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EU Notice To Stakeholders Is Accurate, But Misleading

By **Louise Freeman** (February 14, 2018, 12:42 PM EST)

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This article "fact-checks" the "Notice to Stakeholders" published by the European Commission on Nov. 21, 2017.[1] The notice has received widespread press attention, due to its stark warnings about the risks of choosing to litigate in the English courts post-Brexit. The warnings have caused raised eyebrows and questions in financial institutions around the city and beyond.

We consider whether the notice is factually accurate (yes), whether it gives an interested commercial stakeholder the full story (no), and suggest some reasons why the notice was released when it was (primarily, political motivations). We conclude that the notice, which purports to be a useful guide for interested parties, is in fact misleadingly incomplete, presumably for political purposes.

"Notice to Stakeholders"

The first question that arises is, what is a notice to stakeholders? It is a form of communication rarely used by the EU. A search of the EU website, Europa, identifies only two prior notices to stakeholders.[2] A notice to stakeholders does not have any identifiable status and is not one of the forms of "soft law" used by the commission, but is simply, as the name suggests, a communication to any parties that may be interested. Interestingly, however, the commission has issued a flurry of similar notices in the last few weeks, including in relation to the impact of Brexit on company law, data protection, EU trade marks and community designs and public procurement.[3]

Purpose of the Notice

This notice seems to be targeted at "private parties in the Member States," whom the commission suggests should be preparing for withdrawal, as well as "members of the legal profession," whom the commission suggests may need to be "reminded of legal repercussions." This seems surprising given the extensive writings produced by law firms on what might happen post-Brexit and the depth of analysis invested by financial institutions in Brexit-planning.

Fact-checking

Introduction

The notice begins by summarizing the Article 50 notice given by the U.K., and concluding that all EU law will cease to apply to the United Kingdom from March 30, 2019, at 00:00 hours (CET). Following this time, the U.K. will become a third country. Whilst the facts as stated in the introduction are accurate, they do not acknowledge the effect of the so-called 'Great Repeal Bill',[4] pursuant to which, post-Brexit, U.K. law will mirror current EU law in the U.K.[5] The introduction to the notice therefore gives the misleading impression that EU law will cease to have any relevance in the U.K. as of March 30, 2019, when, in fact, the opposite is true.[6]

In what becomes a theme of the notice, the introduction is characterized by an exclusive focus on the EU perspective and wholly ignores the impact of steps taken by the U.K. As such, it is a one-sided introduction (and, as will be seen below, document).

Impact of Brexit

The notice then goes on to comment on the consequences of Brexit in relation to international jurisdiction, recognition and enforcement, judicial cooperation procedures and specific EU procedures[7]. Taking each in turn:

¾ International Jurisdiction: The notice states that the EU rules on international jurisdiction will no longer apply to judicial proceedings in the U.K. or to judicial proceedings in the EU where the defendant is domiciled in the U.K. It concludes that international jurisdiction will be governed by the national rules of the state in which a court has been seized. Again, there is nothing inaccurate in these statements, but it does not give an interested stakeholder the full picture.

Whilst the Brussels Recast Regulation[8] will no longer be effective in governing the allocation of jurisdiction or enforcement of judgments between the EU 27 and the U.K. post-Brexit (due to its reliance on reciprocity, which will fall away), it is entirely feasible (and some would suggest likely) that a new agreement between the U.K. and the EU will take its place,[9] or that the U.K. will join the Lugano Convention,[10] which in either case would largely replicate the Brussels Recast Regulation.[11]

Even if no such deal is reached (for example, because there is no consensus on the future role of the Court of Justice), the notice also ignores the impact of the Hague Convention on Choice of Court Agreements[12] (the "Hague Convention"), which binds the EU and all other signatories to it. The U.K. can and, we understand will, become party to the Hague Convention in its own right upon Brexit[13], which will mean that EU national courts will be bound to respect an exclusive choice of English jurisdiction post-Brexit. Interested commercial stakeholders would therefore be well-advised to continue to include an exclusive choice of court provision in their agreements (which, for these purposes, probably does not include an asymmetric clause).

The notice also ignores the possibility that the Brussels Convention[14] will revive, despite the fact that this is what is expected by the European Parliament (DG Internal Policies, which expressed this view in a paper dated August 2017[15]).

The notice refers to international jurisdiction being governed by the national rules of the state in which a court has been seized but does not acknowledge that these courts remain highly likely to respect a choice of court by a commercial party in any event. It seems highly unlikely, and indeed no national court in the EU27 seems to be suggesting, that an express and exclusive choice of English jurisdiction would not be respected by any EU national court post-Brexit. If that were not the case, it would cast doubt upon the seized court's respect for the law, for commercial choice and for international comity. It

would seriously affect their attractiveness as a forum for international business. Since there would be no reason to distinguish between English and, for example, U.S. choices of jurisdiction, the seized court would be harming its reputation far more broadly than just in the U.K. It seems infeasible that it would do so.

The summary in relation to international jurisdiction in the notice, therefore, is not inaccurate, but it is misleadingly incomplete.

¾ *Recognition and Enforcement*: In relation to recognition and enforcement, the commission states that judgments issued in the U.K. will no longer be recognized and enforced in EU member states under EU rules. Again, it concludes that recognition and enforcement will be governed by the national law of the state in question, but also acknowledges that there may be international conventions to which some states are a party.

The first part of the commission's statement in this regard, whilst accurate, is expressed in such a way as to give the impression that the only reason English judgments might be enforced in EU 27 national courts is due to EU instruments and that, once those instruments fall away, such judgments will no longer be enforceable. In fact, just as is the case in relation to jurisdiction explored above, it is likely that a new agreement will be entered into between the EU and the U.K. covering the enforcement of judgments, or that the U.K. will join the Lugano Convention. Even if neither happens, English judgments given pursuant to exclusive choices of jurisdiction will be enforceable under the Hague Convention[16], and if none of those options were available, there remains the possibility that the Brussels Convention revives upon Brexit. Above all, even in the absence of any binding international obligation to do so, the EU 27 national courts remain highly likely to enforce English judgments (just as they did prior to the enactment of the relevant EU regulations). To do otherwise would be likely seriously to damage that court's credibility.

Here again, although the commission's notice is not inaccurate it is misleadingly incomplete.

¾ *Judicial Cooperation*: The commission states in its notice that EU instruments facilitating judicial cooperation (e.g. in relation to the service of documents, taking of evidence or within the context of the European Judicial Network in Civil and Commercial Matters) will no longer apply between EU member states and the U.K. It is true that EU instruments relating to service of documents and taking of evidence will fall away. However, the notice does not make any reference to the possibility of the continued application of these regimes, by agreement, nor to the Hague Service Convention[17] or the Hague Taking of Evidence Abroad Convention[18], nor to bilateral treaties that were in place before EU-wide regimes were implemented, which would together largely fill any gaps left. Commercial parties also of course regularly include service of process provisions in their contracts in any event, and would be well-advised to continue to do so.

The European Judicial Network exists to ease the application of EU law within the EU, so once the U.K. is no longer bound by EU law, it will no longer have need of it.[19]

The notice, again, is not inaccurate, but nor is it giving the full picture.

Conclusion

Our fact-checking indicates that the notice, in failing to give the reader a rounded view of the position, is misleading.

Taken at face value, it would suggest that post-Brexit, a choice of English jurisdiction will not be respected, and an English judgment will not be enforced, in EU 27 courts. One only has to look at how choices of other jurisdictions, or enforcement of judgments from other jurisdictions, such as Singapore, Hong Kong, the U.S. and Canada, are treated in EU 27 courts to see that this is not going to be the case.

Timing

It seems to us that the notice has been carefully drafted to be technically accurate, but the fact that it does not give the full picture to interested commercial parties renders it unhelpful to stakeholders.

This therefore gives rise to possibly the most significant question about the notice: its timing and the motives behind it. The notice acknowledges in passing in a footnote that there may be a transitional period following the U.K.'s exit from the EU. However, it does not make clear that, in the Position Paper dated July 12, 2017, the EU 27 took the position that a choice of forum made before the withdrawal date should be assessed in accordance with the current regimes. The current stated EU position is therefore that a choice of English jurisdiction made today should be upheld by the EU 27 national courts under current regimes post-Brexit. Since this is the case, and since the post-Brexit arrangements between the EU and the U.K. are not yet known, the question arises as to why the European Commission considered now to be the right time to issue the notice? Surely it would be more helpful to wait until the position is clearer and then issue a notice explaining the position to stakeholders.

We hesitate to suggest that there could be a motive behind the notice other than the provision of factually and legally accurate information but the notice is misleading and the timing is unfortunate[20]. As such, we question whether there were in fact political motives behind the publication of a notice casting doubt on the continued efficacy of the English courts, in the midst of highly-charged negotiations.

Comment

If the European Commission truly intends to assist stakeholders to commercial relations and potential disputes, it should either prepare a comprehensive notice setting out the position in relation to applicable international conventions and the position taken by EU 27 national courts or it should wait until the post-Brexit position is known. This notice simply raises more questions and potential uncertainty than it answers.

If our assessment is correct, it is of concern that legal certainty is apparently being used as a bargaining chip, at a time when it must be in the interests of private parties and national courts, across the EU and the U.K., that cross-border cooperation and enforcement continue.

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[1] Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules in the Field of Civil Justice and Private International Law

[2] One related to a public session of the EU – U.S. High Level Regulatory Cooperation Forum in 2013, and one being an update on procedures for marketing authorisation in 2009

[3] Notice to Stakeholders - Withdrawal of the United Kingdom and EU Rules on Company Law, 21 November 2017; Withdrawal of the United Kingdom and EU rules in the field of data protection, 9 January 2018; Notice to Holders of and Applicants for European Union Trade Marks Pursuant to Regulation (EU) 2017/1001 on the European Union Trade Mark and to Holders of and Applicants for Community Designs pursuant to Regulation (EC) No 6/2002 on Community Designs; Withdrawal of the United Kingdom and EU rules in the field of public procurement, 18 January 2018.

[4] Formally entitled the "European Union (Withdrawal) Bill"

[5] Section 3(1) of the European Union (Withdrawal) Bill providing: "Direct EU legislation, so far as operative immediately before exit day, forms part of domestic law on and after exit day."

[6] It also does not address the possibility of any attempt by the UK to withdraw Article 50 (itself a contentious topic and perhaps unlikely to be sought by the UK but in the world of Brexit, anything is possible)

[7] We do not comment on the European Payment Order procedure or the European Procedure for Small Claims since those procedures are unlikely to be relevant to significant commercial parties

[8] Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)

[9] Whether by means of an entirely new, bespoke regime, or (perhaps more likely) by way of an agreement between the EU and the UK to apply the Brussels Recast Regulation as if the UK were still a Member State

[10] 2007 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which applies to the enforcement of judgments as between EU Member States and the EFTA (European Free Trade Association) States of Iceland, Norway, and Switzerland

[11] The UK Government's intention is to negotiate a new deal, with continued participation in the 2007 Lugano Convention as a fall back - see, for example, the Government Response to the House of Lords European Select Committeedated 1 December 2017, page 8

[12] Hague Convention of 30 June 2005 Choice of Court Agreements

[13] For example, the Government Response to the House of Lords European Select Committee dated 1 December 2017 states that "the Government also intends to apply the 2005 Hague Convention on Choice of Court post exit…"

[14] Convention on civil jurisdiction and enforcement of judgments

[15] Directorate General for Internal Policies: Policy Department A - Economic and Scientific Policy, Legal Implications of Brexit, August 2017

[16] Assuming that the UK fulfils its intention to join the Hague Convention in its own right upon Brexit

[17] Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

[18] Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

[19] If it remains bound (for example, by reaching an agreement to continue to apply the Brussels Recast regime), the Network could presumably be made available to it

[20] At the time that the Notice was issued (on 21 November 2017), the phase 1 negotiations were intense and their outcome uncertain. The UK government was desperate to move on to phase 2 negotiations about a future relationship and the EU was putting pressure on the UK to make concessions on phase 1 to move to phase 2. Whilst the Notice relates to a relatively small issue in the grand scheme of Brexit negotiations, it may reflect a broader political aim to put pressure on the UK.