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The Devolution Settlement and Brexit

Introduction

In the 1975 EEC referendum, Northern Ireland delivered the slimmest vote (at 52%), in favour of maintaining UK membership of the then European Economic Community at of any region of the UK. (England:69%, Wales:65%, and Scotland:59%).

Setting aside that a possible downstream consequence of Brexit might be that Scotland votes to leave the UK, and despite the fact that Northern Ireland is the smallest population of any region of the UK with some 1.81 million citizens (or 1.5 per cent of the UK's citizens), I suggest that the issue of 'Brexit' matters more to this region of the UK than any other.

The institution direct rule and the consequent displacement of the devolved government of Northern Ireland closely coincide with the UK joining the then EEC.¹ Therefore EU membership has been a constant feature during the long quest for peace, the historic peace settlement as represented in its current constitution, the Northern Ireland Act 1998 and continuing processes to deliver a lasting peace on this basis. This settlement assumes continued membership of the EU by both parties. It is a fact that the relationship between the 2 states on each side of the UK's only land border with another EU state were a crucial element both during the "Troubles" in Northern Ireland, and most particularly in the finding of a solution. A part of that solution has been the institutional cross-border economic links embodied in the constitutional arrangements. They provide for a range of cross-border cultural, economic and political initiatives.

In this context it seems natural to examine the effects Brexit might have on the constitutional settlement and how it operates.

As a matter of law, I believe the following are relevant issues concerning the effect of BREXIT on our current constitutional arrangements:

Firstly:

A. regarding unique features concerning Northern Ireland's devolution settlement:

1. -nature of the devolution settlement in Northern Ireland, that is:
 - it is the subject of an international agreement
 - there is shared sovereignty with Ireland in the North-South arrangements
- EU Assistance in maintaining the operation of the settlement
2. -the effect of Brexit in creating an external EU border on the island

¹ Direct rule in Northern Ireland started on 28th March 1972. The UK joined the EU on the 1st January 1973.

Secondly:

B. I comment on how the devolution settlement has worked in practice in an EU law context by looking at key interactions between EU and the law in Northern Ireland, and their effect on the aspirations and achievements of the devolved administration: the single market rules, the Northern Ireland and all island economy.

Working through those headings:

A. Unique Features regarding Northern Ireland

1. The Nature of the devolution settlement in Northern Ireland, that is:

-it is the subject of an international agreement between Ireland and the UK which assumes the continued EU membership of both parties, and which involves the sharing of sovereignty between the UK and Ireland in the form of the North-South/East-West arrangements which the agreement provides for.

-the EU has also contributed to peace promotion, special funding arrangements, and a taskforce to help make Northern Ireland more competitive.

It is a unique feature of the Northern Ireland devolution settlement that what is in effect its constitution, the Northern Ireland Act 1998² is founded on an agreement, the “Belfast”, or as it is commonly referred to, “the Good Friday” Agreement³, which was the subject of a referendum conducted in both of the island’s jurisdictions and accompanied by an international agreement⁴ between Ireland and the United Kingdom, commonly referred to as the British-Ireland Agreement. In that international agreement, the two governments affirmed,

Firstly, in the initial provisions their common intent:

“Wishing to develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union”

and further:

“their solemn commitment to support, and where appropriate implement, the provisions of the Multi-Party Agreement [that is, the Belfast Agreement]. In particular, there shall be established in accordance with the provisions of the Multi-Party Agreement immediately on the entry into force of this Agreement, the following institutions:

(i) a North/South Ministerial Council;

(ii) the implementation bodies referred to in paragraph 9(ii) of the section entitled “Strand Two” of the Multi-Party Agreement;

² 1998 c.47

³ Cmnd 3883 1998

⁴ 8th March 1999

(iii) a British-Irish Council;
(iv) a British-Irish Intergovernmental Conference.”

Regarding the operation of the North-South Council the Agreement provides that the Council is tasked:

“to consider the European Union dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework. Arrangements to be made to ensure that the views of the Council are taken into account and represented appropriately at relevant EU meetings.”

The BIC also has a role vis-a-vis EU matters:

“The BIC will [consider, and will promote, consultation and] exchange information, discuss, consult and use best endeavours to reach agreement on co-operation on matters of [common] mutual interest [falling] within the competence of [its members] the relevant Administrations. Suitable issues for early discussion in the BIC could include transport links, agricultural issues, environmental issues, cultural issues, [minority languages] health issues, education issues and approaches to [European Union (EU)] issues. Suitable arrangements to be made for practical cooperation on agreed policies.”

The UK government is responsible for international relations, including with the European Union, and to carry out this function it is aided by a memorandum and concordats with the devolved administrations. These provide for co-ordination of action across the UK on EU issues. They reflect not only the subordinate role of the devolved government structures but also acknowledge the existence and operation of the British-Irish Council and the North-South Ministerial Council.⁵

In theory the international agreement between the UK and Ireland does not however prescribe the details of the devolution settlement. In general, the actual terms of devolution were, in the end, for the UK to settle. However, if power had not been devolved to the Northern Ireland Assembly, it would not have been possible for the North-South Ministerial Council, the British-Irish Council and perhaps even the British Irish Intergovernmental Conference to function as was intended.

So the UK can change the terms of devolution provided for in the Northern Ireland Act 1998 unilaterally, including in respect of its references to the application of EU law in Northern Ireland.⁶ However, the functioning of the bodies created by it would be so affected by a Brexit, it is inconceivable that discussion of the changes posed by Brexit to their functions would not be undertaken by the two states. This is especially so where the functions of those bodies are in the fields of competence of EU law, for example in respect of all-island public procurements, animal disease controls and trade.

This view is mirrored in the attitude expressed by the joint Oireachtas committee on European Affairs when it considered Brexit in its Report ‘UK-EU Future Relationship: Implications for Ireland’⁷ in which it recommended:

- that the Irish Government is involved from the outset in all negotiations on the UK relationship with the EU, as the UK’s membership of the EU is an issue of vital national interest to Ireland.

⁵ the memorandum of understanding and supplementary agreements (MoU), presented to parliament by the lord chancellor in October 1999 (Cm 4444)

⁶ See sections 6 and 24.

⁷ UK-EU Future Relationship: Implications for Ireland’ June 2015

- that any negotiated 'exit or reform package' for the UK reflects Ireland's special status in its Irish/UK relationship and that all existing bilateral arrangements between Ireland and the UK are maintained including citizenship arrangements, unrestricted travel and trade arrangements and unhindered borders.
- the Irish government legitimately has a voice in relation to the future of Northern Ireland and it must feature in EU negotiations with the UK.
- the Irish government engage immediately with the UK government to protect the existing Common Travel Area, as the introduction of any restrictions on the right of the free movement of people may have a significant negative impact on the operation of the CTA between the UK and Ireland.

While it is understandable that Ireland would seek to work closely with the UK concerning its intentions, as was the case regarding the negotiation of the Anglo-Irish Agreement of 1987, such interstate liaison is already seen as politically contentious for Unionist parties in Northern Ireland. Economically, the key starting point is that Brexit would inevitably mean the border would become an EU customs and immigration frontier. The issue then becomes which, if any, of the inevitable burdens this would impose could be alleviated by alternative arrangements sanctioned by the EU. I will particularize the difficulties for Northern Ireland in more detail below. However, it seems to me that no alternative models can deliver the benefits we have now, and all come with problems in terms of the burdens and costs they impose.

Compliance with EU law is at the heart of the terms of the Northern Ireland Act as it is provided that the devolved government can only legislate, and Departments of the Northern Ireland government can only act in a manner which:

- is compatible the Human Rights Act;
- is compatible with European Union law;
- does not discriminate against any person or class of person on the ground of religious belief or political opinion.

Regarding these key provisions of our constitutional arrangements:

Firstly, to put the exercise of legislative powers of the devolved government in context, it should be noted that the legislative output of primary legislation of the Northern Ireland Assembly has not been large- 37 measures of primary legislation have been passed from 2011, that is just over 7 a year. This is not the case in respect of secondary legislation, made by Departments, the vast majority of which implement EU law. As EU obligations must be implemented timeously, this legislation, and the often substantial local decisions in respect of the exercise of departmental discretion in the policy choices left by directives must be expedited in order to comply with EU deadlines. I will return to this point later. However, for present purposes it can be said that in the absence of substantial new sources of legislation, Brexit would leave us with a sizeable gap in the current scheme of legislative outputs. It would also deprive us of the rights provided for in the Treaty on the Functioning of the EU.

Secondly, the European Convention of Human Rights protections, "the convention rights" as they are called in common in both the Northern Ireland and the Human Rights Acts of 1998 are set to be repealed. The prospect of this has caused political dissention locally. Northern Ireland Secretary of State, Teresa Villiers, when she was interviewed on the subject, indicated that the proposed new Bill of Rights would nevertheless be available in a Northern Ireland context. This has caused local further dissention.⁸

⁸ See <http://www.theguardian.com/> 23rd October 2014, and <http://www.bbc.co.uk/news/uk-northern-ireland-32721851> Report of 13th May 2015 "Human Rights Act: Gerry Adams criticizes 'attack' on NI peace deal"

The loss of rights that the removal of the Human Rights Act entails would be compounded by a Brexit. This is because, although the Human Rights Act, and convention rights, are separate sources of law from EU law, there is an overlap, as EU law is influenced by convention rights. Accordingly, if the UK leaves the EU, that feed-through of convention rights would also cease in Northern Ireland.

Thirdly, it should be possible as a matter of national law to continue to apply convention rights in Northern Ireland, and in some form, the application of EU law. However, in both cases, this would raise other problems. In the case of the Convention rights, would it be desirable, for example that prisoners might have an opportunity to vote in Northern Ireland, but not elsewhere in the UK?; or that the Supreme Court develop different jurisprudence generally, depending on whether the Charter and the Bill of Rights apply? In the case of EU law, it is the case that aspirant nations adopt the *acquis communautaire* before they apply for membership, but the whole point of doing so is to become and have the full benefits of membership in due course. It seems to me it does not make sense either to divide the application of laws in the UK in such a way, or to lay such a requirement on a devolved jurisdiction, while depriving it of the benefits that might otherwise flow from full membership of the EU. If one adds to this the distinct possibility that if Scotland withdraws from the UK, and becomes a new member state of the EU in its own right, an immigration and customs frontier would also be created between Northern Ireland and Scotland, even if Northern Ireland maintained the *acquis communautaire*, such a result would compound the disconnection from its neighbouring jurisdictions.

It has taken a long time and much patience to achieve the degree of political stability which the current constitution for Northern Ireland has created. The devolved government which we have, often produces and advances policies with difficulty and slowly. In this context its ability to take advantage of the regulatory freedoms which leaving the EU would create would be limited. As John Bradley in, "Britain and Europe: the Endgame; An Irish Perspective,"⁹ put it,

"Any hasty rush to focus on the immediate future that neglects the past would be unwise since the ability of Northern Ireland policy-makers to react to changing circumstances, maximising any benefits and mitigating any possible costs, is heavily constrained by the legacy of developments that occurred in the past." (Chapter 13).

It is a worrying question in its own right what the effect on the ground and what reactions of the political parties will be to the disapplication of the ECHR through the Human Rights Act, and for our immediate context of Brexit, with a disapplication of EU law, and with it, the disapplication of ECHR human rights standards through EU law. It certainly introduces further unanticipated uncertainties to the already difficult enough path of the peace process as manifested in the operation of devolution to date.

In this respect, the omens are not good with a critical Democratic Unionist Party reaction¹⁰ to the report of the Oireachtas Committee. Sinn Fein appear to be taking a trenchant anti-Brexit stance¹¹. It follows that the prospect of Brexit shows signs of being a destabilising element in local politics.

⁹ Britain and Europe: The Endgame - An Irish Perspective Edited by Dáithí O'Ceallaigh and Paul Gillespie - See more at: <http://www.iiea.com/>

¹⁰ See mydup.com 24th June 2015: Dodds: No role for the RoI in UK's negotiations with the European Union

¹¹ See sinfein.ie 1st October 2015: A BREXIT would result in high human, social and economic costs - Anderson

Local political debate on the issues of the day, including EU law issues is expected and welcome in the devolved setting, changing key tenets of the constitutional settlement is quite another matter.

EU Assistance in support of the constitutional settlement:

Structural Funds and Peace Support: Northern Ireland has benefitted considerably from structural funds and peace monies. Indeed, some €2.4 billion was received from the EU between 2007 and 2013 with a broadly similar amount being available between 2014 and 2020. This funding source would stop following a 'Brexit'.

This funding is a tangible indication of the commitment of the EU to Northern Ireland's continuing Peace Process.

As is related in "the Story of Peace: Learning from the EU Peace Funding in Northern Ireland and the Border Regions",¹² peace cannot be bought. However, this publication relates a story of continuing commitment, carried out with a good deal of humility and learning sometimes by trial and error about how to add to the process of making a lasting peace in Northern Ireland. The funding covered areas of need, including in respect of employment, urban and rural regeneration, cross-border development, social inclusion and productive investment and industrial development.

Peace funding remains an active addition to other EU funding in Northern Ireland.

This commitment is also manifested in the hands-on involvement from the top in the European Commission over the years, from i.a. Presidents of the Commission, Jaques Delors and Jose Manuel Barroso, and Carlo Trojan, as Secretary General.

President Barroso instituted what is called "the Barroso Taskforce" in 2007, with the express mission of assisting Northern Ireland, a heavily subsidised region, in addition to the extra funding, to reinvigorate the competitiveness of Northern Ireland. It is thought that this is the first time the European Commission has put together such a specific taskforce for a single region in the EU.

It is clear that there has been a huge amount of care and expertise and attention to detail, in short, commitment from the EU to promoting peace stability and a healthy economy in Northern Ireland. If Brexit occurred, it is difficult to see how this EU financial commitment could be justified, and the work of the Barroso taskforce, posited as it is on helping Northern Ireland to do better as a region of the EU, would no longer be apposite.

2. The Potential External Border

As explained, in principle, 'Brexit' would mean the creation of a physical international border between Northern Ireland and Ireland (i.e. the imposition of passport checks and customs posts) that would impact on the lives of many families as well as trade and tourism.

The porous 499km land border with Ireland, is the only land border the UK has with another Member State. However, for day to day purposes, for those crossing it, it appears not to exist. The common travel

¹² Paper of the International Conflict and Research Institute

area which has existed since 1925 between the UK and Ireland in effect requires each state to operate their immigration policies and individual decisions in common. It is currently governed by a “Joint Statement [between the UK and Ireland] regarding Co-operation regarding Measures to Secure the External Common Travel Area Border” of 2011¹³.

We have come a long way from the time of the UK and Ireland joined the EU in 1973. At that time, the only specifically Northern Irish transitional measure was the retention of the Safeguarding of Employment Act 1948¹⁴, which provided for an employment permit system for people seeking to come to work in Northern Ireland, and was intended to ensure priority for Northern Ireland workers seeking jobs. It was allowed to remain for 5 years until 1978. It is a very long time since systematic border checks were in place, and what remained of the physical checkpoints were abolished with the establishment of the single market on 1st January 1993. Even at the height of “the Troubles” security checks were an irregular occurrence, (although part of the security measures taken involved closing many minor roads across the border), and as the Peace Process took root in the wake of the Good Friday Agreement, military surveillance, and checks were discontinued, and blocked roads, re-opened, which was a particular convenience to local residents, families and business.

An “unknown” factor at this stage, is whether the UK would bid to join the EEA, with the free movement across borders with the EU that it provides for. It cannot be assumed either that, assuming a vote for Brexit, with the key arguments being deployed, that joining the EEA would be an acceptable response to the outcome of the referendum, as member states of the EEA have obligations to meet as if they were members of the EU, including in various areas that many Brexiteers object to, such as regulatory burdens, the immigration, and European level court interventions; or that financial cost would be acceptable, as access to the market comes at a cost which would be entirely out of the hands of the UK to set.¹⁵

In the absence of an EEA style agreement, it is hard to see how what would become an external EU Border would not require the re-introduction of physical check-points of some sort, depending on the type of agreement the UK might forge with the EU to manage its ongoing relationship with the external state.

Along with this would almost inevitably come an upsurge in smuggling activity, which formerly was a much more major feature of the border region. There is some smuggling even now, mainly in respect of fuel, but the much more extensive smuggling, of even the early years of our common EU membership, which was predicated on large taxation and currency differences and the system of monetary compensatory amounts paid to farmers on livestock crossing the border, has been eroded by measures taken as a part of general European integration which has led to in general broadly similar rates of taxation on most goods. The more these differ, the more tempting smuggling would become. The more tempting smuggling becomes, the more we will need effective civil and criminal law co-operation on the island (This issue will be addressed by Claire Archbold shortly).

Regarding the UK’s particular concern regarding immigration, and with the land border between Northern Ireland and the Irish Republic an obvious “back door” entry point from the EU, it is difficult to see how the current open borders arrangement could continue on the island. The porous nature of the land border, which could not be fully controlled even during the troubles might even mean that in

¹³ Home Office: January 2012

¹⁴ See the Accession Treaties at eurlex.europa.eu

¹⁵ For an example of how a post Brexit negotiation might turn out see: <http://openeurope.org.uk/>

addition to border checks at the border, the UK might want to step up checks on travel from Northern Ireland to the rest of the UK. Such changes were mooted in the past. This caused great protests in particular from the Unionist community in Northern Ireland, and the idea was eventually scrapped. However, in the absence of a ring of steel approach at the land border with Ireland, such as has been seen in southern EU countries, in response to the current refugee crisis on their land borders, such an internal division of the UK cannot be ruled out.

I have no doubt that in the event of a vote in favour of Brexit, every effort will be made by both the UK and Ireland to find a solution. In the absence of such a solution, the economic gains in the deprived border areas are at risk. A full border would be anathema to the notion of operating in a single European market, and to progressing an all-island market, both established long term areas of endeavor for the Northern Ireland Executive in tune with the basis of the Good Friday Agreement.

B. Other Key interactions between EU law and the law devolved to the Northern Ireland Executive under the constitutional settlement: freedoms and restrictions: regulation, aspirations and achievements:

Access to the Single Market is a privilege of membership of the EU. Various statistics have been produced to illustrate this, but all commentators agree that loss of that access would be particularly damaging to the economy of Northern Ireland. It appears that 55% of manufacturing in Northern Ireland goes to the Eurozone, and the largest part of that to Ireland.

the Assembly's Enterprise committee asked Open University economist Leslie Budd to assess the potential impacts of a British exit from the European Union, so-called the 'Brexit'.

Dr Budd said economic output in Northern Ireland could be 3% lower as a result.

The most recent figures suggest that the output of the Northern Ireland economy is £33bn a year.

A 3% fall would knock almost £1bn off that.

In addition, Dr Budd also pointed to the £2.4bn of EU funding Northern Ireland received between 2007 and 2013. He said the EU funding programme for 2014 to 2020 is "central to Northern Ireland economic and innovation strategies"

It is apparent that the performance of the Northern Ireland economy has been underpinned by funding support from the EU. Under the last programming period, support accounted for about 8.4% of annual GDP across a range of activities of which nearly 2/3rds is accounted for by agriculture according to Dr Budd.

In that assessment, it was suggested that¹⁶:

-the Northern Ireland economy would lose some 1 billion euro per annum following a Brexit and experience a decline of 3% in GDP

¹⁶ From the website of the Northern Ireland Assembly: The Consequences for the Northern Ireland Economy from a United Kingdom exit from the European Union Briefing Note: CETI/OU, 2/15 March 2015

- the logic of harmonising corporation tax with that of the ROI is undermined because transactions costs (for example from a lack of regulatory harmonisation, or processing customs duties) would rise significantly for cross-border trade and economic co-operation if a BREXIT occurred
- the cost of cross-border trade and economic co-operation would rise and would managing risk of any cross-border infrastructure projects;
- as a site for FDI to access EU markets, Northern Ireland could lose ground on its neighbour as the ROI becomes a more favourable location for emerging economies;
- the regulations concerning transatlantic air traffic are negotiated at the EU level that could be detrimental to growth of international connectivity with Northern Ireland;
- the ending of EU economic development funding could result in a reversal of economic decentralisation.

Apart from relating this economic assessment, how do the EU rules relate to economic activity on the island-

-in general terms, the single market has facilitated co-operative ventures by public authorities and private ventures, for example through joint cross-border public procurements by the institution of an all island energy market being created within the EU rules. Co-operative initiatives in the development of tourism and all-island infrastructure for research excellence are other examples.

In a setting where the same EU regulatory structures apply, where the rules are specifically designed to remove attempts to distort competition by single market rules, a common competition law applies, state aid is controlled by common rules, and capital services and goods cannot be protected by national preferences, both internal and interstate trade is encouraged without discrimination.

It is worth noting that both the UK and Ireland adopted the template of the key EU competition provisions and allowed the European Court jurisprudence to operate in their internal Member State settings.

Here are some specific key Interactions between EU law and the aspirations or actions of the Northern Ireland devolved government over the years in Northern Ireland since the UK joined the EU. They raise issues of importance to the economic and social well-being of governance and the interests of Northern Ireland. I think they give a real basis on which to form a view on whether the EU has been a positive or negative influence in Northern Ireland:

Trading Restrictions:

From an early point of time in our membership, Common market rules intervened to stop state attempts to restrict cross border trading. In what was known as the 48 hour rule case, Commission v. Ireland¹⁷. This case concerned a requirement placed upon Irish citizens being required to stay in Northern Ireland more than 48 hours to avail of then exemptions from taxes and duties then imposed on personal purchases made in Northern Ireland.

Privatised or State Controlled Industry?

In Northern Ireland key economic decisions of a sort can be referred to, such as the government's choice not to further advance earlier water privatization proposals started by the previous direct rule administration, the government's choice not to privatise any ports (at a time when the "Golden Shares"

¹⁷ Case C-158/88: Judgment of 12th June 1990

infringement cases¹⁸ were underway), but to enhance the powers of Belfast Port, working within the competition rules on undertaking granted special or exclusive rights. This choice, public or private ownership of assets, where Northern Ireland has taken significantly different views from the rest of the UK have not, and could not be the subject of EU law intervention.

The bottom line is that EU rules do not control whether economic activity is conducted in the public or private sector, although they do not allow advantage to be taken, merely by virtue of the sector in which the activity is conducted.

Taxation:

One potentially crucial area where political consensus has been reached and progress has been made in Northern Ireland concerns the adoption of a policy to reduce corporation tax in Northern Ireland in an attempt to emulate the experience of the Republic of Ireland in stimulating inward investment and economic growth. With recent UK government approval, this initiative is now able to make progress as the UK government's conditions for devolution have been met. There is cross party agreement that this approach presents a unique opportunity to break out of the regions dependence on external funding by stimulating economic growth through fresh inward investment.¹⁹

An unanswered question was whether EU law would see such an initiative as an impermissible regional state aid, and the opportunity was presented to the devolved jurisdictions to test this in the case of *Commission v. Portugal (concerning the Azores)*²⁰, and to open the way to persuade the court, the UK exercised its power to intervene in the case.

The facts were that the Azores islands, which is a region of Portugal, exercised its own legislative power to set a lower income and corporation tax rate for businesses based in the island than the rate set in the rest of Portugal.

The European Commission considered that this was unlawful State Aid to undertakings based in the Azores, contrary to Article 87 TEC (as it was at the time). The "aid" lay in the fact that the state was imposing a lesser financial burden on the undertakings in the Azores.

The Commission argued that it breached the "selectivity" criterion contained in Article 87 ("distort[ing] competition by favouring certain undertakings") by virtue of the fact that only undertakings in the Azores benefited from the lower tax rate. It is important to note that the measure was not selective in any other way - i.e. it did not favour one particular sector of the Azores economy over another.

Essentially, the Commission was arguing that ANY reduction in tax by a "regional" government ("regional" in EU, rather than UK, terms) was selective State Aid - and therefore, in principle, unlawful State Aid (in principle because it might be "saved" by one of the compatibility categories).

The Commission had already accepted that in a federated national state, where all the constituent parts of the State to set their own tax rates, there would be no "normal" rate and therefore it would not be possible to speak of "selectivity". This was not, the constitutional position in Portugal, and it is not, of course, the current constitutional position in the UK where we have asymmetrical devolution. So the case proceeded to the ECJ, and both Spain and the UK intervened in support of Portugal.

In a welcome judgment, the ECJ accepted that State Aid is not "selective" (and therefore unlawful) merely because it is limited to undertakings within a devolved or federated territory - provided that certain conditions are satisfied. These conditions are that:

¹⁸ http://ec.europa.eu/internal_market/capital/framework/court/index_en.htm

¹⁹ "Business frustrated that Northern Ireland deadlock is delaying investment": Financial Times: September 20th 2015

²⁰ Case 78/03: judgment of September 6th 2006

- the decision in question must, first of all, have been taken by a regional or local authority which has, from a constitutional point of view, a political and administrative status separate from that of the central government
- the decision must have been adopted without the central government being able to directly intervene as regards its content, and
- the financial consequences of the decision (in this case, a reduction of the national tax rate for undertakings in the region) must not be offset by aid or subsidies from other regions or central government.

It follows that, with the devolution of power over setting corporation tax rates to Northern Ireland, provided the administration meets the conditions of the court, it is free to set a rate at odds with that in the rest of the UK.

This is achievable in a setting where the EU rules nevertheless protect us from unfair state aids deployed against our enterprises in other parts of the EU.

Agriculture and the CAP

Economists tell us that currently the operation of the EU's Common Agricultural Policy accounts for some 82% of farm income across Northern Ireland. The figure of aid for the period 2014-20 is estimated at some €3billion. Civil employment in agriculture is at 3.3% in Northern Ireland as against 1.2% in the rest of the UK

In the framework of the Common Agricultural Policy, 2014-2020, Northern Ireland will receive direct payments ("Pillar 1") of some € 2.3 billion. Rural development allocation over the same period is €227.4 million.

Northern Ireland and Ireland have a common interest in the CAP, and often a common approach to negotiating EU measures.

Would the UK Treasury replace these funds with UK funding following Brexit? If not, what would happen to the farming and agri-food sectors?

The likely answer is bad news for Northern Ireland farmers. The UK has always been a strong critic of the CAP. As history shows, the UK is likely to provide less direct support for its farmers than currently under EU rules, and is more likely to switch expenditure to agri-environment schemes and promotion of public goods²¹. This is mooted in the UK's review of the Balance of Competences report on agriculture.²²

The UK entered the EU with a command and control system, seen in the Agricultural Marketing Boards which had, (it seems incredible now), statutory powers to compulsorily buy produce and thus to control agricultural marketing and a subsidy system which intruded into the free market choices of farmers as to the running of their businesses. This model was routed by the CJEU in the Northern Irish Redmond v. Pigs Marketing Board²³ case. The CAP may not be perfect, but the current Single Farm Payment system, is designed to allow farmers a greater discretion to choose what they wish to produce. I will say more about this later, but for now, Brexit seems so fraught with uncertainty for our farmers, that the term "pig in a poke" occurs to me as apt to describe the uncertainties entailed on working out the prospects for the farming industry in the event of a Brexit.

²¹ From capreform.eu "Agricultural Implications of EU Withdrawal for the rest of the EU" Alan Mathews: January 2015

²² <https://www.gov.uk/government/consultations/agriculture-report-review-of-the-balance-of-competences>

²³ 1978 ECR 2347

The saga of the agricultural marketing boards, and under Northern Ireland legislation related to the enforcement of a marketing system where agricultural marketing boards had the power to compulsorily acquire agricultural produce, and who controlled marketing of the produce. This regime operated across the UK and to some extent in Ireland as we joined the European Economic Community in 1973.

Redmond v. Pigs Marketing Board: this is the tale of a small scale farmer who was prosecuted for moving his pigs without a permit and who had his pigs and lorry confiscated in the process as a part of the exercise of these powers. His case was referred from the lowest court in Northern Ireland (the Magistrates Court) directly to the European Court of Justice. The court took the opportunity to effectively find that the essential function of the Boards were incompatible with the free movement and agricultural regime of the CAP. This in effect led to the abandonment of the Boards and the institution for free marketing for farmers in the longer term, where any organization of marketing had to be “bottom up” at the initiative of individual farmers making the choice to work together.

So, the bottom line was that we could still have Marketing Boards, but not imposed on farmers by government, and with powers of compulsory acquisition of produce, rather only at the initiative of willing farmers.

It appeared that this new approach opened the way for innovation in production and marketing²⁴.

Protection of the quality of agricultural goods where protection objectively merited

To safeguard against the risk of a poultry disease called Newcastle disease, it was decided to slaughter poultry where there was an outbreak and seal the Island of Ireland from imports. This was a long standing all island co-operatively implemented policy by Northern Ireland and Ireland. It gave a higher standard of poultry than where the disease was controlled by inoculation of poultry (which only masked the virus) and which was the system used in Great Britain. When Great Britain decided to adopt the same approach, at a time when this conveniently meant that cheap French imports which were disrupting the industry in Great Britain, could no longer be imported as a part of the disease control system, the Commission issued infringement proceedings against both the UK and Ireland.

The interesting points for our purposes were-

-that the European Court were prepared to hear the case against Ireland at the same hearing against the UK in respect of Northern Ireland; and

-that court went on to make identical and more favorable findings for both parts of the island, than it did in respect of Great Britain²⁵.

This remarkable flexibility acknowledges both the independence of the Member States, and the singularity and common interests of cross-border initiatives, which readily facilitates the all-island initiatives contemplated by the Good Friday Agreement.

A general safeguard for autonomous policy making: Northern Ireland in the EU Single Market setting

In the case of Horvath²⁶, a case taken by an English farmer in which he claimed that implementing an agricultural funding scheme under which in the English version of the implementation of the scheme he had to do more, that is spend more, under the requirements of the implementation there than a Northern Irish farmer would have to spend to receive the same grant to maintain rights of way across his farm in Northern Ireland. Horvath claimed (before the CJEU) that implementation of the EU scheme was defective because of the differential implementation because it put English farmers at a disadvantage by having to spend more by doing more work to get the same grant as a Northern Ireland

²⁴ <http://www.theguardian.com/commentisfree/2009/dec/31/in-praise-british-cheese>

²⁵ Case C-40/82 and Case C-74/82

²⁶ Case C-428/07: Judgment of July 19th 2009

farmer with a like project. However, in its judgment, the court rejected Horvath's argument and held that there was no discrimination in EU law created by differential implementation of itself, provided of course that the EU measure had been fully and properly implemented in each jurisdiction. It is notable that Ireland intervened in the case in support of the arguments of the UK to ensure that the court was aware of the North-South constitutional arrangements, and the fact that, had the court decided other than it did, its decision was likely to impact on their effective operation. This judgment therefore gave assurance regarding the exercise of discretion which Northern Ireland has in implementing EU law, and therefore also regarding its ability, where there is the desire to do so, to implement EU law in common terms in the two jurisdictions on the island in a way that is different from the method of implementation made in other parts of the UK.

Promoting social justice

An early policy priority adopted by the restored devolved government was to pursue through public procurement, social policy objectives, such as imposing a requirement on winning tenderers to use a percentage of workers from the ranks of the long term employed. Although care was required to meet the requirement of EU law not to discriminate on grounds of nationality while pursuing this policy and while it proved very difficult to have bidders compete in how much they would offer in this respect, the administration has pursued such policy objectives as a matter of course across the government public procurement in Northern Ireland²⁷.

These are a few examples from my own experience which show, I think, EU membership to have provided a helpful and surprisingly flexible medium for Northern Ireland, both in respect of its pursuit of a peaceful and politically and economically stable future, and able to pursue its own political and economic aspirations within the EU within both a UK framework, and working closely with Ireland.

Of course this does not mean that I am wholly uncritical of all EU policy and law as it operates in Northern Ireland, certainly in respect of the sometimes unnecessary regulatory burdens it imposes. See for example the critical analysis of the EU public procurement regime as it operates in Northern Ireland which was also the subject of Ministerial criticism²⁸.

Conclusions

The prospect of Brexit (and indeed, the invitation to participate in this conference) has provided an opportunity to stand back, and do a stocktaking exercise on UK membership and its effects in Northern Ireland to see what effects membership has had and what changes to the constitutional settlement leaving the EU would entail:

- since the legislative competence of the Assembly and all acts of Northern Ireland Departments of government are conditioned by compliance with EU law, the operation of that settlement would be affected by Brexit;
- EU membership of both the UK and Ireland was never going to create a revolutionary new setting on the island to sweep away political differences, the legacies of history or the rationale for the two

²⁷ See Buying Social Justice: Equality, Government Procurement & Legal Change: Christopher McCrudden

²⁸ See www.ukael.org Public Procurement Law: Limitations, Opportunities and Paradoxes: UK Rapporteur: Brian Doherty, Northern Ireland Executive

different political systems on the island; however, its legal framework has helped greatly to negate the burdens and disadvantages of the land border through the operation of the single market. The natural economic disadvantages of the border regions and indeed Northern Ireland generally, have been directly and specifically identified and addressed by EU initiatives;

- the authorities of the EU have made the institution a friendly and enduring partner to both the UK and Ireland in pursuing sustained peace in Northern Ireland and a harmonious relationship between Ireland and the UK and the two administrations on the island;

- furthermore, harmonizing law on the island by the commonality of EU rules have reduced differences and encouraged co-operation, particularly where there have been naturally common interests, for example in the common interest in the importance of agriculture, and the good sense of cross border procurements;

- although the loss of EU membership would save on the cost of the UK's contribution to the EU budget, the ability to maintain, and if so the costs, of continuing access to the EU market is unknown, Northern Ireland would lose various established EU lines of funding, and the cost of trading with the EU is likely to become more expensive. How we would fare in making trade arrangements alone with the world's major trading blocs is unknown.

Brian Doherty
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