Irish Centre for European Law and The Law Society of Northern Ireland

"BREXIT"- A Briefing for Practitioners

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Effect of BREXIT on the Operation of Devolution under the Northern Ireland Act

Introduction

This is a special occasion for me. The last time I gave a talk to colleagues under the aegis of the Law Society is a very long time ago- the late 1970s, if I am not mistaken.
-direct rule was relatively new- though we did not know that then;
-the 1975 referendum had settled the issue of EU membership, 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%);
-and the Law Society asked me to give a set of lectures on what the consequences of joining the EEC would be on the Northern Ireland legal system. How times change.

Now, of course we have the devolution settlement. 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 believe that BREXIT puts at risk more in this region of the UK than any other. This is because of the terms of the devolution settlement, in particular:
-the difficulty forging and maintaining our devolution settlement;
-its acknowledgement of and provision for the all island economic setting; and
-its particular Human Rights dimension.
It is no coincidence that these headings are reflected in subjects we intend to reflect on this afternoon.

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 quest for peace, the peace settlement effected in part by an international agreement between the UK and Ireland as represented in its current constitution, the Northern Ireland Act 1998 and continuing processes to deliver a lasting peace on this basis.

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

Although the overtly political assistance came internationally, principally through the good offices of the US in the form of Senator Mitchell's relentless efforts, -the EU has also contributed to peace promotion, special funding arrangements (structural and peace funding from 2007 to 2020 is estimated at some £5billion), and a taskforce, the Barroso 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 1998[2] is founded on an agreement, the "Belfast", or as it is commonly referred to, "the Good Friday" Agreement[3], which was the subject of a referendum conducted in both of the island's jurisdictions and accompanied by an international agreement[4] between Ireland and the United Kingdom, commonly referred to as the British-Ireland Agreement. This is registered with the United Nations, and is therefore is subject to the jurisdiction of the UN's mechanisms for upholding International Law.
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;
(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."

[2] 1998 c.47
[3] Cmnd 3883 1998
[4] 8th March 1999

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 Northern Ireland devolved Executive is responsible for the administration of powers devolved to the Executive, and many of those powers are the subject of EU law.
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]

Over the years there has been close co-operation on sensitive legal matters between the two legal jurisdictions on this island in an EU law context- here are two examples:

Protection of the quality of agricultural goods where protection objectively merited
To safeguard again 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 Britain[6].

[5] the memorandum of understanding and supplementary agreements (MoU), presented to parliament by the lord chancellor in October 1999 (Cm 4444)
[6] Case C-40/82 and Case C-74/82

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 Horvath[7], 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 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.

I think these cases illustrate the remarkable flexibility of EU law in accommodating our unique constitutional arrangements on the island, and the common economic interests and co-operation between the two island jurisdictions.

Returning to our constitutional arrangements, 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

[7] Case C-428/07: Judgment of July 19th 2009

Ireland.[8] 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'[9] 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.

• 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. Without, I hope trespassing too far into Margaret's remit, I would note that:

-international relations are an "excepted matter", that is outside our administrations competence, and since

-economically, the key starting point is that BREXIT would mean there would be an external EU customs and immigration frontier on this island to be accounted for. This would be unprecedented;

-the issue then becomes which, if any, of the inevitable burdens this would impose could be alleviated by alternative arrangements agreed with Ireland and sanctioned by the EU.

The Northern Ireland administration would therefore be in the passenger seat in dealing with this issue. However, it seems to me that no alternative models can deliver the benefits we have now with the Common Travel Area, and in a single Market setting.

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:

[8] See sections 6 and 24.

[9] UK-EU Future Relationship: Implications for Ireland' June 2015

-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 as large as expected. This is not the case in respect of secondary legislation, made by Departments, many 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.
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 European Union.

-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, if the conservative government follows through on their manifesto promise. 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.[10] 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[11]. 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. Those regarding the Convention rights I will leave to my colleague, Professor Colin Harvey. In the case of EU law, it is the case that aspirant nations adopt the acquis communitaire 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.

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[10] 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"
[11] Art 6 TEU "Fundamental Human Rights, as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms…shall constitute general principles of the Union's law"

I said I would return to the effect of a BREXIT on the statutory law applicable in Northern Ireland, and I will finish with this issue.

After we joined the EEC as it then was, John Temple Lang, an Irish EU law expert, referred to the event as, the biggest legal revolution for us since the institution of the napoleonic codes. Leaving the EU could create great disorder in our legal system.

Consider the following: a huge amount of the statute book, mostly in the form of secondary legislation, is transposing EU law. The subject matter areas are immense, as many of the areas of devolved powers are the subject of EU competence, agriculture, the environment, fisheries, competition law, state aids, equality and so on. I will not try to give you numbers, or subject matter areas. Neither, I think, help to give a realistic view. But I hope what follows helps in starting to explain the challenges.

Of course leaving the EU does mean they all have to go, and certainly not at once, In principle, savings provisions could be made, at least up to a point, while the UK ponders what to do with EU law here- but consider:
-a lot of EU law is contained directly in the treaties- it applies directly. On leaving the EU this immediately will not apply, as would all EU Regulations- that is Regulations which are the formal EU measures passed by the EU, which by their nature are of direct effect in our legal system. Directives, also made by the EU which we in turn have a duty to implement by national measures would suffer a similar fate.
But what of those many measures transposing EU Directives, or supplementing Regulations so they work within the national system? These are mostly in the form of secondary legislation. This legislation is made in London, and in the devolved administrations. But some is in UK-wide or Northern Irish primary legislation. Not all implementing measures follow the devolved/non-devolved competence split. Some devolved measures are "contracted out" to London departments to transpose, even though the subject matter is in the devolved sphere. An example is the public procurement regulations. Here we depend on the UK SIs, though Scotland has its own regulations.
Many implementing measures derive from and relate to principles in the treaties. But even if the implementing measures are retained in the short or longer term, their founding principles will be gone.
How does one assemble all the implementing measures in secondary legislation? The obvious place is to look at where the specific powers for transposing EU measures were used- Section 2(2) of the ECA is the obvious place to look. But because of the breadth of that power, and to minimise its use, by parliamentary convention, Departments have been bound to use any other national enabling power as a 1st choice to implement EU law. The result is that even identifying all the transposing measures since 1973 is now an intimidating task.
Of course, some of these measures we will want to keep, as they would have been made anyway by the UK. These measures, or acceptable parts of them would have to be identified.

However, a key consideration in any survey of the implementing measures would be that if the UK wished to continue to sell into the EU market, it will have to retain all the EU legislation on standards required for goods for sale in the EU anyway.

As to our local, indeed uk caselaw on matters of EU based law, our courts are EU courts for the purposes of applying EU law. What happens after we leave, Do the canons of interpretation change from the European ones, where established principles of proportionality, equality and so on apply to what was "saved" transposing legislation? Have some of these concepts already become a part of the common law?

And finally, what of our UK Competition law- this is national law, not implementing any EU law, but which adopts not only the principles and actual words of the Treaty as their essence, but also require that ongoing interpretation is made consistently with the developing EU jurisprudence?

In summary, I would like to quote Judge Sir David Edwards, long time Scottish judge at the European Court in Luxembourg, in the findings of the House of Lords European Union Committee,

"The long term ghastliness of the legal complications is almost unimaginable"[12]
He went on to say,
"Certainly there will be people who will make a great deal of money out of it"

For the sake of clarity, I should add, in case listeners take the comments the wrong way, I do not however think that he advanced that comment in any way to the many lawyers in the audience and other service sectors in the audience, to promote a UK BREXIT- quite the contrary.

Thank you.

Brian Doherty.

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[12] Lords Select Committee: 4.5.16: EU withdrawal would be complex and daunting, Committee finds http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/news-parliament-2015/withdrawal-process-report-published/