

A BRIEF ANALYSIS ON BREXIT'S CONSEQUENCES ON THE CJEU'S JURISDICTION

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Abstract

As the United Kingdom of Great Britain and Northern Ireland's effective withdrawal from the European Union advances, there is a growing interest on what solutions shall be found for the complex legal problems raised by Brexit. The research intends to highlight the main issues relevant for the Court of Justice of the European Union's jurisdiction, in an effort to better understand the possible consequences on the European Court's competence to receive, hear and solve cases involving the United Kingdom, as well as on the means to enforce its rulings. The study aims to anticipate and suggest possible approaches to the practical challenges that shall have to be addressed.

Keywords: *Brexit; withdrawal from the European Union; Court of Justice of the European Union; jurisdiction; actions.*

1. Brexit and its challenges

As this study is being written, the United Kingdom of Great Britain and Northern Ireland's Government is preparing to notify the European Council of the state's intention to exercise its right to withdraw from the European Union (EU), using Article 50 of the Treaty on European Union¹. The United Kingdom (UK) is taking the legal steps necessary to give full effect to the result of the referendum held on 23 June 2016.

Thus, the only withdrawal so far of a Member State from this international integration organisation has become imminent. This raises a lot of questions regarding the legal, economic and social aspects of the process, as well as questions about EU's future, once such a precedent is established².

The negotiations that will follow the formal use of Article 50 of the Treaty on European Union shall have their result enshrined in a withdrawal agreement. One of the legal issues that shall have to be taken into account is the matter of the Court of Justice of the European Union's jurisdiction in pending cases involving the UK.

The study shall present the possible consequences on the jurisdiction of the three courts which compose the Court of Justice of the European Union (CJEU): the Court of Justice³, the General Court and the Civil Service Tribunal, focusing on their main competences, that is (i. e.) on the main types of actions they can solve. There is also the topic of the efficiency of the means to

enforce the CJEU's rulings once UK's withdrawal becomes opposable to the other Member States.

So, for the Member States, including the UK, it is important to know what they can expect from the different stages of this process and how far the limits of the negotiations⁴ could extend on the matter of CJEU's jurisdiction.

This brief analysis is meant to contribute to the debate among legal practitioners and officials from the Member States and to help clarify these legal problems. Its main objective is a better understanding of how the European Court works, what it can and cannot do with respect to a withdrawing Member State and how far reaching are the effects of its rulings beyond formal jurisdiction.

For achieving this purpose, the study shall present the powers of the three courts in a temporal correlation with the different stages of Brexit and shall suggest solutions to the legal and practical issues in discussion, supported by doctrinal opinions from established authors and by relevant examples from the CJEU's case-law.

Since the subject matter is rather recent and unprecedented, there are few contributions in legal literature, all the more reason to stimulate the pursuit of knowledge in this global society we share.

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¹ The Treaty on European Union (TEU) was signed at Maastricht on 7 February 1992 and entered into force on 1 November 1993. Article 50 was introduced by the Treaty of Lisbon, signed on 13 December 2007, in force since 1 December 2009. For the consolidated version of TEU see: http://europa.eu/eu-law/decision-making/treaties/index_en.htm, last accessed on 20 March 2017.

² See Fuerea, *Brexit – trecut...*, 2016, 631-633 and The White Paper presented by the European Commission on 1 March 2017, available at https://ec.europa.eu/commission/white-paper-future-europe-reflections-and-scenarios-eu27_en, last accessed on 20 March 2017.

³ The former Court of Justice of the European Communities.

⁴ For an analysis on the limits of negotiation between the UK and the other Member States in the field of the free movement of persons and services, see Fuerea, *Brexit – Limitele...*, 106-112.

2. The jurisdiction of the Court of Justice of the European Union with respect to the withdrawing UK

2.1. Official date of Brexit

The first question to be addressed is what is the moment when Brexit becomes effective, i.e. the moment from which the UK ceases to have the rights and obligations of an EU Member State. The answer can be found in TEU, that establishes two alternative dates.

According to paragraph 3 of Article 50 of the Treaty on European Union⁵ the UK shall no longer be bound by the Treaties establishing the EU from the day of entry into force of the withdrawal agreement or, failing that, two years after the day it has notified its intention to withdraw from the EU to the European Council. The period of two years may be extended by a unanimous decision of the European Council, in agreement with the state concerned.

Per a contrario, the UK is bound by the Treaties until the withdrawal agreement enters into force or, if it does not do so within the two-year period from the day the European Council is officially notified, two years after the day of notification. Hence, there is an approximate period of two years, that may be extended, in which the UK is still under the CJEU's jurisdiction.

Three distinct stages can be of interest:

- a) after the referendum, but prior to the official notification of the European Council;
- b) after notification, up until the effective withdrawal date, a period in which negotiations shall take place;
- c) after the day of effective withdrawal, a stage in which, at least for a short or medium time after withdrawal, the EU law might still have an echo.

2.2. Prior to the official notification of the European Council

As we have seen, after the referendum the UK has taken the internal legal steps that would allow official notification of withdrawal. Since Article 50 paragraph 1 of the TEU states that a Member State shall decide to withdraw from the EU according to its own constitutional requirements, the UK has had to sort out if, following the result of the referendum, the Government needed the Parliament's approval to use

Article 50 of the TEU⁶. The High Court answered that such a permission was necessary and its decision was confirmed by the UK's Supreme Court⁷. It also stated that the withdrawal process is irreversible, though prominent legal authors argued the contrary⁸ and even expressed the view that this is a matter of interpretation for the Court of Justice, not for the internal court⁹.

However, the Government did get the permission of the Parliament, the proper internal legislation was passed and official notification of the European Council is due until the end of March 2017.

During this time, the UK is under the complete jurisdiction of the CJEU, under all its aspects and it has to give full effect to all of the three court's rulings, just like any other Member State.

A succinct presentation of the role and attributions of the three courts composing the Court of Justice of the European Union¹⁰ is necessary in order to better understand what type of legal relations they can establish with a Member State, including the UK.

The main *sedes materiae* is Article 19 of the Treaty on European Union, Articles 256, 258-277 of the Treaty on the Functioning of the European Union (TFEU) and Protocol no. 3 to the TFEU on the statute of the Court of Justice of the European Union (the Statute)¹¹.

The role of the CJEU is to "ensure that in the interpretation and application of the Treaties the law is observed"¹². For this purpose, the CJEU can function as a jurisdictional institution, and give rulings, as well as an advisory one, and render opinions.

Article 19 paragraph 3 of the TEU summarizes CJEU's competence. It can: "(a) rule on actions brought by a Member State, an institution or a natural or legal person; (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions; (c) rule in other cases provided for in the Treaties"¹³

From this text, it results that the CJEU's jurisdictional function is also divided into ruling on direct actions and on preliminary references.

One author observes that there are two categories of direct actions: "those over which the Court has jurisdiction by virtue of an agreement between the parties and those where the Court's jurisdiction is conferred by direct operation of the law"¹⁴.

⁵ Article 50, paragraph 3 of TEU reads: "The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period." For its legal analysis, see Hillion, 2016, 1-12.

⁶ See Hestermayer, 2016, 2-15 and Douglas-Scott, 2016, 6-18.

⁷ See Sari, 2017, 2-3, with reference to the *Miller* case. For the UK's court hierarchy see Schütze, 2012, 293.

⁸ See Craig, *Brexit...*, 2016, 33-37.

⁹ See Sari, 2017, 30-32.

¹⁰ See also Chalmers, Davies and Monti, 2010, 143-149.

¹¹ For further details and legal texts see Fábíán, 2014.

¹² Article 19, paragraph 1 of TEU. For more about the role of CJUE, see Stone Sweet, 2011, 121-153.

¹³ Text available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016M/TXT&from=EN>, last accessed on 20 March 2017.

¹⁴ Hartley, 2010, 56.

The former may result from a contract concluded by the EU with a jurisdiction clause and “are not very important in practice”¹⁵.

The latter are the actions that can be brought against a Member State, as part of the infringement procedure, for the alleged violation of EU law¹⁶ and the actions against the EU and its institutions, such as annulment actions, actions regarding the EU’s institutions’ failure to act, the EU’s non-contractual liability, actions against penalties¹⁷ or staff cases.

Preliminary rulings procedure, on the other hand, is noncontentious¹⁸ and can be started by a judicial body¹⁹ from a Member State in order to obtain an answer on the interpretation of the Treaties or on the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union²⁰.

The Court of Justice, whose existence dates back to the creation of the three European Communities²¹, is at the top of the judicial system created by the Member States of the EU, as shown by its competence and by the judicial remedies. The General Court, established in 1989, on the base of amendments contained in the Single European Act²², was meant to relieve the Court of Justice of its increasing case-load, which is why the Court of Justice has jurisdiction to do all of the above and the General Court only has jurisdiction to determine the cases expressly provided by Article 256 of the TFEU and Article 51 of the Statute. It can solve a part of the annulment actions, actions for failure to act, tort actions and contract cases, where the contract so provides.

Although Article 256 paragraph 3 of the TFEU gives the General Court competence to answer preliminary references in specific areas laid down by the Statute, the Statute has not yet been modified in this respect²³.

The Civil Service Tribunal determines disputes between the EU and its staff. It was established in 2004, in order to take over these types of cases from the General Court²⁴, that was also experiencing an increasing case-load in the context of EU enlargement.

Due to this chronology, it is not surprising that there is a right to appeal the General Court’s rulings to the Court of Justice and the Civil Service Tribunal’s rulings to the General Court.

Concretely, until official notification of withdrawal is made, the UK’s legal standing is untroubled. As the case may be, it can stand in any of the three courts as a plaintiff or a defendant in a direct action, it can be the subject of an infringement/enforcement action, it can make an appeal, it can ask the Court of Justice’s opinion on the base of Article 218 paragraph 11 of the TFEU²⁵, its judicial bodies may ask for preliminary rulings, its nationals may be the subject of direct actions or staff cases etc.

2.3. Between official notification and effective withdrawal

This shall be a time when the UK is one foot out the door, but still a member of the EU, still bound by EU law²⁶ and, in our opinion, still completely under the jurisdiction of the CJEU.

This period is dedicated to negotiation between the Member States, that will have to solve a series of complex issues such as budget contributions, rights of UK and EU nationals²⁷, pending cases before the CJEU and so on²⁸. But, as long as the UK still has all the rights and obligations set out in the Treaties, the negotiations cannot result in the partial or complete loss of jurisdiction over the UK until effective withdrawal. At the same time, the UK cannot adopt internal legislation to limit CJEU’s jurisdiction or UK’s courts and nationals access to the European Court, without infringing the principle of the supremacy of EU law and exposing itself to some form of punishment, on the basis of either EU law or public international law.

All of the three EU courts can receive, hear and solve cases involving the United Kingdom, according to their competence. The only way in which CJEU’s jurisdiction could be limited during this period is if an agreement would be negotiated on this aspect and if that agreement would enter into force before the withdrawal agreement and the two-year time-limit.

2.4. After UK’s effective withdrawal from the EU

The UK shall no longer be a Member State and it shall no longer be under CJEU’s jurisdiction. The CJEU shall lack competence, *ratione personae*, to

¹⁵ Hartley, 2010, 56.

¹⁶ Also, known as enforcement actions.

¹⁷ See Mathijsen, 2010, 131-132.

¹⁸ See Șandru, Banu and Călin, 19-20.

¹⁹ For the criteria that judicial body has to fulfil, see Andreșan-Grigoriu, 2010, 72-143.

²⁰ Article 267 of the Treaty on the functioning of the European Union.

²¹ See Fuerea, 2011, Manualul..., 14-19.

²² Text of the Single European Act available here: http://europa.eu/european-union/law/treaties_en, last accessed on 26 March 2017.

²³ See Article 3 of the Regulation (EU, Euratom) of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, available at http://curia.europa.eu/jcms/jcms/Jo2_7031/, last accessed on 20 March 2017. For an analysis on why this transfer of jurisdiction has not happened yet, see Broberg and Fenger, 2010, 25-28.

²⁴ See Hartley, 2010, 53.

²⁵ Article 218 paragraph 11 of the TFEU reads: “A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.” The text is available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016E/TXT>, last accessed on 20 March 2017.

²⁶ For a concurrent opinion, see Craig, *Brexit...*, 2016, 34.

²⁷ About EU citizenship after Brexit, see Mindus, 2016, 7-27.

²⁸ See also Hestermeyer, 2016, 15-22.

receive, hear and solve cases involving the UK and the UK shall no longer be under the obligation to observe the Court's rulings. This raises the question of the fate of the pending cases. If a case has already been registered, will it no longer be heard? If it was heard, will it no longer be solved? And if it was solved, will the ruling no longer be observed and enforced?

However, "Article 50 is uncharted territory and therefore the content of the withdrawal agreement is uncertain. This is so not merely with respect to the precise details of the future relationship between the EU and the UK, but also more fundamentally with regard to what is put into the withdrawal agreement and what remains for resolution through some later treaty"²⁹.

Therefore, depending on the outcome of the negotiations and on the practical implications of some measures, the UK may retain some rights and some obligations under a form or another, to make the transition equitable for all the Member States and their nationals, including the UK and its nationals.

It is difficult to speculate on what an agreement on these issues shall include. It would be salutary if it would address the matter of the pending cases and establish criteria for the CJUE to keep jurisdiction over some of them. For example, such a criterion could be the date of the event giving rise to the dispute. If the facts of the matter are prior to effective Brexit, the European Court should be able, in principle, to continue determining the case and the UK should have to observe its ruling, even after withdrawal. This solution would be justified especially in those cases related to cross-border disputes governed by the rules of EU private international law³⁰ or to intellectual property litigation³¹, where "A large part of UK legislation on intellectual rights comes from the European Union"³².

For a more accurate image, it is useful to have a separate look at each of the main actions the three EU courts can solve³³, as presented above.

With respect to the direct actions, in the infringement/enforcement actions the UK can be a plaintiff, as well as a defendant. The legal basis for this action is represented by Articles 258-260 of the TFEU. The wording of these articles leads to the interpretation that the Member State status of the defendant has to subsist until a judgment is given, since the Court of

Justice has to find "that a Member State has failed to fulfil an obligation under the Treaties"³⁴. Thus, if the UK is a plaintiff, the action introduced before withdrawal against another Member State should be given a final judgment. Another solution could be to let the Commission decide if it chooses to continue the action UK has introduced or not.

On the other hand, if the UK is a defendant, the action cannot be solved after withdrawal, but the issue may be addressed during the negotiations for the conclusion of the withdrawal agreement, if it has relevance and importance for an amiable separation.

In annulment actions³⁵, the UK can only be a plaintiff³⁶, as the goal is for the Court of Justice or the General Court, as the case may be, to review the legality of EU acts. If the act is declared null and void, the ruling produces a retroactive effect (*ex tunc*) and an *erga omnes* effect.

If such an action is registered before effective withdrawal, the Court should be able to give its judgment even after the UK loses Member State status, as it is in everybody's best interest for legality to be established in a system based on the rule of law³⁷. Even for a non-member UK the ruling of the Court could be relevant, for example, if UK courts had to solve post Brexit cases in which UK's internal law for intertemporal situations would lead to the conclusion that EU law still applies to the grounds of the matter. Since national courts do not have jurisdiction to decide on the annulment of EU law³⁸, they have to turn to the European Court's jurisprudence.

The same should be the solution for the other direct actions against the EU or its institutions, whether actions regarding EU's institutions' failure to act³⁹, EU's non-contractual liability⁴⁰ or staff cases⁴¹, especially if the plaintiff is a UK national. The main arguments supporting this view are that the UK was a Member State at the time the action was registered, the facts of the dispute occurred prior effective withdrawal and it would be in agreement with the principles of legal certainty and with the principle of the protection of legitimate expectations, ensuring the highest degree of protection for the parties.

The preliminary reference procedure⁴² is an instrument of dialogue with the Court of Justice given to

²⁹ Craig, *Brexit...*, 2016, 37.

³⁰ For an analysis of how far can the EU rules of private international law extend after Brexit, see Dickinson, 2016, 10-11.

³¹ See van Hooft, 2016, 541-564.

³² Traub, Haleen and Clay, 2016, 12. For how Brexit might affect the sources of UK law see Popa, 2016, 126-136.

³³ For a synthesis about the main actions CJUE can solve, see Fuerea, 2016, *Dreptul...*, 65-123.

³⁴ Text available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016E/TXT>, last accessed on 20 March 2017.

³⁵ Articles 263-264 of the TFEU.

³⁶ For the legal standing of Member States to introduce an annulment action, as privileged plaintiffs, see Craig and de Búrca, 2009, 637 and Schütze, 2012, 269.

³⁷ Judgment of 23 April 1986 in case 294/83 *Les Verts/Parliament*, paragraph 23, available at http://curia.europa.eu/en/content/juris/c1_juris.htm, last accessed on 20 March 2017.

³⁸ Judgment of 10 January 2006 in case C-344/04 *IATA and ELFAA*, paragraph 27, available at http://curia.europa.eu/en/content/juris/c2_juris.htm, last accessed on 20 March 2017.

³⁹ Articles 265-266 of the TFEU.

⁴⁰ Articles 268 and 340 paragraphs 2 and 3 of the TFEU.

⁴¹ Article 270 of the TFEU.

⁴² Article 267 of TFEU.

the judicial bodies from the Member States. As we have argued, in detail, on another occasion⁴³, the Court of Justice should answer preliminary references registered and unsolved until effective withdrawal, as the judicial body did fulfil the condition of pertaining to a Member State at the time the reference was registered and an answer may still be necessary to the UK judicial body in order to solve the pending national case. A restrictive interpretation seems excessive and in discord with the two principles mentioned above, especially since the length of the proceedings is at the discretion of the Court of Justice. Otherwise, two references from UK courts registered the same day might find themselves in the absurd situation in which one receives an answer and the other is rejected for lack of competence, depending solely on the duration of the procedure.

The solution is different for the references registered with the Court of Justice after Brexit, even if they arose from facts that happened before withdrawal, since Article 267 paragraph 1 of the TFEU expressly requires that the reference be made by a court or tribunal of a Member state, meaning that the judicial body would belong to a Member State at the time the reference is made.

As emphasized by other authors⁴⁴, it is also our opinion that the date of registration of an action with the European Court should be the moment taken into account in order to establish if the state is still a Member State or not and if the national or the judicial body is still from a Member State or not.

As to appeals against the rulings of the General Court or of the Civil Service Tribunal and applications for revision based on Article 44 of the Statute, it is our belief that the UK and its nationals should retain the right to appeal or ask for revision even after effective Brexit, if either were a party to the proceedings⁴⁵. Producing a final solution to a case is essential for legal certainty. Therefore, it is the legitimate interest of the parties to use all the judicial remedies available, especially since they have little influence on the lengths of the procedure and cannot be sanctioned for not having been offered a final ruling before the UK's withdrawal.

If a ruling was given before effective Brexit, EU legal means of enforcement, like the infringement procedure, are no longer available in case the UK does not, after Brexit, give full effect to what the CJEU decided. For example, the UK could be ordered to pay a sum of money as a result of an infringement procedure conducted just before its withdrawal from

the EU. If UK refuses to pay, there would only be recourse to means of public international law, ranging from diplomatic means to sanctions⁴⁶.

If the other Member States so require, perhaps it could be possible for the UK to accept to keep the obligation to obey any of the three court's rulings that were given in cases in which the UK or a UK national was a party to, as well as to observe the rulings that produce *erga omnes* effects, which have relevance for UK courts in pending or future cases, by inserting a provision in this respect in the withdrawal agreement, as well as some kind of enforcement means based on this new international treaty.

In the future, the UK might come again under the CJEU's jurisdiction, at least for some types of actions, like a direct action based on contractual liability⁴⁷, if it concludes a contract or an international agreement with the EU, as any other third country can. For example, if the UK becomes a member of the European Free Trade Association (EFTA), the Agreement on the European Economic Area already authorises courts and tribunals of the EFTA Member States to refer questions to the Court of Justice on the interpretation of an agreement rule⁴⁸.

3. Conclusions

The unexpected result of the referendum held in the UK on 23 June 2017 has given rise to many new challenges for the EU, which has to redefine itself, to regain the trust of EU nationals, to firmly address all the reasons for which it is vulnerable to a certain type of nationalist propaganda and to draw up a new vision for its future⁴⁹.

At the same time, Brexit represents an opportunity to witness something without precedent: a Member State's withdrawal from the EU, with all its legal and practical implications. Finding solutions for all the terms of this separation shall obviously be a highly complex task, but the prize shall be, in the end, a better understanding of how Article 50 of the TEU works and the development of EU law.

The study has approached the specific issue of the CJEU's jurisdiction throughout the withdrawal process: before the official notification of the European Council on the basis of Article 50 of the TEU, from the day of official notification until the day withdrawal becomes effective, i.e. EU law ceases to apply for the

⁴³ See Larion, 2016, 76-84.

⁴⁴ See Broberg and Fenger, 2010, 90.

⁴⁵ The exception provided by Article 56 paragraph 3 of the Statute for Member States that were not parties and did not intervene in the main proceedings is not justified for former Member States. The former Member State does not have an interest to appeal anymore, since the obligation to observe the ruling as *res judicata* and as a part of the EU case-law ceases to exist.

⁴⁶ For solving disputes according to public international law, see Miga-Beșteliu, 2008, 1-21, 167-169.

⁴⁷ Article 272 of the TFEU.

⁴⁸ Article 107 of the Agreement on the European Economic Area and Protocol 34 annexed to it, available at <http://www.efta.int/legal-texts/eea>, last accessed on 20 March 2017.

⁴⁹ The 27 Member States still committed to a common future are taking steps in order to define a vision of even stronger unity and solidarity for EU's future, the latest example being The Rome Declaration, signed on 25 March 2017, at the 60th anniversary of the Treaties of Rome, signed on the same day in 1957, in the same city. Its text is available here: <http://www.consilium.europa.eu/en/press/press-releases/2017/03/25-rome-declaration/>, last accessed on 26 March 2017.

UK and the period after withdrawal. Focusing on the main competences of the courts composing the CJEU, we have highlighted to what extent CJEU shall or should retain jurisdiction during these different stages of Brexit and offered our opinion on what legal solutions could be chosen for pending cases in order for all the participants, including UK and its nationals, to obtain the highest legal protection possible.

The research is meant to raise awareness about the legal problems that have been identified, to sparkle

more substantial debate, aimed at identifying all the aspects which may be relevant for CJEU's jurisdiction in relation to a withdrawing state, to stimulate creativity in finding innovative answers to the questions raised and, perhaps, to inspire in determining the future content of the withdrawal agreement.

Further efforts could focus in detail on the infringement procedure, on any of the other direct actions or on the limits of the negotiations between Member States on the matter of CJEU's jurisdiction.

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