European Court of Justice: Nemesis of Brexit Britain?

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One of the most contentious issues in Britain's exit from the EU is the role of the European Court of Justice (ECJ) during and after Brexit. This is because Brexit is ultimately a question of sovereign authority. Who decides the rules of the game when things go awry: the UK judge or the EU judge? This piece examines the ECJ's impact on British sovereignty by reflecting on the procedure, contents and implementation of withdrawal. After a summary overview of the ECJ's jurisdiction, I discuss the meaning and implications of the negotiating positions adopted by EU institutions and the UK Government and Parliament.

1) Jurisdiction

The ECJ does not regulate, legislate, or decide cases instead of national courts. It interprets the meaning of EU law and makes sure that EU regulations and directives are adopted in line with EU treaties and that such EU legislation is correctly implemented by the Member States. The ECJ does this because all Member States, including the UK, wanted to have an effective mechanism to ensure that one and the same right has the same practical effect in all Member States. The goal is thus a positive one: it ensures that individuals and businesses enjoy the same rights that EU law gives them across the territory of the entire EU. Otherwise, Member States could simply ignore or legislate their EU law commitments away. ECJ thus helps the single market to operate smoothly and coherently.

But the ECJ cannot decide to adjudicate on its own if it notices a problem: it needs to be prompted by an action brought before it. This is mostly done by a national court deciding a case started by a citizen or company ('preliminary rulings', over 68% of the new ECJ cases in 2012-2016). Actions can also be filed directly where a Member State or a piece of EU legislation infringes EU law, as well as, in limited situations, by a private party where EU law directly and individually concerns them (altogether called 'direct actions', ca. 5% in the same period).

In any event, a dispute that reaches the ECJ must raise a question of EU law. The ECJ cannot act on appeal from national courts either. It will also refuse to rule on hypothetical questions or those that it has already decided.

In 1991, British courts accepted that EU law overrides UK law so as to ensure that private parties in the UK can rely on rights derived from EU law to protect their private or commercial interests. Parts of the British political elite dislike this because they cannot control how the ECJ will interpret these EU rights. Yet they also cannot control how British courts would interpret such rights if they were derived purely from UK law. But note that three judges in the EU judicial system are British: Christopher Vajda in the ECJ and Ian Forrester and Anthony Collins in the General Court. One of the 11 Advocates-General in the ECJ, Eleanor Sharpston, is also British.

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2) Withdrawal – Question of Procedure

Like any EU law provision, Article 50 TEU is justiciable: it can be the object of litigation before the ECJ. The key question here is whether the UK may unilaterally revoke the notification of withdrawal which it made, as Article 50 mandates, 'in accordance with its own constitutional requirements' on 29 March 2017. This is problematic because the right of unilateral revocation would allow Britain to control the withdrawal process ignoring the will of the other Member States: it could extend the two-year deadline indefinitely and pull out of the negotiations if it was dissatisfied with the outcome. But could it?

EU Treaties are clear on the effect of such a notification. EU membership "shall cease" after two years (or later if extended) or on the date set by the withdrawal agreement.

The UK Supreme Court suggested in the *Miller* case that Britain could not revoke its withdrawal notification, holding that it carries 'fundamental and irreversible consequences'. This is a legally sound conclusion, because the EU Treaty foresees the possibility of exit without reaching any agreement whatsoever. An EU-UK agreement is thus not a requirement for exit; the notification to withdraw suffices. For better or worse, the referendum was not about *how* to leave, but *whether* to leave.

Cessation of EU membership is not optional and there are legitimate reasons for this. One is trustworthiness. A member state where 52% of the electorate do not want to be in the EU and which has formally told other club members that they do not want to stay in the same club as them can no longer be trusted to be committed to achieving the goals of the club. The remaining Member States have an interest in having only fully devoted partners in the club rather than those that would doubtlessly continue to be 'uneasy'. Two is certainty. Not knowing whether Britain does indeed wish to leave as it declared it does is harmful for business, trade and investment. Years-long lack of predictability as to the rules that will apply in the future frustrates business planning and creates unnecessary costs for both UK and EU businesses and consumers.

In legal terms, therefore, one would not only need a new UK referendum to reverse the current result and respect the democratic will of the British people but also a Treaty amendment. This is why notifying intention to withdraw is not a mere puff, but a serious legal act.

Politically, however, there are countless ways in which irrevocability could be waived. Central in this is the European Council, where Heads of State or Government could agree to accept revocability. Another is through the ECJ. A case has already been lodged in the High Court in Dublin on the possibility of unilateral revocation of the withdrawal notification with the hope that the case will be referred to the ECJ. The ECJ would then have the final say over this aspect of Brexit.

3) Agreements – Question of Contents

The ECJ also has a strong role if a Member State, the European Parliament, the Council or the Commission decide to ask the Court for an opinion on whether a UK-EU withdrawal agreement violates the EU Treaties. This could refer to residence, pension or healthcare rights accrued during EU membership or institutional arrangements foreseen to facilitate withdrawal.

If the ECJ found the agreement to be in breach of EU law, the agreement would have to be amended. The ECJ may also be persuaded to annul the decision to sign or conclude the agreement, as it did in 2006 with the 2004 EU-US PNR agreement, which sought to provide passenger data of EU citizens to US authorities.

When it comes to a potential future UK-EU free trade agreement, the ECJ may be asked to decide on 'mixity', that is whether it should be concluded only by the EU or jointly by the EU and the Member States. The latter creates extra veto opportunities because it requires additional approval of the agreement by national and regional parliaments. For instance, EU trade agreements with Canada (CETA) and South Korea are mixed, and the EU-Singapore agreement will also be mixed if the ECJ follows the advice of the British Advocate-General Sharpston.

The likelihood of a UK-EU trade agreement being mixed is high given Prime Minister May's aspiration to create a 'deep and special partnership' going beyond trade in goods and services. The deeper the partnership, however, the greater the likelihood of ECJ jurisdiction. In addition, if the UK and the EU sought to form an association, this would require unanimity in the Council, which would create further veto powers by individual Member States.

4) Life after Brexit Day – Question of Implementation

The ECJ may retain jurisdiction over Britain well after Brexit day. The degree is a sliding scale: the softer the Brexit, the greater the ECJ jurisdiction. This is because as long as a state reaps the benefits of EU membership, above all freedoms of movement, it must give up a portion of sovereign control over the governance of those benefits. This is why any transitional period, currently floated to last 3-5 years, would need to include ECJ competence. Eurosceptics' demand for UK Supreme Court jurisdiction over disputes arising out of any interim agreement is fanciful, because that would enable British judges to make EU law which the UK actively wants to jettison.

The leaked European Commission guidelines on a Brexit negotiating mandate insist on ECJ competence both for pending UK cases and for the interpretation and enforcement of the withdrawal agreement. One contentious issue in this mandate relates to social security rights, because the UK could become subject to future amendments of EU law in this area without having a say in their making. In its 'red lines' resolution, the European Parliament made ECJ jurisdiction a condition for consent.

More importantly, the EU wishes to ensure that all concepts and provisions of EU law used in the withdrawal agreement continue to be interpreted according to pre-Brexit ECJ case law, while post-Brexit ECJ case law should also be taken into account. The setting up of an alternative dispute settlement mechanism is only envisaged for provisions of the agreement that are unrelated to EU law. Yet any new dispute settlement structure may fail at the ECJ, as an attempt to establish a European Economic Area Court did in 1991. In 2014, the ECJ similarly scuppered the draft agreement on EU accession to the European Convention on Human Rights for fear of it jeopardising its supremacy over the interpretation of EU law.

The UK Government's White Paper on the Great Repeal Bill intends to convert 'historic' ECJ case law into British common law by giving it the status of binding precedent from which the Supreme Court would only depart exceptionally. This means that EU law that will be converted into UK law on Brexit day will continue to be supreme and be interpreted by reference to ECJ case law until replaced by an Act of Parliament. Such replacement UK legislation will not need to be interpreted in light of ECJ case law. This wish to guarantee

coherent interpretation of EU-derived rights in the UK before and after Brexit also indicates that UK courts are likely to follow post-Brexit ECJ judgments on pre-Brexit EU law.

Reporting in March 2017, the House of Commons Justice Committee conceded that keeping ECJ jurisdiction on certain procedural matters is 'a price worth paying' to provide certainty for families and businesses. These matters include mutual recognition and enforcement of judgments as well as rules determining which court should hear disputes and what law should apply when there is a conflict of laws between two Member States. This would require UK courts to give 'due regard' to ECJ judgments in these areas.

Even in the 'hardest' possible Brexit scenario, ECJ case law will continue to matter because for UK businesses to sell their products and services in the EU single market they will have to respect the standards set by the ECJ. This operates as a permanent limit to the control that Britain can take back and the degree of sovereignty it can restore. This, however, applies to all third countries.

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To conclude, as long as UK law is substantively the same as EU law, there could be reciprocity and seamless cooperation based on the equivalence of regulatory regimes. However, risks arise as soon as UK courts start interpreting UK law at variance with EU law and ECJ case law, because this causes substantive regulatory divergence between UK and EU law. This is particularly important for the financial services sector. The more UK and EU law drift apart, the lower the chance of UK finance companies retaining single market access based on equivalence. Therefore, one way of softening Brexit would be for UK courts to interpret British law that mirrors EU law to the greatest possible extent as the ECJ does. This is all the more important if financial services end up being excluded from a future UK-EU trade deal, as the latest EU negotiating guidelines suggest.

Long-term UK judicial alignment with the ECJ, however, is unrealistic because it collides with the prevalent leitmotif of Brexit, which is to eliminate ECJ competence and re-empower the British judge. Either way, EU law will retain a great deal of relevance in UK law for years to come.