

**RE-VISITING AND RE-IMAGINING BORDERS
AFTER BREXIT**

**12 June 2017
University of Glasgow**



**Organised by the Scottish Universities Legal Network
on Europe**

INTRODUCTION

The SULNE Workshop on “Borders After Brexit” took place over the morning of the 12th June 2017 at the University of Glasgow. The presentations consisted of two 45 minute panels, with the first session discussing border questions from a broad EU perspective, and the second specifically focusing on the Irish border. Attention was paid to issues of persons (citizenship, immigration, border checks) and of goods and services (customs, tariffs, and rules of origin). The audience consisted of researchers, academics, policymakers and legal practitioners, from whom questions and observations were invited at the end of each panel. The workshop was organised by Maria Fletcher (University of Glasgow), Annalisa Savaresi (University of Stirling) and Nina Miller Westoby (University of Glasgow), under the auspices of SULNE and generously funded by the Royal Society of Edinburgh.

SESSION ONE: BORDER QUESTIONS

The session was opened by its chair, Professor Noreen Burrows, who introduced the three speakers on the first panel:

- Professor Jo Shaw, University of Edinburgh
- Dr Nikos Skoutaris, University of East Anglia
- Professor Dimitry Kochenov, University of Groningen

In her opening remarks, Professor Burrows observed that the purpose of the session was not simply to identify the problems arising from the vote to leave the European Union, but also to try to identify possible answers. Reference was made to a passage from the European Council’s Guidelines for Brexit Negotiations¹ which, in the context of Northern Ireland, highlighting the need for “imaginative and flexible solutions.”² The Northern Irish context, observed Professor Burrows, was one of many issues in respect of which the practical need for solutions was vast.

Each of the three papers offered a perspective on how to solve the border issues caused by Brexit. The first paper discussed the background factors for the “Leave” vote, before concentrating on the particular issues, and possible solutions thereto, arising from the Scottish perspective. The second paper, on the phenomenon of “de-Europeanisation”, highlighted the dangers which may arise from EU withdrawal, and focussed on Cyprus and the solutions adopted in that context. The final paper extolled the flexibility of the toolkit which the European Union is endowed with for dealing with border issues, making reference to examples from all corners of the European Union.

¹ Press Release 220/2017, 29/04/2017, available at http://www.consilium.europa.eu/press-releases-pdf/2017/4/47244658130_en.pdf.

² Ibid, para 11.

'Brexit, Freedom of Movement and EU Migration: The View from Scotland'

Professor Jo Shaw

Professor Shaw began by discussing how we in the UK had arrived at the need to go through the difficult and challenging process of exiting the European Union. She noted that the “take back control” theme which permeated much of the message of the ‘Leave’ campaign had been abandoned in the wake of their success. Instead, there had been a “major post-hoc reconstruction” of the slender majority – 51.9% - as “the will of the people” which must be implemented, seemingly at all and any cost. This reconception raises vital issues of democracy which must be threaded through all Brexit discussions and their practical implications. The democratic problems are exacerbated by the multiplicity of *demoi* which were present in the referendum.³ Further, the conceptual worth of the notion of “borders” declines in the context of modern, ambulatory, notions of citizenship, with the sovereign state no longer the sole body capable of bestowing “citizenship-like” entitlements on persons, although retaining its importance in times of political upheaval.⁴

It was observed that, in the debate leading up to the 23rd June 2016, three strands of discussion were conspicuous by their absence. The first concerned the economic benefits which EU migration brings to the UK, especially in areas of service provision as well as areas of low skilled seasonal agricultural work. The second was whether or not British ‘ex-pats’ (i.e. those who have left the UK to exercise free movement rights in other Member States) would, by virtue of their present EU citizenship, have “acquired rights” which would subsist once the UK exited the EU and allow them to enjoy the benefits, and indeed the residence, which they presently enjoy in their country of residence. The lack of prominence given to these issues, when added to the post-referendum discourse on how to get the “best deal” for Britain and its citizens, demonstrated a lack of any sophisticated understanding of European integration. The pick-and-choose approach, especially in relation to freedom of movement, advocated by many fails to appreciate the inextricable linkage of the various limbs of the single market, where the amputation of one limb may be fatal to the success of the entire endeavour.

Further, there had been precious little discussion of the poor implementation and application of free movement rules by the Home Office. An appreciable degree of friction between EU free movement and UK immigration law can be observed, and many have suffered as a result of this.⁵ This can only get worse in the lead up to the UK’s withdrawal, with there being no clarity as to whether EU citizens wishing to continue to reside here should apply for permanent residency or for citizenship.

The shock result of the General Election on the 8th June 2017 may be the beginning of the pathway to a “reckoning”: the realisation that it is impossible to maintain present standards of

³ On this, see J Shaw, ‘The Quintessentially Democratic Act? Democracy, Political Community, and Citizenship In and After the UK’s EU Referendum of June 2016’, 2017 *Journal of European Integration* <http://dx.doi.org/10.1080/07036337.2017.1333119> (pre-publication version available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2976438).

⁴ See further J Shaw, ‘Unions and Citizens: Membership Status and Political Rights in Scotland, the UK and the EU’ in C Closa (ed), *Secession from a Member State and Withdrawal from the European Union*, (CUP, forthcoming 2017), chapter 9.

⁵ See further J Shaw and N Miller, ‘Where Legal Words Collide: An Exploration of What Happens When EU Law Free Movement Law Meets UK Immigration Law’, (2013) 38(2) *European Law Review* 136.

living while simultaneously “taking back control”. So far, Professor Shaw remarked that Labour appears to be doing a better job of manoeuvring the strategic difficulties of Brexit than the Conservatives, though this may be a privilege of not being in office. Keir Starmer has recently shown an openness in an article he wrote for the *New European* towards the possibility of pivoting towards something akin to EEA membership. The present position renders the role of the Liberal Democrats, the Scottish National Party, and Conservative MPs with seats in Scotland, even more important.

In terms of the particular Scottish position, the result of the 2017 election makes Scottish Independence less likely in the short, or even the medium, term. Independence would, of course, give Scotland autonomy over its own border and immigration policy, and could see Scotland become a member of the European Economic Area or the EU. A question would then arise as to how much would be brought over from existing UK immigration and border policy in a new Scottish policy. Professor Shaw hoped that the answer to this question would be “not very much”, for the present British position is “poorly implemented” and based on the idea of a “hostile environment”, and not where one would want to be if starting with a blank canvas. Whatever shape the policy would take, questions of integration and cohesion would have to feed into the larger question of redistribution – who is to benefit from the integration of immigrants?

Assuming Scotland stays as part of the United Kingdom, the question becomes whether or not a differentiated position would be adopted. Would Westminster devolve (some aspects of) border and immigration law to Holyrood? And, if so, what form would those policies take? The issue would be more pronounced in the context of goods than with persons: little work has been done on the character of the Scottish economy to ascertain its nature and its corresponding needs. Even if that had been identified, how would one design a suitable border policy?

If no differentiated position is adopted, the fortunes of Scottish border policy is tied with that of the entire United Kingdom. The outcome depends on how the realisation that maintenance of present living standards and a “hard” Brexit are incompatible positions is resolved. This is impossible to predict.

‘The De-Europeanisation of Border Conflicts: The Brexit Effect on UK Territorial Borders’

Nikos Skoutaris

Dr Skoutaris’ presentation had three aims. First, to unpack the term “de-Europeanisation”; secondly, to identify potential issues which this may cause in future with border conflicts; and, thirdly, to observe what this may mean for the special status of Scotland and Northern Ireland.⁶

Around the time of the 2004 enlargement of the European Union, there was much talk of the benefits of “Europeanisation”. Most pertinently, it was said that the process had a positive impact on border conflicts, i.e. there was a dispute over the prevailing sovereignty in a particular region. The theory is that, the closer a state comes to the EU’s orbit, the easier it is for that state to resolve border conflicts. To some extent, this position has been verified: see the instances of FYR Macedonia (in which the EU brokered agreement) and Serbia and Montenegro.

However, Europeanisation has not always been a panacea: as evidenced by Cyprus, Europeanisation does not always lead to the resolution of border conflicts. The EU is at its strongest at the point just before a country accedes: post-accession, the EU is much more capable and willing of compromise and accommodation. What is less well documented, however, is what happens if a state leaves the EU. This is particularly acute in the UK, where the territorial borders of the UK are inextricably linked with conflicts: particularly, Northern Ireland, Gibraltar, and the Cyprus Sovereign Base Areas of Akrotiri and Dhekelia. What relationship should the UK retain with the EU in order to not disrupt the balance in these areas?

Problems will be caused by Brexit in all three areas. While Northern Ireland and Gibraltar have each attracted headlines in the wake of the vote to leave the EU, less has been said of the Cyprus Sovereign Base Areas. These areas, in which the UK has sovereignty, are the closest one can get to the concept of a “colony”. Their relationship with the EU has been tied to that of the Republic of Cyprus: they became part of the EU only when Cyprus joined in 2004. This arrangement smooths the status of base workers (c.2% of the Cypriot population.)

Both areas border the Republic of Cyprus. Turkish Cypriots, however, wish for their territory to border one of the bases to inculcate a sense of security and provide a potential place of refuge. If this eventuated, then that base would then be outside the EU. The position is complicated by the fact that, alongside Greece and Turkey, the UK is one of the guarantor states of the Republic of Cyprus.⁷ After Brexit, two of those three states would not be EU Member States, and there is no indication on how this position would be accommodated.

All this demands a differential solution. If the position is reached whereby the UK is outside the single market and customs union, there is a real problem in the three border regions identified above. There would be an argument for “special status” being accorded to these

⁶ See further N Skoutaris, ‘From Britain and Ireland to Cyprus: Accommodating ‘Divided Islands’ in the EU Legal and Political Order’, EUI Working Paper 2016/02 (available at http://cadmus.eui.eu/bitstream/handle/1814/42484/AEL_2016_02.pdf?sequence=1).

⁷ See the Treaty of Guarantee (1960).

geographical regions, but it is not clear how the EU legal order would accommodate this, for the regions involved aren't states, but territorial regions with distinct positions. The toolbox used to deal with the contested territory in Cyprus may assist here.

'An EU Perspective on Brexit and Borders'⁸

Dimitry Kochenov

Professor Kochenov's paper emphasised the flexibility of EU law for accommodating the different needs of different territories.⁹ His claim was that, in terms of goods and persons, the EU is 'overwhelmingly flexible'. This flexibility arises from the background to the creation of the EU where France, as a major colonial power, sought, via an ultimatum, to secure funding for its overseas colonies on its accession to the EEC. The corollary of this would be the establishment of a single internal market across Europe and Africa. However, the gradual movement from servility to independent civilisations through decolonisation shattered those dreams. Nevertheless, the requisite flexibility is still present.

Take, for instance, the existence of the 8 or so different categories created by UK citizenship law. This panoply was mandated upon the UK's accession to the EU, after which not all Member States were particularly welcoming of so-called non-UK British citizens.

In fact, there is a "staggering" variety of possible approaches. Cyprus is the best example, but others exist. In Liechtenstein, a member of the EEA, there exist no borders between itself and Switzerland, which is simply an EFTA state.

The Faroe Islands are outside the scope of the EU. There are no border checks despite the islands being outside the customs union and single market. It is also outside the personal scope of EU law: Faroese citizens are not Danish citizens for the purpose of EU law. That the Faroese are not EU citizens according to the protocol does NOT change the fact that they are EU citizens and full Danish citizens. They are entitled to both Danish Faroese and a standard Danish passport.

Plentiful examples exist of differentiated yet transparent borders. In Sint Maarten, one can venture into different country simply by hiking across hills. One part of the island is in single market (France); but the Dutch part, as "Overseas Country of the Kingdom", is not part of single market. This poses real problems when it comes to extradition and tax evasion: for instance, the European Arrest Warrant applies to the French side, but not on the Dutch side. In the Dutch context, the Dutch courts have held that the Dutch border is any place where any office of any EU Member State checks the passport of a Dutch citizen's passport. The French condition was not only about financing, but also "full gradual inclusion of the French colonial empire into the single market"

The clear story is that, because of these historical reasons, the EU has a DNA of flexibility, which could certainly apply in the context of Northern Ireland and Scotland. Borders should

⁸ This presentation is based on a paper available at the following link

<http://www.lse.ac.uk/europeanInstitute/LEQS%20Discussion%20Paper%20Series/LEQSPaper111.pdf>

⁹ See generally D Kochenov, 'EU Citizenship and Withdrawal from the Union: How Inevitable is the Radical Downgrading of Rights?', in Closa (ed), *Secession from a Member State and Withdrawal from the European Union*, (CUP, forthcoming 2017), chapter 13.

not be thought of in dogmatic terms: concrete examples testify to the flexibility of EU law in this regard.

Discussion

Bill Rodger, European Movement in Scotland

Would the effect of Brexit be to move the rest of the EU to tighten up its definition of citizenship, thus working against the flexibility of the concept?

- Jo Shaw (JS) remarked that the relationship between borders and citizenship is akin to a venn diagram. The classic element of citizenship is right of return, but this may create a paradox in trans-national world where citizens may be more ambulatory or peripatetic. The role that law plays in accommodating this fact is by no means obvious. Should it be administrative, facilitative, or as peace keeper? It is important that law retains its “strategic ambiguity” while not undermining the rule of law itself.
- Dmitry Kochenov (DK) noted that the prominence accorded to Brexit on the streets of Europe has been exaggerated in the UK: while it is viewed as an utterly irrational populist act, it does not make day-to-day front-page news. In the wider context, it presents only marginal challenges for the EU, with the direction of the EU project still intact. The concept of EU citizenship is central to this. Citizenship, which he defined as “benefitting from the exclusive love that emanates from a sovereign”, has nationalistic overtones, and the EU has hijacked the concept to destroy the legal means of forcing a nationalistic message. It means that one must respect an Estonian or an Irishman as much as one’s home national. This point is not universally assented to: the fact that populists aggravating against this sentiment have a fair share of the vote around Europe testifies to this. However, the difference between the identity of Member States, research has shown, comes down to tolerance. The uniqueness that pertains to national identity is a myth, but nevertheless a powerful and persistent myth. The EU is proof that ‘uniqueness’ is not something we overwhelmingly need to build a successful society: a successful society is one which looks behind borders.

Dr Adam Marks, Senior Policy Advisor for Alyn Smith MEP

If the UK leaves the single market and the customs union, how would the EU deal with goods leaving Ireland by air and by haulage? And how could it do so in a manner which did not disrupt the Irish economy?

- Noreen Burrows (NB) thought that the solution would rest in strong rules of origin.
- Nikos Skoutaris (NK) countered that any solution would have its own attendant difficulties. It may simply have the effect of transferring the border from the ROI border to the Irish Sea. The lesser of the two evils will have to be adopted: there is no panacea. The biggest concern is the stability of the Good Friday Agreement.

- DK noted that transparent borders are possible, citing the example of Basel, where trams carrying goods are permitted to go to and from Germany without checks. The key question is regarding rules of origin: witness the asymmetrical treatment of overseas territorials. Bonaire, for instance, is part of Netherlands, but goods emanating from there are “overseas” ones for the purpose of EU rules. Clear rules can ameliorate the difficulties.

Dr. Mariona Illamola Dausà (University of Girona Visiting academic, University of Leicester)

What solution could be adopted for Gibraltar?

- NS noted that the key issues with Gibraltar were the free movement of persons and services. It is most interesting that the sovereignty of Gibraltar came to the fore post-referendum, and both UK and Spanish ruling parties have Gibraltar at the forefront of their mind. The bluster of the press is unhelpful, but, if a forum for dispute resolution is not adopted, there will be a surge in nationalism. As for Catalonia, the ruling party is in favour of EU membership. There, the debate will focus on two possible outcomes: first, a surge in statehood; second, a sort of ‘soft statehood’. It is important for the EU to accommodate either outcome and not to become a dividing factor.

Elsbeth Attwooll, European Movement in Scotland

The terms ‘nationality’ and ‘citizenship’ are used interchangeably. Why is it EU ‘citizenship’? And what will the effect of Brexit be on EU citizens in Britain/British citizens abroad?

- JS remarked that, if no agreement was reached on the status of citizens, the results would be potentially catastrophic. Here, the ECHR plays some role, placing a restriction on the extent to which existing rights can be frozen. The point is likely to be litigated, probably in another Member State so a preliminary reference could be made. British citizens, as third state nationals, would no longer benefit from EU law. The EU has sought to solve difficulties by allowing the registration of citizens’ initiatives seeking signatures in support of persuading the EU to act in certain areas of citizenship policy to protect those affected by Brexit. The outcome largely depends on the negotiating position – the talk of a “large and generous offer” being made by the UK preceded the recent election. The practical burden on the Immigration and Asylum Tribunal would be pronounced. Mass naturalisation under changed conditions to those applicable at present (where naturalisation in the UK is very expensive) could be the most effective way to ensure continuing citizenship, but under current conditions this would be a massive administrative cost and burden.
- DK noted that it may be relevant that the CJEU does not take into account the past citizenship of the applicant, whereas the Strasbourg court has held that it is important under Article 8 to “look back” in order to ensure that Member States do not abuse the sudden change in status of the applicant.

Dr Katy Hayward, Queen's University Belfast

How is the problem of goods from Northern Cyprus dealt with?

- NS noted that Cyprus was a relatively small economy, especially compared to Ireland or the UK. The CJEU has designated North Cypriot goods as “third country” goods (*Anastasiou cases*). The issue is how to “launder” these goods into the customs union without disrupting the sovereignty of the Republic of Cyprus. This was solved by endowing the already existing Turkish Cypriot Chamber of Commerce with the power to issue goods certificates to enable goods to go to the Republic and then onto other EU states. It was also observed that Northern Cyprus’s dependency on Turkey is largely in the services sector, and that many Turkish universities have their campuses in Northern Cyprus.

Peter Geoghegan, Journalist

How useful are the Australian and Canadian approaches as examples of flexibility, and could these be implemented in Scotland?

- NB – In theory, Scotland could be able to have slightly different immigration system. However, the White Paper on Great Repeal Bill suggests a huge power grab on frameworks, including immigration. The result of the 2017 General Election may bring about a return to differentiated position, with Ruth Davidson presenting a Scottish focus.
- JS emphasised that it is important to keep the selection process separate from its enforcement. A ‘points based’ system is already in existence in the UK, where it has proved problematic. The idea that, post-Brexit, all EU citizens could be subjected to those incredibly stringent processes without major systemic stress is untenable – the cost to the civil service would be massive. Enforcement should be the key focus, and it determines what state the UK would become outside of the EU.
- NS noted that Quebec has a different immigration policy than the rest of Canada, so it is not impossible to have differentiated policies within the one state.
- DK noted that the EU itself is best example of differentiated immigration policy.

SESSION TWO: THE IRISH BORDER

The session's chair, Peter Geoghegan, noted how the Irish question is never far from the forefront of any political change in the United Kingdom, and introduced the three speakers for the second panel devoted to that context:

- Dr Katy Hayward, Queen's University Belfast
- Professor Bernard Ryan, University of Leicester
- Dr John Temple Lang, Partner, Senior Visiting Research Fellow, Oxford and Adjunct Professor, Trinity College Dublin

'Brexit and the Irish Border: Beyond the Law'

Katy Hayward

Dr Hayward sought to place the issues arising with the Irish border post-Brexit in the wider context. She began by noting the inherent difficulty in "squaring the circle" between the views of the UK Government and the realpolitik evinced by EU officials. James Brokenshire, the Secretary of State for Northern Ireland, expressing a desire to maintain a "seamless frictionless border, but the EU's Michel Barnier's statement that the "UK's departure from the EU will have consequences. Customs controls are part of EU border management". It was observed that a "frictionless" border does not reflect reality: there is a distinct border even at the moment, and it already has some effect on those crossing it. It was noted in light of the election result that the DUP's policy has often been one of seeking to have their cake and eat it regarding the undesirability, or otherwise, of a hard border.

The starting point should be the 1998 British Irish Agreement. This noted that the UK and Irish governments wished "to develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union". This important document also entrenched a variety of important norms: provision regarding British/Irish citizenship, respect for human rights, parity of esteem, the institutionalisation of cross-border co-operation and, most inviolably, the border poll mechanism.

The DUP could play a kingmaker role in the upcoming negotiations. It was noted that they might bring their traditional pragmatism to the table here. In terms of the form of Brexit which the DUP wished for, it is important to note that the issues arising in border areas were similar to those which resonated with middle England: immigration, bureaucracy, and taking back control. The effect of this may be to force the UK government to opt for a softer approach in order to avoid complications arising at the Irish border; however, it may also be to give Nigel Farage a pronounced role in the process. The DUP's Brexit policy has had little contact with reality. As for the indirect effect of the DUP's prominence, much would depend on the response of Sinn Fein. As for devolution, the moderate parties are now nervous about the role of the DUP, and it may take some time for power-sharing to be restored to Stormont. Also unclear is what role will now be afforded to the Irish government in the talks.

What effect has membership of the European Union had on the Irish border? First and foremost, it has brought about the normalisation and depoliticalisation of cross-border co-

operation (though that is not to say it has effected a process of denationalisation. As for trade (and note that the trade with the south is much more important for Northern Ireland than it is vice versa), EU membership has removed customs tariffs, other barriers to trade, harmonised regulation and indirect taxation, and has afforded potent mechanisms for realising major cross-border infrastructural projects. As for its effect on citizens, the most obvious addition has been the notion of EU citizenship. But this has been attended with the right to work cross-borders, supranational rights, harmonised protective employment legislation, the Treatment Abroad scheme, and special protections for frontier workers. And the desire for an “ever closer union” has brought with it the opportunity to benefit from European Cohesion policies and funding, other Community-level funding for projects, closer security co-operation and communication, education and research cooperation and funding, and a harmonisation of environmental protection standards.

Brexit could pose a threat in three regards: the repoliticalisation of the border, detriment to trade, and a weakening of the rights of citizens. As for the former, we have seen the suspension of devolution, the polarisation of even moderate intentions, a rise in nationalistic discourse, and the securitisation of the border. To mitigate this, the priority should be the restoration of devolution. This should be accompanied by a proper channel for Northern Ireland to feed into Brexit negotiations, a renewed commitment to the 1998 Agreement, and the establishment of new cross-border institutions, for instance in the energy field.

As for trade, the effect of leaving the Single Market and Customs Union would be deleterious. This would bring about the re-introducing of tariffs and other trade controls, which would place a friction on trade on many dimensions and may incentivise smuggling. All this would result in the shrinkage of the Northern Irish economy and the corresponding loss of investment. This could be ameliorated by having Northern Ireland join the EEA, but this may risk easy trade with the rest of the UK. It would be possible post-Brexit to ensure that Northern Ireland (and the rest of the UK) tracks EU regulatory standards to facilitate trade. The harmonisation of taxes on the island of Ireland may also solve difficulties, as would a commitment to close co-operation among customs authorities

As for the risk to citizens, the threat to the movement of people arise from the inadequacies of the Common Travel Area – the equal rights enjoyed by British and Irish citizens rest on EU law. This could be ameliorated by strengthening those arrangements and providing specific recognition of the British/Irish citizenship of Northern Irish residents. A differentiated border policy and the introduction of smart borders would also mitigate certain issues.

The outcome depends on a number of “known unknowns”. First, how might the EU and negotiators respond to the ‘unique circumstances’ arising from the island of Ireland and the particular position of Northern Ireland? Second, what is the scope for differentiation within the UK itself? Thirdly, what will the effect of the Great Repeal Bill be: will it amount to a powergrab by Westminster, or will border controls be repatriated to devolved regions? Finally, what scope is there for arrangements to be arrived at between the UK and Irish governments?

'The Implications of Brexit for the Common Travel Area and for Irish Citizens in the United Kingdom'

Professor Bernard Ryan

Professor Ryan began by explaining that, contrary to what one would think, there is no clear common travel area agreement between the UK and the Republic of Ireland. There is no formal documentation recording all of immigration arrangements, so “common travel area” can refer to a number of different arrangements.

In the early days of the Irish state, from 1923 to 1939, it was fully integrated into UK immigration law, with full mutual recognition being accorded to aliens. This reflected the pre-1922 position. However, as World War II broke out, controls were introduced for sea and air travel between both parts of Ireland and the UK mainland. These subsisted until 1952, when administrative arrangements were reached between the two governments providing for open borders and control of entry by aliens. Over this period, Britain lead the way, such as with the Commonwealth Immigrants Act 1962 and visa policies. In 1997, the Irish state imposed partial immigration controls to UK arrivals, which provoked tit-for-tat enforcement action by UK agencies at Northern Irish ports. More constructively in 1997, the Treaty of Amsterdam recognised the importance of the CTA, with Protocol 20 TFEU now stating that “the United Kingdom and Ireland may continue to make arrangements between them relating to the movement of persons between their territories.” Since then, and despite moves by the Labour Government in 2009 to adopt the Irish State’s conditions for entry (which was abandoned after Unionist objections), the CTA has been successful, and the move has been towards greater transparency in co-operation.

The CTA is important for two reasons. First, it presents an enduring link to the Irish border. This is not a historic border, and nor has it ever been an effective immigration border. The UK’s position consistently has been that immigration controls are not feasible. Customs controls were present between 1923 and 1992, and security checkpoints were in existence from the 1970s to the 1990s. However, in the post-1998 political context, with increased economic integration on the island of Ireland, it is vital that the border is as ‘soft’ as possible. Secondly, the CTA enshrines the freedom of movement of British and Irish citizens, a presentation favoured by both governments.

The post-Brexit discussion has the continuation of the CTA in view (indeed, this was a DUP manifesto commitment). The European Council’s negotiating guidelines and the Irish Government’s published approach both support the maintenance of the CTA. But it may not be so simple. There may be the need to impose a customs border, which could bring with pressure for immigration controls. Moreover, security considerations have become more pronounced since the London Bridge attack, where one of the attackers had married a British national in Ireland, There is also a pressing need to address the status of Irish citizens in UK immigration law. Overall, all of this may lead the introduction of immigration controls at British sea and airports.

The preferred approach would be to seek a formalisation of the CTA arrangements. This could expressly provide for the rights of nationals from each state to travel to the other, the persons whom would be exempt from immigration law, may introduce differentiated form of immigration controls, short term and common visa arrangements, and information sharing provisions, amongst others. However, it may be idealistic to expect this now.

Distinct from the immigration question is the question of British-Irish *citizenship* regimes. 332,000 Irish citizens are said to reside in the UK (this appears to be an underestimate), and 103,000 British citizens live in the Republic of Ireland. The rights of these citizens arise not from specific agreements reach between the two states, but mostly as a product of EU law. National law may sometimes go further (full political rights are accorded to Irish citizens by the UK; Ireland exempts British citizens from immigration law). There is some scope for special status to be accorded to these citizens – Irish citizens are not ‘foreign citizens’ for the purpose of the Ireland Act 1949, s2, but the effect of this may be limited in that it was intended simply to equate Irish citizens with Commonwealth citizens. The Irish government prefers to approach the issue through the prism of the CTA. But the status issue is not simply about the CTA.

The rights of Irish citizens will therefore have to be defined in detail. Relevant here is the Belfast Agreement: this recognised the “birthright” of the people of Northern Ireland to identify as British, Irish, or both. The “people of Northern Ireland” is defined there as “all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence.” This may have important implications post-Brexit: first, it permits those born to British/Irish citizens or permanent residents in Northern Ireland to hold both British and Irish citizenships, which provides a gateway to EU citizenship. Secondly, it prevents Irish citizens from Northern Ireland from being denied full rights in the UK, thereby protecting all Irish citizens in the UK.

During the Brexit process, the position of current residents should broadly be preserved by the Article 50 agreement: protection of immigration and residence rights, economic and social rights, and political rights. The EU clearly has the situation of Irish citizens in NI in view: the intention appears to at least be protecting the right to be an Irish/EU citizen, and to identify as such.

However, the position of such citizens in UK immigration law will become less clear post-Brexit. Under the Immigration Act 1971, Irish citizens arriving from the Irish state are exempt from control. However, if they arrive from another state, they will be subject to control. They do not have a “right of abode” in either case. At present, all resident Irish citizens are treated as “settled”, but it is not clear why this is the case.

After Brexit, it will be necessary to address a number of questions. First, will all Irish citizens be free to enter from anywhere? Second, will all Irish citizens benefit from a right to enter/reside (particular issues may be raised here by those who are not self-sufficient). Finally, will Irish citizens retain the full economic and social rights that they enjoy presently?

Historically, both governments have avoided discussing these matters. This has been based on a reluctance to entrench separatist narratives. But modern attitudes are different: the equality of the relationship between the UK and Ireland, as well as the Northern Irish

settlement, provides opportunity for agreement. A bilateral agreement already has been proposed by the House of Lords EU Committee (12th December 2016). However, in the wake of the June 2017 General Election, the position of the DUP may be problematic. There is a risk that the DUP will influence future agreements between the UK and the Republic of Ireland. In that regard, unfortunately, the prospects of agreements on the CTA and citizenship seem to be going backwards.

‘Northern Ireland and Brexit: The European Economic Area Option’

John Temple Lang

It was first observed that it had been agreed between the EU and UK that the treatment of Northern Ireland is a priority: it should not await resolution of Article 50 negotiations. Therefore, much of the arrangements will have to be conducted ‘in the dark’. The effect of this depends on several factors. First, the attitude of the DUP towards the border is vital. A soft border would reflect a preference towards a solution which does not antagonise those who would be ready to antagonise. However, the DUP’s support for Leave may reflect a feeling that anything that separates Northern Ireland from the Republic is to be supported, an attitude which could be problematic. Secondly, the DUP must realise that the economic effects of Brexit on Northern Ireland are very serious. For instance, at the moment, the vast majority of agricultural funding comes from the EU, and the chance of comparable subsidies from London are low. Finally, the DUP must weigh up the short term benefits promised by Westminster against the extent (or lack thereof) of long term guarantees of subsidies from London.

It is certain that the ‘freedom’ acquired through Brexit will be used by Westminster to negotiate trade agreements with third states to bring about a “cheap food policy” for agricultural imports. This is one of the very few benefits which Brexit would bring for Great Britain, but would result in monumental hardship being visited upon Northern Irish farmers, which can only be ameliorated by London subsidies. This is not, however, an issue that would be solved by joining the single market.

It is unclear whether or not the DUP wish for Northern Ireland to remain in the single market: however, clearly it would be of great benefit to Northern Ireland. It is clear that it cannot remain in the customs union, but it would be perfectly possible to arrange for continuing membership of the single market by having Northern Ireland join the EEA as a separate trading area. This means that it would remain free to trade with Ireland, the rest of the EU, and the rest of the UK. There would of course be conditions attached to this, but it would be the best means of minimising disruption to the status quo.

If the UK negotiates a successful single market-esque deal, the need for EEA membership would fall away. But given the priority timeframe that has been adopted, it may be necessary in the meantime to secure membership of the EEA pending the outcome of negotiations.

The EEA option is the only sustainable possibility in the context of goods: in the Scottish context, there is little chance of negotiating a separate Scottish arrangement, alongside a special Northern Irish arrangement, on top of the general “rUK” position. As for persons, there are three stark choices: no immigration controls; the need for those travelling from NI to produce identity documents (which would shock Unionists), or stronger controls. However, if the UK places strict controls on immigration into Britain, it will be necessary to have some form of control, as it could not countenance a possible “open back door” for immigration via Northern Ireland. There are implications here for Scotland: if a land border is an impractical means of controlling immigration at the Northern Irish border, then it would be similarly ineffective between Scotland and England. The result would be a need for similar or identical immigration policy on both sides to reduce the need for a practical border.

It was hoped that the chances of a deal between the EU and the UK would be more likely because of the tight election result (leaving out of account, for the moment, the complexities of the DUP). The prospects for Northern Ireland is not clear, and it remains to be seen as to whether or not the solutions adopted there will be of benefit to Scotland.

Conclusion

In summation, Peter Geoghegan noted that, although it seems that a deal would be in the mutual interest of all parties, there were a lot more complexities standing in its way. Chief among them, perhaps, may be the DUP’s perceived attitude that any difficulty for Dublin is a benefit to Belfast.

Discussion

NK: Why would the DUP be against a special deal for NI?

- Katy Hayward (KH) noted that, in fact, the Ulster Unionist Party was even more stark in its manifesto against a special status being accorded to Northern Ireland than the DUP. But, if one looks at the detail of the manifestos, there is a desire for “bespoke arrangements”, or some other euphemistic phrase.

NB: In what forum can the negotiations take place? The British-Irish Council?

- KH observed that the Joint Ministerial Council is not taken seriously, for it has a consultative role only. It is important that discussion take place not just political level, but there is also a pronounced need for civil service engagement. Sectoral specific debates and discussions also may be appropriate. The challenge is that Ireland’s position will be negotiated separately from that of UK. The Joint Secretariat operates on a private and confidential basis.
- John Temple Lang (JTL) noted that it is not obvious that another body with a different title would work any better than the JMC: it depends on the willingness of London to listen to other governments. The position is complicated by lack of Belfast government, and the DUP have no obvious incentive to re-establish government. It would not be constructive in the slightest to exclude Sinn Fein. It is important, however, to not write off the JMC based on its inactivity to date: a body that emulates its function is necessary.

Eamon Butler, University of Glasgow, noted that the reinstatement of Northern and Southern Irish bodies will be key to dealing with the day to day issues which will immediately be affected by Brexit. This may force the hand of Northern Irish parties to come to an agreement, but the wider problem of disengagement between London and Belfast would remain.

Thomas Munzier, University of Stirling noted that the political history of Arlene Foster may not mean that she is best placed to negotiate a sound deal.

Bill Rodgers, European Movement in Scotland

Is the focus on the DUP a distraction?

- JTL noted that if a cross-party policy were to be adopted in London, the influence of the DUP would be reduced.
- Bernard Ryan (BR) noted that the DUP have not discounted the possibility of going into government through Brexit negotiations. Unionists will not accept any divergence on immigration, but a price has to be paid to not have controls. If EU citizens were to have right to travel to the UK via an agreement, then the issues would be solved. A visa waiver system would remove the need for an effective border.
- KH noted that the result could be the issuing of work permits or five year terms for EU university graduates. The idea of landlords checking the status of tenants in Northern Ireland is politically different.

Michael Deans – Maclay Murray and Spens

What about the problems of impartiality founded on the Good Friday Agreement if the Conservatives are to enter into an arrangement with the DUP?

- KH observed that this issue was not raised in 2010 when a deal was struck with the UUP. It does not run counter to the letter of the GFA, but may run counter to its spirit.

Maria O'Neill, University of Abertay

Could a practical solution not be found to immigration issues? What about passenger name recognition for planes and boats: would be an easy means of performing a visa check without a formal agreement.

- BR agreed that this could be a possibility, but questioned how it could operate effectively. It certainly could function for airports, but perhaps not for a ferry, unless one has a car.
- KH opined that greater data sharing looks to be the way forward.