

Could UK exporters miss the ECJ?

Blog post by Research Associate Guillaume Ferlet, 23 November 2016

GC has just published a [report](#) with colleagues from HSF and Boston Consulting looking at some of the implications of a ‘hard Brexit’ for traders between the EU and the UK. Media coverage of the report has focused on the headline issue of tariffs being re-imposed on EU-UK trade. But, among many other things, the report flags the important issue of changes to British investors’ rights of recourse in the EU, which is often not well appreciated by businesses.

The issue here is that the EU treaties guarantee British businesses operating in other EU countries the sort of legal protection they enjoy at home. That is, in essence, the right to be treated like any domestic company in any EU member state. On top of that, both the EU infringements system and ultimately the ECJ offer the possibility for British businesses to have these rights directly enforced in case of violations.

There is no easy fix for this. An FTA agreed between the EU and the UK would be certain to include dispute settlement arrangements, and possibly more detailed arrangements for protecting investor rights (although the TTIP debate has complicated the politics of this, to put it mildly). FTAs typically include two sorts of dispute settlement clauses, one being state-to-state and the other company-to-state. The former requires activating state diplomatic channels and does not result in legally binding solutions; the latter is binding and follows a true legal procedure but is nonetheless limited to narrow instances of unfair treatment and expropriation.

This is a whole new system of recourse that will require British businesses to adapt to new dispute settlement mechanisms. It is far from equivalent to the sort of protection provided by the ECJ in the EU (or by the EFTA court in the EEA system). As my colleagues pointed out in their report - the European Court system processes around 1,500 cases a year of this or similar kinds. Most FTA dispute settlement clauses are activated rarely, if ever. Reflecting on this, some British investors may even want to reconsider their legal structure in the EU to regain clearer routes to protecting their interests.

For many UK Brexiteers, the idea of escaping the reach of the ECJ is one of the key motivations for leaving the EU. Whatever the merits of such a choice in other respects, from the point of view of the rights of British investors in the EU single market it is worth remembering that like any court the ECJ not only imposes the law, it protects your rights under it.