UKAEL Conference on:

EU Law and Devolution – the relationship between Devolved Jurisdictions and the European Union

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Fields in which Welsh Ministers have functions and NAW can gain legislative competence

- Agriculture, fisheries, forestry and rural development
- Ancient monuments and historic buildings
- Culture
- Economic development
- Education and training
- Environment
- Fire and rescue services and promotion of fire safety
- Food
- Health and health services
- Highways and Transport
- Housing
- Local Government
- National Assembly for Wales
- Public Administration
- Social Welfare
- Sport and Recreation
- Tourism
- Town and Country Planning
- Water and Flood Defence
- Welsh Language

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Implementing EU law

- In order to implement EU law, the Welsh Ministers need an appropriate power – via a Designation Order under the European Communities Act 1972, a Transfer of Functions Order, an Act of Parliament or – perhaps – an Assembly Measure
- The situation is comparable for the Secretary of State and Northern Ireland Departments, but Scottish Ministers have more powers automatically

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Implementing EU law

- Designation Order power - Secretary of State always has a concurrent power with Welsh Ministers, so the UK Government can ensure compliance in its terms
- Transfer of Functions Order power - Government of Wales Act 2006 provides the Secretary of State with a concurrent power (Schedule 3 GOWA 2006)

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Compliance with EU Law

- Wherever the power is derived from, the Welsh Ministers cannot make any subordinate legislation, or do any other thing, if it is incompatible with EU law
- (s. 80(8) GOWA 2006)
- The same applies to the National Assembly for Wales when making Assembly Measures (quasi-primary legislation) –
- s. 94(6)(c) GOWA 2006

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Some relevant case-law

Internal constitutional arrangements – some cases showing the traditional ECJ position

- The Court will look to see if a Member State as a whole has complied with its Community obligations; it is not concerned with how a Member State divides up its responsibilities within the devolved structure (Case – C-8/88 *Germany v Commission [1990]* ECR I-2321, para 13*).*
- But a Member State cannot plead provisions resulting from its constitutional arrangements to justify failure to comply with Community obligations (Case C-87/02 *Commission v Italy [2004]* ECR I – 5975, para 38).

Principle of Equality

- Member States must comply with general principles of Community Law when implementing Community obligations (Case 5/88 *Wachauf* [1989] ECR 2609, para 19).
- One such general principle is the principle of equality, which requires that similar situations must not be treated differently unless differentiation is objectively justified (Case C-2/92 *Bostock* [1994] ECR I – 955, para 23).

A new approach? The Azores case - Commission v Portugal (ECJ C-88/03) - judgment of 6th September 2006

This was a State Aid case. The Azores islands – a region of Portugal - has its own legislative assembly. In accordance with that body's powers under the Portuguese constitution, the Assembly set a significantly lower income and corporation tax rate for businesses based in the island than the rate that obtained in the rest of Portugal.

The European Commission considered that this constituted 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 fell foul of 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).

As the case proceeded, however, the Commission did nuance its position somewhat, recognising that, if a Member State's constitution allowed for 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, however, the constitutional position in Portugal, and it is not, of course, the current constitutional position in the UK. So the case proceeded to the ECJ, and both Spain and the UK intervened in support of Portugal.

In a very 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:

- 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 goes without saying that the decision must also be non-selective WITHIN THE "REGION" IN QUESTION - i.e. it must not be a tax reduction only for steel companies, for instance - or a reduction only in part of the "region".

Continuation of the Azores approach in the context of implementation of EU obligations? Case C-428/07 Horvath - judgment of 17th July 2009

This case concerned the EU Single Payment Scheme - the scheme that replaced the previous system of agricultural subsidies - set up by Regulation 1782/2003 EU. Under the Regulation, farmers receiving direct payments have to maintain their land in "good agricultural and environmental condition" - "GAEC". The Regulation provides that "Member States shall define, at national or regional level, minimum requirements for good agricultural and environmental condition on the basis of the framework set up in Annex IV…".

In England, the Secretary of State defined the GAEC requirement as including obligations relating to the maintenance of footpaths. In Wales, Scotland and Northern Ireland, no such GAEC condition was imposed – so it was, arguably,

easier for a farmer in Wales to qualify for direct payments, than for a farmer whose land was in England.

Mr Horvath judicially reviewed the Secretary of State's imposition of the footpath requirement as part of the definition of GAEC and the case was referred to the ECJ under former Article 234 TEC. He claimed (*inter alia*) that the differential implementation of the Regulation in England and Wales was a breach of the fundamental principle of non-discrimination in EU law.

The Court confirmed its previous case-law to the effect that a Member State is free to allocate powers internally and to implement Community acts which are not directly applicable by means of measures adopted by regional or local authorities, provided that that allocation of powers enables the Community legal measures in question to be implemented correctly (Case C-156/91 *Hansa Fleisch).*

It also noted that, in this case, "The possibility for the Member States, to the extent authorised by their constitutional system or public law, to permit regional or local authorities to implement Community law measures is, moreover, expressly recognised in Article 5(1) of Regulation No 1782/2003. That provision states that 'Member States shall define, at national or regional level, minimum requirements for [GAEC] on the basis of the framework set up in Annex IV'.

However, the Court clearly did not hold that differential implementation is possible ONLY where EU secondary legislation contains this sort of formula. It went on to hold, effectively, that there is no discrimination contrary to EU law where different implementing bodies within a Member State implement Union legislation in different ways, provided that, in each case, the devolved legislation affects equally all persons subject to it. In other words, the proper subjects for comparison, when judging whether discrimination has occurred, is not a farmer in England and a farmer in Wales, but two farmers in Wales or two farmers in England.

It also goes without saying that the way in which a devolved authority chooses to implement the EU obligation must be compliant with EU law.

The Advocate General's Opinion in this case is worth reading; it draws heavily on the reasoning in the *Azores* case.

A different approach in the context of the Four Freedoms? - The "Walloon case" (ECJ case C 212/06, Government of the French Community and Walloon Government v Flemish Government - judgment of 1st April 2008

In this case, the ECJ held that a Member State law breaches the free movement provisions of (what is now) the Treaty on the Functioning of the European Union if that law adversely affects nationals of the Member State concerned, who had made use of their right of freedom of movement within the Union.

The case concerned a law made by the Flemish Community in Belgium. The law limited access to, and benefits under, a care insurance scheme, to:

- people living in the regions for which the Flemish Government was responsible, and
- people employed or self-employed within those regions, but living in another Member State.

So it excluded persons living in other parts of Belgium but working in the regions for which the Flemish Government was responsible.

The Court found that this was not a wholly internal situation, because the Flemish scheme affected:

- nationals of other EU States working in the Dutch-speaking or bilingual regions, but living elsewhere in Belgium, and

- Belgian nationals who worked in those regions but lived elsewhere in Belgium and who had at some time exercised their EU freedom of movement.

Therefore the Court found that it had jurisdiction, and held that the scheme constituted an obstacle to free movement, and could not be justified - so was in breach of Community law.

The Court specifically took into account the fact that the numbers of persons adversely affected might be very small. It held that, because the free movement provisions are fundamental Community provisions, “any restriction, even minor” of those freedoms was prohibited.

It also expressly considered the defence, raised by the Flemish Government, that the Flemish Community had no powers to legislate in relation to care insurance for persons living in other regions of Belgium. In response to that argument, the Court reiterated its well-established case-law, quoted in the Annex, that a Member State cannot plead provisions prevailing in its domestic legal order (including its constitution) to justify breaches of Community law. In this, the Court followed the reasoning of the Advocate General - AG Sharpston, who is of course from the UK.