

# The Irish Border and Brexit

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# (1) The 2016 Referendum

- I (a person from 'nowhere' i.e. Islington) voted remain on 23 June 2016
- The Cameron government lost surprisingly: 52 per cent to 48 per cent on a 72 per cent turnout (a victory for the people from 'somewhere')
- I now support - for constitutional reasons - the UK leaving the EU (plus the EEA) on 29 March 2019: query whether the referendum was advisory or mandatory (European Union Act 2011)?

## (2)The Irish Border

- This issue has dominated the withdrawal negotiations since 29 March 2017 perplexingly
- The card has been played very effectively by Monsieur Barnier, with the ROI supporting the EU27
- Unfortunately, this has been at the expense of political and legal understanding

## (3) The EU and National Referendums

- 2005 France, European constitution
- 2005 The Netherlands, European constitution
  
- 1992-1993 Denmark, Maastricht treaty
- 2001-02 ROI, Nice treaty
- 2008-09 ROI, Lisbon treaty
  
- Is the EU trying to force the UK to a second referendum?

## (4) Articles:

[www.austenmorgan.com/legalwriting/](http://www.austenmorgan.com/legalwriting/)

- (1) (With Others) 'Mutual Interest: how the UK and EU can resolve the Irish border issue after Brexit'  
Legatum Institute special trade commission, September 2017
- (2) *Technical Note regarding the above*
- (3) (With Veronica Hewson) 'A Hard Question: managing the Irish border through Brexit'  
[2017] 20(1) IJEL
- (4) 'Questions over the Irish border are eminently soluble, if only the EU would allow the work to begin'  
BrexitCentral, 20 February 2018

## (5) The First Ideological Cloud

- The so-called Good Friday Agreement
- Austen Morgan *The Belfast Agreement: a practical legal analysis* (London 2000)
- R (Miller) v SoS [2017] UKSC 5 (NI devolution points fail)
- The only issue: special EU programmes body (1 of 6 north/south bodies) (8 March 1999)

## (6) The Second Ideological Cloud

- The European Vision:
- The European Council conclusions (annexes 1-7), 19 February 2016 (37 pp): David Cameron's concessions he never used
- Draft agreement on the withdrawal of the UK from the EU, 19 March 2018 (green, yellow & white text) (130 pp) - including protocol on common regulatory area

## (7) A Hard Border?

- Berlin wall pre-1989?
- Irish border is (and will remain) an international frontier between UK and ROI - two states - (with Lough Foyle & Carlingford Lough not agreed after nearly a century!)
- Three notional borders:
  - security border (during NI troubles);
  - people's border (the common travel area since 1922);
  - trade border (with freedom of movement from 1993)

## (8) Trade Statistics

- NI turnover, 2015:
  - NI 66.0%
  - GB 21.0%
  - **ROI 5.0%**
- ROI trade, 2015:
  - To GB 12.3%
  - From GB 24.1%**
- ROI followed UK into EU in 1973. In 2017, it exercised its article 50 right to remain a member-state
- Ray Bassett, *After Brexit: will Ireland be next to exit?* (Policy Exchange, June 2017)

## (9) A Pragmatic Solution?

- Develop the London/Dublin bilateral relationship of 1998 and after
- No problem requiring a security border (unless one threatening violence)
- Build on common travel area (EEA freedom of movement and immigration): a future UK/ROI bilateral agreement
- As for trade, a smart border (the ROI has to implement the EU's common customs tariff)

## (10) Work on Technology

- (1) Nicholas Fisher & Stephen Talbot, *Technology Solutions for UK/EU Land Border Security Post-Brexit*, white paper, UES Advisory, 13 March 2017
- (2) Lars Karlsson (deputy DG Swedish customs), *Smart Border 2.0: avoiding a hard border on the island of Ireland for customs control and the free movement of persons*, European Parliament November 2017

# (11) Structure of the Negotiations

- On one side, the UK: divided government; reluctant commons; defiant lords; Whitehall default for EEA; overt political support for EU ('remoaners')
- On the other, the EU: solidarity EU27; commission's task force 50; council's guiding principles; phases I & II; council meetings; backstop
- Opinions: Barry Gardiner MP (Brussels, 20 March 2018); Boris Johnson (private dinner, IOD, 6 June 2018)
- Baroque!!!

## (12) Does the EU want an agreement?

- Priority in Brussels: to deter the breakup of the EU (*pour encourager les autres*)
- Everything since March 2017 suggests the answer is no, bar the transition agreement to 31 December 2020 (based upon continuing UK contributions to the EU budget)
- The foregrounding of the Irish border has been a negotiating tactic to, finally, force the UK to change its mind...or something else
- Last words: (1) Tony Connelly, *Brexit and Ireland*, London 2018, p 287 on bloody Brussels bureaucrats; (2) Dublin might lose out in any possible final deal between London & Brussels