

## Notes on the UK and the CJEU after UK withdrawal – Notes by Rhodri Thompson QC

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### A. Comments on § 2.3 of the White Paper

1. § 2.3 of the White Paper states as follows:

- a. *'The Court of Justice of the European Union (CJEU) is the EU's ultimate arbiter on matters of EU law.'*

This reflects the role of the CJEU under the EU Treaties.

- b. *'As a supranational court, it aims to provide both consistent interpretation and enforcement of EU law across all 28 Member States and a clear process for dispute resolution when disagreements arise.'*

Again, this is the role of the CJEU under the EU Treaties, which require the Member States to use the CJEU to resolve disputes.

- c. *'The CJEU is amongst the most powerful of supranational courts due to the principles of primacy and direct effect in EU law.'*

The principles of supremacy and direct applicability are certainly the cornerstones of EU law, but the CJEU is 'powerful' for two other reasons:

- the content of the rights conferred on individuals and businesses by the EU Treaties; and
- the fact that the EU is matched in economic power only by the US and China.

- d. *'We will bring an end to the jurisdiction of the CJEU in the UK.'*

Strictly speaking the CJEU has no jurisdiction in the UK:

- EU law is implemented in the UK by its own courts and administrative bodies in cooperation with the EU institutions.
- In the UK, EU law has effect by the operation of the 1972 Act and other primary and secondary legislation.

- e. *'We will of course continue to honour our international commitments and follow international law.'*

This raises some difficult questions:

- the content of the UK's '*international commitments*' in respect of the EU are going to be the subject matter of negotiations over the next few years, including the way in which those commitments are to be enforced and interpreted if the UK and the EU do not agree; but
- whatever is agreed, EU law will remain part of '*international law*', and the CJEU will remain the '*ultimate arbiter*' of its validity and interpretation under the EU Treaties, after UK withdrawal just as it was before the UK joined in 1973.

2. So there are at least five issues that will be crucial:

- a. What EU law rights will still be available to individuals and businesses after UK withdrawal?
- b. What status will rulings of the CJEU on EU law have in the UK after UK withdrawal?
- c. What rights will be available to individuals and businesses under any new agreement between the UK and the EU?
- d. How will any issues about the interpretation and enforcement of those rights be decided?
- e. Could the CJEU have any role in dispute resolution after UK withdrawal?

**B. What EU law rights will still be available to individuals and businesses after UK withdrawal?**

3. After UK withdrawal, it seems that individuals and businesses will have **no EU law** rights in the UK. That seems to be what the White Paper means by bringing '*an end to the jurisdiction of the CJEU in the UK*'.
4. Likewise, UK nationals and businesses will in general have **no EU law** rights in the other 27 Member States, at least under the EU Treaties, even though EU law will still apply in those other Member States; and the CJEU will still be the '*ultimate arbiter*' of its content throughout the EU.

**C. What status will rulings of the CJEU on EU law have after UK withdrawal?**

5. It seems to be generally assumed that the status of the CJEU as the '*ultimate arbiter*' of EU law will change in the UK after UK withdrawal, but it is not obvious why that should be the case:
  - a. the UK will apparently still be committed to complying with '*international law*'; and

- b. the CJEU's role under the EU Treaties will not change after UK withdrawal, any more than it did on the accession of the UK and other Member States.
6. In that sense, there is no **legal** reason for section 3 of the 1972 Act to be amended, other than to delete the reference to preliminary rulings from UK courts to the CJEU on difficult points of EU law, which will presumably end.
7. However, the status of CJEU rulings may give rise to some very difficult and sensitive political issues, particularly in relation to:
  - a. EU law rights of individuals and businesses in the UK that arose **before the date of withdrawal**;
  - b. the extent of the UK's final assets/liabilities under the EU Treaties **on withdrawal**; and
  - c. any transitional arrangements, under which the UK might agree to abide by some elements of EU law **during the transitional period**.
8. The EU is likely to take the view that the CJEU will have exclusive jurisdiction over these issues, but that may be very politically controversial in the UK.
9. The other main change from the UK point of view will be a serious loss of influence over the future development of EU law, apart from the loss of the preliminary ruling procedure:
  - a. The UK will presumably no longer have any right to judges or an advocate general at the CJEU or General Court.
  - b. The UK will presumably no longer have any right of appearance at the CJEU.
  - c. UK courts faced with issues of EU law will need to decide those questions for themselves.
10. Again, transitional arrangements will need to be addressed for these important changes on UK withdrawal. In addition, these changes may make it politically more difficult for the UK and its Courts to accept the continuing role of the CJEU as the '*ultimate arbiter*' of EU law.
11. However, the EU is very likely say that, just as the ECJ was the '*ultimate arbiter*' of the European Communities Treaties before UK accession, the CJEU's role under the EU Treaties will not change after UK withdrawal.

**D. What rights will be available to individuals and businesses under any new agreement between the UK and the EU?**

12. These rights will of course be the subject matter of the negotiations – but it seems inevitable that there will be a loss of many if not all **EU law** rights for:

- a. all current EU citizens and businesses (including UK nationals and business) in the UK; and
- b. UK citizens and businesses in all other 27 Member States.

13. Parliament may of course enact at least some equivalent rights but:

- a. they will no longer be underpinned by EU law or the interpretation of the CJEU, so there will be a further loss of procedural rights; and
- b. it is likely that most if not all Treaty rights and fundamental principles of EU law, in particular non-discrimination on grounds of nationality, will be lost altogether.

14. The EU might also agree to give UK nationals and businesses some equivalent rights as part of the negotiations and some equivalent rights may be protected under national law in those other Member States.

**E. How will any issues about the interpretation and enforcement of those rights be decided?**

15. Difficult issues will undoubtedly arise in the UK as to the interpretation of:

- a. domestic UK legislation originally adopted to reflect EU law; and
- b. new provisions of UK law incorporating EU law to avoid a legal gap on withdrawal.

16. What will be the status of past and future CJEU case law for the interpretation of UK legislation modelled on EU law?

17. In other Member States, in so far as EU law rights are still available to UK nationals and businesses, the CJEU will still be the '*ultimate arbiter*' of EU law.

**F. Could the CJEU have a role in dispute resolution after withdrawal?**

18. The annex to the White Paper does not mention the role of the CJEU in relation to external agreements concluded by the EU, but one can anticipate the following general problems for any negotiations to include:

- a. What role will the **EU** expect the CJEU to play in resolving disputes concerning:
  - future UK-EU arrangements; and
  - EU projects in which UK wishes to participate, e.g. European Investment Bank, medicines regime?

- b. If the EU starts from the position that the CJEU will continue to have a central role in relation to each of these issues, then:
- could the UK credibly maintain that the CJEU had **no** role in the interpretation of EU law as it applied in relations between the UK and the EU?
  - what **other** judicial or arbitral body could the UK credibly suggest to interpret obligations entered into between the UK and the EU?
  - what **control** would the UK exercise over any such new body, as against the role it currently plays in the CJEU as an EU Member State?
19. Finally, from the perspective of individuals and businesses, what rights, if any, will individuals and businesses have to use whatever dispute resolution arrangements are eventually agreed:
- a. At the moment, EU law rights can be asserted by individuals in all EU national courts.
  - b. Under any future arrangements, there is likely to be a very significant loss of procedural as well as substantive rights currently enjoyed by UK nationals and businesses throughout the EU, if future disputes, whether under the WTO or some form of special procedure, are operated only at the international level between the UK and the EU.

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