FACULTY OF ADVOCATES

RESPONSE BY THE FACULTY OF ADVOCATES
TO A CALL FOR EVIDENCE BY THE HOUSE OF LORDS
EU JUSTICE SUB-COMMITTEE

BREXIT: ENFORCEMENT AND DISPUTE RESOLUTION – IS THERE A ROLE FOR THE COURT OF JUSTICE OF THE EUROPEAN UNION ("CJEU")?

Introduction

1. It is not possible to prescribe or describe an appropriate role for the CJEU at this stage in the Brexit negotiations. We understand, for example, that the UK government wishes to maintain UK participation in the EU regimes for medicines, chemicals and aviation. Equally, the negotiators' joint report of 8 December 2017 describes a role for the CJEU in ensuring consistent interpretation of the citizens' rights part of the Withdrawal Agreement (§§37-41; and Item 56 in the joint technical note). Until the substantive content of the Withdrawal Agreement and of any future relationship has been finally agreed, it is not possible (nor sensible) to prescribe the means by which disputes (whether between the UK and the EU, or in relation to the vindication of individual rights) should best be resolved. Whatever the role to be played by the CJEU, it is important for the rule of law that its role is transparent and that the status of any of that court's decisions, past and future, should be clear to all parties, institutions and courts involved. This must include clarity about the CJEU's role and the juridical status of its judgments not only under the eventual agreements after the UK's withdrawal, but also during any "transitional period". It may also require imaginative thought about the participation of an *ad hoc* UK judge in certain proceedings before the CJEU.

2. The present response illustrates the difficulties by focusing in particular on (i) family law and (ii) how the role of the CJEU is reflected in the present European Union (Withdrawal) Bill. In addition the Faculty notes that it would be unusual for disputes between the UK and the EU under any international agreement to be subject to resolution by the CJEU, a body representing the EU 27 and on which the UK cannot expect to retain any permanent presence. The relative merits of the various alternative means of dispute resolution can only be measured in the context of the eventual shape of the deal.

3. Finally, the Committee may wish to reflect on the EU's role in creating a transparent, rights-based system of international dispute resolution. Over the past 45 years there has been a move away from closed, national regulatory systems to a supranational legalism enabling rights to be vindicated in a transparent manner. The UK will remain a close trading partner of an EU that remains grounded in the four freedoms. UK citizens and companies that have had access to a single supranational court and its case law will still have individual rights requiring vindication post-Brexit.

Family law

4. The two main EU instruments that affect family law in the UK are Council Regulation 2201/2003[1] known as Brussels IIa Regulation and the Council Regulation 4/2009 known as the Maintenance Regulation[2]. Brussels IIa has been described as "probably the most important international law within Europe"[3]. With increasing population mobility, international family life and divorce/separation[4], Brussels IIa provides a comprehensive and uniform set of rules on jurisdiction and the recognition and automatic enforcement of judgments within the EU in matters relating to divorce and parental responsibility, including the placement of a child in foster family or institutional care. The Maintenance Regulation establishes similar rules on jurisdiction, recognition and enforcement of decisions in matters relating to maintenance obligations.

5. If enacted, the EU Withdrawal Bill would incorporate Brussels IIa and the Maintenance Regulation into UK domestic law. These regulations are premised upon the principle of mutual trust. Reciprocity cannot be achieved by domestic law alone. The arrangement would no longer be a mutual one. In the absence of a separate reciprocal agreement with the EU, UK litigants in EU cross border family disputes would find themselves disadvantaged. The benefits of clarity, certainty and equality of application would be lost.

6. The Faculty has considered the conclusions and recommendations of the House of Lords European Union Committee in their Report *Brexit: justice for families, individuals and businesses?*[5] The Faculty agrees that there is no satisfactory fallback position in the area of family law, either with reference to common law or existing international treaty or convention arrangements. The Faculty agrees that:

"leaving the EU without an alternative system in place will have a profound and damaging impact on the UK's family justice system and those individuals seeking redress within it."[6]

7. This is an area in which consistency with the EU should be ensured.[7] The Faculty agrees that the optimal solution in legal terms is for the EU framework in this field to be sustained post-Brexit.[8] Whilst the government seeks to maintain a close and comprehensive arrangement for future civil judicial cooperation with the EU that largely replicates the current system, it is difficult to see how reciprocity can be achieved without the CJEU retaining oversight.[9] Any bespoke

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[1] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L338/1

[2] Council Regulation 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L7

[3] Magnus, U. and Mankowski, P. (eds) *European Commentaries on Private International Law. Brussels II bis Regulation,* (Sellier European Law Publishers 2012) p.7 para 1

[4] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, 14.4.2014, COM(2014) 225 final, p.2 Footnote 1 http://ec.europa.eu/justice/civil/files/matrimonial_act_part1_v3_en.pdf

[5] HL Paper 134, March 2017

[6] HL Paper 134, March 2017 paragraph 145

[7] Transcript of the Select Committee on the European Union Justice Sub-Committee, *Brexit: the jurisdiction of the* CJEU, 21 November 2017, p.5

[8] HL Paper 134, March 2017 paragraph 137

[9] *Providing a cross-border civil judicial cooperation framework – A Future Partnership Paper*

arrangement could well take a very long time to consider, negotiate, agree and put in place, both legally and politically. Another consideration is the additional expense of creating a new framework. Even if the UK could secure the agreement of the EU27 to an alternative but similar arrangement, there would remain the need for an ultimate arbiter to make binding decisions on the interpretation of the provisions to ensure uniformity and enforceability. It is extremely unlikely that the EU would agree to an arbiter other than the CJEU, especially when we have an existing system that works well.

8. Such a role for the CJEU in this field of family law would not encroach upon the sovereignty of the UK. The CJEU would have no jurisdiction to interpret UK domestic substantive law. The regulations are procedural and regulatory in nature and do not affect UK substantive family law. They would apply only to the interpretation of an international regulatory mechanism. This is a form of indirect rather than direct jurisdiction. While it is a matter of political negotiation, nonetheless arrangements could be agreed whereby the UK maintained an input into future amendments, such as the proposed recast of Brussels IIa. It is significant that the UK government has opted into those negotiations notwithstanding the referendum result. Such an arrangement could involve the use of an *ad hoc* judge from the United Kingdom, and a mechanism similar to the current reference procedure under Article 267 of the Treaty on the Functioning of the European Union.

9. The CJEU's limited jurisdiction in the interpretation of procedural cross-border matters would be consistent with the UK retaining sovereignty in its domestic affairs, and would facilitate the maintenance of the current family law framework to the benefit of citizens and families across the UK and EU. It is essential that the current system should be available to all pending post-Brexit arrangements being put in place. The CJEU should continue to have jurisdiction throughout any transitional period.

10. Family law also falls within the ambit of powers devolved to the Scottish Parliament. Consideration will have to be given to the implications arising from devolution. The Faculty has already provided responses to matters concerning devolution and exiting the EU.[10]

The CJEU and the European Union (Withdrawal) Bill

11. The EU Withdrawal Bill (as amended in Committee) seeks to retain, in UK domestic law after exit day, (a) EU-derived domestic law (cl. 2) (e.g. UK legislation implementing EU Directives); (b) direct EU legislation (cl. 3) (e.g. EU Regulations); (c) the rights etc. available in domestic law by virtue of section 2(1) of the 1972 Act (cl. 4) (e.g. directly effective rights under treaty articles); and (d) the case law of the UK courts and the CJEU in relation to sources (a)-(c) (cl. 6), in each case only up to exit day. EU law as at exit day is to be frozen in time and incorporated into UK law for the sake of legal continuity. There are to be no references to the CJEU on the interpretation of such retained law (cl. 6(1)(b)). The UK courts are not to be bound by the CJEU's decisions made after exit day (cl. 6(1)(a)). The UK courts need not have regard to such decisions,

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639271/Providing_a_cross-border_civil_judicial_cooperation_framework.pdf

[10]http://www.advocates.org.uk/news-and-responses/responses/2017/dec/inquiry-into-devolution-and-exiting-the-eu
http://www.advocates.org.uk/news-and-responses/responses/2017/oct/european-union-withdrawal-bill

but may do so if they consider it appropriate (cl. 6(2)). The provisions give rise to the following practical issues as far as the role of the CJEU is concerned.

12. First, a decision of the CJEU in a reference commenced but not concluded before exit day would not, in terms of the current version of the Bill, be binding in UK domestic law, either as a decision in the particular litigation in which the reference had been made or as a binding precedent in other cases. This would render continuing with any such reference academic for the parties to the particular dispute. It would also deprive them, in the middle of a litigation, of the benefit of an authoritative decision which they may have legitimately expected at the outset.

13. A solution to this problem emerges from paragraph 93 of the Joint Report of the Negotiators (TF50 (2017) 19, 8 December 2017). The UK and the EU have agreed that "*the CJEU should remain competent for UK judicial procedures registered at the CJEU on the date of withdrawal, and that those procedures should continue through to a binding judgment*". It is not clear whether a post-exit day judgment of the CJEU in a pending reference would be binding as between the parties to the particular litigation, or whether it would form part of the retained EU case law by way of a limited exception to cl. 6(1) of the Bill. This matter requires to be clarified as a matter of policy, and the ultimate solution adequately reflected in an amendment to the Bill, which currently makes no provision for it.

14. Second, if there is to be a transitional period, the Bill as currently drafted would prevent any new EU law, including the case law of the CJEU, made during that period from becoming part of the UK domestic law (i) by virtue of section 2 of the 1972 Act (as EU law); and (ii) by virtue of the retention provisions in the Bill (as retained EU law). If the benefits of the transitional period can be obtained, through negotiation with the EU27, on this basis, this may not seem to pose a problem. If no such outcome is possible, then the only solution would seem to be to postpone, or redefine, exit day, as far as clause 2 to 4 and 6 of the Bill are concerned, until the end of the transitional period. The retention of new EU law until the end of the transitional period, on the basis set out in the retention provisions of the Bill, would still fail to achieve the cohesion in EU law, as between the UK and the EU27.

15. Third, the CJEU's interpretation of the EU law concepts embedded in the UK's retained EU law may evolve as a result of CJEU's developing jurisprudence in the context of references from the courts of the EU27. There is thus potential for the meaning of concepts such as "worker" or "habitual residence" in retained EU law as interpreted by the UK courts to diverge from their meaning in the post-exit day case law of the CJEU. How important it is for such divergence to be minimised will depend, to some degree, on the nature of the UK's future legal relationship with the EU after exit day and, in particular, after the end of any transitional period.

16. The more distant the future relationship, the less of a concern it is that the UK courts' interpretation of what were originally EU law concepts ends up diverging from the CJEU's continuing jurisprudence on the subject. If, by contrast, the future relationship is to remain close to what it has been so far, then cohesion remains an important objective. It would be inconsistent with the UK government's current policy aims for the Bill to provide that the decisions of the CJEU made after exit day were binding on the UK courts as precedents to follow in the interpretation of the UK's retained EU law.

17. It is only to be expected that, with the continuing expansion of the range of authorities cited to the UK courts, any future jurisprudence of the CJEU will be relied on in UK domestic litigation where it is seen to be relevant, for such persuasive effect as it may have in any given case. The current wording of cl. 6(2) seems to us to capture this approach, where the UK courts are allowed

to have regard to the CJEU post-exit day case law where they consider it appropriate to do so. The difficult question is whether, given the common pedigree of the relevant concepts in EU law as it evolves and the UK's retained EU law as it is frozen on exit day, and the precise nature of the future relationship, a middle way should be adopted, somewhere between binding precedent, on the one hand, and merely persuasive material from another legal system, on the other. The duty to "take account of" or "pay due regard to" the post-exit day jurisprudence of the CJEU may be better if such a middle way is thought appropriate, perhaps along the Strasbourg model.

Criminal Justice

18. In the field of criminal justice, the ending of the CJEU's primacy is likely to have the most significant impact on European arrest warrant. The Faculty agrees with Lord Thomas of Cwmgiedd that:
"It would be perfectly possible to agree an extradition treaty with the EU, but the European arrest warrant operates in a fundamentally different way. Unlike treaties, it is premised upon judicial co-operation. It is very difficult to see how, if an instrument operates on that basis, it can do so without some body at its apex to determine the rules by which it works."[11]

19. In the event that rulings from the CJEU lose their status as binding authority, there is nothing to stop those rulings remaining as persuasive authority. Scottish courts routinely draw from cases in other jurisdictions and there is no reason why this should not apply to those from the CJEU.

20. It is possible that there may be some divergence in approach by the courts, but this should not be over-stated. CJEU rulings have become embedded in UK jurisprudence and it is unlikely that they will suddenly be departed from, especially in the area of Criminal Justice where it should be obvious and desirable that a consistent approach is applied in both jurisdictions.

21. To reinforce this point it would be prudent to have some sort of two-way requirement, whereby both courts were required to consider the jurisprudence of the other in reaching a decision. There is a possibility that two inconsistent strands of jurisprudence could develop in the two jurisdictions – one where rulings of the other court were considered and one where they were not - but this seems unlikely given that the requirement would be to "take account of" and not to "follow" the other court's decisions.

22. Finally, it is submitted that there is no scope for arbitration as an alternative solution in this area. Decisions regarding an individual's liberty should be based on reasoned legal analysis by courts.

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Parliament House
Edinburgh

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[11] Transcript of the Select Committee on the European Union Justice Sub-Committee, *Brexit: the jurisdiction of the* CJEU, 21 November 2017, p.12