland in a unique constitutional and economic position within the UK. It would still part of the UK but it would, by contrast to other regions of the UK, be able to maintain the current unfettered access to the EU internal market in the area of goods.

Some have viewed the CRA as providing Northern Ireland with a special deal which would allow it to keep the best of both worlds; continued participation in the EU internal market whilst keeping its foothold in the UK. Some politicians have pointed to the CRA proposal and questioned why this special deal which allows the NI to [effectively stay in the single market should not be extended other devolved authorities](#). However, this reading of the CRA as providing Northern Ireland a special, and perhaps more favourable, deal which would allow it to stay in the single market does not accurately reflect what is being proposed in the CRA and the potential drawbacks it presents for Northern Ireland.

Firstly, the CRA does not encompass the entirety of the single market. It only applies to trade in goods and only to those areas which have a cross-border trade dimension. Other important economic sectors, like services, are excluded from the scope of the CRA. Secondly, the CRA does not, in its current form, enable Northern Ireland to maintain the status quo in terms the benefits associated with internal market membership. For example, there is nothing in the Protocol which indicates that Northern Ireland would continue to benefit from the preferential tariff treatment and market access provided under EU Free Trade Agreements (FTAs). Indeed EU FTAs typically only apply to EU Member States which, as part of the UK, Northern Ireland would not qualify as. This would mean that Northern Ireland could find itself in a position where must allow unrestricted access goods from third countries with whom the EU has signed a FTA whilst Northern Ireland goods would not benefit from the preferential treatment under these FTAs. This problem is further exacerbated by the fact that because Northern Ireland would be subject to EU customs rules it would also not be covered by commitments relating to goods negotiated in future UK FTAs. In other words, under the CRA, Northern Ireland could well find itself excluded from both EU and UK FTAs. This would be particularly problematic as goods still account for the majority of Northern Irish exports.

Image by [Mount](#)

[Pleasant Granary](#), Public Domain.

Another example can be found in the area of agricultural subsidies. [The farming sector remains an important feature of the Northern Irish economy. One that is especially reliant on EU subsidies under the Common Agricultural Policy \(CAP\).](#) Yet, whilst the CRA would remove all barriers to trade in agricultural products between Northern Ireland and the EU, nothing is said about the fate of agricultural subsidies. This raises concerns regarding potential distortions of competition. Unless Northern Ireland farmers continue to benefit from CAP payments or in the absence of a commitment by the UK to match EU levels of agricultural subsidies to Northern Ireland farmers, the latter could well be placed at significant competitive disadvantage compared to their counterparts in the south of the island.

There are also important questions relating to the constitutional operation of the CRA. The CRA provides that Northern Ireland will have to comply with relevant EU law and that the Court of Justice of the European Union shall have jurisdiction over issues falling within the scope of the Protocol. But no clarity is provided with respect to the relation between the EU and the Northern Ireland legal order. Will provisions of EU law have direct effect in Northern Ireland (that is, can they be invoked by individuals directly before domestic courts) and will the principle of supremacy of EU law continue to apply?

The backstop option proposed by the EU has clear merits. The most obvious one is that it obviates the need for a return to a hard border within the island of Ireland, a key component of the peace process in Northern Ireland. Its importance should not be dismissed or underestimated. But the current proposals for a CRA leave a lot of unanswered questions and present a number of considerable challenges for the Northern Ireland economy. These questions *must* be addressed, as a matter of urgency, if the CRA is not to cause significant adverse consequences to the economy of Northern Ireland.

Finally, there is the uncomfortable question of what happens to trade between Northern Ireland and the rest of the UK. [Great Britain remains the largest export destination for Northern Irish goods](#). An inevitable consequence of Northern Ireland being subject to EU customs and single market rules is that barriers will be erected to 'East-West' trade. This would be politically problematic for the UK government (in light of its commitment to maintain Northern Ireland within the UK's internal market) and would come at a considerable economic cost for Northern Ireland.

This, of course, is a domestic issue rather than one that could be solved by the EU. The only realistic solution would be for the UK, as a whole to stay in the customs union and the single market for goods. And that would bring us back to square one.

*This article gives the views of the author, and not the position of LSE Brexit, nor of the London School of Economics.*

**Dr Billy Melo Araujo** is Lecturer and Director of the Masters in Law (MLaw) Programme at the School of Law, Queen's University Belfast.

**Dr Federico Lupo Pasini** is Lecturer at the School of Law, Queen's University Belfast.