

ICEL-ISEL BREXIT CONFERENCE 9 MAY

THE POST-BREXIT RELATIONSHIP BETWEEN THE UK AND THE EU, AND THE STATUS OF THE NORTH/SOUTH IRISH BORDER.

1. This talk addresses the situation of the UK and Ireland in the event that the UK votes for Brexit on 23 June. For the avoidance of doubt, that is not a situation which I wish for. I shall vote to remain. My aim this afternoon is to provide an objective assessment of possible consequences for the north/south border if Brexit does happen.
2. Shortly after a Brexit vote, David Cameron would inform the President of the Council, Donald Tusk, that the UK intended to withdraw from the EU. Withdrawal would be a process, rather than an event. That process would take between 2 and 5+ years.
3. The tasks for the UK and the rest of the EU would be to negotiate two agreements. One would be a withdrawal agreement. The other would be an agreement on future trading relations between the UK and the EU.
4. The procedure for negotiating the withdrawal agreement would follow that laid down in Article 50 TFEU. The EU treaties would cease to apply to the UK when the withdrawal agreement came into force. If no agreement had been negotiated after two years, then the EU treaties would cease to apply to the UK, unless the UK and all the Member States agreed to extend that period.
5. In parallel with the negotiation of the withdrawal agreement, the UK and the EU would be negotiating an agreement on future trading relations. The aim would be to ensure a smooth transition between the status quo of EU membership, and the onset of the new relationship.
6. The withdrawal agreement would deal with issues such as the acquired rights of migrants in the UK and the EU, and transitional arrangements for migrants without acquired rights, whose rights of residence might be phased out. These issues would be unlikely to affect directly Irish citizens resident in the UK or UK citizens resident in Ireland. Their rights are not dependent on EU law.
7. Ideally, the withdrawal agreement, and the agreement on future relations, would come into force at the same time. That would ensure a smooth transition.

8. There are some key elements the UK would be keen to secure in a future relations agreement:

- free trade in goods, including agricultural products
- free trade in services, including financial services, and including current so-called “passporting rights” for banks and insurance companies.

9. I should say briefly what I mean by passporting. A bank registered in e.g., Ireland and complying with necessary capital requirements and prudentially supervised in Ireland can provide cross border banking services in any other Member States without needing permission. It can set up branches in other member States without further capitalisation and without further authorisation. These rights are valuable to UK banks established and subject to prudential supervision in London. Continuation of passporting would clearly be at risk if the UK left the EU.

10. The EU has never conceded passporting rights for banks and insurance companies in a free trade agreement, with one exception. There are such rights for Norway, Iceland and Liechtenstein as members of the EEA, but this agreement also involves acceptance of the *acquis communautaire*, including the free movement of people, and financial contributions to the EU.

11. There are some elements the **UK** would **not** be willing to concede in negotiations:

- the free movement of people
- financial contributions to the EU

But, free movement subject to unilateral restrictions, and some financial contributions by the UK to the EU, might find their way into the negotiations, if passporting of financial operators might be secured in return.

12. How long would it take to negotiate a withdrawal agreement in conjunction with a future relations agreement? If the process took more than 2 years (the period specified in Article 50), there would need to be unanimous agreement by the UK and all other EU Member States to extend that period. I think it likely but not certain that everybody would agree to an extension if the UK asked for it. The UK would remain in the EU after all, making its financial contributions to the EU, and importing EU products, and no doubt hosting EU migrants.

13. It is difficult to forecast how long it would take to secure a good future relations agreement between the UK and EU.

14. When the politics are right, and negotiations are given priority on both sides, trade agreements can be negotiated quickly, see e.g., UK accession to the EEC in 1973. But on this occasion both the UK and the EEC were committed to the UK signing up to the existing package of rights and obligations, and negotiations focussed on certain transitional arrangements.

15. The position would be very different after Brexit. The politics might be far from right after a Brexit vote. The EU side might feel very sore about the outcome. The UK side might not be inclined to understand why. And the sort of deal the UK would want would be more favourable to a non EU country than any the EU had ever negotiated before. Furthermore, the deal would in all probability have to be agreed by all the remaining 27 EU Member States, as well as by the European Parliament.

16. A quick fix would not be to the UK's advantage. A quick fix would most likely only cover trade in goods. And even that sort of agreement might not be all that quick. It would take time for the dust to settle, and for the recriminations to subside.

17. There would be **arguments over trade in agricultural products**, such as beef and pork (see the EU-Canada agreement), and arguments over lamb (there would be potential opposition from French farmers), though such issues would not be crucial to the UK.

18. **Spain would want to maintain** as much in the way of **fishing rights in UK waters** as it could. **East European countries** would be looking to salvage something in the way of **acquired rights for migrants** and some element of **continuing access to the UK labour market**. One **big question mark** would be over access of **UK financial services to the EU**. That would be crucial to the UK. For that reason some Member States would oppose it.

19. From the point of view of Ireland/UK relations, and the risk of border controls and checks, there are certain features of a future UK/EU agreement which are likely or possible and which should be flagged up.

20. A **close to certain feature** is an agreement on free trade in goods, in which free trade is however **confined to goods originating in the UK or the EU**. That is the pattern for the EU's free trade agreements, including those with the EFTA countries, Norway et al. It follows that **originating goods have to be distinguished from non-originating goods**, and non originating goods are likely to be subject to whatever **external tariff** is applied by the UK and EU respectively.

21. That means that Irish exports of goods to the UK will either qualify for free trade on the basis of proportion of Irish content, or will face duties at the rate of the UK's external tariff. Any waiver of these requirements at the border between Ireland and Northern Ireland would circumvent the UK's external border for imports of Irish goods and suck non qualifying goods from other EU countries into the UK.

22. And the same in the other direction. UK exports of goods to Ireland will either qualify for free trade on the basis of proportion of UK content, or will face duties at the rate of the common external tariff. Any waiver of these requirements at the border between Ireland and Northern Ireland would circumvent the EU's external border for UK goods, and suck non qualifying goods imported into the UK from third countries into the EU via Northern Ireland.

23. This would mean that the issue of border checks on goods would not solely be a matter for agreement between Ireland and the UK; the **EU Commission would need to be satisfied by Ireland** that it was applying and enforcing the EU-UK trade agreement, and the common external tariff, correctly.

THIS WOULD SEEM TO MAKE IT INEVITABLE TO INTRODUCE CUSTOMS CHECKS OF ONE SORT OR ANOTHER ON TRADE BETWEEN IRELAND AND NORTHERN IRELAND.

24. This would be quite separate and distinct from the issue of passport checks, which I shall address shortly. There is a general analogy which might be made and which might assist.

IT IS WITH THE BORDER BETWEEN SWEDEN AND NORWAY

25. EU Member State Sweden and non EU Member State Norway are members of the Schengen area, so there are no passport checks. But there are customs checks. Norway is part of the EEA and is part of the single market but NOT part of the customs union. Trade is confined to originating products between Norway and the EU, and non-originating products are subject to the common external tariff. **FOR THESE REASONS THERE ARE CUSTOMS CHECKS BETWEEN NORWAY AND SWEDEN.**

CUSTOMS CHECKS AROUND THE NORTH/SOUTH BORDER MIGHT HOWEVER BE FAIRLY LIGHT TOUCH

26. Such checks could be spot checks and need not take place at the border. The existence of personal exemptions from the common

external tariff could facilitate **private cars** entering Ireland being exempted from systematic checks. It might be possible to use mobile check points, and thus to avoid fixed check points for the monitoring of private cars.

27. Vans and lorries carrying imports could be required to attend a customs depot in Ireland, which need not be at the border, and spot checks of commercial vehicles in the vicinity of the border might be a feasible deterrent against evasion.

28. The approach on the UK side of the border could be the same.

29. There would no doubt be close cooperation between the Irish authorities and the UK authorities, to ensure the effectiveness of such an approach on each side of the border.

30. My general conclusion as regards the transit of goods, is that customs checks of one or sort of another would become necessary. These checks would not need to take place at the border, and need not lead to delays at the border for private cars or commercial vehicles.

31. I would add the rather obvious point that attempts at comprehensive monitoring of the north/south border would be difficult and costly in practice.

THE OTHER ISSUE WHICH MUST BE ADDRESSED CONCERNS PASSPORT CHECKS. WOULD THESE BECOME NECESSARY IN THE EVENT OF BREXIT?

32. First, a few words about **the status quo in the common travel area**. There are of course **no passport checks**.

33. This suggests that anybody entering the UK must also be entitled to enter Ireland, and vice versa. This is largely true, but not completely true.

34. First, there is the problem of **illegal immigrants** in the UK and Ireland using the common travel area to secure entry to Ireland, or the UK, as the case may be.

35. Secondly, legal entrants to Ireland are not necessarily legal entrants to the UK, and vice versa.

36. All EU nationals are entitled to travel, reside and work in both Ireland the UK. **But UK and Irish visa requirements for nationals of third countries are not identical**. It is possible for a person to have a

visa to visit the UK, without being eligible to visit Ireland. In practice such a person might find it possible to enter Ireland from Northern Ireland.

37. In other words, the common travel area is a potential means of evading the immigration rules of both the UK and Ireland.

38. This is currently addressed by “**Operation Gull**”, a UK/Ireland initiative operating on both sides of the border, and designed to address abuse of the common travel area by those seeking illegal entry to the UK or Ireland.

39. Methods used include the interviewing of suspected persons at airports and ports in the UK including Northern Ireland. According to the UK Border Agency

“Immigration officers in Northern Ireland check the status of passengers arriving from, or leaving for, Great Britain targeting routes shown to be most at risk.”

40. Passports are not required on transit between Northern Ireland and Great Britain but airlines and ferry operators require photo ID which facilitates the checking of the status of passengers on these routes.

41. In 2008 a British government proposal to introduce passport checks for those who fly from Belfast to the rest of the UK was dropped after strong opposition from Conservatives and Ulster Unionists. <http://www.theguardian.com/uk/2009/jan/15/uk-irish-republic-border-passports>

42. On the Irish side, there are reports of Irish police setting up checkpoints in the vicinity of the border and detaining illegal entrants who have crossed the border from Northern Ireland.

43. The potential of Operation Gull to deal with any significant increase in potential cross border illegal movement is not clear. There has been criticism of OG on the UK side by human rights groups. It has been accused of racial profiling in its identification of individuals selected for interview in UK ports and airports. The UK authorities do not accept that this is the case. Techniques used on the UK side to identify and interview suspect travellers at airports and ports in Northern Ireland and elsewhere in the UK lack the transparency of border passport checks.

44. But there is no doubt that action taken, for example, to interview travellers between Northern Ireland and the rest of the UK are a kind of

surrogate passport check, designed to compensate for unauthorised transit across the north/south border.

45. Would Brexit change the position? It might. If it generated enough additional illegal cross-border movement to outstrip the capabilities of Irish/UK cooperation within the framework of Operation Gull. The UK might be faced with a choice - introduce passport checks at the north/south border, or introduce passport checks between Northern Ireland and the rest of the UK.

46. At the moment nationals of all EU Member States are entitled to enter the UK. After Brexit they would no longer be entitled to reside and work in the UK, but they might still be entitled to *enter* the UK **if the UK did not require visas for short stays for tourism and business purposes.**

47. If the UK post-Brexit were to require visa for nationals of a number of EU countries, it is possible that passport checks would be introduced at the north/south border. Prominent Brexit campaigner Lord Lawson has expressed this view. He said: "There would have to be border controls, but not a prevention of genuine Irish coming in, from crossing the border." (Irish News)

48. Theresa Villiers, the pro Brexit secretary of state for Northern Ireland, contradicted this, saying, Lord Lawson had "made a mistake" and that the north-south border would be as "free flowing" as it is today". (Financial Times).

49. Theresa Villiers has not to my knowledge made clear what assumptions she is making. The likely basis is the assumption that Operation Gull would continue to compensate effectively for the lack of passport controls in any scenario she can foresee post Brexit. And if so, that might indeed be the case. Or it might not. It is difficult to forecast the position one way or the other.

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