

UK-EU Dispute Resolution Post-Brexit: What Role for the CJEU?

Event Report

Date: 27 February 2018

Venue: Matrix Chambers

Organisers: This event was convened by the Bingham Centre for the Rule of Law, in partnership with Matrix Chambers, The Law Society of England and Wales and the Bar Council.

Chair: **Hugh Mercer QC**, Essex Court Chambers and Chair of Bar Council Brexit Working Group

Speakers:

- **Professor Catherine Barnard**, Professor of European Union Law at the University of Cambridge
- **Sir Christopher Bellamy QC**, Chairman, Linklaters Global Competition Practice, London
- **Murray Hunt**, Director of the Bingham Centre and associate member of Matrix Chambers
- **Dr Helena Raulus**, Head of the UK Law Societies Joint Brussels Office
- **Rhodri Thompson QC**, Matrix Chambers and Chair of Bar Council EU Law Committee

Event Summary

First, **Professor Catherine Barnard** addressed issues surrounding dispute resolution post-Brexit.

She began by identifying four main issues that need to be resolved: ongoing management and supervision, interpretation, enforcement, and sanctions.

She recognised that the current EU system already deals with each of these four issues: ongoing management and supervision is carried out by the EU Commission and EU agencies; interpretation is carried out by the national and EU courts; enforcement is effected by the EU Commission and courts; and sanctions are imposed pursuant to Article 260 TFEU and, at the individual level, through *Francovich*.

The practical problem for the UK Government, she suggested, is that the EU is approaching the issue of post-Brexit dispute resolution through this prism.

She then set out the following three elements of the Brexit agreements: the Withdrawal Agreement, Transition, and the Future Trade Agreement. She suggested that each of these three pillars should be considered in light of the four issues identified at the outset.

As regards dispute resolution under the Withdrawal Agreement, Professor Barnard recognised that citizens' rights is the one area where we have a degree of certainty, following the publication of the Joint Report on 8 December 2017. The Report states that, for an eight-year period, UK courts and tribunals will be able to make references to the CJEU, having "due regard" to the case law of the CJEU. The EU Commission will be able to intervene in cases before the UK courts, and the UK will be able to intervene in cases before the CJEU. An independent national authority will also be set up, with the detail of this requirement being fleshed out in Phase 2.

As regards dispute resolution under the Future Trade Agreement, she identified a number of options, including the creation of a joint political committee, or provision for judicial or quasi-judicial involvement, whether in the form of an arbitration panel or a court. She suggested that docking to the EFTA Court could preserve the autonomy of EU law – something which is jealously guarded by the CJEU.

Secondly, **Sir Christopher Bellamy** agreed that there were three different aspects of the Brexit process that need to be considered: the Withdrawal Agreement, the Transition Period, and the long-term Free Trade Agreement.

Unlike Professor Barnard, however, he considered that some kind of EFTA or EFTA-type system seems unlikely, barring a radical shift in UK politics and public opinion.

It appears that the Commission wants the CJEU to be the sole arbiter of issues arising from the interpretation of the Withdrawal Agreement. Sir Christopher advised there were arguments against that which ought to be considered. Such an approach would be out of line with international practice, which almost always opts for an arbitration procedure. He pointed out that the judges are appointed to the CJEU by the common accord of the Member States, and given that the UK will no longer have any influence over the composition of the Court. He suggested that there might thus even be a risk of challenge under the Strasbourg case law on impartial tribunals, and that it would be politically difficult in the UK to retain Articles 251-281 TFEU dealing among other things with enforcement of the Court's judgments.

He then discussed possible transitional provision. He did not think it beyond the bounds of possibility that some limited role might be accorded to the CJEU during such a period.

He thought that it might be difficult to conceive of the CJEU having a wide-ranging role in the long term, however. He considered that the whole texture of EU law is imbued with the four freedoms – a necessarily integrationist framework – which is not a relevant context for a third country, as the UK will be.

He also described the treatment of the EU supremacy principle in the Withdrawal Bill as difficult, insofar as the EU law that supposedly benefits from that principle is aiming at quite different objectives to the post-exit law of the UK.

Ultimately, he saw this as raising constitutional issues for the UK domestic legal system, and suggested that we need to think very hard indeed if we are going to give individuals the right to challenge parliamentary legislation post-exit on grounds of the supposed “supremacy” of a legal system to which we no longer belonged.

Thirdly, **Dr Helena Raulus** suggested that the CJEU should not be the automatic answer for dispute resolution post-Brexit.

She drew attention to the lack of UK judges in, and UK legal representation before, the Court in that regard. She queried whether, during the eight-year period of preliminary references on citizens’ rights, UK legal professionals would be able to represent their clients before the CJEU. She considered that this is a rule of law question that needs to be addressed.

She recognised that the UK seems to be talking about falling back on a state-to-state dispute resolution system. If the UK is seeking a deep and special relationship, however, a state-to-state system will not be sufficient: even with the CETA, there is an Investment Courts mechanism that allows individual rights to be invoked. The Swiss solution, meanwhile, derives from the 1970s – which was a very different world – and Switzerland is in any event being pushed to accept the CJEU’s jurisdiction.

Dr Raulus then discussed the EFTA court, which was created as a parallel mechanism for the CJEU to oversee the EEA Agreement. She suggested that docking the UK to the EFTA Court could be an option, but, whilst it might prove acceptable on the EU side, it is not clear that the UK is politically ready to join the EFTA itself.

She considered that another option might be to create a special panel for the Supreme Court. This would entail a few issues, however: it would demand that individuals be able to challenge executive action in contravention of the agreement, and possibly even parliamentary action, which might not be constitutionally possible; it might require the creation of an independent authority to take enforcement action against the UK, akin to the EU Commission, the seeds of which we can already see in the Withdrawal Agreement; and it would be necessary to work out how convergence could be created between the Supreme Court and the CJEU, possibly by them having “due regard” to each other’s case law, as is spelled out in the Lugano Convention and as is reflected in the traditions of the EFTA Court. A state-to-state dispute resolution settlement mechanism would then be needed to iron out what happens in the event of material divergence between the two systems.

Fourthly, **Rhodri Thompson QC** identified a number of elementary points that are often forgotten in the UK. First, the CJEU is and will remain the supreme court of the EU – the role of the EU institutions, as a matter of EU law, is not within the UK’s gift. Secondly, the CJEU does not exercise a “direct jurisdiction” over the Member States; the direct roles are played by the national courts and the EU Commission. Thirdly, once the UK ceases to be a Member State, the doctrine of direct effect will no longer apply, and there will be no ongoing claims against it under EU law. Fourthly, looking forward, a former Member State that decides or agrees to adopt measures reflecting EU law will have to take account of the CJEU. The Withdrawal Bill has chosen to incorporate EU law into

UK domestic law. Given that choice, it seems that account must be taken of CJEU case law: while UK legislation could amend or reverse this choice, the CJEU will remain the supreme authority as to the meaning of EU law itself. The same is true if the UK agrees that it will participate in EU schemes whose rules are interpreted by the CJEU (just as participant clubs in the UEFA Champions League must comply with the rules of that competition and the decisions of its referees). Fifthly, a former Member State that is affected by decisions of EU institutions (for example in fields such as merger control, medicines or environmental regulation) will in practice have to take account of the CJEU, which is where appellate control and judicial review will lie.

He then identified a series of crucial questions that need to be resolved: Will individuals and businesses have any enforceable rights under the new agreements? How will the EU or national signatories enforce compliance with such agreements? What body will resolve disagreements that cannot be resolved by the national courts or by consensus? What will be the status of that body in national or EU law? Is it sensible to create a third body in addition to the CJEU and EFTA Court?

Finally, Rhodri questioned whether the 'red line' that has been drawn by the Government in respect of the CJEU is necessary or consistent with its stated aspiration to have a close and ambitious ongoing relationship with the EU and its Member States. He pointed out that the UK has participated actively in the CJEU since 1973, and that, since before the creation of the EU, the UK had achieved a range of "opt outs" from various elements of what is now EU law that it considered to be too intrusive or political. He suggested that it would, at least in principle, be possible to generalise this approach, by further narrowing rather than eliminating the role of the CJEU post-exit. At least from the perspective of the rule of law and the protection of individual rights, he considered that this would be a significantly better approach than that which has been taken by the Government in the negotiations to date.

Finally, and in conclusion, **Sir Christopher Bellamy** emphasised that, from the UK perspective, there is lots to think about, given that it is at least as likely, if not more likely, that it will be the EU that finds itself in breach of the agreement, and not the UK.

Report prepared by:
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