

8 June 2018

**Dispute Resolution and Enforcement under
a Withdrawal Agreement UK – EU**

Why we are presenting this evidence

We are all members of Monckton Chambers. In addition

Professor Dr Dr h.c. Carl Baudenbacher is the former President of the EFTA Court and Professor at the University of St Gallen

Michael Bowsher QC is Visiting Professor at the Dickson Poon School of Law, King's College London and Fellow of the Centre of European Law.

and

Professor Peter Oliver is a former Legal Advisor at the European Commission and a Visiting Professor at the Université Libre de Bruxelles

We hope that our legal expertise in this field will be useful to the Committee. We write here in our personal capacity.

Executive Summary

Our position may be summarised as follows:

- 1) During the transitional period, the UK courts should apply EU law in its entirety and the European Union (Withdrawal) Bill should be amended accordingly.
- 2) Despite our misgivings at the prospect of the CJEU continuing to enjoy jurisdiction after Brexit, it should be accepted for the transitional period, which is very short. In any case, at this late stage, it seems hard to imagine how another satisfactory forum could be found or established.
- 3) At the same time, we share the view of the House of Lords Select Committee that the CJEU should only retain jurisdiction for a relatively short time after the transitional period.
- 4) At that stage, the EFTA Court will be a viable alternative.

I. General

Consensus has been reached on some 75 per cent of the DWA. Many of the provisions concerned relate to dispute resolution. However, the stark reality is that, unless agreement can also be reached by October 2018 on the remaining provisions on this matter together with the Ireland/Northern Ireland problem, the UK will simply “crash out” of the EU without any agreement at all. Furthermore, time is now exceedingly short.

In accordance with standard practice in agreements between the EU and third countries, the DWA will provide for a Joint Committee of the parties to find solutions to problems arising between them. Plainly, however, the EU will not be satisfied with this alone. It sees the need for some disputes to be decided by a judicial or quasi-judicial body consisting of judges from States other than the UK. We share this view, since it is important that private parties have access to courts of law. This is especially poignant in relation to citizens’ rights: the proverbial Polish plumber cannot be expected to take a dispute with the British authorities to international arbitration, or to accept that it be decided in interstate proceedings without his involvement.

Given the complexity of the relevant provisions of the DWA, this paper can only deal with a few salient points. With regret, so as to avoid this statement becoming excessively long, we have decided not to discuss the draft Protocol on Ireland and Northern Ireland.

Moreover, in principle, we see no point in re-opening issues on which consensus has already been reached.

The present submissions take account of the report published on 3 May by the report of the House of Lords European Union Committee (“the HL Select Committee”).

It is crucial to distinguish between the provisions of the DWA intended to apply during the transitional period (30 March 2019 to 31 December 2020) and those intended to apply thereafter.

II. The transitional period

The cornerstone of the deal already agreed between the EU and the UK is that, subject to certain exceptions, EU law will continue to apply in full during the transitional period and the UK will be treated as though it were a Member State (Article 122(1) and (6) DWA).

(a) Applying EU law in the UK courts

Article 2 DWA lays down an all-embracing definition of “Union law”, including *inter alia* the general principles of EU law and the Charter. Consequently, the Withdrawal Bill should provide that the Charter will continue to apply in full during that period (see clause 6). Equally, general principles recognised by the CJEU prior to exit day should be given full effect in the UK courts (see Schedule 1). Similarly, any remedy available in EU law (include damages according to the rule in *Francovich*) should continue to be available during this period (see Schedule 1).

All these elements are an integral part of EU law and cannot be dissociated from it. Accordingly, the DWA cannot function properly unless the UK fully respects them.

(b) The jurisdiction of the Court of Justice of the EU

In keeping with the above-mentioned principle that EU law will continue to apply in the same way to the UK and its nationals and residents during the transitional period, Article 126 provides that the CJEU will retain jurisdiction over such matters during the same period. In addition, this provision would confer jurisdiction on the CJEU to hear disputes relating to the interpretation of the DWA itself. The UK has given its agreement to this provision.

The HL Select Committee expressed concern at the prospect of the court of one of the parties having jurisdiction over disputes involving the other party or its citizens, since “justice must not only be done, but should manifestly and undoubtedly be seen to be done” (paragraph 84 of the report). However, the HL Select Committee accepted that, “given that the transitional period will be relatively short, it would be too burdensome and time-consuming to establish a separate dispute settlement mechanism solely for the period of transition” (paragraph 146).

We share that view, even if the EU’s proposal in this regard is unusual. Time is now too short to negotiate another mechanism before October, the deadline set by the EU in view of the need to ratify the DWA before Brexit occurs six months later. While the EU’s proposal in this regard is unusual, it is not unprecedented: the Agreement between the EU and Switzerland on air transport confers jurisdiction on the CJEU with regard to disputes relating to its application. Of course, this concerns only a handful of air traffic companies.

In addition, it should be noted that as regards citizens’ rights (one of the most sensitive areas to be covered by the DWA), if the CJEU were to interpret the relevant provisions broadly, that would benefit the 1.5 million UK citizens resident in the EU27 as well as the 3.5 million EU27 expatriates in the UK.

The Select Committee’s disquiet was exacerbated by the fact that, according to Article 6(1)(a), the CJEU will without UK judges (paragraphs 135ff). From a psychological perspective, this is a problem. In reality, however, this will hardly make a difference in practice, since a very high percentage of cases have always been decided without the participation of a judge of the nationality of the Member State concerned.

We shall return to these issues in relation to the post-transitional period.

(c) “Interstate Disputes”

The term “interstate disputes” is used here to denote disputes between States or between States and an international organisation (in this case the EU).

Under the DWA, such disputes would continue to be heard by the CJEU. If the Commission believes that the UK is in breach of EU law, it can bring infringement proceedings under Article 258 TFEU; and a Member State can bring such proceedings under Article 259 TFEU.

By the same token, since the UK will be treated for most purposes as though it were a Member State (Article 122(6) DWA), it will be able to seek the annulment of an EU act just like any Member State; and it will also be able to initiate proceedings against a Member State under Article 259 TFEU.

For the reasons set out in Part II b) above, we agree with the HL Select Committee that these mechanisms should be retained during the transitional period.

Furthermore, as already mentioned, the DWA would establish a Joint Committee (Article 157, a “green” provision). Its tasks would include “resolving disputes that may arise regarding the interpretation and application of this Agreement” (Article 157(4)(c) DWA). This is a standard provision in agreements of this type.

The same cannot be said of Article 165 DWA, which would empower the EU to “suspend certain benefits deriving for the United Kingdom from participation in the internal market”, if the UK failed to respect a judgment in infringement proceedings brought by the Commission pursuant to Article 126 DWA read with Article 258 TFEU, or an interim Court order rendered in the context of such proceedings. This provision lacks reciprocity: the UK would not have any corresponding powers in the event of a failure by the EU to observe its obligations. In contrast, the suspension mechanism envisaged in Article 163(2) DWA with regard to the post-transitional period could be activated either by the EU or by the UK.

Article 165 is one of the provisions in the DWA on which the UK has not given its consent. We see no objection to this article provided that it is amended so as to be compatible with the principle of reciprocity.

III. The post-transitional period

The regime envisaged by the DWA for the period beginning 1 January 2021 is quite different. From that date onwards, most provisions of EU law will cease to apply, albeit with notable exceptions such as citizens’ rights and (assuming the UK concedes this) the issues relating to Ireland and Northern Ireland enshrined in the draft Protocol to the DWA. In particular, the UK is likely to leave the single market on that date.

(a) Pending cases and “historic” cases

According to Articles 82 DWA, the CJEU would retain jurisdiction over actions brought by or against the UK and references for preliminary rulings which are still pending on 31 December 2020.

Article 83 DWA would allow the Commission to lodge an application in infringement proceedings against the UK so long as the material facts occurred prior to the end of the transitional period. Equally, the UK courts could continue to make references for preliminary rulings, provided that the same condition is fulfilled.

The UK has not yet given its consent to either of these two provisions.

We are mindful of the finding of the HL Select Committee that:

“It is important that this continuing jurisdiction of the CJEU should only be for a reasonable, time-limited period: we urge the Government to ensure that there is a longstop for any claims that arise during the transition, so that cases relating to acts occurring during the transition cannot be brought indefinitely.” (paragraph 147 of the report)

On this approach, Article 82 seems to be acceptable and in any case it is hard to imagine what other solution could be devised: it would make no sense to transfer pending cases to another court or tribunal; and to close the files without providing a remedy would amount to a denial of justice.

If Article 83 were to be retained, it would have to be limited in time so that new actions could only be lodged, and references for a preliminary ruling made, during a certain period after the end of the transitional period.

(b) Other judicial proceedings

In essence, Article 151 DWA would enable the UK courts to make a reference for a preliminary ruling to the CJEU in cases which commenced at first instance within 8 years of the end of the transitional period. Together with the Irish/ Northern Irish issue, this is one of the two most sensitive matters and greater flexibility is therefore necessary. Having said that, on the basis of this provision, the CJEU would be delivering preliminary rulings twelve years or more after the end of the transitional period.

Article 153 DWA would go much further: infringement proceedings could be brought, and preliminary references made, for an unlimited period after 31 December 2020 with regard to the diverse sectors referred to in Part Three of the DWA (e.g. customs, VAT, intellectual property and judicial cooperation in criminal matters) and certain issues relating to the EU budget. To date, the UK has agreed to this provision only in so far as it concerns the EU budget.

In view of the particular sensitivity of citizens’ rights, Article 151 might be regarded as passing the test set out in paragraph I of the HL Select Committee’s report (see Part IIIa) above, but one can hardly say the same of Article 153.

For the reasons given by Carl Baudenbacher in his oral and written evidence to the Select Committee of the House of Lords,¹ we submit that jurisdiction over these matters should be conferred on the EFTA Court by “docking”. The EU can scarcely object to this solution: not only has it accepted the EFTA Court for Norway, Iceland and Liechtenstein (“the EEA-EFTA States”), but it has also proposed docking to Switzerland.

¹ respectively <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-enforcement-and-dispute-resolution/oral/77242.html> and <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-enforcement-and-dispute-resolution/written/81660.html>

The HL Select Committee rejected this idea on two grounds: first, the current jurisdiction of the EFTA Court is limited, since it does not cover such matters as justice and home affairs (paragraph 57); and second, that “docking” would make little sense unless the UK accedes to the EEA Agreement (paragraph 58). We beg to differ on both counts: there is nothing to preclude the jurisdiction of the EFTA Court being extended with regard to Brexit issues by agreement between the EU, the UK and the EEA-EFTA States; and “docking” would work just as well whether or not the UK becomes party to the EEA.

If this option were chosen, the UK would have to accept the authority of the EFTA Surveillance Authority, which would be able to bring infringement proceedings against it before the EFTA Court.

(c) The Joint Committee, the CJEU and possible sanctions

In addition, according to Article 162 DWA, either the EU or the UK may bring any dispute concerning the interpretation or application of this Agreement before the Joint Committee, which decides by mutual consent. Amongst other things, this would appear to cover conflicts arising out of divergences between the CJEU and the UK courts.

By virtue of Article 162(2) DWA, the Joint Committee would be empowered to “settle the dispute through a recommendation” but not to take binding decisions. According to Article 162(3) DWA, the Joint Committee may, at any point, decide to submit the dispute to the CJEU for a ruling which would be binding on both parties. Since a unanimous decision of the Joint Committee is required, the UK would at this stage have a right of veto.

The UK has not yet given its agreement to Article 162, but it seems acceptable to us. Indeed, the proposed mechanism corresponds to Article 111 of the EEA Agreement.

Article 105(2) EEA states that the EEA Joint Committee which also decides by unanimity “shall act so as to preserve the homogeneous interpretation of the [EEA] Agreement.” The question has arisen as to what “acting” means. In view of the principle of judicial independence of courts, it would be out of the question for the Joint Committee to overrule the EFTA Court’s judgment. In practice, conflicts have been resolved over time by judicial dialogue. In any case, Article 162(3) DWA does not require the EU – UK Joint Committee to act so as to preserve the homogeneous interpretation of the withdrawal agreement.

At the same time, Article 162 DWA goes further than Article 105(2) EEA in another respect. According to Article 162(4), if the dispute has not been settled within 3 months and has not been submitted to the CJEU by the Joint Committee, that dispute may be submitted to the CJEU for a ruling at the request of either the EU or the UK. The ruling will be binding on both the EU and the UK. That means that the EU would have the right to bring the matter before its own court unilaterally. For the UK, the CJEU would be the court of the other side which would necessarily lack impartiality. In our view, this is unacceptable. In the event of non-compliance with the ruling, the CJEU may impose a lump sum or penalty payment on the recalcitrant party.

(d) Lack of flexibility

Article 161 DWA provides: “For any dispute between the Union and the United Kingdom arising under this Agreement, the Union and the United Kingdom shall only have recourse to the procedures provided for in this Agreement.”

In principle, this provision is most welcome, since it would avoid the severe complications which would arise if either party brought proceedings before a forum not contemplated by the Withdrawal Agreement. However, it is conceivable that both the EU and the UK might prefer to submit a particular dispute to another recognised international court or tribunal of arbitration such as the Permanent Court of Arbitration.

Accordingly, we would suggest that, although the UK has already agreed to Article 161, thought might be given to amending it so as to enable the two parties to agree on another forum in specific cases, should they so wish.

IV. Concluding Remarks

Our conclusions are set out in the executive summary at the beginning. We take this opportunity to underscore once again the extreme urgency of the situation: the proverbial cliff-edge looms ever closer and will only be averted if the provisions on dispute resolution (and on Ireland and Northern Ireland) are finalised by October.