

Brexit negotiations likely to deal with EU court control - lawyers

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- Manner of departure crucial to court role
- Moment EC ceases to bring infraction key
- UK could establish relations with EFTA court

The extent to which the European Court of Justice and General Court (EU courts) maintain control over the UK post-Brexit will likely form a key part of the Article 50 negotiations, lawyers told *PaRR*.

“All will depend on how the UK exits and what will be in the Article 50 withdrawal agreement,” a source with knowledge of the matter commented.

The UK will have two years to negotiate a withdrawal from the EU once it has served official notice of its intent to leave under Article 50 of the Treaty on European Union.

A "clean break" Brexit – meaning that the UK would have no structural relationship with the EU whatever – would result in an immediate end to the authority of EU court judgments in the UK, according to Hogan Lovells partner Christopher Thomas.

If instead the UK and EU agree to a "Norway model", similar to the European Economic Area (EEA), then it is likely that the UK would agree EU court decisions should be binding from the date the new agreement is signed, he said.

The UK might also opt to be guided by future EU court judgments under an EEA-style agreement. Under this model the EU courts would not be entitled to bring infringement proceedings against the UK, however, and UK judges would not be able to refer questions to the EU courts. This is the status Norway currently enjoys.

The source said a fundamental question will turn on whether the UK decides to repeal the European Communities Act 1972 – the implementing legislation for its original European Community membership – in bringing Brexit about.

If this is the chosen path then how and when it does so, and what the repealing act says as to rights and obligations pre-dating Brexit will be key to any continuing juridical influence of the EU courts.

The source added that the way the EU courts dealt with European Coal and Steel Community cases – stemming from the original forerunner organisation of the EU – when that treaty expired in 2002, could be used as a guide by Brexit negotiators.

For infringement proceedings brought by the European Commission (EC) against the UK, the question will be whether the procedure before European Court of Justice reaches the point of judgment while the UK is still actually an EU Member State, according to Thomas.

State aid

The UK and EU might also opt for state aid control to form part of any new post-Brexit relationship. Sheppard Mullin's head of competition Jacques Derenne pointed out that South Korea has agreed to abide by EU state aid rules under its free trade agreement (FTA) with the EU.

Similarly, the FTA entered into between the EU and Ukraine in January 2016, provided for a domestic Ukrainian state aid control system and an independent authority to manage it on the basis of the EU state aid rules.

“That begs the question whether the UK might not also do so, even if enforcement would be less efficient than under EU law where the combination of national courts, [the European] Commission, and EU courts is quite powerful,” according to Derenne. This type of state aid control, using FTAs, would depend on the goodwill of both parties, Derenne said.

Whatever path is chosen for state aid and other infringement procedures, the thorny issue of the cut-off point of the court's jurisdiction will again be crucial in the negotiations, according to Covington lawyer Bart Van Vooren.

“The issue of the precise point at which ongoing procedures before the EU courts, and judgments given by courts will cease to have effect will need to be precisely determined as part of the agreement itself,” he said.

EC proceedings against UK companies will be totally unaffected by Brexit, since these will continue to need to comply with EU competition law in their activities affecting competition within the EU, he added.

As soon as the UK leaves, activities affecting competition only in the UK would not infringe EU competition law.

However UK judges may continue to consider influential EU judgments interpreting the directives underlying on-going UK legislation, according to Thomas.

Aside from the potential disentanglement with the EU courts, Brexit opens up the possibility of new court ties.

“Besides the likely exclusion of the EU courts, we just don't know what kind of court arrangements a 'Norway model' would mean for the UK,” Thomas said.

The EEA uses a special court set up by Norway and the two other non-EU countries involved – the EFTA Court – which provides advisory opinions on the interpretation of the EEA rules for their courts.

It also hears infringement proceedings against those countries and challenges to competition law and other decisions by the EFTA Surveillance Authority – which performs a role somewhat similar to the EC in this respect.

“Whether the UK 'Norway model' would look like this is just impossible to predict at this stage,” Thomas adds.

With no political role to play, the EU courts would take no active part in the Article 50 process itself.

A spokesman for the EU courts was unable to comment on the process.

by Jeremy Fleming-Jones in Brussels

- Agencies

- European Court of Justice
- EU General Court