Royal Flemish Academy of Belgium for Science and the Arts

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Europe, Our Home?

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"Brexit" by Francis Jacobs

EXTRACTS

Introduction

Despite the British Government's White Paper on "The United Kingdom's exit from and new partnership with the European Union" of 17 January 2017, and the ideas set out in the UK's Article 50 notice of 29 March, there have been as yet few indications of the Government's precise intentions in the negotiations for withdrawal from the EU, and indeed some apparently contradictory indications from different Ministers and at different times about what the Government seeks to achieve and what it would regard as an acceptable outcome of the negotiations. This could perhaps be charitably attributed, at least in part , to the novelty and difficulty of the issues raised.

In contrast, there has been some precision on the EU side, and some rather concrete indications in the very recent "European Council guidelines for Brexit negotiations" of ten days ago (29 April 2017)

First, these guidelines make a clear distinction between negotiations for an "Agreement on arrangements for an orderly withdrawal" on the one hand and, on the other hand, discussions on the future relationship between the Union and the UK. That position contrasts with the apparent desire of the UK to discuss its future relationship with the EU at the same time as the arrangements for withdrawal, including the thorny issue of financial liabilities.

On the arrangements for orderly withdrawal, three points in the European Council guidelines are of particular interest.

First the Guidelines stress the fundamental importance of the rights of EU citizens: as the Guidelines proclaim, the right of every EU citizen, and of his or her family members, to live, to work, or to study in any EU Member State has shaped the lives and choices of millions of people. While the Guidelines do not give figures, apart from referring to "millions", there are currently thought to be over 3 million nationals of other Member States in the UK, and over 1 million UK nationals in other Member States. Many of us also know numbers of people who made their choice to live in the UK, who are devastated by the outcome of the referendum and the subsequent responses to it, and who live in continuing uncertainty about their future and that of their families. The European Council guidelines are therefore surely right to set out, as the first priority of the negotiations, agreement on reciprocal guarantees to safeguard the status and rights derived from EU law of EU and UK citizens and their families affected by the UK's exit.

In the same spirit, the Guidelines recognise that uncertainty created for businesses as a result of the UK's exit should be addressed; negotiations should seek to prevent a legal vacuum.

Secondly, the Guidelines refer to a financial settlement, to cover the financial obligations of the UK and the EU.

And thirdly, the Guidelines give priority to the position of Northern Ireland and the Republic of Ireland, including the avoidance of a hard border. And that of course is also the aim of the UK and the Republic of Ireland. The difficult question is how the aim is to be achieved. The issue is particularly serious because to reintroduce a border between Northern Ireland and the Republic could have serious political consequences and undo many years of progress in their relations. But without a border, how can there be controls of the movement of people and of goods?

And then, some might say, if such a solution could be found for Ireland, why cannot a similar solution be found for Scotland, which voted to remain in the EU, and England, which voted to leave?

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The Court of Justice

I turn now to the Court of Justice after Brexit. Section 2 of the White Paper, entitled "Taking control of our own laws", has a heading "Ending the jurisdiction of the Court of Justice of the European Union in the UK". After an objective summary of the existing role of the Court, paragraph 2.3 states: "We will bring an end to the jurisdiction of the EU Court of Justice in the UK". Indeed this is made, perhaps surprisingly, a "red line" for the UK. This negative attitude to the Court is perhaps the result of many years of misunderstanding and ill-informed criticism in the UK of the role of the Court.

But the goal of ending the jurisdiction of the Court may be difficult to attain. The European Council guidelines might be taken to suggest that the rights of EU citizens should continue to be guaranteed by the Court long after Brexit. There may be other aspects of the future agreements between the EU and the UK which should be subject to the jurisdiction of the Court. British companies will remain indefinitely subject in some respects to the enforcement powers of the European Commission under the competition rules, and possibly under other rules, and will be entitled to challenge the Commission's decisions before the Court. It is not conceivable that that entitlement will be removed. The United Kingdom itself may wish to challenge an EU measure before the Court: for example, if it were to grant aid to encourage companies to remain in the UK and the EU were to impose an anti-subsidy measure in response.

Then there is the issue of the effect of the Court's entire case-law, both past and future. Presumably the UK courts will not be prohibited from following the Court's past case-law, and parties in the UK courts will not be prohibited from citing it. Indeed the Government's White Paper seems to accept that past case-law will continue to be binding, unless perhaps overturned by the UK Supreme Court. Any other solution would lead to great legal uncertainty, with any point being open to dispute and challenge. As for new case-law post-Brexit, it may be expected that it will have some persuasive effect, both before UK courts

and before any new courts or arbitration systems which may be set up to handle future disputes.

Moreover there seem to be some areas where some continuing role for the EU Court of Justice is necessary to attain an objective of importance in the UK's national interest. To exclude that objective a priori, because of concerns about the role of the Court, may therefore result in very damaging self-harm.

The clearest example is access to the EU internal market. Some measure of acceptance of the case-law of the EU Court of Justice may be involved in maintaining the fullest available access to the internal market, which is one of the United Kingdom's priorities. According to the White Paper (section 8): "The Government will prioritise securing the freest and most frictionless trade possible in goods and services between the UK and the EU." However, it is clear that to maintain such trade, it will be necessary to comply with evolving regulatory standards, which are often developed in the case-law of the EU Court of Justice. It is indeed that process which has largely made the single market the success which it has been. Some measure of acceptance of the future case-law of the EU Court of Justice may therefore prove necessary if the Government's priority policy aims are to be secured.

Another area of high importance is judicial cooperation in civil and commercial cases. Here there is currently an effective system, and one which is extremely important in practice for the enforcement of judgements among the Member States in civil and commercial cases. That is vital for those doing business in the EU, but also across the whole field of civil law, including family law. It would seem difficult to preserve this system in the absence of a regime equivalent to the existing EU legislation (the Brussels (Brussels I Recast) and Rome Regulations), together with acceptance of the existing and future case-law of the EU Court of Justice. The House of Lords Committee on the European Union, which is one of the few independent and well-informed voices on EU matters, has published on 20 March 2017 a report on this area, entitled "Brexit: justice for families, individuals and businesses?", which examines the damaging and far-reaching consequences which may ensue.

It will not be possible to replace these procedures with equally effective procedures outside the EU. This can be seen from the Government's White Paper, which devotes a section, section 2, to dispute resolution mechanisms. The section gives examples of dispute resolution mechanisms in existing agreements to which the EU or the UK is a party. Further details are given in Annex A to the White Paper.

These mechanisms are in several important respects inadequate compared with the mechanisms under the EU Treaties. In the first place, in many instances the mechanism is available only to States. States are often reluctant to take up a dispute with other States; this is apparent from general experience, ranging from the EU itself to the World Trade Organization. Companies and individuals have no standing, and have no remedy. Moreover, as the White Paper points out (2.8), unlike decisions made by the EU Court of Justice, dispute resolution in agreements made by the UK does not have direct effect in UK law.

Many of the mechanisms outlined in the White Paper provide for arbitration rather than judicial settlement. Arbitration, while it may have some benefits, has some disadvantages compared with judicial settlement; notably, the procedure is not transparent, there may be difficulties with enforcement, and arbitration does not give rise to a body of case-law.

Established courts have advantages over ad hoc tribunals, but it is difficult to provide for established transnational courts outside organisations such as the EU.

The final sentence of the section in the White Paper dealing with dispute resolution mechanisms stresses the concern for UK sovereignty. It states, in very general terms, that "Any arrangements must be ones that respect UK sovereignty …" (2.10). Once again, however, it is unclear how that concern for UK sovereignty can be reconciled with any effective system of transnational dispute settlement.

But suppose that a separate dispute resolution mechanism, distinct from the EU Court of Justice, could be set up for a particular type of agreement, for example the agreement on the participation of the UK in Europol. A special tribunal is created to hear disputes arising between the UK and the EU Member States. Such a tribunal might well consider, on the question before it, whether it should follow the relevant case-law of the EU Court of Justice. Presumably the red line does not go so far as to prohibit the tribunal from taking account of the case-law of the EU Court of Justice. It is not therefore clear whether there is much significance, both in this context and in all other contexts of UK-EU agreements, in setting up a veto on the EU Court of Justice and seeking other forms of adjudication, or in seeking to exclude reliance on its case-law. In any event, it is the whole point of such agreements that they should be interpreted and applied in the same way by all States parties.

Conclusions and suggested recommendations

Some conclusions and suggested recommendations can be set out in summary form as follows:

(1) It is not clear what is meant by regarding the EU Court of Justice as a "red line". This is not a helpful term, and it does not designate a helpful approach. A more constructive approach would start from a more balanced view of the Court, and would approach its future role pragmatically, rather than ideologically.

(2) As a general policy, it would be useful to promote in the UK a more informed view of the role of the Court, a role which will still be important for the UK whatever the outcome of the negotiations.

(3) It is desirable to promote independent and effective dispute resolution mechanisms in all fields where the existing methods will no longer be available. The basic requirements are similar in all fields. It is particularly important that access should not be confined to States.

(4) The rhetoric of sovereignty is not helpful in relation to transnational dispute settlement. It is of the essence of such a system that there should be an independent decision-making body, whose decision is binding and final, subject only to any appeal mechanism which is provided within the system.

(5) Provision should be made for recognition and enforcement of all decisions and judgments in both civil and criminal matters between the UK and EU Member States, subject only to reasoned exceptions required by respect for human rights.

(6) It would be undesirable to allow unsubstantiated concerns about accepting the jurisdiction or the case-law of the EU Court of Justice to preclude or prejudice objectives for the future relationship with the EU which the Government regards as desirable or even necessary in the national interest.

(7) The UK will not be bound after Brexit by decisions of the EU Court of Justice unless express provision is made to that effect in particular sectors. However, UK courts should be expected to take account of decisions of the Court of Justice, notably in relation to the development of regulatory standards in all areas where there are agreements between the UK and the EU/EU Member States.

(8) More generally, the role of the EU Court of Justice will remain important for the UK. According to the White Paper, the UK's aim is a "new partnership with the European Union" and according to its "Conclusions": "It remains overwhelmingly and compellingly in the UK's national interest that the EU should succeed." A successful EU will continue to depend on a successful Court of Justice.

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The future

Just a few words, before concluding, about the future more generally, which is after all the main focus of this series.

I wonder whether, independently of Brexit and all that, the EU is today at a turning-point, and whether the role of the Court cannot fail to reflect that. While Brexit itself seems partly founded on misinformed and misguided views about the Court, we cannot fail to acknowledge an increasing level of *informed* criticism, both from scholars and from national judges. From scholars, it is remarkable how in recent years there has been an increasing level of critique. From national courts, especially supreme courts, there has been a more active dialogue. Again, I think that this debate is to be welcomed. But it would be a matter of great concern if a gulf were to develop between the Court and its closest audience. To some extent, this development may reflect a change in the Union itself. Two points are perhaps obvious here: first, the Union is less popular than it has been: opinion polls in some Member States suggest that the Union is, let us say, unpopular with about half of the electorate. And the Union has changed objectively, over the years, especially with enlargement. There is far more diversity, both within and among Member States.

To some extent, these developments are recognised by the EU's political institutions, which seem to have become in some respects more cautious. The need for consolidation has perhaps displaced, for the time being at least, the appetite for the great leap forward. And perhaps this change of mood reflects a higher level of uncertainty in the outside world. So the prudent maxim for the Union may be, putting it in plain terms, to do rather less and to do it better. Yet there are some vital areas where the Union may need to do more.

The EU has great achievements to its credit. But, to take the metaphor in the title of these lectures, "Europe – our Home", the time has surely come for the EU to put its own house in

order: especially to make the changes necessary for the proper functioning of the Eurozone; and to ensure the proper functioning of Schengen and the treatment of refugees. Such changes seem essential to secure popular support for the EU.

For the role of the Court, I would limit myself to one or two questions. Is the Court still required to fill all the gaps which EU law has left open and unresolved? If the Court is asked to interpret EU legislation, which has left some matters unresolved, should not the Court sometimes be willing to leave them unresolved? There may be good reasons for doing so. There may be benefit in waiting to see how the national courts resolve the issue, perhaps in different ways, which could provide valuable experience; and benefiting from that experience, until the right answer becomes more clear.

Then I think that there may be a question whether, in doubtful cases, it is wise for the Court to resolve an issue by invoking a very general provision in the Treaty, or the Charter of Fundamental Rights. And therefore, by doing so, to preclude the EU legislature from one day adopting a different solution, which might prove desirable, but which the legislature cannot do, since such a solution might be contrary to the EU's basic law as interpreted by the Court. In other words, the Court's judgment may foreclose and preclude other solutions. It has been said: "We must not forget that it is a constitution which we are interpreting". That may be understood as meaning that it should be given a broad interpretation. But it could be given a different sense: we should be careful not to prejudge the future, by adopting a constitutional position which pre-empts the future, and precludes any solution which with hindsight might be preferable.

I am perhaps, and this is my final comment, suggesting that, after Brexit, a touch of British pragmatism might still be useful in EU affairs.