



HM Government

Ongoing Union judicial and administrative proceedings

POSITION PAPER

Position Paper by the United Kingdom

Ongoing Union judicial and administrative proceedings

This paper outlines the United Kingdom's (UK) position with regard to judicial and administrative proceedings that are ongoing at the point of exit from the European Union (EU).

Legal cases pending before the CJEU

1. Leaving the EU will end the jurisdiction of the Court of Justice of the European Union (CJEU) in the UK. On the day of withdrawal, there will be a number of cases before the CJEU which involve the UK as a party, or which have originated as preliminary references from the domestic courts of the UK.
2. Although the consequences of the UK's exit will render some cases moot, for the rest, a means will be needed of ensuring a smooth and orderly end to the jurisdiction of the CJEU in the UK.

Issues for discussion

Types of cases

3. Pending cases in which the UK, or UK natural or legal persons, could have an interest are of four principal types:
 - cases initiated by the UK, including:
 - requests made by the UK for an Opinion on a proposed international agreement under Article 218(11) of the Treaty on the Functioning of the European Union (TFEU);
 - direct actions by the UK against another Member State under Article 259 TFEU or disputes submitted to the CJEU by special agreement under Article 273 TFEU;
 - direct actions brought by the UK against EU institutions seeking annulment of EU acts or failure to act under Articles 263 and 265 TFEU;
 - claims for non-contractual liability brought by the UK under Article 268 TFEU; and
 - direct actions concerning measures adopted by the Board of Governors and Board of Directors of the European Investment Bank (EIB), under Article 271(b) and (c) TFEU.
 - cases initiated against the UK, including:
 - direct actions against the UK by the Commission concerning a proposed infraction under Article 258 TFEU, or proposed fines for infraction under Article 260 TFEU;
 - direct actions against the UK by another Member State under Article 259 TFEU or disputes submitted to the CJEU by special agreement under Article 273 TFEU; and

- direct actions concerning the fulfilment by the UK of obligations under the Statute of the EIB, under Article 271(a) TFEU or fulfilment by the national central bank of obligations under the Treaties and Statutes of the European System of Central Banks and the European Central Bank (ECB), under Article 272(d) TFEU.
 - cases which originated in, and were referred from, the domestic courts of the UK, Gibraltar or the Sovereign Base Areas, including preliminary references originating from courts in the UK under Article 267 TFEU.
 - cases initiated by UK natural or legal persons, including:
 - direct actions brought by a UK natural or legal person against EU institutions seeking annulment of EU acts or failure to act under Articles 263 and 265 TFEU; and
 - disputes between the EU institutions and its servants who are UK nationals, under Article 270 TFEU.
4. Many of these types of case occur relatively rarely and, in practice, the number of UK cases is low. For example, in 2016, there were 23 preliminary references made by courts in the UK, and one infraction against the UK.

Interventions and observations by the UK

5. In addition to the cases above, the UK may also have notified intention to intervene or submit observations, or have actually intervened or submitted observations, in cases before the CJEU which have not yet reached a final judgment.

Definition of 'pending'

6. The cases in question will be at a variety of different stages of proceedings. To ensure certainty as to which cases are covered by an agreement on the treatment of pending cases, criteria will be needed to determine, according to the stage of proceedings reached, which cases should be considered as pending before the CJEU.

Cases involving direct actions by UK natural or legal persons

7. The nationality or citizenship of natural or legal persons bringing direct action is immaterial. Cases brought by UK persons will therefore not, per se, be affected by the UK's withdrawal from the EU. Where judgment is reached, it is directed against the relevant EU body against whom the action is taken.
8. While withdrawal may affect the extent to which UK natural and legal persons are affected by acts of relevant EU bodies, where they are affected, UK natural and legal persons would continue to be able to take such direct actions under Articles 263 and 265 of the TFEU.

The UK's relationship with the CJEU

9. The UK as a Member State has a particular relationship with the CJEU. This means, for example, that the UK nominates a judge to both the Court of Justice and the General Court, and that there is also a UK Advocate General at the CJEU. It also means that lawyers registered in the UK are afforded the right to appear before the CJEU. The position in respect of these issues for any period during which pending cases are to be resolved would need to be addressed.

The UK's approach

10. The UK has made clear that leaving the EU will end the jurisdiction of the CJEU in the UK, a position consistent with international legal precedent, placing the UK in the same position as all other third countries, including those with which the EU has deep and close relationships. At the same time, the UK is committed to minimising uncertainty and disruption for individuals or businesses, including that arising from changes in the treatment of cases pending at the time of withdrawal.
11. Discussion of the treatment of pending cases should take into account the interests of those who have taken cases. The UK recognises that beyond a certain point in proceedings, where considerable time and resources have been invested in CJEU proceedings, it may well be right that such cases continue to a CJEU decision. Detailed technical issues would need to be resolved, and the UK will seek to agree with the EU:
 - the types of case that would be in scope of any agreement in this area;
 - the point at which a case can be considered to be pending;
 - the status of any decision reached by the CJEU;
 - the status of any interventions which the UK has notified; and
 - the role of UK-appointed judges and Advocate General in the Court and the role of UK lawyers appearing before the Court.
12. Discussions should be guided by the following key principles:
 - the process for ending CJEU jurisdiction in the UK should be orderly and fair to those who find their cases before the CJEU at the point of withdrawal;
 - certainty should be provided as to the cases that are in scope - it ought to be possible to identify on the day of withdrawal precisely which cases are pending and so have certainty about the point at which pending cases have been finally resolved;
 - the UK is leaving the EU and the jurisdiction of the CJEU in the UK will end - in particular, the purpose of continuing cases which are aimed at incentivising compliance with EU law when EU law will no longer apply to the UK must be considered;
 - to the extent that CJEU jurisdiction continues for a period in respect of a defined set of cases, the UK's role before the Court should be retained - the position of the UK's judges, Advocate General and UK registered lawyers should be addressed; and
 - the approach in respect of pending cases should be without prejudice to any specific discussions, agreements or arrangements in respect of other areas of negotiations, including on citizens' rights and the future partnership between the UK and the EU.
13. There should be certainty as to which cases are in scope of any agreement on pending cases. The UK does not consider that the CJEU should remain competent to rule on cases on which it has not been seized before the day of withdrawal, even where the facts arose before withdrawal. This would lead to an uncertain environment in which it would

be impossible to predict how long the CJEU would continue to issue judgments in respect of the UK. That is not in the interests of the autonomy of domestic law in the UK.

14. Of course, that does not mean that those cases should not be dealt with fairly and impartially. Where those cases concern individuals or businesses, the domestic courts in the UK will continue to determine cases in accordance with UK law as it stood at the time the facts arose, impartially, fairly and independently. The UK will provide certainty domestically by incorporating the EU *acquis* and CJEU case law into domestic law on exit. This historic case law will be given the same binding, or precedent, status in UK courts as decisions of the UK Supreme Court, which can, where appropriate, depart from its previous judgments.

Administrative procedures before the Union institutions, offices and agencies

15. The UK has made clear its aim of securing a smooth and orderly withdrawal from the EU. At the time of withdrawal, there will be a number of administrative procedures being undertaken by institutions, offices and agencies of the Union which concern the UK or UK natural or legal persons.
16. It is important that there is agreement between the UK and the EU as to the precise administrative procedures that should be within scope of any discussions. In addition to the categories identified by the Commission's negotiating directives, the UK will strive for clarity on the position in respect of other administrative procedures. Examples of administrative procedures that may be in scope include the following:
 - proceedings on competition and antitrust under Regulation 1/2003;
 - procedures on concentration of undertakings/mergers under Regulation 139/2004;
 - decisions in respect of aviation enforcement under Regulations 216/2008 and 1008/2008;
 - audits and decisions concerning food safety under Regulation 882/2004; and
 - investigations by the European Ombudsman in respect of complaints made by EU nationals resident in the UK.
17. A shared understanding as to which administrative procedures are within scope of this discussion will be required.
18. Different administrative procedures will follow different processes and involve different stages. It will be important to determine the implications of the UK's withdrawal for each type of procedure, and each stage of that procedure. A single approach is unlikely to be appropriate or desirable.
19. Moreover, the UK has been clear that it will seek a new, deep and special partnership with the EU. There are linkages between the approach taken to ongoing administrative procedures and the form of that future relationship. This should be taken into account during discussions.
20. It is important that there is clarity as to the status of these administrative procedures, in order to ensure certainty for those involved in or affected by them. Further discussions with the EU are required to identify the full scope of those procedures and the appropriate approach in respect of each.