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**Brexit's Dreary Steeples:
Ulster and the EU Precedent
of Bending the Rules**

BRIEFING

NOTE

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Churchill's "dreary steeples of Fermanagh and Tyrone" have again cast their long shadows over the corridors of Westminster. On this occasion, their appearance was hardly surprising; but the modelling associated with it has been instructive.

First, the cock up. The concept of generating a special status for Ulster within the EU framework is not new in Eurosceptic circles. Before the referendum, it was one route that was briefly considered as part of the monumental 1000 page *Change or Go* review.¹ The Stranraer ferry and Belfast airport provide natural transit funnels, where checks could be undertaken with reduced impact. These could be associated with complying with a localised level of sectoral differentiation in standards certification, but whose limits were agreed in advanced and subject to devolved democratic management. In turn they would also supply an inherent off switch, through any subsequent deliberate Single Market divergence. Such an approach could be used to informally distinguish produce (particularly agricultural goods) from the Province by operating an 'Island of Ireland' set of certification scheme, in a sector where such a scheme might be considered of value.

The principle already has precedent, for example in veterinary checks. During the BSE crisis, Northern Ireland's ban was lifted separately and before Britain's – largely down to recognising that there were few reported cases, and that the Province had a longstanding computerised records system (actually set up to counter illegal trade in cattle hormone drugs by paramilitaries). The reality with phytosanitary conditions, one of the core triggers for Technical Barriers to Trade (TBTs), is that regardless of the politics a large body of water does make a physical barrier. This applies regardless of whether it relates to movement of British cattle into Northern Ireland, or transit from the continent of, say, Dutch swine fever or rabies.

The question has always been how to take advantage of that purely geographic boundary without triggering the sovereignty issue. In this, the Irish Prime Minister appears to have played his cards with considerable ineptitude. In July 2017, Dublin encouraged the idea of pushing any new checks into the Irish Sea, while using language clearly associating this with an emerging hard border, rather than as a location for limited random spot checks during transit within the United Kingdom. The inevitable and quite understandable backlash from Unionists completely torpedoed any ranging proposal that might have mutually acceptable. The Irish spin in early December was, if possible, even worse, since it appears to have portrayed Northern Ireland being peeled off from the rest of the UK by successful Dublin negotiation. What is especially unforgivable is the suspicion that this was motivated by the internal political difficulties faced by the Taoiseach. Such self-interest should put Theresa May's handling of the matter, and the role of the DUP, into due context.

Notwithstanding the actions of diplomatic arsonists, precedent still encourages us to be less pessimistic on where the border issue may yet end up. The EU, to apply an element of metaphor, has more history in fudge than Thorntons. Let's here briefly look at three examples.

¹ <http://brexitcentral.com/wp-content/uploads/2016/11/ChangeorGo.pdf>

East Germany

After the Second World War, West Germany (the FRG) considered East Germany (the GDR) to be intrinsically a part of it but administered by an illegitimate government. The brief recitals to its constitution were twice marked with the principle of reunification. Article 23 also stated that Basic Law applied “for the time being” in West German territory, and that “it shall be put into force for other parts of Germany on their accession.” Politically, it was only in the 1970s that Bonn ended its policy, like China over Taiwan, of claiming unitary diplomatic recognition.

This policy change was accompanied by a legal shift, with the FRG now considering that the GDR was a territory within Germany, where Bonn constituted the legitimate overall government but where locally there was a separate authority in power.

This was a diplomatic dance that was then exploited within the context of the EEC. Since East Germany was technically part of West Germany and was now a recognised administration, that meant that it could avoid certain Technical Barriers to Trade (TBTs) and quotas that otherwise applied to the Eastern Bloc. It could do so while selling at higher non-EEC rates, all the while despite the fact that the GDR was part of an entirely different and highly proscriptive trading union (COMECON – the highly insular Soviet-led bloc).

East German pigs and pig meat, poultry and eggs, and wheat were allowed into the EEC by counting it as the domestic produce of a member. This loophole was then further exploited through a carousel of counterpart imports deployed by East Berlin as a means to obtain foreign currency. Reporting from the time suggested this route was also operating as a back door for Polish steel.

Politically though, the arrangement suited Bonn at a time of rapprochement and was allowed to continue.

Algeria

Perhaps West Germany was allowed to get away with it because precedent had already been set elsewhere by France. Algeria before independence had enjoyed an associated EEC status, reflecting the fact that the littoral provinces were considered to be part of Metropolitan France despite being physically seated on a different continent. Under Article 227, the Overseas Departments were specifically covered by the EEC Treaty with respect to the free movement of goods; agriculture (except for agricultural guidance and guarantee funds); the liberalisation of Services; rules on competition; crisis measures under balance of payments difficulties; support in sectoral crises during transition; and the institutions themselves. The term “Overseas Departments” was not uniquely applied to Algeria, but as by far the most important territories, the article’s inclusion in the treaty in the first place was clearly driven by its priorities and needs.

Algerian independence was, obviously, not foreseen in drafting the Treaty of Rome. Self-evidently, that breach meant that those territories were no longer part of France. However, for several years after 1962 an administrative fiction was maintained. The effect of this was only eroded in practice by gradual divergence by the two parties. It was only in 1976 that the new legal reality was admitted and formalised with an EEC-Algeria bilateral.

The Algerian example thus provides a precedent of considerable significance as a route for medium term divergence in the absence of an end settlement, providing the irregular circumstances do not last so long that they are objected against at the WTO.

Cyprus

Or we might turn to another example. Some Remain commentators have latterly, and very tardily, started considering what lessons Cyprus might provide with respect to the Irish Border. In so doing they have turned to the wrong example on the right island. The example of the Sovereign Base Areas (SBAs) that they moot does not provide precedent or parallel on how Northern Ireland will look, and for a raft of reasons – not the least of which is self-evident if one looks at the map and observes how the SBAs straddle East-West transit routes.

The likely future status of the SBAs (which, incidentally, unlike Northern Ireland use the Euro) could indeed provide an Irish model, but only in a parallel universe in which the Treaty Ports had been retained by the UK, and applying to them alone.

A more relevant precedent lies in the peculiar status of Northern Cyprus. Internationally, despite there being a separate administration in the North, it is the southern government that is recognised as the island's sole authority. The 1960 constitution is deemed as still applying to the whole island, with obvious restraints on such issues as the suspension of the quotas on communal representation. But what this provides again is an example of *de iure* versus *de facto* limbo that is interpretable as suits political needs.

The situation in EU terms is set out in Protocol 10 of the accession treaty for the new states joining in 2003. It explains that the accession treaty covers the whole island of Cyprus, but “it is, therefore, necessary to provide for the suspension of the application of the *acquis* in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control.”

Significantly, under Article 2, the precise terms of how EU rules operate on the Green Line are left to the Council to decide. This means that there is considerable scope to change the customs terms and rules at any time in the future.

The most obvious example of legal and political spaghetti that has arisen lies in the series of court cases brought in the South, involving foreign buyers of certain properties in the North even where legally registered in that domain. In the UK, the *Orams* case involved a Nicosia court ruling being forced on UK nationals through a UK court, under Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. We do not intend here to review the merits of the claim, nor the inequity behind the limited time allowed to the defendants to find one of the few available lawyers. We here simply note that the law in the south is intrinsically biased against such purchases - and for obvious reasons. EU law in turn facilitates enforcing one EU state's position relating to what is in practice a third party.

It is worth also briefly reflecting on the trade barriers that emerged between the two communities, as the current situation might have evolved differently, and an 'illicit membership' scenario closer to the other two cases above might have developed.

Even after the Turkish invasion, exports from the North into the EEC were still considered legal. However, this changed with the declaration of independence some months later, since that led to new certification being issued for trade goods but which was carried out in formats that were no longer recognised.

Meanwhile of course, Nicosia is fully aware that TBTs (such as non-recognition of driving licenses issued in the North) constitute an effective economic lever to encourage reunification. Equally, the EU institutionally has agreed that if a deal is reached between the two parties, reunification will trigger the territory of the north coming fully into the Single Market. In the interim, the wording of the accession texts allow the Council, by unanimity, considerable discretion in finding future carrots, and adapting the nature of the trade terms accordingly.

Precedents in Pragmatism

The reality is that the EU has plenty of precedents for working round what we might euphemistically call 'areas of territorial divergence'. The ball today over the Irish trade border is very much in the Brussels court.

It first requires defining what the UK's general trade terms are, then adapting them to the Irish frontier: the attempt at the outset by the Commission to put the cart before the horse was as inept as the decision by Whitehall to go along with it.

It is certainly also worth noting that Dublin's current position is exceptionally baffling, since it demonstrates that its Department of Finance either hasn't done its homework or is keeping quiet about what it has found. In an important piece of research, William Norton has number crunched the EU budget as it will look after Brexit.² He finds that among EU member states, quite apart from the border and tariff issues, there is one key loser from a 'No Deal' scenario arising in a rather unexpected area. Because of the way the EU is financed, the Republic is set to stump up nearly €1.5 billion more into the central EU budget than it would do if a full Free Trade Agreement were reached. By contrast, it is the Commission that is the biggest loser with an FTA, since it would then find a €7.1 billion gap in its budget that those new tariffs would otherwise help fill.

The inevitable suspicion can only be that someone in the Commission out of self-interest has been stringing Dublin along.

This, of course, is before we even take into consideration whether it is in the Republic's own interest to ditch the EU and solve the border issue by leaving the EU as well. That's a sovereign decision for the Irish to resolve by themselves, though as the Irish embassy in London was deployed in support of the Remain side during the referendum campaign, a British Eurosceptic can now feel morally secure

² http://www.theredcell.co.uk/uploads/9/6/4/0/96409902/black_hole.pdf

in dropping that particular stone into the water. In any event, an Irish Eurosceptic take reviewing the significant gains available from following that route can be found online.³

The fact is that the EU has found mechanisms to cut corners in the past where it has suited member states, and if Brussels really cared about the issue it could do so again. Analysis of the plethora of cross-border bodies operating on the island shows that the overwhelming majority are not dependent on EU recognition to survive, beyond an acknowledgement that both parties are certified competent and complementary.

How long it will take for the European Commission to come clean on this is a different question. By any rational standards, the future management of the Northern Ireland border could only ever be defined after the trading status of the UK as a whole was settled. Including it as a preliminary condition for the talks was either a back-of-a-fag-packet decision (incompetence of the sort Remainers consider to be a monopoly held by Whitehall right now); or a cynical attempt to spike a Brexit FTA using very high stakes. Adding the money issue to the preconditions for trade talks suggests the latter, but neither interpretation does the Commission any credit.

As a final aside on the questionable politics pursued over Brexit in certain parts of Brussels, it is worth noting the absence of comment by the Commissioners from the Baltic States over the 2017 push by Michel Barnier to give the Luxembourg Court a direct role inside the UK over EU citizens' rights. It is patently obvious how the premiers of Estonia, Latvia or Lithuania would have responded to an identical demand from Moscow, insisting that its courts continued to police the rights of its expats abroad in post-Soviet times.

³ http://www.theredcell.co.uk/uploads/9/6/4/0/96409902/why_brexit_should_be_accompanied.pdf

About the Author



Dr Lee Rotherham has been an adviser to John Major’s whipless rebels, Eurosceptic MEPs, three Shadow Foreign Secretaries, the Conservative delegate to the Convention on the Future of Europe, a delegate to the Council of Europe, and government ministers. He was Head of Opposition Research for the No Campaign in the AV Referendum, and Director of Special Projects at Vote Leave, the designated pro-withdrawal campaign during the 2016 referendum.

He has twice been a Conservative candidate in General Elections, in 2001 in St Helens South (the “butler campaign”), and in 2005 in Rotherham standing against the then-Europe Minister. Outside of Westminster he has worked in publishing, teaching, heritage, and in Defence.

He has been very extensively published in academia and across think tanks. His publications as author or co-author include *The EU in a Nutshell*; *Ten Years On - Britain Without the European Union*; *Change or Go*; *Plan B for Europe*; *Controversies from Brussels and Closer to Home*; *Manning the Pumps*; *Hard Bargains or Weak Compromises*; *The Hard Sell*; *Bloc Tory*; *Common Ground*; *A Spotter’s Guide to Sound Government Policies*; and the award-winning *Bumper Book of Government Waste* and *Brown’s Wasted Billions*. His historical works include *A Fate Worse Than Debt – A History of Britain’s National Debt from Boadicea to Cameron*; *The Sassenach’s Escape Manual*; and tour guides to Roman Britain, colonial North America, the Hundred Years War, and the Apocalypse.

Lee is a reservist in the British army, and has served on three overseas deployments

