



How Sausages and Laws are Unmade: The European Court of Justice, Northern Ireland, and Brexit

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[Image: [The European Court of Justice in Luxembourg](#)]

In Northern Ireland, the consequences of Brexit have already ranged from renewed flare-ups of violence to a trade dispute flippantly nicknamed the “sausage war.”¹ The latter, a months-long standoff between the UK and the EU over import controls on meat products, laid bare the fragility of the Northern Ireland protocol, for all its complexity: European reliance on British enforcement of European common-market rules in British ports, indispensable for avoiding a “hard border” in Northern Ireland, could incentivize an unscrupulous government in London to break its own agreements to shake down its negotiating partner.² A recent demand by Boris Johnson’s government to strip the European Court of Justice (ECJ) of ultimate jurisdiction over the Northern Ireland protocol—reopening a core issue that the two parties had expressly closed by signing the agreement³—may

gamble with the economic stability and even the security of this volatile region, not least because ECJ jurisdiction is indispensable to the common market.

The ECJ and the Common Market

The EU refers to the common market as “one of [its] greatest achievements,” eliminating “[h]undreds of technical, legal and bureaucratic barriers to free trade and free movement” among member states.⁴ The 1957 Treaty of Rome, which founded the EU’s predecessor, the European Economic Community (EEC), laid the foundation for the common market by committing its signatories to common policymaking across twenty-one enumerated areas.⁵ The ECJ interprets these laws.⁶

To understand the indispensability of the ECJ, contrast the EEC with its onetime rival, the European Free Trade Association (EFTA). EFTA—of which the UK, perhaps not incidentally, was a founding member—was a mere free trade zone, which envisaged no progressive cession of customs policymaking power to centralized institutions.⁷ By contrast, the signatories of the Treaty of Rome declared themselves “DETERMINED to lay the foundations of an ever closer union among the peoples of Europe,”⁸ and by the early 1960s had built the EEC into an economic powerhouse whose success was owed not to mere laissez-faire openness but to French-style *dirigisme*, or proactive economic and social planning.⁹ The ECJ, integral to this regulated openness, was built into the EEC from the beginning.¹⁰ Already, the UK had begun to seek EEC membership, and its defection from EFTA to the EEC in 1973 paved the way for the latter’s ascendance.¹¹

The New Negotiation Deadlock

The Treaty of Rome, however, provides that “[t]he Court of Justice shall consist of one judge per Member State.”¹² Brexit therefore removed the only UK judge from the

tribunal.¹³ So, in July of this year, the UK reopened the issue of final ECJ jurisdiction over the Northern Ireland protocol on this ground, protesting that “[i]t is highly unusual in international affairs for one party to a treaty to subject itself to the jurisdiction of the institutions of the other, all the more so when the arrangements concerned are designed to mediate the *sui generis* relationship between the EU and its Member States.”¹⁴ Officials on the EU side were taken by surprise when the UK escalated this demand to an ultimatum in recent weeks.¹⁵

Assuming EU negotiators don’t acquiesce in the UK move to reopen the issue of ECJ jurisdiction—which would, after all, only hand London even more control over the common market—and the UK does not drop its ECJ demands, the risk is that the UK will now invoke Article 16 of the Northern Ireland protocol, which allows either side to unilaterally take “safeguard measures” in response to “serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade.”¹⁶ Such “safeguard measures” are likely to consist of partial suspensions of the protocol, taking it hostage to the UK demand for its renegotiation.¹⁷ To continue to enforce common market controls, the EU may be forced to choose between two bad options: reimposing a hard border in Ireland—which would grievously violate the Good Friday peace agreement that ended the Troubles in 1998—or severing one of its own members by imposing controls between the Republic of Ireland and the European mainland.¹⁸

So there is no clear way to resolve this new UK demand without some combination of economic chaos, political violence, and loss of face to one side for another. One can hope for as great a proportion of that third option as possible.

¹ *Brexit Is the Catalyst for Rioting in Northern Ireland*, THE ECONOMIST (Apr. 8, 2021), <https://www.economist.com/britain/2021/04/08/brexit-is-the-catalyst-for-rioting-in-northern-ireland> [https://perma.cc/K84P-G6PF]; Caroline de Gruyter, *Boris Johnson’s “Sausage War” Was Deadly Serious*, FOREIGN POLICY (June 23, 2021 4:16 PM), <https://foreignpolicy.com/2021/06/23/boris-johnsons-sausage-war-was-deadly-serious/> [https://perma.cc/XTP8-LDET].

² See generally de Gruyter, *supra* note 1.

³ See NORTHERN IRELAND OFFICE, NORTHERN IRELAND PROTOCOL: THE WAY FORWARD, 2021, Cm. 502 ¶ 67 (UK) (arguing that the UK ought to be able to escape ECJ jurisdiction because UK negotiators “only agreed to it in the Protocol because of the very specific circumstances of that negotiation”).

⁴ *Single Market*, PUBL’NS OFF. EUR. UNION (Oct. 28, 2020) <https://op.europa.eu/en/publication-detail/-/publication/25deabe8-199a-11eb-b57e-01aa75ed71a1> [<https://perma.cc/V7XL-N9YJ>].

⁵ Treaty Establishing the European Economic Community art. 3, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome].

⁶ *Id.* arts. 225-39.

⁷ Bryan H. Druzin, *Tipping Points and the Formation of the European Union: Birth, Brexit, and Beyond*, 27 COLUM. J. EUR. L. 68, 69–70 (2021).

⁸ Treaty of Rome, *supra* note 5, at 14.

⁹ WALTER LAQUEUR, EUROPE IN OUR TIME: A HISTORY 1945-1992, 121–22 (1992).

¹⁰ Treaty of Rome, *supra* note 5, art. 220; *see also* LAQUEUR, *supra* note 9, at 120 (describing the role of the ECJ within the EEC’s “quasi-federal structure independent of governments and private interests”); Druzin, *supra* note 7, at 79 (“Rulings of the European Court of Justice (‘ECJ’) in the 1960s and 1970s strengthened Community policies and established the supremacy of Community law over national law.”).

¹¹ Druzin, *supra* note 7, at 77–78. British accession to the EEC was only possible after the departure from office of Charles de Gaulle, who single-handedly stonewalled the UK application for a decade. LAQUEUR, *supra* note 9, at 330–32.

¹² Treaty of Rome, *supra* note 5, art. 221.

¹³ Daniel Boffey, *Last British Member of European Court of Justice Could Sue EU*, THE GUARDIAN, (Feb. 17, 2020 7:47 AM) <https://www.theguardian.com/law/2020/feb/17/british-ecj-could-sue-eu-eleanor-sharpston> [<https://perma.cc/N929-N49V>] (describing departure of Christopher Vajda even before the official end of UK participation in the common market).

¹⁴ NORTHERN IRELAND PROTOCOL: THE WAY FORWARD, ¶ 67.

¹⁵ Simon Coveney (@simoncoveney), TWITTER (Oct. 9, 2021, 6:22 PM) <https://twitter.com/simoncoveney/status/1446964235972616194> [<https://perma.cc/GB8K-JRZQ>] (expressing frustration as Republic of Ireland foreign minister).

¹⁶ Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Protocol on Ireland/Northern Ireland, 2020 O.J. (L 29) 102, 111.

¹⁷ Jennifer Rankin, *What May Happen if Article 16 of Northern Ireland Protocol is Triggered?*, THE GUARDIAN (Oct. 4, 2021, 6:50 AM), <https://www.theguardian.com/politics/2021/oct/04/what-may-happen-if-article-16-of-northern-ireland-protocol-is-triggered> [<https://perma.cc/HC4X-3XWF>].

¹⁸ De Gruyter, *supra* note 1.