Northern Ireland Affairs Committee

Future of the Land Border with the Republic of Ireland Inquiry

Written Evidence on the subject of:

Securing freedom of movement of persons on the island across an EU external border

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Executive Summary

This evidence makes three main points with regard to the status of the land border between the UK and the Republic of Ireland after the UK's exit from the EU:

- First, arrangements for the **management of an external border of the EU may be bespoke**, to some degree reflecting the particular needs, interests and histories of the neighbouring countries.
    - o Any post-Brexit bespoke arrangement for the Irish border will require EU Council and Commission approval and thus must comply with core principles of EU integration, including upholding the 'four freedoms' in the Republic and maintaining the security of the EU's external boundary.
- Secondly, examples from other member-states show that there are **several means of ensuring freedom of movement of designated persons across a state border** even after it becomes an external EU boundary.
    - o Such measures tend to centre on national prerogatives and identities (e.g. granting of citizenship), which mean that some options may be problematic in the context of the (post-conflict, post-Brexit) island of Ireland.
- Finally, **technology** can assist in the management of a border but it is best seen as an aid to, rather than a substitute for, manual, visible and physical border management.
    - o The effectiveness of Automated Border Controls (ABC) rely on access to data prior to the arrival of a person or vehicle at the border/entry point. If monitoring legal cross-border movement through ABC requires intelligence, pre-registration, and routing through specified access points, the use of technology is not likely to diminish levels of illegal cross-border activity. Border security, surveillance and control inevitably comes at a cost to the efficiency, ease and speed of cross-border transit.

Introduction

This evidence follows the presentation of oral evidence before the committee on 23rd November 2016, at which Dr Hayward was asked to submit further written examples of the management of land borders regarding the movement of people, including the use of technology. Dr Hayward is the main author of this submission, with research assistance from Dr Komarova. Please see biographical details at the end of this document for full declaration.

We submit evidence that relates to three main fields:

1. Managing the Irish border as an external border of the European Union
2. Methods of enabling freedom of movement of people across the EU's external border
3. The role of technology in border management

1. Managing the Irish border as an external border of the European Union

1.1. *Bespoke arrangements for cross-border mobility*

1.1.i. The governance and control of the Irish land border will be a shared matter of concern for the UK, Ireland and the wider EU. Whilst unilateral action for border control is possible (as seen, for example, in the recent erection of security fences at several points along the EU's border), this is not conducive to positive relations between neighbouring states.

1.1.ii. **Differentiation and variation characterize the EU's external border**. The ways in which EU external border policy is manifest at ground level can be to some extent customized for each member-state's conditions.

1.1.iii. The example of Cyprus has some relevance to the island of Ireland, as an island with a history of contested national sovereignty. The EU's Green Line Regulation legislates for the management of the border that marks a division between Cyprus (an EU member-state) and the Turkish-controlled northern part of the island. Even though (because it does not recognise the independence of the Turkish Republic of Northern Cyprus) the line is not officially an external border of the EU, the EU imposes severe restrictions on border crossings with the aim of combatting illegal immigration and protecting public security. Geopolitical location is a vital consideration for EU border policy. Although the EU's assumption is that reunification of the island of Cyprus will happen in the future, and all EU citizens have freedom of movement across the border, it still **requires Cyprus to carry out 'effective surveillance' all along the border and 'checks on all persons crossing the line',** including vehicles and objects in their possession.[1]

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[1] The Green Line Regulation, Articles 2 and 3, see Council Regulation (EC) No 866/2004 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004R0866R(01). This check on persons and their vehicles

Activity on the Green Line is closely monitored and the Commission submits annual reports to the EU Council on the implementation of the Regulation.

1.1.iv. In other settings, where the principles of European cohesion and prosperity can be seen as being enhanced by closer cross-border cooperation, Berg and Ehin noted that '[p]airs of countries, including Estonia and Russia, Romania and Moldova and Spain and Morocco, have each invented ways to provide for greater openness of the border than the *acquis* envisions'.[2]

1.1.v. Notwithstanding this, in light of the 'migration crisis' of 2015/16, the future of the external borders of the EU in the short to medium term is likely to reflect a **growing trend towards a hardening of border management** that has two dimensions: at state borders and *within* states.

1.1.vi. First, there are **stronger measures of security at state borders**, not just at the southern and eastern edges of its territory but also *between* EU member-states. Strategic nodes in the transport infrastructure across Europe have also been subject to intensified border enforcement. For example, ID checks at Swedish and Danish railway stations on lines which connect the two countries are a clear example of the current prioritisation of security over ease of mobility.

1.1.vii. Secondly, the enforcement of 'borders' *within* the territory of the EU itself has occurred through an **expansion of data-gathering and surveillance**. The border security measures (including the 'Smart Borders Package') passed into EU legislation at unprecedented speed in 2016 enhance the capacity of EU agencies (and partner state enforcement bodies) to monitor and respond to threats to border security arising from movement of persons. This includes the augmentation of centralised databases on passengers/travellers (including biometric data) and the expansion of Frontex in guarding the EU's land and sea borders.

1.1.viii. Whilst the EU provides a growing number of tools and measures to facilitate border securitisation, **state sovereignty is still the predominant determinant of practices and means of border management** (e.g. in the erection of border fences or the use of ID checks at transport hubs), including at its external boundaries.

1.2. *Implications for the Irish border*

1.2.i. In accordance with core principles of European integration, the EU Commission will not wish to see the peace process or the growth of the island economy harmed by the outcome of the Brexit negotiations. As such, it will be receptive to arrangements proposed by Ireland and the UK vis-à-vis border management that have the intention of protecting those broad priorities. This is

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etc. is despite the fact that goods arriving across the border from the northern part of Cyprus are not subject to customs duties or declarations (see Article 4).

[2] E. Berg and P. Ehin (2006) 'What Kind of Border Regime is in the Making? Towards a Differentiated and Uneven Border Strategy', Cooperation and Conflict, 41(1), p.66.

not to say, however, that individual member-states will not be alert to arrangements that may seem to give unfair advantage to a member-state (Ireland) or neighbouring state.

1.2.ii. In finding such an arrangement, both governments will have to convince the European Council and Commission: **first, that the security of the EU's external border will be secured** and, **second, that freedom of movement for EU citizens, goods etc. into the Republic of Ireland will not be hindered.**

1.2.iii. This is where the matter of *how and where* to implement the management of the EU's external border comes into play. The need for border checks at some point – whether at the land border across the island or at entry points to the island – is unavoidable once the UK is outside the EU, and **the 'harder' the outcome of the Brexit negotiations, the more acute this requirement for a 'contact point' at which border checks take place.**

2. Methods of enabling freedom of movement of people across the EU's external border

2.1. *Freedom of movement of persons*

2.1.i. Examples from the EU's external border shows that there are four main ways in which freedom of movement for persons between an EU member-state and a non-member-state may be achieved:

• Visa-free travel

• Extra-territorial EU citizenship

• Passport union

• Special permission for pre-registered persons

2.2. *Visa-free travel*

2.2.i. Visa-free travel will enable freedom of movement across a border for a specified period of time, but it will not allow for residency, employment or access to public services, i.e. it has **severe limitations as a replacement for current arrangements** of citizens on these islands.

2.2.ii. Many countries have visa-free access to the Schengen area; some *but not all* of these permissions are replicated in the visa regimes of the UK and of Ireland. Thus, as it is at the moment, travellers from many third world countries are advised to get separate visas for travel into Schengen, into Ireland, and into the UK. Unless Ireland joins Schengen, this system is unlikely to be simplified after Brexit.

2.2.iii. Even if visa-free movement across the UK and EU is enabled, there are three issues to be solved. The first is the matter of *where* checks for visa compliance take place; the second issue is how to ensure that visa-free travel for 90 days does not transmute into longer-term residency;

the third issue is how to allow special treatment of UK citizens by Ireland and *vice versa* when it comes to residency and work.

2.2.iv. The securitisation of border governance in the European Union (including access to Passenger Name Records, a Schengen security measure that the UK and Ireland have opted into) implies that the means of checking for the visa status of individuals can be performed *prior to arrival* in Ireland or the UK.

2.2.v. Checks about legitimate access to state territory would still need to be performed, and it is more straightforward to implement these at entry points (ferry terminals, airports) rather than the land border. This would relieve the need for a 'harder' (i.e. materially secure) land border for the movement of people only under certain conditions, meaning that either:

(a) the visa regimes of the UK and Ireland would need to become even closer (in which case the same status of EU citizens would have to apply), or

(b) there would be a differential status for visa requirements to enter Northern Ireland compared to the rest of the UK.

2.2.vi. An alternative would be to maintain the Common Travel Area (with greater formalisation, albeit with distinction between visa regimes in the Republic of Ireland and the UK) whilst placing checks (regarding the rights to reside, work, access state benefits etc.) at points at which immigrants make contact with such sources of provision. Whilst this has the benefit of not requiring highly visible border checks, it has significant consequences for privacy and rights, given that it further expands the surveillance of citizens (including by fellow citizens).

2.2.vii. The expansion of a role of ordinary citizens as 'border agents' in this way would raise major ethical and legal as well as practical problems. What is the overall purpose and gain of such practices of discrimination? Does the legislative context fall under devolved or reserved competence? How will legal rights to residency be determined – profiling, ID cards, passports?

2.2.viii. In sum, **even if visa-free travel for EU (and UK) citizens was retained, it does not address some of the major problems regarding movement of people that will be created by the Irish border becoming an EU external border.**

2.3. *Extra-territorial EU citizenship*

2.3.i. One of the primary concerns about the impact of Brexit is the treatment of EU citizens (and their partners) resident in the UK and the removal of EU citizenship rights from British citizens.

2.3.ii. Northern Ireland is a case different to the rest of the UK in that all born in Northern Ireland (some 88 per cent of its current population) have, subject to some conditions for those born after 2004, the right to hold Irish and (thus) EU citizenship. According to the 2011 census, 21 per cent of the population in Northern Ireland hold Irish passports.

2.3.iii. If it were the case that all permanent residents of Northern Ireland (including those born in a third country) are given the option of Irish citizenship, this would be one means of facilitating complete freedom of movement across and between these islands, even if the Common Travel Area is undermined. However, an expansion of the terms of Irish citizenship (and thus contradicting the spirit and law of the 2004 amendment to Article 9 of Bunreacht na hÉireann) could conceivably spark controversial debates and require a referendum in the Republic.

2.3.iv. There are a number of precedents where **dual citizenship has acted as a tool in shaping exceptions in relation to freedom of movement in the EU's external border regime**. For example, descendants of Romanians living in Moldova and Ukraine are eligible for Romanian citizenship (and thereby EU citizenship). This was viewed with some concern by EU member-states prior to Romania joining the EU in 2007 and Romanian citizenship for non-residents was consequently suspended during EU accession negotiations. It has since been reinstated and it is clear that the feared 'exploitation' of EU citizenship rights by residents of non-member states has not happened. This is partly because Romanian citizenship is difficult to achieve for non-residents, it takes time to process and it is expensive.

2.3.v. This example is not unique. Most EU member-states grant national citizenship to people living abroad on the grounds of cultural or ethnic affinity. This **'extraterritorial' dimension of EU citizenship can be useful when it comes to enabling freedom of movement that facilitates continued cooperation between neighbours** even when one becomes (or ceases to be) an EU member-state.

2.3.vi. As such, it is clear that EU citizenship rights can be held by those in a non-EU state and enjoyed if they move into the territory of a member-state. The greater problem in the case of Northern Ireland is the 'responsibility' of the Irish government towards its citizens in a different jurisdiction.

2.3.vii. More generally, the politicisation of 'Irish' national identity, not least as a result of the conflict, would make the use of Irish citizenship less than ideal as a general 'tool' for facilitating freedom of movement of persons.

2.3.viii. Perhaps this is an opportune time to consider the position for British-Irish as a recognised, stand-alone identity – as allowed for in principle by the 1998 Agreement.

2.4. *Passport union*

2.4.i. There is an alternative to common visa regimes and dual citizenship that does not require the production of passports in order to travel across state borders. The Common Travel Area is one such model. The matter of whether this can be sustained post-Brexit is one that can be resolved with reference to the example of the Nordic passport union.

2.4.ii. Norway is not a member of the EU but its special arrangements with Denmark and Sweden in a passport union pre-date their EU membership and have continued subsequently. Recently there has been a reimposition of some checks and requirements within the passport union (including ID checks mentioned above) as a result of security alerts connected to a terrorist threat. However, this does not diminish **the principle that freedom of movement without ID checks is possible between non-EU and EU member-states**.

2.4.iii. In order to enable the special freedom of movement for Norwegian citizens into the Schengen area, Norway has had to sign up to the Schengen acquis. The Faroe Islands have not done so, and as a consequence there are tougher rules for access to Schengen from the Faroes than from the Schengen area into the Islands.

2.4.iv. This means that **there would be precedent for the Republic of Ireland treating travel from north to south, or even from the whole of the UK, more liberally than the UK may wish, in turn, to treat travel from the Republic of Ireland.** This is far from ideal but it is a conceivable way of ensuring that there is not a unilateral veto from the UK on freedom of movement of people on the island of Ireland or between these islands.

2.5. *Special movement rights for pre-registered persons*

2.5.i. Another way of facilitating flows of people across the EU's external border is to create a **local border traffic regime**. Regulation (EC) No. 1931/2006 of the European Parliament and Council (20 December 2006) allows for residents and workers within 30km of each side of the EU's external border (or 50km, if the local authority was based further away) to have special mobility across the border.

2.5.ii. This begins as a bilateral arrangement between EU and non-EU states but must have approval of its terms by the European Commission before it becomes effective. Such arrangements make most sense when they come on the back of long-standing arrangements prior to accession to the EU.

2.5.iii. The terms of the Regulation mean that this **special treatment can apply to all residents of the border region, including those from third countries**. It also potentially allows for associated rights of employment and establishment on the other side of the border.

2.5.iv. The Small Border Traffic Zone between Poland and the Kaliningrad region of Russia is one such example of this, Kaliningrad being an enclave of Russia within the EU. Other uses of this regulation have been made by Ukraine in the creation of small border traffic zones with Hungary, Poland and Slovakia.

2.5.v. Being designated as **a local border traffic zone enables pre-registered individuals to cross the border outside the regulated hours and at different crossing points**. Although entry and exit

checks still have to be systematic at such a border, border crossing is significantly eased for such individuals.

2.5.vi. The priority behind the creation of a local border traffic zone is ease of movement for those crossing the border for work, and thus contributing to the economic development of the region. The **presumption in such a scenario is that the border is otherwise a 'hard' one and that all crossing the border are subject to checks** or other impediments to transit.

2.5.vii. The apparent *disadvantages* of such an arrangement are many, including:

- the need for registration by beneficiaries,
- the need for renewal of the permit (it may last from 1 to 5 years),
- the fact it is not intended to apply to those travelling from outside the border region (although there could be grounds for a bespoke treatment of Northern Ireland for its inclusion as a whole, including the whole of the Republic would require an exceptional case to be made), and
- it requires implementation (i.e. formal and evident distinction between those who have the permit and those who are not).

2.5.viii. It is worth noting that the arrangements for small border traffic zones can be suspended according to national priorities. For example, the Polish/Russian local border traffic regime was suspended in July 2016 prior to a NATO summit in Warsaw.

3. The role of technology in border management

3.1. *Different uses of technology at borders*

3.1.i. Technology is sometimes seen as offering a panacea for the complex practical challenges associated with screening, monitoring and blocking freedom of movement. Essentially, **the fundamental legal architecture of the border regime needs to be decided first. Technology acts as a facilitator of these rules.**

3.1.ii. That is not to say that technology is a passive tool – the use of technology actually has agency in that it shapes behaviour, assumptions and norms. It is important to note at this stage, therefore, that **whichever technologies are put in place are likely not only to require certain actions in the form of enforcement and effective implementation, but are also likely to prompt new forms of evasion and criminality.**

3.1.iii. The main principles relevant here are the fact that there are two 'settings' for the use of technology: *closed* (where prior data gathering means that the technology just responds to whether the live information matches the data it already has, e.g. at a security gate in an airport) and *open* (in which there are unpredictable flows of data for the technology to categorise).

3.2. Use of technology in closed settings

3.2.i. Much of the security initiatives being put in place in Schengen Border Control are underpinned by the increasing use of biometric data (e.g. facial recognition, iris matching or fingerprints). There also forms of technology that allow straightforward opening of a gate or barrier, such as a microchip in a passport or a tag (Radio Frequency ID) in a vehicle.

3.2.ii. Intelligent Video Analytics, e.g. number plate recognition, is quite advanced and can be used to generate onward responses, e.g. the request for fee payment or criminal prosecutions.

3.2.iii. There are several examples of this technology being used effectively in border security already. For example, Automated Border Crossing (ABC) works quite effectively in such places as the border between Singapore and Malaysia, which runs an enhanced Immigration Automated Clearance System.

3.2.iv. Notably, following the discontinuation of the Iris Recognition Immigration Service in 2013, the UK currently collects less biometric data on citizens than in the Schengen area (i.e. it does not include fingerprints); nonetheless, in certain UK airports such measures are used by private companies, albeit to speed up transit rather than to filter for suspect passengers.

3.2.v. **If a closed setting is to be created on a land border, the minimal requirement for its effectiveness would be the hardening of the line of the border itself**, particularly at current access points. It would also require the stationing of persons at these points when, as is inevitable, technology – or people's use of it – fails.

3.2.vi. Professional border agents emphasise that the effectiveness of technology currently centres on the quality of information that is already available to them. **Effective border security technology in closed settings relies on up to date databases and pre-registration of information**, either specifically for the purpose of travel (e.g. e-flow tag) or gathered by the state for other purposes (e.g. number plates).

3.3. Use of technology in open settings

3.3.i. There are many means of using technology in the surveillance of movement of persons. The European Border Surveillance System (Eurosur), for example, uses drones, reconnaissance aircraft, offshore sensors and satellite remote sensing to track the movement of persons into European territory.

3.3.ii. There are examples of this security at use along land borders, although much of this is not widely publicised. An example from outside the EU is that of the border between India and Pakistan, where troop patrols are being replaced by 'smart fences' in a Comprehensive Integrated Border Management System (due for completion in 2017), where guards react to radar readings that indicate a breach of the fence.

3.3.iii. **Automated technologies in open settings are primarily effective in so far as they can identify the location and timing of a possible security breach**.

3.3.iv. **If the purpose of hardening borders is to prevent or restrict entry, then the use of technology must be accompanied by the use of personnel**, such as a rapid response team.

3.3.v. Whilst sensitivities exist regarding the visibility of border security personnel along the land border, it is to be expected that invisible solutions will be sought.

3.3.vi. Given that the security of borders is less about movement *per se* and specifically about distinguishing between different types of movement and different persons – some are allowed to work and reside, others are not – it is unsurprising that the most notable (yet largely veiled) trend in border security at the moment is occurring in the sheer amount and detail of data being gathered and stored on individuals.

Relevant biographical details

Dr Katy Hayward is Senior Lecturer in Sociology and Senior Research Fellow of the Senator George J. Mitchell Institute for Global Peace, Security and Justice at Queen's University Belfast. She was a research fellow on the FP5 EUBorderConf project on EU border conflicts (http://cordis.europa.eu/project/rcn/67119_en.html) and co-investigator of the RCUK-funded Tracing Risk and Uncertainty in Security Technologies (TRUST) project (http://gtr.rcuk.ac.uk/project/38EBDD4C-E69F-46E3-9237-B808AF599CEC). Relevant publications to this subject include *Irish Nationalism and European Integration* (2009) and (as co-editor) *Nationalism, Territory, and Organized Violence* (2013), and *Dynamics of Political Change in Ireland* (January 2017). She is currently responsible for the Irish case study of the 'Borders in Globalization' project funded by the Canadian SSHRC (www.biglobalization.org). She also sits on the Board of the Centre for Cross Border Studies (http://crossborder.ie/). A full account of the grants she has obtained throughout her academic career (http://go.qub.ac.uk/hayward). This evidence is not part of any funded activity she undertakes, but only given in a personal capacity. She does not represent the Mitchell Institute or the University in making this submission.

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