

What do we want from the next Prime Minister?



A series of policy ideas for new leadership:
The Backstop

Lord Bew

Foreword by Sir Graham Brady MP



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Foreword

by Sir Graham Brady MP

In January this year something unique happened – a majority of the House of Commons agreed an approach to Brexit. A coalition of Conservatives, the DUP and Labour MPs came together to pass an amendment that stood in my name. It was the first – and to date only – time that the elected chamber agreed on how the UK should leave the European Union and deliver on the result of the Referendum.

The amendment addressed the so-called ‘Backstop’ – that part of the Agreement the Government had negotiated with the EU to which so many objected. The provisions of the Backstop could have seen Northern Ireland separated from the rest of the United Kingdom, something those of us who cherish the Union could not countenance. To address this, my amendment stated that the Government should seek alternative arrangements to solve the Irish Border issue and ensure Northern Ireland’s status as an integral part of the UK. Subject to this, the House would back the other aspects of the Agreement with the EU.

Unfortunately our Government did not secure sufficient changes to the Agreement from the EU and, as we know, the House of Commons rejected the deal on multiple occasions.

Specifically, the Government has been too pliant in accepting the EU’s argument that the Backstop is the only way to protect the terms of the Good Friday Agreement. It was too slow in taking up the suggestions of leading international customs experts that technology could help mitigate the effects of checks on the border (accepting the straw man argument that such efforts were useless if they could not emphatically “solve” the border issue).

The election of a new leader now presents an opportunity to return to the negotiations and secure an agreement that is acceptable to both the House of Commons and the EU. Their task will be twofold: firstly, as this admirable Policy Exchange report, informed by the peacemakers of 1998, makes clear – they must recognise that the Backstop is a threat to the Good Friday Agreement, rather than its guarantor. The Government should make sure that any deal on the Irish border protects the “principle of consent” which is the bedrock of the Good Friday Agreement (GFA).

Secondly, they must at once ensure work on alternative arrangements, including the technical solutions, is given (long overdue) priority. Such arrangements will be needed under any Brexit scenario, including ‘No Deal’ or Canada++ future relationship and a number of leading international customs and border experts insist that technology already exists that could considerably mitigate the effects of any future friction on the border. These do not necessarily “solve” the border issue entirely; but the truth is

that a number of checks and differences exist already. After all, Northern Ireland and the Republic of Ireland operate in a different monetary system, different VAT regimes, operate under different legal regimens, and there are pre-existing problems over things like smuggling and security. The scale and functioning of such checks is the real issue here.

With sufficient preparations and goodwill from all parties, a way round this impasse can be found. The next Prime Minister would do well to heed the message of this Policy Exchange report and, with renewed vigour, work with our European partners to secure an agreement that is in the best interests of all concerned.

Breaking the Brexit impasse

Towards a new approach to the Irish border that protects the peace process and secures the future of the Union

The next government should

1. Seek a **new approach** to the Irish border issue as part of a broader strategy after Brexit to stabilise and strengthen the Union. Work towards a **new memorandum of understanding with the EU, and especially the Irish Government**, about how the Irish border will be managed in the future that puts the **preservation of the peace process** at its core.
2. Make sure that any deal on the Irish border **protects the “principle of consent”** which is the bedrock of the Good Friday Agreement (GFA) and is also reconcilable with the UK’s prior commitments under international law (such as UN Security Council Resolution 1373 on border security). There should be a commitment on all sides to ensure that future changes affecting regulatory alignment should not be made until it has been accommodated to the GFA.
3. **Build on the success of the ‘Brady Amendment’ and insist on a time-limit or release clause to the backstop** in negotiations with the EU (if circumstances demand) and continue to insist upon the UK’s own right of interpretation of the more ambiguous aspects of the Withdrawal Agreement (firming up the interpretative declaration that will accompany any future meaningful vote and considering, in extremis, the right of a unilateral exit should the WA undermine the GFA). Without this, or without a workable mechanism for the UK to exit the backstop, there will be no agreement.
4. Invest serious resources in **customs technology** to reduce any future friction on the border in the event that such checks do become necessary. But break with the **unrealistic idea that there should be no effective border controls at all**, including the absurd notion that “any checks” – no matter where they take place – would undermine the GFA.
5. Prioritise the return of the devolved executive in Northern Ireland and setting the basis for improved relations with the Irish government.
6. **Develop a whole of Union approach** to preserving the cohesion

and territorial integrity of the UK. Consider a Charter of the Union in order to anticipate further changes in the relationship between the devolved institutions and Westminster. The creation of a new Department of the Union or the appointment of a dedicated Minister of State is also worthy of consideration.

Protecting the Union

In any circumstances, the next Prime Minister is duty bound to give the state of the United Kingdom his or her fullest attention. Today, in an era in which the Union is being questioned and challenged, the cohesion of the British nation state must be the absolute priority of anyone seeking to hold the highest office.

To that end, one of the first jobs of the new Prime Minister will be to seek some sort of way out of the impasse on the Irish border. This is not only vital to the chances of leaving the EU by the deadline of 31 October 2019; it is also essential to the future of confidence and supply arrangements with the DUP. Getting this will help ensure an orderly Brexit. More broadly, it has been shown this is also necessary to command the support of the current House of Commons.

It is worth remembering that – as Arlene Foster has recently made clear – the DUP do not want to see a no deal Brexit and there are concerns that it could destabilise the Union. There is still room for compromise. But the only way to achieve this is for something substantive to happen in negotiations that alleviates the current terms of the backstop. If this cannot be achieved, there will be a hard Brexit and the EU will expect the Irish government to put up a hard border of their own.

Policy: the government should seek a new approach to the Irish border issue as part of a broader strategy to stabilise and secure the Union. It should work towards a new memorandum of understanding with the EU, and especially the Irish government, about how the Irish border will be managed in the future that puts the preservation of the peace process at its core.

The wrong turn: a failed negotiation on a flawed premise

Progress on the Irish backstop can only be achieved if the government adopts a markedly different approach than the one it has pursued so far.

It is not quite true to say that the British government has been outplayed in the negotiations on the backstop, as it has recognised genuine concerns about the return of a hard border and sought to address them. But it has singularly failed to anticipate the domestic political objections to its stance, including genuine concerns about the backstop and ceded needless ground on some fundamental issues. This is one of the reasons for the impasse today.

Specifically, the government has been too pliant in accepting the EU's argument that the backstop is the only way to protect the terms of the Good Friday Agreement. It was too slow in taking up the suggestions of leading international customs experts that technology could help mitigate the effects of checks on the border (accepting the straw man argument that such efforts were useless if they could not emphatically "solve" the border issue). And it has failed to pay sufficient attention to genuine experts on Northern Ireland – including those who were central to the peace process – who outlined the risk that the backstop poses to the Good Friday Agreement and future stability in Northern Ireland.

EU negotiators continue to insist that there will be no reopening of the Withdrawal Agreement or changes to the terms of the proposed backstop. But nor do they want responsibility for asking the Irish government to put up a hard border in the event of a no deal (thereby creating precisely the situation that they sought to avoid). As such, there is room for further constructive dialogue on the backstop (along with flexibility in how it is interpreted) in a way that addresses everyone's concerns. But the British government needs to take the lead, pushing back against the false narrative around the peace process (of which it is the protector-in-chief) and changing its approach.

The urgent need for a new approach: back to first principles

The Good Friday Agreement has been ripped out of its original historical context. It was above all an agreement about the sharing of power within Northern Ireland and on a North/South basis. Ironically, while the GFA made explicit provisions for north-south cooperation in, for example, animal health and food safety, the WA in a powergrab appropriates these competences for the backstop. This is despite the recognition by the UK Government in its 2017 Position Paper of the pre-existing, effective structures for power-sharing and North/South cooperation.

Over the last eighteen months, Policy Exchange has made the argument that the Withdrawal Agreement, as it is being presented, is incompatible with some aspects of the Good Friday Agreement (and other international obligations such as UNSC Resolution 1373 on border security). The government has acknowledged these concerns and – in the last few months – begun to move to address some of them (including acknowledging the possibility for potential conflict between the Withdrawal Agreement and the Good Friday Agreement).

The idea that the backstop protects the Good Friday Agreement has become an article of faith at the EU; but this is based on a highly partial reading of the peace process. The Good Friday Agreement is a considerable achievement of statecraft, brought about by close Anglo-Irish cooperation. But it has been weaponised by the Irish government and the EU in a way that risks contributing to instability in Northern Ireland. It is the British government that pays for the maintenance of peace in Northern Ireland

in what is its sovereign territory. It is time to take control of this issue in negotiations rather than following talking points as directed by Brussels and Dublin.

This false narrative – that the backstop is the only way to protect the Good Friday Agreement – must be challenged at its core. There is no mention of a frictionless border in the terms of the Good Friday Agreement; nor is the UK committed to preserving a frictionless border under its previous commitments in international law. In fact, the melting away of a hard border has been a more organic process – one enabled by the peace process but not central to its terms. When it comes to frictionless trade, the key change was the introduction of the Single Market in 1992 (which removed customs posts). After that, the success of the peace process enabled the removal of military checks but that is something different and unrelated to Brexit.

The Irish government's focus on this issue has been presented as a matter of defending peace. This is a highly dubious claim. The threat from dissident republicans was increasing before Brexit and dissident republican groups have consistently argued that Brexit makes no difference to their campaign. It might be more accurate for Dublin to say that there are concerns in the nationalist community about the effects of Brexit. But it is patronising to the people of Northern Ireland for the EU to style itself as more concerned about keeping the peace than the British government. Dublin's main point is that Brexit could threaten the cross-border co-operation measures developed largely since 1998. But many of these issues are low-level and soluble and need not have been elevated to the sacrosanct status they are today.

In fact, in its present form, it is the Withdrawal Agreement that potentially endangers the terms of the Good Friday Agreement (by raising the prospect a top-down imposition by external authorities without formal democratic control). Specifically, as a number of leading players in the Northern Ireland peace process have argued, the backstop potentially undermines the principle of consent that is so vital to the settlement in Northern Ireland. It undermines Northern Ireland's status within the UK and erodes the control of Northern Ireland's Assembly over the pace of North-South cooperation. As the distinguished, pro-EU, Dublin-based economist Dan O'Brien set out:

It would change the constitutional status of Northern Ireland. Voters there would be disenfranchised. The Parliament making the swathes of laws governing their commerce would have its seat in Strasbourg and voters in Northern Ireland would have no representatives in it. The highest court in the land would be in Luxemburg. Again citizens of Northern Ireland would have no role in the running of that court. EU law would be supreme over UK law in Larne. It would not be across the water in Stranraer. (Sunday Independent 10 March 2019)

There are also genuine economic concerns about a long-term backstop. The vast majority of Northern Ireland's trade is with the rest of the UK and only a small portion goes across the border. The farming community,

who are concerned about the effects of “no deal”, also speak of dangers of being trapped in a regulatory universe that is separate for the British market in which they operate. This could have negative effects over the longer term on their competitiveness in the UK market as if producers are operating EU rules, rather than those in the rest of the UK, a case will exist that the products will not be able to be merchandised as British.

Policy: the government should make sure that any deal on the Irish border protects the “principle of consent” which is the bedrock of the Good Friday Agreement (GFA) and is also reconcilable with the UK’s prior commitments under international law (such as UN Security Council Resolution 1373 on border security). There should be a commitment on all sides to ensure that future changes affecting regularity alignment should not be made until it has been accommodated to the Good Friday Agreement.

The changing mood: seizing the moment

All parties want a deal – just not this Deal. No one in Northern Ireland (including all the main political parties) wants a hard border to return. No one in Northern Ireland (including the DUP) wants to see a hard Brexit. Very few in the UK or the EU want a “no deal” scenario. But unless something is done to allay concerns on the backstop, in a way that can command the support of parliament, this is a real risk.

Ironically, there is growing recognition that the EU’s hard-line stance (putatively in solidarity with Dublin) might well have highly negative consequences for Ireland itself, which stands most to lose from no deal. Any hard border that Ireland is forced to put up would hurt the Republic more than other parties, making a mockery of its declared strategy to avoid such an outcome.

There is a growing recognition of this of quandary in Dublin. Dan O’Brien, a respected Irish economist and columnist in the Irish Independent recently wrote that the Irish government needed to “rethink their approach to Brexit to take account of the changed situation.” He suggested that Theresa May’s greatest mistake as Prime Minister was to fail to see how the backstop would play out but also criticised the Irish government for sticking intransigently to the same line: “Demanding that there be absolutely no change to the Border for all time, and claiming that any whatsoever was a catastrophe for the Good Friday Agreement, were high-risk positions to take. The later position also came with the downside that any appearance of compromise could be construed as putting peace at risk. Painting oneself into a corner when the stakes are so high is never a good idea”. Instead, Mr. O’Brien suggests a five-year time-limit to the backstop, combined with the current transition period up the end of 2020, and therefore guaranteeing zero change to the border until 2025.¹ It is worth noting that Mr. O’Brien is chief economist with the pro-EU Institute for European and International Affairs.

It is also worth noting that a number of senior Europeans are wondering

why Europe is being pushed to the point of no return on an issue which should – with good will – be possible to solve. Notably, Angela Merkel’s most likely successor, CDU leader Annegret Kramp-Karrenbauer, has put out a tender to British negotiators to seek another way round the impasse. She says “If the UK now came to us and said ‘let’s spend five days negotiating non-stop on how to avoid the backstop’, I can’t imagine anyone in Europe saying ‘No’. If the UK had new watertight proposals for the border, I don’t think anyone in the EU would say, ‘We don’t want to talk about it.’” It is time for the government to respond this plea with positive and constructive suggestions of its own.

Policy: the government should insist on a time-limit or release clause to the backstop in negotiations with the EU and continue to insist upon the UK’s own right of interpretation of the more ambiguous aspects of the Withdrawal Agreement. This could mean two things: firming up the interpretative declaration that will accompany any future meaningful vote; or, in the event that the WA is seen to undermine aspects of the GFA or the Union, to insist on a right of unilateral exit in extremis). Without this, or without a workable mechanism for the UK to exit the backstop, there will be no agreement.

Principles for negotiation and expert voices

Policy Exchange has published a series of reports on the legal, constitutional, economic and security aspects of the Irish border question. A number of these proposals have been gradually adopted by government towards the end of Theresa May’s tenure, approximately from the time of the Brady amendment. Gradually, these have helped guide a more constructive approach. However, the government still has further distance to go to clarify and refine the backstop in a way that allows the Withdrawal Agreement to pass parliament before 31 October 2019. It should do so on the basis of the following principles:

1 Emphasise the sanctity of the principle of consent as the basis of the Good Friday Agreement.

See Policy Exchange, *The Backstop Paralysis: A Way Out*, 28 January 2019:

The Agreement of 1998 was intended to bring to a close the ‘cold war’ between North and South. This it has done for many years. Unless we preserve its template, the current deterioration in North-South relationships might intensify in unpredictable and dangerous ways. In particular, the unionist population, which underwent an enormous internal struggle to accept the new North-South arrangements, is likely to regard itself as having been betrayed on the key point of compromise in 1998.

See Lord Trimble in Graham Gudgin and Ray Bassett, *The Irish Border and the Principle of Consent*, 1 November 2018

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.

2 Continue to acknowledge the potential conflict between the Good Friday Agreement and the Withdrawal Agreement, thereby allowing itself the option of a unilateral correction to the working of any future backstop.

See Lord Trimble, *The Irish Backstop: Nothing has changed? It has actually*, 18 March 2019:

While the Withdrawal Agreement itself has not changed, the potential practical functioning and probable duration of any future backstop has been significantly changed in the course of recent negotiations. The UK Government is now correct in asserting the right, in extremis, to appeal to international law under the Vienna Convention . . . Crucially, the Government has now admitted the point that there are circumstances in which the backstop may undercut the 1998 Good Friday Agreement rather than protect it, as it is intended to do. This could constitute the 'socially destabilising effect' by which certain provisions of the Withdrawal Agreement might be 'disapplied'.

3 Continue to invest in technology that mitigates the effects of any potential friction on the border (but get away from the argument that unless such technology involves no checks at all, it should be ignored)

As Policy Exchange has argued in a series of reports, there are many leading international custom and border experts who insist that technology already exists that could considerably mitigate the effects of any future friction on the border. These do not necessarily "solve" the border issue entirely; but the truth is that a number of checks and differences exist already. After all, Northern Ireland and the Republic of Ireland operate in a different monetary system, different VAT regimes, operate under different legal regimens, and there are pre-existing problems over things like smuggling and security. The scale and functioning of such checks is the real issue here.

The government should welcome the fact that some of these ideas are now being investigated by the Alternative Arrangements Working Group but it needs to take the lead in this effort and take its own proposals before the EU. See Dr Graham Gudgin and Ray Basset, *Getting Over the Line: Solutions to the Irish border*, 9 May 2018:

The Irish border is not the insoluble obstacle to Brexit negotiations that it has

been made out to be and the UK can leave the single market and customs union while preserving a frictionless border in Ireland. This can be achieved by the use of new technology and in the context of a Free Trade Agreement between the UK and EU, in an arrangement that goes beyond the Customs Partnership and in no way threatens the Good Friday Agreement.

The search for technological methods to reduce potential friction on the border should not be the responsibility of the British government alone, however. The Irish government should also be prepared to commit resources to the search and London should call on Dublin and its customs service to work again, as it did under Enda Kenny, with their British counterparts in a cooperative spirit.

4 Seek to build political good will with the Irish government and the EU but stop punching below our weight.

There will be no breakthrough on the Irish border issue unless the government seeks to pursue these talks in a constructive manner. There is no appetite in the EU for deserting Ireland, which has genuine concerns about the future of the Good Friday Agreements. Efforts must be made to reach out directly to Dublin, rather than over the heads of the Irish government, and to seek to rebuild the spirit of Anglo-Irish cooperation that existed before the 2016 referendum.

However, the UK government needs to stop punching below its weight. It has a unique responsibility in Northern Ireland to protect and represent all communities, whereas the Irish government has increasingly acted in a way that primarily reflects nationalist concerns (and has aggravated the unionist community). In the event that no solution on the backstop is found, it is the UK that is likely to be forced to accept a significant part of the burden for security concerns that might emerge from the imposition of a hard border.

Instead, both sides should seek to reignite the spirit of cooperation that saw the UK government give assistance to the Republic of Ireland government at the time of the financial crisis. Good trading relations, furthermore, are crucial to the Irish economy and good faith from Dublin towards London should be possible to restore.

5 Strengthening the whole of the United Kingdom

By any comparative international standards, the Union has proved both successful and durable as an arrangement of state. For many years, negative narratives of the Union have predicted its death but many of these arguments are often based on falsifiable or insupportable suppositions. The instrumental case for the Union remains strong and unionists should not be reluctant to continue to make it. But the government must recognise that Brexit has opened up the Union to a new nationalist and separatist agenda and respond in kind. A new, modern case for the Union must be developed, based on the principle of consent. An important moment in the constitutional history of the UK is approaching; the government must seek to shape that moment with a positive vision for the functioning of the UK that counters nationalist or separatist solutions.

Policy: The next Prime Minister should develop a coherent Union strategy, based on the following principles:

- Confidence should inform the politics of the Union. It remains the case that the UK rests on much broader and firmer foundations of allegiance than its critics claim.
- Consent is the democratic foundation stone of the Union. It is conditional and contingent but it remains potent. It requires to be sustained by a continuing political ‘conversation’ in which citizens can participate in an imaginative debate about the Union’s history, politics, culture and society.
- Care should be taken in the use of language deployed to make the case for the Union in order to appeal to those not already persuaded of its value. However, the intellectual weakness of the case against the Union should be consistently highlighted.
- Consideration should be given to a Charter of the Union in order to lay down the principles of the territorial constitution’ and which might reverse the notion that devolution is eroding rather than strengthening the Union.
- Consider the creation of a Department of the Union
- A solution on the Irish border which creates a special status for Northern Ireland or customs border between it and the rest of the United Kingdom in the Irish Sea should be resisted. See: *The State of the Union*, by Professor Arthur Aughey, author of *The Politics of Englishness* (2007); *The British Question* (2013); and *The Conservative Party and the Nation* (2018).

Further reading: Policy Exchange and the Irish border

The Irish Backstop: Nothing has changed? It has actually

March 18, 2019

by Lord Bew and Lord Trimble

A Second Look

March 15, 2019

by Professor Guglielmo Verdirame, Sir Stephen Laws and Richard Ekins

Strengthening the UK’s position on the Backstop

January 29, 2019

by Professor Guglielmo Verdirame and Richard Ekins

How to Exit the Backstop

December 3, 2018

by Professor Guglielmo Verdirame, Sir Stephen Laws and Richard Ekins

The Irish Border and the Principle of Consent

November 1, 2018

by Dr Graham Gudgin and Ray Bassett

The State of the Union

May 21, 2018

by Arthur Aughey

Getting Over the Line: Solutions to the Irish border

May 9, 2018

by Dr Graham Gudgin and Ray Bassett



What do we want from the next Prime Minister? New ideas for the UK's future are plentiful. Brexit has increased the number of potential futures for our country. But as yet a new national consensus – a governing philosophy with a broad basis of support and an exciting policy agenda to match – has proved elusive.

Policy Exchange believes that such a consensus is within our grasp and is the only basis for a process of national renewal. This publication forms part of a complete set of policy ideas on these issues and more.