

# The Irish Border and the Principle of Consent



A Policy Exchange research note

Graham Gudgin and Ray Bassett

Foreword by Lord Trimble





## About the Authors

**Dr Graham Gudgin** is Policy Exchange's Chief Economic Adviser. He is currently Honorary Research Associate at the Centre for Business Research (CBR) in the Judge Business School at the University of Cambridge. He is also visiting Professor at the University of Ulster and Chairman of the Advisory Board of the Ulster University Economic Policy Centre, and was senior Economic Adviser at Oxford Economics from 2007 to 2015. He was Director of the ESRC-funded Northern Ireland Economic Research Centre from 1985 to 1998 when he became Special Adviser to the First Minister in the NI Assembly until 2002. Prior to this he was economics fellow at Selwyn College, Cambridge and a member of the Cambridge Economic Policy Group under Wynne Godley. He is the author of a large number of books, reports and journal articles on regional economic growth in the UK, the growth of small firms and electoral systems. He is currently working with Ken Coutts on a macro-economic model and forecasts for the UK economy and on the economic impact of Brexit.

**Ray Bassett** is Policy Exchange's Senior Fellow on EU Affairs. Dublin born, he was educated at The O'Connell School and Trinity College, Dublin. He obtained a Ph.D. in Biochemistry from Trinity. He specialised in the study of the vitamin Folic Acid. He changed career from clinical biochemistry to the Irish Diplomatic Service, serving in Belfast, London, Canberra, Copenhagen and Ottawa. Bassett was part of the Irish Government Talks Team during the Belfast (Good Friday) Agreement negotiations. He went on to serve as Irish Joint Secretary to the British Irish Intergovernmental Conference in Belfast, 2001-2005. He subsequently headed up the Irish Consular Service and the Irish Abroad Unit, which deals with relations with the Irish Diaspora. He spent his last six years in the Diplomatic Service as Irish Ambassador to Canada, Jamaica and the Bahamas. Since his retirement in October 2016, he has become a columnist with the Sunday Business Post.

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# Foreword

*by Lord Trimble*

*former First Minister of Northern Ireland and winner of the Nobel Peace Prize*

Twenty years ago, shortly after the Good Friday Agreement came into effect, I argued that what democratic politicians such as myself wanted in Northern Ireland was not some utopian society – that was for the few fanatics. What we wanted was something far more achievable: a normal society.

This is the prize that has since been enjoyed by a generation of young people, who have grown up free from the daily threat of violence that was experienced by all those who lived through the Troubles. This normalcy is a precious thing, which must be handled with care and defended with a quiet vigour. I worry now that it is in danger of being ripped apart.

As I argued two decades ago, the best way to secure normalcy in Northern Ireland was the tried and trusted method of parliamentary democracy. The Northern Ireland Assembly was – and still is – the primary institutional instrument for the development of a normal society in Northern Ireland. That idea was embodied in the spirit and terms of the 1998 Good Friday Agreement.

It is clear to me that the Irish side in the Brexit negotiations is undermining the 1998 Good Friday Agreement, riding roughshod over its terms and violating its spirit. As this research note by Policy Exchange observes, there is a genuine risk that Northern Ireland will end up as part of an effective EU protectorate, without the say-so of the Northern Ireland Assembly. This would be an appalling breach of the principle of consent, which runs through the Agreement.

For example, the North-South Institutions for cross-border co-operation that were set up under the 1998 Good Friday Agreement will require the ‘specific endorsement’ of the Northern Ireland Assembly to continue their work after Brexit. Without that endorsement, the Irish side will effectively be unilaterally deciding on the future of North-South relations and reinterpreting the 1998 Good Friday Agreement in a way that puts all of its achievements at risk.

## Executive summary:

- The Brexit negotiations have reached an impasse over the Irish border 'backstop'.
- EU and Irish demands go well beyond the avoidance of a hard border and focus on the maintenance of cross-border cooperation measures flowing from the 1998 Good Friday Agreement.
- Protecting the 1998 Good Friday Agreement remains a shared goal for all parties in the Brexit negotiations, as Paragraphs 49 and 50 of the December 2017 Joint Progress Report between the UK and EU demand.
- It is currently the hard-line Irish and hard-line EU position in talks that is the greatest danger to the terms of the Good Friday Agreement of 1998 – because of a fundamental misinterpretation of the principle of consent on which that accord rests.
- The EU have insisted that, after Brexit, they want to maintain the 'necessary conditions' for continued cooperation between the North-South institutions for cross-border cooperation that were set up under the Good Friday Agreement of 1998.
- However, these 'necessary conditions', as the Good Friday Agreement of 1998 spells out, require the 'specific endorsement' (see Strand 2, Section 12) of the Northern Ireland Assembly.
- The threat to the principle of consent can be seen in the idea that Northern Ireland could or should end up as part of an effective EU protectorate.
- Theresa May's stance is more closely aligned to the original principles of the Good Friday Agreement of 1998 than the Irish-EU side's stance.
- There are huge dangers of a 'no deal' scenario to the Irish economy and to the appearance of a hard border on the Irish side, which would be the responsibility of Dublin to administer.

**One possible way out of the current impasse is for both sides to sign a declaration that future trade talks (scheduled for the next phase of Brexit negotiations) will include an 'Ireland chapter', in which both sides undertake to use their best efforts to ensure an invisible border and to preserve all existing measures of cross-border cooperation agreed under the auspices of the 1998 Good Friday Agreement, on the basis of the principle of consent.**

## Irish demands contravene the Good Friday Agreement

The Brexit negotiations have now reached an impasse over the Irish border 'backstop'. The Irish aims in trying to secure a backstop go well beyond 'no new infrastructure on the border'. The focus on preserving the panoply of measures for cross-border cooperation, agreed under the North-South Ministerial Council of the 1998 Good Friday Agreement, has led the EU to demand that Northern Ireland remains inside the EU as far as trade and related production are concerned. The UK regards this as unacceptable and in contravention of the 1998 Good Friday Agreement.

Protecting the Good Friday Agreement of 1998 remains a shared goal for all parties in the Brexit negotiations, as stated in Paragraphs 49 and 50 of the Joint Progress Report of December 2017 (ending the first phase of Brexit talks). However, it is currently the EU position in talks that is the greatest danger to the terms of the 1998 Good Friday Agreement, because of a fundamental misinterpretation of the principle of consent on which it rests. (The principle of consent holds that the future constitutional status of the people of Northern Ireland has to be decided by a majority of the people in Northern Ireland.)

The threat to the principle of consent can be seen in the idea that Northern Ireland could or should end up as part of an effective EU protectorate (i.e. in a customs and/or regulatory regimen separate from the rest of the UK), without any consent of its local population, or the Northern Ireland Assembly. It has been said by those supporting the EU position that the principle of consent only relates to Northern Ireland's potential formal transfer into an Irish Republic. Recent evidence given to the House of Commons Exiting the European Committee has given succour to this idea.

In fact, contrary to this claim, the principle of consent is much broader and all-encompassing than this interpretation suggests. Specifically, the North-South institutions for cross-border cooperation set up under the Good Friday Agreement of 1998 require the principle of consent for them to function. It is the cross-border cooperation agreed under the aegis of these North-South bodies that the Irish and EU side are now insisting needs to be maintained after Brexit. Specifically, the EU have insisted that they want to maintain the 'necessary conditions' for continued North-South cooperation after Brexit. However, it is not for the Irish or EU side unilaterally to determine what those 'necessary conditions' are. According to the 1998 Good Friday Agreement, these

require the 'specific endorsement' (Strand 2, Section 12) of the Northern Ireland Assembly itself, for them to function. Therefore, the Irish-EU stance undermines the spirit and terms of the original peace treaty.

This provision was in the original 1998 Good Friday Agreement to reassure unionists in Northern Ireland that cross-border cooperation would have an in-built democratic checking mechanism. It is right that preserving the Good Friday Agreement is the template for all sides in the talks. However, the Irish-EU stance on this question ignores and directly undermines Strand 2 of the 1998 Good Friday Agreement, challenging the democratic legitimacy on which it rests. It is concerning that when the British Prime Minister refers back to these principles in discussions with the EU side, she is being accused of stepping back from commitments made to preserve the Good Friday Agreement in the first phase of Brexit talks. In fact, her stance is more closely aligned to the original principles of the Good Friday Agreement than the Irish-EU side.

It remains to be seen how the Irish Government can continue to push this hard-line negotiating stance, given the huge dangers of a 'no deal' scenario to the Irish economy and to the need for a hard border on the Irish side, which would be the responsibility of Dublin to administer. At the same time, it is clear that the British Prime Minister cannot be expected to act in a way that undermines the principle of consent, which sits at the core of the 1998 Good Friday Agreement. One possible way out of the current impasse is to sign a declaration that future trade talks (scheduled for the next phase of Brexit negotiations) will include an 'Ireland chapter' in which both sides undertake to use their best efforts to ensure an invisible border and to preserve all existing measures of cross-border cooperation agreed under the auspices of the Good Friday Agreement of 1998, on the basis of the principle of consent.

## North-South cooperation

The EU's Draft Withdrawal Agreement of March 2018 records a desire to '*create a common regulatory area on the island of Ireland in order to safeguard North-South cooperation, the all-island economy, and protect the 1998 [Good Friday] Agreement*'. Note that this does not say 'to avoid a hard border' – despite that having been the focus of much recent political debate. In fact, the aims are much wider, focussing on preserving North-South cooperation, which the Draft Withdrawal Agreement of March 2018 says is part of the 1998 Good Friday Agreement and which it claims depends on membership of the EU.

The facts are as follows. The Good Friday Agreement of 1998 set up a North-South Ministerial Council and six implementation bodies. It is the measures

implemented by these bodies that the Irish and EU are claiming depend on joint EU membership. All of the measures, including medical cooperation along the border, would be supported by the UK without much difficulty. It is unclear how much cross-border cooperation relies on joint EU membership. The recent NAO report says that most medical cooperation is independent of the EU. Whatever the truth, the UK has not accepted that a common Ireland/Northern Ireland regulatory area is necessary to keep them in operation. It is on the Irish side that there seems to be fear that EU inflexibility will cause problems.

## The backstop

The UK Government had conditionally agreed in paragraph 49 of the December 2017 Joint Progress Report to a form of words now generally referred to as 'the backstop'. These words were: *'In the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 [Good Friday] Agreement'*.

In that paragraph the context is clearly the avoidance of a hard border, but the conditions at the end of the sentence once again refer to North-South cooperation. However, paragraph 43 of the December 2017 Joint Progress Report does say: *'The United Kingdom also recalls its commitment to the avoidance of a hard border, including any physical infrastructure or related checks and controls'*. It is unclear where that 'commitment' was made or whether the 'checks and controls' refer solely to the land-border or to the island as a whole or indeed to the Irish Sea. Moreover, the term 'hard border' is nowhere defined.

The EU Draft Withdrawal Agreement of March 2018 'highlights' that the backstop *'applies unless and until an alternative arrangement implementing another scenario is agreed'*. The words 'unless and until' appear to indicate permanence and to give the EU and Ireland a veto over Northern Ireland exiting the arrangements. Unless the EU agrees, Northern Ireland would stay within the EU for trade purposes. To make the potential clear, the March 2018 Draft Withdrawal Agreement states that *'the Protocol on Ireland/Northern Ireland... shall apply as from the end of the transition period' (para 168)*.

## The implications of the draft protocol

The rest of the Ireland/Northern Ireland protocol of the EU's Draft Withdrawal Agreement of March 2018 spells out what this means in detail. The following excerpts give a flavour of its ambition and reach:



*'A common regulatory area comprising the Union and ... Northern Ireland is hereby established. The common regulatory area shall constitute an area without internal borders'.*

*'The territory of Northern Ireland .... shall be considered to be part of the customs territory of the Union'.*

*'Customs duties .... and quantitative restrictions on imports and exports shall be prohibited between the Union and Northern Ireland'.*

The March 2018 Draft Withdrawal Agreement goes on in the same vein to propose subjecting Northern Ireland to the provisions of EU law on VAT and excise duties for goods, sanitary and phytosanitary rules, the production and marketing of agricultural and fisheries products, wholesale electricity markets, and environmental protection (concerning the control of the import, export, release into, or transport within the Union of substances or material, or plant or animal species).

To drive home the extent of what is proposed, the March 2018 Draft Withdrawal Agreement says that the protocol shall be *'applied so as to maintain the necessary conditions for continued North-South cooperation, including in the areas of environment, health, agriculture, transport, education and tourism, as well as energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport'*. Not much it seems would escape the tentacles of the protocol. Moreover this paragraph is already conditionally agreed with the UK. We note however that it imposes an obligation on the EU as well as the UK. These 'necessary conditions' are predicated in the 1998 Good Friday Agreement on the existence of consent granted by the Northern Ireland Assembly.

## The British rejection

The EU claimed that the March 2018 Draft Withdrawal Agreement was merely the translation into legal text of the Joint Progress Report of three months earlier. To British eyes it was much more than this, although the poor drafting of the December 2017 Joint Progress Report from a British point of view meant that it was not always easy to tell. The Draft Withdrawal Agreement of March 2018 was widely interpreted as an attempt to annex Northern Ireland and it was almost immediately rejected by Theresa May who denounced it as an agreement that no British Prime Minister could sign up to.

A clear consequence of the EU proposals was that a border between the EU and GB would need to be created in the Irish Sea, something strongly rejected by the DUP – upon whom Mrs May depends for her majority. Because this also appeared to have been an implication of the original draft of the December 2017 Joint Progress Report, the DUP had forced the insertion of an additional

paragraph at the last minute. This new paragraph 50 of the December 2017 Joint Progress Report stated that *'In the absence of agreed solutions ... the United Kingdom will ensure that no new regulatory barriers develop between Northern Ireland and the rest of the United Kingdom, unless the NI Executive and Assembly agree ...'*.

The EU Draft Withdrawal Agreement of March 2018 cut through the complexity essentially by ignoring the new paragraph 50 of the earlier December 2017 Joint Progress Report and hence by also by-passing the 1998 Good Friday Agreement that it appeared to be so determined to uphold.

In her appearance at the Exiting the European Union Commons Committee this week, Dr Katy Hayward of Queen's University Belfast claimed that the backstop could not be seen as a change to Northern Ireland's constitutional status. If, however, it was to override the 1998 Good Friday Agreement's commitment to democratic consent, it would do exactly that. It would also conflict with the 1998 Good Friday Agreement's explicit insistence that the development of North-South cooperation required the 'specific endorsement of the Northern Ireland Assembly'. Her admission that the backstop would raise "interesting questions about governance" post-Brexit hints at the nature of the EU's proposal.

Despite the UK's rejection, the EU have failed to withdraw or water down the Draft Withdrawal Agreement of March 2018. Promises by Michel Barnier to de-escalate the impact of the March 2018 Draft Withdrawal Agreement amounted in the end to little of significance. His suggestion was that Irish Sea checks could be done at British ports or inland in GB. Not surprisingly the DUP took the view that a border is still a border wherever the checks are done. Incidentally, this is exactly the response of the EU and Ireland to British suggestions that checks might take place away from a land border in Ireland. It was somewhat hypocritical that both the EU and Ireland's Deputy Prime Minister could extol the virtues of technology, in regard to proposed inspections between GB ports and Northern Ireland, while ridiculing the same technology having a role on a North/South border in Ireland.

## What about tariffs?

What is odd about this whole debate is the lack of mention of tariffs. If the backstop is meant to operate in circumstances where there is no agreement between the UK and EU, then these circumstances would involve the imposition of tariffs certainly by the EU and most probably also by the UK. The idea that a backstop might involve a few veterinary checks on ferries or at ports in GB is palpably false. In the circumstances in which a backstop would operate, tariffs would need to be collected. In our view these could be collected without border checks but the same is true for a land border. Of course, the idea that a tariff wall would exist between Northern Ireland and GB

is anathema to the DUP and would also be roundly rejected by most Tory MPs. Implicitly, the British Labour Party also supported this position by not forcing a division on the matter in the Customs Bill during its passage through the House of Commons.

As Theresa May has said, no British Prime Minister could agree the arrangements proposed in the Draft Withdrawal Agreement of March 2018. On the Irish side, the Taoiseach Leo Varadkar and Deputy Prime Minister Simon Coveney have been equally intransigent. Mrs May's July 2018 Chequers proposals for an all-UK customs arrangement fail to meet Irish aspirations to protect existing cross-border cooperation and this aspect of the issue requires detailed talks on trade.

Nobody can be sure if there will be a resolution. Every serious commentator on Ireland has stated that 'no deal' will do serious harm to the Irish economy. There are reports – denied by Dublin – that senior EU leaders are looking for a compromise.

## The solution

**The compromise should be for both sides to sign a declaration that future trade talks will include an Ireland chapter in which both sides undertake to use their best efforts to secure an invisible border and to preserve all existing measures of cross-border cooperation agreed under the auspices of the 1998 Good Friday Agreement.** With the addition of that, plus the removal of the unacceptable elements in the Ireland/Northern Ireland Protocol, and in the context of the UK remaining in a customs arrangement with the EU, the Draft Withdrawal Agreement of March 2018 could then be signed. Talks could then begin on the important matter of the long-term relationship between the UK and EU. The imbalance in the current EU proposals would be replaced by a balanced agreement. Neither side would have legal certainty. Both, however, would have a strong incentive to reach a mutually satisfactory agreement.

