



★ ★ ★
★ Senior
★ European
★ Experts

The Role of the Court of Justice of the European Union

The Role of the Court of Justice of the European Union

Introduction

Since the 2016 referendum on EU membership in the United Kingdom there have been many references in debate to the Court of Justice of the European Union (hereafter, the Court). The Prime Minister has made excluding the UK from the jurisdiction of the Court one of her principle aims in the Brexit process. Yet it is not clear that the role and work of the Court, let alone its impact on the UK, is widely understood. Indeed, commentators still occasionally confuse it with the wholly separate European Court of Human Rights, which is part of the Council of Europe and not part of the EU.

This briefing explains why the Court is necessary to the EU, how it works day-to-day and the impact of its decisions on the UK and other EU Member States during the 45 years of our membership. It makes brief reference to other methods of dispute resolution in the context of Brexit. It is complementary to an existing SEE paper on the Court which gives further information on its methods of work.¹

Background: The Court's history and structure

The founding treaty of the European Communities, the Treaty of Rome (1957), provided for a shared system of law. The concept was that by pooling part of their sovereignty the Member States of the European Communities (now European Union) would enable a level playing field in order to promote greater economic prosperity for their own countries. They sought to achieve this by the establishment of a customs union, by the progressive reduction of non-tariff barriers to trade and by outlawing distorting subsidies and practices. In this way a common or internal market across the EU would be created. Within this area no customs tariffs would be permitted, businesses would be free to establish themselves in any Member State, and the four freedoms set out in the Treaties – the free movement of goods, capital, labour and services – would be guaranteed.

To enable the internal market to work, it was necessary to have effective means of dispute settlement and, to this end, a court with the jurisdiction to determine cases across the whole area of the three treaties (ECSC, EEC and Euratom) was established. The Court would have the authority to make decisions whose consequences impacted in all of the Member States and it would determine cases brought it before by the European Commission as part of its enforcement responsibilities.

¹ Senior European Experts, *The European Court of Justice*, June 2010

During the 1960s several important cases helped to determine the extent of the Court's powers; these are considered below. Later, as the workload of the Court grew it was restructured to allow a system of lower courts able to hear cases in the first instance with the main court acting as a court of appeal and for the consideration of the most serious cases. Its powers of enforcement were enhanced in the Treaty of Maastricht when it was given the power to levy fines on Member States who failed to comply with its judgments. In addition, the Court's judgment in the *Francovich* (1991) case made it possible for individuals to sue governments for damages in national courts as a result of their failure to implement an EU law.

The Court is one of the seven institutions of the European Union alongside the Commission, the Council of Ministers, the Parliament, the European Council, the European Central Bank and the Court of Auditors. Its statute, which forms a protocol to the Treaties, sets out its methods of work, the rules concerning the appointment and conduct of judges and the procedure that applies in cases before the court. Each Member State nominates a judge to sit on the main Court. All judges are considered by a panel to assess their suitability before appointment.

Cases before the Court originate in one of three ways:

- requests from national courts for a ruling on points of EU law;
- actions brought by the EU institutions, Member States, individuals and organisations (the latter two categories are known as natural and legal persons);
- appeals against judgments made in the lower courts of the Court.

The Statute of the Court (Article 40) permits Member States and the institutions of the EU to intervene in cases before it. This is because there may be important questions affecting the interests of another EU institution or a Member State which they ought to be able to put to the Court.

It is important to note that the Court of Justice is a court operating under the EU's Treaties; its jurisdiction is limited to areas of law that fall within those Treaties. EU law is primarily concerned with business regulation in the Single Market, with external trade, with cross-border crime and justice measures and with the environment. The EU is very active in external relations but the Common Foreign and Security Policy and the EU defence and security policy are largely excluded from the Court's jurisdiction.

The Court also settles disputes between the institutions of the EU and deals with cases concerning staff of the institutions. It is the final court of appeal in cases concerning the rights of individuals against whom the EU has taken sanctions (for example as part of a foreign policy initiative or in response to a UN Security Council resolution). Unlike other international courts however, the Court does not normally give advisory opinions.

Principles of EU law

Two of the most important principles implicit in the Treaties have been defined in judgments of the Court. These are direct effect and the primacy of EU law. Both these rulings took place before the UK joined the EU in 1973.

Direct effect

In the landmark case of *Van Gend den Loos*, 1963, a Dutch transport firm complained that Dutch customs had increased the duty on a product they had imported from Germany. The company argued that the Dutch authorities had breached Article 12 of the Treaties, which prohibited Member States from introducing new duties or increasing existing duties in the Single Market. The company's argument was that the Treaty article had direct effect in the Netherlands. The Court agreed, stating that it had direct effect because it contained a "clear and unconditional prohibition". The Court then declared that any unconditionally worded Treaty provisions were "self-sufficient and legally complete", meaning that they did not require any further action at the national or EU level and therefore applied directly to individuals or other legal persons.² The Court's judgment was important because it made clear that EU not only imposes obligations on individuals but also confers rights upon them.³

In a later judgment, *Grad v. Finanzamt Traunstein*, (1970), the Court held that this direct effect still applied if EU legislation placed a clear and unconditional obligation on a Member State which had not been implemented by that Member within the period prescribed in the legislation.⁴

Primacy of EU law

The second principle implicit in the Treaties but only explicitly spelt out in judgments of the Court was that EU law has primacy over national law. Without such a power the Member States or their courts would be able to overrule decisions of the EU that they did not like, thus rendering inoperable the shared system of law and preventing the development of the internal market.

The key case came in 1964, *Costa v. ENEL*, when the Court ruled that Member States had handed over some of their sovereign rights to the European Community through the Treaties and that EU law could not be overridden by national law.⁵ In a further case in 1978, *Simmenthal v. Commission*, the court ruled that "every national court must [...] apply Community law in its entirety [...] and must accordingly set aside any provisions of national law which may conflict with it".⁶ This means that individuals and businesses can take action in national courts if their government fails to implement a new EU law in that country or passes national laws that are contrary to EU law.

These cases established the basic principles of EU law and by doing so they confirmed that the EU is a body based on the rule of law. They also enhanced the status of the Court in the eyes of Member States, the other EU institutions and individuals across Europe. This encouraged businesses to invest in the EU Member States because of the legal certainty that derives from the system of EU law.

Impact of the Court's judgments

Since its establishment the Court has made other judgments in a number of significant cases that have had wide impact. This section looks at a number of the more significant of these cases.

² *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, C-26/62, [1963] ECR 1

³ There is a simple and clear explanation of this and other landmark cases in Desmond Dinan, *Ever Closer Union: An Introduction to European Integration* (London: Palgrave Macmillan, 2005), pp. 303-304

⁴ *Franz Grad v. Finanzamt Traunstein*, C-9/70, R-9/70, [1970] ECR 825

⁵ *Costa v. ENEL*, C-6/64, [1964] ECR 585

⁶ *Simmenthal v. Commission*, C-92/78, [1979] ECR 777

Free movement of goods

In the case of *Cassis de Dijon* (1979), the Court established the ability of the EU to develop the principle of mutual recognition, through which Member States have to recognise each other's regulations.⁷ This was a vital step towards establishing a full internal market because this ruling meant that goods produced and marketed in any one Member State may be sold in all other Member States. It also therefore reduced the need for harmonising laws at the EU level.

Free movement of services

A case involving cross-border telecommunications services in 1988, *Bond van Adverteerders v. The Netherlands*, resulted in a court ruling which reduced the barriers to the provision of services across the EU.⁸

Professional qualifications

Many Member States did not recognise professional qualifications unless obtained in their country. In the case of *Vlassopoulou* (1991) the Court restricted the ability of a Member State to require a lawyer from another Member State to obtain a qualification before practising in their country.⁹ The case law that followed allows many professionals to work across the EU without having to obtain further qualifications or meet complex requirements.

Competition policy

Court judgments in a number of cases have helped to extend the use competition policy, for example by confirming the Commission's powers to order governments to repay illegal state aid to industry. Court judgments also played a key role in putting detail on the framework of the prohibitions on anti-competitive behaviour (for example abuse of dominance by large multinational corporations) thus ensuring a coherent and consistent framework for business and protecting consumers across the EU.

Equal rights

A landmark case in 1971, *Defrenne v. Belgium*, led the Court to rule that the Treaty's provisions for equal pay were directly applicable and national courts should ensure that all citizens enjoyed the benefit of that principle.¹⁰ As a result, a number of directives were adopted by the EU in order to end discrimination against women.

Consumer rights

In *Sturgeon v. Condor* (2009), the Court ruled that airlines could not use a technical fault on an aircraft to deny help and compensation to passengers whose flights were badly delayed or cancelled.¹¹ This was an important clarification of the meaning of the phrase "extraordinary circumstances" in the Air Passenger Rights Directive 2004 and has benefited many passengers since.

⁷ *Rewe-Zentral Ag v. Bundesmonopolverwaltung Fuer Branntwein* (commonly referred to as *Cassis de Dijon*), C-120/78, R-120/78, [1979] ECR 649

⁸ *Bond van Adverteerders and Others v. The Netherlands*, C-352/85, [1988] ECR 2085

⁹ *Irene Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg*, C-340/89, [1991] ECR 2357

¹⁰ *Defrenne v. Belgium*, C-80/70, R-80/70, [1971] ECR 445

¹¹ *Sturgeon and Others v. Condor Flugdienst GmbH*, C- 402/07, [2009] ECR I-10923

All of these cases have enabled the broadening and deepening of the EU's internal market to the benefit of British businesses and of citizens by enhancing their personal rights. The Court's judgments have enabled UK businesses to invest and export confident in the knowledge they are trading and operating on a level playing field across all 28 Member States. Without the Court, Member States would have continued to operate non-tariff barriers to trade that favoured their own citizens and businesses, to the detriment of competitive British businesses.

Estimates of the economic benefits of EU membership vary but there is little doubt that the modern Single Market, in operation since the beginning of 1993, has substantially increased the wealth of the United Kingdom. For example, one study carried out before the 2016 referendum found that the UK's trade with other EU Member States was 55 per cent higher than would have been expected given the size of those countries and other factors.¹²

Critics of the Court argue that it is highly political, "federalising", a "foreign court" and even that it has "subverted" the treaties.¹³ Such arguments, which often rely on cases considered by the Court in its earlier years, ignore the fact that the Court had to develop its role and assert its authority in order to make a reality of the EU as a community based upon the rule of law.

Cases concerning the United Kingdom

A number of cases have demonstrated the value of the Court to the United Kingdom. These include:

- Overturning the French beef ban – as a result of the outbreak of the BSE disease in the 1980s, British beef was banned from sale in the EU while safety precautions were put in place; France retained a ban on British beef imports long after the EU had lifted its restrictions but in 2001 the Court overturned the French ban (the US, by contrast, which is not subject to the rulings of the Court, maintained the beef ban for many more years after that);
- In 2015 the Court ruled against a European Central Bank directive that would have had the effect of requiring part of London's financial services sector, the euro clearing houses, to relocate to the eurozone;
- In 2016 an attempt by European Commission to overturn restrictions on the granting of housing and child benefit to EU migrants was rejected by the Court, which held that the UK's residency test was within the law.

Some cases have gone against the UK, as is to be expected when disputes are decided by the courts. It has been suggested that the UK has lost as many as three out of four cases in the Court.¹⁴ This reflects the fact that the majority of cases concern a failure to implement EU law. The European Commission does not bring such cases unless it believes it has a high chance of success and only after a lengthy process of trying to persuade the Member State

¹² John Springford, Simon Tilford & Philip Whyte, *The economic consequences of leaving the EU*, Centre for European Reform, 3 June 2014, p. 24; Erik Dahlberg, *The Economic Benefits of the European Single Market*, National Board of Trade of Sweden, May 2015, is a useful review which has the benefit of not having been written by a protagonist in the Brexit debate.

¹³ For example, Professor Richard Ekins of Oxford University in *Brexit and Judicial Power*, Policy Exchange, 21 July 2016

¹⁴ A claim made by Vote Leave in March 2016: see 'More proof of meddling: Britain has lost 'more than 75 PER CENT' of EU court cases', Macer Hall, *Daily Express*, 2 March 2016

in question to act without recourse to the Court. Between 1973 and 2016 there were 131 cases in total before the Court that concerned the UK. Out of the 91 cases brought by the Commission, it won 77 of them (84 per cent). In the 40 cases not brought by the Commission, the UK did much better winning 60 per cent of them (24 out of 40). The UK's failure rate in the European Court is lower than that of comparable Member States, for example, France loses 90 per cent of its cases at the Court. The larger point is that the UK benefits from other Member States' defeats in the Court, as over the French beef ban.¹⁵

The most famous case lost by the United Kingdom was the *Factortame* case.¹⁶ This concerned provisions in the *Merchant Shipping Act 1988* which said that 75 per cent of directors and shareholders of fishing vessels registered in the United Kingdom must be British. The purpose of the legislation was to prevent so-called fisheries quota hopping by other EU Member States, notably Spain. The Court overturned this part of the Act on the grounds that it was discriminatory. But the fact that it would be challenged in the courts was known before the legislation became law and MPs had suggested that it violated EU law.

British judges have been influential members of the Court. The distinguished Scots lawyer Lord Mackenzie-Stuart served as President between 1984 and 1988. UK lawyers and judges have brought to the Court their understanding of how a single market with multiple legal jurisdictions like the UK works successfully.¹⁷ They have also enabled judges from different legal traditions to better understand the common law which is also practised by three other Member States, Cyprus, Ireland and Malta.

Dispute resolution after Brexit

The transition agreement endorsed by the European Council provides for the Court to retain its jurisdiction in the UK throughout the period of the transition from 30 March 2019 to 31 December 2020.¹⁸

Some kind of dispute resolution mechanism or mechanisms will be needed after the end of the transition period to regulate the relationship between the UK and the EU in any new partnership.¹⁹ The UK accepts this but the Prime Minister has rejected the UK continuing to accept the Court's direct jurisdiction in most areas. Nonetheless, ministers have accepted that in practice the UK will work with the Court's jurisdiction so that it can stay involved in important EU agencies such as those dealing with medicines and civil aviation and, if the EU agrees, continue to operate key crime and justice measures, such as the European Arrest Warrant.

For the UK-EU trade agreement, the options for dispute resolution mechanisms include making use of the Court of the European Free Trade Association or the establishment of a new court specifically for this agreement. These alternatives to the Court would neither involve direct effect nor the UK accepting the primacy of EU law. Even if such a special

¹⁵ 'ECJ loss rate doesn't show injustice', Jack Schickler, *In Facts*, 12 April 2016

¹⁶ *R v. Secretary of State for Transport ex p. Factortame*, C-213/89, [1990] ECR I-2433

¹⁷ See, for example, Sir Jonathan Faull, *European Law in the United Kingdom*, UK Association of European Law, 14 December 2017

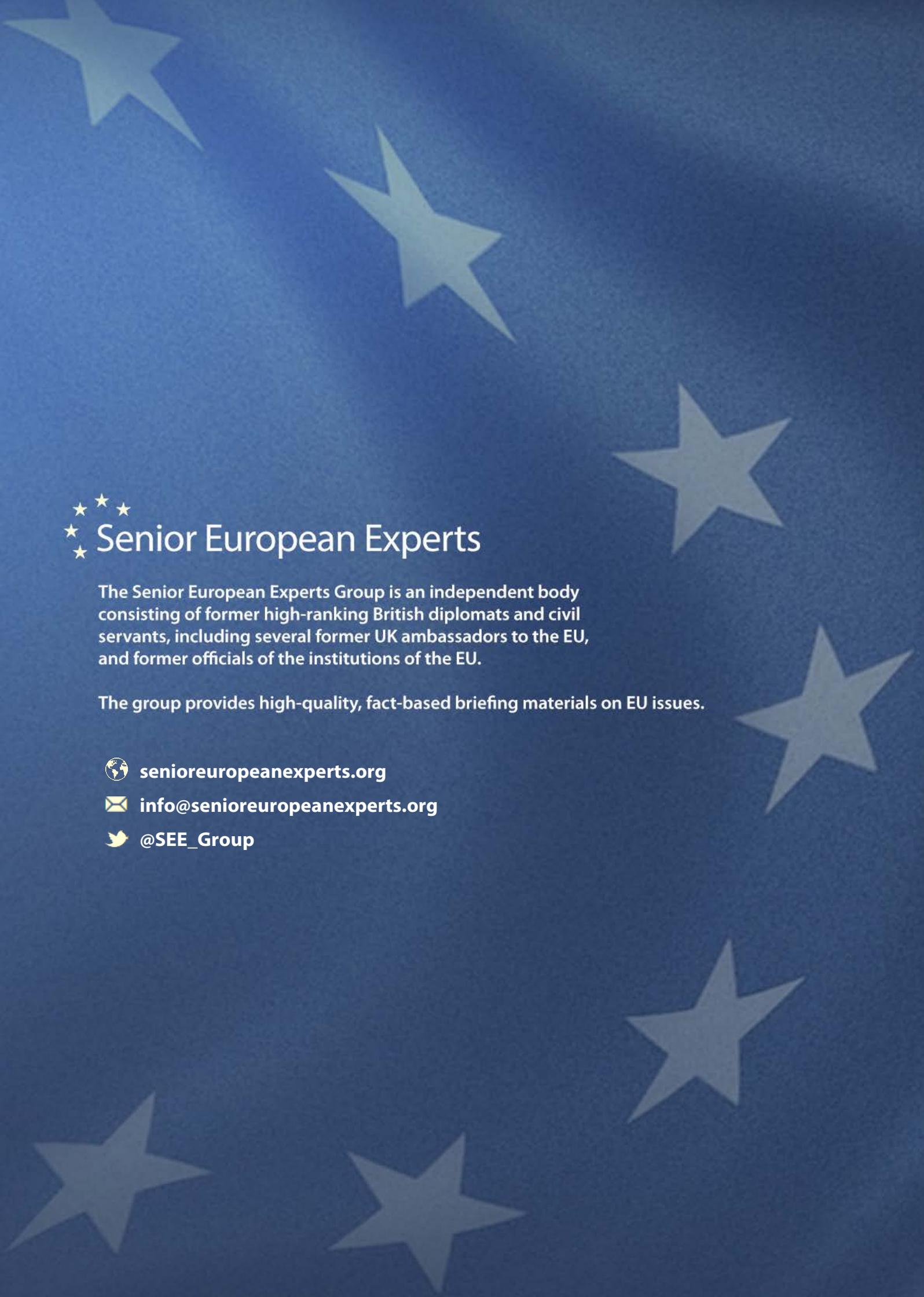
¹⁸ European Commission, *Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, TF50 (2018) 35, 19 March 2018; the UK had not agreed to the sections covering dispute resolution at the time of writing

¹⁹ There is more detail on this question in Senior European Experts, *Dispute settlement after Brexit*, August 2017

arrangement proves acceptable to the EU in respect of trade cases, it is highly unlikely that it would accept this approach in justice and home affairs cases.

Although the Court has often been criticised in the UK – as it is in other Member States – for ruling against the government's policies, it has nonetheless been of great benefit to the UK. By developing a system of law that provides certainty for business and protection for individuals and consumers, the Court has helped to shape the EU to the advantage of British businesses and citizens. The demonisation of the Court during and since the referendum campaign in 2016 has no basis in reality.

March 2018



Senior European Experts

The Senior European Experts Group is an independent body consisting of former high-ranking British diplomats and civil servants, including several former UK ambassadors to the EU, and former officials of the institutions of the EU.

The group provides high-quality, fact-based briefing materials on EU issues.

 senioreuropeanexperts.org

 info@senioreuropeanexperts.org

 [@SEE_Group](https://twitter.com/SEE_Group)