

Why the UK's Government's Demands on the Irish Backstop Would Violate the Sovereignty of the EU-27

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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 infringes upon the sovereignty of the United Kingdom. As a contingency plan, 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. The significance of this has been amplified by the European Parliament's [resolution](#) that it will not consent to any Withdrawal Agreement without an Irish Backstop, in direct contravention to the UK's position.

This post will argue that the EU legal order places constraints on this option. Ireland would be in breach of EU law if it followed this course, and the EU institutions have no discretion to suspend these legal obligations. The only legally legitimate option would be revision of the EU treaties, but this seems impracticable before the UK's exit day. Therefore the only practicable method would be the conclusion of a simplified agreement in international law pre-committing the EU-27 to such a revision in the event that solutions to the border problem are not realised in the future relationship negotiations. 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.

Breaching EU law and violating the sovereignty of the Member States

If the EU and Ireland were to acquiesce to the United Kingdom's request, the Member State would breach its treaty obligations under [Title II TFEU](#) on the free movement of goods to adopt and maintain a common customs tariff in relation to third countries. The European Commission, despite its political solidarity with Ireland, would thus be obliged to bring [infringement proceedings](#) before the Court of Justice of the European Union.

Furthermore, unlike the United Kingdom which may rely upon residual prerogative powers for the conduct of foreign policy, the EU institutions do not have the executive discretion to suspend the operation of the legal order. [Conferral of powers](#) means the EU can only act in the areas in which the Member States have transferred competence. In the general conduct of international agreements, this is regulated by [Title V TEU](#) and Part V TFEU on the Union's external action.

With specific regard to Brexit, these powers and obligations are strictly regulated by [Article 50 TEU](#), the references to [legal bases](#) on conclusion of international agreements therein, and the [mandate](#) adopted by the European Council for negotiations.

The text of the treaties is crucial. The Treaties enshrine in legally binding form the choices made by the contracting parties to pool their sovereignty on the international plane. By asking the EU institutions to suspend the operation of EU law relating to the border, the UK government is asking the EU to violate the sovereignty of the remaining Member States in order to vindicate the sovereignty claims of a departing state. The only constitutionally legitimate means to realise this would be for these Member States to consent to such amendment through revision of the Treaties.

Revision of the treaties to create an exemption from the customs union

The simplified revision procedure under [Article 48 TEU](#) would have to be used to create the power to disapply EU law in relation to the Irish border. This could take the form of a new exemption to the customs union obligation drawing inspiration from the exemptions in relation to the single market provided for in [Article 36 TFEU](#). Following this text, such exemptions could be ‘justified on ground of...public security; [and] the protection of health and life of humans’. Ireland could then justify relying on this new exemption to serve the purposes of upholding 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 amendment would need to be ratified by all of the national and regional parliaments within the EU. It seems unfeasible that the full necessary scrutiny and decision-making could be carried out before the 31 October, or even the 31 January if a further Article 50 extension is granted.

International law facilitation and legitimacy deficits

A device from the earliest chapters of the Brexit saga could be revived as a practical means to realise the request for ‘legally binding guarantees’ not to enforce border checks as a contingency plan if a replacement for the backstop is not found. 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.

The Member States and the UK could draw upon their reserved sovereignty in order to conclude a similar international agreement with the UK to provide pre-commitments to amend the treaty in the event of a failure to find a solution to the border problem after Brexit. This mechanism has also been [proposed](#) by Joseph Weiler, Daniel Sarmiento, and Jonathan Faull as a means to realise substantive alternatives to the backstop. For the amendment proposed above, there would be a resemblance to the 2016 Decision insofar as the exception could also be understood as an ‘emergency brake’ for Member States that would find themselves in a precarious situation such as Ireland.

However, the use of international law 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 treaty revision, the Member States will have already bound the Convention 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 substance of the single market as the ‘core’ of the EU legal order. The four freedoms facilitate individuals to exercise their life-plans across borders. An emergency suspension mechanisms 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 exemptions for the free movement of goods and people in the internal markets 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 as a fall-back for renegotiations. The only legitimate means to achieve this would be treaty revision 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. In the event that the United Kingdom rejects the backstop, 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.

