

# ‘Brexit’: Where are we now?

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# Introduction

- ▶ Very little else talked about in UK and Ireland at the moment other than Brexit
- ▶ I won't assume you are equally obsessed!
- ▶ I need to declare several interests:
  - ▶ Recently joined Irish Government's Brexit Stakeholder Committee
  - ▶ Member of the European Commission's Network on equality law
  - ▶ Barrister representing one of the parties before the UK Supreme Court

# So, where are we on Brexit?

- ▶ Lot's of activity in the UK and Brussels, but very little movement
- ▶ I'll sketch out the activity before trying to explain the lack of movement

# Article 50

- ▶ “(1) Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

# Article 50

- ▶ (2) A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

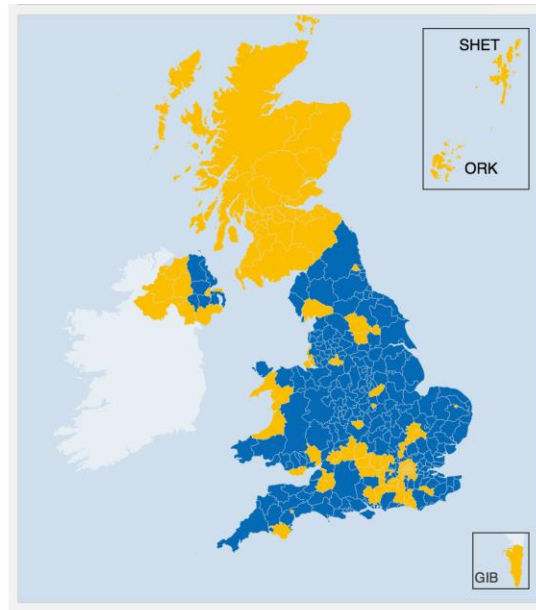
# Article 50

- ▶ (3) The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

# UK Referendum

- ▶ A Referendum was held in the United Kingdom, on the 23th June 2016, under the European Referendum Act 2015.
- ▶ In the Referendum, the majority of valid votes cast in the United Kingdom were in favour of leaving the European Union.
- ▶ In Northern Ireland, however, 55.8% of Northern Ireland's valid votes were in favour of remaining in the EU, while only 44.2% of such votes were in favour of leaving the European Union.
- ▶ Like Scotland, therefore, the majority in Northern Ireland voted clearly to remain.

# Referendum result – June 2016



Key:

■ Majority leave ■ Majority remain

■ Tie □ Undeclared



# Triggering Article 50

- ▶ Government indicated it would use Royal Prerogative
- ▶ Challenges to use of prerogative in Miller case before UK Supreme Court
- ▶ Parallel cases from Northern Ireland (Agnew and McCord)
  - ▶ See forthcoming article by McCrudden and Halberstam, Miller and Northern Ireland, (2018) *UK Supreme Court Yearbook*
- ▶ Supreme Court held that Parliamentary legislation was required in January 2017
- ▶ Act passed by Parliament in March 2017
- ▶ Prime Minister triggers Article 50 in March 2017

# UK general election and aftermath

- ▶ Prime Minister calls General Election
- ▶ Loses majority in House of Commons
- ▶ Dependent on Democratic Unionist Party for support
  - ▶ Extra one and a half billion pounds sterling for Northern Ireland
- ▶ Radically divided Cabinet
- ▶ Lead negotiator: David Davis

# EU-27

- ▶ EU negotiating team: Michel Barnier
- ▶ So far, united front
- ▶ Most important move so far was to divide up the issues to be addressed into two phases:
- ▶ First phase: "divorce" issues
- ▶ Second phase: "future relationship" issues (trade, investment, economic relations, customs, security, etc)

# First phase: “divorce” issues

- ▶ 1. Brexit financial obligations.
- ▶ 2. EU citizens' rights in UK, and UK citizens' rights in EU.
- ▶ 3. Ireland: Border, Common Travel Area, Good Friday Agreement
- ▶ NB: only after “sufficient progress” has been made on all three issues, will the EU-27 agree to begin formal negotiations about second phase “future relationship” issues.
- ▶ UK Prime Minister's Florence Speech and UK diplomatic push unsuccessful
- ▶ European Council decided in October that “sufficient progress” had not been made on any of these issues, so far. Reconsider in December.

# First phase sticking points

- ▶ Financial obligations: How much will the UK have to pay? UK offered around €20 billion. No agreement. €50 - €100 billion? Disagreement over how far existing obligations extend, and how to cost these.
- ▶ Citizens' rights: How will any agreement be enforced? EU-27 wants continuing role for Court of Justice; UK says "no way".
  - ▶ See McCrudden, 'An Early Deal-Breaker? EU Citizens' Rights in the UK after Brexit, and the future role of the European Court of Justice' UK Const. L. Blog (27th June 2017) (available at <http://ukconstitutionallaw.org>)
- ▶ Ireland: perhaps, the most difficult issue – come back to this in a moment: spoiler alert: everyone agrees on the principles, no one agrees on the modalities

# Why not sufficient progress?

- ▶ Politically, no real progress on the UK side because Cabinet is in disarray
- ▶ Prime Minister weak and unable to enforce discipline
- ▶ Old problem of splits within Conservative Party on Europe remain unresolved – civil war within the Party
- ▶ Legislation before Parliament has stalled: everyone has a virtual veto: Labour Party; DUP; Conservative "remainers"; Conservative "Brexitiers"

# Why not sufficient progress?

- ▶ Technically very difficult issues
- ▶ Consider only the variety of different arrangements that are in play:

# Europe's Ties That Bind

## Europe's Ties That Bind

The U.K.'s plan to leave the European Union has focused attention on long-standing pacts that govern trade, immigration and the common currency

### European Union

28-nation single market of free trade and shared regulation; includes "free movement" of goods, services, capital and people

### Euro Zone

19 countries using the euro currency

### European Economic Area

Provides access to single market in exchange for payments; has "emergency brake" on free movement of people

### European Free Trade Association

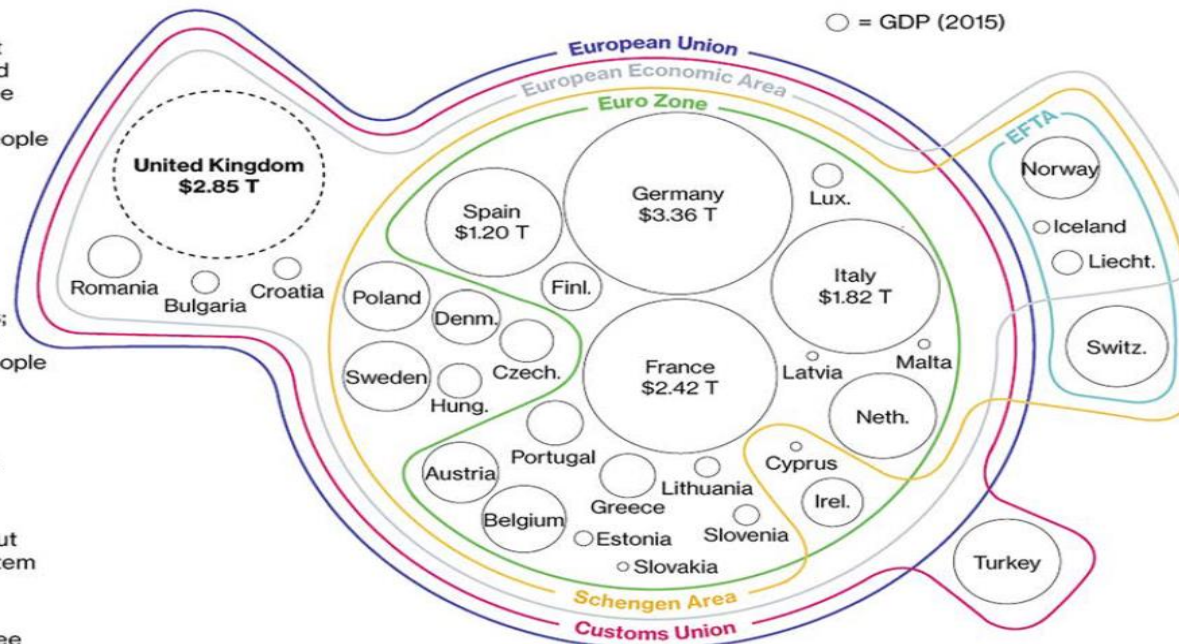
Free-trade zone and network of agreements with other countries

### Customs Union

Circulates goods without duties, has uniform system for handling imports

### Schengen Area

26-country passport-free travel zone



Sources: EU, ETRA, IMF

Bloomberg Graphics

Source: <https://www.bloomberg.com/news/articles/2017-06-22/u-k-should-consider-efta-deal-to-kick-start-post-brexit-trade>




# Why not sufficient progress?

- ▶ Real problem for the Government:
- ▶ No agreement on “future relationships” issues
- ▶ Dilemma for the UK:
  - ▶ Align as far as possible with EU, or
  - ▶ Ditch the EU and rely on trade negotiations with non-EU states
  - ▶ UK wants to have it both ways
  - ▶ EU says: absolutely not

# Possible scenarios

- ▶ 1. Transition agreement, effectively continuing existing position, followed by
  - ▶ Agreement on "soft Brexit": EEA option, or
  - ▶ Agreement on similar basis as EU-Canada Agreement, or
  - ▶ "Bespoke" Agreement
- ▶ 2. Negotiations collapse, and the UK leaves in March 2019 without an Agreement. Hard Brexit. WTO issues arise.
- ▶ 3. UK government collapses, a new general election is called, and an anti-Brexit majority is elected. New referendum? No Brexit



# A case study in complexity: 'Brexit' & Ireland

# UK: Great Britain and Northern Ireland



Northern Ireland geographically separate from Great Britain

Northern Ireland is the only part of the UK that shares land border with another Member State (Gibraltar is not part of the UK)

500 km long

# Northern Ireland/Ireland land border



# The Common Travel Area

- ▶ Has existed since 1923 in various forms (except 1939-52)
- ▶ Wide variety of different Border arrangements between 1923 and now
- ▶ 'There will be no return to the borders of the past' (James Brokenshire and Theresa May); meaningless ...
  - ▶ which Border of the past?

# Images that the border conjures up



Eire Custom Hat on the Leones to Newtown battle.



# The Border in recent history: 1956

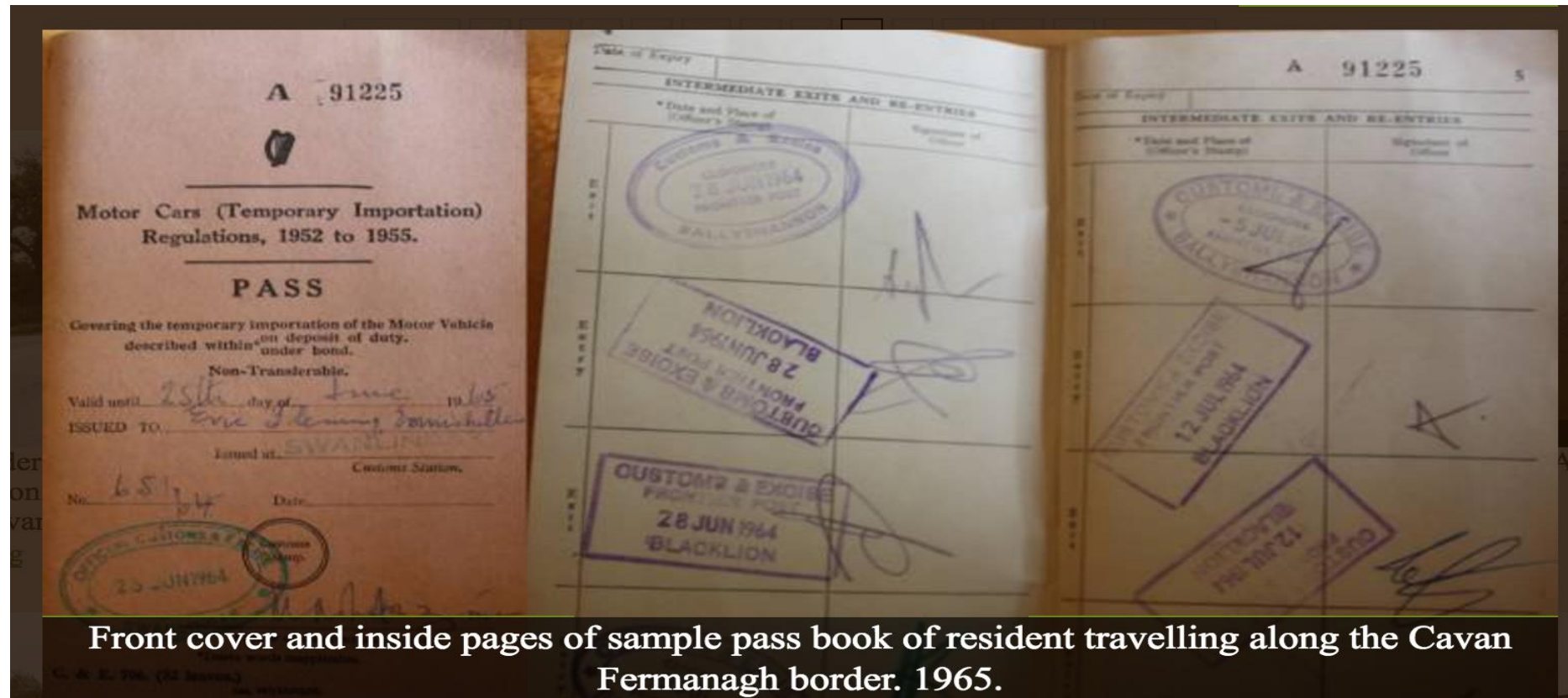


Sunday, 11th November 1956, at 5.30 a.m. an explosion was heard over a distance of four or five miles and awakened most of the residents of Clones town. The debris of the Clontivrin Customs Post which was strongly constructed of timber erected on a concrete base was strewn across the fields for a distance of 200 yards in some cases. The residents of the town who were situated about 150 yards from the Customs Post were alarmed. Mr. James McNamee, who resided with his wife and family stated he was actually lifted right up of his bed by the blast and Mr. James Sheehy, who lived along side with his family had been thrown from his bed. The Customs Post was then allocated portion of a building at Clontivrin Cross belonging to the Ministry of Agriculture and used for

**Photo of the bombed Clontivrin Customs Post and Cattle Grading Pens the Clones to Roslea Road. 11th November 1956.**



# “The Border” in Irish history: 1960s



# “The Border” in Irish history: 1980s



Picture of the Level Crossing on the Meigh to Jonesborough road when it was closed.

# “The Border” in Irish history: ‘mistakes’



The two Ferret Scout cars that crossed the border in error at Courtbane/Craiganoran

# What changed, and why?

- ▶ EEC membership of Ireland and the UK in 1973, followed by significant deepening of relationships in EC and EU
- ▶ Belfast/Good Friday Agreement 1998
- ▶ End of significant political violence



# The land border today: only the metrics change



# The border today





# The border today



# The border today





# “Common Travel Area” now

- ▶ Provides for open borders in Ireland and the UK, with minimal document checks at land and sea borders
- ▶ Current form is in **the UK/Irish Joint Statement Regarding Co-operation on Measures to Secure the External Common Travel Area Border**, December 2011
- ▶ Not legally binding in either the UK or Ireland
- ▶ Certain exceptions: certain 3rd country, & non-EU nationals not covered
- ▶ Provision in UK legislation to require document checks between Northern Ireland and Great Britain (Terrorism Act 2000)
- ▶ Acceptable under EU law, but unclear after Brexit

## Unique circumstances contd.

- ▶ All-island perspectives are not limited to trade
- ▶ Particular nature of devolution arrangements set it apart from Scotland and Wales
- ▶ Northern Ireland likely to be more adversely affected economically
- ▶ Particular socio-political context: an *emerging* post-conflict society
- ▶ Role of the Irish Government as co-guarantors of Belfast-Good Friday Agreement

# Northern Ireland and EU before 2016

- ▶ EU membership brought significant conceptual flexibility into discussions in Northern Ireland, and between Ireland and the UK.
- ▶ What can fill the vacuum? Exit was largely brought about through the mobilization of British (better: English) identity, resurgent English nationalism, and a perceived need to strengthen national sovereignty.
- ▶ Brexit has thus become a central question in NI party politics
- ▶ The potential for unintended but disastrous consequences is high given the current tone-deafness of those in power in London

# Key developments to date

- ▶ June 2016: 56% in NI voted to remain in the EU
- ▶ August 2016: NI government (FM-dFM) letter to the UK PM
- ▶ Dec-Jan2017: Miller/Agnew/McCord decision in UK Supreme Court
- ▶ January 2017: Parliament considers Article 50 legislation
- ▶ February 2017: NI Executive collapses, followed by NIA elections
- ▶ April 2017-: Negotiations to form Executive stall
- ▶ April 2017: Negotiating positions of UK and EU-27 established
- ▶ June 2017: UK General Election and EU-27/UK negotiations begin

# “Unique circumstances” that are accepted by UK government

- ▶ Prime Minister's letter to the European Council suggested as a principle for the Article 50 negotiations:
  - ▶ UK and the EU ‘must pay attention to the UK's unique relationship with the Republic of Ireland and the importance of the peace process in Northern Ireland’.
  - ▶ The land border and the need ‘to avoid a return to a hard border’ were highlighted.

# “Unique circumstances” that are accepted by UK government

- ▶ David Davis (Brexit Minister), acknowledged that each of the UK's devolved administrations have ‘individual circumstances’ that need to be reflected in the UK government's approach to the Article 50 negotiations.
- ▶ UK government accepts that if voters in Northern Ireland were to opt for unification with the Republic of Ireland, Northern Ireland ‘would be in a position of becoming part of an existing EU member state, rather than seeking to join the EU as a new independent state’

# “Unique circumstances” broadly accepted by EU-27

- ▶ EU guidelines in response to May’s notification letter went further in highlighting the uniqueness of Northern Ireland’s position.
- ▶ EU’s consistent support for ‘the goal of peace and reconciliation enshrined in the Good Friday Agreement’ adding that ‘continuing to support and protect the achievements, benefits and commitments of the Peace Process will remain of paramount importance [to the EU]’.
- ▶ Reference to ‘the unique circumstances on the island of Ireland’ requiring ‘flexible and imaginative solutions ... including ... avoiding a hard border, while respecting the Union’s legal order.

# Critical issues

- ▶ Trade in goods and services
- ▶ Agri-food/animal health/environment: trade and subsidies
- ▶ Electricity supply
- ▶ Customs
- ▶ Free movement of persons



# Critical issues

- ▶ Irish/EU citizens resident in Northern Ireland
- ▶ Implication for Belfast/Good Friday Agreement
- ▶ Police/security co-operation
- ▶ EU Peace-dividend grants
- ▶ Devolution of EU powers back to Northern Ireland
- ▶ Human rights

# Degree of agreement between NI and Irish Governments

- ▶ North-South Ministerial Council meeting of 18 November 2016 agreed a set of eight common principles to guide future discussions (not formally published)
- ▶ Includes 'protecting the free movement of people, goods, capital and services on and between these islands'

# Degree of agreement between political parties in Northern Ireland: the wish list

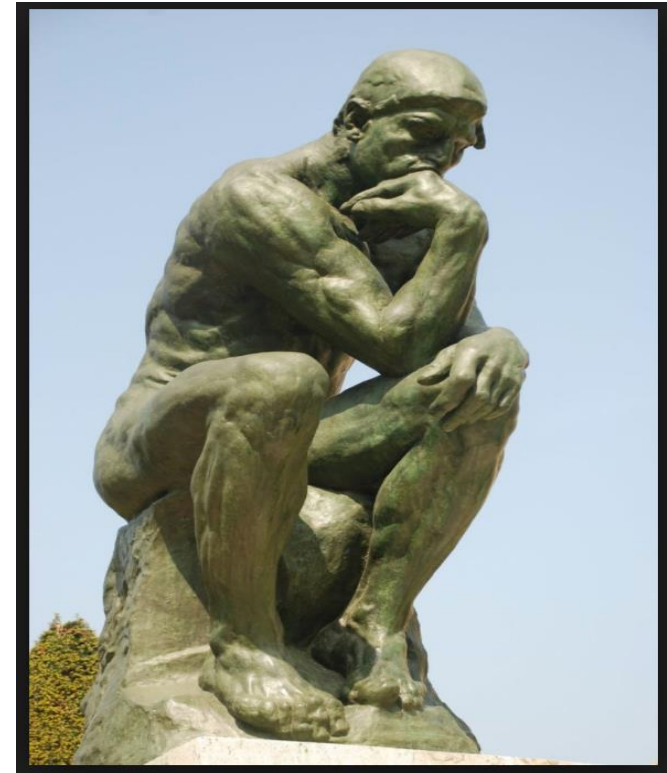
- ▶ Likely agreement on desired outcomes of Brexit negotiations and negotiation objectives to include:
- ▶ Retaining current access to existing markets and the potential to develop trade with new ones through free movement of people, goods, capital and services
- ▶ Arrangements for agri-food sector that takes account of integration across the island
- ▶ A regionally tailored migration policy
- ▶ Maintenance of stable market arrangements for electricity supply

# Degree of agreement between political parties in Northern Ireland: the wish list

- ▶ A funding agreement that maintains access to priority EU initiatives, replaces lost EU revenue streams, supports the cost of transitional adjustment, and strengthens overall NI funding allocation
- ▶ Treaties and agreements in place between Ireland and UK are fully taken account of, together with all associated citizenship rights
- ▶ Continued security and justice co-operation between NI, Ireland, UK and EU
- ▶ NI influence in the negotiation process

# But absence of any *detailed* plan, by anyone ...

- ▶ Filling the vacuum?
- ▶ UK government/Parliament
- ▶ Irish government/Parliament
- ▶ EU Commission/Parliament
- ▶ NI Assembly/Executive
- ▶ Universities/think tanks



# Theoretical options

- ▶ 1. Northern Ireland opts for unity with Ireland, leaves the UK, and remains in the EU (the 'German' option)
- ▶ 2. Northern Ireland has no special arrangements separate from other parts of the UK (the 'sink or swim together' option).
  - ▶ Two major possibilities: the UK leaves Single Market and Customs Union; or
  - ▶ the UK joins EFTA and then EEA
- ▶ 3. Northern Ireland opts for independence from the UK without joining Ireland, and seeks membership of the EU as a separate country (the 'Scottish independence' option)
- ▶ 4. Northern Ireland secures some form of 'special status' within the EU (the 'EU special status' option, including the 'DALRIADA option' (O'Leary))
- ▶ 5. Ireland to leave the EU and rejoin the Commonwealth
- ▶ 6. Northern Ireland joins EFTA and agrees to EEA Agreement (the 'EEA' option)
- ▶ 7. UK (including NI) opts to remain in the EU

# Suggested reading:

- ▶ Royal Irish Academy/British Academy Brexit Policy Discussion Papers:
  - ▶ Brexit and the Irish Border: Historical Context - Professor Mary E. Daly, MRIA
  - ▶ Brexit and the Irish Border: Legal and Political Questions - Professor Gordon Anthony, QUB
  - ▶ The Good Friday Agreement, Brexit and Rights - Professor Chris McCrudden, FBA
  - ▶ The Common Travel Area: More Than Just Travel - Professor Imelda Maher, MRIA
- ▶ Available at: <https://www.ria.ie/news/policy-and-international-relations/ria-british-academy-brexit-briefing-paper-series>

# Thank you

- ▶ Contact details:
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# *EEA-plus* option

- ▶ Three (theoretical) possibilities:
  - ▶ UK joins EEA,
  - ▶ Scotland joins EEA
  - ▶ Northern Ireland joins EEA

# The 'EEA-plus' option

- ▶ EEA: free trade area with the EU; the free movement of goods, services, capital and people; and adherence to EU norms and standards regarding the Single Market
- ▶ Different from, but linked to European Free Trade Association (EFTA) -- established in 1960 (with the UK as a founder member). Current membership comprises Iceland, Norway, Liechtenstein and Switzerland (which does not participate in the EEA)
- ▶ EEA rejected by UK government for UK *as a whole prior to the General Election*, and for *Scotland* separately, but not rejected for Northern Ireland

# Why has EEA been rejected for UK as a whole?

- ▶ UK membership of the EEA would involve
  - ▶ agreeing to free movement of persons
  - ▶ paying into EFTA budget
  - ▶ continuing commitment to EU standards, in goods & services
  - ▶ less control over future than current EU membership
- ▶ And even if the UK wanted it, would Norway agree?
- ▶ And would the PM be able to get it through Parliament?

# Why EEA rejected by UK for Scotland?

- ▶ UK government letter to Scottish Government, 29 March 2017
- ▶ “Scotland’s accession to EFTA, and then the EEA, would not be deliverable and, importantly, would require the consent of all EFTA and EU member states. Any divergence between EU and UK law - as a result, perhaps, of new EU regulation - could lead to the creation of new barriers to trade within our Union, which could take the form of additional controls and checks on trade within the United Kingdom. Given that trade with the rest of the UK is worth four times trade with the EU, I do not believe that such significant disruption to the internal UK market is in Scotland’s - or the UK’s - best interests. And Scotland’s businesses could face a confusing mix of regulatory regimes.”

# The 'EEA-plus' option for Northern Ireland

- ▶ Recent European Policy Centre Paper
- ▶ available at:
- ▶ [http://www.epc.eu/pub\\_details.php?cat\\_id=17&pub\\_id=7576&year=2017\)](http://www.epc.eu/pub_details.php?cat_id=17&pub_id=7576&year=2017)

# The EEA-plus option features contd.

- ▶ It would
  - ▶ achieve much of what the FM & dFM sought in their August 2016 letter to the UK PM
  - ▶ retain current arrangements regarding the movement of goods, services, capital and labour
  - ▶ allow existing levels of market integration on the island of Ireland to be largely maintained

# The EEA-plus option

- ▶ Free movement of persons from the EU, including Ireland.
  - ▶ Access to migrant labour kept, as well as the right of tourists from other EU Member States to come to NI
- ▶ It would withdraw from the EU with UK, be outside the customs union and outside the jurisdiction of the CJEU
- ▶ EEA is a known quantity, well established, and obligations and benefits are clear
- ▶ Dispute resolution, where necessary, would be through mechanisms in the EU-EEA Agreement. Would involve reference to the EFTA Court.

## The EEA-plus features contd.

- ▶ The existing bespoke single electricity market on the island can be maintained – NI would remain within the Internal Energy market
- ▶ Partially safeguard the ethos if not the letter, of the Belfast/Good Friday Agreement, in providing membership within a common European organization
  - ▶ Other than continued EU membership, the EEA is the only existing arrangement that can achieve this
- ▶ A modest payment into the EU budget would need to be made on behalf of Northern Ireland



# EEA Agreement cost: Norwegian accounting

- ▶ In 2016, Norway's payments in relation to its membership of the European single market and other EU programs came to about £623 million or £119 a head,
- ▶ Norway contributes €381 million (£294 million) to EU projects in areas like research; €400 million (£308 million) at the behest of the EU on grants to poorer EU states; and 262 million Norwegian Krone (£21 million) on the upkeep of the institutions of the European Economic Area. Total= £623 million.
- ▶ Norway also contributes to Frontex (the border agency), provides humanitarian support for refugees, and second experts to the Commission. There are no public estimates of these costs, but including them would show the cost of the "Norway option" to be higher.
- ▶ But there are other, different figures on Norway's contributions that is up to some £40 lower a head. The Confederation of British Industry, for example, ops for €100 per head:
- ▶ [http://www.cbi.org.uk/global-future/case\\_study06\\_norway.html](http://www.cbi.org.uk/global-future/case_study06_norway.html)

# Norwegian accounting contd

- ▶ So, if we assume the two amounts for Northern Ireland and estimate cost by population of 1.8 million we get:
- ▶ MAX: if Norway is paying £119 per head, then NI's fee = £214 million pa.
- ▶ MIN: If Norway is paying €100 (£86) per head, then we have a figure of some £155 million per year. [CONVERT ALL INTO EUROS]

# The EEA-plus option: East-West issues

- ▶ Free movement of persons from the EU would entail control of movement from Great Britain to Northern Ireland.
  - ▶ The EEA option does not solve the question of how the controls are to be operated, but importantly it does not accentuate them.
- ▶ Membership of the EEA would not, in itself, avoid a customs border between Northern Ireland and Ireland.

# What EEA-option for NI doesn't cover

- ▶ Customs issues: Rules of origin would have to be applied to ensure that goods originating in Great Britain do not independent Ireland (and therefore the EU) without paying any applicable tariffs, etc
- ▶ Northern Ireland would be outside the CAP and the CFP
- ▶ EEA has no regional policy.
- ▶ EEA option would not automatically include NI's participation in EU research framework, educational and training programs
- ▶ Police and judicial cooperation on criminal matters.
  - ▶ Separate agreements necessary (and possible)

# EEA-plus: challenges

- ▶ Northern Ireland participation in the EEA would involve changes in:
  - ▶ the EEA Agreement,
  - ▶ in UK legislation relating to Northern Ireland,
- ▶ with the need for co-operation from the UK Parliament and government, the Irish government, and the existing members of the EEA.

# EEA Agreement changes needed

- ▶ Arrangements through which NI could join the EEA.
- ▶ 1: UK becomes a signatory to the EEA Agreement – a move that would currently require the UK to join EFTA – but application would be limited to NI.
  - ▶ The EEA Agreement would require amendment to allow a sub-national entity to participate.
- ▶ 2: Northern Ireland becomes a member of the EEA.
  - ▶ Membership of EFTA would probably be required
  - ▶ the EEA Agreement would need to be amended to allow Northern Ireland as a sub-state region to participate in the EEA and in the EEA bodies.

# UK & NI legal changes necessary

- ▶ An increase in the powers of the Northern Ireland authorities.
- ▶ Supplementary agreements on e.g. security, scientific cooperation, to be made by the UK on behalf of Northern Ireland.
- ▶ UK Parliament would adopt legislation for NI; either:
  - ▶ (i) itself setting out the main arrangements for EEA membership;
  - ▶ (ii) allocating NI the powers to give effect to arrangements agreed between the UK, the EU, and Northern Ireland.

# Northern Ireland and the UK constitution: problems ahead

- ▶ Rejection of constitutional pluralism
- ▶ Embrace of unitary state and parliamentary sovereignty
- ▶ "UK single market"



# Post-General Election Opportunities?

- ▶ DUP-Conservative informal coalition
- ▶ Distinguish “special status within the EU” from recognition of “unique circumstances” outside the EU
- ▶ EEA-plus option for the whole of the UK, if only for transition?
- ▶ EEA-plus option for Northern Ireland?