General Issues of Post-Brexit EU Law

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Summary: The issue of the United Kingdom's (hereinafter referred to as: UK) exit from the European Union (the so-called Brexit) means a turning point both in the history of the European integration and also of the United Kingdom. Moreover, Brexit results in the changes of both legal systems. As European Union (hereinafter referred to as: EU, Union) affects national legal systems of the member states via its legal acts, and the rest of the member states have continental legal systems, the withdrawal of the United Kingdom from this supranational international organization necessarily causes some changes of British law. British legal system − based on common law traditions − also took impacts on legal institutions and Union legal acts which may change after the exit of the UK. The paper highlights the UK's general impact on EU policies, having a regard to some special fields of harmonization as well.

Keywords: Brexit, withdrawal of a member state, Article 50 TEU, British impact on EU law

1. Introduction

United Kingdom has always fitted uneasily into the EU's framework. In the very beginning, shortly after the European Economic Community (hereinafter referred to as: EEC) was established in 1957, the United Kingdom applied to join it in 1962. However, France vetoed its application. In 1968, British prime minister, *Harold Wilson*[1] submitted a new application for accession, but this also failed due to *Charles de Gaulle*'s[2] political ambitions[3]. After a government change in

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1 James Harold Wilson was the prime minister (from Labour Party) between 1964-70 and 1974-76.

2 Charles de Gaulle was the French prime minister until 1969. The the first two British application was denied on behalf of the EEC, because of his veto.

3 For more information about relationship of De Gaulle and the United Kingdom, see: CHOCHIA, Archil; KERIKMÄE, Tanel and RAMIRO TROITIÑO, David. De Gaulle and the British Membership in the European Communities. In RAMIRO TROITIÑO, David; KERIKMÄE, Tanel; CHOCHIA, Archil (eds). *Brexit, History, Reasoning and Perspectives*, Springer, 2018, pp. 83-98.

the UK, *Edward Heath*[4] conservative prime minister renegotiated the accession at the beginning of the 1970's. Finally, after two denials, the third attempt of accession to the EEC was successful, and the UK became a member state of the EEC from 1 January 1973. Shortly before the accession, a *"clear position was taken in the United Kingdom, assuming that the United Kingdom could withdraw from the EC after a new referendum"*[5].

At this point, it is important to mention that the UK became a member state not just after it was rejected twice, but 16 years after the integration was founded. Thus the UK could join to fix framework, ready conditions and it's emphasis – in theory – was less than of the founding members. This became the part of the UK's mentality and attitude in the whole integration, sealed the British commitment in the process. Moreover, the support of the accession in the UK was never overwhelming. The oil crisis of the 1970's, the economic relapse strengthened the isolation rather than the integration. In 1974, Labour Party *Harold Wilson* became the prime minister again. The manifesto of the Labour Party included a referendum on EEC membership in case of winning the national elections. Thus, in 1975, the British hold the first Brexit-referendum, in which those, who wanted to remain in the EEC, won.[6]

From then, until the second Brexit-referendum in 2016, the question of the membership did not raise again. However, the British attitude towards the integration project was different from the continental one.[7] On the background of this process – among other reasons such as the abovementioned "hard-accession" – the different legal culture and thinking, lack of mutual trust in legal institutions may hide. During the decades of the British membership, *"population and political elites were more skeptical about whether a stronger or more centralized Europe was desirable"*[8]. Strong euro-skepticism, isolation and politics

[4] Sir Edward Richard George Heath British prime minister from Conservatives, between 1970-74. He was the leader of the Party between 1965-75.

[5] HARHOFF, Frederik. Greenland's withdrawal from the European Communities. *Common Market Law Review*, 1983, Vol. 20, p. 28.

[6] On 5 June, 1975, the turnout was 64,62%, where the 67,23% voted in favor of remaining in the EEC.

[7] That attitude could be understood also in relation to the British engagement in the process of introducing the right to withdraw as they supported the first version of the mechanism which ensured the complete freedom of withdrawal for the member state. For further information on the process and interpretation of the right to withdraw, see: CIRCOLO, Andrea; HAMUĽÁK, Ondrej; BLAŽO, Ondrej. Article 50 of the Treaty on European Union: How to Understand the 'Right' of the Member State to Withdraw the European Union? In RAMIRO TROITIÑO, David; KERIKMÄE, Tanel; CHOCHIA, Archil (eds). *Brexit, History, Reasoning and Perspectives*, Springer, 2018, p. 207.

[8] GELTER, Martin. Introduction, EU Law with the UK – EU Law without the UK. *Fordham International Law Journal,* 2017, vol. 40, issue 5, p. 1328

were supporting factors of Brexit, complemented with the specialties of the legal culture and economic system all together could lead to the current situation. The UK is unique in every aspect compared to other member states. Its uniqueness could be defined with a wide range of features from cars with the steering wheel on the right side; or constitutional monarchy as a form of government in a Unitarian state; market-making economic attitude; or to precedent-law traditions, etc. All of these could be hardly understood from a truly continental perspective.

The United Kingdom – therefore – kept its specialties within the EU as well. Due to their "thinking advanced" politics, they could link opt-outs to policies, such as Schengen-zone or criminal law cooperation instruments, Euro-zone, etc., which also took role in differentiating the levels of cooperation within Europe[9]. On the other hand, in other areas of integration, the United Kingdom was a driving force, influenced EU policies and participated in shaping EU law. These areas are mainly: financial law, insolvency law, company law, competition law, privacy law, equality law (broadly: anti-discrimination law), etc. Besides these areas, the UK was a force in cross-border environmental issues, and its special common law legal system affected the Luxembourg judicial style. This impact could remain after Brexit as the judicial system is already developed, and secondly, due to the remaining common law countries of the EU, such as Ireland and the mixed common-continental law Malta will still have their professionals in Luxembourg. In the following, I attempt to highlight the UK's general impact on EU policies first. Then, I summarize three special fields of EU Law, which evolved upon British (more broadly on common law) legal traditions.

2. The UK's influence on EU Law

The British impact on Union law could be separated into general and special issues. Common law and the continental law could affect each other back and forth. That is the general part of the British influence on integration law. Some areas of European cooperation, common policies or strategies could be affected by the British way of thinking, these are the special issues. As European Law is valid in all of the twenty-eight member states in general, member states had to introduce an opt-out system to avoid the accession to integration fields to what they did not find acceptable – without preventing the other member

[9] For further information about the differentiation and multi-level integration paradigm, see: KEEDUS, Liisi; CHOCHIA, Archil; KERIKMÄE, Tanel and RAMIRO TROITIÑO, David. The British Role in the Emergence of Multi-Speed Europe and Enhanced Cooperation. In RAMIRO TROITIÑO, David; KERIKMÄE, Tanel; CHOCHIA, Archil (eds). *Brexit, History, Reasoning and Perspectives*, Springer, 2018, pp. 187-198.

states to cooperate if they find it acceptable. Thus, occasionally, member states may negotiate certain opt-outs from legislation or treaties, meaning that they do not have to participate in certain policy areas. Currently, only four states have such opt-outs. Among that states, the UK has the most opt-outs, numerically, four. Denmark – involving Greenland, which country was the first exited member[10] of the European Communities in 1985 − has three opt-outs. Ireland has two opt-outs, and Poland has one opt-out. The system of opt-outs in an integration area could be understood as a way of isolation, or rather a lack of trust towards common policies.

The opt-outs for the UK could serve as a bastion of sovereignty against integration, and due to different legal traditions and legal thinking, the continental member states accepted the unique British way during the decades. Cardinal issues of criminal cooperation, such as Schengen Agreement, the Area of Freedom, Security and Justice miss the UK as a party, such as Economic and Monetary Union, or the EU Charter of Fundamental Rights. Integration process in those fields to which the UK did not accede may fasten after the withdrawal. Due to the opt-outs of the UK, British legal traditions could not affect the conditions and framework of cooperation on these areas. However, creating an extraordinary situation with an opt-out, keeping the member state far away from the integration base an attitude which could impact the area(s) indirectly. The message of opting-out might have strong political consequences – especially in cross-border criminal cooperation. Deciding to which common policy does the member state join may encourage other member states to select among desirable and less desirable policies which – in the long-run – may impact the future of the whole integration project. Therefore, opt-outs able to have an indirect effect on EU integration, while opt-ins are direct tools in shaping EU policies.

Common law traditions, precedent law, legal institutions, values, and interpretation necessarily complemented the continental ones which together structured the European legal thinking and its results: the EU Law. The UK linked opt-outs to the abovementioned cooperations on the field of public law, while it participates in many civil law cooperation instruments[11]. This highlights the British political attitude towards the common European public laws which necessarily decrease national powers – such as public prosecution, police forces and indirectly, the sovereignty and autonomy of national legislation. Private law cooperation is and was more acceptable than public law, as mainly private persons were and are involved in the relationships, and not the state institutions themselves.

[10] Greenland was the member of the EC ont he right of Denmark and not on its own right.

[11] Eg. Brussels I and II regulations

2.1. Post-Brexit EU company law

British voice in EU legislation might be sorely missed post-Brexit in some areas. According to *M. Gelter* and *A. Reif "legal harmonization on company law has possibly been the area of private law most affected by the EEC/EC/EU"* [12]. Shortly after the British accession, the UK behaved as a brake on company law harmonization. This time, German law was more influential. During the 1990s and 2000s EU company law became more focused on capital markets and in this process, the "*UK law became a model*"[13] for harmonization, especially on the fields of the board of directors and the issue of legal capital. However, according to *Gelter* and *Reif*, UK membership was irrelevant in this process as the UK did not take any measures to export its model in Continental Europe. Thus, post-Brexit capital markets will remain the same as it is now. The question is that the process would have been the same without the membership of the UK. Possibly not, as development on EU company laws needed a good example and the UK served it. On the other hand, the company law in the UK[14], especially that regulates the corporate citizenship may change post-Brexit, depending on the mode of being "divorced" from the EU (hard or soft), with an agreement or without an agreement, and in case of having a withdrawal treaty, depending on its content. Assuming a hard Brexit, the freedom of establishment as a governing principle will not operate, thus the "*UK loses its attraction as a destination for cross-border restructurings*"[15]. This seems to affect only the British internal situation. However, the economic consequences may reach the member states remaining in the EU, due to the spillover-effect. Therefore, it is worth to take into account the future of EU corporate law without the UK when it comes to the drafting of the withdrawal treaty.

2.2. European financial market without the UK

Due to a London-centered financial market, the United Kingdom became one of the main characters in shaping the European regulatory architecture. The

[12] GELTER, Martin, REIF M., Alexandra. What is Dead May Never Die: The UK's Influence on EU Company Law. *Fordham International Law Journal,* 2017, Vol. 40, No. 5, Available at: https://ssrn.com/abstract=3042828, p.1414.

[13] GELTER, M. Introduction, EU Law with the UK – EU Law without the UK. ibid. ab., p. 1330

[14] See ARMOUR John, FLEISCHER Holger, KNAPP Vanessa, WINNER Martin. Brexit and Corporate Citizenship. *ECGI Working Paper Series in Law*. European Corporate Governance Institute. Working Paper n. 340/2017, 2017, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2897419

[15] SCHILLIG Michael. Corporate Law after Brexit. *King's Law Journal*, 2016, vol. 27., no. 3., pp. 431-441.

UK is a "*liberal market economy*", whereas continental European countries are classified as "*coordinated market economies*".[16] Besides this difference in economic approaches among the member states, discrepancies in the legal traditions were also main factors in the transformation of the financial market in the EU. The United Kingdom represented the "*liberal, market-orientation coalition that generally opposed a prescriptive, one-size-fits-all approach advocated by other member states – such as France, Spain, Italy, whereas Germany wavered between both positions*"[17]. This liberal approach lost its leading role after the financial crisis, but some effects of the British aspect could be realized, especially because of the practical reasons for having the City as a center for finances. According to *Niamh Moloney* "*After Brexit, UK financial regulation can be expected to become ever-more standardized and to bend more sharply toward uniformity […] and become less liberal, […] but radical changes are unlikely. […] The most uncertainty attaches to the EU's third country arrangements for access to the EU market. "*[18] Post-Brexit, the UK becomes a third country, and in case of a no-agreement on this issue, the link between the EU financial market and the UK could cease in theory. If we consider that "*between 2009 and 2014, financial services accounted for 44% of the total value of transactional work amongst the Top 50 City law firms in the UK"*[19] it can be stated that it is vital from the perspective of the UK to maintain this situation, after the Brexit, too. Therefore, during the transitional period, a supplementary agreement shall be made in this field.

2.3. Common law impact on the judicial style of the Court of Justice

The combination of common law and continental law style in the judicial process of the European Court of Justice (hereinafter referred to as: ECJ, Court) made the Court develop a very influential institution of the EU. The ECJ – during the decades – using its interpretative power strengthen its own position. On the one hand, it is a Court, on the other hand, its an authority, and on the third, it is like a legislator (via interpretation and the consequent follow-up its decisions).

[16] HALL Peter A., SOSKICE David. *An introduction to Varieties of Capitalism*. In: Varieties of Capitalism 1., (ed.: HALL Peter A., SOSKICE David), 2001, p. 16., available at: http://www.people.fas.harvard.edu/~phall/VofCIntro.pdf

[17] GELTER, M. Introduction, EU Law with the UK – EU Law without the UK. ibid. ab., p. 1329

[18] MOLONEY, Niamh. 'Bending to Uniformity': EU Financial Regulation With and Without the UK. *Fordham International Law Journal,* 2017, Vol. 40, No. 5, Article 2., p. 1371

[19] The Law Society. *Brexit and the Laws*, available at: https://www.lawsociety.org.uk/support-services/research-trends/documents/brexit-and-the-law

The common law impact is maybe the most important on this field. Initially, the Court was influenced by French impulses, but after the British accession in 1973, precedent law (with the principle of *stare decisis*) had an impact on the judicial style of it. By now, the ECJ could become – maybe – the most influential institution as it can touch legislation, execution, and decision in one body. The only institution which is exclusively entitled to interpret Union law, that decides on omission or annulment, − after the initiative of the European Commission – it decides on infringement procedure, etc… As each case decision is binding both on the referring court and on all courts in EU countries, the impact of the ECJ is cannot be ignored. Thus, the most unique part of the common law tradition, the precedent law itself became generally accepted all over the EU without changing the national systems unintentionally. Moreover, British style complemented the continental legal thinking and this, in my view, led the ECJ's jurisdiction to be the most interesting structure that court is able to produce. Mixing features of both of process and substance gained a style, that is called *"Luxembourg Judicial Style"*[20]. The unique interpretation and the binding force of them *"allowed the Court to make policy while giving relatively few*[21] *justifications"*. The process affected back and forth the legal traditions, thus the British law and jurisdiction could also developed due to the EU.

Fernanda G. Nicola highlights that *"after forty years of relationship between London and Luxembourg, it remains unclear how much the inner workings of the ECJ will change by losing their UK members, including three judges and an advocate general"*[22]. Due to the systems' effects on each other, the absence of the British may change somehow the inner workings of the ECJ, but – as the impacts were already taken during the evolution of the Court – maybe not. Those British members of the ECJ shall leave whose position is depending on EU citizenship. However, the advocate general's position is not like that. Thus, in my view, entitles her to remain after the withdrawal, too. Except for the judges, all British cabinet members at Luxembourg could stay in theory. In this case, the continuous British impact may remain as well. If not, the most important changes and developments of ECJ's judicial style were already made during the last forty years, so Brexit is unlikely to change the Court's jurisdiction radically.

In addition to the abovementioned issues related to interpretation and impulses, there is a question mark above the future of jurisdiction, its scope (having

[20] NICOLA, G. Fernanda. Luxembourg Judicial Style with or without the UK. *Fordham International Law Journal,* 2017, Vol. 40, No. 5, Article 7, pp. 1505-1534.

[21] See EDWARD, Sir David A.O.. The Role and Relevance of the Civil Law Tradition in the Work of the European Court of Justice. In: D.L. Carey MILLER et. al., eds. The civilian tradition and scots law: Aberdeen Quincentenary Essays at 14, 1997, pp. 309-320.

[22] Ibid.above p. 1534

special regard to the ongoing cases) and another is above the dispute settlement in the future. British politicians often declare that the "UK does not ask for the ECJ's jurisdiction" in the future. In my view, it is hardly avoidable – at least in one case: where it comes to interpret the withdrawal agreement. That is going to belong under the scope of EU law on the one hand, and on the other, it is going to be categorized as a product of international law. In this sense, the ECJ's jurisdiction has to be approved by the UK as well.

It is obvious that the current mechanisms of the ECJ's jurisdiction and judicial style involve common law traditions. That may not change after the Brexit due to that is already evolved, and to that Malta and Ireland remain in the EU.

3. Conclusion

Firstly, European Union law is deeply influenced by common law values which impacts improved not just the judicial style of the European Court of Justice, but the whole EU legal system. British sometimes behaved strictly in a conservative way, other times very liberally, which attitude stimulated the economy on the one hand, and the legislation and jurisdiction on the other.

Post-Brexit – as a significant liberal economy is exiting – changes in the economic governance are expected. Due to the spillover-effect, changes arrive at other sectors of the economy – like finance, capital market, etc. – then finally it reaches different spheres. Thus, Brexit means a loss not just for the UK, but for the remaining EU27 as well. In order to avoid dramatic and quick changes, a well-used transitional period is needed, with a balanced withdrawal treaty collecting the most important points (besides citizens rights, financial settlement, and border issues).

All in all, British impacts on the legal system of the European Union cannot be abolished from day to day. In my view, small changes in legal harmonization could be expected – especially on those fields where the UK was a break of harmonization – but nothing radical.