

Three times the EU bent its rules to accommodate unorthodox borders

*The EU is used to accommodating unorthodox borders. It has found pragmatic solutions in the past – none of which required the external party to yield in its customs arrangements. Given these precedents, the EU's continued insistence on a Northern Ireland backstop is nothing more than shallow political manoeuvring, writes CIB committee member **Dr Lee Rotherham**.*

The EU has portrayed the Northern Ireland border as an almost unsurmountable obstacle to a deal with the UK. But the reality is that the EU has plenty of precedents for working round what we might euphemistically call 'areas of territorial divergence'. So in fact, the ball over the NI border is very much in Brussels' court.

The logical way of proceeding would have been as follows. First, define the UK's general trade terms. Then adapt them to the NI border. Yet the Commission insisted on putting the cart before the horse, i.e. border arrangements coming before trade arrangements. A cynic might suggest this was an attempt to spike a Brexit trade agreement using very high stakes.

If Brussels genuinely cared about the NI border issue, it could find pragmatic ways to work around it. It has done so in the past. Below we detail three cases where the EU has previously bent its own rules to accommodate unorthodox borders.

East Germany

After the Second World War, West Germany (the FRG) considered

East Germany (the GDR) to be part of its territory, but administered by an illegitimate government. 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. West Germany now considered the GDR as a territory within Germany where Bonn constituted the legitimate overall government, but where locally there was a separate authority in power.

This diplomatic dance was then exploited within the context of the EEC. Since East Germany was technically part of West Germany and now had 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 pork, poultry, eggs and wheat were allowed into the EEC by counting it as the domestic produce of a member. This loophole was further exploited through a carousel of counterpart imports deployed by East Berlin as a means to obtain foreign currency. Reporting from the time suggested the route also operated as a back door for Polish steel.

Algeria

Before independence from France in 1962, Algeria had enjoyed an associated EEC status, reflecting the fact that its coastal provinces were considered part of Metropolitan France – despite being physically seated on a different continent.

The so-called “Overseas Departments” were specifically covered by the Article 227 of the EEC Treaty. This included the free movement of goods; agriculture; liberalisation of services; rules on competition; and the institutions themselves. While the term “Overseas Departments” was not applied exclusively to

Algeria, these were by far the most important of the territories it concerned, and Article 227's very inclusion in the treaty was clearly driven by French priorities and needs in relation to Algeria.

Algerian independence was obviously not foreseen in the drafting of the Treaty of Rome. Clearly, those territories were no longer part of France after 1962. And yet an administrative fiction was maintained for several years afterwards. 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 treaty.

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

Cyprus

Despite there being a separate administration in North Cyprus, it is the southern government that is internationally recognised as the island's sole authority. The 1960 Constitution of the Republic of Cyprus is deemed as still applying to the whole island.

When Cyprus joined the EU in 2003, the EU addressed the situation in a suitably flexible manner. Protocol 10 of the accession treaty explains that the treaty covers the whole island of Cyprus, but that it is "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."

In practice, this provides a legal limbo that can be interpreted to suit political needs. Significantly, under Article 2, the precise terms of how EU rules operate on the Green Line are left to the Council of the European Union to

decide. This means that there is considerable scope to change the customs terms and rules at any time.

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 properties located in and legally registered in the North. In the UK, the Orams case involved a Nicosia court ruling being forced on UK nationals through a UK court. In other words, EU law facilitates enforcing one EU state's position in relation to what is in practice a third party.

We can conclude by noting that none of the arrangements described above required the external party to yield in its customs arrangements. Given these precedents, and with IT and trusted inspectorates also here in play, demands for a Northern Ireland backstop are nothing more than shallow political manoeuvrings.

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This article is based on a briefing note entitled 'Brexit's Dreary Steeples: Ulster and the EU Precedent of Bending the Rules' published by Dr Rotherham's The Red Cell think tank.