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Escaping the jurisdiction of the Court of Justice for the European Union by EUXIT?

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*The Court of Justice for the European Union is the EU's ultimate arbiter on matters of EU law. As a supranational court, it aims to provide both consistent interpretation and enforcement of EU law across all 28 Member States and a clear process for dispute resolution when disagreements arise. The CJEU is amongst the most powerful of supranational courts due to the principles of primacy and direct effect in EU law. We will bring an end to the jurisdiction of the CJEU in the UK.(...)
" (White Paper on Exiting the EU, 2.3"*

Escaping the jurisdiction of the Court of Justice of the European Union (CJEU) is not just one of the goals professed in the White Paper on exiting the EU – it most likely qualifies as one of the Prime Minister's red lines for any so-called "Brexit Deal", next to free movement. After all, Court of Justice found some flag ship policies devised under Theresa May as Home Secretary to be incompatible with EU law, lastly [-on 21 December 2016](#) - the Data Retention Regulations, also dubbed "Snoopers' Charta". But just how realistic is it to achieve this aim?

What does the jurisdiction of the CJEU comprise?

The Court of Justice ensures "that the law is observed in the interpretation and application of the Treaties" (Article 19 TEU). The term "the Treaties" refers to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), and comprises instruments which have the same value as the Treaties, including the Charter of Fundamental Rights of the European Union (CFREU, see Article 6 TEU) In referring to "the law", Article 19 TEU confirms that the Court not only draws on the Treaties themselves, but also on general principles of law. These are ultimately derived from natural justice, while drawing on the common traditions of the Member States and the international treaties to which the EU and the Member States are bound. The principles of direct effect and supremacy of EU law over national law have been derived from those general principles and the purposive interpretation of the Treaties themselves.

In reviewing legality of legislative acts and any other act of the EU institutions, the Court also decides whether adoption of decisions, directives and regulations (Article 249 TFEU) is beyond the Union's powers (*ultra vires*), and whether EU legislation and other institutional acts comply with the Treaties and the CFREU. Legality control is exercised in direct actions by the EU institutions and natural persons to which an act is addressed, or under certain qualifications also if they are otherwise affected (Article 263). National courts may also refer a case to the CJEU in order to question the legality of EU legislation (Article 267 (1) b). The review of the EU's own "snooper charter", an earlier version on the Digital Rights Directive, in the [Digital Rights Ireland](#) case. Interpretation of the Treaties as well as interpretation of EU legislation (secondary law), likewise is the prerogative of the EU Courts (Article 267 TFEU). Most importantly in relation to the UK's future relationship with the EU, the Court of Justice also has jurisdiction over any agreements of the EU under international law. Under Article 218 (11) TFEU any

Member State, the EU Commission, the European Parliament and the Council can apply for an opinion by the Court on draft agreements with other states or international organisations. The opinion is binding, and the EU cannot conclude any agreement rejected by the Court.

What makes it one of the most powerful courts in the world?

These Treaty provisions confirm principles which the Court of Justice has developed in its nearly 60-year history. Among the most important ones is the principle of autonomy of European Union law, based on the principle of the EU's special character as a supranational legal order and a "Community of Law", from which the principles of direct effect and supremacy of European Union law derive. Under this principle, the content and authority of European Union law cannot be derived from national law, but instead flow from an autonomous legal order. The sole responsibility of the Court of Justice for interpreting EU law as well as for invalidating EU legislation is indispensable for this principle to prevail. Accordingly, the EU, its institutions and its Member States must not enter into legally binding agreements endangering this principle, are required to interpret any legal obligations they may enter into in line with this principle and sever any legal obligations that may endanger it.

In how far will the Court's jurisdiction continue to affect the UK?

The Court's wide ranging competence and principled stance on the autonomy of EU law make it quite unlikely that its jurisdiction will become irrelevant for the UK after it withdraws from the EU.

a) Extraterritorial application and effects of European Union law

Most importantly, the Court's jurisdiction extends beyond the territory of the European Union in applying and interpreting European Union law. Accordingly, UK citizens and businesses will be subjected to its jurisdiction independently from EU membership status, just as citizens and businesses from the US, for example.

The most prominent examples of EU law's extraterritorial effects stem from EU competition law. The EU Commission has pursued, for example, the US based [Microsoft corporation for abuse of its dominant market position](#) (Article 102 TFEU) by limiting the access of Microsoft customers to software by competing companies all over the world, not just in the EU. The ECJ case law became decisive for confirming the fines the Commission imposed, and ultimately shaped the conditions for programming the Windows system programme. State aid provisions, another section of EU competition law, do not apply beyond the EU's territory, Nevertheless, they prevent EU Member States from granting foreign companies tax advantages that distort the competition within the Internal Market. As a consequence, the tax bill of the US company Apple is [presently disputed](#) before the Court of Justice.

Secondly, EU legislation protects rights of EU citizens even if they move beyond the EU. As a consequence, the Court held the lack of data protection for Facebook accounts to be in violation of the EU's data protection directive, ([Schrems case](#)) a ruling which has been relied upon in challenging agreements between the EU and other countries on [Passenger Name Recording](#). Thirdly, EU law also protects rights of non-EU citizens, including UK citizens in the future. The emerging [case law on matters of asylum](#) as well as other aspects of immigration law is testimony for the relevance of EU based human rights protection in this field, even though [human rights lawyer take issue](#) with the scope of human rights protection. The Court's protection of rights conveyed by directives in the field of consumer law, employment protection and anti-discrimination law benefits EU and non-EU citizens alike.

These three examples demonstrate that the "most powerful court" of the world will remain relevant for UK citizens and businesses after the UK's withdrawal from the EU, although these cases do not directly bind courts in states outside the EU.

b) Association agreements in Europe

[Some authors](#) suggest that an association agreement between the UK and the EU would be the most advantageous basis for future relations. As far as the CJEU's jurisdiction is concerned, we must distinguish between two different types of association agreements.

The early association agreements, for example with Turkey ([1963](#)), do not provide for their own court system. Accordingly, they are encompassed by the Court's doctrine that [international agreements of the EU become part of the EU legal order](#), and are thus subject to the Court's jurisdiction. However, this only applies to the supervision of the application of these agreements within the EU, by its Member States and private actors as far as the provisions are implemented into national law or have horizontal effect. A large proportion of the relevant case law evolves around equal treatment rights of citizens of those association states once they have entered the EU, and does not bind courts beyond the EU.

Younger type association agreements provide for their own court system, or a specific arbitration system. The [EEA agreement](#) of 1994 was the first example of this. It aims to extend the EU Internal Market as well as "flanking and horizontal policies" including social and environmental policy to Iceland, Liechtenstein and Norway. The first draft of the agreement foresaw an EEA court, which would interpret the EEA substantive law, with an obligation to respect the existing body of ECJ case law and provide homogeneity. The [ECJ held](#) that the draft agreement was not compatible with EU law because it did not provide a role for the ECJ to safeguard that the interpretation of identical rules in the EEA agreement and the EEC Treaty would remain homogeneous. The [amended draft](#) provided for today's [specific EFTA court](#) which oversees the EFTA states' compliance with the EEA agreement. While compliance of EU Member States with the EEA agreement remains within the ambit of the ECJ, a reference procedure ensures that the [ECJ will be able to give a ruling on any legally binding interpretation of those EEA](#) agreement rules that are congruent with EU law.

The more recent generation of the EU's Deep and Comprehensive Free Trade Agreements with neighbourhood states provide for similar rules. The Association Agreement with [Ukraine](#) constitutes the latest of a new type association agreements with EU neighbourhood states aiming at deep and comprehensive trade relations. While it is fair to say that there are a number [of differences between the UK and Ukraine](#), the agreement is an interesting example. because it not only aims at access to markets in goods and services as well as freedom of establishment, while leaving free movement of persons to one side, but also contains a programme of regulatory approximation of Ukraine towards the EU. This important precondition for accessing service markets and realising freedom of establishment is often said to be completed already in the case of the UK through the long period of EU membership. At first glance, the agreement also seems to confirm the White Paper position on dispute resolution avoiding any input of the ECJ: amicable dispute solution prevails (Article 305), failing which a specific arbitration panel is composed for each dispute. Compliance with the arbitration panel ruling is a legal obligation of the state parties, without any direct effects on citizens (Article 321). However, in the sphere of regulatory approximation, arbitration panels will have to defer to the Court of Justice of the European Union, when it comes to interpretation of any obligation which is defined by reference to EU law. The ruling is binding on the arbitration panel. This provision ensures the coherence of EU law, avoids contradictions in the law governing the Internal Market, and safeguards the Court of Justice's exclusive jurisdiction on the content of EU law.

In summary, the specific role of the Court in safeguarding the autonomy of EU law demands that access to the Internal Market requires accepting the jurisdiction of the CJEU over the interpretation of the relevant provision of any association agreements, although the resulting arbitration awards may

not be directly effective within the state parties. Thus, if the UK wishes to maintain access to any part of the Internal Market, it cannot avoid the jurisdiction of the CJEU at the same time.

c) Arbitration under CETA as a model to escape ECJ jurisdiction?

The White Book on Exiting the EU explicitly cites the recent [Comprehensive Economic and Trade Agreement with Canada \(CETA\)](#) as a model on how best to avoid ECJ jurisdiction. The CETA agreement is a traditional free trade agreement under the WTO rules, and does not offer access to the EU Internal Market or foresee policy approximation in any way similar to the Association agreements discussed above. Nevertheless, CETA goes beyond the WTO treaties in several aspects, including, but not limited to, service provision with related movement of persons, movement of persons for business purposes, mutual recognition of qualifications as well as providing for direct investment, and covers areas where there has been no progress within the WTO context, including but not limited to public procurement and financial services. The question how external trade agreements will be adjudicated in the future, and how the prerogatives of the Court of Justice are safeguarded in the process will be decided in the process of CETA ratification, which is not yet completed.

The CETA agreement provides for arbitration as the main dispute resolution procedure, prioritising amicable solutions. Parties can choose to resolve their disputes by agreeing to disagree, and impose interim sanctions to ward off any perceived economic disadvantages caused by the violation of the Agreement. As adequate for a mere free trade agreement, establishing a preferential tariff regime within the WTO framework, the CETA is framed in the language of international treaties, and does not necessarily convey individual rights on citizens and businesses. This is advantageous for its acceptance under EU law. The Court of Justice has not opposed the EU's accession to the WTO, because the Dispute Settlement provisions do not constitute an equivalent to a judicial procedure. This is congruent with the fact that the WTO treaties [do not create directly effective law](#), and do thus not enjoy any status within the EU legal system. Similarly, CETA states explicitly that its provisions are not legally binding beyond the signatory states. It thus lacks direct effect and primacy, which rules out one potential source of conflict between CETA dispute settlement and ECJ jurisdiction.

CETA entails two different dispute settlement procedures. The general procedure in chapter 29 is based on WTO principles, and has been praised for providing transparency in the arbitration process. As under WTO law, any decision by an arbitration panel lacks direct effect in the national legal orders. The sanctions can be imposed by the signatories by declaring temporary suspending obligations. For example, the aggrieved state party may impose tariffs or interrupt other economic cooperation. The enforcement thus relies on the mutual economic interest in continuing the cooperation. A specific procedure applies for direct foreign investment. Under chapter 8, investors may initiate a dispute procedure before the Tribunal, which is established by the CETA Joint Committee. The proceedings can be opened against one of the parties (i.e. against Canada or the EU) if they consider that their interests have been affected by non-compliance of Canada or the EU with chapter 8. The remedies to be achieved through these proceedings comprise monetary damages as well as restitution of property (Article 8:39). This alone constitutes a problem under EU law, which provides that any damages against the EU must be decided upon by the Court of Justice (Article 340 TFEU). Further, the Tribunal is not prevented from interpreting EU law or Canadian law, which it treats as a matter of fact. While the Agreement states explicitly that the parties are not bound by the Tribunal's interpretation, the prospect of diverging interpretations of EU law by the Tribunal and the ECJ is not addressed (Article 8:31). Further, the determination of defendant (whether this is the EU or a one of its Member States) must be completed within 50 days, which may exclude adequate involvement of the Court of Justice (Article 8:21).

As a consequence, there remains [some doubt](#) whether the CETA rules comply with EU law. So far, the Court of Justice has not been asked for an opinion on CETA. However, CETA is not legally effective yet, because not only the EU, but also all its Member States have to sign it. During the long process of obtaining Member States' signatures, the ECJ may still become involved, and a change of the CETA agreement's judicial procedures may be required. The final settlement of the CETA will also be decisive for the role of investment courts in the [EU's new external trade strategy](#), which the Commission is presently consulting upon. It is thus not clear presently whether the UK can avoid the ECJ's jurisdiction through pursuing the "CETA" option for its future relations with the EU.

ECJ Jurisdiction on the withdrawal agreement and any agreement(s) on the future relation of the UK to the EU

Before any question on legally binding rights emerging from the future relation between the EU and the UK can be resolved, an agreement between the EU and the UK on this relationship needs to be established. Within the withdrawal procedure, two agreements are foreseen: the agreement on the withdrawal under Article 50 TFEU and one or several agreements on the future relationship between the EU and the UK. Because of the complexity of unravelling more than 40 years of EU membership, it is generally assumed that a specific agreement for a transitional period is needed.

All these agreements also need to comply with European Union law, which is ensured by the procedure under Article 218 (11) TFEU mentioned above. The withdrawal agreement is generally governed by Article 50 TFEU. It is concluded between the EU and the UK, and only requires a qualified majority in the Council. Article 50 TEU provides that the withdrawal agreement is negotiated under Article 218 TFEU. Accordingly, the Court of Justice should also have jurisdiction to give a binding opinion on the withdrawal agreement, as indicated by its president [Koen Lenaerts](#). Any transitional and final agreement on the UK's future relationship with the EU will also be subject to the procedure under Article 218 (11) TFEU. Since each Member State, as well as the European Parliament (and the other EU institutions) can raise such a claim, it is not at all unlikely that the Court will have its opportunity to adjudicate the UK's EUXIT.

Conclusion

Overall, the chances of the UK to escape the ECJ's jurisdiction are very slim if the future relationship resembles the agreements of the EU with its neighbouring countries in any way. Depending on whether and how the CETA enters into force, its dispute resolution provisions may or may not offer a model for an EU trade agreement avoiding the jurisdiction of the Court of Justice. This would come at the price of maintaining a rather distant relationship to the EU's internal market, though. Alternatively, the subjugation to references to the Court of Justice under the model first established by the EEA Agreement is still available. This does not offer the perspective of ECJ case law becoming fully irrelevant for the UK. However, the rulings of the EFTA court and the dispute settlement bodies under the Ukraine DCFTA are not directly effective in the law of the signatory states. Accordingly, this solution would remove some of the concerns the former Home Secretary may have. Life within even the smallest part of the Internal Market will, however, not be possible without being subjected to the rule of law, which in agreements with the EU also is safeguarded by the Court of Justice.