



Northern Ireland & “Brexit” – between the draft protocol and the threat of “hard Brexit” – legal perspectives

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20 September 2018

Since the “Irish question” is still unresolved...

- Draft protocol on Ireland/Northern Ireland PLUS other aspects of draft withdrawal agreement



- “Brexit” without agreement (pure Article 50 TFEU)

What are the needs of Northern Ireland?

Joint letter FMDFM August 2016

- Closest to a cross community position
- Surprisingly current

“Border”

- No “impediment to the movement of people, goods and services
- no “catalyst for illegal activity”, or reason to compromise arrangements in criminal justice and tackling organized crime”
- no incentive to undermine the peace process or political settlement

Economy/business competitiveness

- Retain ease of trade with EU Member States
- Retain access to labour, unskilled as well as skilled
- Maintain ease of commute for frontier workers

Specific sectors

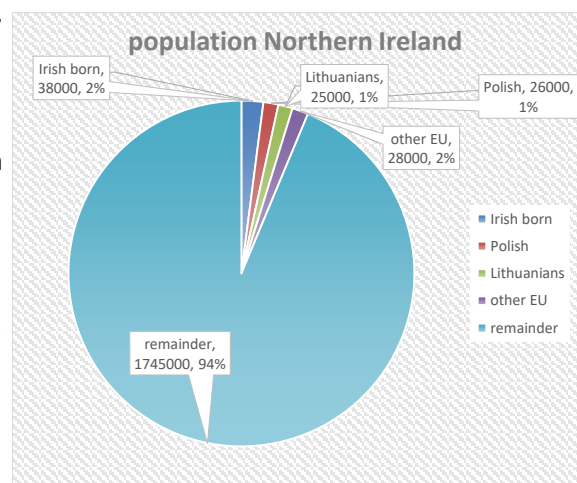
- Energy: an isolated market to be avoided
- Agri-food and fisheries
 - CAP receipts
 - Export options to other EU and non-EU countries

EU funds

- Regional funds
- “peace money”

NI: free movement important aspect of normalisation

- Northern Ireland: 38,000 Irish-born residents, 26,000 Poles, 25,000 Lithuanians and 28,000 residents who were born in other EU countries (recent report by Office of National Statistics)
- British-Irish international agreement to which Good Friday agreement annexed: only persons born in Northern Ireland to either a UK or an Irish citizen or someone otherwise entitled to permanent residence protected .
- population growth in Northern Ireland is based on “international immigration” (mainly from the EU, Poland, Ireland, Romania in 2016, NISRA)
- Next to being part of civil life in NI, these free movers are also an integral part of economic life as employees and self-employed persons



EU law underpinning good Friday Agreement

Internal Market & Funds

- Free movement of goods, services, persons and capital
- Competition law (includes state aid)
- Contributes to addressing economic disadvantage deriving from miniature statelet
- Structural, regional and agricultural funds benefit NI disproportionately within UK

Customs Union

- No tariffs to other EU states, uniform tariffs with non EU states (from 1965)
- Customs Code (1993, subsequent reforms)
 - Customs, phyto-sanitary and other standards controlled based on trust
 - Common VAT collection (EU budget)
 - No physical border posts

Equality acquis & citizenship rights

- Free movers
 - UK and Irish (more efficient than CTA)
 - Other EU citizens (EU acquis)
- Non discrimination directives
 - uniformity of Irish and UK law
 - racial and ethnic origin, religion and belief, disability, sexual orientation, age and sex

Supranational law

- EU law has direct effect and supremacy
- Accepted by UK and Irish Courts in spite of dualism
- For UK: adds quasi-constitutional law in a country which does not effectively enforce rights at all

Institutional aspects

- Communicative aspects of EU membership
- Representation of regions via Committee of Regions

Withdrawal Agreement and Northern Ireland - max

Internal Market & Funds

- Indivisibility of economic freedoms
- Continuing validity of secondary EU law
 - e.g. professional qualifications
- Employment, company law, standards in many fields
- Continuing participation in funds, consider outer region status for island of Ireland

Avoiding bordering

- No physical posts on the island
 - Customs, phyto-sanitary and other standards [customs union]
- No barriers for all-island economy
- No barriers for all-island society

Equality acquis & citizenship rights – to maintain

- free movement rights fully
 - UK and Irish (beyond CTA)
 - Other EU citizens (EU acquis)
- Non discrimination directives

Direct effect and supranationality

- Maintain authority of ECJ
 - “Francovich” not sufficient
- Ensure common law judge / AG

Institutional aspects

- Ensure that Northern Ireland politicians participate in supervisory structures
- Provide auxiliary mechanisms for when GFA/BA institutions are dysfunctional

DRAFT PROTOCOL IRELAND/NORTHERN IRELAND – LEGAL STRUCTURE

- Chapter I “rights”
 - UK to guarantee no diminution of rights
 - UK to maintain GFA institutions
 - No institutional or judicial protection
- Chapter II movement of persons
 - UK and Ireland may maintain CTA as far as no violation of EU law
 - i.e. no preference of UK citizens over Irish citizens (and vice versa)
- Chap III: Common regulatory area
 - Alludes to Internal Market, but only partial coverage
 - Devious: full coverage by state aid law, but not full advantage of economic freedoms
 - These provisions are directly effective, supreme and protected by ECJ, no guarantee for Irish/Northern Irish judge or AG
- Chapter IV & V
 - Some institutional participation of UK (no guarantee for NI or cross community aspects)



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HOW TO DEVELOP PROTOCOL (UTOPIA?)

- Add to Chapter I
 - Include equality acquis
 - Cover these by judicial protection and effects of EU law
- Add to Chapter II
 - Include citizenship rights
 - Cover these by judicial protection and effects of EU law
- Extend common regulatory area
 - Indivisibility of Internal Market
 - extension of annex
 - Might be achieved by special joint committee work in future
- Chapters IV and V
 - Ensure NI presentation / cross community consent in special joint committee
 - Ensure Irish/Northern Irish AG at ECJ



Pure Article 50 TFEU scenario ("no deal")

- Border controls for customs, VAT, phyto-sanitary standards and all other standards added to Custom's code (environment) needed
 - No rights to travel, work and leisure across borders
 - CTA does not grant rights, has no legal quality
 - EU citizens other than "people of NI" wholly unprotected
 - Not even protection of those who relied on free movement rights
 - Transborder health care, other care, education, transport, electricity no longer guaranteed
- NI as the new bargaining chip?



Happy to answer
your questions



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