TCA16 Dr Richard Lang

Senedd Cymru | Welsh Parliament

Adolygiad o weithrediad y Cytundeb Masnach a Chydweithredu rhwng y DU a'r UE | UK-EU implementation review of the Trade and Cooperation Agreement

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Submission to the Senedd's consultation on the UK-EU implementation review of the Trade and Cooperation Agreement

Section 1: Introduction

1.1 I am a British national. I have nearly thirty years' experience in European Union Law as both student and legal practitioner, including a *stage* at the European Commission, five years in practice in Brussels working on cases before the Court of Justice (including two cited cases in the *European Court Reports*), a PhD (Kings College London, 2011), numerous articles in learned journals, and two years as External Expert in Fundamental Rights to the Petitions Committee of the European Parliament (2012-14). I currently sit on the International Committee of the Law Society of England & Wales.

1.2 Previously, I have held the positions of Senior Lecturer in Law (later Principal Lecturer in Law) at the University of Bedfordshire, Senior Lecturer in Law at the University of Brighton and Associate Professor in International and European Law at Liverpool Hope University. I also undertake legal consultancy work on a part time basis.

1.3 I will make it clear from the outset that, given my specialism, my interest is exclusively in the legal interpretation of the TCA and the instrument transposing it into UK Law. I will therefore only be addressing Question 3 of the Consultation Document on the effectiveness of the TCA in practice, and its implementation.

1.4 In Section 2, I consider some of the controversies surrounding section 29 of the European Union (Future Relationship) Act. In Section 3, I look briefly at the subject of state aids and subsidy control.

1.5 In the final section, I bring together my recommendations.

Section 2: Problems in implementation – the question of section 29 of the European Union (Future Relationship) Act

2.1 The EU-UK Trade and Cooperation Agreement (TCA) entered into force on 31 December 2020 and was implemented in UK domestic law by the European Union

(Future Relationship) Act 2020 (EURA), which also became law on 31 December 2020.

2.2 From the point of view of judicial interpretation, one section of the EURA was always likely to cause more problems than any other, and that was section 29, subsection 1 of which reads:

Existing domestic law has effect on and after the relevant day with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement… so far as the agreement concerned is not otherwise so implemented and so far as such implementation is necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement.

It could be argued that this amounts to an abdication of responsibility to properly implement the TCA, instead trying to pretend that such implementation had already taken place and could simply be *read into* the existing corpus of UK law by judges.

2.3 It is hard not to see Section 29 as anything other than a brother cousin to the original EU Law doctrine of indirect effect, sometimes called the Duty of Consistent Interpretation, whereby, faced with a clash between domestic (ie EU Member State) and EU law, the judge was to give an interpretation so as to bring the former into line, so far as possible, with the latter. The obligation was to interpret consistently, though not *contra legem*.

2.4 It is well acknowledged that this doctrine had already been the inspiration for s3 of the Human Rights Act 1998, but here, faced with the prospect of giving a consistent interpretation only at the cost of significant damage to the existing statute book, the judge had the option to bat the matter back to Parliament via a Declaration of Incompatibility.

2.5 This third iteration however is really quite unique, in that the 'supreme' law (EU law in the case of indirect effect, and human rights law in the case of the Human Rights Act s3) is the whole of the post-TCA legal settlement, whatever that might be or have turned out to be, and the 'subordinate' law (domestic law, UK law) is the entirety of the pre-TCA legal settlement, in other words, the law as it stands today. The task for the judge is thus a kin to reading *War and Peace* into *The Brothers Karamazov*.

2.6 This time there is no option to revert to the democratically elected lawmakers, as in the Human Rights Act, and nor is there any initial filtration system, as there is in EU law, requiring the passage being interpreted to be clear and precise enough to spare a judge from the situation where he or she would be faced with an excessively broad provision, leaving them no option but to legislate from the Bench. Without these safeguards, the risks to the integrity of the UK statute book posed by section 29 are

tremendous, as the provision entails charging judges with the carrying out of political processes for which they lack machinery, training, experience or responsibility.

2.7 Lord Justice Coulson opined that this section did not 'lay down a principle of purposive interpretation',[1] thereby compelling British judges to use a purposive approach to interpretation, namely that approach which starts with the judge ascertaining the purpose of the legislation and then attempting to reach the decision which most clearly attains it. However, if this is not purposive interpretation it must be something very close as the judge only really has the goals and aims of the TCA as a lodestar guiding him or her in their interpretative journey. In that sense, the pursuit of Brexit has proved to be a long term *telos* requiring that British judges take a similarly long term view. If British judges are now to pursue the teleological approach to interpretation so hated when it was pursued by the judges of the Court of Justice, it is quite a turnaround. Such judges must be activist in championing, even stimulating, the attainment of the *telos* (the creation of the EU in the CJEU's case, and Brexit now). This author already predicted such a state of affairs in 2017.[2]

2.8 The use of such a clause, sometimes called a sweeper provision, or glossing mechanism, caused much consternation in the practitioner and academic communities. Jack Williams said that the courts would need to engage themselves in 'immeasurable exercises of crystal ball gazing and policy choices'.[3] Jeff King warned about the breadth and vagueness of the section, and that it represented 'shoddy drafting'.[4]

2.9 There have not been that many cases turning on s29 to date, but such as there have been do not do much to allay fears. In *Avaaz Foundation v Scottish Ministers*,[5] for example, a petitioner to the Court of Session Outer House in Scotland sought to have two articles of the TCA (Articles 186 and 653) automatically read across into domestic law (specifically the Proceeds of Crime Act 2002) via s29. Article 186 says, inter alia, that parties should make best endeavours to prosecute the fight against money laundering. Article 653 sets out measures to prevent and combat money laundering and terrorist financing. When hearing the petition, Lord Sandison appeared to entertain the petitioner's arguments at least as far as the read-across point was

[1] *Lipton & Anor v BA City Flyer Ltd* [2021] EWCA Civ 454 [78] (Coulson LJ).

[2] R Lang, 'Must Mutual Recognition transform into Mutually Assured Obstruction? Three creative suggestions for the UK's Brexit negotiators', Twenty fourth International Conference of Europeanists, Glasgow, 7/17. Available at SSRN: **https://ssrn.com/abstract=3029656**.

[3] J Williams, 'Relevant Relationship Agreement Law: a guide for the perplexed' (*UK-EU Relations Law*, 4 January 2021) < **https://eurelationslaw.com/blog/relevant-relationship-agreement-law-a-guide-for-the-perplexed**> accessed 8 November 2024.

[4] J King, 'Looking Back at the EU Future Relationship Act' (*UCL Europe Blog*, 11 January 2021) < **https://uceuropeblog.com/2021/01/11/looking-back-at-the-eu-future-relationship-act/**> accessed 8 November 2024.

[5] *AVAAZ FOUNDATION Petitioner* P392/21[2021] CSOH 119.

concerned, only turning down the petitions on the grounds that the two articles concerned were too wide for the petitioner's purposes.

2.10 It is submitted that the sweeper clause contained in s29 of the EURA poses real risks to legal certainty, and, insofar as it allows judges to add to the statute book, endangers both due process and, arguably, democracy. Since any renegotiation of the TCA is bound to bring with it a modification of the latter's domestic implementation, it is suggested that this opportunity be used to reassess, and reinforce, the wording of s29, providing some appropriate guardrails for judges.

2.11 One obvious guardrail in the context of Wales would be to insert at the beginning a phrase along the lines of: '[w]hile keeping in mind the preservation of the integrity of the UK's constitutional settlement'.

2.12 Could one be more creative? Might there be a way to legislatively insist (without Parliament binding its successors) that any judicial pronouncement pursuant to s29 be codified into written law at the earliest possible opportunity, thus giving chance for the new material, whatever it might be, to undergo proper democratic scrutiny including the chance for a debate and, if necessary, amendment or even abandonment?

2.13 Where one has judges charged with the interpretation of a very wide legal document, which is already vague and which impacts upon many other laws, one is put in mind of the US Supreme Court and its task of formulating judicially administerable decisions based upon the Constitution. Where crucial questions turn not on issues of "law," but on issues of fact, characterization or degree, a decision may be peculiarly made subject to revision through the legislative process. By 'peculiarly' is meant peculiar for the US system of constitutional democracy with its attendant understanding of the separation of powers. In the UK's system of parliamentary sovereignty it is not controversial, or better, it is fundamental, that the legislative branch may treat *any* prior rulings of the judicial branch howsoever it sees fit including revision, the making of exceptions, and of course reversal altogether.

2.14 However, that does not change the fact that the determinations needed in order for the UK, in the pertinent context, to formulate a new TCA-compliant rule, or to modify an existing rule to make it TCA-compliant – the determinations upon which affixing the label "TCA-compliant" or "non TCA-compliant" depends – are better made by Parliament, or by the executive acting in pursuance of powers granted by Parliament, than a court. Section 29 turns the British courts into superlegislatures in arguable violation of (the UK understanding of) the separation of powers. An *ex post facto* salve is second best to avoiding the violation to begin with.

2.15 While I am therefore not drawing a direct analogy with the US Supreme Court's practice, the method by which an inter-branch *passarelle* is brought about – not in

fact through legislation at all but the usage of certain formulae by the judges themselves – is worth a moment's consideration.

2.16 Acknowledging that certain (prior) political spadework would have been needed to pass the constitutionally-implicated law now in front of them, the Justices make an explicit assumption that such spadework has in fact been carried out.[6] They then hand down a decision which is necessarily based on, and therefore subject to, this assumption.

2.17 Where this decision is to leave things as they are, this manoeuvre looks little different to the doctrine of judicial deference. But that does not have to be the outcome. Where it is not, this phraseology makes it easy for the relevant legislature, for example, if it had passed the law in ignorance of the constitutional point, to amend it or, if the Constitutional Court had voided it altogether, to reinstate it. They need simply negate the assumption.

2.18 This mechanism, effectively the judiciary giving a 'licence to amend' to the legislature, seems absurd in our system, where of course the legislature has that licence as of right. However, why could the gift not be reversed? One could easily imagine a section 29(1a) worded as follows:

Where an implementation referred to in section 29(1) would have been justified only in the case of a certain state of facts existing, and the existence of this state of facts would have been feasible at that time, then a court must assume that that state of facts actually did exist at that time.

2.19 Any decision now reached by the court is made pursuant to that assumption, by legislative mandate, and, post decision, said legislature would enjoy the same ease of amendment referred to above in the context of a given American legislature. The clause does not cause Parliament to bind its successors, and respects, even furthers, the separation of powers. Parliament would be effectively directing the court to recognise the true *locus* of legislative power.

Section 3: State aids and subsidy control

3.1 Mrs Thatcher famously said in her Bruges speech that:

[6] *Munn v. Illinois* 2294 U.S. 113 (1876).at 132, cited in A Cox, The Role of Congress in Constitutional Adjudication' 40 U. CiN. L. REV. 199, 207.

We have not successfully rolled back the frontiers of the state in Britain, only to see them re-imposed at a European level with a European super-state exercising a new dominance from Brussels.[7]

3.2 With Brexit, the UK firmly re re-imposes the frontiers of state at UK level, at the same time apparently wishing to create a kind of Legoland European Union here, with the four constituent nations taking the place of the EU Member States to form a so-called UK Internal Market, and with the UK itself (presumably) now in the role of 'super-state'. The rationale for the UK Internal Market was that, when the country Brexited, the powers which it had once ceded to (others would say shared with) the institutions in Brussels would now come home to "an already territorially-segmented UK",[8] raising the prospect of differentiation of laws, leading to potential inter-nation unfairnesses. It is not clear to this author why the existing differentiation of laws, surely inherent in any system of devolution, did *not* require the creation of an 'internal market' – or even talk of such a thing – complete with centrally controlled corrective gears.[9]

3.3 In EU Internal Market law, what I have called the 'unfairnesses' take different forms, each dealt with in its own way. One such is 'State aid' about which, as is well known, the EU has particularly strict rules. These rules stop individual Member States unduly favouring their 'national champions' (say, the yogurt maker Danone in France) as against the interests of similar enterprises across the bloc. What would happen if the UK government insisted, as it did, in replicating in miniature this State aid (perhaps now better termed Nation aid) regime post-Brexit? Could one of the constituent nations be chastised for effectively spending its own money on its own project?

3.4 As Biondi notes, the 'very first 'domestication' of the TCA' was the Subsidy Control Act (SCA), which sets up a new Subsidies Advice Unit (SAU) at the Competition and Markets Authority (CMA), the job of which it is to assist public authorities by providing independent non-binding advice in relation to certain subsidies.[10]

3.5 This system appears to be working quite well, with awarding bodies such as the Welsh Government able to seek such advice and then follow it without undue risk of future legal challenge (although, with the advice being non-binding, some risk will

[7] Margaret Thatcher, 'Speech to the College of Europe/ "The Bruges Speech"' (delivered in Bruges, 20 September 1988) **https://www.margaretthatcher.org/document/107332** Accessed 2 November 2024.

[8] S Tierney, 'The Territorial Constitution and the Brexit Process' (2019) 72(1) Current Legal Problems 59, 82.

[9] It is perhaps little wonder that in the House of Commons, Liz Saville Roberts described the Subsidy Control Bill (as it was then) as 'steamroll[ing] devolved competence': HC Deb 22 September 2021, vol 701, col 337.

[10] A Biondi, 'Subsidies control and enforcement' in F Fabbrini, *The Law and Politics of Brexit, Volume V: The Trade and Cooperation Agreement* (OUP 2024) 226.

always remain).[11] It can also be seen how, in its assessments of proposed aids, the SAU takes seriously the need to consider potential market disruption not just within the UK but also internationally.[12] However, can the same be said for the EU? Since the TCA was signed, the European Commission continues to limit its assessment of EU state aids to compatibility (or otherwise) 'with the internal market'[13] and it is not clear that this EU institution is looking at (potential) impact on the UK at all. Biondi notes that the specific obligation set out in art 366 of the TCA to create an effective subsidies regime 'mostly applies to the UK only, as the European Commission already performs this task in the EU'.[14] That may be so, but it is not certain that that means that the Commission need make no changes to its existing mechanisms at all.

3.6 To summarise, there remain questions to be answered about whether and to what extent the European Commission is reviewing aids/ subsidies awarded by EU governments for their potential to disturb market conditions *outside the bloc*, and particularly within the UK. If they are not conducting such reviews then it could be said, at best, that the EU is only implementing the relevant articles of the TCA superficially (obeying the letter but not the spirit), and at worst, that it is not implementing them at all.

3.7 It is recommended that, when it comes to reconsidering Chapter 3 of Title XI of Part II of the TCA (the Subsidy Control chapter), stronger language be utilised so that the EU cannot simply shirk its new responsibilities by doing what it has always done. These new arrangements arguably put the EU under a <u>new</u> duty to enquire as to whether any given EU aid can cause market disturbances <u>within the UK</u>, a third country. The wording needs to be tightened to reflect this.

3.8 The alternative argument is that the TCA never intended to create a pair of centrally-controlled, mutually-regarding State Aid regimes, one in London and one in Brussels, but simply a pair of 'home' regimes, one for the United Kingdom, one for the European Union, which would act as reassurance that their partner took the business of subsidies seriously. This reassurance would counteract any suspicions of bad faith should a genuine market disturbance ever occur across the Channel, or indeed across the Irish Sea. If that is the case, then my recommendation at paragraph 2.7 may be ignored. However, the question is surely begged, why should Wales have to

[11] Eg Referral of proposed Holyhead Breakwater subsidy by the Welsh Government, SAU Referral, Opened: 28 June 2023, Closed: 9 August 2023; O Hughes, 'Holyhead Breakwater gets £40m in grant and loan from Welsh and UK governments' (*North Wales Live*, 19 October 2023) < **https://www.dailypost.co.uk/news/north-wales-news/holyhead-breakwater-gets-40m-grant-27941586**> accessed 8 November 2024.

[12] Subsidy Advice Unit, *Subsidy Advice Unit Report on a proposed subsidy to Stena Line Ports Ltd. for Holyhead Breakwater* (Crown 2023) Para 3.48.

[13] Eg State Aid SA.115222 (2024/N) – Germany Rheinland-Palatinate: State aid to compensate for the damage caused by floods in July 2021 (VV Wiederaufbau RLP 2021), Para 26.

[14] Biondi (n 10).

give up its autonomy over the spending of public finances merely for the sake of a feelgood or window-dressing exercise?

Section 4: Recommendations

4.1 My recommendations are thus as follows:-

I recommend that the committees:-

- Insert at the beginning of section 29(1) of the European Union (Future Relationship) Act 2020 (EURA) a phrase along the lines of: '[w]hile keeping in mind the preservation of the integrity of the UK's constitutional settlement'.
- Insert a new section 29(1a) along the following lines:
  Where an implementation referred to in section 29(1) would have been justified only in the case of a certain state of facts existing, and the existence of this state of facts would have been feasible at that time, then a court must assume that that state of facts actually did exist at that time.
- When reconsidering Chapter 3 of Title XI of Part II of the TCA (the Subsidy Control chapter), tighten the existing language, or utilise stronger language, so that the EU cannot simply shirk its new responsibilities by doing what it has always done.