Hotel California?

The Continuing Jurisdiction of the CJEU

REPORT

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Introduction

1. The UK Government has promised five ostensible 'red lines' in its Brexit negotiations. These are:
    i. Ending the jurisdiction of the Court of Justice of the European Union ('CJEU')[1].
    ii. Ending free movement.
    iii. Ending membership of the single market and customs union.
    iv. Freeing government to forge its own trade policy.
    v. No hard border for Northern Ireland.

2. For its part, Brussels has been adamant that the European Court must retain final jurisdiction over all matters affecting oversight of EU law; that in order to preserve its integrity there cannot be any cherry-picking of the single market and that there can be no hard border.

3. Whatever the challenges posed by the other 'red lines', the Government has displayed confidence over the ending of the jurisdiction of the CJEU. This Paper analyses whether that confidence is well-founded and concludes that it is not. In respect of matters affecting relevant EU law the UK will, under the terms of the current version of the Withdrawal Agreement published on 14th November 2018, inevitably be directly and indirectly bound by post-Brexit judgments of the CJEU for an indeterminate period.

4. This will be so during the transition period (including any extension of that period), during the unknown period for which the backstop arrangement over Northern Ireland lasts, for a period following the ending of the transition period for disputes affecting citizens' rights and, materially, for an indefinite time where matters of EU law are raised in disputes under Part 6.

5. The respective red-lines of the UK and EU are incompatible one with the other. However, whereas the UK's ostensible insistence on the ending of CJEU jurisdiction is founded upon a particular assertion of parliamentary sovereignty and the need to give effect to the outcome of the June 2016 referendum, the EU's continuing claims to ultimate jurisdiction of the CJEU over the interpretation of EU law is constitutionally inevitable. Those claims have prevailed over the UK's in the Withdrawal Agreement negotiations to date and for good reason.

1 See for example the Conservative 2017 General Election Manifesto at p. 36: '[o]ur laws will be made in London, Edinburgh, Belfast and Cardiff and interpreted by judges across the United Kingdom, not in Luxembourg.'

The Intractability of the Problem

6. Starting with fundamentals, assuming that the UK exits from the EU on March 29 2019, Article 50.3 TEU prescribes that *'[t]he Treaties shall cease to apply.'* When the Treaties cease to apply, UK primary and secondary legislation which incorporates EU law will remain in force. However, subject to contrary agreement, EU Regulations and Directives and decisions of the CJEU will no longer bind the UK (unless domestic legislation is – as it has been - enacted which provides otherwise) because the UK will no longer be bound by the Treaties.

7. The EU (Withdrawal) Act 2018 purports to square the circle by retaining most EU law in force prior to Brexit day (but, of necessity, statutorily converted into domestic law). It gives future EU law after Brexit a degree of persuasiveness in domestic law but without binding force. It expressly ends the jurisdiction of the CJEU and ends the reference procedure under Article 267.

8. In the case of 'non-reciprocal' laws such as the internal protection of fundamental rights any relevant EU legislation can be retained as a matter of purely domestic law unilaterally. However, the process is quite different with EU legislation which requires reciprocity between Member States. In such cases it is necessary to enter into an agreement to ensure that all parties are bound by the reciprocal obligations necessary to make the scheme effective. Pursuant to Article 50.2 any agreement resulting from the Article 50 process has the status of an international Treaty with the EU and engages matters of EU law.

9. As such, any Withdrawal Agreement negotiated between the UK Government and the EU operates on two distinct levels. In order to form part of domestic law within the UK it has to be incorporated into our laws. This is proposed to be achieved by the enactment of the EU (Withdrawal Agreement) Bill which will legislate for the major elements of a Withdrawal Agreement as well as (where necessary) amending the EU (Withdrawal) Act so as to ensure compatibility between the terms of the Withdrawal Agreement and the provisions of the Withdrawal Act.

10. However, the second level on which a Withdrawal Agreement would have to operate is that, as an international Treaty, it is compatible with EU law. The CJEU would be responsible for ensuring that it was so compatible.

11. In Opinion 1/91 the (then) ECJ considered certain aspects of the proposed EEA Agreement with EU law. In particular, it was asked to consider the power of the proposed EEA Court to interpret the Agreement when disputes arose between the Contracting States. The ECJ observed that the Agreement required the EEA Court to interpret various provisions which were worded identically to certain provisions of the EU Treaties. However, the EEA Court was not subject to the same interpretive rules as the ECJ. The use of identical

wording was, therefore, not sufficient to guarantee the uniform application of EU law, and it was necessary to consider whether the Agreement contained sufficient safeguards to ensure consistency.

12. In the event, the ECJ found that the proposed Agreement did not contain adequate safeguards and was, therefore, contrary to EU law. Following the ECJ's ruling in Opinion 1/91 the EEA Court had to be abandoned. In its Opinion 1/92 the ECJ found that the EFTA Court was lawful. Its reasons included the fact that rulings given by the ECJ would be binding on the referring Court, rather than being purely advisory and that unlike the proposed EEA Court, the ECJ was under no obligation to take account of judgments given by the EFTA Court.

13. It follows that as a matter of constitutional comparison there is no reason why, as a matter of domestic constitutional law, the UK cannot enter into an international Treaty and incorporate the terms of that Treaty into its domestic laws. By contrast, the effect of Opinion 1/91 is that international agreements which incorporate EU law (as the draft Withdrawal Agreement plainly does) will only be lawful in the Member States where there are sufficient safeguards to ensure the uniform application of those provisions of EU law throughout the Member States.

14. What this means is that unless the Withdrawal Agreement is considered to be compatible with EU law it cannot be concluded by the EU. But one of the tests of compatibility, as Opinion 1/91 demonstrates, is the requirement that the CJEU has ultimate responsibility for the interpretation of all matters relating to EU law. The CJEU cannot legitimately surrender that autonomy. As the European Union Committee of the House of Lords observes in its 2018 report on 'Dispute Resolution and Enforcement after Brexit'[2] ('the HL Report') the CJEU could even be asked, under Article 218 TFEU, for its opinion on the legality of the Withdrawal Agreement prior to ratification.

15. 'Hotel California' in respect of continuing CJEU jurisdiction after Brexit is, therefore, a pre-requisite of any Withdrawal Agreement. There is simply no other inn to stay at in town. The Government is wrong to say that material CJEU jurisdiction ends with the entry into force of a Withdrawal Agreement. Critics of the Withdrawal Agreement are equally wrong to suggest that, in this respect at least, the terms of a Withdrawal Agreement can be amended.

16. Accordingly, as is provided in Article 4.1 of the November draft, *'[t]he provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same*

2 15th Report of Session 2017-19 at paragraph 90

legal effects as those which they produce within the Union and its Member States."[3] Natural and legal persons are, by the same paragraph, able to rely directly on the provisions contained or referred to in the Agreement which meet the conditions for direct effect under Union law. By Article 4.2 the UK must ensure compliance with those continuing obligations including the dis-application of inconsistent or incompatible provisions of domestic law. Moreover, Article 4.3 stipulates that *'[t]he provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law.'*

17. With these points in mind, there are four main[4] aspects to the continuation of CJEU jurisdiction after Brexit. These are: (i) CJEU jurisdiction during the transition period (including jurisdiction referable to the transition period but after the end of that period), (ii) Jurisdiction over Part 2 of the Withdrawal Agreement, (iii) CJEU jurisdiction over the proper interpretation of the terms of a Withdrawal Agreement and (iv) CJEU jurisdiction through the backstop protocol.

18. This Paper outlines these, briefly, including as part of that outline, the substantial amendments that are likely to be required to be made to the intended structure of the Withdrawal Act (whether in that Act or in the EU (Withdrawal Agreement) Bill or both) in order to give proper effect to the continuation of CJEU jurisdiction after exit day.

CJEU Jurisdiction in the Transition Period

19. The drafting of the EU (Withdrawal) Act does not envisage a transition period. Nonetheless, if any Withdrawal Agreement is negotiated it will definitely contain a transition period until the end of 2020 and possibly extendable to the end of 2022. During that time the CJEU will, as now, have ultimate and direct jurisdiction over the interpretation of EU law.

20. Prior to the end of the transition period, Article 4.4 of the November draft provides that: *'[t]he provisions of this Agreement shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period.'*

21. It is clear that provided proceedings are lodged with the CJEU before the end of the transition period, that the Court's jurisdiction extends beyond the end of the transition period. Thus, Article 86.1 preserves the jurisdiction

3 Article 4.1 (present in the draft considered by the HL) is described in paragraph 64 of the HL Report as *'a novel constitutional provision.'* The paragraph goes on to say that: *'[i]t would be tantamount to continuing the supremacy of EU law in respect of the relevant provisions even after the transition period has ended. At present this is deemed to occur by virtue of the European Communities Act 1972 and associated CJEU and domestic case law… the European Union (Withdrawal) Bill would repeal the 1972 Act, ending direct effect and the supremacy of EU law.'*

4 Various other provisions of the Withdrawal Agreement refer to continuing CJEU jurisdiction. Note especially Article 160 relating to continuing CJEU jurisdiction in respect of certain matters under Part 5.

of the CJEU in any proceedings brought against the UK before the end of the transition period and it extends to all stages of those proceedings. By virtue of Article 86.2 the CJEU continues to have jurisdiction to give preliminary rulings on requests made by domestic courts or tribunals prior to the end of the transition period.

22. Further, by Article 87 if the EU Commission considers that the UK has failed to fulfil an obligation under the Treaties or under Part 4 of the Withdrawal Agreement (EU law during the transition period) before the end of the transition period the Commission may within four years from the end of the transition period bring the matter before the CJEU. Similar provisions relate to the adoption of EU decisions, and competition and state aid infringements prior to the end of the transition period.

23. CJEU judgments given in or after the end of the transition period as outlined above are binding in their entirety on the UK and the UK is required to ensure the enforcement of such judgments (see Article 89).

24. Finally, Article 131 provides that during the transition period the CJEU has the jurisdiction conferred by the Treaties and that this extends to the interpretation and application of the Withdrawal Agreement itself.

25. This brief outline emphasises the inroads that the transition period provisions alone will have on the current structure of the Withdrawal Act. They run, in particular, directly contrary to the express terms of s. 6(1) which provide that: *'[a] court or tribunal – (a) is not bound by any principles laid down, or any decisions made, after exit day by the European Court, and (b) cannot refer any matter to the European Court on or after exit day.'* They are also contrary to the definitions of *'retained EU case law'* in s. 6(7)(b) and presumably, too, of *'retained domestic case law'* under the same sub-section (s. 6(7)(a)). Moreover, unlike the easy-to-apply cut off point of *'exit day'* in the Act for ending CJEU jurisdiction, there is no similar clear cut-off point for ending that jurisdiction under the proposed Withdrawal Agreement.

26. The transition period provisions of the November draft may run until the end of 2022 and it would be many years after this (perhaps up to six more years i.e. to 2028) that the current jurisdiction of the CJEU in its current form would lapse. However, this is to ignore the remaining and continuing areas of CJEU jurisdiction extending well beyond the transition period.

CJEU Part 2 Jurisdiction

27. Part 2 of the Withdrawal Agreement concerns citizens' rights. Here, the CJEU has a longer jurisdiction than that envisaged under the transition period provisions.

28. Under Article 158 of the November draft where, in a case which commenced at first instance within 8 years from the end of the transition period before a court or tribunal in the United Kingdom, a question is raised

concerning the interpretation of Part Two of this Agreement, and where that court or tribunal considers that a decision on that question is necessary to enable it to give judgment in that case, that court or tribunal may request the Court of Justice of the European Union to give a preliminary ruling on that question.[5]

29. Here, therefore, the jurisdiction of the CJEU may continue in practice for upwards of 10 years after the end of the transition period (say up to 2032).

The CJEU's Role in Dispute Resolution

30. Under Article 4.5 of the November draft:

'[i]n the interpretation and application of this Agreement, the United Kingdom's judicial and administrative authorities shall have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period.'

31. Read in isolation this provision would lead the casual reader to differentiate between the strength of CJEU jurisdiction during the transition period and that jurisdiction thereafter. However, Article 4.5 should be read alongside the arbitration provisions in Part 6.

32. By Article 167 the UK and EU must attempt to agree on the interpretation and application of the Withdrawal Agreement. Where, however, a dispute arises it may be referred by one of the parties to an arbitration panel under Article 170.[6]

33. Under Article 174 of the November draft where a dispute so submitted to arbitration raises a question of interpretation of a concept of Union law, a question of interpretation of a provision of Union law referred to in the Agreement or a question of whether the United Kingdom has complied with its obligations under Article 89(2) (failure to comply with a CJEU judgment that the UK has not fulfilled a Treaty obligation or provision in the Agreement), the arbitration panel shall not decide on any such question. In such case, it shall request the CJEU to give a ruling on the question. The CJEU shall have jurisdiction to give such a ruling which shall be binding on the arbitration panel.

34. As will be clear from the explanation given earlier, the ultimate authority of the CJEU over the proper

5 A shorter period applies in respect of Articles 18-19 subject to an extension of time granted by the Joint Committee

6 The potential for disputes is considerable. The HL Report (see paragraph 19) includes disputes arising over implementation, subsequent actions (as for example legislation), and (iii) divergence of interpretation in areas where the parties have agreed to avoid divergence. Moreover, disputes may arise for a lengthy period of time (see paragraph 87 of the HL Report which makes reference to the final payment of the divorce bill not being made until 2064 and the fact that certain of the citizens' rights provisions will apply to the children of EU nationals in the UK). Moreover, the open-ended nature of Protocol 1 relating to Northern Ireland makes the potential for disputes arising under Article 174 potentially indefinite.

interpretation of EU law is a *sine qua non* of the EU being able to enter into the Withdrawal Agreement. Article 174 of the November draft is, thus, entirely consistent with this provision.

35. This has, however, attracted criticism from, amongst others[7], Martin Howe QC[8] in a well-reasoned paper. He observes (correctly) that there is a tension between, on the one hand, the obligation on UK courts post-Brexit under Article 4.5 merely to have *due regard* to relevant case law of the CJEU after the end of the transition period and, on the other, conferring ultimate (and indefinite) authority on the CJEU to pronounce on the proper interpretation of EU law whenever a relevant matter is referred to arbitration.

36. He points out, with some justification, that:

> *'Although the phrase* "due regard" *does not explicitly make ECJ rulings binding on UK courts, our courts will interpret this obligation in the light of the existence of the joint referral mechanism. They will reason that there is no point in them departing from EU case law, even if they disagree with it, since it will just end up in an arbitration in which the issue will be sent to the ECJ whose ruling will then be binding on the UK.'*

37. In many ways this is the most challenging provision of the Withdrawal Agreement in terms of continuing CJEU jurisdiction. Howe is well aware of the content of Opinion 1/91 and seeks to use it to support his argument that by entering into the Withdrawal Agreement the UK is surrendering control of its laws to the *'policy driven'* CJEU.

38. He fails, however, to address the point that without ultimate jurisdiction over questions of interpretation being conferred on the CJEU there can be no Withdrawal Agreement at all because such Agreement would not be permitted by the EU as being contrary to EU law.

39. Given this continuing aspect of CJEU jurisdiction (not to mention the open-ended Protocol in relation to the Northern Ireland border question: see below) it is not easy to see how the current structure of the EU (Withdrawal) Act can be maintained as a simple cut-off point between pre- and post-CJEU rulings.

The Northern Ireland Protocol

40. Although the backstop agreement reflected in Protocol No 1 to the Withdrawal Agreement is intended to be temporary (see Article 1 of the Protocol) it is expressed to subsist *'unless and until'* the provisions of the Protocol

7 The HL Report devotes much space to this issue (see paragraphs 79 and following). It records concerns about apparent bias if the CJEU were to have ultimate authority over dispute resolution but is implicitly driven to accept the central point that the CJEU can only lawfully enter into a Withdrawal Agreement that confers final authority of the CJEU over the interpretation of EU law.

8 Chairman of Lawyers for Britain. See his paper 'Chequers White Paper Briefing No 1' July 12 2018.

are *'superseded in whole or in part by a subsequent agreement'*.

41. Under the Protocol EU law applies in several areas as laid down in Annexes to the Protocol. Although the UK Courts nominally decide such issues there are two provisos.

42. First, by virtue of Article 15.3 of the Protocol the UK Court must decide questions of EU law arising under the Protocol *'in conformity with'* the relevant case law of the CJEU. That is a stronger obligation than merely paying *due regard* to such case law.

43. Secondly, and in any event, some issues of EU law arising under the Protocol will be caught by the arbitration procedures in Part 6 and therefore subject to binding CJEU authority.

44. It does not, perhaps, need emphasis that the duration of the backstop arrangement, though intended to be temporary, is entirely open-ended.

Conclusion

45. When voting on the November draft, Parliament will have to take a great many considerations into account. One of them, a previously (and repeatedly) expressed 'red line' is the ending of CJEU jurisdiction following Brexit. This has not been achieved. More fundamentally, it could not be achieved and could never have been achieved in the event of a Withdrawal Agreement.

46. The dilemma is acute. It is succinctly expressed in the HL Report at paragraph 85: *'An indefinite role for the CJEU would … appear to contradict both the Government's red line in respect of CJEU jurisdiction and, more broadly, part of the basic rationale for Brexit, which is that the UK should cease to be part of the EU, or subject to the obligations of EU membership.'* Put simply, only a no-deal Brexit is consistent with that red line and with that rationale. This is because in the absence of a deal the EU (Withdrawal) Act would take immediate effect without amendment. That Act ends the jurisdiction of the CJEU on exit-day.

47. But if we enter into a Withdrawal Agreement we cannot escape the continuing and potentially indefinite CJEU jurisdiction. No one has put the 'sweet sorrow' of parting from the EU more poetically or accurately than the Eagles at the end of their celebrated album track 'Hotel California':

> *'You can check out any time you like,*
> *But you can never leave!'*