Workshop: “The Future of a United Kingdom in the European Union”
University of Luxembourg, 11 March 2016
Panel III: Law and Justice in view of the reform package

The reform package in view of Free movement, social and fundamental rights

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I. Introductive remarks

The whole proceedings, starting with the official UK demands formulated in November 2015 until the European Council of 18-19 February and until the Referendum in June, **are a shame for the EU**.

In this unprecedented situation triggered by the humanitarian crisis of hundred of thousands of refugees leaving war zones in Syria, Afghanistan, North Africa …, no time and energy should have been wasted on such domestic problems of one Member State whose Prime minister unilaterally decided to put the matter of a BREXIT to a national referendum in order to overcome internal political tensions. There are much graver issues to be solved.

I would have expected at least one HS or HG **to vetoe** the matter to be discussed and thus the European Council being absorbed by such an egoistic approach in this period. A pity that Luxembourg’s PM did not do so.

Moreover: The chances for a Brexit to realise have not been diminished anyway.

> See Britain’s top-selling tabloid ‚The Sun’ has said the Queen wants the UK to leave the EU, in a report denied by her office and by the man to whom she’s said to have spoken. The Sun published its story in a front page splash on Wednesday (9 March) entitled “Queen backs Brexit.” And London’s Mayor campaigning for a Brexit as well as 6 cabinet members.
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> A survey conducted by leading British pollster YouGov in the first few days of March, following Cameron’s EU reform deal in late February, said 40 percent of people want to stay in the EU, 37

percent want to leave, 18 percent don’t know, and 5 percent don’t care.

The reform package is a rather unconvincing attempt to solve an internal political issue by a legal agreement whose content is more than uncertain.

It constitutes however a major threat to fundamental EU principles which are tackled in the HSG decision.

In some respects, it resembles to a ‘fata morgana’ which mirrors a desired destiny to the UK nomads, but always remains out of reach.

II. „The reform package in view of Free movement, social and fundamental rights “

The so called ‚fourth basket’ which has become „SECTION D : SOCIAL BENEFITS AND FREE MOVEMENT“ of the European Council meeting (18 and 19 February 2016) – Conclusions

Legally binding character of the ‘set of arrangements’ ?
The wording is somewhat strange as it announces ‘a new settlement of the UK within the EU’. According to the dictionary, such terminology usually refers to ‘new colonized territories’. Does it mean that the UK will colonize the EU?
It is an international agreement concluded in simplified form between the 28 MS, which is said ‘fully compatible’ with the founding treaties and will only enter into force if the UK decides to remain in the EU.

If yes to which extent?

- The Decision of the Heads of State or Government (HSG Decision)
- DECLARATION OF THE EUROPEAN COMMISSION on the indexation of child benefits exported to a Member State other than that where the worker resides (annex V)

- DECLARATION OF THE EUROPEAN COMMISSION on the Safeguard Mechanism referred to in paragraph 2(b) of Section D of the Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union (annex VI)
- DECLARATION OF THE EUROPEAN COMMISSION on issues related to the abuse of the right of free movement of persons (annex VII)

Each single arrangement has to be carefully analysed with regard to the treaties and the Charter, GPL, case-law, existing secondary legislation

1. Changes to primary law

They have been limited to the strict minimum, as the next IGC is far away.
Still, in Section D-3, ‘Appropriate transitional measures’ are announced with regard to future enlargements and shall be provided for within the Acts of Accession.

Remarks:

- First: this is always the case and was so with the past accession treaties of 2004, 2007 and 2014 but the UK decided not to implement the transitional rules.
- Second: It’ll require approval of the EP which could veto such measures. See the precedent of the Czech Republic wanting to join protocol 30 on the application of the CFR to UK and Poland. There also, at a European Council meeting in Brussels 29-30 Oct. 2009 it was decided to annex a protocol in that sense to the treaties. The EP vetoed however such measures in a resolution from 20 May 2013.

2. Interpretation of current EU law rules (Section D-1.)

To be compared with the 2 prior HSG decisions of 12.12.1992 “Edinburgh” (Denmark) and 18-19 June 2009 “Brussels” (Ireland):

- Both were HSG decisions adopted in order to influence the outcome of a national referendum on treaty ratification (but a treaty to be ratified by all MS not a treaty to be rejected by one MS)
- They did not intend to deliver ‘official interpretations of treaty rules’
- Both were drafted in more general terms
- Both were subsequently integrated into primary law by protocols annexed to the founding treaties by the Amsterdam treaty and the accession treaty with Croatia. (That is not foreseen for the present HSG decision)

According to **article 19 TEU** it’s the ECJ who has the competence to construe the treaties. The ECJ “shall ensure that in the interpretation and application of the Treaties the law is observed “.

So what can be the legal effect of ‚interpretations’ delivered by the HSG in an international agreement concluded in simplified form and to be registered with the UN Secretariat under article 102 UN Charter ?

Vienna Convention on the law of treaties. Art. 31,

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

But according tot he well established case-law oft he ECJ, which considers the founding treaties more a constitution than an ordinary international treaty, it is more than doubtful whether the Court would consider article 31 fully applicable to the interpretation of the treaties.

See also case law on protocol 30 on the applicability of the CFR in case *N.S.,* and on the binding character of the similar HSG “Edinburgh decision” in case *Rottmann:*

ECJ, 21.12.2011, Case C-411/10, N.S. , point 118:

> „it must be noted that Protocol (No 30) provides, in Article 1(1), that the Charter is not to extend the ability of the Court of Justice or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it affirms.
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> 119 According to the wording of that provision, as noted by the Advocate General in points 169 and 170 of her Opinion in Case C-411/10, Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol. Thus, according to the third recital in the preamble to Protocol (No 30), Article 6 TEU requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that article. In addition, according to the sixth recital in the preamble to that protocol, the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles.
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> 120 In those circumstances, Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.“

So clearly, what was presented in the UK as a true ‘opt out’ shows to be something very different.

As the ECJ insist on the ‘recitals’ in the preamble of the protocol, one might draw a parallel with the preamble of the February 2016 HSG decision, which insists in its recitals on the compatibility of the settlement with the founding treaties and the fact that is respects the powers of the institutions. Which clearly includes the ECJ.

ECJ, Rottmann, 2 March 2010, C-135/08:

> 40 It is true that Declaration No 2 on nationality of a Member State, annexed by the Member States to the final act of the Treaty on European Union, and the decision of the Heads of State and Government, meeting within the European Council at Edinburgh on 11 and 12 December 1992, concerning certain problems raised by Denmark on the Treaty of European Union, which were intended to clarify a question of particular importance to the Member States, namely, the definition of the ambit ratione personae of the provisions of European Union law referring to the concept of national, have to be taken into consideration as being instruments for the interpretation of the EC Treaty, especially for the purpose of determining the ambit ratione personae of that Treaty.
> 41 Nevertheless…

- **The intended ‘interpretations’ are not fully consistent with the ECJ’s Case law on GPL prohibiting the abuse and fraud**

  ECJ, 5 Jul. 2007, Case C-321/05, Hans Markus Kofoed v. Skatteministeriet [2007] ECR I-5795, This ruling clearly points to a formal recognition of a general principle prohibiting the abuse of rights on a Union level.

- **Nor with the ECJ case law on the public policy exception**

- **Or with the Case law on cross-border workers**

- **they may still be vetoed in the EP (see speech of MEP Gianni Pitella, leader of the socialist group)**

3. Changes to secondary legislation (Section D-2):

Required the 3 annexed declarations of the Commission who has the power to introduce such proposals.

a) **Indexation of child benefits** (amendment of Regulation 883/2004)

   Not problematic as applies to all MS and does not seem discriminatory.

b) Introduction of a ‘**safeguard mechanism’** in Regulation 492/2011 (ancient R. 1612/68)

Is meant to apply in cases of ‘exceptional magnitude of inflow of workers’. The threat appears to be strongly overrated for instance if one compares the UK statistics and those of Luxembourg or Germany.

c) Complement and clarifications on Directive 2004/38 with regard to the **abuse** of the right of free movement of persons

Here the Commission only ‘intends’ t adopt a proposal to complement Dir. 2004/38 (in the 2 previous it says the Commission “will” do so. It will be submitted after a positive outcome of the Referendum.
Its about the case-law in **Akrich** (23.9.2003) and **Metock** (25.7.2008, on the directive). A return to ‘Akrich’.

The further **clarifications** are to be developed in a simple Communication on abuse and ‘public policy’ exception. That is OK as the Commission will have to base that communication on the case-law. Otherwise its policy, stated in such a communication. Will not have any binding force and can easily be challenged before the ECJ.

Conclusion

The decision creates a risk for several fundamental principles of EU Law: EU citizenship, free movement of workers and non discrimination are put into question without any need.

This kind of ‘cherry picking’ which is also favoured by the Swiss government should not be tolerated.

The adequate new settlement for the UK would rather be the EEA than the EU.