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Escape from the Jurisdiction of the Court of Justice: A Good Reason to Quit the European Union?

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Executive Summary

> In comparison to other Member States, the UK has been involved in fewer court cases.

> There are fewer infringement cases initiated by the European Commission against the UK.

> The UK benefits from judgments of the Court of Justice that pry open other markets.

> "Taking back control" means losing the support of the Court of Justice in keeping markets open.

One of the reasons for the withdrawal of the United Kingdom (UK) from the European Union (EU) is the wish to escape from the reach of the Court of Justice of the European Union. Prime Minister Theresa May, in her January 2017 Lancaster House speech and again in her Florence speech of September 2017, identified the ending of the jurisdiction of the Court over the UK as a principal motivation for exiting the EU. The same significance to terminating the jurisdiction of the Court is given by the UK's White Paper on Exit from the EU of February 2017 and the Bill for the Withdrawal from the EU ('Great Repeal Bill') of March 2017.

Both speeches, the White Paper and the Great Repeal Bill highlight the prospective benefits from having 'laws made in Westminster' and 'interpreted by UK courts'. This is because those who support Brexit claim that the Court is 'biased' and 'integrationist'. Bias and a tendency towards integration are claimed to be detected on the basis of judgments that run counter to alleged national interests. These claims are tenuous and ignore the fundamental point that the laws which are interpreted by the Court are made by the Member States themselves when they sit in the Council of the EU. The purpose of this policy brief is to examine, first, whether the Court is particularly biased against the UK and, second, to ask whether, in principle, the alleged integrationist tendency of the Court disadvantages a Member State. For the purpose of detecting a bias against the UK, the policy brief reviews the number of infringements of EU law confirmed by the Court against two benchmarks made up by the 'best' performing and the 'worst' performing Member States. 'Best' here refers to a Member State with the lowest number of infringements and 'worst' refers to the highest number of infringements. In order to answer the question as to whether, in principle, Member States really lose out from integrationist judgments, a simple model is developed which leads to counterintuitive results.

Judicial 'bias' as measured by infringement statistics

Bias can be detected only when measured against a benchmark or defined standard of behaviour. This section does not answer the question whether *in general* the rulings of the Court of Justice reveal a tendency towards integrationist outcomes. Rather it examines whether the UK has been affected more than other Member States by the alleged integrationist bias of the Court of Justice.

Table 1 shows the number of judicial cases to which Member States are parties. The three columns show the data obtained through the search form of the Court of Justice for three time periods: 1977-2017, 1987-2017, 1997-2017. The first period includes the UK plus the largest three founding Member States, which have comparable size to the UK, plus Denmark which acceded to the European Economic Community at the same time as the UK and which can function as a comparator. The second period includes the corresponding data for the Southern Member States, Greece, Portugal and Spain. The third period includes also Finland that acceded in 1995. As will be explained later on, Denmark and Finland are the 'best' performing Member States in terms of having the lowest the

[1] I am grateful to Bruno de Witte and the editors for helpful comments on earlier drafts. References are provided at the end of the brief.

number of declared infringements of EU law in the 21-year period 1995-2016.

Table 1: Member States party to judicial proceedings

	1977-2017	1987-2017	1997-2017
UK	212	189	150
Italy	864	757	533
France	692	619	491
Germany	503	467	380
Denmark	58	49	33
Greece		501	363
Spain		462	387
Portugal		261	240
Finland			76

The data in Table 1 should be treated with caution. They do not always concern infringement of EU law. They may also refer to other types of disputes such as when a Member State takes action against a Council or Commission act. With this qualification in mind, it is obvious from Table 1 that the UK has not been involved in more cases than other Member States of comparable size. In fact, if the number of infringements is thought to be related to the size of the economy, rather surprisingly, the UK has also been involved in significantly fewer cases than the Southern Member States which are smaller in size. However, the numbers for the UK far exceed those of Denmark and Finland for the corresponding time periods. Hence, the conclusion must be that the UK has fared much better than other Member States of comparable size and also better than several other Member States of smaller size.

Admittedly, the raw data in Table 1 also reflects, first, the propensity of a Member State to comply with or ignore EU law, second, the administrative capacity of the country to implement EU law and, third, the willingness of the country to challenge EU acts. The UK is generally perceived to be legally compliant (resulting in fewer cases before the Court), it has a strong and capable administrative system (which also results in fewer cases), but it has also not hesitated to challenge EU acts which it perceived to encroach on national prerogatives (which leads to a higher number of cases). But whatever the reason behind the statistics, the UK has been involved in fewer cases before the Court of Justice than other Member States.

The statistics of the Court of Justice only on infringements show that the UK actually occupies the ninth position within the EU (see Table 2). Although the statistics recorded by the Court start in 1952, there were very few cases in the 1950s and only a small number in the 1960s. Despite the fact that the UK acceded to the EEC/EU in 1973, fewer proceedings have been initiated against it than against Greece, Ireland or Portugal.

Table 2: Number of infringement proceedings, 1952-2016

Member State	Number of infringement proceedings
Italy	643
France	417
Greece	404
Belgium	384
Germany	283
Luxembourg	267
Ireland	206
Portugal	205
UK	141

Perhaps what critics of the Court mean by integrationist bias is that the Court tends to find that national measures infringe on EU rules. This is true. Table 3 shows the number of infringement cases opened each year, the number of cases concluded with a judgment and the number of judgments that confirm infringement for the period 2002-2016. More than 90% of judgments find infringement.

However, it is important to understand that the proceedings before the Court are not necessarily representative of the actual situation in each Member State. Infringement proceedings are initiated by the Commission. Hardly ever is a case brought by a Member State against another Member State. Of the hundreds of files opened each year by the Commission, only very few, about five to ten percent, end up before the Court of Justice. The vast majority of files are closed before the case reaches the Court. To some extent these numbers also reflect the willingness or unwillingness of Member States to accept the view of the Commission.

In addition, the Commission has discretion to choose the cases it wants to pursue before the Court. Naturally, it chooses those it believes it can win or those for which it wants a ruling to clarify important issues over which Member States hold conflicting views. Hence, the cases which are lodged with the Court are not a random sample of all possible disputed issues.

Furthermore, not all infringements are of the same importance, nor do they have the same impact on national economies and policies or the internal EU market. For example, restrictions on establishment can have a significant restrictive effect. By contrast, the effect of failure to record a certain statistic or to provide adequate protection to an indigenous species is unlikely to impede the functioning of the internal market. Nonetheless, they are also classified as infringements of EU law and are counted towards the data in Table 3.

Table 3: Infringement cases [opened and closed], 2002-2016

Year	Cases opened	Judgments	Infringement found (% of judgments)
2016	31	31	27 (87%)
2015	37	31	26 (84%)
2014	57	44	41 (93%)
2013	54	63	40 (64%)
2012	58	52	47 (90%)
2011	73	81	72 (89%)
2010	128	95	83 (87%)
2009	142	141	133 (95%)
2008	207	103	94 (91%)
2007	212	143	127 (89%)
2006	193	111	103 (93%)
2005	170	136	131 (96%)
2004	193	155	144 (93%)
2003	214	86	77 (90%)
2002	168	93	90 (97%)

NB: The starting year is 2002 because earlier reports of the Court of Justice do not provide the same data.

Even assuming that the Court of Justice has a pronounced tendency to find infringement of EU law, which implicitly assumes that the standard for detecting bias is that the share of judgments finding infringement should not be higher than 50 percent, the UK has not been the Member State with the worst record in terms of infringements.

The data in Table 3 shows a significant decline in the number of cases over the last six years. This can be interpreted as the result of Member States becoming more compliant. However, there can also be alternative explanations. Perhaps the efforts of the Commission to resolve issues at the pre-litigation stage are more successful. Indeed the annual reports of the Commission on the implementation of EU law indicate that the large majority of cases are resolved at the stage of 'letter of first notice' or of the 'reasoned opinion'. It may also be that the network of SOLVIT centres and 'pilot' scheme are effective in persuading Member States to adjust their laws and policies before a case reaches the Court of Justice.

Table 4 shows the 'worst' and 'best' performing Member States, as measured by the number of cases initiated by the Commission against them. It also shows the number of cases which are 'won' by the Member States when the Court dismisses the action brought against them by the Commission.

Table 4: Infringements per Member State ['best/worst' Member State], 1995-2016

	Finding of infringement (wholly or partially)	Dismissed ('won' by Member State)
Finland	11	4 (27%)
Denmark	11	1 (8%)
UK	61	12 (16%)
France	123	13 (10%)
Italy	207	10 (5%)

Again the UK is neither the worst, nor the best Member State. It occupies a middle position. More interestingly, in comparison to the Member States in the table, the UK has won more cases in relative terms with the exception of Finland and more cases in absolute terms with the exception of France.

These statistics do not measure the magnitude of the benefits or costs of each Member State from the judgments of the Court of Justice. The numbers by themselves cannot prove that the UK has 'suffered' more or less than other Member States. However, the numbers do indicate that the UK has not been involved in more cases than the other large Member States, nor has it had more cases initiated against it. In conclusion, the actions of the Court of Justice do not seem to have had a disproportionate impact on the UK.

Does integrationist bias necessarily harm national interests?

The recent speeches of the UK Prime Minister, the White Paper and the Great Repeal Bill and, of course, the numerous statements of Brexiteers explicitly and implicitly assume that it is unequivocally in the interest of the UK that the laws that apply to the country are those made in Parliament in Westminster and enforced by UK courts. The logical weakness of this view is that it ignores the benefits that can be derived from the ability to influence other countries' laws and policies through the Council of the EU. To put it differently, the UK is in the process of exiting the EU in order to regain control over its laws and policies. But the concomitant consequence of 'taking back control' over its own laws is losing control over others' laws and policies and over issues that transcend national borders such as pollution, tax evasion or organised crime. One may have credible arguments that in practice the benefits from gaining control will outweigh the costs of losing control. But it is certainly not true, either logically or empirically, that gaining control will unambiguously make the UK better off. The loss of control must be factored into the equation.

A country may exercise a degree of control over another country's laws and policies not only by influencing them at the policy formulation stage, but also by preventing practices which are harmful to its interests and which contravene agreed principles. It is at this stage that adjudication or dispute resolution play a significant role. Just like loss of control is the flip side of gaining control, a court's judgment on another country's practices is the flip side of that court's judgment on one's own practices.

The UK may bemoan what it perceives as an intrusion in its domestic legal system, but whenever the Court finds an infringement it opens up even slightly more the market of other Member States or aligns even more closely other Member States' policies and practice to agreed norms. Both of these effects, reduction in barriers and alignment of policies, enable the internal market to function more smoothly. The UK, as a major exporting country, certainly benefits from these outcomes even when such benefits are not recorded or perceived to be flowing from the judgments of the Court. Therefore, the alleged integrationist bias of the Court must make the UK better off by prying open other markets and by enabling, as a result, UK firms to export to and establish commercial presence in other Member States.

To see more rigorously why integrationist bias does not necessarily harm national interests, consider the following simple model. Assume that the judgments of the Court can lead to two outcomes: a pro-integration outcome and an outcome that confirms national measures. The implication of this assumption is that the model which is developed below fits more in the context of the internal market than in other areas of EU law that may not have the same market-opening effect. The integrationist bias is captured by the fact that the probability of the pro-integration outcome, 'a', is greater than the probability of the outcome that confirms the national measure, 'b'. Since there are only two mutually exclusive outcomes it necessarily follows that $a + b = 1$ and that $b = (1 – a)$. Given that $a > b$, it also follows that $a > 0.5$.

Further assume that the effects from the pro-integration outcome are considered by any Member State to have a value of E and the effects of the confirmation of national measures to have a value of N. Because E is perceived to be a cost to the country, the net impact of a judgment is captured by the formula $(1 – a)N – aE$. If $N = E$, then it follows that the country loses out from a pro-integration judgment because $(1 – a)N – aE < 0$. But it is not necessary to assume that the values of E and N are the same.

Let us further assume that (i) we have a union of 'n' Member States of similar size, that (ii) in each year all Member States are involved in a case before the Court and that (iii) the size of the effects of Court judgments on each Member State is the same. This of course is not true in reality. But this is to represent the worst-case scenario, given the fact that, as seen above, the UK is involved in fewer cases than other Member States.

Now each year, the full impact of Court rulings on the EU as a whole is given by the formula

> [**N** (number of Member States) x **a** (probability of pro-integration outcome) x **E** (effects from pro-integration outcome)] – [**n** (number of Member States) x (**1 – a**) (probability of pro-member state outcome) x **N** (effects from confirmation of national measures)].

It is important to understand the change in signs. Whereas for each Member State individually a court judgement leading to E is negative because it opens up its market or forces it to change policy, such a judgement is positive for all other Member States. The opposite holds for N. The gains of each Member State individually correspond to losses for other Member States. Moreover, given the assumption that the effects are the same for all Member States and all Member States have equivalent size, it follows that the share of the gains and losses experienced from each judgment by all other Member State is derived by dividing the total effects by $(n – 1)$ which is the number of Member States minus the one directly involved in the judgment.

Therefore, the net effect experienced by each Member State is the sum of the effects of the judgment that concerns it directly and the effects of the judgments for all other Member States, that is:

$$[(1 – a)N – aE] + [(n – 1)aE/(n – 1) – (n – 1)(1 – a)N/(n – 1)] = 0.$$

This result demonstrates that regardless of the supposed bias of the Court, the overall effect, when taking into account the effects from the opening up of all other markets, is zero. Since the Court of Justice has not shown any specific bias against the UK, the integrationist tendency of the Court in general has not harmed UK interests.

Let us then consider the effects on a country which, like the UK, is involved in fewer court cases than the other large Member States. It is necessary to consider what such effects may be because the larger Member States due to the size of their economies are the natural destination of the majority of exports of the other Member States.

Let 'm' be the number of cases and that $m > n$. There are more cases than Member States which means that some Member States are involved in more than one case each year. We still presume that the Member State we examine is involved only in one case per year.

The total effect on that country is now:

$$[(1 - a)N - aE] + [maE/(n - 1) - m(1 - a)N/(n - 1)],$$

By rearranging, we derive

$$[(n - 1)(1 - a)N - (n - 1)aE] + [maE - m(1 - a)N]/(n - 1),$$

Or,

$$[nN - naN - N + aN - naE + aE + maE - mN + maN]/(n - 1).$$

The expression above gives the total effect. It follows that a Member State experiences net positive effects when that expression is greater than zero, i.e.

$$[nN - naN - N + aN - naE + aE + maE - mN + maN]/(n - 1) > 0.$$

Given that the denominator is positive [$(n - 1) > 0$], the whole expression is positive when the numerator is also positive. Since it is assumed that $n > 1$ and that $m > n$, it follows that the pairs $(nN - N)$, $(maN - naN)$, $(maE - naE)$, $(aN + aE)$ have all positive values. But $(- mN)$ has a negative value. This means that a Member State experiences a net positive effect when

$$(nN - N) + (maN - naN) + (maE - naE) + (aN + aE) - mN > 0,$$

or

$$(nN - N) + (maN - naN) + (maE - naE) + (aN + aE) > mN.$$

The outcome of the inequality above is indeterminate. It depends on the values of E, N, a, n and m.

But, let us see what happens when the alleged integrationist bias of the Court is at its limit. In formal terms, this means that probability 'a' becomes 1. We can now re-write the inequality above as

$$nN - N + mN - nN + mE - nE + N + E > mN,$$

$$mE - nE + E > 0,$$

which means that

$$\underline{E(m - n + 1) > 0}$$

The last expression is true because $m > n$, regardless of the size of 'E'! Moreover, the larger the number of cases 'm' brought against other countries, the larger the beneficial effect experienced by a pro-market Member State.

This is an important result. If other Member States do not apply agreed principles and rules correctly, then a pro-market, pro-trade, pro-investment country like the UK certainly benefits from a pro-integrationist bias by the Court of Justice.

Conclusions

This policy brief has sought to demonstrate that, first, the UK has not been embroiled in more proceedings before the Court of Justice than other large Member States. Second, actually fewer proceedings have been initiated against it by the Commission than against other large or medium-size members. Third, it has won relatively more cases than other large Member States.

The policy brief has also shown that in principle, judicial bias towards integration is not necessarily harmful to the interests of a relatively open economy like that of the UK. This is because such an integrationist tendency would pry open other markets which would be beneficial to firms of such an open economy.

Therefore, for the UK at least, escaping from the jurisdiction of the Court of Justice is not a good reason to leave the EU.

Further Reading

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