



6/14/2018 | **General**

Is this How Brexit Might Sustain the UPC?

The negotiations to extract the UK from the European Union (EU) have got bogged down in the fundamental issue of the nature of the border on the island of Ireland. Let's not ourselves get bogged down but basically the EU, driven by the Irish government, is adamant that there should be no "hard" customs border between Ireland (the sovereign country) and Northern Ireland (part of the UK). The UK government and the EU have dreamt up various legal and technological proposals to circumvent the issue such that the necessarily hard border of checks and monitoring post-Brexit would be "soft" in fact. None commands enthusiasm or optimism. Whatever happens, any solution needs time that the Brexit interlocutors do not have. As a result there is a "backstop" concept floating around the EU, and also the subject of a paper circulating in UK government, that addresses what could happen in the (increasingly likely) event that a deal cannot be struck, and no Brexit agreement can be reached, by the deadline for concluding the Brexit deal of March 2019. This will entail the UK remaining in parts of the EU framework, such as the customs union, for an extended period in order that the seamless customs border between the two parts of the island of Ireland can be maintained while a solution can be perfected - the talk is of 2 to 5 years. Hard UK Brexiteers are against it but it may yet be part of the solution.

What has this got to do with the UPC? The UK has ratified the UPC Agreement – this is a good thing for the UPC. However, the stumbling block for the UK's continued membership of the UPC is that the UPC is subject to the jurisdiction of the Court of Justice of the European Union (CJEU) which is a no-no for the UK post-Brexit. The backstop, whatever it looks like, would mean the UK would continue to be subject to aspects of the regulatory authority of the EU for the extended period - and that means the CJEU! And that means the UK might be able to abide cosily by the UPC Agreement for longer than previously contemplated while the border issue is sorted out. So, in the on again-off again, swings and roundabouts world of Brexit the light glows a little brighter for the UPC as the prospects for a Brexit clean break in March 2019 grow dimmer. This is only one piece of the jigsaw puzzle but it may provide an extended period for the UPC to get up and running with UK involvement until such time as it proves necessary for the UK to leave at the point where it can no longer be subject to the CJEU. Whether that happens or a fudge is found for the UK to stay is another matter but at least it might provide a bigger breathing space.

The actual start of the UPC hangs on ratification by Germany. The sooner the German judicial system can get its act together and opine on the constitutional issues on the UPC that are before it the better as it would leave more time for the UPC to be in force with UK involvement. But at least the prospects for the sustainability of the UPC are improved, somewhat ironically, if the EU and the UK cannot find an immediate solution for how the Irish border can be made to work. Timing is everything.

This is all speculation and will more than likely end up as tomorrow's fish and chip wrapper but it could be how the UPC is able to be sustained in the medium term - by the law of unintended consequences. Watch this space!

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