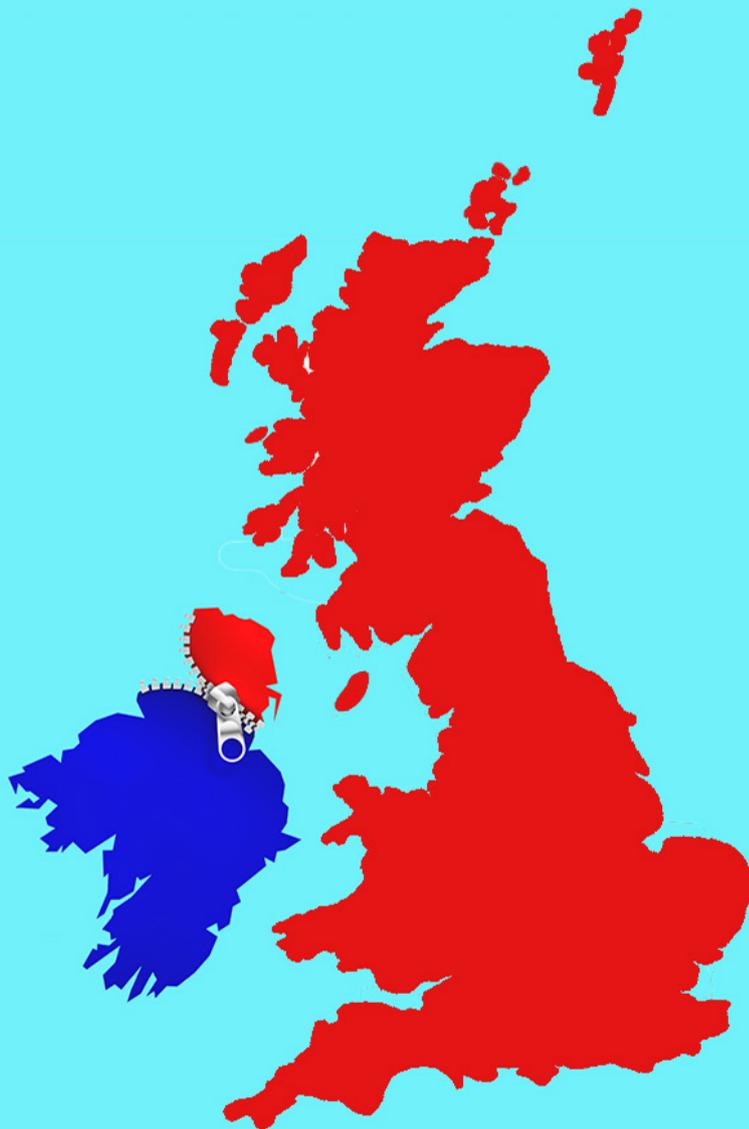


The Backstop Would Wreck the Good Friday Agreement



Rt Hon Lord Trimble

Foreword by Roderick Crawford



The Backstop Would Wreck the Good Friday Agreement

Rt Hon Lord Trimble

Foreword by Roderick Crawford



Policy Exchange is the UK's leading think tank. We are an independent, non-partisan educational charity whose mission is to develop and promote new policy ideas that will deliver better public services, a stronger society and a more dynamic economy.

Policy Exchange is committed to an evidence-based approach to policy development and retains copyright and full editorial control over all its written research. We work in partnership with academics and other experts and commission major studies involving thorough empirical research of alternative policy outcomes. We believe that the policy experience of other countries offers important lessons for government in the UK. We also believe that government has much to learn from business and the voluntary sector.

Registered charity no: 1096300.

Trustees

Diana Berry, Pamela Dow, Alexander Downer, Andrew Feldman, Candida Gertler, Patricia Hodgson, Greta Jones, Edward Lee, Charlotte Metcalf, Roger Orf, Andrew Roberts, George Robinson, Robert Rosenkranz, Peter Wall, Nigel Wright.

About the Author

Lord Trimble won the Nobel Peace Prize for his role in securing the 1998 Belfast Agreement. He was First Minister of Northern Ireland 1998-2002 and leader of the Ulster Unionist Party (UUP) from 1995-2005. He sits as a Conservative peer in the House of Lords.

© Policy Exchange 2019

Published by
Policy Exchange, 8 - 10 Great George Street, Westminster, London SW1P 3AE

www.policyexchange.org.uk

ISBN: 978-1-910812-83-9

Contents

About the Author	2
Foreword	5
The Backstop would Wreck the Good Friday Agreement	6

Foreword

Roderick Crawford

In his article for Policy Exchange, David Trimble, who won the Nobel Peace Prize for his role in negotiating and agreeing the 1998 Belfast Agreement, provides a devastating critique of the Protocol on Ireland/Northern Ireland. In doing so, he exposes the EU27's claim that the Protocol protects the 1998 Agreement by showing how, by undermining its core principles, it damages it and could destroy it. The Protocol clearly changes the status of Northern Ireland.

The foundation of North-South co-operation is not EU law, as claimed by the Protocol, but consent. Unionists negotiated to ensure that this co-operation would operate under the authority of the devolved assembly and with its consent and under its constraint, thus giving confidence to unionists. In this regard, the Protocol, far from protecting what exists, appears to be an attempt to increase North-South co-operation and integration for political reasons.

The 1998 Agreement is a political settlement with the aim of providing constitutional stability based on the consent of the people and the two traditions. The Protocol threatens that settlement and overturns the principles on which it is based.

David Trimble shows the chasm between the principles and outcomes of the Protocol and the 1998 Agreement not only by comparison of legal texts but by setting out the historical context of the negotiation of the 1998 Agreement. The issues of consent and agreement are not abstract principles, they are, as can be seen from the account presented here, the reason that the agreement was possible and the reason that it works. That these have been abandoned by the Protocol shows how quickly the lessons of the failed initiatives that preceded 1998 have been forgotten. Perhaps it was not surprising, given that the UK government consulted no-one with experience of the 1998 Agreement when it conducted its Brexit negotiations.

Roderick Crawford was founder and editor of Parliamentary Brief 1992-2012. The magazine covered the negotiations from the Downing Street Declaration of 1993 to the 2006 St Andrew's Agreement. He currently works in conflict resolution in Iraq, South Sudan and Yemen, running 'If you are safe, I am safe'.

The Backstop would Wreck the Good Friday Agreement

The 1998 Belfast (Good Friday) Agreement is under severe threat from the Protocol. To save it, the next Prime Minister must neuter this threat and then insist that the Belfast Agreement between the UK and Ireland be used to resolve the issues of the border and North-South co-operation. In doing so, he can secure the 1998 settlement, restore British-Irish relations and ensure a stable exit for the UK from the EU.

The Protocol does not protect the Belfast Agreement, but it could destroy it

The EU27 justifies the Protocol on Ireland/Northern Ireland in large part because it claims that it protects the 1998 Belfast Agreement, commonly referred to as the Good Friday Agreement, (hereafter, the Agreement). It is worthwhile therefore revisiting the Agreement to test this proposition.

The Agreement consists of two elements, the agreement reached in the multi-party negotiations, and the Agreement between the Government of the United Kingdom and the Government of Ireland. The first element has 27 pages and the second element has four pages. As an agreement between governments it is an international treaty the substance of which is contained in two articles, Article 1 and Article 2.

Article 1 reiterates the substance of Article 1 of the constitutional issues of the Multi-party Agreement, the latter text being somewhat fuller. Para 1 (iii) ‘The present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and accordingly that Northern Ireland’s status as part of the United Kingdom reflects and relies upon that wish; and that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people.’

As the Agreements frequently refer to Northern Ireland and Ireland there are those who contend that the consent principle only relates to the question of whether Northern Ireland becomes part of a United Ireland or not and that consequently the governments can make decisions on any issue falling short of that.

In doing so they overlook the key phrase in Para iii, which clearly rules out any change in the status of Northern Ireland without consent.

Separating Northern Ireland from the UK’s single market and placing it under a separate economic regulatory regime clearly changes the status of

Northern Ireland. This violates the consent principle of the Agreement and makes a laughing stock of Article 2 of the British/Irish intergovernmental treaty in which ‘the two Governments affirm their solemn commitment to support and where appropriate implement the provisions of the multi-party agreement’.

The 1998 Agreement is founded on consent: the consent of two governments, the consent of the political parties of Northern Ireland as well as the people of Northern Ireland and the people of the Republic in two referenda — that in Northern Ireland endorsed the Agreement by 71% of those voting and that in the Republic endorsed by 94%.

The Agreement is made up of three Strands. Consent runs right through Strand One of the 1998 Agreement. Firstly, the STV electoral system brings in the widest range of people providing inclusive representation. Inclusive government flows from the distribution of Ministerial and other posts in accordance with the d’Hondt formula thus ensuring that all sections of the community can participate and work together. Secondly, the operation of the assembly is undertaken on a consensual basis, with arrangements to ensure that key decisions are made on a cross-community basis, requiring a majority of assembly members and a majority of each designated community or a weighted majority of 60% of one and 40% of the other. It is not just consent — it is consent plus; it is not consent minus.

It is the same for Strand Two regarding cross-border arrangements — which are created and limited by the 1998 Agreement: the consent principle underpins these.

The North South Ministerial Council was created to deal with cross-border co-operation. Six North-South bodies were created on the authority of the Northern Ireland Assembly and the Oireachtas. Each North-South body has a six-person board with two from the largest and one from the second-largest party of each community appointed by the political parties. All decisions are made by agreement between the two sides in accordance with the rules of democratic authority and accountability in force in both legislatures.

It is highly political and was purposely designed to be so, with the usual rules governing appointments in the UK set aside. This ensured that all the board members fully understand the political constraints on the cross-border bodies and are accountable directly to the political parties. This is what makes it work. The cross-border bodies are not autonomous.

Even Strand III, which deals with British-Irish relations and the totality of relationships of the people of these islands, is not just top-down: the British-Irish Agreement has provision for representatives of Northern Ireland’s administration to express views in this context too. Here again, decisions between the two governments are by agreement.

Consent and agreement, between equals, is the mark of the 1998 Agreement. The fundamental reason for this is that lessons were learned from the failures of the 1973 Sunningdale Agreement, the 1985 Anglo-Irish Agreement and the 1995 Framework Documents. These all failed, one way or another, because they lacked the consent of both communities

in Northern Ireland and they lacked that consent because the negotiations were dominated by the two governments with little or no input from local politicians — particularly Unionist in 1985 when we were kept out of the process entirely. The governments learned from this — or seemed to. We realised that we needed to take ownership of the talks process itself, making agreements in Northern Ireland that the governments could give their consent to.

The 1998 Agreement worked because the two largest parties representing the two communities in Northern Ireland at the time, my party (the UUP) and the SDLP, agreed Strands One and Two between themselves — a bottom-up process. It was not imposed or dictated to us — a top-down process. The basis for Strand One was agreed during the Brooke-Mayhew talks of 1991-92, with the final details agreed in the days before the 1998 Agreement was finalised. When it came to negotiating Strand Two, there were things that we could not accept in the Framework Documents of 1995 — especially in the proposed ‘dynamic’, ‘harmonising’ and ‘executive’ bodies for North-South co-operation operating across a wide range of social and economic life.

We were hugely sensitive to this kind of language because we were alert to a nationalist agenda going back to Sunningdale that North-South co-operation was going to be the vehicle that trundled Unionists into a united Ireland. We have never forgotten that. So that language had to be curbed and the possibility of ‘trundling’ Unionists into a united Ireland prevented. North-South co-operation had to be pragmatic and consensual — things like agriculture and animal health were obvious areas to start with as there is a significant cross-border trade in this area, the island is a single-epidemiological area, and because it is also politically neutral.

Through negotiation, my party and the Irish government agreed the architecture of cross-border co-operation; it would operate through a North South Ministerial Council that would bring together the governments of Northern Ireland and the Republic to co-operate within their competencies and with decisions by mutual agreement. Each side would be accountable to its legislature. It was agreed that any further developments would require the explicit endorsement of the two legislatures. With this architecture agreed, my party later negotiated with the SDLP for cross-border arrangements that were pragmatic and whose benefits would be genuine and not political.

It was not all plain sailing; the talks were nearly derailed at the last moment by an attempt to over-ride the bottom-up approach and the principle of consent. George Mitchell began bilaterals with the parties with the aim of producing a draft agreement by Friday, 3 April 1998. He was unable to do so as the Irish government delegation went to London; by the weekend I heard that they wanted the Agreement to provide for a number of pre-cooked north/south co-operation schemes which would not be subject to a Northern Ireland Assembly — going against the core principle that we had agreed with Prime Minister Blair. That weekend I spoke twice on the phone to Blair — how could people see that the new arrangements

would be subject to their consent if their elected representatives had no choice in the creation of huge parts of the Agreement?

On Monday morning the Prime Minister phoned and told me that he saw the problem of by-passing the Assembly and that he expected that the Mitchell draft would point up this and other problems. But when that draft appeared on Tuesday morning it called for the immediate agreement and implementation by the two governments — in advance of any agreement in the multi-party talks — of eight cross-border bodies, with 40 other areas for immediate co-operation thereafter. I went up to George, explained my position, and added that I did not think that the Prime Minister would endorse these proposals. George replied that he had been told by the Irish delegation that the text had been agreed by both governments and could not be changed: an assertion from which the British representatives appeared unable to dissent.

We immediately issued a statement saying that the paper was unacceptable and that, before considering alternative proposals, we needed to know if both governments were prepared to accept alternatives. At that point we considered the day's business done, my deputy leader, then John Taylor, left, and on being accosted by the press, said, "I wouldn't touch it with a forty-foot barge pole".

At the same time I phoned Downing Street to be told by the PM's principal private secretary, "Don't worry, as soon as we saw it this morning we knew it would not work; we are coming over".

The Irish wish list came from the rejected Framework Documents of 1995 but the attempt to impose unwelcome proposals on us was checked, and an historic agreement was later reached.

It is all about consent and agreement — not imposition. This is the only way Unionists could engage in the negotiations and why I set out to achieve an agreement arrived at by negotiation between the main representatives of the two communities in Northern Ireland and which was underpinned by consent. This is why the 1998 Agreement is not, in the words of Seamus Mallon, 'Sunningdale for slow learners': the 1998 Agreement was anchored in consent right the way through Strand One and Two. That is the key difference; its absence caused the deep opposition of Unionists as well as the destabilisation of Unionism to pre-1998 initiatives compared to the broad support it has today.

When support for the 1998 Agreement did fall amongst Unionists it was not due to the constitutional settlement of Strands One and Two that established devolved government and accountable cross-border co-operation, but was related to the terms of decommissioning, prisoner release and police reform, which were reserved to the British government and Strand Three co-operation and co-ordination with Dublin.

It is this lack of understanding about the Good Friday Agreement that strikes me most about the Protocol on Ireland/Northern Ireland in the Draft Withdrawal Agreement. The Protocol ignores and undermines the very thing that makes the 1998 Agreement work — consent. The bottom-up approach that created devolved institutions and cross-border bodies is

replaced by the imposition of a whole lot of committees that ignore the provisions of the 1998 Agreement — blatantly ignore them. For instance, the requirement for the consent of the two legislatures in Belfast and Dublin under Strand Two cannot be overridden by the UK-EU protocol without overriding the basis of the 1998 Agreement itself, which the Protocol is committed to upholding (Article 1:3). The consent principle is not limited to whether Northern Ireland becomes part of a united Ireland — it is so much broader than that.

Top-down arrangements make it easy for Dublin to insert into it little things to apparently ‘protect’ an all-island economy, but in reality they are an attempt to create one. And the attempt to create one is part of a decades-long agenda to move Unionists away from the United Kingdom and towards a united Ireland. It is politically and ideologically motivated, not pragmatic. It is also not consensual — and it is consent that is the true underpinning of North-South co-operation.

Whereas in 1998 that was worked out by the largest parties in Northern Ireland, ‘bottom-up’, today it is imposed, ‘top-down’. Article 13 of the Protocol is a good example of this, with more extensive areas for North-South co-operation being spelled out than agreed in 1998 and with the Joint Committee constantly reviewing whether the Protocol is ‘maintaining the necessary conditions for continued North-South co-operation’, and making recommendations to the EU and the UK in this respect. This is a major departure from the model of North-South co-operation under the authority of Belfast and Dublin and undertaken with their consent.

If the Committees created by the Protocol to the Withdrawal Agreement can operate without the consent of the Northern Ireland Assembly and the parties, then that is completely destroying the basis of the Good Friday Agreement. The provisions in the Protocol that require the approval of the Assembly to further changes miss the point that the Protocol would have already changed the basis of the 1998 Agreement and the operation of both Strands One and Two — without consent and without the participation of the Assembly and the main parties. It is a complete abandonment of the principles that led to the success of the 1998 Agreement and a return to the methods that failed in 1973-4, 1985 and 1995.

The Protocol is not capable of upholding the Good Friday Agreement — it has run a coach and horses through it; it has driven it into the ditch.

In 1998 we were able to engage with the governments and explain our problems and they listened. The Irish government listened. We worked to create something that would work — and we succeeded: it has just gone 21 years since we agreed it. In contrast, the Protocol emerges out of a closed negotiation, apparently set in stone, with no participation from the communities most affected. There can, apparently, be no amendment — even when it is clear that it is misconceived and undermines the Agreement it insists it protects and ignores the very basis of North-South co-operation, and cannot claim to address the unique circumstances of the island of Ireland when one of the two communities is rejecting the Protocol and one of the two governments is unable to ratify it.

What is really extraordinary is that the two governments, UK and Irish, in the British-Irish Agreement of 1998, made a ‘solemn commitment to support’ the provisions of the Multi-Party Agreement’ that we negotiated and agreed as parties. It was not just an intergovernmental treaty. When it was last amended by the 2006 St Andrew’s Agreement the changes were agreed by the parties and the governments in line with the procedures that led to the 1998 Agreement. Today, these procedures are entirely ignored.

Specific provision is made for the North South Ministerial Council ‘to consider the European dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework. Arrangements to be made to ensure the views of the Council are to taken into account and represented appropriately at relevant EU meetings’ (paragraph 17, Strand Two). The views of Northern Ireland’s democratically elected politicians have not been heard nor have they been taken into account during the Brexit negotiations: that too is a clear breach of the Agreement.

So far from protecting the Agreement, as is claimed by the EU27, the Protocol breaches it and undermines it in many significant ways. The status of Northern Ireland is substantially changed by the Protocol, the internal governance of Northern Ireland is altered and its democracy undermined; the basis of North-South co-operation is removed from democratic oversight and agreement, and the views of Northern Ireland’s elected representatives are ignored at the EU level.

Overall, it is terribly disappointing that the Belfast Agreement has been treated as part of the problem rather than as part of the solution in the context of Brexit. There is a consensus across the two communities that we want to avoid a hard border on the island. The 1998 Agreement provides the framework for British-Irish co-operation through the British-Irish Intergovernmental Conference on issues of mutual interest, which includes border management. The North-South Ministerial Council can manage many aspects of North-South co-operation — on an agreed and accountable Belfast-Dublin basis. There is much talk of technology and systems to prevent a hard border, but little about the contribution that consent, agreement, and co-operation can bring.

Failure to co-operate under Strand Three by the British and Irish governments to avoid a hard border demonstrates a real lack of commitment to the Agreement and sends the message that it is of historical value alone. It is more than a pity that the two governments are not prepared to engage with each other as the parties did in 1998 and in the many years that followed.

Far from protecting the Belfast Agreement as the EU27 claims, the Protocol, if implemented, would severely damage the working of the Agreement and destroy the principle and mechanism which holds it together — consent.

The lessons from Sunningdale in 1973 are clear: imposition, however apparently reasonable to those imposing it, fails. Locally negotiated approaches, based on consent, that are pragmatic and non-ideological

work. These are lessons that London, Dublin and Brussels would do well to learn and apply, for they are key to resolving the current crisis in a manner that respects and upholds the 1998 Agreement, North-South co-operation and the unique circumstances of the island of Ireland. They also offer the only basis on which we can work to ensure that there is no hard border.



£10.00
ISBN: 978-1-910812-83-9

Policy Exchange
8 - 10 Great George Street
Westminster
London SW1P 3AE

www.policyexchange.org.uk