

Brexit: Time Is of the Essence

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Why the Involvement of the ECJ May Become a Stumbling Block

On 19 March 2017 the UK delivered its notice to leave the European Union (EU) pursuant to Article 50 of the Treaty on European Union (TEU). Such notice started the two-year “sunset period”, at the end of which the UK will cease to be a member state of the EU (subject to potentially three exemptions).

The negotiation of the Withdrawal Agreement started in June 2017, with the EU having granted a mandate to the negotiators for so-called “Phase 1”, which shall deal with ⁽ⁱ⁾ Citizen’s Rights in the EU27 and the UK, (ii) the financial settlement and (iii) the relationship between Northern Ireland and the Republic of Ireland.

Time is of the essence for the negotiations since the agreements on Phase 1, as well as the potential Phase 2 on the future trading relationship, must be finalised well before 29 March 2019, in order to enable the European Council, the European Parliament, the Parliaments of all EU27 Member States and the UK Parliament to adopt and ratify the negotiation results.

One major stumbling block that must be removed in time is the issue of how the European Court of Justice (ECJ) will be involved in the Withdrawal Process.

There is the obvious and well-discussed issue of what role the ECJ will be given under the Withdrawal Agreement and the Future Relationship Agreement. In that respect the Department for Exiting the European Union has issued on 23 August 2017 a position paper on Enforcement and Dispute Resolution. It needs to be seen how the EU27 will react to the statements made therein.

However, there is another, rather hidden, undiscussed and unresolved second aspect:

It is a common theme for the EU and its member states to obtain Opinions from the ECJ on the constitutionality of agreements that the EU contemplates to enter into with other states. Such Opinions are obtained prior to the conclusion of such international agreements. One major aspect of such Opinions obtained from the ECJ is whether the system of judicial review contemplated in the relevant agreement is compatible with the EU legal order and sufficiently reflects the competences of the ECJ. Striking examples for such Opinions are ECJ Opinion 1/91 and 1/92 in respect of the Treaty on the European Economic Area (dealing mainly with the system of dispute resolution), ECJ Opinion 1/00 in respect of the Multilateral Treaty on the European Common Aviation Area (also dealing with the system of dispute resolution) and ECJ Opinion 2/13 on the (failed) accession of the EU to the European Convention for the Protection of Human Rights (where the ECJ Opinion made the accession fail, *inter alia*, on the grounds of the contemplated system of dispute resolution being incompatible with the TEU and TFEU).

Thus, the crucial issue is: Will the EU27 ask the ECJ to render an Opinion in respect of any draft Withdrawal Agreement and Future Relationship Agreement, in particular, with having the proposed system of dispute resolution being reviewed by the ECJ? How would such a request for an ECJ Opinion fit into the timetable until 29 March 2019?

Of course, there is also the issue of whether there is a competence of the ECJ to render an Opinion in respect of the Withdrawal Agreement and the Future Relationship Agreement at all. The legal basis for such ECJ Opinions is Article 218 (11) TFEU. Article 50 TEU which deals with the Brexit procedure obviously does not expressly refer to Article 218 (11) TFEU.

However, there are number of legal arguments for stating that it cannot be excluded that the ECJ will, if called upon by the competent applicants on the EU27 side, apply Article 218 (11) TFEU either directly or in *analogy*¹ to argue for its competence to render an opinion on the legality and constitutionality of any draft Withdrawal Agreement and Future Relationship Agreement prior to such agreements being entered into.

¹ insofar as the principle of analogy being applied by the ECJ is concerned, see *Brexit, Exit from Brexit and the loss of British Privileges as a legal consequence*