

Why the UK's demands on the Irish Backstop would undermine the EU legal order

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Introduction

The UK Government and the European Union are renegotiating the Withdrawal Agreement. The former seeks the removal of the 'Irish Backstop' on the basis of its 'undemocratic character' which it claims infringes upon the sovereignty of the United Kingdom. The European Parliament has passed a [resolution](#) that it will not consent to any Withdrawal Agreement without an Irish Backstop, in direct contravention to the UK's position. The Prime Minister has asked the European Council President in a [letter](#) for reciprocal 'binding legal guarantees' not to put in place infrastructure, checks, or controls at the border between Northern Ireland and Ireland.

This post will argue that the EU legal order places constraints on this option. Prime facie, Ireland would be in breach of EU law if it followed this course. Pre-existing exemptions would not be sufficient to enable the complete removal of infrastructure, checks, or controls. The only legally legitimate option would be revision of EU law, but this seems impracticable before the EU's exit day. Therefore the only practicable method would be pre-commitments in international law to revise the law. Substantively, this could jeopardise the integrity of the customs union and the single market. Procedurally, this would also create a legitimacy deficit for the EU constitutional order.

EU Law breach and possible exemptions

If Ireland were not to enforce border checks and controls, this would impact upon the EU goal in [Title II TFEU](#) to adopt and maintain a common customs and tariff policy in relation to third countries. Specifically, Ireland would breach the secondary law of the [Union Customs Code](#) (UCC). This includes obligations to implement the external aspects of the internal market, carry out risk management and customs controls, engage in customs supervision, and details the conditions for release of non-Union goods into free circulation. It also makes provision for the customs debts that are imposed in the event of non-compliance. Exemptions do exist in relation to these obligations. However I would argue that they would not cover the situation requested by the UK for a Member State to refrain completely from any customs supervision regarding non-Union goods.

The [Regulation](#) setting up a system of reliefs from customs duty enables the non-application of import duties but only in narrowly defined circumstances that includes personal property and negligible value consignments. Although provisions on products obtained by EU farmers on properties located on properties in a third country could be relevant for Irish frontier farmers, the Regulation does not provide for a comprehensive regime to enable the elimination of controls. The preamble does state that the Regulation does not 'preclude the application by Member States of import or export prohibitions or restrictions which are justified on grounds of public morality, public policy or public security, [and] protection of health and life of humans'. This exemption is also found in Article 24 of the [Regulation](#) on common rules for imports. The considerations of public security and protection of health and life of humans are relevant in the context of the Irish border, as will be argued below. However, the legal exemptions that these consideration enable, imposition of restrictions, is the opposite of the removal of these controls.

A potential precedent for exemption from customs union obligations is provided for by the Regulation introducing emergency autonomous trade preference for Pakistan. This was also accompanied by a waiver from obligations in the WTO General Agreement on Trades and Tariffs (GATT). This is another layer to the backstop conundrum that lies beyond the scope of this article's focus on the EU legal order. The WTO element has recently been covered on the [DCU Brexit Institute blog](#). The legislation on Pakistan was promulgated on the basis of [Article 207 TFEU](#), a legal basis for agreements with third countries concerning the common commercial policy. The provisions in the legislation allowed for the 'immediate and time limited reduction of duties on key imports from Pakistan' to address an emergency situation. Again, however, this exemption was strictly limited both temporally and with regard to subject-matter.

If these obligations were not fulfilled, the European Commission despite its political solidarity with Ireland would be obliged to bring [infringement proceedings](#) against Ireland before the Court of Justice of the European Union. The EU treaties and secondary legislation are crucial. Their text enshrines in legally binding form the choices made by the contracting parties to pool their sovereignty on the international plane. By asking the EU institutions and a Member State not to uphold obligations in this text, the UK is asking the EU to prioritise the sovereignty claims of a departing state over an expression of the shared sovereignty of the remaining Member States. The only constitutionally legitimate means to realise these claims as 'binding legal guarantees' would be through amendment of the relevant EU law.

Creation or revision of EU law to create an exemption from the customs union

The option remains of the creation or amendment of secondary legislation to enable an exemption from enforcing the customs union. The exemptions for Member States to impose restrictions 'justified on grounds of...public security; [and] the protection of health and life of humans' in the legislation discussed above could be broadened so as to enable the reverse situation of relief from the enforcement of customs checks. There is also some precedent that could be evoked to justify such an exemption being geographically limited. The [Regulation](#) on common rules for imports makes provision for the Commission to introduce surveillance mechanisms 'confined...to one or more regions of the Union' in the event of certain trends in imports. The exact modalities of this exemption power could be left subject to the conferral of delegated acts and implementing powers for the Commission, as mandated extensively throughout the Union Customs Code. If this exemption were created, Ireland could then evoke the justifications of 'public security' and 'the protection of health and life of humans' to be exempt from customs obligations so as to uphold the [Good Friday Agreement](#) and an open border to prevent the return of the hostilities of the Troubles.

There are severe procedural constraints beyond generating the necessary political will amongst the 27 Member States and the EU institutions. The ordinary legislative procedure in [Article 294 TFEU](#) requires the consent of the European Parliament and the Council to Commission proposals over the course of three readings and a conciliation committee. The provision envisages maximum time-limits of three months, with possibility to extend for one month, for second reading, and a period of six weeks, with the possibility of extension of two weeks, for third reading. These constraints would only be exacerbated further if the institutions decided that the creation of such a comprehensive power of exemption from the customs union would require revision of the treaties to ensure a sufficient legal base. This would follow the form of exemptions enabling the imposition of restrictions between Member States in the internal market being included in the primary law of [Article 36 TFEU](#). If treaty revision were pursued, then this amendment would need to be ratified by all of the national and regional parliaments within the EU in accordance with [Article 48 TEU](#). It seems unfeasible that either the secondary or primary law revision processes could be carried out in the one month before 31 October, or even before 31 January if a further [Article 50 extension](#) is granted. If the revision were managed within the time-constraints, one could expect deficiencies in the quality of scrutiny and decision-making.

International law facilitation and legitimacy deficits

The EU institutions and the Member States could rely upon international law to overcome these procedural constraints. Joseph Weiler, Daniel Sarmiento, and Jonathan Faull [suggest](#) that their own substantive alternative proposal to the backstop could be realised through amendment of the Withdrawal Agreement and the Political Declaration. If, as the Irish Taoiseach has recently [implied](#), it is not feasible nor desirable for the Withdrawal Agreement to be re-opened, then the other approach in the aforementioned post could be utilised - a legally binding commitment in international law taken by the EU's heads of state or government. To use Leo Varadkar's words, a heads of state or government decision is precisely the 'kind of thing that can be amended or cobbled together late at night at the European Council meeting on 17th of October'.

This option would re-introduce a device from the earlier chapters of the Brexit saga . The [Decision](#) on a 'New Settlement for the UK' in February 2016 would have come into force if the UK had voted to remain. This took the form of a simplified international treaty, rather than EU law, concluded between the 27 heads of state or government using the European Council as a forum. Part of the Decision was a pre-commitment for the next treaty revision that the principle of 'ever closer union' would no longer apply to the UK. The Commission also issued Declarations that it would initiate revision of secondary legislation to enable an 'emergency brake' on social security co-ordination in the event of large inflows of EU citizens into a Member State.

Such an international law agreement could not be used to realise the customs exemptions directly because the customs union and the common commercial policy are exclusive competences of the Union under [Article 3 TEU](#) . Instead, the Member States could draw upon their reserved sovereignty in order to conclude a similar international agreement with the UK to provide pre-commitments to consider amendment. The commitment to create an exemption from the customs union would resemble the 2016 Decision insofar as this could also be understood as an 'emergency brake' for Member States that would find themselves in a precarious situation such as Ireland. Pre-commitments by the Commission to introduce either new legislation or amendments to the Union Customs Code or Regulation on reliefs from customs duty could similarly take the form of such 'Declarations' in the current context.

However, the resort to international law, either through amendment to the Withdrawal Agreement or through a heads of state or government decision, to bypass EU law constraints also poses legitimacy problems. Transparency is lacking within the European Council forum because the intergovernmental deliberations between heads of state or government remain private. This impacts upon the capacity for scrutiny by national parliaments of their executives' decisions. Bypassing the EU constitutional channels of the ordinary revision procedure and ordinary legislative procedure also displaces the functions of the EU institutions.

In addition to these throughput legitimacy problems, the use of international law also poses problems for input legitimacy. In concluding such a Decision, the national governments would derive their legitimacy solely from the citizens of these Member States. This excludes the voice of individuals in their role as EU citizens as directly represented by the European Parliament. When the EU institutions may come to exercise their initiation and consultative roles in revision procedures, the Member States will have already bound the subject-matter through the prior international law agreement. The results of the match will have been pre-determined before the players enter the pitch.

Finally, these procedural deficiencies are exacerbated by the risks that such a mechanism would pose for the integrity of the internal market. This affects the output legitimacy of the [indivisibility](#) of the single market. The four freedoms facilitate individuals to exercise their life-plans across borders. An emergency suspension mechanism for the customs union could set a dangerous precedent, and undermine the idea that the four freedoms are indivisible and immutable. However, the presence of the pre-existing exemptions that have been discussed in this piece suggests that such action is not impossible.

Conclusion

There are legal, practical, and political problems with the UK Prime Minister's request for legally binding guarantees that the EU will not enforce EU law in relation to the Irish border. The only legitimate means to achieve this would be amendment of the EU legal order to create a new power of exemption from the customs union. Substantively this could present risks to the uniformity of the single market. Procedurally the only practical means to achieve this would have serious legitimacy defects. The question for the EU's constitutional legislators would be whether the sacrifices to the internal market and the customs union are justified by the existential threats to the EU and Ireland posed by a no deal Brexit.

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