Strengthening the UK's position on the Backstop

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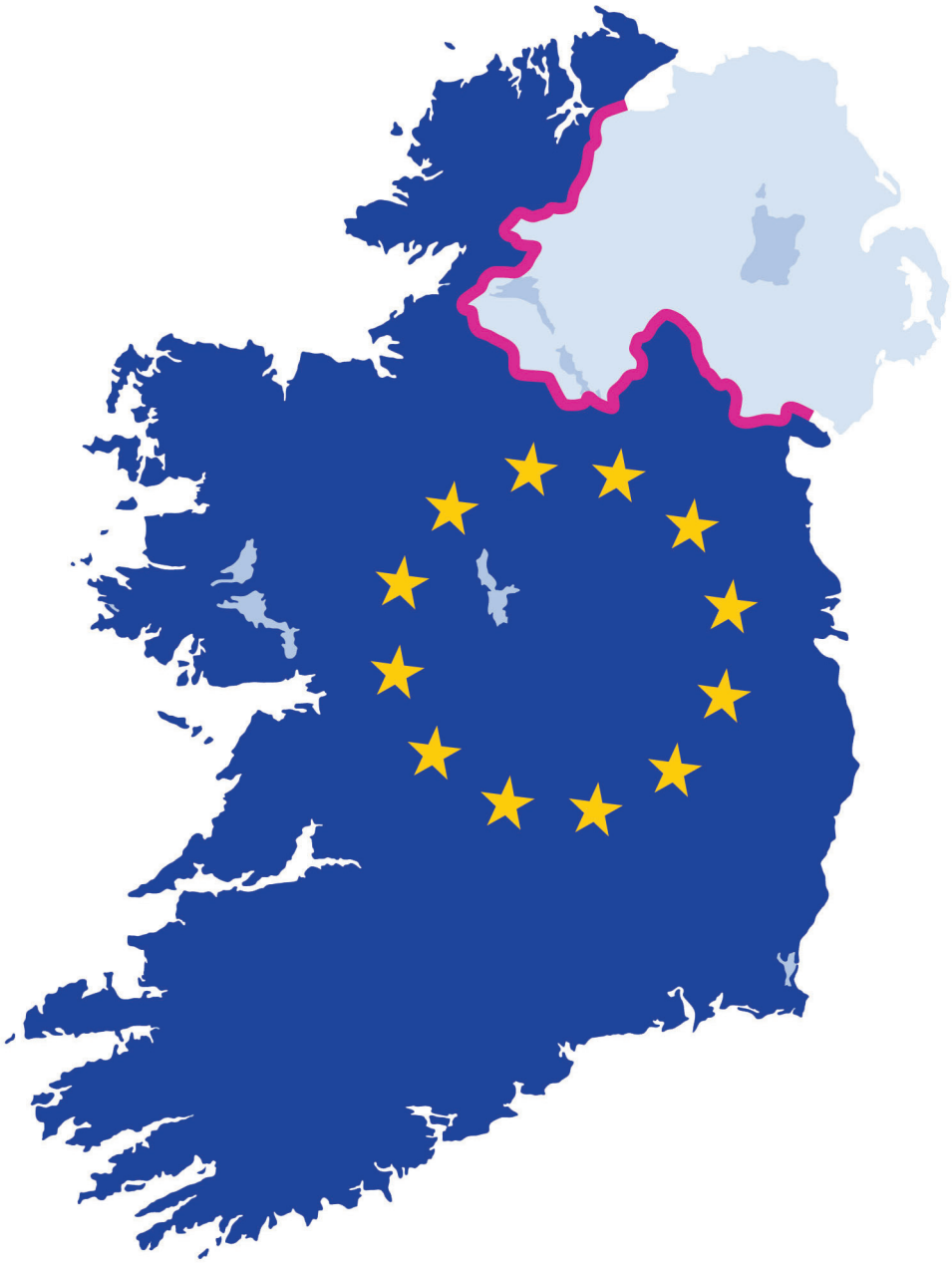
A Policy Exchange Research Note

Professor Guglielmo Verdirame and Professor Richard Ekins



About the Author

Professor Guglielmo Verdirame is Professor of International Law at King's College London in the Department of War Studies and the School of Law; and a barrister at 20 Essex Street Chambers

Professor Richard Ekins is Associate Professor, Faculty of Law, University of Oxford and Head of Policy Exchange's Judicial Power Project.

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Strengthening the UK's position on the Backstop

Few people like the backstop, and for good reason. But the UK risks making matters worse by giving up good arguments about how the backstop should be interpreted and instead quietly going along with the most unfavourable interpretations that can be put upon it. There are two main areas of concern: (1) the relationship between the backstop and the Belfast/Good Friday Agreement, which Lord Bew of Donnegore has addressed separately for Policy Exchange; and (2) the conditions, if any, under which the backstop can be brought to an end. This note outlines the problem and sets out ways in which the Government can strengthen the UK's legal position.

The Belfast Agreement

With brinkmanship, and some cheek, Ireland has appropriated the Belfast Agreement and tirelessly deployed it in the withdrawal negotiations to its advantage. Why the UK did not object is a mystery.

The UK should have insisted from the outset that the difficulties Brexit poses for Northern Ireland had to be dealt with by way of agreement between the UK and Ireland. British-Irish bilateralism is at the heart of the peaceful settlement of the conflict in Northern Ireland. Various institutions created by the Belfast Agreement constitute an ongoing framework for such bilateral action. Doubtless the absence of a functioning devolved administration in Northern Ireland since the 2017 elections has complicated matters. But this does not excuse the Irish Government's decision to transform the Northern Ireland question into a UK-EU question. Ireland was of course trying to gain leverage in this way. This may have been a shrewd political calculation – it may yet misfire – but a service to the Belfast Agreement it was not.

The UK Government should have also emphasised from the outset that any solution for Northern Ireland had to respect the principle of consent which is at the heart of the Belfast Agreement. To be fair to the British Government, it never advanced proposals that it knew to be unacceptable to the republican community in Northern Ireland; there is less evidence of any concern on the part of the Irish Government about the consent of the unionist community.

Had the Belfast Agreement really informed the Brexit policies of the Irish and British Governments, the UK and Ireland would have been united in explaining to other European countries that their obligations under the Agreement required

them to identify solutions cooperatively and that the solutions had to have a broad base of consent in Northern Ireland and could not afford to risk alienating either community. As we know, the backstop has already had exactly the opposite effect. While it is true that some unionists support the backstop, both the DUP and UUP are strongly opposed.

As noted by Lord Bew, there is thus a real risk that imposing the backstop will "*turn the Good Friday Agreement on its head*". This is a risk implicitly acknowledged, but not entirely resolved, in the Exchange of Letters of 14 January 2019 between our Prime Minister, and the Presidents of the European Commission and the European Council. In that Exchange, the UK and the EU confirmed their shared understanding that the Withdrawal Agreement and the protocol setting out the backstop "*do not affect or supersede the provisions of the Good Friday or Belfast Agreement of 10 April 1998 in any way whatsoever*".

There are however some important differences between the UK letter and the EU response.

The UK letter describes the UK understanding on the Belfast Agreement in the following terms:

> ***the Protocol does not affect or supersede the provisions of the 1998 Belfast Agreement in any way whatsoever.*** *The Protocol has as a key objective the protection of the Belfast Agreement in all its parts. This includes full respect for the provisions regarding the constitutional status of Northern Ireland and the principle of consent, and the underpinning three-stranded approach. The Protocol does not alter in any way the arrangements under Strand II of the Belfast Agreement in particular, whereby areas of North-South cooperation in areas within their respective competences are matters for the Northern Ireland Executive and Government of Ireland to determine in accordance with their respective legal regimes. The safeguards and protections, including the cross- community provisions, set out in the Agreement and applying to North- South cooperation remain in place and unaffected.*

The response from the European Commission says:

> *The European Commission can also confirm our shared understanding that the Withdrawal Agreement and the Protocol on Ireland/Northern Ireland:*
>
> *• Do not affect or supersede the provisions of the Good Friday or Belfast Agreement of 10 April 1998 in any way whatsoever; they do not alter in any way the arrangements under Strand II of the 1998*

> *Agreement in particular, whereby areas of North-South cooperation in areas within their respective competences are matters for the Northern Ireland Executive and Government of Ireland to determine;*

The EU understanding does not, therefore, expressly refer to the principle of consent or to the three-stranded approach. Nor does the EU identify the protection of the Belfast Agreement as a "*key objective*" of the Protocol. These omissions are telling.

The backstop would inevitably weaken the institutions of the Belfast Agreement and their role in policy-making for Northern Ireland. For example, the Belfast Agreement provides that the Northern Ireland Assembly must be "*capable of exercising executive and legislative authority*". As long as the UK is a member of the EU, it can be said that Northern Ireland has some EU-level representation, and that the exercise of executive and legislative authority by the EU does not contravene the principle of consent. But this would not be the case after Brexit and if the backstop were triggered. The backstop would depart from general principles of democratic representation and consent, principles which are given particular force in Northern Ireland and find detailed expression in the Belfast Agreement.

To be clear, there is nothing wrong with using an Exchange of Letters to clarify, expand (or even amend) the Withdrawal Agreement. The MPs and commentators who dismissed it as legally irrelevant were wrong. As a matter of basic international law, an exchange of letters or notes can even be a 'treaty'. There are in fact various examples of treaties concluded by the UK in this manner, including some famous ones (e.g. the 1940 and 1941 Land-Lease Agreements with the US). In any event, even if the Exchange of Letters between the UK and the EU were not technically a treaty, it would be very difficult for either party, or a future tribunal, to interpret the Withdrawal Agreement in a manner that is different from what is laid down in the Exchange.

The problem is that the Exchange reveals that the UK and the EU may not share a common understanding of the relationship between the Belfast Agreement and the backstop.

The UK continues to be too timid about making clear its understanding of that relationship. Such timidity may limit our ability to raise certain arguments in the future, should it become necessary to resist the EU's interpretation of the backstop or to make the UK's case before a tribunal. In particular, as we argued in a recent Policy Exchange report, the UK should insist, unilaterally if need be, on its future right to suspend or terminate the backstop if faced with a material

breach by the EU of its obligations. This right is provided for under the Vienna Convention on the Law of Treaties. As noted in our Policy Exchange report, a "*material breach*" under the Vienna Convention consists in the "*violation of a provision essential to the accomplishment of the object or purpose of the treaty*". In this regard, the UK Letter of 19 January was helpful in stating that the protection of the Belfast Agreement is a key objective of the Protocol. The UK can go further and affirm that this objective cannot be met if the backstop is allowed to become permanent.

The UK Government should also be quite firm about Ireland's responsibilities under the Belfast Agreement. For example, the Government should have insisted on Ireland being part of the Exchange of Letters. Ireland cannot offshore its legal obligations and political commitments under the Belfast Agreement to Brussels, as these were undertaken by Ireland, not by the EU. Ireland should thus be directly involved in any exchange concerning them. The UK Government should insist that Ireland is a party to any further Exchange of Letters and should seek to complement the Withdrawal Agreement with a UK-Ireland agreement which would make clear a joint commitment to priority for the Belfast Agreement.

The termination of the backstop

The most critical aspect of the backstop is its termination, that is, the conditions under which either party may bring it to an end. Ideally, the EU and UK would agree on a clear termination process. This agreement could be recorded in a binding Exchange of Letters, a separate Protocol, or an amendment of the Withdrawal Agreement itself. We may, however, end up with the current text, in which case the Government must be careful not to repeat the mistake of acquiescing – as it did with the December 2017 Joint Report – in the least favourable interpretation for the UK.

The key provision on termination is Article 2(1) of the Protocol on the backstop which reads: "The Union and the United Kingdom shall use their best endeavours to conclude, by 31 December 2020, an agreement which supersedes this Protocol in whole or in part." This is a crucial provision, not least in light of what has been said above about its bearing on the Belfast Agreement. In fact, in order to be able to invoke its right to suspend or terminate the backstop under the Vienna Convention, the UK would have to point to a material breach of a treaty obligation by the EU. In the current text, Article 2(1) is the one provision on which the UK could conceivably rely for this purpose.

Article 2(1) does not specify what type of agreement could eventually supersede the backstop. But there should be no doubt about one thing: the EU cannot insist that a necessary condition for any future agreement is that the UK would have no right of unilateral withdrawal from that agreement, or that the exercise of such a right would always be subject to the backstop or some future version of it. In other words, the EU cannot seek to extend the backstop forever in all but name. There are two reasons why our Government should make clear now that this is its understanding.

First, the EU's deputy negotiator, Ms Sabine Weyand, has already suggested privately that the Protocol is in effect permanent and requires the customs union as the basis for an agreement about the future relationship between the UK and the EU. The EU letter of 14 January contained a carefully worded passage that should also cause alarm:

> *The Commission can also confirm the European Union's determination to replace the backstop solution on Northern Ireland by a subsequent agreement that would ensure the absence of a hard border on the island of Ireland on a permanent footing.*

If by "*permanent footing*", the EU means arrangements which would bind the UK forever, with no right of unilateral withdrawal or with a right of withdrawal subject to a backstop of sorts, the UK must be clear that it would regard such a negotiating stance by the EU as a material breach of the "*best endeavours*" obligation. In outlining this position, the UK would not be adopting or insisting on a far-fetched interpretation of Article 2(1). On the contrary, the "*best endeavours*" obligation to replace the protocol with a long-term deal cannot be reasonably interpreted to imply "*as long as the long-term deal preserves the backstop in some way*". A commitment to replace something with something else but only as long as there is no material difference between the two is empty.

Since this wholly unreasonable interpretation of Article 2(1) has already cropped up, the UK cannot afford to leave it unchallenged. The Government must hold the EU to a reasonable interpretation of the current wording of Article 2(1), and publicly reserve the UK's rights to suspend or terminate the backstop in the event of a material breach by the EU, including a request by the EU that something equivalent to a permanent backstop be part of the agreement designed to replace the backstop. But, if it is to preserve this option, the UK must act to strengthen its position now. This can be achieved in a number of ways, ideally by agreement with the EU through an Exchange of Letters or a Protocol but also – as discussed in the earlier Policy Exchange report – through a unilateral interpretative declaration. It cannot and should not be left to chance.

Secondly, the Government may also want to clarify these points now to pre-empt those in the UK who are in effect endorsing the Weyand position as a means of giving their preferred form of Brexit (or of no-Brexit) a tactical advantage over other options. Whatever shape or form the future UK-EU relationship takes, it will have to include a right of unilateral withdrawal, and that right of unilateral withdrawal cannot be subject to any kind of backstop. EU membership includes such a right; so too does membership of the EEA and Canada-style free-trade agreements. It would be quite wrong for the UK to find itself less free to exit a future agreement than it is to exit EU membership itself. Further and finally, the UK would find itself in a hopelessly weak position in the final deal negotiations if it is stuck between the rock of the backstop and the hard place of a long-term deal from which it is impossible to exit.