

Brexit: the consequences for State aid control in the UK

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Disclaimer

What the English person says	What the English person means
"With the greatest respect to X"	"X is an idiot"
"X is a brave decision"	"X is an insane decision"
"I am a bit disappointed about X"	"I am furious about X"

Brexit



UK General Election



This ...



... or this?



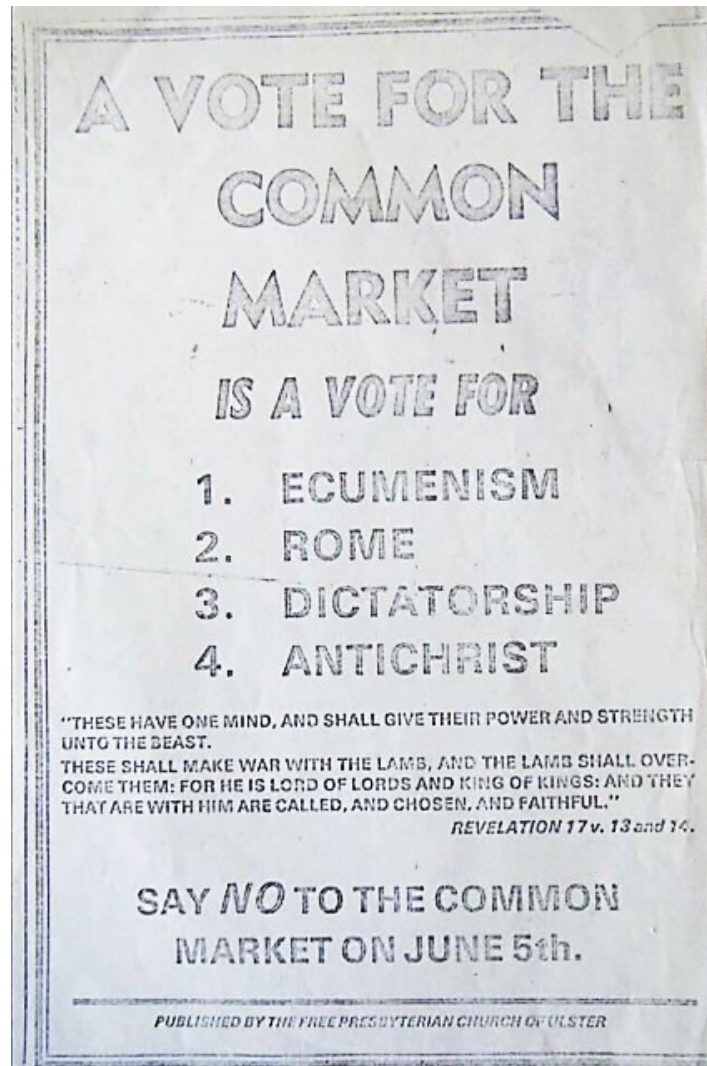
From this ...



... to this.



DUP policy on EU (from 1975)



Queen's Speech delayed: why?



Ministers sacked at DExEU

What the English person says

“some disarray”

What the English person means



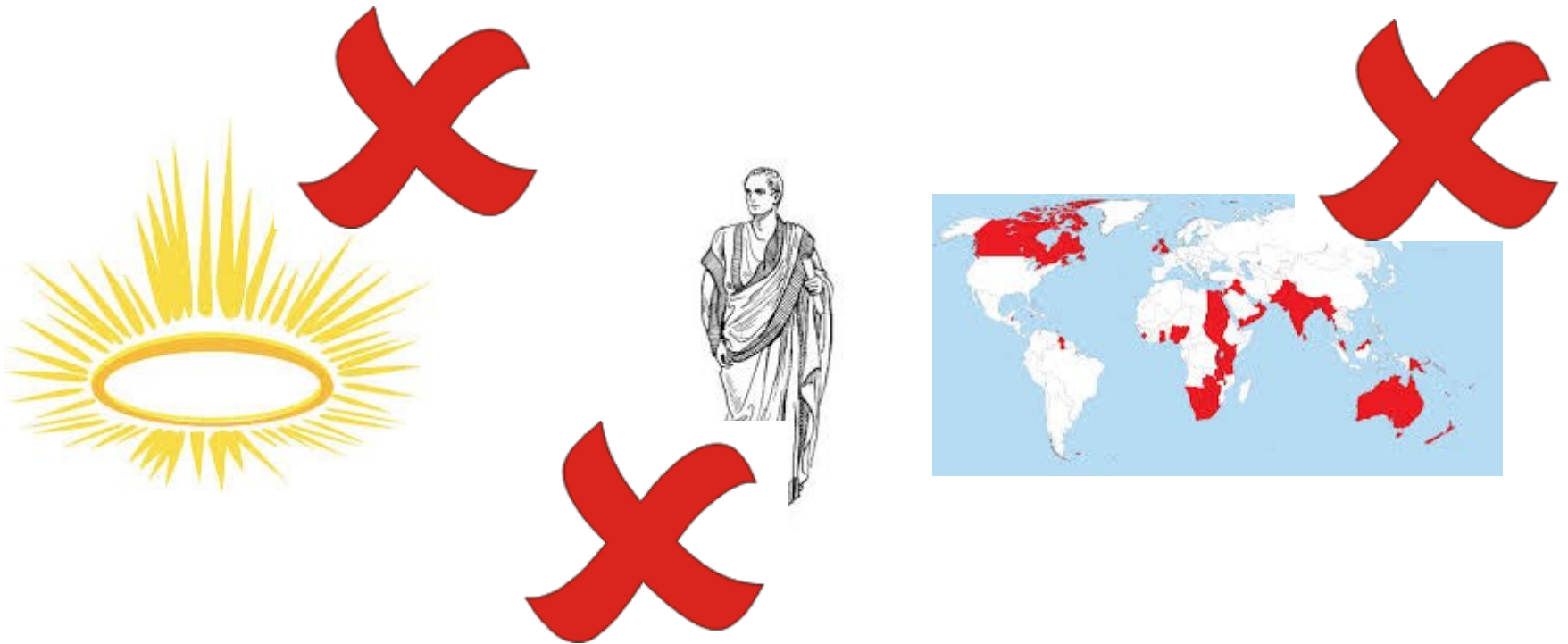
State aid: the politics

- Complete silence in Government White Paper
- Ministers dislike: but keen on application to others
- Labour: Corbyn/McDonnell – State aid rules a constraint on nationalisation/industrial policy
- Conservatives: ditto – but now a positive!

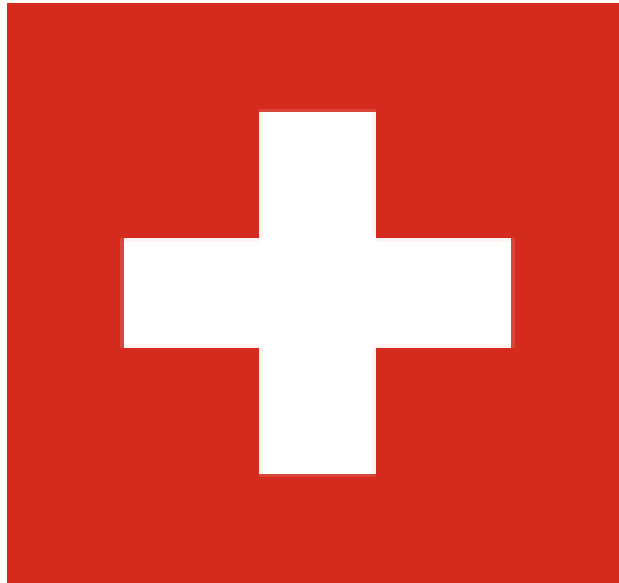
Devolution

- No limitation on State aid in Scottish, N Ireland, Welsh devolution settlements
- Unnecessary: EU rules applied
- But now? Real risk of subsidy races, distortions.
- But politically difficult

Great Repeal Bill



State Aid: The Swiss “option”



The Swiss “option”

- 1972 FTA – Art 23(1)(iii)
 - Vague provision
 - No enforcement mechanism
- 1999 Air Transport Agreement
 - Art 13 = Art 107 TFEU
 - But weak enforcement
- Is this an available option?

EU Council negotiating guidelines

20. Any free trade agreement should be balanced, ambitious and wide-ranging. It cannot, however, amount to participation in the Single Market or parts thereof, as this would undermine its integrity and proper functioning. It must ensure a level playing field, notably in terms of competition and state aid, and in this regard encompass safeguards against unfair competitive advantages through, inter alia, tax, social, environmental and regulatory measures and practices.

State aid: The Iceland option



Article 61 EEA Agreement

61. Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.

Clearance/enforcement

- Same as EU
 - See Article 62 EEA, Articles 5 and 24 of and Protocol 3 to Surveillance and Court Agreement
- EFTA Surveillance Authority = Commission
- EFTA Court = ECJ/General Court
- But fish products excluded

“Iceland minus”

- Do not join EEA
- But join EFTA and use ESA/EFTA Court for limited purposes including State aid
- ESA/EFTA Court would have functions under 2 Treaties
- UK judge(s)/UK commissioner(s) sit(s) on EFTA Court/ESA for the UK treaty functions only

State Aid: the Ukraine option



EU/Ukraine Free Trade Agreement

- Article 262: Sets out State aid rules
- Article 264: rules to be applied “*using as sources of interpretation the criteria arising from the application of [the EU State aid rules] including the relevant jurisprudence of the [CJEU], as well as [Commission frameworks and guidance].*”

EU/Ukraine FTA (2)

- Article 263: each of the EU and Ukraine annually report to each other on State aid granted on each side.
- Article 267: Ukraine must implement a domestic system of State aid control, with “*an operationally independent authority ... entrusted with the powers necessary for the full application of [the State aid rules]*”

Difficulties in Ukraine to UK transplant: substance

- What to do about “affect trade between Member States”?
- Keeping key concepts in harmony: “have regard to”

Difficulties in Ukraine to UK transplant: enforcement body

- Could it be done by the courts alone?
 - No ability to get certainty by notification
 - No ability to develop policy/guidelines
 - Not suitable to decide Art 107(3) issues
- Who is the authority? CMA? Reserve power to Ministers to overrule?
- How to ensure consistency of policy between UK/Commission?

Difficulties in Ukraine to UK transplant: aid by Ministers/Parliament

- What about aid granted by devolved Governments?
- What about aid granted by central Government?
- What about aid by legislation?
 - CMA power to ask court for declaration of incompatibility?

State aid law in UK – the future?



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