

# The Northern Ireland Protocol

## The Clash of Two Treaties

Roderick Crawford

Forewords by Rt Hon Lord Frost CMG  
and Lord Bew

“

**In line with the European Council guidelines, the Union is committed to continuing to support peace, stability and reconciliation on the island of Ireland. Nothing in the Agreement should undermine the objectives and commitments set out in the Good Friday Agreement in all its parts and its related implementing agreements** ”

**The European Council's Negotiating Directives**



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**Roderick Crawford** was editor of *Parliamentary Brief* 1992-2012; he founded the magazine to promote a political settlement in Northern Ireland. In 2014 he began work on 'If you are safe, I am safe', a concept aimed at building conflict resolution capacity in Iraq, which he later extended to South Sudan and Yemen. He has worked on the Northern Ireland Protocol since 2018. He is a Senior Research Fellow at Policy Exchange and author of *The Northern Ireland Protocol: The Origins of the Current Crisis* (Policy Exchange, 2021).

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# Foreword

Rt Hon Lord Frost CMG

Roderick Crawford's fascinating essay, *The Northern Ireland Protocol: The Clash of Two Treaties* is the latest in the indispensable series of papers from Policy Exchange dissecting the sad experience of the Brexit negotiations as they relate to Ireland and Northern Ireland.

I played my part in those negotiations and have written separately for Policy Exchange on the events of summer and autumn 2019 which culminated in the Protocol as it currently stands. Without repeating the detail of that, my view remains that it was right to agree the Protocol as the best available way through at the time, given the highly unsatisfactory choice we faced between on the one hand resolving the UK's constitutional and Parliamentary crisis and respecting the referendum result, and on the other of facing prolonged further negotiations with no guarantee of a better result and with every chance of the referendum being overturned entirely.

The Protocol that emerged was an unsatisfactory and delicate balance. There were circumstances in which it could have operated successfully, but those circumstances were rapidly destroyed by the poisonous politics of autumn 2020 and early 2021. The task now is to find a new balance and put the arrangements onto a new, more sustainable, basis.

As the responsible Minister, I proposed a set of changes to the Protocol in July 2021 which would have achieved that end. An honest and constructive negotiation at that point would surely have put us in a much better position than the one which now prevails. However, the EU refused to change the Protocol in any way. It is not wholly clear whether that remains their position. It would certainly be wise for them to change their view. Roderick Crawford's paper explains why doing so would not only be politically and economically sensible but would also be in line with the objectives the EU originally set itself and with the overriding purpose of the Protocol itself, that is, to protect the Belfast Good Friday Agreement in all its dimensions.

He sets out how EU declared negotiating aims, to support the Agreement in all its dimensions, became distorted by an "Irish" view of it which saw preserving North / South links as the primary requirement of post-Brexit arrangements, to the exclusion of other aspects which were essential to the Agreement's overall balance. For a mix of reasons this was never effectively challenged by UK negotiators and indeed became enshrined in the notorious December 2017 *Joint Report*, the *fons et origo* of all the subsequent problems. So, although the EU's mandate and indeed the Protocol itself prioritise support of the Agreement, the actually existing

arrangements do not. It is no surprise therefore that the operation of these arrangements has produced a breakdown in the institutions responsible for the governance of Northern Ireland, a breakdown — as Roderick Crawford points out — unlike previous ones because it has been caused by a fundamental disagreement on the way Northern Ireland should be run.

As I write, in late January 2023, the UK and EU negotiating teams are seemingly locked in negotiations to try to reach a new agreement of some kind. It is not clear precisely what objectives UK negotiators are pursuing: whether they are aiming at palliatives for the Protocol's current operations, or a more fundamental change which is capable of reassuring the Unionist community that Northern Ireland's place in the United Kingdom is sufficiently secure. We will have to wait and see. Certainly the UK has entered negotiations with a weaker hand than it needed to because of the effective abandonment of the Northern Ireland Protocol Bill in the Lords and the dropping of any prospect of using Article 16 of the Protocol to safeguard the situation. The Government is therefore much more dependent than it needed to be on the EU's good will and good sense on Northern Ireland — commodities which have been in short supply in recent years.

If there is to be an outcome which can re-establish stability, the EU has to recognise that its own interests necessitate fundamental change. The great achievement of Roderick Crawford's paper is to show that the EU faces no legal or political obstacle to accepting that. If EU negotiators can see clearly that the crucial need is to put in place arrangements which support the Belfast Good Friday Agreement, and that their own mandate is entirely consistent with that, indeed requires it, then it is still possible that a way out may be found. We must all hope so.

*Lord Frost was the UK's Chief Negotiator for Exiting the European Union 2019-20 and Chief Negotiator for Task Force Europe during 2021.*



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# Foreword

Lord Bew

The debate on the Northern Ireland Protocol in the UK is remarkably perfunctory. This is not to say that there is little or no attention paid to the topic. Many tears — some of them crocodile tears — are shed over the unfortunate fate of the Northern Irish who find themselves, unlike the rest of the UK, placed under the jurisdiction of European law in certain respects. There are commentators only too glad to point out that this is one of the many predictable negative consequences of Brexit. Even amongst those reluctant to accept a negative view of Brexit there is an insistence that the UK does not now break international law and it cannot, therefore, do anything but accept the Protocol.

What is absent, however, is a sharply focussed analysis of the genesis and contours of the problem and documents involved. Such an analysis is a *sine qua non*, before we can begin to think about ways to move beyond the current impasse, profoundly damaging as it is to UK/European relations and political stability on the island of Ireland. This is what Roderick Crawford gives us in this text. The Protocol as it stands *cannot work* — not simply because it disconcerts unionists — but because it is based on a radical misunderstanding of the structures and logic of the Good Friday Agreement.

A key concept in the French theoretical writings of the 1970s (for example, Foucault, Canguilhem, Althusser) was the concept of problematic (*problematique*). The argument here is that a word or a concept cannot be considered in isolation; it only exists in the theoretical or ideological framework in which it is used: its problematic. The key insight here is the idea that a careful reading should pay attention not only to the system of questions and answers located within a discourse, but also to absences and suppressions of meaning. This is precisely the achievement of Roderick Crawford in this text. He has analysed the various key documents: the Irish position papers, the EU negotiating mandates, the November 2017 negotiating paper, the 2017 EU/UK Joint Report, the Withdrawal Agreement proposed by the May government in 2018 and the Johnson Withdrawal Agreement of 2019. He has reconstructed not only the system of concepts involved but also their key silences. Key concepts like the ‘island economy’ are interrogated, key silences like the East/West dimension of the Good Friday Agreement are reconstructed. The real and rather limited role of the EU in the working of the Good Friday Agreement pre-Brexit is explained as against absurdly exaggerated versions of North-South cooperation<sup>1</sup> which are described as ‘significant’ in the Protocol; this word is made to bear a massively heavy weight even for a word as ambiguous as ‘significant’.

There is no doubt as to the seriousness of the political crisis in Northern Ireland. The Good Friday Agreement of 1998 was supported at that point by a majority (52%) of unionists in the key referendum of that year. Today,

1. See for the latter, Michel Barnier, *La Grande Illusion: Journal Secret du Brexit (2016-20)*, Paris, 2021, p137; or see page 3 of the Protocol itself (page 294 of the withdrawal Agreement).

however, the recent Lucid Talk poll reveals only 35% support the Agreement. Suzanne Breen, political editor of the *Belfast Telegraph*, has said this is at first sight ‘perplexing’<sup>2</sup> because so many of the controversial issues of 1998 which worried unionists — for example police reform and decommissioning — are now matters for the history books rather than contemporary politics. The union, on the other hand has survived comfortably; much more comfortably up to 2017 than many nationalists expected. As Suzanne Breen puts it: “the issues which drove unionist opposition 25 years ago seem no longer relevant”. It has led some to claim that the issue which generates unionist alienation is not just so much the Protocol, as the demographic and political retreat of that community. It is quite true that there are significant wider issues in play, but it should be stated here that the decisive element in the crisis of unionism is the fallout from the Protocol. Would today’s polling be quite so difficult if the rights of the unionist community under that treaty had been respected?

In the general election of the summer of 2017, the unionist vote was exceptionally strong — the DUP alone scored 36%, well ahead of opinion polling. But this was before the December 2017 joint EU/UK report, which set the template for both the May and Johnson withdrawal agreements, clearly revealed the scale of the challenges unionists were likely to face with any withdrawal agreement. Since then, unionists have regularly been behind the pace of events — despite possessing for much of 2018/9 the apparent ‘balance of power’ at Westminster. The unionist vote is currently split in three ways: the TUV has effectively deprived the relatively pragmatic DUP, now at 25%, of its electoral hegemony which the post Trimble Stormont consensus depends upon. The problem for those who wish to preserve the Good Friday Agreement is this: the DUP is the only possible vehicle.

As long as the Protocol realities continue as they are, the Good Friday Agreement is stagnant and radically weakened. Nevertheless, the mainstream unionist *Belfast News Letter* notes that the unionist community is prepared to settle for reform of the Protocol. Those who reject this idea have articulated no long-term strategy beyond the hopeless one of putting up DUP candidates in English seats.

The recent ARINS polling carried out for the Royal Irish Academy suggests different realities. Catholic support for Irish unity has risen since Brexit but this trend appears to be tapering off. There is still very strong popular support for the union. For all the talk of unity, the connections between North and South are fragile; with two-thirds of Southerners having no friend in the North. It seems likely that a return to devolution would stabilise Northern Ireland and that a return to a more relaxed relationship with the UK government would strengthen unionism electorally as in the 2017 election. But such a return requires that the EU and UK have not laboured in vain in their search for a new approach.

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2. ‘Despite the hope from 25 years ago, politics here is still more deeply divided than ever’, *Belfast Telegraph*, 28 January 2023.

# Executive Summary

## Overview

This paper briefly summarises how the UK and the EU arrived at an international agreement that protected North-South cooperation and trade at the expense of Northern Ireland's place within the United Kingdom — in particular its place in the UK's internal market — based on an Irish “interpretation of the Good Friday Agreement that highlighted North-South cooperation” (in the words of the senior official in Dublin's Department for Foreign Affairs with responsibility for Brexit<sup>3</sup>). This resulted in a skewed Protocol that could not work operationally<sup>4</sup> and has failed to secure the consensus required for post-Brexit governance of Northern Ireland, thus failing politically.

The paper describes how the argument for the legal commitment for alignment of Northern Ireland with much of the European Union's Single Market and Customs Union was developed from the European Union's original negotiating mandates of April and May 2017 through the *Guiding Principles for the Dialogue on Ireland/Northern Ireland* in September 2017 to the November 2017 negotiating paper *Dialogue on Ireland/Northern Ireland* and finally to the *Joint Report* of December 2017 when the UK committed to the ‘backstop’. The paper shows how over emphasising one aspect of the Good Friday Agreement has led to a Protocol that cannot meet either the EU's commitments to the Good Friday Agreement in its negotiating mandate or the Protocol's own objectives. This analysis provides a compelling case for a negotiation to reform the Protocol to meet the original EU mandate and realise the objectives of the Protocol by properly safeguarding the Good Friday Agreement and the settlement it established.

This paper focuses largely on the Irish and EU positions. By contrast, my previous Policy Exchange paper, *The Northern Ireland Protocol: The Origins of the Current Crisis*<sup>5</sup>, highlighted the UK's contribution to the Protocol's failure through the conduct of its negotiations leading up to the *Joint Report* of December 2017.

## The GFA and the Protocol

### Background

The negotiations on the UK's withdrawal began in June 2017 based on the EU's negotiating *Guidelines*<sup>6</sup> and *Directives*<sup>7</sup> and the UK's position set out in the Prime Minister's letter triggering Article 50. Whilst issues like finance and citizenship were well understood and both sides had developed

3. Rory Montgomery, ‘Protocol problems for both parts of Ireland: North and South’ (*Fortnight*, April 2021). Note: Rory Montgomery was involved in the negotiations leading to the Good Friday Agreement in 1998 and worked on Northern Ireland affairs for much of his career. He was Ireland's Permanent Representative to the EU 2009-13 and then Ambassador to France before returning to work in the office of the Taoiseach with responsibility for EU affairs. He was second secretary-general and director-general of the EU division at the Department of Foreign Affairs during the Brexit negotiations.
4. Note: It has worked ‘operationally’ for the EU in that it secures the internal market and for Ireland in that it secures North-South co-operation. It has not worked operationally for Northern Ireland in regard to its access to goods from Great Britain upon which it is heavily reliant. Latest figures for imports to Northern Ireland were: £3.1bn from the Republic, £14.4bn from Great Britain, £2.5bn from the rest of the EU, £2.1bn from the rest of the world. Northern Ireland imports from Great Britain are over 4.5 times greater than those of the Republic and almost three times those of the EU including Ireland. (Source: *Northern Ireland Statistics and Research Agency*, 2021.)
5. Roderick Crawford, *The Northern Ireland Protocol: The Origins of the Current Crisis*, Policy Exchange 2021.
6. ‘Guidelines following the United Kingdom's notification under Article 50 TEU’, Special meeting of the European Council (Art. 50), General Secretariat of the European Council, 29 April 2017.
7. ‘Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union’, General Secretariat of the European Council, 22 May 2017. These are based exactly on the European Commission's ‘Recommendation for a Council decision authorising the Commission to open negotiations on an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union’, 3 May 2017.

positions, the issues for Northern Ireland/Ireland were far less worked through — though the Irish Government and the EU had developed a strong position on the Good Friday Agreement and on the border. The Irish position on these matters had already shaped the EU’s understanding of the issues, as the Irish Government position paper of May 2017<sup>8</sup> as well as the testimony of key players from the Irish side and authoritative Irish authors on this subject make clear<sup>9</sup>. The success of this is demonstrated in the Irish interpretation being publicly adopted by the Commission in its key *Guiding Principles*<sup>10</sup> position paper.

With both sides far apart in their understanding of the issues, they agreed to present their positions over the summer. The UK published its position paper in August 2017<sup>11</sup> providing an overview of the Good Friday Agreement that stressed Northern Ireland’s place in the United Kingdom reflecting and relying on the wishes of a majority of the people living there<sup>12</sup>, its three Strands, and the balance of the Northern Ireland-Great Britain/UK and North-South dimensions. It included some possible border solutions drawn from its customs proposals paper<sup>13</sup> which were rejected immediately by the EU.

The European Commission set out its position in its *Guiding Principles* paper the following month. This set out six principles to protect the Good Friday Agreement and the Peace Process; these highlighted the importance of the effective operation of institutions established by the Agreement, the avoidance of a hard border — “essential to protecting the gains of the peace process”<sup>14</sup>, North-South cooperation and its centrality to the Good Friday Agreement. The paper gave no recognition of the Northern Ireland-Great Britain dimension and the centrality of Northern Ireland’s place in the United Kingdom. What the UK said about the Good Friday Agreement — set out in its *Position Paper* — was completely ignored in favour of a North-South interpretation of the Good Friday Agreement. The solution that later emerged was designed to protect this interpretation.

On 8 November 2017, following the end of the original set of negotiating rounds and the failure of the UK to progress to the second phase of talks — and with Theresa May’s Government under intense pressure — the EU published a negotiation paper called *Dialogue on Ireland/Northern Ireland*<sup>15</sup>. This set out the EU’s argument for Northern Ireland’s continued alignment with much of the EU internal market and Customs Union rules:

“North South cooperation is a central part of the Good Friday Agreement. Both sides agree that such cooperation should be protected across all the relevant sectors... Already prior to undertaking this [mapping] exercise<sup>16</sup>, the **EU’s guiding principles underlined that an important part of political, economic, security, societal and agricultural activity on the island of Ireland currently operates on a cross-border basis, underpinned by joint EU membership of the UK and Ireland.** It consequently seems essential for the **UK to commit**

8. ‘Ireland and the negotiations on the UK’s withdrawal from the European Union: The Government’s Approach’, Irish Government Publication, May 2017.

9. Rory Montgomery, *Fortnight*, as above; Tony Connelly, *Brexit & Ireland* (2018) and Stephen Collins, *Ireland’s Call* (2022).

10. *Guiding Principles on the Dialogue on Ireland/Northern Ireland*, 6/7 September 2017; communicated to the UK Government on 20 September 2017.

11. ‘Position Paper on Northern Ireland/Ireland’, HM Government, 16 August 2017.

12. As set out in Article 1 (iii) of both the British-Irish Agreement 1998 (‘Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland 1998’) and the Belfast (Good Friday) Agreement. Note: The latest poll published in December 2022 by ARINS showed only 27% would vote for a united Ireland, 50% against, the rest undecided; (the polling was conducted in September and October 2022.)

13. *Future Customs Arrangements*, 15 August 2017.

14. *Ibid.* It is the second ‘guiding principle’, page 3.

15. *Dialogue on Ireland/Northern Ireland*, General Secretariat of the Council of the European Union, 8 November 2017.

16. Note: The mapping exercise assessed the extent to which North-South cooperation relied on common EU law and policy. At this point the mapping exercise was not completed and had not been assessed. It was not made public until June 2019, at which point it came under critical assessment.

**to ensuring that a hard border on the island of Ireland is avoided, including by ensuring no emergence of regulatory divergence from those rules of the internal market and the Customs Union which are (or may be in the future) necessary for meaningful North South cooperation, the all-island economy and the protection of the Good Friday Agreement.”**

The argument that fulfilment of the legal commitment to uphold the Good Friday Agreement included avoiding a hard border was first made in this paper. It also exaggerated both what the *Guiding Principles* had said about cross-border activity and introduced the idea of an all-island economy. Yet cross-border economic activity on the island of Ireland represented just 1.5% of Ireland’s total trade<sup>17</sup>. Whilst it is crucial for some very specific sectors — of which dairy is the most obvious — it hardly represents a dominant share of economic activity on the island of Ireland.

The argument set out in the November 2017 negotiating paper is based on an imbalanced premise and incorrect evidence and was not set in the context of the whole. It thus led to the wrong conclusions. Yet it is this argument that shaped the heart of the Protocol. The language in bold above (as in the original document), forms the basis of paragraph 49 of the EU-UK Joint Report of 8 December 2017; it is this paragraph that provided a formal commitment from the UK Government to align Northern Ireland with the EU Single Market and Customs Union in the event that an overall settlement or specific solutions could not address the issue (the so-called ‘backstop’).

Given that an overall settlement based on UK red lines and the EU legal order was not able to address the challenge as defined by the EU, and specific solutions although included were never seen by the EU as providing a possible solution, alignment always represented the optimal and arguably the only solution for an EU working with an Irish interpretation of the Good Friday Agreement. However, though the EU may have ‘signed up’ for an Irish version of the Good Friday Agreement, it is not a North-South interpretation of the Good Friday Agreement that they or the UK agreed to protect in all its parts and in all its dimensions in the Withdrawal Agreement.

## The EU mandate and the Protocol

The European Union committed— unconditionally — to ensuring that “Nothing in the Agreement should undermine the objectives and commitments set out in the Good Friday Agreement in all its parts and its related implementing agreements”<sup>18</sup>. The Protocol aims to achieve this — but based on an Irish interpretation of the Good Friday Agreement that secures North-South cooperation at the expense of Northern Ireland’s United Kingdom dimension: Northern Ireland’s place within the United Kingdom is guaranteed “in its entirety” in the British-Irish Agreement 1998 that is annexed to the Good Friday Agreement and which gives it legal effect<sup>19</sup>. It was not given its own ‘Strand’ — though it underpins Strand One and the relationship is central

17. Figure quoted by Dan O’Brien, Ireland’s foremost public economist, on *The Stand*, podcast 503 ‘Brexit crisis – Our backstop consensus is wrong’, 16 September 2019.

18. ‘Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union’, Paragraph 14, 22 May 2017. In text and footnotes, the *Negotiating Directives*.

19. Austen Morgan, *The Belfast Agreement: a practical legal analysis*, Belfast Press, 2000, page 544.

to Strand Three — because that was in no way required.

The EU has designed a Protocol around a skewed understanding of the Good Friday Agreement, yet it has made a legal commitment to uphold the Good Friday Agreement, not an interpretation of it. This provides the grounds for negotiations to remodel the Protocol politically and technically so that it ‘balances’<sup>20</sup> North-South and Great Britain-Northern Ireland and UK dimensions whilst still protecting the EU’s single market; that needs to be done in such a way that it wins sustained majority unionist support whilst retaining that of nationalists. In other words, to negotiate the solution to the challenge of protecting the Good Friday Agreement in all its dimensions that we all sought and signed up for in the first place.

In its introduction to the *Guiding Principles* regarding its main subject, the “Good Friday Agreement and Peace Process”, the EU’s overall purpose is stated as follows:

“The gains and benefits of peace which have been achieved through the Good Friday Agreement and facilitated and supported by the European Union should continue to be protected and strengthened. They include societal benefits and the normalisation of relations between communities in Northern Ireland and between North and South”.

The heart of the ‘gains and benefits’ of the Good Friday Agreement is the end of violence based on a new cross-community political consensus on the governance of Northern Ireland and an agreed formula on the constitutional question. The Irish ‘interpretation’ put the avoidance of a hard border “at the front and centre of the EU’s negotiating mandate”<sup>21</sup>, based on the claim that the open border was the most tangible benefit of the peace process and essential for normalisation of relations<sup>22</sup>. There is truth in that, but not the whole truth.

The normalisation of relations between communities in Northern Ireland is based on sustaining cross-community consensus on the governance of Northern Ireland. That consensus includes avoiding a hard border, but it also includes ensuring that Northern Ireland’s position in the UK is sufficiently secure to ensure unionist support. Currently, no unionist MLA supports the Protocol.

*The solution must ensure the effective operation of the institutions*

The first ‘Guiding Principle’ for any solution that the EU set out in its *Guiding Principles for the Dialogue on Ireland/Northern Ireland* was that any solution had to ensure that the institutions established by the Good Friday Agreement<sup>23</sup> could operate effectively. This key requirement states:

“(1) The Good Friday Agreement established interlocking political institutions which reflect the totality of the relationships on the islands of Great Britain and Ireland.<sup>24</sup> The institutions, which provide frameworks for cooperation between both parts of the island and between Ireland and Great Britain, will need to continue to operate effectively<sup>25</sup>.”

20. Note: The use of the word ‘balances’ does not suggest that these two dimensions are equal. They are different, with the overall weight being far greater in terms of Northern Ireland’s UK dimension than its relationship with the Republic or its ‘all-island’ dimension. Both are equally valid and deserve equal respect from a parity of esteem perspective — an argument made by Theresa May in, for instance, her July 2018 speech in Belfast.

21. Rory Montgomery, ‘Protocol problems for both parts of Ireland: North and South’ (*Fortnight*, April 2021).

22. See ‘Ireland and the negotiations on the UK’s withdrawal from the European Union: The Government’s Approach’, Irish Government Publication, May 2017, page 22.

23. ‘Guiding Principles for the Dialogue on Ireland/Northern Ireland’, put forward on 6 September 2017 by the European Commission’s Task Force 50, agreed on 7 September and communicated formally to the UK on 21 September 2017 ahead of the fourth negotiating round. In text and footnotes, *Guiding Principles*.

24. The footnote in the *Guiding Principles* document reads: ‘British-Irish Agreement: Annex 1 “The Agreement Reached on the Multi-Party Talks”: Strand One, Strand Two and Strand Three’. Note: This is a somewhat misleading statement as institutions established by the Good Friday Agreement obviously don’t reflect the totality of relationships, not least because that Agreement established neither the Government of the United Kingdom nor that of the Republic.

25. As footnoted in the *Guiding Principles*: “This includes preserving the effective operation of the Implementation Bodies established under the Good Friday Agreement, and other bodies that give effect to North South cooperation”.

In February 2022, the institutions ceased to “operate effectively” directly because of the Protocol. What caused this was a collapse in the consensus that supports the governance of Northern Ireland. It was the breakdown of this constitutional consensus in the late 1960s that brought on the Troubles; this was widely recognised at the time, including in Dublin<sup>26</sup>. The current breakdown in the operation of the institutions is unlike anything that has happened before: previous breakdowns did not involve fundamental questions of the basis on which the governance of Northern Ireland rested.

The collapse of the core institutions established by the Good Friday Agreement in Northern Ireland is a consequence of the collapse in unionist support for the basis of the governance of Northern Ireland as adjusted by the Protocol. The Good Friday Agreement is now on life support. The political solution that shaped the Protocol is the driver of this, and as such it is a deeper reform than the EU has thus far been prepared to undertake that is required if the problem is to be properly addressed, as it must be.

It is no longer possible to argue that the EU’s strict condition that: “Nothing in the Agreement should undermine the objectives and commitments set out in the Good Friday Agreement in all its parts and its related implementing agreements” has been achieved. The key objective of the Good Friday Agreement was to provide a consensual basis for Northern Ireland’s governance that removed the cause of violence; that consensus has been lost and the EU’s own first principle for a solution has been breached in consequence. This is of huge significance yet sets off no alarm bells in Brussels or in member states other than Ireland. That EU principle reflects, perhaps unwittingly, the political reality of the need for consensus for Northern Ireland’s governance to function — whether the EU realised that then, or indeed now.

## The Protocol’s objectives

The collapse of Northern Ireland’s institutions further undermines the Protocol’s status in ways that have yet to be widely recognised. The Protocol’s objectives are intimately bound up with the preservation of the Good Friday Agreement, as set out in Article 1.3 of the Protocol below.

“This Protocol sets out arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions.”

This section of the Protocol’s objectives<sup>27</sup> reflects the requirement to uphold the breadth of the Good Friday Agreement and, in the first listed objective, the integrity of the EU’s single market:

- ‘the unique circumstances of Ireland’ are exactly what the Good Friday Agreement addressed prior to Brexit; those unique circumstances include, alongside North-South, the considerable East-West relationship between the island of Ireland (particularly

26. Note: Liam Cosgrave, then Taoiseach, made this point in a debate in the Dáil Éireann in response to the UK’s *Constitutional Proposals* white paper in May 1973.

27. Note: The others are Article 1 clauses 1 and 2.

Northern Ireland) and the rest of these islands which the aim of promoting “the harmonious and mutually beneficial development of the totality of relationships among the peoples of these islands”<sup>28</sup>. Post-Brexit, those ‘unique circumstances’ now include Ireland’s continuing place in the EU’s internal market and customs union and the need to secure that.

- “to maintain the necessary conditions for continued North-South cooperation” was the key argument for alignment of Northern Ireland based on protecting the Strand Two dimension of the Good Friday Agreement in the EU’s November 2017 negotiating paper;
- avoiding a hard border was included in that same negotiating paper as a necessary condition for North-South cooperation to take place, thus meeting the requirement of protecting the Good Friday Agreement and raising this ‘aim’, as the EU’s negotiating *Guidelines and Directives* had it, to a requirement for protecting the Good Friday Agreement instead of the peace process.
- The requirement “to protect the 1998 [Good Friday] Agreement in all its dimensions” is therefore not one of four objectives in this clause, but the one from which the above two derive their own status as objectives. It must also mean something more than the Irish interpretation since North-South has already been dealt with separately. Those other ‘dimensions’ include Northern Ireland’s place in the UK (“in its entirety”, as the British-Irish Agreement states should be set out in UK law and which is affirmed in the Good Friday Agreement<sup>29</sup>); this UK dimension is also reflected in Strand One through devolution from Westminster and the continued role of the Secretary of State for Northern Ireland; it is also reflected in Strand Three — which specifically includes Great Britain-Northern Ireland thus providing institutional relational balance to those of North-South.

Above and beyond these, Article 1.2 “respects the essential State functions and territorial integrity of the United Kingdom”. This has been compromised in respect of the UK Government’s ability to govern Northern Ireland in such a way as to uphold its obligations — including being able to address the current political crisis. Article 1.1 — the commitment that the Protocol would be without prejudice to the provisions of the 1998 Agreement in respect of the constitutional status of Northern Ireland and the principle of consent — is widely understood by unionists to have been failed.

The architecture and implementation measures of the Protocol ought to serve the objectives of the Protocol: after all, they only exist to achieve those objectives and are justified only on the basis that they do so. If they don’t achieve or help achieve them — and if instead they not only substantially undermine key objectives of the Protocol but also break the EU’s strictest condition for the Protocol<sup>30</sup> — then the case for a negotiation to re-align the Protocol’s architecture and implementation mechanisms

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28. The Good Friday Agreement, Strand Three, British Irish Council, paragraph 1. (10 April 1998).

29. Note: This is the wording set out in the British Irish Agreement 1998 for inclusion in new legislation to replace the 1920 Government of Ireland Act.

30. “Nothing in the Agreement should undermine the objectives and commitments set out in the Good Friday Agreement in all its parts and its related implementing agreements” as set out in paragraph 14 of the European Council’s Negotiating Directives.



with the Protocol's objectives, and thus to also meet the chief condition of the EU's mandate, is hard to refute.

The EU appears committed to rigorous upholding of the architecture and supporting regulations of the Protocol whilst ignoring whether they meet the Protocol's objectives. The EU and the UK agreed the Protocol on the basis that it would uphold the Good Friday Agreement as well as secure the EU's internal market. It does not do both; rather, it has crashed the institutions established by the Good Friday Agreement in Northern Ireland; it has also failed the EU's negotiating mandate and its *Guiding Principles* as well as the Protocol's own core objectives. The case for renegotiation based on the EU's own commitments and those of the Protocol itself is clear. It is no longer the commonly agreed solution because it is no longer a solution to the complex challenge it was designed to address. The negotiators need to produce a solution that is better able to address the balance of the objectives of the Protocol; this is now both an urgent necessity and a requirement for both parties.

# The Northern Ireland Protocol: The Clash of Two Treaties

## Introduction

For three and a half years the British government has been warning that conflict between the Belfast (Good Friday) Agreement<sup>31</sup> and the Protocol would necessitate the UK prioritising upholding the Good Friday Agreement<sup>32</sup>. It is almost two years since the UK, initially with EU agreement<sup>33</sup>, derogated from the implementation measures of the Protocol, at first to support business preparation for implementation but within weeks it was also to manage the political fallout from the Protocol's implementation<sup>34</sup>.

It has been clear for some years that there was a conflict between the manner of the continued alignment of Northern Ireland with the EU's single market and customs union — which is the 'solution' to the challenges of Brexit that lies at the heart of the Protocol — and the Good Friday Agreement<sup>35</sup>. There has also therefore been a conflict between the UK Government's obligations under the British-Irish Agreement of 1998<sup>36</sup> — as the sovereign government and its commitment in that treaty to uphold the Good Friday Agreement<sup>37</sup> — and some of its obligations under the Protocol<sup>38</sup>, an agreement that exists to uphold the Good Friday Agreement in all its dimensions.

This paper describes how the disputes over the Protocol originated and persist due to the EU's adoption of an Irish interpretation of the Good Friday Agreement and its inevitable conflict with the Good Friday Agreement which has a far weightier Northern Ireland-Great Britain dimension to it — and whose core consent principle has far wider application — than the EU was led to understand. This interpretation has shaped a Protocol designed to value and protect only some of the Good Friday Agreement and which consequently has failed to protect the whole. This has led to a prolonged crisis in Northern Irish politics and the collapse of the main institutions established by the Good Friday Agreement.

This paper sets out the implications of this political and institutional crisis for the Protocol and for the EU's negotiating position in the light of its original negotiating Directives. These conflicts provide a strong legal, moral and political case for negotiating meaningful reforms to the Protocol.

The aim must be to produce a Protocol that meets the commitments the two parties have agreed whilst better balancing the inevitable trade-offs that must be made to address the sometimes-conflicting objectives.

31. Henceforth, the Good Friday Agreement.

32. Note: This was first set out by the then Brexit Secretary, Rt Hon Stephen Barclay MP, in the House of Commons on 12 March 2019. It was also set out in Prime Minister Boris Johnson's 19 August 2019 letter to Donald Tusk and Jean-Claude Juncker.

33. 'Brexit: Withdrawal Agreement to be fully operational on 1 January 2021', European Commission Press Release, 17 December 2020: "the EU and the UK have made a series of unilateral declarations to ensure an orderly, consensual approach to the implementation of the Protocol on Ireland and Northern Ireland, as its substantive provisions start to apply from 1 January 2021".

34. Note: Continued problems managing the implementation of the Protocol and the need to manage the political problems stemming from that and the fallout from the EU's announced triggering of Article 16 on 29 January 2021 led to Michael Gove's 'Next Steps on the Northern Ireland Protocol' letter to Maroš Šefčovič (2 February 2021) and later the UK's unilateral extension of derogations in March 2021.

35. Note: Theresa May: "as a United Kingdom government we could never accept that the way to prevent a hard border with Ireland is to create a new border within the United Kingdom. To do so would also be a breach of the spirit of the Belfast Agreement, and for exactly the same reason that a hard border would be. It would not be showing 'parity of esteem' and 'just and equal treatment for the identity, ethos and aspirations' of the Unionist community in Northern Ireland to cut their part of the United Kingdom off from the rest of the UK". (Prime Minister Theresa May, speech in Belfast, 20 July 2018).

36. It is known as the British-Irish Agreement 1998: it is formally titled: 'Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland 1998'.

37. British-Irish Agreement 1998, Article 2.

38. Specific obligations in Articles 5-10, and their associated annexes.

At present, the mechanisms within the Protocol that protect the EU single market have proved unsustainable for the Good Friday Agreement in practice and in consequence the Protocol has completely failed to achieve its primary stated objective. In the face of that inconvenient truth, in the light of a better understanding of the Good Friday Agreement, and the absence of any threat to the internal market posed by the application of wide-ranging derogations from the Protocol for the last two years, the balance of risk needs to be revisited. What a new solution might look like is not the subject of this paper: that the current configuration of the Protocol has failed to provide a solution and has left commitments to uphold the Good Friday Agreement unmet leaving a solution still to be found — and an obligation on both sides to find it — is the case this paper sets out.

# 1. The EU's misunderstanding of the Good Friday Agreement

## Ireland as sole interpreter of the Good Friday Agreement

In the weeks and months after the referendum result the Irish Government took guardianship of the Good Friday Agreement and presented it to the EU as an agreement that was primarily designed to protect and develop North-South cooperation rather than an agreement that established devolved power-sharing and developed North-South cooperation within a settlement that confirmed Northern Ireland's place in the United Kingdom. This has been acknowledged by Rory Montgomery, the senior Irish official involved in the negotiations. Writing in *Fortnight*, the Northern Irish current affairs magazine, he said:

“Ireland was remarkably successful in persuading the EU member states and institutions to accept its analysis and adopt its objectives. In the context of protecting the peace process and the Good Friday Agreement, ‘the aim of avoiding a hard border’s front and centre of the EU’s negotiating mandate... In the crucial early months of the negotiations the UK essentially permitted Ireland to present itself as the primary guardian of the Good Friday Agreement. It largely accepted — or at least did not seriously question — an interpretation of the Good Friday Agreement which highlighted its North/South dimension.”<sup>39</sup>

Acceptance of Ireland's position as the ‘primary guardian’ of the Good Friday Agreement by the EU rather goes against the spirit and letter of the International Agreement which is affixed to the Good Friday Agreement in which both Governments reaffirmed their “commitment to the principles of partnership, equality and mutual respect and to the protection of civil, political, social, economic and cultural rights in their respective jurisdictions”<sup>40</sup>; whilst both Governments are co-signatories of the international agreement, the British Government, as the sovereign government, has obligations in the 1998 International Agreement (the British-Irish Agreement) affixed to the Good Friday Agreement<sup>41</sup> that go well beyond those of the Irish Government.

That there was an Irish ‘interpretation’ of the Good Friday Agreement that was accepted by the UK without serious question is not quite true. The UK — unlike the EU — did challenge the Irish ‘interpretation’ in its very thorough 2017 *Position Paper on Northern Ireland/Ireland* but was unable to influence the European Commission and Council because they had already been persuaded by the Irish “interpretation of the Good Friday

39. Rory Montgomery, ‘Protocol problems for both parts of Ireland: North and South’ (*Fortnight*, April 2021).

40. Preamble to the ‘Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland 1998; the ‘British Irish Agreement 1998 is an international agreement signed on 10 April 1998; it entered into force on 2 December 1999 replacing the 1985 Anglo-Irish Agreement. It is annexed to the Multi-Party Agreement — the Belfast (Good Friday Agreement) but is a separate and international agreement. (See, Austen Morgan, *The Belfast Agreement: a practical legal analysis*, pages 545-548.)

41. Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland 1998.

Agreement which highlighted its North/South dimension". The Irish had begun their 'pedagogical exercise' with the circulation to member states of a non-paper<sup>42</sup> on the Good Friday Agreement around member states in September 2016<sup>43</sup>. In December 2017's Joint Report, the commitment to protect both North-South and East-West cooperation is found in paragraph 48, but it is only a UK commitment<sup>44</sup> — and the EU's understanding of 'East-West' cooperation appears to emphasise UK-Ireland rather than that of Northern Ireland-Great Britain.

### Seeding the problem: Ireland's diplomatic success

Ireland's senior Brexit official's admission is important and revealing, for if the EU has bought an Irish 'interpretation' of the Good Friday Agreement then that cannot be a full picture, a true picture, of the whole Agreement. It is not, after all, the Irish interpretation of the Good Friday Agreement that the EU has signed up to protect legally in its negotiating mandate or in the Protocol.

According to Tony Connelly, RTÉ's Brussels Correspondent: "Key to Ireland's strategy would be to ensure that the Commission, Michel Barnier and the Task Force were all on board in the political/technical sequencing in pushing the problem back across the table to London. There would be two steps: fully apprising the EU of the complexities of the Northern Irish peace process and then turning the Irish position into the European position."<sup>45</sup>

Their success in achieving this is confirmed by the Irish Government's position paper of May 2017<sup>46</sup> — by far its most detailed paper on Brexit. This sets out the scale of the early success of its extensive work in assessing its priorities and communicating them to the Commission and the other EU27: "This work — one of the largest undertakings of the Irish Government over the last fifty years — has ensured that our priority concerns are now clearly understood throughout the EU. The proof of this work has been seen early in the Brexit process, with clear references to our specific Irish issues in the UK's Article 50 letter<sup>47</sup>, in the European Parliament Resolution on the Brexit negotiations<sup>48</sup> and most recently, in the EU Negotiation Guidelines agreed by the European Council on 29 April<sup>49</sup>... Ireland's specific priorities are a central element of the EU's overall negotiating objectives."<sup>50</sup>

There were over 400 engagements at either political or senior official level with EU partners. These included the Taoiseach [Enda Kenny TD] and Minister for Foreign Affairs and Trade [Charles Flanagan TD] undertaking numerous bilateral meetings with their opposite numbers as well as meeting with them on the fringes of Councils, and the Permanent Representative to the EU working inside Brussels. This diplomatic initiative was supported by embassies in Member States being extremely active in explaining Ireland's priorities to national governments and parliaments<sup>51</sup>. The UK meanwhile was limited to a meeting once every six weeks with Martin Selmayr: member states were persuaded to refuse bilateral meetings with the UK for discussions over its withdrawal from the EU and the

42. Note: "A non-paper is an informal document, usually without explicit attribution, put forward in closed negotiations within EU institutions, notably the Council of Ministers, in order to seek agreement on some contentious procedural or policy issue." (*The Penguin Companion to European Union* (2012), additional website entry.)

43. Tony Connelly, *Brexit & Ireland*, (2018), pages 67 & 68.

44. Paragraph 48 of the 'Joint Report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union', 8 December 2017, (henceforth, the 'Joint Report'): "The United Kingdom remains committed to protecting and supporting continued North-South and East-West cooperation across the full range of political, economic, security, societal and agricultural contexts and frameworks of cooperation, including the continued operation of the North-South implementation bodies".

45. Tony Connelly, *Brexit & Ireland* (2018), page 182.

46. 'Ireland and the negotiations on the UK's withdrawal from the European Union: The Government's Approach', Irish Government Publication, May 2017.

47. The Prime Minister's letter of 29 March 2017 contained seven 'proposed principles for discussion', the fifth of which was "In particular, we must pay attention to the UK's unique relationship with the Republic of Ireland and the importance of the peace process in Northern Ireland".

48. European Parliament resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union: "(O) whereas the European Parliament is especially concerned at the consequences of the United Kingdom's withdrawal from the European Union for Northern Ireland and its future relations with Ireland; whereas in that respect it is crucial to safeguard peace and therefore to preserve the Good Friday Agreement in all its parts, recalling that it was brokered with the active participation of the Union, as the European Parliament emphasised in its resolution of 13 November 2014 on the Northern Ireland peace process."

Note: the statement that the Good Friday Agreement was 'actively brokered with the active participation of the Union' somewhat exaggerates the EU's role. It was the US, not the EU, that provided the major external brokerage, primarily through the work of Senator George J. Mitchell with full support and key interventions from President Bill Clinton.

49. Paragraph 11. "The Union has consistently supported the goal of peace and reconciliation enshrined in the Good Friday Agreement in all its parts, and continuing to support and protect the achievements, benefits and commitments of the Peace Process will remain of paramount importance. In view of the unique circumstances on the island of Ireland, flexible and imaginative solutions will be required, including with the aim of avoiding a hard border, while respecting the integrity of the Union legal order. In this context, the Union should also recognise existing bilateral agreements and arrangements between the United Kingdom and Ireland which are compatible with EU law." Note: The position paper was published before the 22 May 2017 *Negotiating Directives*.

50. 'Ireland and the negotiations on the UK's withdrawal from the European Union: The Government's Approach', Irish Government Publication, May 2017, page 4.

51. *Ibid.* page 4.

EU wouldn't engage with the UK until Article 50 was triggered<sup>52</sup>, either formally or informally despite the best efforts of the UK. As one senior UK diplomat, quoted by Tony Connelly stated: “Most negotiations I have worked on have a lot of pre-cooking and pre-discussion and a lot of pitch-rolling where the two sides start to understand each other better”. But the EU27 wasn't interested<sup>53</sup>.

Whilst the Irish Government shaped the rest of the EU27's understanding of the specific implications for Ireland of Brexit — over avoiding a hard border, the maintenance of the Common Travel Area and protecting the Good Friday Agreement (based on its own interpretation of that Agreement) — it did so with its own interests to the fore. Whilst quite understandable, this had implications for the European Commission and European Council's understanding of these key issues, not least as the UK was absent from this Europe-wide diplomacy and was internally focused on a far broader set of issues relating to Brexit. The UK also started far behind Ireland in its own internal preparations as David Cameron had prohibited government preparation for a Leave vote prior to the 24 June 2016 referendum result.

As a consequence, the European Commission and the European Council signed up to commitments to support a Good Friday Agreement based on Dublin's 'interpretation' of that Agreement and influenced by Ireland's perspective on it, as well as by the need to promote and protect Irish interests. There has been no evidence of any critique of Ireland's pedagogic exercise: the desire for unity was understandably strong, there was much sympathy and the issues complex, remote and they were branded as 'Irish'. This fulsome adoption of the Irish interpretation has contributed substantially to the problems of negotiating arrangements to protect the Good Friday Agreement from the second half of 2017 leading up to the Joint Report of December 2017, in the negotiations that followed the publication of the Commission's Draft Withdrawal Agreement through to the first Northern Ireland Protocol in November 2018, in the attempts to resolve those problems by the May Government, in the Johnson Government's negotiations that led to the October 2019 Protocol, in those that determined the implementation of the current Protocol and in attempts to mitigate and reform it ever since. It has also led to misunderstandings and misinterpretations of UK statements and actions based on its commitments to the Good Friday Agreement that are, unsurprisingly, not always influenced by the Irish 'interpretation'.

52. 'Informal meeting at [EU] 27, Brussels, 29 June 2016 Statement'. Paragraph 2: "There can be no negotiations of any kind before this [Article 50] notification has taken place".

53. Tony Connelly, *Brexit & Ireland*, pages 64 and 65.

54. 'The Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland' to which the multiparty Good Friday Agreement is attached, lists draft clauses that the UK government would put into legislation. The first clause listed states: "It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1." This was undertaken through the Northern Ireland Act 1998.

### The Good Friday Agreement – correcting the picture

Ireland's presentation of the Good Friday Agreement appears reasonably solid, but it has serious blind spots, particularly in its insistence on seeing it solely as an all-island agreement without recognising the substantial Great Britain-Northern Ireland dimension based on Northern Ireland remaining fully part of the United Kingdom in law<sup>54</sup> and in practice — despite elements of 'hybridity' introduced in Strand Two arrangements and through one of the two institutions in Strand Three — though

neither have had much practical impact. The North-South arrangements remain, almost twenty-five years after the Good Friday Agreement, far less important than Northern Ireland's relationship with Great Britain underpinned as it is by Northern Ireland's constitutional status and the legal, governmental, political, fiscal, security and judicial, public service, economic, financial, trade, social and cultural realities that flow from that. Ignoring this has been fatal to the prospects of securing a solution that works operationally, politically and, in the context of the Good Friday Agreement, arguably legally. It is poor policy that fails in these respects.

As an example of underplaying the Northern Ireland/Great Britain dimension, the Irish Government's position paper stated: "The Government's policy continues to be grounded in our role as co-guarantor of the Good Friday Agreement and active pursuit of its full implementation, along with subsequent agreements such as the St. Andrews Agreement (2006) and the Stormont House (2014) and Fresh Start (2015) Agreements<sup>55</sup>. The objective of this policy remains sustained peace, enhanced reconciliation and political progress in Northern Ireland; increased cooperation between both parts of the island and between Ireland and Britain."<sup>56</sup> The last sentence ignores that Strand Three was designed to increase cooperation not only between Ireland and Britain, but also to increase cooperation between Northern Ireland and the rest of the UK and its devolved governments.

The British-Irish Council was instigated at the insistence of David Trimble as part of his acceptance of both the British-Irish Intergovernmental Conference<sup>57</sup> and the North/South Ministerial Council, as David Donoghue, an Irish government official closely involved in the negotiations in Belfast, makes clear in his recent book<sup>58</sup>. John Taylor MP, Trimble's deputy, set out his party's opening position in the negotiations in October 1997: "The UUP [then the largest unionist party] attached greater importance to East-West cooperation; indeed, it could contemplate North-South bodies only as a by-product of an expanded East-West relationship", recalls Donoghue.<sup>59</sup> "Unionists regarded such a Council as a necessary counterweight to the North-South institutions which nationalists wanted. We had no fundamental difficulty with this. We understood the need for unionists to see their identity given institutional expression"<sup>60</sup>.

However, though they accepted it the Irish were not keen on it, as Donoghue's account of Strand Three negotiations makes clear<sup>61</sup>; the "UUP tried with some success to recruit the Blair government to their position"<sup>62</sup> and it was agreed and appears in its first outline in the *Heads of Agreement* of January 1998.<sup>63</sup>

The British-Irish Council balanced Strand Two (North-South Ministerial Council) and the British-Irish Intergovernmental Conference<sup>64</sup>. It was "to promote the harmonious and mutually beneficial development of the totality of relationships among the peoples of these islands"<sup>65</sup>. Ignoring this dimension, underplaying its scale and validity is a consistent and serious error by the Irish Government; it is replicated in the EU's understanding and can be clearly seen in its *Guiding Principles* for any solution<sup>66</sup>.

55. Note: The paper was published before the 'New Decade, New Approach Deal' of 9 January 2020.

56. 'Ireland and the negotiations on the UK's withdrawal from the European Union: The Government's Approach', Irish Government Publication, May 2017, page 20.

57. Note: This body subsumed both the Anglo-Irish Intergovernmental Council and the Intergovernmental Conference established under the 1985 Anglo-Irish Agreement, an agreement rejected by unionists.

58. David Donoghue, *One Good Day: My Journey to the Good Friday Agreement*, Gill, Dublin, 2022.

59. *Ibid.*, page 83.

60. *Ibid.*, page 87.

61. *Ibid.* see particularly his chapter 'Strand Three and Onwards', pages 87-93.

62. *Ibid.*, page 85.

63. 'Propositions on Heads of Agreement', issued by the British and Irish Governments, 12 January 1998.

64. This body subsumed both the Anglo-Irish Intergovernmental Council and the Intergovernmental Conference established under the 1985 Anglo-Irish Agreement, an agreement rejected by unionists.

65. Good Friday Agreement, Strand Three, British-Irish Council, paragraph 1; (10 April 1998.)

66. The second sentence of the first guiding principle of the *Guiding Principles for the Dialogue on Ireland/Northern Ireland* states: "The institutions, which provide frameworks for co-operation between both parts of the island and between Ireland and Great Britain, will need to continue to operate effectively". It has a footnote stating: "This includes preserving the effective operation of the Implementation Bodies established under the Good Friday Agreement, and other bodies that give effect to North South cooperation". No mention of the British-Irish Council that facilitates Northern Ireland's relationships eastwards to the other parts of these Isles or indeed the UK dimension.

### Dublin – the threats perceived and the objectives to be realised

Ireland’s approach to the negotiations was not just based on its own ‘interpretation’ of the Good Friday Agreement that emphasised North-South cooperation: it was also impacted by how Dublin perceived Brexit as a serious threat to its own interests. The first line of the Irish position paper was: “Brexit poses unprecedented political, economic and diplomatic challenges for Ireland.” It goes on to say that “Brexit presents challenges to our peace, and challenges to our prosperity”<sup>67</sup>. “The negotiations Ireland faces are among the most important in the history of the State”<sup>68</sup>.

In response to these challenges, it states: “Our headline priorities are clear: minimising the impact on our trade and economy, protecting the peace process and the Good Friday Agreement, maintaining the Common Travel Area with the UK, and securing Ireland’s future in a strong European Union. All of these underpin the most fundamental objective of all — ensuring the continued wellbeing of our citizens.”<sup>69</sup> This dual motivation was hardly new: Bertie Ahern promoted prioritising a settlement in the North based not only on a desire for peace on the basis of its own merits (which he certainly did and consistently pursued) but also justifying it more broadly as in the economic interests of the Republic<sup>70</sup> — and rightly so. In the Irish position paper, the Irish government assured its citizens that it “will be vigorously pursuing and defending Ireland’s national interests” in the negotiations, or as Enda Kenny, then Taoiseach, put it in a key address in February 2017: “We are firmly focused on winning the argument and on getting the best deal for Ireland”<sup>71</sup>.

In getting “the best deal for Ireland”, the Irish presentation of the Good Friday Agreement reflected the need to achieve key Irish aims, rather than the need to present the full balance of the Good Friday Agreement (North/South and Great Britain/Northern Ireland) along with its underlying principles and with all the complexities and nuances the Good Friday Agreement, the British-Irish Agreement and Northern Ireland itself hold, including Northern Ireland’s position as part of the UK ‘in its entirety’<sup>72</sup> and the validity of that relationship and of that dimension which the Good Friday Agreement recognises and which ‘parity of esteem’ demands.

### Prioritising the border

Dublin set out four key objectives in its position paper in regard to ‘Irish specific issues’:

- “Avoid a hard border on the island of Ireland”;
- “Acknowledgement by the EU and the UK of the need to respect the provisions of the Good Friday Agreement through the withdrawal process and thereafter”;
- “Continued EU Engagement in Northern Ireland”; and,
- “Protection of the unique status of Irish Citizens in Northern Ireland”<sup>73</sup>.

67. Both these sentences appear in the position paper, page 1, but appear also in Taoiseach Enda Kenny’s ‘Address to the Institute of International and European Affairs (IIEA)’, Dublin, 17 February 2017.

68. ‘Ireland and the negotiations on the UK’s withdrawal from the European Union: The Government’s Approach’, Irish Government Publication, May 2017. Page 1.

69. *Ibid.* page 1.

70. “Right from day one I said that the North was ‘the priority I would put above all others’. I wanted peace on the island. I also thought that would bring prosperity with it. If we could get a multi-party agreement, I knew that would help drive the economy and in turn would bring in the resources to reform health and education.” **Bertie Ahern: The Autobiography**, Hutchinson, (London, 2009); page 195.

71. Taoiseach Enda Kenny’s Address to the Institute of International and European Affairs (IIEA), Dublin, 17 February 2017.

72. As the draft wording for UK legislation is set out in the British-Irish Agreement 1998.

73. Ireland and the negotiations on the UK’s withdrawal from the European Union: The Government’s Approach, Irish Government Publication, May 2017, pages 22 and 23.



On the first point, the Irish Government's paper stated:

“As the most tangible symbol of the Peace Process, the invisible border on the island of Ireland, is essential to the continuing normalisation of relationships. This is a horizontal issue involving multiple aspects of the withdrawal negotiation process and will require a multifaceted approach in the negotiations.”<sup>74</sup>

In fact, as everyone has long known, the most tangible gain of the Good Friday Agreement and peace process was an end to violent conflict and the establishment of consensual power-sharing government along with cross-community agreement that the constitutional status of Northern Ireland would be based on the wishes of its people alone.

The Irish government was remarkably successful in achieving its objectives. ‘Winning the argument’ meant not that the Good Friday Agreement be fully protected but, first and foremost, that the key interests of Ireland be secured and Dublin and broader nationalism's interpretation — and recollection — of the Good Friday Agreement be promoted and protected. Ultimately, this led to the conflation of Irish aims on the border with the protection of the Good Friday Agreement. The aim of avoiding a hard border is separated from the Good Friday Agreement in the published Irish Government position paper and key speeches of early 2017, including the reports of the Oireachtas, and is not mentioned in its information note on the Good Friday Agreement published at the time of the *Guiding Principles* paper<sup>75</sup>; it therefore remains separate in the EU's papers too — including the *Negotiating Guidelines and Negotiating Directives*<sup>76</sup>; the *Guiding Principles* paper of September 2017's states: “ensuring the avoidance of a hard border on the island of Ireland is central to protecting the gains of the Peace Process underpinned by the Good Friday Agreement”<sup>77</sup>.

It was only in early November 2017, with Dublin desperate to get a legal commitment from the UK that there would be no hard border before the conclusion of phase 1 of the withdrawal negotiations, that avoiding a hard border was presented by the EU as a requirement for North-South cooperation, thus giving it a claim to be a requirement for protecting the Good Friday Agreement<sup>78</sup>. I described this in a previous Policy Exchange paper as ‘the EU's manoeuvre’<sup>79</sup>. In the event, this approach and its success have created problems not only in and for London and Northern Ireland but also for Brussels and Dublin too.

The Protocol has not proved to function effectively as an ‘operational’ solution — causing economic as well as business and consumer problems; the Protocol has caused extremely serious political and social problems within Northern Ireland as well as strained relations between London and Dublin and between London and Brussels. The Irish government has failed to keep in balance the requirements it set out in its May 2017 position paper:

74. *Ibid.*, page 22.

75. ‘Good Friday Agreement and Peace Process: Information Note from Ireland to the Article 50 Working Party’, 6 September 2017.

76. ‘ANNEX to Council decision (EU, Euratom) 2017/... authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union — Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union’, 22 May 2017. These were based on the European Commission's own ‘Recommendation for a Council decision authorising the Commission to open negotiations on an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union’, 3 May 2017.

77. *Guiding Principles for the Dialogue on Ireland/Northern Ireland*, second guiding principle (2), page 3, Task Force 50, European Commission, September 2017.

78. *Dialogue on Ireland/Northern Ireland*, General Secretariat of the Council of the European Union, 8 November 2017.

79. Roderick Crawford, *The Northern Ireland Protocol: The Origins of the Current Crisis*, Policy Exchange, 2021, pages 63-72.

“In seeking practical solutions, with our EU partners and with the UK, to the challenges that Brexit poses, we will need to be mindful of *considering fully the needs and concerns of the main unionist and nationalist communities in Northern Ireland*, and of the need to ensure that any proposed solutions will be in line with Ireland’s obligations, interests and rights as a Member State of the EU.”<sup>80</sup> It might have added: and in line with its obligations under the Good Friday Agreement.

That Dublin did not reconcile the above stated objectives is not surprising given the level of threat Ireland perceived from Brexit. Failures on the part of London to engage with Dublin, and the very limited engagement allowed for the UK with the EU27 during the formative period in which the EU’s position was established played a large part in preventing these objectives being addressed too. Those objectives remain to be reconciled.

Unfortunately, the EU’s adoption of the Irish position has overridden core principles of the Good Friday Agreement and severely damaged the constitutional consensus that underpins the stability of Northern Ireland. Given the UK’s diplomatic isolation in the formative year between June 2016 and June 2017 it could not successfully challenge Ireland’s presentation of the Agreement. During the negotiations the UK’s presentation of a more complex and nuanced Good Friday Agreement was unwelcome as it interfered with the solution that the EU had come up with — alignment. This was set out in an EU memo as early as February 2017<sup>81</sup> and subsequently became the EU’s policy aim. This came to light in June 2017 when the recently appointed Foreign Minister Simon Coveney made remarks on the future arrangements for Northern Ireland at the launch of an Oireachtas report on the implications for the Good Friday Agreement of Brexit<sup>82</sup>. The manoeuvre to put avoiding a hard border at the centre of North-South cooperation would follow<sup>83</sup>.

When faced with ‘the manoeuvre’, London ought to have rejected the argument for alignment that the EU’s *Dialogue* paper was based on and delayed in completing phase 1 so that the complexity and context of Northern Ireland’s relationship with Great Britain and its place in the UK could be better understood by the EU and to allow the implications of the commitments being sought by Dublin and Brussels to be properly understood in London and in Belfast. Unfortunately, that did not happen and the UK moved forward with a false hope of sorting the problems out in phase 2.

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80. ‘Ireland and the negotiations on the UK’s withdrawal from the European Union: The Government’s Approach’, Irish Government Publication, May 2017, page 20. (*Italics in the quoted text is not in the original.*)

81. Tom McTague, ‘How the UK lost the Brexit battle’, *Politico*, 27 March 2019.

82. ‘Irish government demands special status for Northern Ireland after Brexit and invisible border’, Colm Kelpie, *Belfast Telegraph*, 23 June 2017.

83. For a detailed account of this see: Roderick Crawford, *The Northern Ireland Protocol: The Origins of the Current Crisis*, Policy Exchange 2021, pages 63-77.

## 2. Losing the balance of the Good Friday Agreement

### How the balance was lost

When the negotiators met in June 2017 for their first round of talks, matters relating to Ireland/Northern Ireland were not part of the negotiations but conducted under a separate ‘dialogue’. Whilst the negotiations on citizenship and financial obligations started with substantial starting positions already fleshed out, those on Northern Ireland did not appear to do so — at least openly<sup>84</sup> — but the emphasis of discussion was already on how to protect North-South cooperation<sup>85</sup>. After the second round in July 2017, it was agreed that both sides should make presentations of their positions in respect of Northern Ireland/Ireland. The UK subsequently published a very thorough position paper<sup>86</sup> — which appeared to have been long in the making. This set out clearly the UK perspective on the Good Friday Agreement: its three strands and the balance between North-South cooperation established in Strand Two of the Good Friday Agreement together with trade and cooperation occurring between North and South as neighbours, and the interaction occurring through Northern Ireland’s place in the United Kingdom and its inclusion in the UK’s internal market for over two hundred years<sup>87</sup>.

The EU was slow to put forward its own position, but three weeks after the UK’s position paper was published it produced the *Guiding Principles for the Dialogue on Ireland/Northern Ireland*<sup>88</sup>, alongside an Irish government information document on the Good Friday Agreement<sup>89</sup>.

The *Guidelines* highlight the need to protect the gains of the peace process and the Good Friday Agreement “in all its parts”. It describes the invisible border on the island of Ireland as “one of the major achievements and societal benefits of the Peace Process. Border issues are broader than economic questions. The physical border itself was a symbol of division and conflict”<sup>90</sup>. It goes on to say that: “As an essential element of the withdrawal process, there needs to be a political commitment to protecting the Good Friday Agreement in all its parts, to protecting the gains of the peace process [‘an invisible border’], and to the practical application of this on the island of Ireland.”<sup>91</sup> (Note that at this stage there was still no direct connection between the aim of avoiding a hard border — still associated with the peace process — and the requirement of protecting the Good Friday Agreement.)

The EU paper then introduces its six principles. Overall, these

84. *The Belfast Telegraph* reported at the end of June 2017 that Dublin will be pushing for a special deal — ‘unique status’ — for Northern Ireland to ensure the border remains as close as possible to the current arrangement... Michel Barnier, Europe’s chief Brexit negotiator, is on board. “Ireland’s staying in the Customs Union. So if we’re going to avoid a hard border between Northern Ireland and Ireland, there needs to be some relationship with the Customs Union and common market that allows Northern Ireland to be able to operate the way that it does today,” it reported Simon Coveney, by then Minister of Foreign Affairs, as saying. “Irish government demands special status for Northern Ireland after Brexit and invisible border”; Colm Kelpie, *Belfast Telegraph*, 23 June 2017.

85. ‘Speaking points by Michel Barnier at the press conference following the second round of Article 50 negotiations with the United Kingdom’, Brussels, 20 July 2017: “We agree that the important issue of the Good Friday Agreement, in all its dimensions, requires more detailed discussions. In particular, more work needs to be done to protect North-South cooperation between Ireland and Northern Ireland. Today, that cooperation is embedded in the common framework of EU law and EU policies. We need to better understand how the UK intends on ensuring the continuation of this cooperation after Brexit.”

86. *Position Paper on Northern Ireland/Ireland*, HM Government, 16 August 2017.

87. This began with the Act of Union of 1800 that brought Ireland into parliamentary union with Great Britain. Unlike the Irish Free State, the six northern counties remained in the UK’s internal market after 1922.

88. *Guiding Principles on the Dialogue on Ireland/Northern Ireland*, European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, 6 September 2017; it was agreed on 7 September 2017 and published on the 21 September 2017 on the TF50 website as the EU’s position in view of the 4th negotiation round with the UK.

89. ‘Good Friday Agreement and Peace Process: Information Note from Ireland to the Article 50 Working Party’, 6 September 2017.

90. *Guiding Principles*, paragraph 2, page 2.

91. *Ibid.* Paragraph 6, page 2.

demonstrate that EU understanding reflects the Irish interpretation of the Good Friday Agreement. The first principle reads:

“(1) The Good Friday Agreement established interlocking political institutions which reflect the totality of the relationships on the islands of Great Britain and Ireland. The institutions, which provide frameworks for cooperation between both parts of the island and between Ireland and Great Britain, will need to continue to operate effectively.”

The first sentence is a somewhat misleading statement as institutions established by the Good Friday Agreement obviously don't reflect the totality of relationships, not least because that Agreement established neither the Government of the United Kingdom, the UK's devolved Governments, nor the Government of the Republic. The second sentence describing the institutions and the frameworks for cooperation confines them to North-South and Dublin-London, but ignores the relationship between Northern Ireland and the United Kingdom's Government that is included in Strand One and Northern Ireland's relationship with the rest of these Isles represented in the British-Irish Council under Strand Three with the aim “to promote the harmonious and mutually beneficial development of the totality of relationships among the peoples of these islands.”<sup>92</sup> This is the same mistake the Irish government's position paper makes, as pointed out above<sup>93</sup>, and contributes to confusion about what 'East-West' constitutes by obscuring the Northern Ireland-Great Britain dimension, its importance, its centrality to the Agreement and its validity.

The EU's *Guiding Principles* go on to state that “the avoidance of a hard border is central to the protection of the gains of the peace process” (principle 2). However, the border was made seamless by a combination of the completion of the Single Market in 1992 and the removal of the security arrangements following the Good Friday Agreement and subsequent security developments<sup>94</sup> — thus its association with the peace process. An invisible border is central to the peace process because it is one of the key pillars that provide consensus for the governance framework of Northern Ireland. Maintaining that consensus across all communities is the key issue. That is why the UK Government have been so determined to avoid a hard border and why they have sought to address the corresponding issues relating to Northern Ireland's relationship with the rest of the United Kingdom at both political and technical levels.

The third principle, that “North-South cooperation between Ireland and Northern Ireland is a central part of the Good Friday Agreement and should be protected across all of the relevant sectors” is certainly true; it is the substance of Strand Two of the Good Friday Agreement. However, its scale has been much exaggerated as will be made clear in the next section of this paper. (The need to avoid a hard border and the requirement for protecting North-South cooperation would later be merged in the November 2017 *Dialogue* paper). The next three principles cover rights, citizenship and EU funding.

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92. The Good Friday Agreement, Strand Three, the British-Irish Council, paragraph 1. (Belfast, 10 April 1998)

93. Note: This is to misrepresent the Good Friday Agreement as being about North-South and Dublin-London cooperation, excluding the Northern Ireland-Great Britain relationship from 'the totality of relationships'. The Irish position paper (May 2017) and the EU's *Guiding Principles* both make this mistake.

94. The last British army border observation post was removed in July 2006.

There is no recognition of the Northern Ireland-Great Britain relationship or the United Kingdom aspect of the Good Friday Agreement including the UK Government's role. Yet the EU's position was that "Agreement on these principles will form the basis for the subsequent negotiation of solutions"<sup>95</sup>. But these principles don't reflect the Good Friday Agreement, only an interpretation of it. Here is where the 'dialogue' failed, why the UK and EU found themselves speaking about and meaning different things in respect of the Good Friday Agreement, and on its relationship with the border. The relationship of the border to the Good Friday Agreement is that it was necessary for continued nationalist support for the overall governance arrangements of Northern Ireland. For the UK, avoiding a hard border was not, *per se*, a direct requirement of the Good Friday Agreement, but foremost it stemmed from its obligations to ensure stability in Northern Ireland, including through maintaining the consensus in Northern Ireland for the 1998 settlement, an obligation it must now meet for unionists.

### The Exaggeration and distortion of North-South Cooperation

The extent of North-South cooperation was vastly exaggerated; in a letter to the *Irish Times* in July 2019, Andy Pollak, wrote:

"The impression has been given to the public that this [North-South cooperation] is a very important sector initiated by the Belfast [Good Friday] Agreement which is now imperilled by Brexit. As the founding director of the Centre for Cross Border Studies in Armagh, and somebody who was dedicated to researching and developing North-South co-operation for 14 years, I have to say that this is an erroneous impression. Such co-operation is a tiny element in the governmental activities of both administrations in Dublin and Belfast. The seven North-South bodies and companies set up by the 1998 agreement had a total budget of €64 million in 2016 — this compares to total Irish government budget expenditure in that year of over €55 billion (thus around 0.11 per cent of total government spending)."<sup>96</sup>

Not only is the extent of North-South cooperation exaggerated, so too is the part played by EU law and policy in making that cooperation possible<sup>97</sup>. In his justification for Northern Ireland's alignment with significant parts of the Single Market and the customs Union, Michel Barnier writes: "There are in fact nearly 142 points of cooperation between Northern Ireland and Ireland in all areas — trade in goods, agriculture, health, education, prevention of animal diseases — which are governed by European law and supported by EU policies and by the EU budget. The UK's withdrawal *de facto* calls into question or undermines most of these points of cooperation."<sup>98</sup> This is an extreme overstatement and distortion, but it

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95. *Guiding Principles*, page 3 (just above the heading 'Good Friday Agreement and Peace Process').

96. Andy Pollak, letter, *Irish Times*, 3 July 2019.

97. The original mapping exercise was released in June 2019 and is available through this [link](#).

98. Michel Barnier, *My Secret Brexit Diary*, Polity Press (2021); entry for Monday, 4 December 2017, p.95.

does reflect the EU's understanding of the importance of the EU policy and legal framework. Linking the centrality of North-South cooperation to the Good Friday Agreement and the necessity of EU policy and law to its operation is the justification for continued alignment of Northern Ireland with the EU, which is the heart of the Protocol.

However, in an article for the *Irish Times*, Newton Emerson<sup>99</sup> sets out a more detailed account of the 'mapping exercise' and what it claims for itself. It is worth setting out his core analysis in full.

“Of the 142 policy areas, only seven relate to the cross-Border bodies established under the agreement, covering topics such as inland waterways, food-safety promotion and languages. The next 44 are 'priority' or 'potential' interests of the agreement's North-South Ministerial Council (NSMC), covering topics such as health, education and benefit fraud. The next 70 areas are 'co-operation beyond NSMC' and therefore beyond the agreement. This includes the all-Ireland electricity market. The final 19 are described as 'avoiding a hard border' and include all customs union and single-market issues. This is again beyond the agreement, which says nothing about trade or the nature of the Border.

“Despite widespread repetition of the 142 figure in public and media debate, the mapping exercise did not find all these areas to be affected: 46 are described as 'not underpinned or linked' to EU membership, with no EU legal or policy base. Another 42 are only 'partially underpinned or linked'. Of the 40 areas actually covered by cross-Border bodies or considered a priority by NSMC, just 16 are described as 'directly underpinned or linked'. That might sound bad enough until you realise a lost underpinning or linkage does not prevent co-operation, let alone breach the agreement.

“The entire purpose of the agreement's architecture of North-South co-operation is to identify these kind of problems and work through them. A common EU legal and regulatory regime may have been assumed but there is nothing in the agreement to require it, or even to harmonise what laws and regulations exist. Co-operation is to be about “action within the island of Ireland on matters of mutual interest and within the competence of the administrations, North and South”. That can and has been delivered regardless of EU jurisdiction. Where Brexit causes disruption to cross-Border co-operation, the answer will be more co-operation and the agreement is the framework to provide it.

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99. Newton Emerson is a respected Northern Irish journalist who writes for the *Irish Times*, *Irish News* and the Irish edition of *The Sunday Times*.

“A final context to the mapping exercise is that the agreement itself lists just 12 areas of North-South co-operation, in order to suggest them as remits for cross-Border bodies. The establishment and oversight of those bodies is left to NSMC, along with whatever matters it wishes to discuss. In other words, North-South co-operation is largely what North and South decide. Brexit cannot breach this — it becomes merely another challenge on the agenda, albeit a vastly difficult one.”<sup>100</sup>

This analysis challenges Michel Barnier’s claims for the mapping exercise and thus his and the EU’s justification for paragraph 49 of the Joint Report. It is worth noting David Trimble’s assessment of the language of ‘harmonisation’:

“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<sup>101</sup>. 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...”<sup>102</sup>.

The basis of North-South cooperation was consent, not EU policy and law, as confirmed by the Good Friday Agreement itself. After all, there was North-South cooperation before the EU frameworks existed or applied. In this sense, the Protocol contradicts the basis for North-South cooperation under the Good Friday Agreement and the basis on which it was agreed by unionists.

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100. Newton Emerson, ‘Mapping of Belfast accord veers off-course: Varadkar is pushing Brexit risk to Belfast Agreement way too far’, *Irish Times*, 27 June 2019.

101. This included the word ‘dynamic’ relating to North-South relations in paragraph 24 and in paragraph 38 about the remit of the North/South body being ‘dynamic’, and the term harmonising in paragraph 13 (b) and harmonising and harmonisation in paragraphs 25, 28, 29, 32, 33 and 38.

102. David Trimble, *The Backstop would wreck the Good Friday Agreement*, Policy Exchange, 2019.

## 3. Alignment and the Good Friday Agreement

Two months after the *Guiding Principles*, the European Council's negotiating document *Dialogue on Ireland/Northern Ireland*<sup>103</sup> set out the argument that led directly to the legal commitment for aligning Northern Ireland with the EU's Single Market and Customs Union set out in paragraph 49 of the Joint Report of December 2017. This is so significant that the final chapter of RTÉ's Brussels correspondent Tony Connelly's account of the Irish response to Brexit is entitled 'The Bullet Point'<sup>104</sup> in reference to the final point of this six bullet point negotiating document. The first two points covered the Common Travel Area; the key 'bullet points' (3-6) stated:

- “Since the last round, intensive work has been carried out with the objective of **mapping the potential impact of UK withdrawal on ongoing North South cooperation on the island of Ireland**. North South cooperation is a central part of the Good Friday Agreement. Both sides agree that such cooperation should be protected across all the relevant sectors, and that to arrive at a common understanding of the potential risks resulting from UK withdrawal for this cooperation, this joint exercise has been useful.
- In the context of this mapping exercise, the six North-South Implementation Bodies, the six areas for cooperation and implementation agreed by the North-South Ministerial Council (NSMC) as well as a first set of the seven priority areas agreed by the NSMC at its last meeting in November 2016<sup>105</sup> are under continuing examination. (These include environment, health, agriculture, transport, education/higher education, tourism, energy, telecommunications/broadcasting, inland fisheries, justice and security, and sport.)
- Conclusions and recommendations from this exercise will be elaborated and shared once we have worked through all policy areas. Already prior to undertaking this exercise, the **EU's guiding principles underlined that an important part of political, economic, security, societal and agricultural activity on the island of Ireland currently operates on a cross-border basis, underpinned by joint EU membership of the UK and Ireland**.
- It consequently seems essential for the **UK to commit to ensuring that a hard border on the island of Ireland is avoided, including by ensuring no emergence of regulatory divergence from those**

103. *Dialogue on Ireland/Northern Ireland*, General Secretariat of the Council of the European Union, 8 November 2017; presented to the UK in the sixth round of negotiations, 9 November 2017.

104. Tony Connelly, *Brexit & Ireland*, 2018. Chapter 17 is 'The Bullet Point', pages 345-381.

105. Note: The North South Ministerial Council's next plenary meeting would not be until July 2020; its last was July 2021 before unionist disengagement was announced on 9 September 2021.



**rules of the internal market and the Customs Union which are (or may be in the future) necessary for meaningful North South cooperation, the all-island economy and the protection of the Good Friday Agreement.”<sup>106</sup> (Bold as in the original.)**

The November negotiating paper introduces for the first time a direct connection between ‘avoiding a hard border’ and the protection of the North-South dimension of the Good Friday Agreement. It states, in effect, that there is a legal obligation to avoid a hard border because it is a condition for securing North-South cooperation (Strand Two) which is a central element of the Good Friday Agreement. This takes the objective of avoiding a hard border from an ‘aim’ (as set out in the Irish position papers and the EU’s negotiating mandate) to an essential element of the legal requirement for the two governments to protect a key dimension of the Good Friday Agreement and thus brings it within the EU’s negotiating guidelines own ‘red lines’ that “Nothing in the Agreement should undermine the objectives and commitments set out in the Good Friday Agreement in all its parts and its related implementing agreements”<sup>107</sup>. This is far more effective for gaining a legal or formal guarantee on the border than an argument for avoiding a hard border based on the need to maintain consensus for government or a peace process related matter because that would be little different, or different only by degree, to arguments against a ‘border’ in the Irish Sea. It avoids the need to ‘balance’ North-South and Northern Ireland-Great Britain dimensions, and thus makes the solution to the ‘trilemma’ of protecting the Good Friday Agreement and the EU and UK internal markets far easier — or so it appeared.

It is worth pointing out that this negotiating document also exaggerates what the *Guiding Principles* document actually said of North-South cooperation which it described as “the very specific and interwoven political, economic, security, societal and agricultural context and frameworks on the island of Ireland” rather than, as stated here, “an important part of political, economic, security, societal and agricultural activity on the island of Ireland currently operates on a cross-border basis, underpinned by joint EU membership of the UK and Ireland”. It would be fairer to ascribe these descriptions to the relationship of Northern Ireland with Great Britain than to North-South cooperation. This is not to understate the importance of protecting and encouraging North-South cooperation or to undervalue its importance for nationalists or for specific business sectors North and South or for border communities, but rather to make the point that both North-South cooperation and the Northern Ireland/Great Britain dimension require protection and that the ‘political solution’ that Dublin sought needed to protect both these. It is worrying that misquoting and misrepresenting are so central to the argument that led to the commitment to alignment that is at the heart of the current Protocol.

In his account of the negotiations, Michel Barnier sets out his strategy and argument for alignment:

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106. *Dialogue on Ireland/Northern Ireland*, General Secretariat of the Council of the European Union, 8 November 2017.

107. ‘Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union’, paragraph 14, page 6. General Secretariat of the Council of the European Union, 22 May 2017.

“My strategy has been to make sure that the British, who are leaving the Union, recognise their responsibility for the continuation of North-South cooperation in Ireland, set up under EU law, with EU funding, and supported by EU policies. Having recognised this responsibility, if they wish to preserve the Good Friday (Belfast) Agreement, then they will have to provide solutions. And these solutions, for each subject in question, will essentially consist in what I have called common regulatory areas covering the whole island of Ireland.”<sup>108</sup>

He then shares an example to illustrate why a common regulatory area is required for the island of Ireland, based on his experience of being an Agriculture Minister:

“In 2009 I had to deal with the consequence of the bluetongue crisis and in this emergency situation, we improvised coordination between European countries with extremely serious consequences at stake for livestock farms: we had to find a vaccine and vaccinate twenty-four million animals as fast as possible. And there are lessons to be learned here. In a territory as homogenous as the island of Ireland, it is unimaginable that there should be two separate regulatory regimes.”<sup>109</sup>

That agriculture determined the shape of the EU’s solution is confirmed by Stefaan De Rynck, a senior adviser to Michel Barnier. In early 2017, reflecting on four months of work on avoiding a hard border, assuming that Northern Ireland would follow UK rules.

“On standards for food and food products, Commission experts had turned every stone. Since the ‘mad cow’ crisis and outbreaks of other animal diseases, the EU had adopted a stringent food law regime for all food and feed placed on its market that necessitated veterinary checks on all imports. Milk was just one product that went back and forth across the border on a daily basis for treatment and processing; how would that work after Brexit? Something would have to give. The Commission took the view that the application of EU rules at the external border was non-negotiable and that the EU should not change its rules and pay a price for making Brexit happen. “Could you look at an all-island zone for food regulation with the same health rules for food and feed perhaps?”, Barnier asked Kenny in February 2017. On customs, no matter how much use there might be of x-rays to scan trucks to scan trucks and technology for licence plate recognition for vehicles crossing the land border, there would always be a need for physical infrastructure and equipment.”<sup>110</sup>

108. Michel Barnier, *My Secret Brexit Diary*, Polity Press, (2021); entry for Friday, 24 November 2017; p. 90.

109. *Ibid.* Note: Barnier states he gave the example “a few days ago” at the Council of Foreign Ministers (13 November 2017). This is unlikely; the official programme does not list him present and there was no Article 50 (EU27) session. More likely, he gave it at the General Affairs Council (Article 50) where he was the sole Commission official listed and Brexit was discussed. The meeting took place a few days earlier on 20 November 2017.

110. Stefaan De Rynck, *Inside the Deal: How the EU Got Brexit Done*, Agenda Publishing, (2023). Page 127. Stefaan De Rynck was ‘Advisor for Outreach and Think Tanks, Brexit Task Force’ and ‘Head of Task Force for Relations with the UK’ during the negotiations.

It is a significant mistake to extrapolate from agriculture “to each subject in question”. Ireland is a single epidemiological area — even the former founder and leader of the DUP (1971-2008) Dr Ian Paisley, later to be First Minister alongside Martin McGuinness, claimed during the 2005 foot and mouth crisis in the UK that “whilst our people may be British, our cattle are Irish”<sup>111</sup>. Agriculture, as pointed out below, is the most integrated sector North-South, but it is not representative. It is more the exception than the rule and extrapolating from this sector to all others is misleading. Barnier’s comments occurred in the midst of the EU’s final push to get UK agreement on alignment following the EU’s *Dialogue* paper in November 2017.

Refusal to recognise the reality of the Northern Ireland/Great Britain dimension — perhaps even more, the refusal or the failure to recognise its worth compared to North-South — was a real mistake; it also failed to apply the principles of parity of esteem and equality that underpin the Good Friday Agreement<sup>112</sup>. Of course, the UK Government has a share of the blame for bowing to the pressure to enter phase 2 of the withdrawal negotiations in November and December 2017<sup>113</sup>. However, the EU was behind that pressure and the strategy to get a legal commitment from the UK for a ‘solution’ the EU had designed.

#### The all-island economy?

An indication of this process can be seen in the use of the term ‘all-island economy’ in the last paragraph of the *Dialogue* document. The term ‘all-island economy’ is just too misleading in this context, especially for a pan-European audience who will likely imagine a scale of integration that does not exist. It is not mentioned once in the Good Friday Agreement — notable given the detail on North-South cooperation. There is of course a border economy, hugely important to local communities and nationalist identity and aspirations, and some sectors truly operate on an all-island basis, like dairy (though representing only 1% of the island’s GDP — it is a very well organised lobby). Dan O’Brien, Chief Economist at the Institute of International and European Affairs (IIEA) and Ireland’s leading public economist, described the all-island economy in 2019 as tiny: “There is very little all-island economy. Between 1998 and now there has been almost no growth in cross-border trade... It’s tiny. It’s actually gone from 2.7 per cent of our goods trade to just 1.5 per cent; 1.5 per cent of our goods trade goes North-South. This contrasts with our huge British and overseas trade which accounts for 98.5 per cent of our business”<sup>114</sup> (The tiny size of it allows for the significant increases that have been seen since 2021; significant in percentage increase because the starting point is so low. It remains tiny.)

A Policy Exchange report published in June 2022<sup>115</sup> shows that it is more accurate to say that there are two distinct economies on the island of Ireland. The Republic of Ireland is a sovereign state, fully part of the European Union but also one of the world’s largest tax havens. Northern Ireland is a region of the economic union which is the United Kingdom.

111. As recounted in the *New Statesman* by Jonathan Powell, former Chief of Staff to Tony Blair, on Paisley’s visit to No. 10 to discuss the foot and mouth crisis.

112. Theresa May’s argument in her July 2018 Belfast speech.

113. Note: This is likely to be what Rory Montgomerie meant by ‘unchallenged’ in his *Fortnight* article (as below). My paper, *The Northern Ireland Protocol: The Origins of the Current Crisis* (Policy Exchange, 2021), comments on this at length.

114. Eamon Dumphy interview with Dan O’Brien, on *The Stand*, podcast 503 ‘Brexit crisis — Our backstop consensus is wrong’, 16 September 2019.

115. Graham Gudgin, *The Island of Ireland: Two Distinctive Economies*, Policy Exchange, June 2022.

With different currencies, different fiscal and monetary arrangements including different interest rates and VAT excise duties, and with separate legal systems, the two economies on the island are distinct. Only 4% of the goods and services produced in Northern Ireland cross the border to the Republic<sup>116</sup> while 16% go to Great Britain, 6% to the rest of the world and 3% to the rest of the EU and 68% is sold in NI's home market<sup>117</sup>; only 2% of the Republic's exports go to Northern Ireland<sup>118</sup>. Those are not the statistics of an 'all-island' economy.

### Northern Ireland and the UK internal market

Trade in goods between Great Britain and Northern Ireland took place within the UK's internal market prior to 1 January 2021 and had done so for over two hundred years, so it is highly integrated across all economic sectors, whereas only a few sectors have high levels of integration North-South. Sectors like retail and wholesale, which are highly integrated between Great Britain and Northern Ireland and have hundreds of lines of product shipped in each container, are not suited to the imposition of checks designed to take place on external borders<sup>119</sup>. The scale of imports into Northern Ireland is also far larger from the rest of the UK. Latest figures for imports to Northern Ireland were £3.1bn from the Republic, £14.4bn from Great Britain, £2.5bn from the rest of the EU, £2.1bn from the rest of the world<sup>120</sup>. Northern Ireland imports from Great Britain are therefore over four and a half times greater than from the Republic and almost three times those of the EU including Ireland.

The Northern Ireland-Great Britain and UK dimensions, particularly on trade, cannot function properly under the terms of the current Protocol. Without existing unilateral derogations, the position would have been considerably worse economically, with higher prices for consumers in a region that already has the lowest disposable income in the UK, and even greater loss of access to products. These sectors have an extremely high impact on voters, so logistics and trade problems have led directly to social and political problems. Whatever the economic upsides of the Protocol for business — or some businesses or sectors — there is no equivalent upside for consumers. However, even for business, the opportunities are not without cost due to the impact of controls and associated costs on their imports from Great Britain — their main market.

### The Consequence of the Irish Interpretation

An Irish presentation and interpretation of the Good Friday Agreement and the nature of the problem that needed to be addressed was accepted by the Commission and Member States unquestioningly whilst UK representations were first refused and then either dismissed or devalued as special pleading. This caused a distortion in the EU's understanding of the realities — constitutional, governmental, legal, social, political, economic, cultural, and trade. It resulted in an EU position that ignored the necessity of protecting both the North-South and the Northern Ireland-Great Britain and UK dimensions and a failure to recognise that a 'solution' that

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116. Ibid. page 42. One third of the 6% in the table are re-exports from Great Britain.

117. Ibid. Figure from the table on page 42.

118. Ibid. page 12.

119. See, for example, the evidence of Peter Summerton of McCulla Ireland to the Northern Ireland Assembly, 15 September 2021, and his evidence before the House of Lords Northern Ireland Protocol Committee, 7 September 2022.

120. Northern Ireland Statistics and Research Agency. The most recent figures are for 2021.

emphasised one to the detriment of the other was unsustainable.

There was no ‘mapping exercise’ of Northern Ireland’s inter-relationship with the rest of the United Kingdom. Had the problems of the Protocol (as opposed to Brexit) been anticipated, there would have been a very strong case for such an exercise to ensure that protection for North-South cooperation took account of the need to secure the continued Northern Ireland/Great Britain dimension. Unfortunately, that never occurred. In consequence, the UK and EU agreed on the ‘backstop’ in paragraph 49 of the Joint Report of 8 December 2017<sup>121</sup> — a formal commitment to align Northern Ireland with the EU sufficiently to protect North-South cooperation and avoid a hard border in the event that neither a post-withdrawal EU/UK agreement or specific solutions could do so. However, ‘alignment’ was a solution that paid insufficient regard for its implications for the Northern Ireland/Great Britain dimension and for unionist interests, rights and sensitivities. The political, social, and economic consequences of this ‘solution’ were never thought through by the EU, operating as it was on a misunderstanding of the Good Friday Agreement, and seemingly misunderstanding the nature of the all-UK economy and the impact of imposing international customs and regulatory checks and controls on internal trade.

#### **Making commitments neither side fully understood**

It is also apparent that the UK Government did not understand the full implications of what it had agreed in the December 2017 Joint Report. This is clear from Theresa May’s comments in her press conference in Brussels on 8 December 2017 and her statement to the House of Commons on 11 December 2017, as well as by her reaction to the EU’s Draft Withdrawal Agreement on 28 February 2018. It seems likely that the EU and Irish leaders knew this — at the minimum they must have strongly suspected it — at the time. Geoffrey Cox, interviewed by the historian Anthony Seldon in his work on Theresa May’s premiership, suggests that the Cabinet had not been properly briefed on the commitment that the UK entered at the time of the Joint Report. His conclusion, following immersion in the documentation over the summer of 2018, was that “the December 2017 joint report and May’s March 2018 letter to Donald Tusk<sup>122</sup> had entered Britain into commitments which he suspected neither May herself nor Cabinet... could have fully comprehended at the time... He concluded that either Cabinet had not had the implications explained to them at the time or, if they had, they didn’t fully understand. From September [2018] he began to explain the position to May and her team, and she asked him to try to draft legal changes to the backstop which [Olly] Robbins could then negotiate with Brussels before the door closed”<sup>123</sup>. There was surprise too that the UK had agreed: ‘In Dublin they could not believe the UK had agreed, one senior EU27 official said. “I remember being in a taxi that Sunday night [3 December 2017]. We just could not believe the British had accepted the text. We knew it would not be acceptable to the unionists”<sup>124</sup>.

121. “The United Kingdom remains committed to protecting North-South cooperation and to its guarantee of avoiding a hard border. Any future arrangements must be compatible with these overarching requirements. The United Kingdom’s intention is to achieve these objectives through the overall EU-UK relationship. Should this not be possible, the United Kingdom will propose specific solutions to address the unique circumstances of the island of Ireland. 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 Agreement.”, Paragraph 49 of the Joint Report, 8 December 2017.

122. A letter from Prime Minister Theresa May to European Council President Donald Tusk, 19 March 2018.

123. Anthony Seldon with Raymond Newell, *May at 10*, (2019), page 491. Note: Olly Robbins was then Prime Minister Theresa May’s Europe Adviser and Chief Brexit negotiator.

124. Tom McTague, ‘How the UK lost the Brexit battle’, *Politico*, 27 March 2019.

Nevertheless, if the UK did not understand what it had signed up to in December 2017, it is also the case that the EU has signed up to commitments in its April and May 2017 *Negotiating Guidelines* and *Negotiating Directives* that it has not fully understood. Yet those commitments — most importantly that nothing in the Withdrawal Agreement should undermine the objectives and commitments of the Good Friday Agreement and the requirement in its *Guiding Principles* and that any solution should ensure that the institutions established by that Agreement should be able to operate effectively — still stand and remain to be fulfilled. The EU still appears not to have understood the significance of the collapse of Northern Ireland's institutions in respect of the first of the EU's *Guiding Principles* and how this — and its cause, the collapse of consensus in support of the new governance framework introduced by the Protocol — undermines the objectives and commitments of the Good Friday Agreement.

## 4. The Objectives and Commitments of the Good Friday Agreement

### Political consensus — the chief objective of the Good Friday Agreement

Ever since the political failure — despite relative economic success in Irish terms — of the Northern Ireland government (1922-1972), it has been recognised that restoring devolved government that had the support of all communities was key to stability. This was the position of the UK *Constitutional Proposals* white paper of 1973. Its first proposals were that Northern Ireland's new assembly or authority should involve power sharing and absolute fairness and equality for all<sup>125</sup>. Speaking in the House of Commons, William Whitelaw MP, Secretary of State for Northern Ireland following the imposition of direct rule in 1972, said:

“The Government propose to present to Parliament as soon as possible a Bill which will provide for a restoration of elected institutions in Northern Ireland to which a wide range of governmental powers will be devolved. There will be a single-chamber Assembly of about 80 members elected on this occasion by the single transferable vote method of proportional representation applied to the 12 Westminster constituencies. The Office of Secretary of State for Northern Ireland will continue and, as well as bearing responsibility for those services reserved to him, he will represent Northern Ireland's interests in the United Kingdom Cabinet.”<sup>126</sup>

It is remarkable how much of the architecture put in place in 1998 was on display in 1973 — and why Seamus Mallon described the Good Friday Agreement as “Sunningdale for slow learners”. He was not entirely right — consent for North-South arrangements and much broader East-West structures that included Northern Ireland's relationship with Great Britain, and which thus include Dublin's and nationalist recognition of this relationship, as well as clear change in the Irish constitution were all essential in 1998. It is this recognition — historically difficult for Dublin — that is lacking in the Irish ‘interpretation’ of the Good Friday Agreement. Nevertheless, the main building blocks, including the principles, were there in 1973. The key importance of a devolved governance based on

125. The Northern Ireland Constitutional Proposals, HMSO, March 1973 (London) Cmnd. 5259.: “(f) A Northern Ireland assembly or authority must be capable of involving all its members constructively in ways which satisfy them and those they represent that the whole community has a part to play in the government of the Province. As a minimum this would involve assuring minority groups of an effective voice and a real influence; but there are strong arguments that the objective of real participation should be achieved by giving minority interests a share in the exercise of executive power if this can be achieved by means which are not unduly complex or artificial, and which do not represent an obstacle to effective government. (g) There must be an assurance, built into any new structures, that there will be absolute fairness and equality of opportunity for all. The future administration of Northern Ireland must be seen to be completely even-handed both in law and in fact.” Note: The aim of f) would be addressed in the Good Friday Agreement using the D'Hondt method of post allocation.

126. Rt Hon Willie Whitelaw MP, House of Commons statement on Northern Ireland (White Paper), Hansard, Col. 239, 20 March 1973.

political consensus was widely acknowledged in Dublin at the time.

Liam Cosgrove, then Taoiseach, said in the Dáil Éireann in a debate on the Northern Ireland Constitutional Proposals white paper in May 1973:

“It is now generally acknowledged that the most basic problem of Northern Ireland has been the lack of the political consensus which any political entity needs if democratic government is to function. This absence of consensus was latent over a long period but it underlay many of the chronic problems of the area. When those other problems came to a head and culminated in violence, it was exposed and aggravated. It is evident that the creation of a measure of consensus on which future government of that area in the short term can be based is the key problem which any proposals for the future must try to solve. If some structures could now be created to which people of both communities could give a measure of consent and acquiescence other problems could be dealt with in political terms. If this cannot be done then the exhortation alone is unlikely to bring reconciliation.”<sup>127</sup>

### **The Objectives of the Good Friday Agreement**

The objectives of the Good Friday Agreement were summarised by Tony Blair in his first speech in Northern Ireland shortly after his election in May 1997; speaking at the Agricultural Showground, he said:

“Our destination is clear: to see in place a fair political settlement in Northern Ireland — one that lasts, because it is based on the will and consent of the people here... A settlement is to be negotiated between the parties based on consent. My agenda is not a united Ireland — and I wonder just how many see it as a realistic possibility in the foreseeable future. Northern Ireland will remain part of the United Kingdom as long as a majority here wish. What I want to see is a settlement which can command the support of nationalists and unionists. That is what the people of Northern Ireland rightly demand of me and of their political leaders...

“But let me make one thing absolutely clear. Northern Ireland is part of the United Kingdom because that is the wish of a majority of the people who live here. It will remain part of the United Kingdom for as long as that remains the case. This principle of consent is and will be at the heart of my Government’s policies on Northern Ireland. It is the key principle.

“It means that there can be no possibility of a change in the status of Northern Ireland as a part of the United Kingdom without the clear and formal consent of a majority of the

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127. Dáil Éireann debate on the British White Paper on Northern Ireland: Motion. Tuesday, 8 May 1973. Vol. 265 No. 5.



people of Northern Ireland. Any settlement must be negotiated not imposed; it must be endorsed by the people of Northern Ireland in a referendum; and it must be endorsed by the British Parliament...

“The challenge, simply put, is to arrive at an agreement with which all the people of Northern Ireland can feel comfortable, and to which they can all give lasting allegiance; one which reflects and celebrates diversity and the traditions and cultures of both communities; which can provide the opportunity for local politicians of both sides to take local decisions as they should.”<sup>128</sup>

The Protocol has undermined this consensus. In doing so, it has led to the collapse of both the Strand One institutions and the failure of the Strand Two institutions. Tony Blair, in his analysis of the peace process in his political memoir *The Journey*, sets out the ‘central principles of resolution’ of the Northern Ireland conflict:

“the first principle was really what was called the principle of consent. If a majority of people in Northern Ireland wanted to unite with the South, then there would be unity, but until then, Northern Ireland would be part of the United Kingdom. It was this principle that Republicans could not accept historically, arguing that the partition of Ireland was constitutionally invalid and that the island as whole should be treated as the voting constituency. Obviously this meant peace was impossible. So they had to be brought to accept the principle of consent, explicitly or implicitly.

“The question then was: on what basis and on what principles would Republicans accept it? The answer, which then underpinned the formation of the Good Friday Agreement, was peace in return for power-sharing and equality, i.e. the IRA war would end if there was a government in Northern Ireland which was truly representative of all parts of the community and there was genuine equality of treatment for Protestants and Catholics alike. Hence the need for reform of the police and the courts, and hence the acknowledgment of the Irish language. Those wanting a united Ireland would have to accept partition, at least until they were in the majority; but in return, within a divided Ireland, they would receive fair and equal treatment and recognition of the aspiration to a united Ireland. Hence also the North-South bodies.

“Once those core principles were agreed, everything else then became a matter of intensely complicated, hard-fought, often malfunctioning engineering, but based on a valid design concept accepted by all parties. Without such a framework

128. Address by Prime Minister Tony Blair at the Royal Agricultural Society Belfast, 16 May 1997.

of principle, progress in conflict resolution is difficult, if not impossible. It is the enduring reference point. It constitutes guidance. It also traps the parties within it. Once they accept the framework they can't argue things inconsistent with it; or if they do, the inconsistency tells against them."<sup>129</sup>

'Inconsistency' is telling again — the UK is acting inconsistently against the EU's framework and the EU with that of the UK, creating mistrust. Very different frameworks and thus different narratives are present. One of the root causes of this is that language used by both sides means different things. The Good Friday Agreement is 'balanced' between North-South and the UK dimension for one party, but secures North-South alone for the other; East-West includes Northern Ireland's wider relations with the British Isles for one party but is limited to UK-Ireland for the other; the role of consent runs through and underpins the whole Agreement for one party but is limited to the constitutional question for the other; the main gain is consensual power-sharing for one party but for the other it has become an invisible border. At the same time, the key community that is opposed to the Protocol didn't agree the new framework in the first place. We are returning to a crisis, with significant sections of the unionist and loyalist communities openly refuting or prepared to refute the Good Friday Agreement settlement and many others questioning it. Resolving this 'inconsistency' and restoring consensus is the key challenge facing the negotiators in Brussels and London. The worry is that only one of the parties to the Protocol fully recognises this. There has to be a consistency in the parties' understanding and prioritising of the Good Friday Agreement if this is to be resolved

### **The Commitments of the Good Friday Agreement**

Another problem of the current Protocol is that it is not in line — and is not seen to be in line — with the principle of parity of esteem: that one community's aspiration to identify as Irish and to cooperation with the Republic is protected by alignment and avoiding a hard border at the cost to the other community of border checks within the United Kingdom and regulatory requirements that limit their access to the UK's internal market.

Equality and rights is a substantial principle. It is covered specifically in the last paragraph of the short preamble to the 'Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland 1998' (the British-Irish Agreement 1998): "Reaffirming their commitment to the principles of partnership, equality and mutual respect and to the protection of civil, political, social, economic and cultural rights in their respective jurisdictions;" the sovereign government — that is the Government of the United Kingdom — is also given specific responsibilities to uphold them; article 1, states:

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129. Tony Blair, *The Journey*, (2010), pages 181-182.

“(v) the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities;”

This is confirmed by Bertie Ahern, then Taoiseach, in his speech to the Irish Senate in April of that year; he stated that the Belfast Agreement was “an agreement capable, for the first time, of winning the support of both traditions in the North and the support of North and South, as well as enhancing cooperation between these islands”. He said that the agreed settlement was also founded on equality, of a “jurisdiction being founded in rigorous equality as stated in Article 1 of the new British-Irish Agreement [1998]”, and that “Equality is so paramount that it is dealt with in the first article of the Agreement”.<sup>130</sup>

This is reaffirmed by the Irish Government in its May 2017 position paper: “A key element of the Good Friday Agreement is its recognition of the identities, ethos and aspirations of the two communities in Northern Ireland, and a commitment by the relevant sovereign government to treat both on the basis of equality and parity of esteem.”<sup>131</sup>

Rights, safeguards and equality of opportunity are at the heart of the Good Friday Agreement. All parties are specifically required to uphold these; the governments of the UK and Ireland are required to uphold the agreement.<sup>132</sup> Rights, set out in the Good Friday Agreement include “the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity”.

### The consequences of equality and parity of esteem for trade issues

If trade and the border on the island of Ireland matter for nationalists, then trade within the UK, between Great Britain and Northern Ireland, matters for unionists too. The Act of Union is of seismic importance — just as much as the avoidance of a hard border for nationalists. Article 6 of the Act of Union 1800<sup>133</sup> guarantees no trade barriers between Ireland and the rest of Great Britain. Just as care had to be taken over avoiding a ‘hard border’ on the island of Ireland, so care had to be taken over the handling of barriers to trade and cooperation within the UK and its internal market. Defending the Act of Union can be overstated, but it has to be accepted that it is a substantial part of unionist political and economic identity — it is the founding legislation of the Union of Ireland and Great Britain, albeit amended since 1800<sup>134</sup>. It retains significant importance just as the open border on the island of Ireland — only a reality for trade since 1992 with security checks continuing until the early 2000s — does for nationalists. Identity and equality link to trade, in different ways, for both communities.

130. Paragraph v of that Article is quoted above.

131. ‘Ireland and the negotiations on the UK’s withdrawal from the European Union: The Government’s Approach’, Irish Government Publication, May 2017, page 20.

132. Article 2 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland.

133. “Subjects of Great Britain and Ireland to be on same footing from 1 Jan. 1801; No duty or bounty on exportation of produce of one country to the other; All articles the produce of either country shall be imported free from duty; Produce of either country, subject to internal duty, shall on importation into each country be subject to countervailing duty; Same charges on produce of either country exported through the other.” Act of Union 1800, Article 6.

134. The Act of Union came into effect in 1801. It was amended by the Government of Ireland Act 1920 which was replaced by the Northern Ireland Act 1998, which has since been amended again.

### **Avoiding a hard border and the Good Friday Agreement: different, but related**

This is why the UK accepted the need for avoiding a hard border (though undefined); it conceded this in stages, developing from Prime Minister May's July 2016 statement in Belfast that "Nobody wants to return to the borders of the past"<sup>135</sup>, developed further in her letter triggering Article 50 on 29 March 2017 to "We want to avoid a return to a hard border between our two countries", and even more in her speech in Florence of 22 September 2017 when she conceded that "we will not accept any physical infrastructure at the border". UK commitments were made in a context in which avoiding a 'hard border' was a gain from the peace process — it had come about alongside IRA decommissioning and a final permanent ceasefire — not as a requirement for upholding the Agreement that is the foundation of that peace. The reason for avoiding a hard border was rooted in the broad requirement to secure the interests of both communities, their identities and aspirations.

Conflating the avoidance of a hard border into a requirement for upholding Strand Two of the Good Friday Agreement, out of the blue, with no prior governmental or parliamentary documentary support, was a clever move when the UK government was on the back foot and its Prime Minister on the ropes. It appeared to be the only way to get a legal guarantee from the UK that Dublin wanted, but it finalised and deepened the distortion of the 'Irish interpretation' of the Good Friday Agreement. In her 1 December 2022 visit to Dublin, addressing the Joint Houses of the Oireachtas, President Ursula von der Leyen repeated and emphasised this conflation, that avoiding a hard border amounted to the protection of the Good Friday Agreement, saying: "And one thing is clear: Ireland can always count on the European Union to stand by the Good Friday Agreement — *there can be no hard border on the island of Ireland*"<sup>136</sup>, strongly emphasising the direct connection between them. This is not, and never was, the case.

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135. Prime Minister's statement, Stormont Castle, Northern Ireland, 25 July 2016.

136. President Ursula von der Leyen's address to the Joint Houses of the Oireachtas, 1 December 2022. Written as spoken.

## 5. The Protocol's clash with the Good Friday Agreement

Undermining Northern Ireland's relationship with Great Britain and its place in and status in the United Kingdom in order to protect Northern Ireland's relation with the Republic is the chief flaw in the Protocol. Getting that balance wrong has affected politics which has in turn impacted on governance. It is a vicious circle that has resulted in unintended consequences and unforeseen events. However inconvenient this may be for others, it is the main factor in Northern Irish politics today and affects the whole system of government because consent is the principle upon which government rests.

These political impacts were not properly factored into the design of the Protocol. They became clear when the Protocol's provisions on movement of goods were applied on 1 January 2021, and quickly led to public unease, made all the worse by the EU's announcement on 29 January 2021 that it would trigger Article 16 in order to allow export controls on vaccines moving from the EU to Northern Ireland, albeit almost immediately rescinded with public recognition of the mistake and apologies from the Commission President<sup>137</sup>.

### The Political Consequences

What support there was for the Protocol amongst unionists collapsed<sup>138</sup>. First Minister Arlene Foster MLA—who in the months running up to the implementation of the Protocol on 1 January 2021 had been determined to realise the opportunities in 'the best of both worlds' that the Protocol appeared to offer (pending a democratic vote on the Protocol in 2024)<sup>139</sup>—called for the replacement of the Protocol<sup>140</sup>. The second largest unionist party, the UUP, had offered no such defence of the Protocol, calling for the First Minister to “make abundantly clear our opposition to the NI Protocol, a very unequal treaty, which threatens the Belfast Agreement”<sup>141</sup>. The spectre of violence was immediately raised with fringe loyalist threats against port officials involved in checks on the Irish Sea. By the end of February 2021, unionist leaders had brought a legal challenge to the Protocol to the High Court and officials were ordered to cease construction on border posts by Northern Ireland's Agriculture Minister. The worst riots and street disturbances in years took place at the end of March and early April 2021 caused by a conflation of issues, including the Protocol; it was widely condemned by political and community leaders and Northern Ireland's civil society. Far more important was the growing number of

137. Ursula von der Leyen, President of the European Commission, apologised during the European Parliament plenary debate on the EU's COVID-19 Vaccination Strategy; Brussels, 10 February 2021.

138. A poll conducted for Queen's University in March 2021 put 22% strongly agreeing, 20% agreeing whilst 32% strongly disagreed and 10% disagreed with the proposition that “the Protocol provides appropriate means for managing Brexit”. To the proposition that “the Protocol is on balance a good thing for Northern Ireland”, only 18% strongly agreed, 25% agreed but 36% strongly disagreed and 8% disagreed. The respondents were not identified by community affiliation. Majorities mean little in Northern Ireland as it is run on a cross-community basis. Weighting 'strong' responses with 1.5 and 'agree/disagree' with 1, gives a figure of 53/53 to the first proposition and 52/62 against the second. Despite movement towards support, strong response in June 2022 were still 30/27 against 29/28, in the context of widespread derogation (so not a test of an implemented Protocol) and showing deep and strong polarisation. A majority of unionists still strongly opposed to the Protocol.

139. Arlene Foster: Northern Ireland an 'attractive location for US firms accessing EU and UK', *News Letter* (Belfast), 14 December 2020; Arlene Foster MLA interviewed by Andrew Marr, *BBC*, 3 January 2021.

140. 'Fresh difficulties highlight Arlene Foster's shift from selling the protocol to maligning it', *Irish News*, 30 January 2021; 'Arlene Foster urges Boris Johnson to replace NI protocol', *Guardian*, 30 January 2021.

141. "Disgust' at NI Brexit Protocol must be registered: Steve Aiken', *News Letter* (Belfast), 11 December 2020.

protest marches and meetings in small towns. Politics and the courts would be the sphere of protest and the fight back against the Protocol.

The political crisis in unionism internalised, leading to the ousting of First Minister and leader of the DUP Arlene Foster MLA on 28 April 2021 as support for her collapsed<sup>142</sup>; Steve Aiken, leader of the second largest unionist party (UUP) resigned the following month<sup>143</sup>. Foster was followed as leader of the DUP by Edwin Poots MLA and as First Minister by Paul Givan MLA<sup>144</sup>; the new DUP leader resigned after just 21 days in June 2021<sup>145</sup> and was replaced by Sir Jeffrey Donaldson MP<sup>146</sup>. In his first statement as leader, he stated that the Government needed to “deal with the Protocol in a manner which respects the constitutional and economic integrity of the United Kingdom”. The following month he set out seven tests UK government’s policy on the Protocol needed to meet: protecting the Act of Union, preventing trade diversion, ending any internal trade border within the UK, providing democratic oversight of laws applied in Northern Ireland, removal of checks on goods going from Great Britain to Northern Ireland and staying there<sup>147</sup>, prevention of new regulatory barriers between Great Britain and Northern Ireland and, lastly, ensuring that new arrangements preserve the spirit and letter of Northern Ireland’s constitutional place in the United Kingdom (subject to consent)<sup>148</sup>.

A week later the UK published its analysis and reform proposals in *The Northern Ireland Protocol: the way forward*<sup>149</sup>: it was welcomed by unionists as a start. However, in the face of a Protocol that Sir Jeffrey Donaldson claimed “threatens to provoke the most serious constitutional crisis since our formation a century ago” — in language resembling that of Dublin’s assessment of Brexit’s threat to the Republic<sup>150</sup> — the DUP withdrew from the North-South structures established by Strand Two of the Good Friday Agreement on 9 September 2021; Donaldson also stated, in the absence of a resolution of the Protocol crisis, the DUP would have to withdraw from the Executive<sup>151</sup>. In October the EU published its October 2021 non-papers, which fell far short of meeting either any of Donaldson’s tests or engaging with the level of reform the UK had identified as necessary as the non-papers only sought technical adjustments within the existing parameters of the Protocol. Meanwhile, the UUP’s new leader, Doug Beattie MLA, continued arguing the case that the Protocol damaged the Good Friday Agreement<sup>152</sup>. With no progress on reforming the Protocol, the DUP collapsed the Northern Ireland Executive in February 2022<sup>153</sup>; despite new elections in May 2022, the Assembly and Executive remain suspended as unionists continue to refuse to provide their community’s consent for power-sharing to be restored in Northern Ireland until the problems of the Protocol are fully addressed.

This is quite unlike previous crises in power-sharing: in February 2000 the Executive was suspended by the Secretary of State in the face of the failure of the IRA to decommission and restored on 30 May 2000 on a promise that their weapons would be put beyond use and their arms dumps could be inspected. In 2002 in the face of an alleged IRA spy ring at the heart of government and a breakdown in relations between the

142. ‘Arlene Foster to step down as Northern Ireland first minister’, *Guardian*, 28 April 2021.

143. ‘Steve Aiken announces resignation as leader of Ulster Unionist Party’, *Irish Times*, 8 May 2021.

144. ‘Northern Ireland: Paul Givan becomes first minister after Irish language deal’, *Guardian*, 17 June 2021.

145. ‘Edwin Poots resigns as DUP leader after 21 days in post’, *Guardian*, 17 June 2021.

146. ‘Sir Jeffrey Donaldson ratified as DUP leader by party executive’, *Guardian*, 30 June 2021.

147. This caveat was made in answer to an intervention from Mark Harper MP in the same debate (Col. 568) and included in the DUP press release on the Seven Tests, 15 July 2021.

148. Sir Jeffrey Donaldson MP, Northern Ireland Protocol Debate, House of Commons, 15 July 2021, Hansard Col. 567-568.

149. *The Northern Ireland Protocol: the way forward*, HM Government, 21 July 2021.

150. Ireland and the negotiations on the UK’s withdrawal from the European Union: The Government’s Approach’, Irish Government Publication, May 2017, page 1.

151. Sir Jeffrey Donaldson, ‘Now is the time to act’, speech given at La Mon Hotel, Belfast, 9 September 2021.

152. ‘The Northern Ireland Protocol damages the Belfast Agreement and sows division, Doug Beattie tells Ulster Unionist Party conference’, *News Letter*, 11 December 2021.

153. ‘DUP: NI First Minister Paul Givan announces resignation’, *BBC News*, 3 February 2022.

parties, the Executive was again suspended and finally restored only after the St Andrews Agreement 2006 and the election that followed it in 2007; it was suspended as a result of the Renewable Heat Incentive scandal and stayed suspended as the dispute extended onto the place of the Irish language in Northern Ireland and was restored only after the New Decade New Approach agreement in January 2020<sup>154</sup>.

In each case, the means of restoration lay within the powers of government and parties and organisations 'associated' with them. While parties did use suspension to advance or defend their core interests, all parties continued to accept the governance framework under which Northern Ireland operated. That is no longer true. Now, the settlement itself — as adjusted by the Protocol — is disputed. The two governments are out of alignment and London is no longer empowered to fix the crisis, either alone or in partnership with Dublin, because Brussels holds the key (subject to the approval of the European Council). What has also changed is that the largest unionist party, the DUP, is no longer governed by the desire to get or keep devolution at all costs and are willing to risk it not coming back.

### **A Crisis of Confidence: Understanding the crisis in Northern Ireland**

Now, for the second time in Northern Ireland's history, the collapse of constitutional consensus has brought down the government in Belfast. The first time was in 1968-1972, when consensus collapsed — a collapse the Sunningdale Agreement could have addressed had it not been wrecked on the rock of North-South cooperation. The second time was in 2021, with the collapse in unionist consent brought on by the impact of the implementation measures of the Protocol on everyday life, made worse by the EU's unforced error in triggering of Article 16, and the general effect of the Protocol's lack of balance on confidence in the new political settlement it introduced — most of all as regards Northern Ireland's place within the UK and in its internal market. This crisis, different in its implications but not in its type to that of 1968-1998, marks a very different one from those that have brought down previous power-sharing governments in Stormont since 1998. Whatever the party positions may have been in Northern Ireland, they were not disputing the settlement and the two governments were aligned. The degree of crisis is fundamentally misunderstood in Brussels and in the capitals of the other member states.

Consensus on the governance of Northern Ireland is the key factor in maintaining stability in Northern Ireland. It is the main *intangible* gain of the peace process provided by its foundation — the Good Friday Agreement. The main *tangible* benefit is peace and power-sharing government. The absence of this consensus has led to the collapse of the institutions under Strand One and the non-functioning of the institutions under Strand Two, with Northern Ireland's participation in the British-Irish Council (Strand Three) now on hold too.

The conflicts between the Good Friday Agreement and the Protocol are

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154. The Executive was suspended between 12 February and 30 May 2000, between 15 October 2002 and 8 May 2007, 19 June 2008 and 20 November 2008, and 16 January 2017 and 11 January 2020.

the causes of this. It is not possible to uphold the Good Friday Agreement “in all its dimensions” and act as if the United Kingdom dimension and Northern Ireland-Great Britain activity is irrelevant or inferior to North-South: it is at the heart of the agreement. It is not spelled out at length because the Good Friday Agreement is focused on what is additional, not what is continued. Even with Northern Ireland’s continued place in the United Kingdom assured, David Trimble insisted on institutional ‘balance’ between North-South in Strand Two and Northern Ireland’s relations with the rest of the UK and the Crown Dependencies in Strand Three of the Good Friday Agreement. Expanding Strand Three to include recognition of Northern Ireland’s legitimate relationships with the rest of the British Isles ensured that ‘East-West’ relations would not be solely focused on the Dublin-London axis; the aim of promoting harmonious relations between the people of these Isles was extended from Ireland and Great Britain to include Northern Ireland’s relations eastward. Despite perhaps over 99% of Northern Ireland’s relationship with the rest of the UK occurring through its place in the UK, this was still deemed by David Trimble to be essential for unionism<sup>155</sup>.

### Conclusion

Because the Protocol was not designed around the realities and sensitivities of North-South and the Northern Ireland-Great Britain and UK dimensions — and was not renegotiated when the operational and political problems became abundantly clear — it has led to a fundamental political crisis of the institutions. The disengagement of unionism with the North/South Ministerial Council (September 2021) and the collapse of the power-sharing government of Northern Ireland (February 2022) is a body blow to the Good Friday Agreement. This is because the answer to it — a reformed Protocol that addresses the Protocol’s political and regulatory flaws and imbalances — is currently blocked by the European Commission and the European Council and because the leading unionist party (the DUP), supported by its hard-line rival (the TUV), is prepared to see power sharing not return unless there are substantial changes to the Protocol — changes the EU does not recognise as legitimate or necessary. The Protocol was justified because it seemed to address the challenges of Brexit on the island of Ireland. But it has now moved full circle, from being a ‘solution’ that protects the Good Friday Agreement to being the cause of the collapse of the institutions of the Good Friday Agreement. Denial does not help fix the problem.

The operational failures of the Protocol arose because it was designed around an exaggerated and distorted understanding of North-South cooperation and without reference to the scale and complexity of trade between Northern Ireland and Great Britain and Northern Ireland’s economic and social dependence on it (as well as its place in the UK). This trade is simply unable to operate without grace periods and derogations — which are widely supported across political parties and communities in Northern Ireland and right across business. The Protocol was neither

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155.Note: At the time, unionists didn’t see the point Trimble was making; after all, they had the UK guarantee. With a background as an academic lawyer, Trimble wanted to ring-fence unionism’s position by balancing North-South and at the same time widen the East-West relationship to include Northern Ireland and gain Dublin’s and nationalism’s recognition of its validity. That he achieved it was regarded as a significant win at the time.



tested nor kept open to review. The European Commission had no previous experience of designing such a framework (unlike trade or association agreements, for instance).

Few policies succeed first time; this is even more true when they are seeking to achieve potentially conflicting objectives and then the key issue at stake is understood so differently by the parties concerned. The Protocol's prospects for success were always low without the application of great discretion and the ability to revise according to the real-life lessons learned from its operation. By the time the EU agreed to revisit implementation in late 2021 the problem had moved from being defined largely by extremely difficult operational problems to considerable and complex political ones that can't be addressed only with technical changes within the current parameters of the Protocol. Further delay — and it is at the time of writing two years since the collapse of unionist support and willingness to make the Protocol work and a year since the collapse of the power-sharing institutions — will make the compromises that are needed harder to agree for a solution that stabilises Northern Ireland and advances reconciliation.

The UK Government has, as a matter of first principles — as well as under its direct obligation as the sovereign government of Northern Ireland to ensure stability in Northern Ireland and uphold the Good Friday Agreement — a duty to address this issue.

## 6. Failing the Protocol's own objectives

### Overview

The Protocol was designed by the European Commission, based on its mandate from the European Council, to protect the Good Friday Agreement post-Brexit<sup>156</sup>. It is based on the EU's preferred model of alignment<sup>157</sup> and is designed to protect North-South cooperation (Strand Two) and avoid a hard border while securing the EU internal market and customs union. However, the means used to do this has had unintended and unforeseen consequences on the rest of the Agreement, resulting in the failure of the Protocol to meet its other objectives. The Protocol's objectives are set out in Article 1 of the Protocol. The first two clauses set out what the Protocol won't affect, and the third clause sets out what it is designed to achieve.

“1. This Protocol is without prejudice to the provisions of the 1998 [Good Friday] Agreement in respect of the constitutional status of Northern Ireland and the principle of consent, which provides that any change in that status can only be made with the consent of a majority of its people.

“2. This Protocol respects the essential State functions and territorial integrity of the United Kingdom.

“3. This Protocol sets out arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions.”

### Article 1.1: the constitutional status of Northern Ireland

The Protocol may succeed in the purely and narrow objective of being without prejudice to the Good Friday Agreement in respect of the 'constitutional status' of Northern Ireland and the 'consent' principle upon which that status rests, in accordance with a very strict interpretation of how the term 'status' is meant in the Good Friday Agreement — though this has been consistently contested by unionists who insist that 'any change in status' required consent. This is based on the actual form of words in the Good Friday Agreement's Article 1 (iii) which reads:

156. The Protocol puts into effect the EU's 'solution' of alignment, rather than specific solutions proposed by the UK; it was committed to in phase 1 of the withdrawal negotiations at the insistence of the EU, rather than in phase 2 as preferred by the UK which wanted a Northern Ireland/Ireland arrangements negotiated alongside the future relationship.

157. Alignment was the 'backstop' that would secure North-South cooperation and avoid a border in the event that a future UK/EU relationship or specific solutions were unable to do so (Paragraph 49 of the Joint Report, December 2017). Given UK red lines, the EU never saw any alternative to alignment.

“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 pointed out earlier in this paper, ‘constitutional status’ is not a purely abstract term. It means something in the real world. The Good Friday Agreement is composed not only of the Strands and principles that underpin their operation but the foundational place of Northern Ireland in the United Kingdom ‘in its entirety’. The British-Irish Agreement required this specific wording to be set out in UK legislation, just as the Irish constitution had to be amended, before the Agreement could come into force.

So, though strictly speaking the constitutional position of Northern Ireland remains unaltered in that Northern Ireland remains in the UK, its status within the UK has been significantly affected. The UK dimension of the Good Friday Agreement has thus been undermined, and that is the basic political problem unionism has with the Protocol; the changes in the governance structure within the United Kingdom were undertaken without the involvement of Northern Ireland parties or people, and without their consent. At the time of the negotiations (2017-2019) the Executive and Assembly were suspended following Sinn Fein’s collapse of the Executive in January 2017. This meant there was no Northern Ireland institutional presence during the whole of this key period.

This change in governance was undertaken without consideration of the balance between the North-South and Northern Ireland-Great Britain dimensions, yet protection for both was required, not for one at the expense of the other. The political solution insisted upon by the EU does not fit with the Good Friday Agreement. Given the impact of the Protocol on everyday life, the dispute over the question of change of status and consent has exacerbated political problems and had a hugely negative impact on unionist consent for the new arrangements.

### Article 1.1: the Consent Principle

Inconveniently for anyone trying to impose a solution on Northern Ireland, the principle of consent applies far more broadly than to the constitutional question alone. In his paper on the ‘Backstop’<sup>158</sup>, written for Policy Exchange in 2019, the late David Trimble summarised the role of consent throughout the Good Friday Agreement as follows:

“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%.

158. David Trimble, *The Backstop would wreck the Good Friday Agreement*, Policy Exchange, 2019.

“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<sup>159</sup> 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”<sup>160</sup>.

159.Note: The D’Hondt formula is a method of allocating ministerial offices to political parties by applying the formula  $V/(s+1)$ , where  $V$  is the number of a party’s seats,  $(s+1)$  is the number of ministerial offices already allocated plus 1. Parties choose ministerial offices from those available. The formula is used to elect committee chairs and committee members. The posts of First and Deputy First Minister are not chosen using this formula.

160.David Trimble, *The Backstop would wreck the Good Friday Agreement*, Policy Exchange, 2019, page 7.

The main achievement of the Good Friday Agreement was providing a consensual form of governance for Northern Ireland. The new framework of governance for Northern Ireland lacks consent from the unionist community, so we are witnessing a similar failure today.

### **Article 1.2: Respects the essential state functions and territorial integrity of the UK**

The essential state functions of the UK relate to its ability to provide governance for Northern Ireland and to fulfil its obligations under the Good Friday Agreement and the British-Irish Agreement of 1998. Its inability to address the current crisis with the participation of the Northern Irish parties and the Irish Government is a considerable reduction in its ability to fulfil its essential state functions. That it cannot determine VAT rates, manage its internal market in Northern Ireland, regulate medicines and so forth are all significant limitations on its essential state functions.

The United Kingdom is required to provide the economic stability that helps support the peace process more broadly: “Pending the devolution of powers to a new Northern Ireland Assembly, the British Government will pursue broad policies for sustained economic growth and stability in Northern Ireland and for promoting social inclusion, including in particular community development and the advancement of women in public life”<sup>161</sup>. That duty clearly remains, not least because of the commitment to economic rights of the people of Northern Ireland in the British-Irish Agreement 1998<sup>162</sup>. The additional costs of supplying goods into Northern Ireland from Great Britain, and higher costs for sourcing goods from elsewhere, cuts across the UK government’s ability to pursue such policies for a region of the UK with lower-than-average incomes.

### **Article 1.3: The Main Objectives**

The primary purposes of the Protocol are set out in this clause. There are four aims the Protocol’s objectives are chiefly concerned with achieving and all of them are related to the Good Friday Agreement, but in distinctive ways.

- *“To address the unique circumstances on the island of Ireland”*

The unique circumstances of the island of Ireland were addressed primarily through the Good Friday Agreement and the Common Travel Area prior to Brexit. Its circumstances are unique not only because there are two jurisdictions on the island, or because there is a land border, but because there is a substantial Northern Ireland-Great Britain dimension as well as a North-South one. This Northern Ireland-Great Britain dimension is deeper and broader politically and economically for Northern Ireland than the North-South dimension, though both have equal validity. Post-Brexit, the ‘unique circumstances’ broadened to include the added complication of Ireland’s continued membership of the EU and its internal market and customs union. Does the Protocol adequately address these complex and

161. This is set out in paragraph 1 of the ‘Rights, Safeguards and Equality of Opportunity’ section of the Good Friday Agreement, enlarged on in paragraph 2 of that Agreement.

162. The Preamble to the British-Irish Agreement 1998. Note: Since devolution in 1998, power-sharing did not operate between February and May 2000, October 2002 and May 2007, January 2017 and January 2020, and at the time of writing (January 2023), from February 2022, thus requiring this original responsibility to continue to apply to the UK government.

unique circumstances? It is the argument of this paper that it fails to do so. It addresses North-South cooperation and avoids a hard border and does so while protecting the EU's internal market and customs union — the subject of the following two objectives, which are just one dimension of the 'unique circumstances on the island of Ireland'.

- “To maintain the necessary conditions for continued North-South cooperation”

This objective is the protection of one of the dimensions of the Good Friday Agreement — Strand Two. This is the dimension that the 'Irish interpretation' of the Good Friday Agreement highlights and particularly seeks to secure, but which it does by losing unionist engagement with the North/South Ministerial Council (9 September 2021) which has consequently ceased to operate effectively (breaching the EU's first guiding principle for a solution<sup>163</sup>). Whilst existing cooperation continues it will remain limited to areas already agreed and developments within those areas will be more restricted than would otherwise be the case; the freedom to expand this cooperation (acknowledged in Article 11.1 of the Protocol) will be prevented by unionist disengagement. The wording of the second paragraph of Article 11.1<sup>164</sup> suggests that the drafters were entirely unaware that Strand Two North-South cooperation operates on a Belfast-Dublin basis (subject to the devolution settlement and unionist consent rather than London-Dublin). North-South is the one dimension that the Protocol prioritised for protection — as the first paragraph of Article 11.1 states<sup>165</sup> — and which it has been most successful in achieving. However, even here the cost of its failure to address the requirement of protecting the Good Friday Agreement in all its dimensions mean that it has been achieved at a significant cost to the functioning of the North-South institutions and the future development of North-South cooperation.

- “To avoid a hard border”

Avoiding a hard border was initially described and promoted as a gain of the peace process (though primarily, in this respect, a gain of the completion of the single market). The 2016-2017 diplomatic effort by Ireland promoted it on this basis, and it appears as such in the EU's *Negotiating Guidelines and Directives* of April and May 2017<sup>166</sup> until the November 2017 *Dialogue* paper. In 491 words that paper set out an argument that the scale of cross-border activity and the extent to which it relied on a common EU legal and policy frameworks revealed by the mapping exercise (at that time incomplete, unpublished and never assessed against the 'cooperation' within the United Kingdom and Northern Ireland-Great Britain dimensions) meant that:

“It consequently seems essential for the **UK to commit to ensuring that a hard border on the island of Ireland is avoided, including by ensuring no emergence of regulatory**

163. *Guiding Principles*, European Commission/Task Force 50, page 3; 6 September 2017.

164. “In full respect of Union law, the United Kingdom and Ireland may continue to make new arrangements that build on the provisions of the 1998 Agreement in other areas of North-South cooperation on the island of Ireland”. The second paragraph of Article 11.1 of the Protocol.

165. “Consistent with the arrangements set out in Articles 5 to 10, and in full respect of Union law, this Protocol shall be implemented and 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 in the areas of energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport”. First paragraph of Article 11.1 of the Protocol.

166. Paragraph 11 of the European Council's *Negotiating Guidelines* of 29 April 2017 positions the border very generally: “In view of the unique circumstances on the island of Ireland, flexible and imaginative solutions will be required, including with the aim of avoiding a hard border, while respecting the integrity of the Union legal order.” In the Council's May 2017's *Negotiating Directives* it states: “In view of the unique circumstances on the island of Ireland, flexible and imaginative solutions will be required, including with the aim of avoiding a hard border, while respecting the integrity of the Union legal order”. In the Commission's September 2017 *Guiding Principles* it states: “Ensuring the avoidance of a hard border on the island of Ireland is central to protecting the gains of the Peace Process underpinned by the Good Friday Agreement. In view of the unique circumstances on the island of Ireland, flexible and imaginative solutions will be required to avoid a hard border, including any physical border infrastructure. This must be achieved in a way which ensures that Ireland's place within the Internal Market and Customs Union is unaffected”.

**divergence from those rules of the internal market and the Customs Union which are (or may be in the future) necessary for meaningful North South cooperation, the all-island economy and the protection of the Good Friday Agreement.”<sup>167</sup>**

From this point, avoiding a hard border was presented as a requirement for North-South cooperation to take place and thus for protecting the Good Friday Agreement. However, it really relates to nationalist identity and aspiration and the need to secure nationalist acceptance of the post-1998 Good Friday Agreement settlement, similar to that of unionists and the Irish Sea ‘border’. However, on that basis it would not have received the special status it has as a requirement for protecting Strand Two that the November *Dialogue* paper argued for, nor provided the justification for the alignment solution.

Avoiding a hard border is the only objective of the four listed objectives of Article 1.3 that the current Protocol succeeds in delivering in full — and does so despite the UK’s unilateral derogations.

- “To protect the 1998 [Good Friday] Agreement in all its dimensions”

It is hard to see this objective as ‘highlighting’ the North-South dimension given that the core elements the Irish interpretation of the Good Friday Agreement emphasises have been set out separately as the first two objectives of this clause (1.3). “To protect the 1998 Agreement in all its dimensions” must therefore mean, in this context, a commitment to the protection of dimensions beyond Strand Two. That would include Northern Ireland’s place in the United Kingdom, the power-sharing institutions in Northern Ireland, the Northern Ireland/UK dimension of Strand One (specifically the role of Westminster and the Secretary of State) and of course Strand Three with its additional institution (the British-Irish Council) and the aim of developing harmonious relations between Northern Ireland and the rest of the British Isles as well as the core principles of consent and parity of esteem.

Unionists and the UK Government are clear that the Protocol has lost the balance of the Good Friday Agreement between the North-South and Northern Ireland-Great Britain and UK dimensions. Affirming the place of Northern Ireland “in its entirety” in the UK is set out in the 1998 British-Irish Agreement. Protecting the Good Friday Agreement in all its dimensions is not an objective the current Protocol has achieved or is, unless reformed, capable of achieving, nor can this failure be offset by reference to success in protecting North-South cooperation. At present the Protocol fully protects the Good Friday Agreement in only one of its dimensions, and even then without that dimension’s core institution being able to function due to union disengagement and with its future development limited by unionist disengagement. (The Protocol’s overall score card is set out in the table below.)

<sup>167</sup> Dialogue on Ireland/Northern Ireland, 8 November 2017. (The last of the six bullet-points.)

| The Protocol: Meeting its objectives |  |   |
|--------------------------------------|--|---|
| Article 1                            | Objective  | Status  |
| Clause 1                             | This Protocol is without prejudice to the provisions of the 1998 Agreement in respect of the constitutional status of Northern Ireland     | Strongly disputed by unionists and falls short on the GFA's protection of NI's position in the UK and the balance of the GFA <sup>168</sup> . |
|                                      | and the principle of consent, which provides that any change in that status can only be made with the consent of a majority of its people. | Consent is far broader than this; it underpins the working of Strands One and Two of the GFA.   |
| Clause 2                             | This Protocol respects the essential State functions [of the UK]   | Not met.  |
|                                      | and territorial integrity of the United Kingdom  | Not met.  |
| Clause 3                             | This Protocol sets out arrangements necessary to address the unique circumstances on the island of Ireland,                                | Not met <sup>169</sup> .  |
|                                      | to maintain the necessary conditions for continued North-South cooperation,  | Largely met but at the cost of the non-operation of the North/South Ministerial Council and future development.                               |
|                                      | to avoid a hard border   | Fully met.  |
|                                      | and to protect the 1998 Agreement in all its dimensions.'  | Not met. Protocol undermining the GFA and failing the EU's own 'Guiding Principles'.  |

The Protocol has also failed to protect the key principle of parity of esteem as well as the human right to equality and equality in economic opportunity; upholding these are responsibilities for the UK and Irish Governments. Given the importance that the Protocol rightly gives to rights in Article 2, this is a matter of concern.

### The collapse of the institutions and the failure of the Protocol

Given the collapse of the power-sharing institutions in Strand One (devolution) as a consequence of the Protocol (and thus the cessation of a functioning North/South Ministerial Council of Strand Two), the Protocol cannot be regarded as protecting the Good Friday Agreement as power sharing and consensual government is, with guaranteed rights and parity of esteem, the foundation of the entire Good Friday Agreement settlement.

The collapse of the Northern Ireland Executive has caused the key

168. The Good Friday Agreement (GFA).

169. Note: It could be argued that this aim is partially met, but addressing the "unique circumstances on the island of Ireland" cannot be achieved 'partially'. Addressing the North-South dimension and not the 'East-West' (really the Northern Ireland-Great Britain and UK dimensions) does not achieve the objective.



institution of North-South cooperation to cease to operate, thus even failing to fully secure the conditions for North-South cooperation. This is because, as the Good Friday Agreement's 'Declaration of Support' makes clear, the institutions are all interlocking.

“We pledge that we will, in good faith, work to ensure the success of each and every one of the arrangements to be established under this agreement. It is accepted that all of the institutional and constitutional arrangements — an Assembly in Northern Ireland, a North/South Ministerial Council, implementation bodies, a British-Irish Council and a British-Irish Intergovernmental Conference and any amendments to British Acts of Parliament and the Constitution of Ireland — are interlocking and interdependent and that in particular the functioning of the Assembly and the North/South Council are so closely inter-related that the success of each depends on that of the other.”<sup>170</sup>

The realities of this have been ignored or overridden by the design of the Protocol. The EU's own criteria for a solution, set out as the first of its *Guiding Principles*, recognised this. The EU set out its own, very basic criteria for what a solution to the challenges posed by Brexit needed to achieve in *Guiding Principles for the Dialogue on Ireland/Northern Ireland*. Its first test for any solution was:

“The Good Friday Agreement established interlocking political institutions which reflect the totality of the relationships on the islands of Great Britain and Ireland. The institutions, which provide frameworks for cooperation between both parts of the island and between Ireland and Great Britain, will need to continue to operate effectively”.<sup>171</sup>

It is quite clear that those institutions are not operating effectively — indeed they are not operating at all. The politics of the Protocol, born of a misreading of the Good Friday Agreement, have brought down the structures the Protocol was meant — at the barest minimum — to protect.

### **The Protocol's key objectives: Article 1.3 in summary**

These four objectives — “to address the unique circumstances on the island of Ireland, to maintain the conditions for North-South cooperation, to avoid a hard border, and to protect the Good Friday Agreement in all its dimensions”, all depend substantially or completely upon the requirement to protect the Good Friday Agreement.

Only one of these four objectives — avoiding a hard border — is fully achieved by the Protocol; a second — maintaining the conditions necessary for continued North-South cooperation — is largely achieved but at the cost of its institutions contrary to the requirement of the first of the *Guiding Principles* and at the cost of its future development. That is not a sufficient trade-off when it comes not at some cost, which may

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170. Paragraph 5, 'Declaration of Support' by the participants in the multiparty negotiations, Good Friday Agreement, 10 April 1998.

171. *Guiding Principles for the Dialogue on Ireland/Northern Ireland*, European Commission, 6 September 2017.

be perfectly justified in the balance of things, but at such considerable cost to the Good Friday Agreement's foundational basis of power sharing consensual government as a result of the cross-community consent upon which it depended — as well as the cost to Northern Ireland's place in the UK and the disruption of harmonious relationships which is the purpose of Strand Three. Consequently, it fails to meet the objective of addressing the unique circumstances on the island of Ireland too.

Where do these failures in achieving its objectives (of which the loss of power sharing — Strand One of the Good Friday Agreement is substantial) leave the Protocol? What standing does it now have when its implementation measures and its architecture result in it failing almost all its key objectives? Its reason for existence is that it achieves its objectives — most importantly of all, and its essential justification, was that it protected the Good Friday Agreement (with the added condition from the European Council that '*Nothing in the [Withdrawal] Agreement should undermine the objectives and commitments set out in the Good Friday Agreement in all its parts and its related implementing agreements*'<sup>172</sup>). That is why it was agreed in good faith. The Protocol's architecture and implementation measures exist to serve its objectives — they are not sacred in themselves. It is hard to see how the argument that they cannot be reformed can stand. While reform does not make a solution easy, it does make it possible.

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172. The *Negotiating Directives*, paragraph 14, 22 May 2017.

## 7. Where do we go from here?

### The EU's current position

The European Commission's position was set out by Maroš Šefčovič in his statement of 17 May 2022:

“After long and intensive discussions between the EU and the UK, the Protocol on Ireland/Northern Ireland is the solution found to reconcile the challenges created by Brexit, and by the type of Brexit chosen by the UK government. The Protocol is an integral part of the Withdrawal Agreement. It avoids a hard border on the island of Ireland, protects the 1998 Good Friday (Belfast) Agreement in all its dimensions, and ensures the integrity of the EU Single Market.”

His statement is no doubt sincerely meant. Unfortunately, the Protocol is, as realities and events have proved, not a solution as it is currently designed. The position he describes is no longer a tenable one to hold because it simply is not true. It avoids a hard border on the island of Ireland, ensures the integrity of the EU Single Market (and Customs Union), but it does not protect the Good Friday Agreement (or its ‘objectives and commitments’<sup>173</sup>). It is irrational and unreasonable to require that the structures and measures put in place to achieve a set of objectives must be upheld in full but turn a blind eye to (or tired eyes from) their failure to achieve their full and necessary objectives. The Protocol was agreed to in good faith on the basis that it was a solution; if it is not a solution, as presently configured, then the case to reconfigure it is unimpeachable.

The following month, in June 2022, the European Commission published a Q&A on the Northern Ireland Protocol Bill<sup>174</sup> and gave its response to the UK claim that the Good Friday Agreement is threatened by the Protocol. The full section is quoted for completeness sake.

### **The UK government says that the Good Friday (Belfast) Agreement is threatened by EU action. What do you say to that?**

The EU has proven time and again its commitment to the Good Friday (Belfast) Agreement to preserve the hard-earned gains of the peace process. For example, the EU continues to support the PEACE+ programme of approximately €1 billion, together with the Irish and British governments.

173. As required in the European Council's 22 May 2017 *Negotiating Directives*, paragraph 14.

174. 'Questions and answers on the Commission's reaction to the United Kingdom's bill overriding core parts of the Protocol on Ireland/Northern Ireland', European Commission, 15 June 2022, Brussels.

Moreover, the Protocol respects the constitutional position of Northern Ireland within the UK. This is made clear in the preamble to the Protocol, recalling that “the United Kingdom’s withdrawal from the Union presents a significant and unique challenge to the island of Ireland”, and reaffirms that “the achievements, benefits and commitments of the peace process will remain of paramount importance to peace, stability and reconciliation there.”

Article 1 of the Protocol makes explicit that the Protocol is “without prejudice to the provisions of the 1998 Agreement in respect of the constitutional status of Northern Ireland and the principle of consent”. It contains “arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions.”

The only external evidence provided to back up its claims is that the EU has in the past provided PEACE funding and will continue to do so. This is no proof that the Protocol itself is protecting the Good Friday Agreement. The rest of the response is that the Protocol protects the Good Friday Agreement simply because it says it does. This statement does not stand the least objective scrutiny. It is simply self-referencing and is therefore meaningless.

Exactly the same argument was made by Vice-President Maroš Šefčovič when questioned about the concerns of civic and political unionism at a Northern Ireland Assembly committee; Šefčovič pointed to article 1 of the Protocol, jointly agreed with the UK; “it says that we respect the territorial integrity, we respect the constitutional arrangements [of the UK] and we want to deliver the solutions which are working for all communities in Northern Ireland and therefore for us such a primary topic was to avoid a hard border on the island of Ireland”<sup>175</sup>.

The most recent indicator of the EU’s position was the statement quoted earlier of Commission President Ursula von der Leyen in Dublin in December 2022<sup>176</sup>, where she said: “And one thing is clear: Ireland can always count on the European Union to stand by the Good Friday Agreement — *there can be no hard border on the island of Ireland*”. This is just conflating ‘avoiding a hard border’ with the protection of North-South cooperation and in turn, conflating securing North-South cooperation with the protection of the Good Friday Agreement; it is the short-hand summary of the Irish interpretation of the Good Friday Agreement (in its late 2017 stage onwards). The reality is rather more complex, as this paper makes clear. At one level, given that avoiding a hard border relates to maintaining nationalist consent for the Good Friday Agreement it is true, but that cannot be at the cost of unionist consent.

The EU claims for the success of the Protocol — that it is a solution to the challenges of Brexit on the island of Ireland and that it upholds the Good Friday Agreement — do not add up. It does not protect the Good Friday Agreement or protect unionist interests simply because it says so in

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175. Maroš Šefčovič in his appearance before the Executive Office Committee of the Northern Ireland Assembly, 1 December 2021.

176. President Ursula von der Leyen’s address to the Joint Houses of the Oireachtas, 1 December 2022. Written as spoken.

its text. Nor is the Good Friday Agreement protected because a hard border has been avoided; that is to confuse one interpretation and emphasis of the Good Friday Agreement with the whole.

### **Why the EU should negotiate a Protocol that really delivers on its objectives**

The UK position is to seek a re-negotiation to rebalance the Protocol so that it better reflects the Good Friday Agreement ‘in all its dimensions’ and is thus framed in such a way that both unionists and nationalists can accept it as part of the governance framework under which they live. A Protocol remodelled so that it works in practice — operationally, politically and legally — must do so without compromising the EU’s vital interests.

However, as the EU has committed to protect the Good Friday Agreement in all its dimensions, not an ‘interpretation’ of it, the EU will need to draw on its commitment to a ‘flexible and imaginative’ solution to achieve a reformed Protocol that works for all. This does not mean starting again — but it starts with recognising that what we have has solved only part of the puzzle and that the whole remains to be solved. There are key concepts in the Protocol that the UK and EU, to different degrees, are already using to explore how they might provide more flexibility. There has been a breakthrough in access to data that can build confidence in protection to the internal market of the EU. Perhaps a more risk-proportionate approach is justified given the low threat. Perhaps the UK and the Republic can work together through the structures of the Good Friday Agreement to cooperate on risk management and more rigorously addressing smuggling and the potential for smuggling.

The fulfilment of those EU commitments to the Good Friday Agreement that are as yet unrealised provide a political, legal and moral basis to push technical and political flexibilities further than hitherto, and to convince internal EU actors that this is necessary and justifiable. We should be ambitious — to strive for a solution, not just a deal. Only a solution will satisfy the condition set out in the European Council’s *Negotiating Directives, Guiding Principles* and meet the objectives of the Protocol itself

Without a solution the UK will likely continue its unilateral approach to managing the problems of the Protocol: it has been moving from unilateral derogations and grace periods to address operational problems to legislation to enable it to manage political ones; this is a consistent approach to the problems it has to face as the sovereign government in Northern Ireland, but one that has left it misunderstood and misjudged by its friends. To arrive at an agreed solution with the EU, supported of course by the Republic of Ireland, and which is capable of gaining the support of both communities in Northern Ireland, is far more preferable to further unilateral action to address the present crisis. Given that technical talks are likely to be insufficient in addressing the deep structural faults in the Protocol, how can the current talks be upgraded to a renegotiation capable of addressing the Protocol’s real problems, a negotiation that can deliver the solution to the challenge of Brexit to the settlement established by the Good Friday Agreement?

### The case for the European Commission renegotiating the Protocol

There are four key arguments as to why the EU should renegotiate the Protocol.

1. The first reason is because the current Protocol came into existence under a European Council mandate to the European Commission that was set out in its *Negotiating Guidelines and Directives* of April/May 2017. The *Negotiating Directives* say:

“In line with the European Council guidelines, the Union is committed to continuing to support peace, stability and reconciliation on the island of Ireland. Nothing in the *Agreement* should undermine the objectives and commitments set out in the *Good Friday Agreement* in all its parts and its related implementing agreements; the unique circumstances and challenges on the island of Ireland will require flexible and imaginative solutions. Negotiations should in particular aim to avoid the creation of a hard border on the island of Ireland, while respecting the integrity of the Union legal order”.

The negotiating mandate set by the European Council has not been fulfilled by the European Commission and nor has the Commission fulfilled its obligation to negotiate in line with those *Directives*<sup>177</sup>. The current Protocol undermines the objectives and commitments of the *Good Friday Agreement*, thus breaching its own core condition for any solution. The Protocol has failed to address “the unique circumstances on the island of Ireland”. The alignment of Northern Ireland with the EU’s single market and customs union may, arguably, be imaginative, but imposing a regime designed for an international border within an existing highly integrated internal market is not imaginative and is far from flexible. Nor is it contributing to “peace, stability and reconciliation”<sup>178</sup> in line with the European Council’s declaration of its commitments: support for the Protocol amongst unionism has collapsed — and with it cross-community consensus for governance in Northern Ireland on which all these objectives depend. The *Good Friday Agreement* itself is on its knees. There is, therefore, a very strong case for the mandate of the negotiators to be broadened.

2. The second reason is that the flaws in the Protocol’s architecture and implementation measures have directly resulted in the collapse in the institutions which are consequently failing “to operate effectively”. This breaches the first of the *Guiding Principles* set by the EU in September 2017 when it set out in detail its position on the *Dialogue on Ireland/Northern Ireland* and the conditions that a solution had to meet. The Protocol does not meet that core condition. That this is a consequence of its failure to secure the core condition of the EU’s negotiating mandate — a failure due largely to its breach of the *Good Friday Agreement*’s core principle of consent and its balance between nationalist and unionist interests and

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177. Article 2, ‘Recommendation for a Council decision authorising the Commission to open negotiations on an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union’, 3 May 2017.

178. *Negotiating Directives*, 22 May 2017: “In line with the European Council guidelines, the Union is committed to continuing to support peace, stability and reconciliation on the island of Ireland”, first sentence of paragraph 14 (the core text on Ireland/Northern Ireland).

aspirations as well as its undermining of the chief gain of the Good Friday Agreement — consensual governance in Northern Ireland — makes that failure all the more problematic. This again should provide political, legal and moral reasons and justification to negotiate for a result that meets this requirement.

3. The third reason, as outlined above, is that the Protocol exists to achieve a set of objectives — set out in the first article of the Protocol. The Protocol fails to achieve all these aims: of the eight ‘objectives’ that are set out in Article 1 of the Protocol, only two can be claimed without dispute to have been achieved — maintaining the necessary conditions for continued North-South cooperation (at the cost of its institution’s operational effectiveness and future expansion) and avoiding a hard border on the island of Ireland.<sup>179</sup> These goals have been achieved at the price of losing the main goal of the Good Friday Agreement — consensual power sharing government — and significant damage to Northern Ireland’s place in the UK (a foundational guarantee of the Good Friday Agreement). This trade-off is not consistent with the overall aim of protecting the Good Friday Agreement in all its dimensions. The Protocol needs to be reformed to meet all its objectives.

4. The fourth reason is that the Protocol does not work operationally. Apply the Protocol and it creates the conditions for application of Article 16 safeguards, yet these safeguards cannot resolve the problem because the problem is in the design of the Protocol — a ‘political solution’ that the EU put forward that was based on “an interpretation of the Good Friday Agreement which highlighted its North/South dimension”<sup>180</sup> at the expense of the Northern Ireland-Great Britain dimension and ignored the fundamental principles of the Agreement (consent and parity of esteem) and the process that brought the Agreement about<sup>181</sup> — thus leading to the undermining of political consensus. It also ignored the realities: Northern Ireland functions within the internal market of the United Kingdom and not within an ‘all-island economy’. The realities of Northern Ireland’s economy and trade, especially the movement of goods normally associated within an internal market, needs to be reflected in the operational working of the Protocol.

These problems can only be resolved by a negotiation based on a more accurate understanding of the Good Friday Agreement itself, more realism about Northern Ireland and its relations eastwards as well as southwards, together with recognition of the failures of the current ‘top-down’ approach. Tony Blair puts the negotiations on Northern Ireland into a perspective that both the EU and UK would profit from remembering. After the achievement of the 1998 agreement “It took us another nine years to put it all together in a final working solution... Hillsborough, Weston Park, Leeds Castle, St Andrews”.<sup>182</sup> These were real negotiations — painful at times — but worth it.

179. As set out in Article 1:3 of the Protocol.

180. Rory Montgomery, Ireland’s senior Brexit negotiator in the Department of Foreign Affairs, ‘Protocol problems for both parts of Ireland: North and South’ (*Fortnight*, April 2021). Quoted early in the paper.

181. Jonathan Stephens, ‘Northern Ireland Protocol: Process still matters in Northern Ireland’, UK in a Changing Europe, 23 August 2022.

182. Tony Blair, *The Journey*, (2010), page 179.

### Conclusion

Both sides have entered into commitments — legal, political and moral. Those of the UK are well known and oft cited, but those of the member states and the European Commission are hardly recognised and rarely if ever cited. The European Council’s mandate is a real legal commitment that ‘Nothing in the Agreement should undermine the objectives and commitments set out in the Good Friday Agreement in all its parts and its related implementing agreements’; this core condition has not been met. The Commission’s own ‘Recommendation for a decision authorising the Commission to open negotiations...’ stated that “negotiations will be conducted in the light of the European Council guidelines, in line with the negotiating directives set out in the annex”<sup>183</sup>. That key commitment in the Directives has been missed.

Equally, through the Protocol, the EU has entered into a commitment that measures to address the challenges of Brexit on the island of Ireland must protect the Good Friday Agreement in all its dimensions. They are not doing so. The EU’s own requirement for a solution set out as the first of the *Guiding Principles*<sup>184</sup> has not been met because the institutions established by the Good Friday Agreement are not able to work due to a collapse in the political consensus. It was creating a constitutional consensus across the communities that ended violence and normalized life and politics in Northern Ireland. Restoring this consensus must be the chief object of these negotiations and that requires reform of the Protocol so that it achieves all its stated objectives.

A deal on the Protocol based on improved terms of the European Commission’s non-papers of October 2021 will not meet the primary condition of the European Council’s negotiating mandate for the European Commission or satisfy its *Guiding Principles*. There is currently a window of opportunity for negotiations to arrive at a reformed Protocol that protects the Good Friday Agreement in all its dimensions, providing a working solution that finally resolves not only the operational problems but the political ones too. It is only by achieving both, linked as they are, that there is a reasonable chance for unionists to return to power-sharing government with their consent reaffirmed, allowing the institutions to operate effectively and for both the EU and the UK to put this long saga behind them at last.

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183. Article 2, ‘Recommendation for a Council decision authorising the Commission to open negotiations on an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union’, 3 May 2017.

184. “The Good Friday Agreement established interlocking political institutions which reflect the totality of the relationships on the islands of Great Britain and Ireland. The institutions, which provide frameworks for cooperation between both parts of the island and between Ireland and Great Britain, will need to continue to operate effectively”, *Guiding Principles*, 6 September 2017.





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