THE BREXIT PRELIMINARY AGREEMENT IS NOT WHAT MOST PEOPLE THINK.

It is quite fascinating to read the comments of the Twittosphere about the preliminary agreement concluded between the Brexit negotiators. "Total capitulation". "Window dressing". "Nonsensical fudge". Brexit seems to make fools of us all. Many people, sometimes highly qualified, tend to comment here much quicker than they think. And they fail to understand the complex dynamics of a long multi-steps negotiation. This applies to the whole agreement, and especially to the part concerning the European Court of Justice's future role. We are meant to believe that the UK government conceded everything to the EU empire of evil, or vice versa, whereas reality is much more nuanced.

Firstly, this is a preliminary agreement, not even the final exit agreement. It is only meant to allow the opening of the negotiation's second phase. It also allows to explore different options[1]. Consequently, even for the exit (Article 50) matters, there are still complements to be brought. Second, it is a bilateral agreement. Some UK ministers, like Davis or Gove, have indicated that some elements could be revised later. Those people excel in creating storms in a teapot, but not in analysing reality. As this remains a preliminary text, everyone can still try to complete its provisions. Later, parties can always try to revise them. However, this right belongs to all. If there are connections between topics for the UK, they also exist for the EU. The UK government had to offer concessions for this reason, and one must doubt strongly that it will disappear later. The UK will face later exactly the same situation (except that other benefits will appear and time constraints will be heavier then).

As far as the European Court of Justice is concerned, the agreement is certainly much impressive by the numerous things it does not say. There are many black holes, and that's why comments must remain very careful. To understand this, one needs to go back to the European Council's original guidelines. According to § 17, "The withdrawal agreement should include appropriate dispute settlement and enforcement mechanisms regarding the application and interpretation of the withdrawal agreement (…). This should be done bearing in mind the Union's interest to effectively protect its autonomy and its legal order, including the role of the Court of Justice of the European Union."[2]. This was strengthened by the Commission's guidelines. According to § 42, "in these matters, the jurisdiction of the Court of Justice of the European Union (and the supervisory role of the Commission) should be maintained.". [3] It is important to notice that the text refers to "the jurisdiction" of the ECJ and not some kind of limited role.

In other words, the exit agreement had to encompasses all topics (money, migrants' status and Northern Ireland) and dispute settlement had to cover all topics, taking into consideration the normal role of the ECJ.

[1] See the excellent analysis of K. Hayward, Brexit deal allows for three different types of Irish Border, Irish Times, 8 December 2017.
https://www.irishtimes.com/news/ireland/irish-news/brexit-deal-allows-for-three-different-types-of-irish-border-1.3320497#.WirWjKXjEPk.twitter

[2] http://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/

[3] https://www.consilium.europa.eu/media/21766/directives-for-the-negotiation-xt21016-ad01re02en17.pdf

The least that can be said is that the preliminary agreement is luckily very far from such a straightjacket. According to § 38, "this Part of the Agreement establishes rights for citizens following on from those established in Union law during the UK's membership of the European Union; the CJEU is the ultimate arbiter of the interpretation of Union law. In the context of the application or interpretation of those rights, UK courts shall therefore have due regard to relevant decisions of the CJEU after the specified date. The Agreement should also establish a mechanism enabling UK courts or tribunals to decide, having had due regard to whether relevant case-law exists, to ask the CJEU questions of interpretation of those rights where they consider that a CJEU ruling on the question is necessary for the UK court or tribunal to be able to give judgment in a case before it. This mechanism should be available for UK courts or tribunals for litigation brought within 8 years from the date of application of the citizens' rights Part."

The agreement thus foresees a role for the ECJ in one of the three initial areas. This role is a limited one : it covers only prejudicial rulings (not annulment, infringement, compensation…). Furthermore, these prejudicial rulings are an option, not an obligation. Finally, the whole mechanism disappears after 8 years.

The EU team, and Mr. Barnier, have thus finally shown themselves quite flexible on the topic, and must be commended for that. So has the UK side for other matters. It is much preferable[4]. Quickly, Mr. Barnier noticed the need to defined quick and practical solutions for the EU migrants' protection. The ECJ cannot be the pillar of this. Apart from philosophical reasons, its proceedings are both long and costly. Additionally, they do not always provide general solutions, especially in the framework of prejudicial rulings[5]. EU residents could thus be waiting a lot and paying a lot before getting one day – maybe – an adequate decision at the end of the process. Finally, at the end, such a judgment will only settle one case, and there will exist no easy instrument to impose the implementation of a judgment if the UK (then a third state) authorities resist it[6]. The preliminary agreement now wisely gives a stronger priority to practical solutions over theological ones. EU residents need quick and low cost procedures, with technical help, and the suspension of contested decisions in the meantime.

Involving less the ECJ does not mean at all that the EU will abandon its migrants' protection. They are EU citizens. It must be crystal clear for the present and future UK authorities that their proper treatment will remain for all EU institutions an essential component of the future economic and strategic relationship. A clear surveillance legal obligation must be imposed to the European Commission in that domain, and the European Parliament could also associate the Ombudsman to this. Furthermore, as MM. Davis and Gove declarations still confirm, the EU needs a strong safeguard clause to protect its citizens. This will allow the adoption if needed of quicker and stronger reactions than a very long and uncertain judicial process.

[4] F. Dehousse, The European Union is exaggerating in its demands for Brexit, especially about the European Court of Justice's future role, 29 May 2017.
http://www.egmontinstitute.be/eu-exaggerating-in-its-demands-for-brexit/

[5] F. Dehousse, The reform of the EU courts (IV) - The Need for a Better Focus on the European Court of Justice's Core Mission, TEPSA/Egmont, 2017.

[6] As noticed by Steve Peers, The Beginning of the End? Citizens' rights in the Brexit 'Sufficient Progress' deal, 9 December 2017, "Any ECJ link with the courts of a non-EU country for any period of time is already exceptional."
http://eulawanalysis.blogspot.be/2017/12/the-beginning-of-end-citizens-rights-in.html

Furthermore, talks about judicial protection of EU residents in the future must not mask the need to protect them in the present. In a very good recent paper, E. Guild has listed different initiatives from the UK Home Office that require action in that regard[7]. More should be done.

Many politicians have a knack for making grand standing speeches when the cameras are there… and for forgetting them later. To guarantee the most effective results, it is better to create simultaneously different institutional processes.

More generally, we need a fair deal for everyone and, provided negotiators on both sides show flexibility and imagination, as they finally did, we can still get there. From this perspective, the recent preliminary agreement is a good omen. Yes, it does not define a complete legal regime. Yes, it is sometimes ambiguous. Yes, it is not everything the Brexiteers or the EU or Ireland or EU/UK residents expected. It is much better : a balanced agreement that can lead now to devising concrete solutions for the problems of many people and enterprises. There has in fact been one real victor : pragmatism. Let's try to keep it that way.

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[7] E. Guild, Brexit and the Treatment of EU Citizens by the UK Home Office, CEPS, September 2017.