

# The Clock Keeps Ticking...

*By David Hearne, Researcher, Centre for Brexit Studies*

The latest news indicates that negotiations between the UK and EU are still at an impasse, with the “endgame” of talks dragging on for weeks. The ultimate sticking point appears to be over the border between Northern Ireland and the Republic. As an opening gambit, the EU’s initial proposal was that Northern Ireland should remain in the European Economic Area and EU Customs Union (or have a customs union with the EU) whilst Great Britain (at the behest of the UK Government) was to leave both. Contrary to some reports at the time, it was always made clear that this was merely an opening suggestion and that alternatives or amendments from the UK side would be welcomed.

Unsurprisingly, this proposal was never going to be acceptable to the UK Government (and very probably to many people in Northern Ireland). Implementing a “border” for goods between Northern Ireland and Great Britain was always going to be too contentious for the UK Government to stomach and the Unionist community in Northern Ireland reacted with predictable hostility to the idea.

Similarly, the idea of a hard border with physical infrastructure between Northern Ireland and the Republic was equally abhorrent to the Nationalist community (not to mention the fact that it would be damaging for the all-island economy). Continuing talks have thus been to find some sort of compromise. The latest proposal is for the entire UK to remain in a customs union with the EU and for Northern Ireland to remain aligned to crucial Single Market rules, particularly around sanitary and phyto-sanitary standards.

There are two challenges for the UK Government now. Firstly, it makes explicit that Northern Ireland will have different regulatory standards to Great Britain. Secondly, there are a number of challenges and complications around the idea of a customs union. It is from these that all objections (whether domestic or from the EU negotiating team) stem.

If Northern Ireland is to remain within the EU's regulatory system then two things will need to happen:

1. Physical checks on goods (especially agricultural goods) between the UK and Northern Ireland will need to take place.
2. A mechanism will be needed to ensure that Northern Ireland stays aligned to EU rules and that these are appropriately enforced.

The first would appear to be a deal-breaker for Theresa May's DUP coalition partners. However, it is not as simple as it might seem. Firstly, some (primarily agricultural) checks already take place. Secondly, there already exists scope for the devolved government in Northern Ireland to adopt regulations different from those in the rest of the UK. Moreover, there need be no checks on goods flowing from Northern Ireland to Great Britain as these would be entirely under the purview of the UK Government (who would surely wish to minimise any friction in intra-UK trade).

The latter issue, however, is more problematic. What happens when the EU passes new regulations and directives? Presumably, regulations will be put into immediate effect as in the rest of the EU (although it remains to be seen how the UK might choose to deal with the potential for divergence in this area). Directives are more problematic as they need to be passed into law by EU (or EEA) countries themselves. Stormont must therefore be given sufficient competencies to do this (or the UK Government must undertake to do so). Of course, the Stormont government has been suspended for a significant proportion of its total existence – and is indeed suspended at present. This is an issue, albeit a surmountable one.

As for enforcement, the sole arbiter of EU law at present is the Court of Justice of the EU. Presumably the UK would need to agree that the Court of Justice had jurisdiction over Northern Ireland but not Great Britain. This might prove a challenging sell to both the DUP and those with Unionist sympathies on the Conservative backbenches.

The second, key, sticking point is the nature of any proposed customs union. A substantial minority of Conservative backbenchers want any customs union to be temporary. For many, the ability to sign trade deals independent of the EU is a key reason for leaving the

organisation. Moreover, the UK may well find itself in the same position that Turkey is in: having to grant privileged reduced tariffs to third parties when they do not reciprocate.

However, *if* a customs union is temporary, can this function as an effective backstop? After all, it is possible that no agreement can be found on how to avoid a border on the island of Ireland on a permanent basis before the expiry of the customs union. As such, it is unsurprising that the EU has objected to a time-limited backstop strenuously. Current discussions centre around what 'triggers' could enable the UK to leave the customs union (i.e. how to make it temporary but not time-limited), but this is more difficult than many had envisaged. By the same token, Labour has stated that they will vote down any proposal that does not contain a permanent customs union.

We have therefore reached an impasse. The two negotiating teams have still not agreed on a proposal to avoid a hard border on the island of Ireland and time is running out. In the event that a Withdrawal Agreement is agreed (and it will now, by necessity, be relatively last-minute), it must be ratified. Presumably this will occur relatively smoothly on the EU side. However, it is not unlikely that any deal acceptable to the EU and UK negotiating teams will fail to satisfy the House of Commons. The UK therefore faces a real dilemma and it is not at all clear how (or even whether) the Gordian knot can be cut.