THE ATTORNEY-GENERAL's LETTER:

Memorandum

by Martin Howe QC
17 July 2018

1. On 15 July 2018, the new Attorney-General Mr Geoffrey Cox MP wrote to colleagues in the House of Commons and kindly made reference to my Memorandum of 7 July 2018.[1] That memo was based on the brief press statement issued by the government about the conclusion of the Chequers Cabinet meeting on 6 July 2018. The full White Paper will enable a fuller review (now in preparation) of the court jurisdiction aspects of the government's proposal, to be followed by assessments of the legal implications of several other aspects of the Chequers proposals.

2. In the mean time I will briefly comment on the AG's letter.

3. I agree that the White Paper proposals as they stand envisage that the UK's adherence to the so-called "common rulebook"[2] areas of EU law will be achieved by means of an international obligation which binds the UK, rather than by giving direct effect to the treaty inside the UK. I respectfully but firmly disagree with the AG's description of this as a

1. See footnote 1 on page 1 of AG's letter.

2. I do not agree that "common" rulebook is a happy or apt description. These are EU rulebooks with at most consultation input from the UK. The areas to be covered by "common" rulebooks are the rules relating to goods placed on the UK market which might circulate across the UK/EU border (whether or not they do in fact circulate), state aid rules, the EU's Customs Code and related customs provisions, and (possibly) certain rules relating to the trading of electricity.

"*normal*" international agreement which would impose a "*standard*" international law obligation.

4. In a normal international agreement: (1) States do not accept being bound by decisions of courts of the other treaty party but will only accept neutral and balanced means of international adjudication; and (2) the courts of each treaty party will look at each others' judgments with mutual respect and, without being bound by them, will try to be consistent in their interpretations of the treaty as a matter of international judicial comity.

5. By contrast, the system of adjudication described in the White Paper is based on the EU Association Agreements of the former Soviet republics of Ukraine, Moldova and Georgia. As far as I am aware, no other non-member state has agreed to being bound by rulings of the ECJ, a court made up of EU nationals only, in proceedings to which it is a party.[3]

6. These Association Agreements contain wide-ranging obligations on these former Soviet states to progressively harmonise their laws with EU law, as a condition of being granted free trade access to the EU market and in preparation for their hoped-for eventual membership of the EU. In interpreting this transposed EU law, they are required to take "due account" of the case law of the ECJ.[4]

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3. The EEA states under the EEA Agreement, and Turkey in its Customs Union agreement with the EU, have agreed to follow ECJ jurisprudence in different ways which I will describe in more depth in a fuller paper.

4. E.g. Art.273(2) of the EU-Moldova AA: "*due account shall be taken of the corresponding case law of the Court of Justice of the European Union and the implementing measures adopted by the European Commission, as well as, should it*

7. This obligation to take "due account" of ECJ case law in the internal application of harmonised provisions is complemented by the ECJ joint reference procedure which comes into play if there is a dispute at international level over whether they have matched EU law in their internal law. Article 403 of the EU-Moldova[5] Association agreement reads as follows:

> ***Article 403***
> **Referrals to the Court of Justice of the European Union**
>
> 1. The procedures set out in this Article shall apply to disputes concerning the interpretation and application of a provision of this Agreement relating to gradual approximation contained in ... [*lists areas covered*] of this Agreement, or which otherwise imposes upon a Party an obligation defined by reference to a provision of Union law.
>
> 2. Where a dispute raises a question of interpretation of a provision of Union law referred to in paragraph 1, the arbitration panel *shall not decide* the question, but request the Court of Justice of the European Union to give a ruling on the question. In such cases, the deadlines applying to the rulings of the arbitration panel shall be suspended until the Court of Justice of the European Union has given its ruling. *The ruling of the Court of Justice of the European Union shall be binding on the arbitration panel.* [emphasis added]

8. If the UK adopts these provisions as envisaged by the White Paper, consider how this procedure will operate when the EU Commission contends that a UK law which implements a 'common' rulebook is deficient because it does not match the corresponding EU law as interpreted by the ECJ. In such a dispute, the arbitration panel would be *obliged* to refer the question of the meaning of the EU law to the ECJ. The

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become necessary, of any modifications of the Union acquis occurring in the meantime." The Ukraine and Georgia Agreements contain similar provisions.

5. The corresponding provisions of the EU-Ukraine and EU-Georgia Agreements are to the same effect.

panel is then *bound* by the answer it receives, and bound to give a judgment in accordance with the ECJ's ruling.

9. The arbitration panel's function is thus very similar to that of the UK Supreme Court (or other Member State supreme court) under the current preliminary reference procedure. The national court is responsible for finding the facts, and for giving the formal judgment at the end of the case. It is obliged[6] under Art.267 TFEU to refer an issue of EU law which affects the outcome of the case to the ECJ and is then bound to give judgment in conformity with the ECJ's ruling. The arbitral panel will be in the same position: it will find the facts, and formally give judgment at the end of the case, but if the substance of the dispute is about the interpretation of the EU rulebook in the 'common' areas then *the ECJ and not the arbitral panel will be the effective decider of the substance of the case*.

10. In his comments on the "*Referral mechanism*", the AG has reproduced in slightly different order sentences from para 42 of the White Paper, which, with respect, are difficult to follow and serve to obfuscate rather than clarify the degree of compulsory and binding ECJ jurisdiction which will operate under the system.

11. I will comment on these sentences in the AG's letter:-

> "If a question of the interpretation of EU law arose, the Joint Committee would have the option of referring the question to the CJEU – but could only do so *by mutual consent*. This option would also be open to the independent arbitration panel."

12. While a referral by the Joint Committee would be optional and by mutual

6. If it is a supreme court; lower courts have a discretion whether or not to refer.

consent, it is wrong to describe a referral by the arbitration panel as an "option". The panel would be *obliged* to refer if a question of EU law arises in the dispute, regardless of any lack of consent by the UK. The AG continues:-

> "In the event of a referral, the CJEU would rule on the question of EU law, but it would be for the Joint Committee or arbitration panel to resolve the dispute."

13. Where the substance of the dispute relates to EU law (e.g. whether or not UK law has correctly transposed the relevant part of the EU rulebook), the role of the Joint Committee or the arbitration panel would be formal only and the substance of the dispute would in fact be decided by the ECJ.

> "As the White Paper states, this would accommodate the fact that only the CJEU can bind the EU on the interpretation of EU law, while respecting the principle that the court of one party cannot decide disputes between the two."

14. It is undoubtedly true that only the ECJ can bind the EU on the interpretation of EU law as it applies *inside the EU*. But this joint reference procedure would bind the UK to follow the ECJ's interpretation *when applying UK law inside the UK*. The suggestion that it respects the principle that the court of one party cannot decide disputes between the two is true only in the formal sense that the arbitration panel would render the formal judgment; but in a case such as that discussed above, *the substance of the case would have been decided by a court of one party (the ECJ)*.

15. The AG's *Conclusion* evokes the famous language of Lord Denning in the

case of *Bulmer v Bollinger*.[7] But even if the government sticks to its commitment not to give direct effect to the 'common' rulebooks inside the UK, changing or expanding ECJ interpretations of the common rulebooks will continue to flow "into the estuaries and up the rivers" of UK jurisprudence via the unbalanced and non-mutual obligation on our courts to "pay due regard" to ECJ case law. In view of the existence of the referral mechanism under which the ECJ's rulings will be binding on the UK, the courts will see little purpose in departing from ECJ rulings even if they think that they are wrong.

16. The government has already conceded ongoing direct effect and supremacy over Acts of Parliament for EU citizens' rights under the draft withdrawal agreement. This concession will require Parliament to re-enact the equivalent of ss.2(1) and 2(4) of the European Communities Act 1972 providing for the automatic disapplication of earlier or later Acts of Parliament if they are judged by the courts to conflict with EU citizens' rights. Unlike the preliminary reference procedure connected to citizens' rights which is limited to litigation commenced within 8 years of the end of the transition period, the direct effect and supremacy obligation is not time limited and will have effects for the whole lives of EU citizens with acquired rights to reside in the UK.

17. It is yet to be seen how firmly the UK government will hold the line against extending direct effect from EU citizens' rights to the 'common' rulebook areas once it comes under negotiating pressure from the EU.

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7. Rather puzzlingly cited by the AG as "*Bulmer v Bulmer*". The case was about the champagne houses' objection to the sale of fizzy pear cider as 'BabyCham' or 'champagne perry'.