

# Brexit alert

## UK position on post-Brexit role of Court of Justice of the EU

On 23 August 2017, the UK published its proposals for the enforcement of rights and obligations as well as for judicial and political dispute resolution once the UK leaves the EU. This position paper is one of a series which sets out the UK's hopes for its partnership with the EU following Brexit and is intended to form part of the background to the next round of negotiations starting in the week of 28 August 2017.

The position paper considers the interaction of the UK's and EU's autonomous legal systems post-Brexit across enforcement, dispute resolution and remedies. A key factor in reaching any market access deal is likely to be a credible mechanism for the EU and UK to resolve any differences, in case their respective rules and approaches diverge in future.

The paper looks at a number of precedents for dispute resolution, suggesting that the exact form of enforcement and dispute resolution, which the UK views as distinct issues, can be tailored and can vary across different issues. The paper notes that it is not necessary for one body to carry out both functions.

From the UK's perspective, a key point is to show that it is normal for the EU to reach agreements with third countries without the Court of Justice of the EU (CJEU) having **direct jurisdiction** over them. EU law currently has direct effect within the UK as it is a Member State.

The reference to removing direct jurisdiction in the paper suggests that the UK is prepared to show more pragmatic flexibility than has been suggested in past speeches. The proposals may allow an acceptance of a European Court process, where that judgment is obtained in line with whatever mechanism is agreed between the UK and the EU. This compromise may allow progress to be made on the UK's trading relationship with the Single Market.

However, the position paper effectively reiterates the UK's rejection of the EU position that EU citizens residing in the UK should retain access to the CJEU. Instead the question of domestic implementation of the UK-EU agreements will be addressed through the UK legal system. This is likely to remain a hurdle to overcome in progressing negotiations on to future trading arrangements, given that resolving the position on citizens' rights is one of the initial areas where the EU wants 'sufficient' progress to have been made before trade negotiations start.

## The position in UK law

The UK Government makes the point that the agreements it expects to reach with the EU will not automatically become part of the UK legal system. Instead the UK will need to enact its own domestic legislation to give effect to the. The UK will however be bound by the agreements as a matter of international law and will take any necessary steps in its domestic law in order to give effect to its obligations. The Government suggests that the EU will be able to scrutinise that legislation to satisfy itself that the obligations have been met.

The legislation will, as appropriate, provide for an effective means for individuals to enforce rights under the agreements, and challenge decisions of the competent authorities concerning those rights. The exact means of redress will depend on the nature of the dispute, and the approach taken to disputes of that nature in UK legal systems.

## The position in EU law

Following the UK's withdrawal, the CJEU will continue to interpret EU law and be the final arbiter of EU law within the EU and its Member States. However, the UK Government does not accept that the CJEU must be given the power to enforce and interpret international agreements between the EU and third countries, even where they utilise terms or concepts found in EU law. The UK Government makes the point that the EU is able to (and does) agree to a wide range of approaches to dispute resolution under international agreements, including by political negotiation and binding third party arbitration.

In particular, the position paper highlights that under the European Economic Area (EEA) Agreement, the European Free Trade Area (EFTA) Court can interpret and enforce the agreement, which includes terms and concepts of EU law, in the EFTA States that are within the EEA. This is interesting as the president of the EFTA Court has separately suggested that the EFTA Court could be a solution to be explored.

## Options and precedents

The position paper considers a number of existing models and approaches in the context of resolving disputes between the UK and the EU but without any commitment to including any specific aspects in the design of future relationships with the EU. The paper makes the point that different models and approaches can be combined and it seems that the UK Government is considering the use of say an arbitration panel for certain issues (such as trade and economic cooperation) and a joint committee for others (such as security).

## Remedies

This is an area which, so far, has attracted less attention. The position paper makes the point that it is important to be clear when negotiating an international agreement what the consequences will be for either side in the event of a breach of its terms.

The position paper notes that in international agreements, final remedies are principally retaliatory in nature and implemented unilaterally by the parties. The paper cites examples from the EU-Canada Comprehensive Economic and Trade Agreement, the EEA Agreement and World Trade Organization rules. It highlights that the ability within the EU legal system to impose sanctions, such as fines for non-compliance with EU rules, is exceptional and it seems that the UK Government is more in favour of remedies along the lines of restricting market access.

## The next steps

The paper is a welcome attempt to move forward on the issues of enforcement and dispute resolution and accordingly also on the desired trade discussions. All trade and cooperation deals involve some sort of trade-off between national control and ability to drive and lock in market access.

It remains to be seen how much discussion on this issue will be entertained by the Commission at the next round of talks starting in the week of 28 August. There is still significant room for future discussion.

## How we can help

At this time of economic, political, legislative, regulatory and trade change, business decisions are increasingly important and difficult. It is therefore key that businesses are more adaptable, strategic and visionary than ever before and review their methodologies and assumptions. Business leaders must lead more than just business.

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