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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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Abstract

One of the principal objectives of Brexit is to end the jurisdiction of the Court of Justice of the European Union (EU) over the UK. It raises the question whether the UK has 'suffered' more than other Member States from judicial action. To answer this question, this paper examines statistics on judicial action and finds that i) the UK has not been embroiled in more proceedings before the Court of Justice than other large Member States; ii) fewer proceedings have been initiated against it by the Commission than other larger or medium-size Member State; and iii) the UK has won relatively more cases than other large Member States. The paper also argues 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 UK firms. In addition, the distortion-preventing powers of other EU institutions such as the European Commission also tend to favour pro-market countries like the UK. Lastly, the paper considers alternative dispute resolution arrangements identified by the UK and suggests that they are more likely to reduce legal certainty and delay effective enforcement than the present system based on the Court of Justice.

Keywords

Brexit, court of justice, dispute settlement, infringement proceedings, market access

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1. Introduction

One of the reasons for the withdrawal of the United Kingdom (UK) from the European Union (EU) is to escape from the reach of the Court of Justice of the European Union. Prime Minister Theresa May, in her Lancaster House speech in January 2017 and again in her Florence speech in September 2017, identified the ending of the jurisdiction of the Court over the UK as a primary objective of exit from the EU. The same significance to terminating the jurisdiction of the Court is expressed in 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'.[1] This is because those who support Brexit have claimed that the Court is 'biased' and 'integrationist'.[2]

Bias and tendency towards integration are claimed to be detected on the basis of judgments that run counter to alleged national interests.[3] 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.

The purpose of this paper is threefold. First, it examines whether the Court is particularly biased against the UK. Second, it asks whether, in principle, a Member State actually suffers from the alleged integrationist tendency of the Court. And, third, it assesses the options outlined by the UK for alternative dispute resolution mechanisms.

For the purpose of detecting a bias against the UK, the paper 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. In the context of this paper, 'best' merely means Member States with the fewest infringement cases, while 'worst' means Member States with the highest number of infringement cases. 'Best' and 'worst' do not have any other connotation.

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1. UK Government, 'Theresa May's Florence speech, September 2017', *UK Government* (2017), https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu; UK Government, 'Theresa May's Lancaster House speech, January 2017', *UK Government* (2017), https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech; UK Government, 'UK White Paper on Withdrawal from the EU, February 2017', *UK Government* (2017), https://www.gov.uk/government/publications/the-repeal-bill-white-paper. UK Government, 'UK Withdrawal Bill, March 2017', *UK G*overnment (2017), https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/18005.pdf.
2. See, G. Beck, 'The European Court of Justice is not an impartial court and has no role to play in post-Brexit EU-UK relations', *Policy Exchange* (2017), https://judicialpowerproject.org.uk/gunnar-beck-the-european-court-of-justice-is-not-an-impartial-court-and-has-no-role-to-play-in-post-brexit-eu-uk-relations/; M. Wheeler, 'The European Court of Justice's thirst for ever more power', *The Spectator* (2017), https://www.spectator.co.uk/2017/09/the-european-court-of-justices-thirst-for-ever-more-power/
3. For an academic assessment of how the CJEU balances EU and national interests, see J. Schwarze, 'Balancing EU Integration and National Interests in the Case-Law of the Court of Justice', in A. Rosas, E. Levits and Y. Bot (eds.), *The Court of Justice and the Construction of Europe* (T.M.C. Asser Press, 2013); Lord Mance, 'The Interface between National and European Law', 38 *European Law Review* (2013), p. 437–456.

   For an account of popular views in the UK, see The Economist, 'European Court of Justice: Biased Referee?', *The Economist* (1997), http://www.economist.com/node/149581; D. Robinson and A. Barker, 'EU's top judge defends ECJ against charges of integration agenda', *The Financial Times* (2016), https://www.ft.com/content/0e132ef8-af0c-11e6-a37c-f4a01f1b0fa1; Politico, '9 reasons why (some) Brits hate Europe's highest court', *Politico* (2017), https://www.politico.eu/article/brexit-ecj-european-court-of-justice-9-reasons-why-some-brits-hate-europes-highest-court/; R. Ekins, 'The government is right to turn its back on the European Court of Justice', *The Spectator* (2017), https://blogs.spectator.co.uk/2017/08/the-government-is-right-to-turn-its-back-on-the-european-court-of-justice/.

The paper focuses on infringement cases simply because it is easier to identify the involvement of the UK. The judgments in many other cases such as those concerning requests for preliminary rulings also affect Member States. Indeed, court statistics indicate the UK as the origin of 466 cases of preliminary ruling.[4] Although in many of these cases the UK is a party in the proceedings, it has been largely impossible to classify the outcome of the ruling and to determine whether it was in the UK's favour or not. This is especially true when both parties are private. By contrast, infringement judgments always result either in finding failure by the Member State concerned to comply with EU law or in dismissal of the case, which means failure of the Commission to prove infringement.

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 and surprising results.

The article finds that no obvious bias is revealed in the statistics on judicial action. It argues, on the basis of the model, that even if such a bias existed, it would not necessarily be to the disadvantage of a relatively open economy such as that of the UK. The paper concludes that alternative dispute resolution mechanisms are likely to reduce legal certainty and delay enforcement.

2. Judicial 'bias' as measured by statistics on judicial activity

Bias is a prejudice, predisposition or preconceived opinion, and can be detected when measured against a benchmark or defined standard of behaviour.[5] 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 'suffered' more than other Member States by the alleged integrationist bias of the Court of Justice.[6]

Table 1 below shows the number of court cases in 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 plus Denmark, which acceded to the EEC at the same time as the UK. The second period includes the corresponding data for the southern Member States, Greece, Portugal and Spain. The third period includes also Finland, which acceded in 1995. As will be seen later on, Denmark and Finland are the 'best' performing Member States in terms of the number of infringement cases lodged at the Court of Justice in the 21-year period 1995–2016.

The data in Table 1 should be treated with caution. They do not always concern infringement of EU law where proceedings are initiated by the European Commission. They may also refer to other types of dispute such as when a Member State takes action against a Council or Commission act.

4. All the data in this paper have been obtained with the use of the search form on the website of the Court of Justice or from the Annual Reports of the Court. The search form can be accessed at CJEU, 'Case-law of the Court of Justice', *Curia* (2018), http://curia.europa.eu/juris/recherche.jsf?language=en; the Annual Reports can be accessed at CJEU, 'Annual Reports', *Curia* (2018), https://curia.europa.eu/jcms/jcms/Jo2_7000/.
5. In experimental settings, the 'benchmark' or 'standard' is set by a control group. See P. Tetlock, G. Mitchell and J. Anastasopoulos, 'Detecting and Punishing Unconscious Bias', 42 *Journal of Legal Studies* (2013), p. 83-110.
6. After completing this paper, I became aware of a recently published work that also explored the statistics of the UK's involvement in infringement proceedings. See the data reported in R. Hogarth and L. Lloyd, 'Who's Afraid of the ECJ?: Charting the UK's relationship with the European Court', *Institute for Government* (2017), https://www.instituteforgovernment.org.uk/publications/whos-afraid-ecj-brexit.

Table 1. Member States party to court 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

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 court cases is thought to be related to the size of the economy, rather surprisingly, the UK has 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.

The conclusion must be that the UK does not appear to be involved in more cases than other Member States of comparable size. It also ranks below several other Member States of smaller size.

Admittedly, the raw data in Table 1 also reflect, first, the propensity of a Member State to comply with or ignore EU law. Second, they are influenced by the administrative capacity of the country to implement EU law correctly. And, third, they are affected by 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 perceives to encroach into national prerogatives (which leads to more cases).[7] But whatever the reason behind the statistics, the UK has been involved in fewer cases before Court of Justice than other Member States.

With respect to the origin of requests for preliminary rulings, the data from the Court of Justice do not reveal that the UK is a source of more cases than Member States of equal or even smaller size. Table 2 below shows the requests for preliminary rulings for the period 1 January 1973 to 1 November 2017.

The statistics of the Court of Justice that concern only infringements show that the UK occupies the ninth position (see Table 3 below). Although the statistics recorded by the Court start in 1952, there were very few cases in 1950s and only a small number in the 1960s.

Ireland which acceded to the EEC at the same time as the UK, and it is a smaller country, shows 45% more cases than the UK. Also, despite the fact that the UK acceded to the EEC in 1973, fewer proceedings have been initiated against it than Greece or Portugal which become members eight and 13 years later, respectively.

7. Ibid.

Table 2. Requests for preliminary ruling, 1973–2017.

Member State	Number of cases
Germany	2153
Italy	1303
France	913
Netherlands	895
UK	592
Denmark	172
Ireland	87

Table 3. 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 EU rules.[8] This is true. Table 4 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. (The starting year is 2002 because there is a statistical break in the Annual Reports of the Court of Justice in that year. Earlier reports do not provide the same data.) 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. The Court's Annual Reports reveal that hardly ever is a case brought by a Member State against another Member State.[9] Of the hundreds of files opened each year by the Commission only very few, about 5–10%, end up before the Court of Justice.[10] The vast majority of files are closed before the cases reach the Court. To some extent these numbers also reflect the willingness or unwillingness of Member States to accept the view of the Commission.

8. For a legal and empirical assessment of the performance of the Court of Justice and of public attitudes towards the Court, see M. Pollack, 'The Legitimacy of the Court of Justice of the European Union', in H. Cohen and N. Grossman (eds.), *Legitimacy and International Courts* (Cambridge University Press, 2017).
9. See the Annual Reports on the Court's activity. They can be accessed at CJEU, 'Annual Reports', *Curia* (2018), https://curia.europa.eu/jcms/jcms/Jo2_7000/.
10. See the Annual Reports of the European Commission on the monitoring of the application of EU law. They can be accessed at European Commission, 'Annual Reports on monitoring the application of EU Law', *European Commission* (2018), https://ec.europa.eu/info/publications/annual-reports-monitoring-application-eu-law_en.

Table 4. 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%)

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 chilling effect on cross-border transactions. By contrast, the effect of failure to record a certain statistic or to provide adequate protection to an indigenous species of frogs is unlikely to impede the functioning of the internal market. Nonetheless, they are also classified as infringements of EU law and are counted in the data in Table 4.

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

The data in Table 4 show a significant decline in the number of cases in 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 the 'reasoned opinion'. It may also be that the network of SOLVIT centres and 'pilot' scheme are also effective in persuading Member States to adjust their laws and policies before a case reaches the Court of Justice and the finding of infringement.[11]

11. See the views of the European Commission on the role of SOLVIT in monitoring the application of European Union law, 2016 Annual Report that was published on 6 July 2017. The report can be accessed at European Commission,

Table 5. 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%)

Table 6. All cases in which the UK has been involved; January 1973–October 2017.

	Number	For the UK	Against the UK	Other*
Preliminary rulings	9	4 (44%)	0 (0%)	5
Infringements proceedings	138	20 (14%)(16%)	103 (75%)(84%)	15
UK v Commission	44	11 (25%)(39%)	17 (39%)(61%)	16
UK v EP & Council	15	4 (27%)(29%)	10 (66%)(71%)	1
Member States v UK	4	1 (25%)	1 (25%)	2
UK v ECB	3	1 (33%)	0 (0%)	2
Total	213	41 (19%)(24%)	131 (62%)(76%)	41

*Other: Information not available or case deleted from court registry

Table 5 above shows the 'worst' and 'best' performing Member States, as measured by the number of cases initiated by the Commission against them. Table 5 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.

Again the UK is neither the worst, nor the best Member State. It occupies a middle position. More interestingly, of 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.

Table 6 presents analytically the outcome of all cases in which the UK has been involved from the date of its accession to the EU until 31 October 2017. Because registering the outcome of each individual case is a laborious task, it has not been done for other Member States.

The first bracketed number is the percentage share in relation to the total number of cases on the same row. The second bracketed number is the percentage share in relation to the sum of the cases in favour and against the UK on the same row (that is, it excludes other cases whose outcome is indeterminate).

The Table reveals a couple of interesting facts. First, very few cases concern preliminary rulings. Naturally, there are many more cases of preliminary rulings originating from the UK. It is just the UK government has been a party in only a very small number of those cases.

'2016 Commission report on monitoring the application of EU Law (34th)', *European Commission* (2016), https://ec.europa.eu/info/publications/2016-commission-report-monitoring-application-eu-law-34th_en.

Second, the cases won by the UK in proceedings initiated by the Commission hover between 14% and 16%, which, as already indicated above, is in the mid-range of the rates achieved by other Member States. This may be attributed to the fact that the Commission chooses which cases to pursue all the way to the courts. The mirror side of this is that UK presumably the UK also chooses which cases to initiate against the Commission or the Council and Parliament. Yet, Table 5 indicates that its success rate in these categories ranges between 25% and 39%, which is low.

What is also interesting, although it is not reported in Table 6, is the nature of the contested issue varies across the various categories. The proceedings initiated by the Commission against the UK concern mostly failure to apply correctly EU law in the areas of environmental protection, fisheries, agriculture and VAT.[12] There are also a few cases on favour treatment of domestic companies or discriminatory treatment of foreign companies.[13] Failure to protect the environment, or ensure the safety of drinking or bathing water, or to dispose waste properly, is unlikely to be in the national UK interests.

The issue of contention in proceedings initiated by the UK against the Commission is mostly the correctness of calculation of payments of agricultural or structural funds.

When the UK lodges legal challenges to Council, Parliament or European Central Bank (ECB) measures it almost always contests the legal basis of those measures and the competence of the institutions to adopt them. The large majority of these legal challenges are rejected by EU courts.

3. Does integrationist bias necessarily harm national interests?

The recent speeches of the UK Prime Minister mentioned above, the White Paper and the Great Repeal Bill and, of course, the numerous statements of Brexiters 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 the parliament in Westminster and enforced by UK courts.[14] 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 take back control over its laws and policies. But the concomitant consequence of gaining control is to lose control over others' laws and policies and over issues that transcend national borders such as pollution, tax evasion or organised crime. On empirical grounds, one may credibly argue that in practice the benefits from gaining control outweigh the costs of losing control. But it is certainly not true, either logically or empirically, that gaining control can unambiguously make the UK better off. The loss of control must be factored in.

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

12. See also the data in R. Hogarth and L. Lloyd, 'Who's Afraid of the ECJ?: Charting the UK's relationship with the European Court', *Institute for Government* (2017).
13. Ibid.
14. For a review of the recent debate in the UK on the CJEU and the sovereignty of parliament, see K. Ewing, 'Brexit and Parliamentary Sovereignty', 80 *Modern Law Review* (2017), p. 685–745.

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' policy 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 derives benefits 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 concerning disputes on trade or establishment (that is, this is a model that applies to internal market issues rather than issues which are not related to markets). Assume the judgments of the Court can lead to two outcomes: a pro-integration outcome and an outcome that confirms national measures. 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 from 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's 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 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 $naE - n(1 - a)N$. It is important now to understand the change in signs. Whereas for each Member State E is negative (because it opens up its market or forces it to change policy) it is positive for all other Member States. The opposite holds for N. The gains of each Member State 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 other markets, is zero. Since the Court

of Justice has not shown any specific bias against the UK, nor has any Brexiter made such a claim, the integrationist tendency of the Court in general has not harmed UK interests.

Let's consider now 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:

$$[(n - 1)(1 - a)N - (n - 1)aE] + [maE - m(1 - a)N]/(n - 1), \text{ or}$$
$$[nN - naN - N + aN - naE + aE + maE - mN + maN]/(n - 1)$$

Therefore, for a Member State to experience net positive effects it is necessary that:

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

Given that the denominator is positive [(n – 1) > 0], the expression above is positive only when the numerator is also positive. Since it is assumed 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. A Member State experiences a net positive effect when:

$$(nN - N) + (maN - naN) + (maE - naE) + (aN + aE) - mN > 0, \text{ or}$$
$$(nN - N) + (maN - naN) + (maE - naE) + (aN + aE) > mN.$$

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

But, let's see what happens when the alleged integrationist bias of the Court worsens. In formal terms, this means that probability 'a' becomes 1. We can now rewrite the inequality above as:

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

By simplifying, we derive:

$$mE - nE + E > 0, \text{ or}$$
$$E(m - n + 1) > 0$$

which is true because m > n, regardless of the size of 'E'! Moreover, the larger the number of cases 'm', the larger the beneficial effect experienced by a pro-market Member State.

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

4. The pro-market role of other EU institutions

A country like the UK also benefits from the market-protecting, access-preserving and distortion-preventing actions of other EU institutions. Take, for example, the European Commission, which has won a considerable number of infringement cases against the UK in its capacity as 'guardian of the treaties'. However, the Commission in its other roles can also be an important 'ally' of the UK.

Table 7. Cases of recovery of state aid incompatible with the internal market.

Member State	Recovery cases
Germany	64
Italy	42
Spain	34
France	27
Subtotal	**167 (67%)**
Greece	16
Belgium	13
Netherlands	10
Subtotal	**206 (83%)**
UK	2
Total	**249**

A prominent such role is the duty of the Commission to prevent distortions to competition from state subsidies.[15] Its powers to control state aid are assigned to it directly by the Treaty on the Functioning of the EU precisely because Member States naturally tend to favour their own companies and industries. But if Member States were allowed to favour domestic companies, then oneness of the internal market would be undermined.

According to the statistics in the database of DG Competition of the European Commission, between 1999 and 2016, there were 249 cases of subsidies or state aid – that is, about 15 cases per year – which was found by the Commission to be incompatible with the internal market and had to be repaid with interest by the beneficiary companies.[16] The total amount of incompatible aid runs into billions of euro. Table 7 below shows the countries with the highest number of incompatible state aid.

Just four large countries – that is, the UK's main trade partners – account for 67% of all cases. Together with three smaller Member States they are the recipients of 83% of the Commission's recovery orders. It is obvious that their propensity to grant incompatible state aid far exceeds that of the UK which in the same period was ordered only twice to recover incompatible aid. It is also obvious that the powers of the Commission protect less interventionist countries like the UK.

5. What are the likely consequences of ending the jurisdiction of the Court of Justice over the UK?

To answer the question posed in the heading of this section, it is necessary first to ask the prior question: What is the role of a court in international agreements? It is basically the same role as with adjudication on any agreement or contract. Courts determine whether agreements or contracts are implemented in compliance with their own provisions or in compliance with higher laws that

15. In this policy field the Commission exercises powers which are conferred directly by the Treaty, i.e. Article 108 TFEU.
16. See the various reports on DG Competition's website on recovery of unlawful aid. They can be accessed at DG Competition, 'Recovery of Unlawful Aid', *European Commission* (2016), http://ec.europa.eu/competition/state_aid/studies_reports/recovery.html.

apply to those agreements or contracts.[17] Even if an agreement or contract is written in a language that requires no interpretation and covers every possible contingency and imaginable outcome, a court is normally needed to authorise action against the party that breaches the agreement. When, for example, international trade disputes in the WTO system cannot be resolved with compensation offered by one party to another, they are ultimately 'settled' with retaliation authorised by WTO's dispute settlement body.[18] Therefore, courts interpret agreements, determine whether they are correctly applied and authorise action for compensation.

In the EU system, Member States harmed by another's infringement of EU law are not compensated. The infringing Member State simply has to terminate the practice that is at variance with EU law or adopt the measures required by EU law. If it does not do so promptly, it may have to pay a fine that includes a periodic penalty for as long as the infringement lasts.[19] As is well-known, however, Member States can be liable for damages under provisions of national law in accordance with the *Francovich* principle.[20]

Moreover, in the EU system, it is very rare for one Member State to initiate legal action against another. Protecting the rights of Member States is one of the main roles of the Commission. In this connection, the Commission enjoys powers that hardly exist in other international systems. The Commission can launch proceedings under its own initiative or take up a case on behalf of a Member State.

The fact that infringements are resolved with conformity rather than with retaliation by the aggrieved parties together with the fact that the Commission can act independently when it detects infringements mean that the EU system is more efficient than other dispute-settlement systems in two important respects.

First, action initiated by the Commission rather than by a Member State neutralises to a greater extent the size and power of Member States on either side of the equation. Of course, politics can never be eliminated from disputes between countries. But when the Commission acts it is not the same as when, for example, a small Member State acts. Smaller Member States are more vulnerable, economically and politically, and more dependent on the goodwill of larger Member States.

Second, settling disputes with retaliation results in harm for the country that suffers in the first place from the infraction of another. Moreover, retaliation through restrictive measures is contrary to the objective of trade agreements, which is to remove restrictions. In the case of the EU, they would defeat the purpose of establishing a seamless and unified market.

It is unavoidable, therefore, that ending the jurisdiction of the Court of Justice over the UK will reintroduce power politics into any post-exit agreement between the UK and the EU. Surely, one may think, the UK has considered these consequences. What is certain is that the UK has acknowledged the need for a dispute settlement arrangement after it leaves the EU. The White Paper of February 2017 states: '2.4: We recognise that ensuring a fair and equitable implementation of our future relationship with the EU requires provision for dispute resolution'.[21] It goes on to explain that dispute resolution mechanisms are common in international agreements and provides several examples of how they function without, however, identifying their advantages and disadvantages

17. See D. Walker, *Oxford Companion to Law* (Clarendon Press, 1980).
18. See P. Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press, 2013).
19. P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press, 2015).
20. T. Tridimas, *The General Principles of EU Law* (Oxford University Press, 2007).
21. UK Government, 'UK White Paper on Withdrawal from the EU, February 2017', *UK Government* (2017), p. 14.

and, more importantly, without indicating how they differ in their actual impact and effectiveness from the EU system.

The White Paper concludes with the statement that:

> 2.10: There are a number of examples that illustrate how other international agreements approach interpretation and dispute resolution. Some of these are set out in Annex A. Of course, these serve only as examples of current practice. The actual form of dispute resolution in a future relationship with the EU will be a matter for negotiations between the UK and the EU, and we should not be constrained by precedent. Different dispute resolution mechanisms could apply to different agreements, depending on how the new relationship with the EU is structured. Any arrangements must be ones that respect UK sovereignty, protect the role of our courts and maximise legal certainty, including for businesses, consumers, workers and other citizens.[22]

Indeed Annex A of the White Paper provides brief summaries of various existing mechanisms. But again there is no analysis of the implications of the different mechanisms.

In August 2017, the UK government published a short paper entitled 'Enforcement and Dispute Resolution: A Future Partnership Paper' (henceforth 'the Paper').[23] It defines four objectives in paragraph 11 of its Executive Summary:

In designing the future partnership, the UK's aims are to:

- maximise certainty for individuals and businesses;
- ensure that they can effectively enforce their rights in a timely way;
- respect the autonomy of EU law and UK legal systems while taking control of our own laws; and
- continue to respect our international obligations.

The Paper first clarifies (paragraph 14) that:

> Under the UK's constitutional arrangements, the agreements we expect to reach with the EU will not automatically become part of the UK's internal legal order. It will therefore be necessary for the UK to enact domestic legislation to give effect to them.'[24]

It then adds (paragraph 17) that:

> When it implements these agreements in its domestic law, the UK will also as appropriate provide for an effective means for individuals to enforce rights under the agreements, and challenge decisions of the competent authorities concerning those rights. The exact means of redress will depend on the nature of the dispute, and the approach taken to disputes of that nature in UK legal systems.[25]

The Paper does not elaborate further how the UK intends to give effect to future agreements with the EU. The 60-year experience of the EU suggests that when legal text agreed at international

22. Ibid., p. 15.
23. This can be accessed at, UK Government, 'Enforcement and dispute resolution – a future partnership paper', *UK Government* (2017), https://www.gov.uk/government/publications/enforcement-and-dispute-resolution-a-future-partnership-paper.
24. Ibid., p. 4.
25. Ibid.

level is transposed into a domestic legal order, or when agreed procedures are incorporated in the structure of domestic public administrations, mistakes happen. They happen precisely because Member States have discretion in choosing appropriate instruments and processes for implementation. This means that an international agreement that should not quickly become obsolete must indicate who has responsibility or powers to determine the equivalence between the various instruments and procedures that may be chosen by the parties to give effect to that agreement.

It is not surprising, therefore, that the Paper also attempts to outline how disputes may be resolved in the future. Accordingly (paragraph 22):

> The UK's position is that where the Withdrawal Agreement or future relationship agreements between the UK and the EU are intended to give rise to rights or obligations for individuals and businesses operating within the UK then, where appropriate, these will be given effect in UK law. Those rights or obligations will be enforced by the UK courts and ultimately by the UK Supreme Court. UK individuals and businesses operating within the EU should similarly be provided with means to enforce their rights and obligations within the EU's legal order and through the courts of the remaining 27 Member States.

Paragraph 23:

> This means, in both the UK and the EU, individuals and businesses will be able to enforce rights and obligations within the internal legal orders of the UK and the EU respectively, including through access to the highest courts within those legal orders.

Paragraph 24:

> Ending the direct jurisdiction of the CJEU [Court of Justice of the European Union] in the UK will not weaken the rights of individuals, nor call into question the UK's commitment to complying with its obligations under international agreements.[26]

Because the arrangement proposed above by the UK cannot ensure equivalence between the future EU and UK systems, nor achieve uniform interpretation and application of the post-exit agreements given that they will be interpreted by different courts, the Paper goes on to outline a dispute resolution system that can (paragraph 25) '. . . address any disagreements between the UK and the EU on interpretation or application.'[27]

The Paper concedes (paragraph 29), that just as in other '. . . international agreements, including all agreements between the EU and a third country . . . the courts of one party are not given direct jurisdiction over the other in order to resolve disputes between them'.[28] This is why, then, the Paper suggests the establishment of joint committees, arbitration panels and, possibly, an appellate body like that of the WTO.

In other words, the Paper proposes to move away from the current single and binding system of interpretation to one where different courts will be able to arrive at different interpretations. In order to reconcile the different and possibly conflicting interpretations, the EU and the UK, according to the Paper, will have to establish a separate dispute resolution mechanism. Adding an extra layer of adjudication above the courts of either side of the English Channel will in all likelihood decrease

26. Ibid., p. 5.
27. Ibid., p. 6.
28. Ibid.

legal certainty, complicate enforcement and delay compliance. Such outcomes are contrary to the avowed objectives of the UK as stated in paragraph 11 of the Paper, which is quoted above.

The Paper, in paragraphs 46 to 51, also tries to tackle the issue of possibly divergent interpretation after the UK's withdrawal from the EU. However, it limits itself to noting that certain international agreements (for example, the European Economic Area, with Norway on Schengen) recognise the usefulness of uniform interpretation and refer to the judgments of the Court of Justice. But the Paper is silent on how conflicting interpretations may be prevented.

Lastly, the Paper outlines possible remedies when disagreements cannot be resolved. It acknowledges (paragraph 60) that 'in international agreements, final remedies are principally retaliatory in nature and implemented unilaterally by the parties' and recognises that 'the ability of the European Commission and the CJEU within the EU legal system to impose sanctions, such as fines for non-compliance with EU rules, is exceptional'.[29] Again, however, it avoids drawing any lessons from this conclusion or making any concrete proposal.

If the objective of the UK is to safeguard the rights of citizens and businesses and achieve as much legal certainty as possible with speedy and easily accessible enforcement procedures, the current EU system comes very close to that ideal.

There is as yet no detailed proposal on the negotiating table, apart from the views expressed in the UK Paper. Therefore, any inference that is drawn from the Paper may be premature and tenuous. But the unavoidable conclusion must be that the ending of the jurisdiction of the Court of Justice over the UK will come at a cost. The previous two sections highlighted the cost of loss of influence over the policies of the EU and those of the remaining Member States. This section has highlighted several other costs: that of loss of legal certainty, of conflicting interpretation and of the loss of efficient remedies in the form of fines rather than distortionary retaliation.

6. Conclusions

This article has sought to demonstrate that i) the UK has not been embroiled in more proceedings before the Court of Justice than other large Member States; ii) fewer proceedings have been initiated against it by the Commission than other larger or medium-size Member States; and iii) the UK has won relatively more cases than other large Member States.

The article 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 UK firms. In addition, the distortion-preventing powers of other EU institutions such as the European Commission also tend to favour pro-market countries like the UK.

Lastly, the article has assessed alternative dispute resolution arrangements identified by the UK and has argued that they are more likely to reduce legal certainty and delay effective enforcement than the present system based on the Court of Justice.

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29. Ibid., p. 11.