

CJEU'S JURISDICTION AFTER BREXIT

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Abstract

The study explores the main provisions included in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community regarding the Court of Justice of the European Union's Jurisdiction after Brexit, with emphasis on the preliminary ruling procedure. The scope of the analysis is to determine the nature and the limits of CJEU's jurisdiction to decide matters of EU law involving the United Kingdom and the effects of such decisions, pronounced after the end of the transition period.

Keywords: *Court of Justice of the European Union; jurisdiction; preliminary ruling procedure; withdrawal from the European Union; Brexit.*

1. Brexit

The United Kingdom of Great Britain and Northern Ireland (UK) is the first and only Member State of the European Union (EU) to exercise its right to withdraw from this international integration organisation, a choice commonly known as Brexit.

Following a referendum held on 23 June 2016, UK notified its intention to leave the EU to the European Council on 29 March 2017¹, as required by Article 50 of the Treaty on European Union². This marked the beginning of negotiations for the conclusion of an agreement setting out the arrangements for UK's withdrawal. The treaty was necessary in order to facilitate UK's transition to the non-Member State status in an orderly manner, to safeguard the

important interests of the other Members States, to protect the rights of the EU citizens residing and working in the UK and of the UK citizens residing and working in the EU³.

The negotiations lasted approximately one and a half years. The process was sometimes very complicated, a no-deal withdrawal remaining always as an alternative. It was doubled by the need to establish a framework for UK's future relationship with the EU, a political engagement for further negotiations on subject matters not covered by the agreement.

Despite the difficulties, on 17 October 2019, the parties succeeded in concluding the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union

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¹ For the possibility to revoke this notification unilaterally, by a notice addressed to the European Council in writing, see judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraphs 73-75.

² 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 in TEU by the Treaty of Lisbon, signed on 13 December 2007, in force since 1 December 2009. For the development of the withdrawal process in the UK, see Horspool, Humphreys, Wells-Greco, 2018, p. 10-11 and Foster, 2019, p. 11-13.

³ See Fuerea, *Brexit – Limitele negocierilor...*, 2016, p. 106-112 și *Brexit – trecut, prezent ...*, 2016, editorial.

and the European Atomic Energy Community (Withdrawal Agreement), a detailed treaty on the legal, economic and social consequences of Brexit.

The Withdrawal Agreement included a transition period that started on the date of its entry into force, 1 February 2020, and ended on 31 December 2020⁴. The scope was to provide more time for the states' administrations and nationals to prepare and adapt.

During the transition period EU law continued to apply in and to the UK, but without UK's participation in EU institutions and governance structures⁵.

Once the transition period ended, EU law ceased to apply in its entirety to the UK and the Withdrawal Agreement came into full effect, governing the legal relationship between UK and the EU.

The study shall analyse the main provisions of the Withdrawal Agreement that recognize a residual jurisdiction for the Court of Justice of the European Union (CJEU)⁶ in matters involving the UK or its nationals after Brexit and that institute the means to enforce the CJEU's rulings.

Applying these new legal rules in good faith is important for both the UK and the EU, if the efforts to build a new and a better relationship are to be fruitful. Also, since these new rules impact both the public and the private sectors of the states involved, EU and UK nationals, state authorities and legal practitioners need to be aware of their content and of their legal effects, especially in cross-border litigation.

This synthetic analysis aims to facilitate the dissemination of information on the subject matter of CJEU's jurisdiction,

to put in the spotlight recent developments, research of established authors and relevant case law, in order to contribute to doctrinal debate.

Effective withdrawal of a Member State from the EU is an unprecedented legal event and what happens in practice after the transition period represents a subject of great interest for EU legal literature.

2. The jurisdiction of the CJEU with respect to the UK after the entry into force of the Withdrawal Agreement

2.1 The CJEU's jurisdiction during the transition period

With the few exceptions provided in the Withdrawal Agreement, during the transition period the UK continued to be bound by EU law as any other of the Member States⁷. The EU's institutions, bodies, offices and agencies exercised the same powers with respect to the UK as before 1 February 2020. In particular, CJEU had full jurisdiction over UK, including with regard to the interpretation and application of the Withdrawal Agreement.

However, the effects of such competence reach beyond the end of the transition period, especially in what ongoing judicial cooperation in civil and commercial matters and pending cases before CJEU are concerned.

For example, the UK continues to apply Regulation Rome I⁸ to contracts concluded before the end of the transition

⁴ Art. 126 of the Withdrawal Agreement.

⁵ Art. 127 of the Withdrawal Agreement.

⁶ CJEU is composed at the present moment of the Court of Justice and the General Court. For further details, see Coutron, 2019, p. 130-138.

⁷ Art. 127 paragraphs 1 and 3 of the Withdrawal Agreement.

⁸ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (OJ L 177, 4.7.2008, p. 6).

period and Regulation Rome II⁹ to events giving rise to damage, if the events occurred before the end of the transition period.¹⁰

The provisions of several EU Regulations and Directives regarding jurisdiction of national courts, recognition and enforcement of judicial decisions, service of judicial and extrajudicial documents, taking of evidence, legal aid and mediation continue to apply after Brexit in respect of legal proceedings instituted and documents received before the end of the transition period.¹¹

CJEU continues to have jurisdiction to rule on pending direct actions, including appeals, and preliminary references, a solution we envisaged and advocated for in a previous study.¹² Our main arguments supporting this view were that the UK was a EU Member State at the time the proceedings were registered, the facts of the cases occurred prior UK's effective withdrawal from the EU and the solution would be in agreement with the principle of legal certainty and with the principle of the protection of legitimate expectations, since the parties have little or no influence on the length of the procedure before the CJEU.

The case is considered to be pending if the proceedings were brought by or against the UK and if the requests from UK courts were made before the end of the transition period. The date of reference is the moment at which the document initiating the proceedings has been registered by the registry of the Court of Justice or of the General Court, as the case may be.¹³

Thus, if the document was sent to the CJEU before 31 December 2020, but it arrives at the Court and it is registered after this date, the case cannot be considered pending. It shall fall under the category of new cases and it may be deemed inadmissible under the provisions of the Withdrawal Agreement on new cases brought before the CJEU.

The Court of Justice affirmed its jurisdiction in pending cases in a judgment pronounced during the transition period. The Court stated: "it follows from Article 86 of the Withdrawal Agreement, which came into force on 1 February 2020, that the Court of Justice is to continue to have jurisdiction in any proceedings brought against the United Kingdom before the end of the transition period, such as the present action for failure to fulfil obligations."¹⁴

The Court's position is based on the new treaty, but it is in alignment with its case law from the period between the official notification of UK's intention to leave the EU and the date of entry into force of the Withdrawal Agreement, a period in which the UK was, in principle, under the complete jurisdiction of the CJEU, in all its aspects and it had to give full effect to all of CJEU's rulings, just like any other EU Member State.¹⁵ The Court decided that the UK's mere intention to leave the EU, communicated in accordance with Article 50 TEU, does not have the effect of suspending the application of EU law in UK until the

⁹ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (OJ L 199, 31.7.2007, p. 40).

¹⁰ Art. 66 of the Withdrawal Agreement.

¹¹ Art. 67-69 of the Withdrawal Agreement.

¹² Larion, 2017, *A Brief Analysis...*, p. 85-94.

¹³ Art. 86 of the Withdrawal Agreement.

¹⁴ Judgment of 14 May 2020, *Commission v United Kingdom*, C-276/19, EU:C:2020:368, paragraph 28. The case concerned the common system of value added tax and the regime applicable to terminal markets.

¹⁵ See Larion, 2016, *Brexit's Impact...*, p. 76-84.

time of actual withdrawal¹⁶ and cannot justify, in itself, the refusal or postponement of the execution of a European arrest warrant issued by the UK¹⁷.

In conclusion, CJEU's jurisdiction in pending judicial proceedings shall extend after the end of the transition period, with no time limit stipulated in the Withdrawal Agreement. It is reasonable to presume, based on CJEU's existent case law with respect to the withdrawal process, that the Court shall continue to assess consistently all of the legal grounds for its judicial powers in order to ensure that EU law is observed in and by the UK, for as far as the UK is, in one way or another, still bound by EU law.

2.2 The CJEU's jurisdiction after the end of the transition period

The new cases CJEU may rule upon after Brexit are mainly infringement actions and preliminary references.¹⁸

Within four years after the end of the transition period, the European Commission or a Member State may bring an infringement action¹⁹ against the UK. This may be the case if the UK has failed to fulfil an obligation under the EU treaties or under the Withdrawal Agreement before the end of the transition period and if the UK does not comply with decisions adopted by institutions, bodies, offices and agencies of the EU before the end of the transition period or in procedures initiated during the

transition period, addressed to the UK or to natural and legal persons residing or established in the UK. The UK retains the right to bring infringement procedures against a Member State for the same period. The CJEU has jurisdiction over all such cases.²⁰

For actions concerning UK and EU citizens rights²¹ commenced at first instance before a court in the UK within eight years from the end of the transition period, the CJEU has jurisdiction to give a preliminary ruling, where the UK court considers that a decision on the question is necessary to enable it to give judgment in that case.

In what UK's participation to the EU's budget for the years 2019 and 2020 and UK's participation to EU's programmes, activities and previous financial perspectives are concerned, the CJEU retains jurisdiction to decide infringement actions and preliminary references in respect to the applicable EU law referring to this subject matter in the Withdrawal Agreement.²²

Of course, the CJEU has jurisdiction to interpret the Withdrawal Agreement, where a court of a Member State refers for a preliminary ruling to the Court of Justice.²³

The Withdrawal Agreement institutes a procedure of dispute settlement between the EU and the UK on its interpretation and application. If the parties cannot settle a dispute informally and in good faith, any party may require the establishment of an

¹⁶ Judgment of 29 November 2018, *Alcohol Countermeasure Systems (International) v EUIPO*, C-370/17 P, EU:C:2018:965, paragraphs 115-118. The Court of Justice decided an appeal against the General Court's decision in an action for annulment pronounced in the matter of an EU trade mark. See also judgment of 23 January 2019, *M.A. and Others*, C-661/17, EU:C:2019:53, paragraph 54.

¹⁷ Judgment of 19 September 2018, *RO*, C-327/18 PPU, EU:C:2018:733, paragraph 62.

¹⁸ CJEU's jurisdiction to rule on the basis of art. 263 of the Treaty on the Functioning of the European Union (TFEU) is provided in art. 95 paragraph 3 of the Withdrawal Agreement.

¹⁹ Art. 258-261 TFEU. For a synthesis of the main actions before the CJUE, see Fuerea, 2016, *Dreptul Uniunii Europene...*, p. 65-123. For further details, see Craig and De Búrca, 2017, p. 481-677.

²⁰ Art. 87 and art. 95 paragraph 1 of the Withdrawal Agreement.

²¹ Part Two of the Withdrawal Agreement.

²² Art. 160, art. 136 and art. 138 paragraphs 1 and 2 of the Withdrawal Agreement.

²³ Art. 161 of the Withdrawal Agreement.

arbitration panel.²⁴ Where a dispute submitted to arbitration raises a question of interpretation of a concept of EU law or of a provision of EU law referred to in the Withdrawal Agreement or a question of whether the UK has complied with its obligation to respect the binding effects of CJEU's decisions, the arbitration panel must request the CJEU to give a ruling on that question. The CJEU has jurisdiction to give such a ruling, which shall be binding on the arbitration panel.²⁵

The separate Protocol on Ireland/Northern Ireland, annexed to the Withdrawal Agreement, provides for CJEU's jurisdiction over its interpretation and application.²⁶

The procedural rules to be followed in pending cases and in new cases are the ones governing the procedure before CJEU.²⁷

The UK has the right to intervene, to participate and to be represented in all proceedings and requests for preliminary rulings which concern it until the last judgment or order rendered by CJEU has become final.²⁸

It must be emphasized that the UK accepted CJEU's jurisdiction post Brexit for the specific matters indicated above for a nonspecific time-limit. Only the beginning of some proceedings is to take place within a certain period of time, but these proceedings may continue until the last decision becomes final.

2.3 Enforcement of the CJEU's decisions post Brexit

The UK is no longer a member of the EU and, unless otherwise provided by the Withdrawal Agreement, the CJEU lacks competence, *ratione personae*, to receive, hear and solve cases involving the UK and the UK is no longer under the obligation to observe the Court's rulings.

However, judgments and orders of the CJEU handed down before the end of the transition period, as well as those pronounced in proceedings referred to in the Withdrawal Agreement, shall have binding force in their entirety on and in the UK, that is the UK is obliged to take the necessary measures to comply with that decision, which is enforceable under the UK's civil procedural rules.²⁹

Article 158 paragraph 2 of the Withdrawal Agreement also stipulates that the legal effects in the UK of preliminary rulings on citizens' rights shall be the same as the legal effects given pursuant to Article 267 TFEU in the EU and its Member States.

The rule is that UK still has to respect CJEU's decisions that produce *erga omnes* effects and those concerning the UK or one of its nationals given before the end of the transition period and all the decisions pronounced after the end of the transition period as a result of CJEU's jurisdiction enshrined in the Withdrawal Agreement.

The main legal means of enforcement of CJEU's decisions given on the basis of the residual competence conferred upon it after Brexit include: infringement actions³⁰,

²⁴ For a presentation of the dispute settlement procedure, see Chalmers, Davies and Monti, 2019, p. 417-419 and Larik, 2020, p. 7-16.

²⁵ Art. 174 paragraph 1 of the Withdrawal Agreement.

²⁶ Art. 12 paragraph 4 of the Protocol.

²⁷ Art. 88 and art. 161 of the Withdrawal Agreement.

²⁸ Art. 90, art. 91, art. 161 paragraph 3 and art. 174 paragraph 7 of the Withdrawal Agreement.

²⁹ Art. 89 of the Withdrawal Agreement corroborated with art. 280 and art. 299 TFEU.

³⁰ Art. 87 and art. 160 of the Withdrawal Agreement. For example, the European Commission has started an infringement procedure against the UK on 15 March 2021. The Commission sent a letter of formal notice to the UK

preliminary ruling procedure³¹, the use or arbitration³² and the supervision of the UK by an independent Authority³³.

We consider that, because of its role as an instrument of dialogue between the Court of Justice and judicial bodies from EU Member States, the preliminary ruling procedure³⁴ might prove to be the most effective means of proper interpretation and application of the Withdrawal Agreement by its parties. Unlike the infringement procedure, which implies the idea of a sanction, preliminary rulings are meant to facilitate fulfilment of obligations and to prevent improper application of the law.

The EU, its Member States and the UK may decide to extend CJEU's jurisdiction further, by concluding a contract and empowering the CJEU to rule on direct actions based on contractual liability³⁵. Another possibility would be for the UK to become a party to existing international treaties, such as the Agreement on the European Economic Area (EFTA), which authorizes courts of the EFTA Member States to refer questions to the Court of Justice on the interpretation of an Agreement rule³⁶.

At last, a new international treaty could be concluded to further develop UK's relationship with the EU³⁷, which could extend CJEU's jurisdiction over the UK to

actions inspired by the CJEU's current powers or to innovative, outstanding competence. Such a new treaty could offer answers for the need to find better means of enforcement of the CJEU's decisions if the ones provided already prove to be insufficient.

Even if it appears unrealistic at this moment, the UK could even rejoin the EU on the basis of Article 50 paragraph 5 TEU, by starting over the process of accession³⁸.

3. Conclusions

The rather long and sinuous journey of the United Kingdom of Great Britain and Northern Ireland from declaring its intention to leave the European Union until the date of effective withdrawal has ended. Following the effort of all the parties involved, this unprecedented process has led to the conclusion and full entry into force of a Withdrawal Agreement.

Although it is no longer a part of the EU, the UK has chosen an orderly Brexit and it continues to be under the jurisdiction of the Court of Justice of the European Union in pending cases, as well as in a number of new cases that may be lodged with the Court after the end of the transition period, on 31 December 2020.

for breaching the substantive provisions of the Protocol on Ireland and Northern Ireland, as well as the good faith obligation under the Withdrawal Agreement, according to: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_1132 (last accessed on 20 March 2021).

³¹ Art. 158 and art. 160 of the Withdrawal Agreement.

³² Part Six Title III art. 167 and the following of the Withdrawal Agreement.

³³ Art. 158 paragraph 1 of the Withdrawal Agreement.

³⁴ Article 267 of TFEU.

³⁵ Article 272 of the TFEU.

³⁶ Article 107 of the Agreement on the European Economic Area and Protocol 34 annexed to it. For other options in defining the EU – UK relationship after Brexit, see Berry, Homewood, Bogusz, 2019, p. 308 and Schütze, 2018, p. 871-884.

³⁷ For example, the EU and UK concluded a Trade and Cooperation Agreement, provisionally applicable since 1 January 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2020:444:TOC> (last accessed on 20 March 2021).

³⁸ Art. 50 paragraph 5 TEU: "If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49."

It is difficult to foresee all of the complex legal and practical issues which may arise out of the interpretation and application of the Withdrawal Agreement with respect to the CJEU's powers over the UK. The study has focused on the analysis of the main provisions regarding CJEU's jurisdiction after, as well as during the transition period, since the Court has kept, in principle, full jurisdiction in and to the UK until the end of the transition period, with the result that, depending on the length of the proceedings, pending cases may extend well beyond the loss of EU Member State status by the UK.

Also, the study has approached the issue of the means to enforce the CJEU's decisions stipulated in the Withdrawal Agreement, amongst which the preliminary

ruling procedure continues to be an important instrument.

The research aims to contribute to the existing doctrinal works on this latest development of EU law, to be a synthetic source of information about CJEU's jurisdiction post Brexit, of use to legal practitioners, and to inspire further studies on this subject matter.

Further research works could be conducted on the specific rights of EU citizens living and working in the UK after the transition period and of UK citizens residing in the EU, on the detailed jurisdiction of the CJEU with respect to citizens' rights and on the future relationship between the EU and the UK in the areas not covered by the Withdrawal Agreement.

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