

Editorial

Touching distance on citizens' rights?

Why has the UK Government been so dilatory in scheduling Article 50 negotiations with the European Union? Messrs May and Davis insist the United Kingdom is keen to accelerate to make 'sufficient progress' in the eyes of the European Union, so that talks can progress to 'phase two' on the framework of future relations. Yet their tardiness in opening their diaries suggests otherwise, notwithstanding Mrs May's claim that an agreement on citizens' rights is within 'touching distance'.

One possible explanation may be found in the infographic opposite, tweeted by the European Commission early on the morning of Friday 20 October, shortly before the European Council agreed there had been insufficient progress to move to phase two of the negotiations. Headed 'BREXIT Citizens' Rights', it encompasses more than four million European citizens spread across the EU28 member states. To the left are 3.2 million 'EU Citizens in the UK' of whom two million are in employment. To the right are 1.2 million 'UK Citizens in the EU' of whom 0.5 million are in employment. Of course, these 1.2 million are also European citizens, at least until 'Exit Day', if and when the UK leaves the EU.

'Reciprocity' sits centrally in the infographic, meaning 'equal treatment' of both groups. How is this 'equal treatment' to be accomplished? Therein, perhaps, stands the 'stumbling block'.

Prominently displayed are two words, DIRECT EFFECT, with the accompanying explanation: 'as regards their rights, citizens rely directly on the Withdrawal Agreement'. The legal principle of Direct Effect enables individuals to immediately invoke a European provision before a national or European court. It is defined in these terms:

The direct effect of European law has been enshrined by the Court of Justice in the judgement of *Van Gend en Loos* of 5 February 1963. In this judgment, the Court states that European law not only engenders obligations for EU countries, but also rights for individuals. Individuals may therefore take advantage of these rights and directly invoke European acts before national and European courts. However, it is not necessary for the EU country to adopt the European act concerned into its internal legal system. [source: EUR-Lex]

David Davis, the UK negotiator, spoke of 'direct effect if you like' at the end of round four negotiations. The relevant 'Joint Technical Note' comparing EU and UK positions on Citizens' Rights, dated 28 September 2017, gave a yellow light to 'individual enforcement of rights', noting 'UK

to clarify'. The UK position was summarised thus:

UK to incorporate the Withdrawal Agreement fully into UK law and ensure the UK courts can refer directly to it.

The EU position was more explicit.

Directly effective provisions of agreement enforceable through the domestic courts of EU27 and UK (i.e. individuals can rely directly on Withdrawal Agreement provisions in front of domestic courts to override domestic implementing legislation).

Under the overall heading of 'Nature of the Agreement', there was no comparison of positions on the role of the European Court of Justice (CJEU). This thorny topic was 'for discussion in Governance Group'.

'Monitoring and oversight' are also for discussion in the Governance Group, as is 'future CJEU case law concerning the withdrawal agreement'. Positions were described. 'European Commission to monitor compliance,' according to the EU, while the UK position has two parts:

- Commission monitoring body for EU27.
- UK prepared to consider establishment of an independent monitoring arrangement in the UK.

Regarding ECJ case law, the EU position is:

CJEU competence as per Article 267.

Article 267

Treaty on Functioning of the European Union

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

The UK position is stated as:

UK courts to be able to take into account the future CJEU case-law with a view to ensuring consistent interpretation.

No Joint Technical Note on Citizens' Rights was issued after round five of the negotiations, which ended on 12 October. We go to press before round six.

The EU's infographic addresses the unresolved issue concerning the European Court of Justice. Interestingly, it does not mention a role for the European Commission in monitoring and oversight.

In pursuit of 'uniform interpretation of Withdrawal Agreement', UK courts and EU27 national courts may 'request the ECJ to give preliminary ruling'. On the basis of this preliminary ruling, 'national courts give final judgment'.

In the EU view, uniform interpretation of the Withdrawal Agreement depends on the preliminary rulings of the European Court of Justice. This will achieve 'equal treatment of EU citizens in the UK and UK citizens in the EU', and thus establish reciprocity.

M Barnier summarised the position at the end of round five, referring to 'two common objectives':

- That the Withdrawal Agreement has direct effect, which is essential to guarantee the rights of all citizens in the long-term.
- That the interpretation of these rights is fully consistent in the European Union and in the United Kingdom.

On these points, we will continue to work on the specific instruments and mechanisms which will allow us to translate this into reality. This means for us the role of the European Court of Justice.

The clock ticks, as Mrs May's government totters from one crisis to another ...