



Law Society
of Scotland

Memorandum of Comments by the Law Society of Scotland

On the UK Government's and EU Commission's
Position Papers on the Ongoing Union Judicial and
Administrative Proceedings

August 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession. We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership. The Society's Constitutional Law Sub-committee welcomes the opportunity to comment upon the UK Government's *Position Paper on the Ongoing Union judicial and administrative proceedings* and the EU Commission's *Position Paper on Ongoing Union judicial and administrative procedures*.

Specific Comments

We believe that both the UK Government and the EU should be guided by the objectives of supporting the rule of law, advancing the proper administration of justice and protecting the best interests of the parties to the litigations in process. These are issues which raise deep questions about the rule of law and are too important to be treated as a matter for regular negotiation in the context of the Withdrawal.

These objectives should inform and guide the "key principles" in both the UK Position Paper and the EU Commission Task Force Position paper. The details of these negotiation positions can be found in the Annex.

The UK's exit will have an impact on EU and UK citizens, litigants before the Court of Justice of the EU (CJEU) on their lawyers in the UK and the EU27, on the CJEU itself and on the relationship between the CJEU and the domestic courts in the constitutive jurisdictions of the UK. It should be noted that the CJEU does not actually exercise jurisdiction 'in' the UK as referred to in the position paper (paragraph 10).

The CJEU has the following functions:

- a. interpreting EU law (preliminary rulings)
- b. enforcing EU law (infringement proceedings)
- c. annulling EU legal acts (actions for annulment)
- d. ensuring the EU takes action (actions for failure to act)
- e. sanctioning EU institutions (actions for damages)

Although the numbers are not known, it is probable that there are currently cases pending in the domestic courts which may involve action in the CJEU before exit day. There are also cases which have already been referred and are waiting for a decision. Furthermore, once the UK has left the EU, there will still be a

need for a determination on applicable EU law in relation to some cases but the UK will no longer have recourse to the CJEU.

It is critically important that current and pending cases are identified quickly, and that these (plus any new cases) are dealt with using adequate transitional arrangements, rather than left to go through the CJEU system and risk not having been heard before the UK leaves the EU.

It would be helpful to know what steps the Government and the EU have taken to consult with litigants and potential litigants who are likely to be affected by the changes envisaged in the bill and the Position Paper.

The European Union (Withdrawal) bill

Clause 6 of the European Union (withdrawal) bill provides that:--

- (1) A court or tribunal—
 - (a) is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court, and
 - (b) cannot refer any matter to the European Court on or after exit day.
- (2) A court or tribunal need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but may do so if it considers it appropriate to do so.
- (3) Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after exit day and so far as they are relevant to it—
 - (a) in accordance with any retained case law and any retained general principles of EU law, and
 - (b) having regard (among other things) to the limits, immediately before exit day, of EU competences.
- (4) But—
 - (a) the Supreme Court is not bound by any retained EU case law,
 - (b) the High Court of Justiciary is not bound by any retained EU case law when—
 - (i) sitting as a court of appeal otherwise than in relation to a compatibility issue (within the meaning given by section 288ZA(2) of the Criminal Procedure (Scotland) Act 1995) or a devolution issue (within the meaning given by paragraph 1 of Schedule 6 to the Scotland Act 1998), or
 - (ii) sitting on a reference under section 123(1) of the Criminal Procedure (Scotland) Act 1995, and

- (c) no court or tribunal is bound by any retained domestic case law that it would not otherwise be bound by.

We agree with the provisions of clause 6(2) and 6(4) and welcome the recognition by the Government that the High Court of Justiciary is the highest criminal court in Scotland from which there is no right of further appeal in criminal matters to the UK Supreme Court (although there can be applications to the UK Supreme Court about ECHR compatibility and devolution matters referred to in clause 6(4)(b)(i) or (ii)). It is however concerning that there is no provision in this Clause which deals with the issue of cases pending before the European Court at exit day and litigants or potential litigants in that situation are still lacking certainty.

The UK Position Paper

In the section on *Issues for discussion* in the UK paper only preliminary references from UK courts are quantified. There is no detail of how many cases before the General Court have been brought by UK natural or legal persons.

Over and above the (relatively limited) number of references to the CJEU from UK courts, there are a significant number of cases referred by the courts of other Member States in which the UK is involved (see Article 23 of the Statute of the Court of Justice – Protocol No 3 to the TFEU). A decision will be needed on what is to happen in those cases – most obviously, will the UK maintain its participation? The UK also intervenes in a number of direct actions as referred to in paragraph 5 and the same comment applies. The involvement of the UK with the Court of Justice and the General Court is perhaps better appreciated by taking both paragraphs 3 and 5 into account, rather than just paragraph 3.

Many of the contentious matters will arise in the context of domestic litigation which does not appear to raise constitutional matters. For example, is a Polish citizen who lives in the UK post exit entitled to a grant to study in Krakow in light of a local authority's regulations and the Withdrawal Agreement? Is glyphosate acceptable or unacceptable as a pesticide for over the counter sale to farmers and private consumers?

In some cases it will be important to have consistency since otherwise diversions of trade will occur. Farmers need to know that what they use will not exclude the possibility of selling their products in EU27: these scenarios point to a need for consistency between the outcome of cases before the British courts and that with the CJEU. The needs of litigants may point to a consistent rule and both the UK and the EU should take this into account during the negotiations.

These types of cases will arise in civil domestic litigation perhaps without a recognition of the constitutional significance of the debate. The UK may not be aware of the controversy at lower court levels and the case may not reach the UK Supreme Court. The nature of retained EU law is such that it affects economic and governance rules across the spectrum. The impact of EU law on litigants is not exclusively from the top down. We have the following questions:

1. Whether all cases, or only some selection of those cases, which are pending before the ECJ on exit day should continue to be dealt with by the ECJ? or

2. Whether it should be possible in any case, which is pending before the Scottish courts on exit day and which raises an EU question, to refer that question to the ECJ on and after exit day?

The Court of Justice and the General Court both have standard definitions of what is a pending case namely that a case which has been registered at the CJEU's registry and which has not been decided or withdrawn.

In relation to paragraph 9 we note that the judges and Advocate General are not appointed by the UK. They are nominated by the UK but are appointed by decision of all the Member States. EU article 19 states: *The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years.* See also articles 253 and 254 of the TFEU.

Whilst the Court of Justice has 'one judge from each Member State' and the General Court has 'at least one judge per Member State', the Court is 'assisted by Advocates-General' (Article 19(2) TEU). The UK judges may (but do not necessarily) sit in cases involving the UK and they also sit in many other cases. The Advocate General does not represent the UK / make submissions on behalf of the UK and does not sit in cases involving the UK or (with rare exceptions) in cases referred from UK courts.

The EU Position Paper

Like the UK Paper, the EU Paper should be guided by the objectives of supporting the rule of law, advancing the proper administration of justice and protecting the best interests of the parties to the litigations in process. These are issues which raise deep questions about the rule of law and are too important to be treated as a matter for regular negotiation in the context of the Withdrawal.

These objectives should inform and guide the "key principles" in both the UK Position Paper and the EU *Commission Task Force Position paper*. The Paper effectively elaborates a managerial or technical approach to supporting the EU *Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union* which state that : the Agreement should provide for arrangements relating to Judicial proceedings pending before the Court of Justice of the European Union on the withdrawal date involving the United Kingdom, United Kingdom natural and/or legal persons (including preliminary references); the Court of Justice should remain competent to adjudicate in these proceedings and its rulings must be binding upon the United Kingdom.

This approach does not adequately take into account the interests of the citizen in both the UK and the EU in connection with the enforcement of obligations or the vindication of rights.

The components of the Withdrawal Agreement

We note that there are technical issues which would need to be resolved, and the UK will seek to agree with the EU:

- a. the types of case that would be in scope of any agreement in this area;
- b. the point at which a case can be considered to be pending;
- c. the status of any decision reached by the CJEU;
- d. the status of any interventions which the UK has notified; and
- e. the role of UK-appointed judges and Advocate General in the Court and the role of UK lawyers appearing before the Court.

There are a number of options for dealing with such cases:-

Option One is to pursue the position set out in the European Union (Withdrawal) bill and the UK Government's Position Paper.

Option Two would permit the CJEU to hear cases pending on exit day and subsequently promote compliance with decisions in those cases. There would need to be significant transitional arrangements. A model for these arrangements could be the New Zealand Supreme Court Act 2003 which established the New Zealand Supreme Court and replaced the Judicial Committee of the Privy Council. Significantly the New Zealand provisions allowed for continued appeals to the Privy Council in limited circumstances.

Option Three would provide that the UK Supreme Court would establish an EU Chamber consisting of both UK judges and EU judges with expertise in EU law to deal with cases which are repatriated to the UK following the finalisation of the Withdrawal Agreement.

Option Four would provide that those subject to post exit rules know to which court they must apply for resolution of a dispute or vindication of their rights. In this context a new court comprising both EU and UK judges created under the Withdrawal Agreement may be the most acceptable way forward for both the UK and the EU.

Ultimately the agreement is a political matter between the UK and the EU but we hope that it will be informed by the principles set out in our paper.

Annex: The UK and EU Negotiation Positions

EU Commission's negotiating position	UK Government's negotiating position
The withdrawal agreement should ensure	
<p>1. That the ECJ will continue, after the withdrawal date, to have competence to adjudicate in proceedings which are pending on that date</p>	<p>There may be certain pending cases before the ECJ which may continue to be dealt with by the ECJ after the withdrawal date but discussions are required about which cases can be described as pending for this purpose, the status of any decision reached by the ECJ etc (paragraph 11 of UK's Position Paper)</p>
<p>2. That the ECJ should continue to be competent to adjudicate in</p> <ul style="list-style-type: none"> - preliminary references made by UK courts after the withdrawal date relating to facts occurring before that date and - infringement procedures relating to such facts brought by the EU Commission or a member state against the UK after the withdrawal date 	<p>The jurisdiction of the ECJ in the UK will end on the withdrawal date (paragraph 10 of their Paper). Therefore the ECJ should not "remain competent to rule on cases on which it has not been seized before the date of withdrawal even where the facts arose before withdrawal" (paragraph 13). This is supported by clause 6(1)(b) of the EU (Withdrawal) Bill which prohibits a court or a tribunal in the UK from referring any matter to the ECJ on and after exit day</p>
<p>3. That judgements of the ECJ given before the withdrawal date or under the above paragraphs have binding force in the UK after the withdrawal date</p>	<p>The judgements of the ECJ before the withdrawal date will be enforced in the UK but not any after that date because the jurisdiction of the ECJ in the UK will end on that date (paragraph 10 of their Paper).</p>
<p>4. That EU bodies will continue, after the withdrawal date, to have competence to conduct administrative procedures which are pending before them on that date</p>	<p>There will require to be discussions about what is to happen about administrative procedures which are pending before EU bodies which concern the UK and/or UK persons or bodies but a single approach is unlikely to be appropriate or desirable (paragraphs 15-20 of their Paper)</p>



5. That the EU bodies should continue to be competent, after the withdrawal date, to start administrative procedures against the UK and/or UK persons/bodies concerning compliance with EU law relating to facts that occurred before that date

Nothing appears to be stated but it would follow from the above that the UK would not agree that it should be competent for a EU body to start any new cases after the withdrawal date.

For further information, please contact:

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