

“BREXIT”
The Constitutional Dimension in Northern Ireland

Irish Centre for European Law
 Centre for Democracy and Peace Building

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The Devolution Settlement and Brexit

- **Unique to Northern Ireland**
 - Aspects of the devolution settlement
 - the subject of an International Agreement
 - cross-border arrangements allowing for shared sovereignty
 - EU assistance in the form of “Peace Funding”
 - The UK’s only land border with another Member State
- **Of Special Relevance to Northern Ireland**
 - The EU Single Market in an all-island setting
 - The importance of agriculture to Northern Ireland
 - Policing and Justice Co-operation
 - EU Funding (other than Peace Funding)
- **Key Interactions with EU law over the years: Challenges and Aspirations**

The Devolution Settlement & Brexit: Unique Issues

- **The nature of the devolution Settlement ⁽¹⁾**

Subject of an International Agreement

- which assumes continued EU membership by the UK and Ireland
- which provides for North South and East West Bodies, shared sovereignty and co-operation

Many EU competences are within the devolved powers; and are explicit suggestions for North-South co-operation

Terms of devolution are for the UK. They provide the NI Executive can only legislate and act in a manner which is compatible with:

- EU law,
- the Human Rights Act (and it follows, ECHR standards), and
- anti-discrimination laws

The latter 2 strands are represented in EU law

It follows that a Brexit would therefore affect key regulators and guarantees embodied in current constitutional settlement

Could EU/HRA law in N. Ireland be maintained after a Brexit?

HRA issues are especially sensitive and complex

- The HRA ECHR standards are not directly EU law, but it informs and is taken account of in EU law

The Devolution Settlement & Brexit: Unique Issues

• The Nature of the Devolution Settlement (2)

The border in Ireland is open, thanks to common EU membership and the Common Travel Area
Brexit means a new external border of EU on the island of Ireland: Immigration and Customs
Starting point becomes: which, if any, of the burdens involved can be alleviated with EU approval

Meanwhile regarding the operation of Devolution-
Low primary legislative output; most secondary legislation is implementing EU law- this gets done
Unionist concerns about Irish input to UK thinking on Brexit (as with the Anglo-Irish Agreement);
Republican concerns about loss of HRA- (Equality issues having been a sticking point in the Belfast Agreement negotiations).

The Devolution Settlement & Brexit: Unique Issues

• EU assistance to establish and maintain the Settlement
€2.4billion in Peace and Structural Funds: '07 to '13 and for '14 to '20 would end on Brexit

EU Report on Funding: "Peace cannot be bought"
No doubting the commitment and learning on the job openly related: big cross-border dimension

Hands-on involvement from the top of the European Commission:
Commission Presidents Jaques Delors, Jose Manuel Barroso &
Secretary General, Carlo Trojan

Latterly, the Barroso taskforce

The Devolution Settlement & Brexit: Unique Issues

- An External EU Border on the Island
- The History

Common Travel Area since 1925: Currently under a "joint Statement" of 2011
From 1973 to 1978, phasing out the NI Safeguarding of Employment Act
What remained of checkpoints ended with the institution of the Single Market in 1993
"The Troubles": no systematic border checks: closed roads
The Peace Settlement: Opened roads: military surveillance towers removed

• The Practicalities

Physical Checkpoints; a porous border; smuggling; anathema to an all island market
An external EU border on the island would test the close and co-operative relationship the UK and Ireland have developed, discrimination and taking advantage would be possible
border areas, which have finally largely shed their natural economic disadvantages would be especially vulnerable

EU and NI law: freedoms & restrictions: the evidence

- **The Single Market and the all Island Economy**
 Developing the all-island economy within the EU Single market is a current political ambition
 Currently 56% of N. Ireland manufacturing goes to the EU, the majority of that, 37%, to Ireland
 The N. Ireland Executive's Department of Enterprise Committee's advice is that Brexit would:
 -cause a loss of €1billion pa and 3% loss of GDP
 -the cost of cross-border trade and economic co-operation would rise
 -NI would be a less attractive location for incoming investment compared to Ireland
 -since Transatlantic air-travel routes to the US are negotiated at EU level, N. Ireland may lose out
 -the logic of harmonising NI corporation tax (it is now agreed that the power can be devolved)
 with Ireland would be undermined by extra transaction costs
 Advice to the Northern Ireland Executive:
 "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 amounted for about
 8.4%
 of annual GDP across a range of activities of which 2/3rds is accounted for by agriculture"
 Contrary Advice to NI Affairs Committee: from Dr. Graham Gudgin and Prof. Neil Gibson

EU & NI law: freedoms and restrictions: the evidence

- **The Importance of Agriculture to the NI Economy**
 Annual turnover of 4.5 billion. 29,000 people employed
 Economists estimate the operation of the CAP accounts for 82% of agricultural income in NI
 EU aid for agriculture 2014 – 20 is estimated at €3billion
 Civil employment in agriculture in NI is estimated at 3.3% as against 1.3% in the rest of the UK
 More dependent on the agri- and agri-food sectors than any other part of the UK
 NI and Ireland often have common interests in agricultural policy at EU level
 The UK's priorities at EU level may not match those of N.Ireland
 EU CAP reform is reducing funding
 No indication that current or anticipated levels of EU funding would be available from the UK
 The UK Review of the Balance of Competences Report indicates a more modest basis for funding
 The CAP moved the UK from a command structure to one that gave farmer greater discretion.
 It is also argued that with the rebate of funding paid to the EU, the UK can match/exceed current funding

EU & NI Law: Freedoms and Restrictions: the evidence

- **Trading Restrictions**
 The 48 Hour Rule case
 Commission v. Ireland Case C-158/88: the disparity of taxes on the island encouraged shopping tourism,
 reducing trade in Ireland;
 a "48 hour rule" was imposed, whereby the Irish government entitled itself to charge for the Irish tax if
 visitors to Northern Ireland did not stay at least 48 hours in NI.
 Finding of incompatibility with EU free movement rules; the protection the EU rules offer.
- **Privatisation or State Control**
 Water, Ports, Transport
 A key policy decision- different approach in Northern Ireland than in GB
 What does EU law provide?; protection of national/regional choices; protection of fair trading
- **Taxation**
 The Azores Case
 Devolving corporation taxation: compatibility with EU state aid law
 UK intervention in Commission v. Portugal requested by the devolved administrations
 Regional Choices; protection of fair trading.

EU & NI Law: Freedoms and Restrictions: the evidence

- **Agriculture and the CAP**
Command and control marketing: the Redmond case
the marketing boards: statutory powers of purchase and control of marketing; incompatible with EU law
However, voluntary co-operative contractual joint purchasing and marketing permissible
Removing state control, while allowing private sector initiative
Quality Control: Restrictions only where objectively justified
Poultry Import Controls; UHT dairy products: EU; hard on unwarranted trade restrictions, but flexible/proportionate response- and flexible procedurally.
- **Policy Autonomy in a Devolved Setting**
The Horvath Case
Maximising the space for devolved administrations; and
for joint approaches on an all island basis when implementing single market rules
- **Promoting Social Justice**
Employment promotion in public procurement, without breaching single market rules

The End


