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Brexit and Governance of the UK-EU Relationship

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Summary

One of the key areas of negotiation between the UK and the EU is that of 'governance': agreement on how both the proposed Withdrawal Agreement and any future relationship will be managed between the two bodies. Governance, as used by the EU and the UK in this context, is made up of three dimensions: management and supervision of the agreements concluded; dispute settlement, when one party disagrees with the other party's interpretation of their obligations under any of the agreements concluded; and enforcement of dispute settlement, or how to ensure that a party that is found to be in the wrong under the agreed dispute settlement process can be compelled to change its behaviour, and whether it can be penalised for having been in the wrong.

Two distinct 'governance' systems will need to be agreed as part of the Brexit negotiations:

- One to govern the primarily temporary 'Withdrawal Agreement'. This is not merely a temporary governance system; while most aspects of the draft Withdrawal Agreement are indeed temporary, the provisions in Part 2 on citizens' rights and the Protocol on Ireland and Northern Ireland will run, if not indefinitely, then at least for many decades (until there are no more EU or UK nationals benefitting from Part 2 of the agreement). Any agreements struck on those two issues will need to be governed for their entire duration.
- One to govern the future relationship agreement(s) concluded between the UK and the EU.

Both parties agree on certain aspects of the governance models needed for both the draft Withdrawal Agreement and the future relationship; for example, there appears to be broad agreement that overall management will fall to 'joint committees', and that there is to be a role for these joint committees in dispute settlement as well, at least in a 'first stage' of dispute settlement. However, there is substantial disagreement between the EU and the UK on both how a second stage of dispute settlement should function—and what, if anything, the role of the Court of Justice of the EU (CJEU) will be in that second stage—and how enforcement of settled disputes should operate. These disagreements are amplified with regards to the draft Withdrawal Agreement, where the EU has put forth an explicit role for the CJEU in governance, not least because the draft Withdrawal Agreement still embodies many provisions of 'EU law' and the CJEU has declared itself to be the only binding interpretative authority of EU law. The UK, however, has to date maintained that it is unacceptable that the 'appeal' body in dispute settlement of any agreement it concludes with the EU is one that represents and is made up of representatives of *only* the EU.

Discussions of the governance of the future relationship agreement are, as far as is known, still in early stages, and in any event can be kept relatively vague for the purposes of the Political Declaration needed under Article 50; but it is one of only three outstanding issues regarding the conclusion of a Withdrawal Agreement. Continued disagreement on governance of the draft Withdrawal Agreement would result in a 'no-deal' Brexit in March 2019.[1]

[1] For a discussion of the possible implications of no deal, see Commons Briefing Paper 8397, What if there's no Brexit deal? 10 September 2018.

1. Current governance of the UK-EU relationship

In discussing the governance of both the current UK-EU relationship (e.g. EU membership) and the future UK-EU relationship, it is helpful to set out a clear definition of the concept. While there are various ways to explain 'governance', the Commission's definition (echoing the terminology of the Council's negotiating guidelines) is a useful starting point.

It suggests that the governance of any international agreement is made up of three components:

1. Ongoing management/supervision
2. Dispute settlement
3. Enforcement after dispute settlement.

As an EU Member State, all three components of governance of the UK-EU relationship are currently dealt with via EU mechanisms.

1.1 Ongoing management and supervision

Ongoing management and supervision of the EU Treaties, or the Member States' compliance with those, is carried out by several different institutions. There are a variety of 'managerial' bodies in the EU, with tasks ranging from 'big picture' management to 'day to day' management.

The European Council, formally given legal personality in the Treaty of Lisbon, is the 'big picture' management institution. As a body where the EU Heads of State meet bi-annually, it is the body that sets the direction of travel that it wishes other EU institutions to pursue. It is also the body that can formally re-open Treaty negotiations.

However, day to day 'management' as well as supervision of EU law falls to the European Commission. Unlike most other international organisations, which do not have powers to produce 'secondary' legislation, the EU has legislative abilities that are either initiated or (in the case of tertiary legislation) exercised by the Commission. It behaves like an executive in charge of 'management' in this sense, although its activities are steered by the political sign-posting of the European Council. Its supervision powers are more specific and culminate in the infringement proceedings set out in Article 258 of the *Treaty on the Functioning of the European Union* (TFEU). Under this procedure, the Commission can take action against any Member State it believes is not complying with EU law.

Supervision of compliance with the EU Treaties works in further directions, however; the Member States can also take action against each other (Article 259 TFEU) and the EU institutions (Article 263 TFEU), and the EU institutions can also accuse each other of *ultra vires* action (Article 263 TFEU). Consequently, rather than speaking of a single 'supervisor', there is a complex and multi-structural system of

'observing' compliance with and functioning of the Treaties in place in the EU, led (but not exclusively) by the Commission.

A final aspect of 'governance' that was introduced by the Lisbon Treaty in particular is the oversight function allocated to national parliaments in Protocol 2 to the TFEU. Under this Protocol, national parliaments can act as so-called 'watchdogs' of the principle of subsidiarity, which aims to ensure that the EU only legislates in areas of shared competences when the Member States themselves cannot achieve an EU goal and the EU can achieve such a goal 'better'. Under Protocol 2, national parliaments can object to EU legislative proposals on the grounds that they violate the principle of subsidiarity; and if enough national parliaments protest, the Commission is asked to respond to their concerns. It is not obliged to change its proposals, and in response to national parliamentary protests to the establishment of a European Public Prosecutor's Office and changes to the Posted Worker Directive, it did not do so. But the political pressure emanating from national parliaments has resulted in the Commission abandoning EU-level legislation on a 'right to strike'.[2]

1.2 Dispute settlement

Dispute settlement in the EU is first of all dealt with via the aforementioned infringement proceedings. If Member States are unresponsive to a Commission administrative action that sets out how they are perceived as not complying with their EU obligations, the Commission can take its case to the CJEU, which then issues a binding judgment either in favour of the Commission or the Member State.

However, early in the EU's existence it was realised that the EU legal system would not only result in disputes between *Member States* and the EU, but also in disputes originating with *individuals and companies* who are either benefitting from or suffering from their Member States not having complied with EU law. Such complaints may arise between such private parties and their Member State – or even between two private parties affected by an EU law provision. The Treaties have to date remained silent on the dispute settlement mechanism applicable to private parties with complaints rooted in the EU Treaties; all that is clear is that they do not (generally) have standing before the CJEU. Questions of dispute settlement stemming in EU law arose in national courts, however, and when they asked the CJEU how to address these disputes, the CJEU filled this gap in the Treaties with several seminal judgments.

First, it established in *Van Gend en Loos* that private parties could rely directly on EU law provisions before domestic courts where those EU provisions met certain criteria: they were clear, precise, and unconditional.[3] Second, it established in *Costa* that EU law was 'supreme' over domestic law, and so where a national court observed a clash between domestic and EU law, EU law had to take precedence.[4] Third, it eventually found in *Von Colson* that even if EU law is *not* clear,

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2 See the European Parliament's Fact Sheet on the Principle of Subsidiarity, paragraph D

3 Case 26/62 *Van Gen den Loos* ECLI:EU:C:1963:1

4 Case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66

precise and unconditional, domestic courts (under the duty of 'sincere cooperation', as set out in Article 4(3) TEU) must do everything within their power to interpret a national law *in light of* any EU law that a Member State was meant to comply with.[5]

The consequence of this case law is that there have been since 1963 two concurrent streams of 'dispute resolution' in the EU. The first is at the 'macro' level, and involves disputes between the Member States and the EU institutions; these are resolved by the Commission through administrative processes, or the CJEU, where those administrative processes fail. The second is at the 'micro' level, and involves private parties making a claim in a domestic court, which applies CJEU-developed principles to ensure that they attain their EU law rights.

1.3 Enforcement following dispute settlement

Enforcement following dispute settlement is not what is normally meant by 'enforcement' in EU usage of the term. There, the Commission is perceived to have an enforcement function and the domestic courts apply the CJEU principles to establish private enforcement mechanisms.

The latter process does not actually result in EU-level enforcement: the judgment issued in those private party complaints about a failure to comply with EU law is a purely domestic judgment and is enforced via whatever enforcement systems the Member States themselves have in place in their domestic law. The EU has no competence to dictate what those are. The EU cannot directly overturn national law in the Member States.[6]

As far as a failure to comply with CJEU judgments goes, the EU (like most international organisations) has very limited enforcement powers. If Member States are truly unwilling to comply with a CJEU judgment, as of the Maastricht Treaty, under Article 260(2) TFEU, the Commission can bring a further case to the CJEU regarding non-compliance, and the CJEU can impose a 'lump sum' or 'penalty payment' if it finds for the Commission. This is a very rarely-used power, with the CJEU itself determining the amount of penalty payment or lump sum (or both) that is appropriate in a given case (albeit with Commission input, as set out in its applications under Article 260 TFEU).[7]

Many other international agreements have in place other enforcement mechanisms, such as an ability to suspend rights or 'concessions' gained under a treaty in response to persistent harmful non-compliance with treaty obligations. The EU model does not, however; the consequences of this appear to be that there is no EU-level enforcement option that 'excludes' a Member State from aspects of EU law as a punishment and source of pressure for its own non-compliance. This has been considered in the past; the 1984 Spinelli Draft Treaty endorsed by the

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5 Case 14/83 *von Colson and Kamann* ECLI:EU:C:19

6 For a short explanation, see Eurofound, Remedies for infringements of EU law, May 2011.

7 Case C-304/02 *Commission v France*

European Parliament proposed a sanctions mechanism that included the suspension of rights for 'serious and persistent violations of treaty provisions.' The proposal was not adopted, however, and has not since been revisited.

Does this mean that a Member State cannot be 'excluded' from EU law against its wishes, even if it continuously fails to comply with its Treaty obligations? The argument has been made that public international law permits 'sanctions' options beyond those set out in Article 258-260 TFEU – suspension of rights on a temporary basis seems impossible, but expelling a Member State is accounted for in a general principle of international law, namely, *pacta sunt servanda*. The Vienna Convention on the Law of Treaties (VCLT), in Article 60, permits the parties of a treaty to expel or terminate the operation of a treaty vis-à-vis another signatory that has committed a 'material breach' of treaty provisions. A 'material breach' is defined as covering a 'violation of a provision essential to the accomplishment of the object or purpose of the treaty', which appears to be a similar trigger condition as that applicable to the infringement proceedings under EU law. Logically, therefore, a first 'material breach' of the EU Treaties should be dealt with under the infringement proceedings.[8]

However, various international lawyers have persuasively argued that where the EU's own enforcement mechanisms do not work (giving rise to consistent breaching of obligations), Article 60 of the VCLT covers a scenario that is *not* set out in the Treaties – and thus should apply. The alternative would be the Member States effectively being forced to tolerate a regime that consistently fails to comply with promises it has made under the Treaty, and indeed, still being obliged to extend the benefits of EU law to that regime.[9] As a final resort, Article 60 of the VCLT thus appears to permit 'expulsion' of sorts from the EU – but not before any complaining Member State or EU institution has taken recourse to Article 258-260 TFEU.

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8 See, for the opinion that EU law's own 'sanctions' mechanism supersede public international law, S Biernat, 'Ratification Of The Constitutional Treaty And Procedures For The Case Of Veto' (http://www.ecln.net/elements/conferences/book_prag/BiernatFinal.pdf) 23.

9 See, for example, Bruno Simma, 'Self-Contained Regimes' (1985) 16 Netherlands Yearbook of International Law 127; G Conway, 'Breaches of EC Law and the International Responsibility of Member States' (2002) 13 European Journal of International Law 679. For a recent discussion, see Paul Gragl, 'The Silence of the Treaties: General International Law and the European Union' (2014) 57 German Yearbook of International Law 375.

2. Proposals for post-Brexit Governance

Following Brexit, the majority of the EU institutions that are currently in charge of governing the relationship between the EU and the UK as a Member State will no longer have the jurisdiction to act in relation to the UK. This means that the roles currently played by the Commission and CJEU in particular will need to be taken on by other bodies. This has proven to be one of the most controversial aspects of the negotiations, both regarding the conclusion of a Withdrawal Agreement and the conclusion of any number of agreements relating to the post-transition 'future relationship'. UK and EU perspectives on the governance setup of both the Withdrawal Agreement and the Future Relationship Agreement(s) will be considered next.

2.1 Governance of the Withdrawal Agreement

General governance structures

The EU's proposals for governance are set out in its draft Withdrawal Agreement of March 2018.[10] Many parts of this have been agreed by the UK negotiators to date, but significant differences remain. It is important to be clear that there are effectively two dispute resolution mechanisms outlined in the Withdrawal Agreement: one *during* the proposed transition period (until the end of 2020), and one for those provisions of the Withdrawal Agreement that only come into force, or continue to be in force, *after* 2020. The key examples of the latter provisions are those relating to citizens' rights in Part 2, and the Protocol on Ireland and Northern Ireland.

Ongoing management and supervision

The starting point of ongoing management and supervision of the Withdrawal Agreement itself has been agreed by both parties as being conducted by a Joint Committee. As Professor Alan Dashwood has summarised:

> the Joint Committee [is] provided for by WA Articles 157 to 159 (agreed). The broad remit of the Joint Committee is to oversee the implementation and application of the WA. The Joint Committee is to have power to adopt decisions and to make recommendations and to amend the WA itself in cases where the Agreement so provides. Decisions adopted by the Joint Committee are to be binding upon, and must be implemented by the UK and the EU, and they are to have the same legal effect as the Agreement. The Committee's power to adopt decisions and make recommendations is to be exercisable by mutual consent.

The draft Withdrawal Agreement is unspecific as to the composition of the Joint Committee, which remains a matter for negotiation; Article 157 merely notes that it will be comprised of 'representatives of the

[10] For a full discussion, see CBP-8269 *Brexit: the draft withdrawal agreement* (26 March 2018).

Union and of the United Kingdom … [and] shall be co-chaired by the Union and the United Kingdom.' It is due to meet at least once a year.

Article 157(5) makes clear that specialised committees can be formed under the Joint Committee, so as to spread out management and supervision of bespoke parts of the Withdrawal Agreement. The Protocol on Ireland and Northern Ireland and part 2 of the Withdrawal Agreement (on citizens' rights), for instance, will have their own oversight committee with powers equivalent to the Joint Committee itself.

This proposal is a significant change away from management and supervision by the Commission, not least because decisions to be taken by this Committee can only be taken by mutual consent *and* the Committee is made up of direct representatives from both the UK and the EU. Commission supervision explicitly takes place from the perspective of the EU, without concrete Member State representation (as Commissioners are to act independently of their Member States while in position).[11] Its choice to pursue any action, whether supervisory or managerial, is consequently not affected by Member State views. Conversely, the Joint Committee will experience situations where the parties simply cannot find a common position—meaning that references to dispute settlement mechanisms are significantly more likely.

At the same time, the volume of work experienced by this Joint Committee is likely to be significantly reduced from that of the Commission, as its intended remit during transition is to oversee the Withdrawal Agreement as a framework for the UK-EU relationship—rather than its substantive content. This distinction will be clearer once we consider dispute settlement as proposed in the Withdrawal Agreement.

Dispute settlement

As mentioned above, the Withdrawal Agreement effectively splits its dispute settlement processes into two separate but related parts.

First, during the transition period, the *substantive law* in the Withdrawal Agreement remains subject to the ordinary EU law governance mechanisms, as set out in the agreed Article 126:

> During the transition period, the institutions, bodies, offices and agencies of the Union shall have the powers conferred upon them by Union law in relation to the United Kingdom and natural and legal persons residing or established in the United Kingdom. In particular, the Court of Justice of the European Union shall have jurisdiction as provided for in the Treaties.
>
> The first paragraph shall also apply during the transition period as regards the interpretation and application of this Agreement.

However, not all disagreements regarding the Withdrawal Agreement will be on points of substantive EU law, and some may occur following

[11] As set out in Article 17 of the Treaty on European Union

the transition period, as aspects of the Withdrawal Agreement will remain in force even after transition ends in 2020. Neither of these situations covers scenarios where the UK is to be treated as if it were still a Member State, and so the Withdrawal Agreement proposes an alternative pathway to dispute resolution where needed (post-transition).

Under Article 154(7) of the Withdrawal Agreement, the Joint Committee can, by consent, make binding decisions and (non-binding) recommendations. Article 162 on dispute settlement, however, sets out a more explicit limitation on the Joint Committee's powers as a dispute settlement body: it can make recommendations alone. Where a disagreement about the Withdrawal Agreement ends in an agreed change to the Withdrawal Agreement, or a compromise position on the application or interpretation of the Withdrawal Agreement is reached, the dispute is resolved in what the Institute for Government has described as a purely 'political' dispute settlement mechanism. The provisions covering this 'political' approach to dispute settlement have been agreed by both the UK and the EU.

However, the EU intends for the Joint Committee to function as what is only 'step one' of a dispute settlement structure to the Withdrawal Agreement. Its proposed Article 162, dealing with post-transition dispute resolution, sets out that both parties can bring any disputes about the Agreement to the Joint Committee, which may settle the dispute; but it also provides in Article 162(3) that the Joint Committee, once a dispute has been referred to it, has the power to refer a dispute it is hearing to the CJEU for a ruling, and further suggests in Article 162(4) that either party can request such a CJEU ruling if after 3 months of Joint Committee consideration, no agreement has been reached. These aspects of Article 162 have not been agreed to date and many commentators have argued that they are likely to be seen by the UK as inappropriate because they would set up the CJEU—a judicial tribunal that represents only *one* of the parties to the Agreement—as an 'appeals' mechanism to the entire Agreement.[12]

The European Scrutiny Committee, in its current inquiry on Dispute Resolution and Enforcement in the draft Withdrawal Agreement, asked if there was a chance of conflict between the two proposed avenues of dispute settlement. Professor Alan Dashwood responded in his written evidence:

> 22.The Joint Committee only has a role with respect to the [Withdrawal Agreement], and this will be a fairly limited one during the [transition], when Parts Two and Three of the Agreement do not apply. As to the general body of EU law applicable at that time, the EU system of dispute resolution will hold undisputed sway.
>
> 23.In case of disputes relating to the WA, it would be preferable, from the point of view of legal certainty, if the [Withdrawal Agreement] established priority between recourse to the Joint Committee and to the CJEU during the [transition], as it does in

[12] See the Lords EU Committee report *Dispute Resolution and Enforcement After Brexit* (HL 2017-19, 130), para 79-87.

> the post-[transition] under the Article 162 mechanism. However, I am doubtful whether clashes of the kind envisaged in Question (3) would occur in practice.

Enforcement following dispute settlement

The most controversial provisions in the draft Withdrawal Agreement are those regarding enforcement of the outcomes of the dispute settlement processes. To date, none of these have been agreed by the parties.

Again, it should be emphasised here that where the CJEU has jurisdiction over the substantive content of the Withdrawal Agreement, as per Article 126 of the Withdrawal Agreement, the normal EU 'enforcement' processes apply as if the UK were still a full Member State. This is the case up to the end of the transition period.

However, where either party is deemed not to have complied with the outcome of a dispute regarding the interpretation or application of the Withdrawal Agreement, and such a dispute is not covered by the EU's enforcement processes (e.g., it falls outside transition), Article 163 sets out two alternative options:

- Where a Joint Committee dispute has been referred to the CJEU and the 'losing' party does not comply with the CJEU judgment, they can be taken back before the CJEU for processes that are very similar to the current EU 'enforcement' processes (e.g., including a lump sum or penalty payment).
- Where a Joint Committee dispute has *not* been referred to the CJEU, but rather has simply been resolved by the parties in the Joint Committee, non-compliance with an agreement reached there can result in a suspension of *any* part of the Withdrawal Agreement, or any other agreement between the UK and the EU, except for the citizens' rights provisions. Such a suspension must be proportionate, and will be subject to CJEU judicial review.

Both processes result in eventual oversight by the CJEU, and consequently have not been agreed to by the UK. However, there is a further imbalance in enforcement powers found in Article 165 of the draft Withdrawal Agreement, which sets out a power for the *EU alone* to suspend benefits to the UK if it is not compliant with a CJEU ruling on any of the substantive content of the Withdrawal Agreement *during* the transition period. This is a non-reciprocal provision that has been significantly criticised as being disproportionate; evidence submitted to the European Scrutiny Committee suggests that this Article must become reciprocal to be considered acceptable to most legal experts and that it is, in any event, unnecessary.[13]

Special governance structures

Citizens' rights

The Withdrawal Agreement sets up a bespoke system for governance of Part Two on citizens' rights. This part of the Agreement will not enter

[13] See written evidence by Alan Dashwood and by Professor Carl Baudenbacher, Michael Bowsher and Professor Peter Oliver.

into force until the end of the transition period, but—unlike most other parts of the Agreement—makes provision for continued involvement of the EU institutions in governance.

The specific differences are that for 8 years following the end of the transition period, UK courts can continue to ask the CJEU for preliminary references on the meaning of the substantive provisions relating to citizens' rights (Article 151). This will give the CJEU significant oversight and dispute settlement powers even post-Brexit, albeit for a time-limited period.

This continued role for the CJEU is mitigated by the fact that supervisory functions over Part Two of the Agreement will be carried out by an independent UK national authority, rather than the European Commission (Article 152). The role of this authority has not been set out yet in detail, but must be complementary to the Sub-Committee also established under the Withdrawal Agreement with respect to citizens' rights.

Separation provisions

The EU-proposed draft Withdrawal Agreement text suggests a continuation of CJEU jurisdiction post-transition for Part Three of the Agreement, which covers the 'separation provisions'; and certain provisions in Part Five of the Agreement on the 'financial settlement'. The CJEU's jurisdiction would cover all relevant dispute settlement and enforcement functions, and also make preliminary references by UK courts possible in these areas.

The UK has agreed to the proposed text of Article 153 with regards to the financial settlement provisions, but has not agreed to ongoing CJEU jurisdiction regarding the interpretation and application of Part Three of the Withdrawal Agreement, which covers diverse subjects, such as customs, VAT, intellectual property and judicial cooperation in criminal matters. Again, the principal problem is likely to be that the court of only one party to the agreement will be responsible for managing the behaviour of both parties to the agreement. Carl Baudenbacher, former President of the EFTA Court, has therefore suggested that 'docking to the EFTA court' would be a more 'neutral' solution that would achieve the same oversight and dispute settlement goals, as a stand-alone new UK-EU tribunal is unlikely to be agreed in time.

Cases 'straddling' the transition and post-transition period

The EU's proposed text in the Withdrawal Agreement suggests continued CJEU jurisdiction over any case that is *pending* before the CJEU at the end of the transition period, as well as any case that deals with facts that materially took place *during* the transition period; this includes Commission 'infringement proceedings' as well as preliminary references.

The UK has not accepted the text of either of these provisions to date. Professor Carl Baudenbacher, Michael Bowsher and Professor Peter Oliver, responding to the European Scrutiny Committee's dispute resolution inquiry, suggest that Article 82, covering 'pending' cases, is entirely appropriate; Article 83, meanwhile, should be time-limited in

the same way as Article 151 on preliminary references regarding citizens' rights, and would then also be unproblematic. It is unclear what the UK's objections to these Articles are, although written evidence from Michael-James Clifton (*Chef de Cabinet* of EFTA Judge Hammermann) suggests that the absence of UK representation on the EU's courts is not ideal and should be restored for as long as the CJEU has jurisdiction over the UK.

The Protocol on Ireland and Northern Ireland

The EU's proposal for 'regulatory alignment' appears to suggest the ongoing application of relevant EU law, including its enforcement mechanisms, to the territory of Northern Ireland for the duration of the Protocol. However, no text on this has been agreed between the parties to date, barring the creation of a specialist Joint Sub-Committee on issues pertaining to the Protocol for oversight and administrative purposes.

2.2 Governance of the future relationship agreement(s)

The EU position

The European Council, Council and Commission to date have made no concrete proposals for governance of the future EU-UK relationship. These EU bodies' primary contribution to discussion of governance issues has been a clear articulation of where the EU's 'red lines' on governance lie, and what governance structures apply to international agreements generally.

Article 50 Task Force slides on governance suggest that there is likely to be a Joint Committee for oversight/monitoring purposes, and that there may be two strands of dispute settlement: one political (via the joint committee) and one judicial or arbitral (via a 'court' or 'tribunal' system). For enforcement, it highlights sanctions and suspension of concessions as common mechanisms in international agreements, including its own.

However, the EU's most salient comments to date have been about the restrictions inherent to EU law regarding governance of the future relationship and what determines these. The overarching EU position has been set out in Article 15 of the European Council's Guidelines regarding the future relationship:

> Article 15
>
> The governance of our future relationship with the UK will have to address management and supervision, dispute settlement and enforcement, including sanctions and cross-retaliation mechanisms. Designing the overall governance of the future relationship will require to take into account:
>
> i) the content and depth of the future relationship;
>
> ii) the necessity to ensure effectiveness and legal certainty;
>
> iii) the requirements of the autonomy of the EU legal order, including the role of the Court of Justice of the European Union, notably as developed in the jurisprudence.

Article 15 makes clear that in the EU's view, it is impossible to design a governance mechanism without more certainty about the content of the future UK-EU relationship; but that a formal governance system must set up clear and effective mechanisms for oversight, management, dispute resolution and enforcement. Its final paragraph stresses the EU's primary restriction in governance system design: whatever supervisory mechanism underpins the future relationship agreement, it must "take into account the requirements of the autonomy of the EU legal order, including the role of the Court of Justice of the European Union". This provision alludes to the fact that, as the Commission also notes in its slides, it is "in principle" possible for the EU to conclude a future relationship agreement with the UK that establishes judicial bodies in a supervisory and enforcement function, but the nature of the EU legal system places some constraints on the specific powers such judicial bodies can have.

In particular, the CJEU has interpreted its own role as 'guardian' of the EU's 'autonomous legal order' in a restrictive way that limits the scope of international dispute settlement involving the EU as a party. In a series of opinions on the EU's powers in external relations, the CJEU has made clear that it alone has the power to determine the meaning of EU law concepts and, by proxy, the division of competences between the EU and its Member States, as the EU's external relations cannot affect the 'autonomy of EU law'.[14]

First, according to the CJEU interpretation of the EU's Treaties, any form of dispute settlement that involves the EU but does not take place before the CJEU *cannot* bind the EU (internally) to a particular interpretation of EU law.[15] Similarly, but introducing further restrictions, a judicial body overseeing the future UK-EU agreement may not interpret "provisions in substance identical to EU law".[16] These two conditions work together to ensure that concepts of EU law (or even different concepts that have an identical function to EU law concepts) are not interpreted by, for instance, a future UK-EU dispute settlement body in a way that either overrides or conflicts with the CJEU's interpretation of those EU law concepts.

A third, and again similar, overriding condition is that any Joint Committee set up to govern any international agreement to which the EU is party can take decisions, but those decisions cannot have any effect on CJEU case law.[17] So if a Joint Committee overseeing such an agreement is faced with interpreting, for instance, an aspect of free movement of goods under such an agreement, any decision it takes about how the free movement of goods functions under the agreement must *not* override CJEU case law in this area.

A second set of concerns stemming from the 'autonomous legal order' doctrine relates to the authority of the CJEU more generally. First, there

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14 See, seminally, Opinion 2/13 ECLI:EU:C:2014:245
15 Opinion 2/13 ECLI:EU:C:2014:245 [184]
16 Opinion 1/91 ECLI:EU:C:1991:490 [31-36] and Opinion 1/00 [2002] ECR 1-3493 [5]
17 Opinion 01/00 [2002] ECR 1-3493 [43-44]

can be no judges sitting in a double capacity;[18] this is to maintain CJEU independence as much as it is to maintain the independence of the dispute settlement body overseeing the agreement.[19] Second, the CJEU has determined that its rulings must be binding "in any case";[20] turning the CJEU into an advisory body instead of one with binding jurisdiction has also been declared contrary to the EU's legal order.

The consequences of these conditions placed on judicial involvement in the EU's international agreements is that, in practice, no judicial bodies are established as part of those agreements. The fact that the European Court of Human Rights would indeed challenge the CJEU's jurisdiction and authority in any EU accession to the ECHR was the fundamental reason why the CJEU rejected the accession protocol agreed in Opinion 2/13.

Instead, international agreements concluded by the EU tend to follow the more traditional model in which Joint Committee negotiations are the primary mode of dispute settlement.[21] If agreement cannot be found within a Joint Committee structure, arbitration is a common alternative or 'last resort'. At first glance, arbitration does appear to resolve many of the problems the CJEU finds in the EU's status as an 'autonomous legal order', in that the primary job of an arbitration panel is resolution of a particular disagreement; and while findings of an arbitral tribunal are binding on the parties, they do not impact on how the CJEU would deal with separate (if similar) concepts of EU law at stake in the arbitration.[22]

However, arbitration and the inter-party negotiation model of dispute resolution also have significant downsides: the Swiss example demonstrates that where agreement cannot be found, the parties end up in an endless stalemate; and the more complex an international agreement, the more pressing the need for quick dispute resolution becomes. Arbitration, meanwhile, must be very specifically constructed in order to meet the CJEU test: the CJEU in *Achmea* ruled that if an arbitral tribunal could be called upon to interpret EU law in a dispute between investors and States, but its interpretation could not be effectively challenged via the court process, then its role as the exclusive interpreter of EU law was infringed.[23]

Exceptions do exist to the general observation that the EU cannot sign up to agreements with comprehensive international dispute settlement bodies. For example, the CJEU ended up accepting a proposal for an EFTA Court after initially rejecting an EEA Court; but this was on the

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18 Where a judge sits on both the 'dispute settlement body' overseeing the UK-EU agreement *and* on the CJEU

19 Opinion 1/91ECLI:EU:C:1991:490 [47-52]

20 Opinion 1/91ECLI:EU:C:1991:490 [61]; the proposals for the EEA Court had suggested an 'advisory' rule for the CJEU, where its opinions given to EFTA States would not be binding.

21 See, for instance, the EEA and the Swiss Bilaterals I and II.

22 See Opinion 1/92 ECLI:EU:C:1992:189 [5]

23 C-284/16 Achmea ECLI:EU:C:2018:158

condition that the EFTA Court's jurisdiction be limited only to disputes within the EFTA states and consist only of judges from EFTA states.[24]

Similarly, the EU does accept the jurisdiction of the WTO's Dispute Settlement Understanding – and rulings by WTO Panels and the Appellate Body are binding on the EU and its Member States. However, they are not directly effective in the Member States, preventing them from being enforced *against* EU law by private parties in domestic courts.[25]

The UK position

The UK first addressed future relationship dispute resolution and enforcement in an August 2017 Future Partnership Paper, and reiterated its positions on governance of the future relationship in the August 2018 White Paper on the Future Relationship. The White Paper sketches the following as the desired governance/institutional framework for the future relationship:

- The overall framework encompassing future UK-EU relations could take the form of an associate agreement, as set out in Article XX TFEU. This would operate as a framework, however, and encompass the majority of the agreements concluded between the UK and the EU on the three debated 'pillar' areas of economic, security and 'cross-cutting' cooperation.
- In terms of governance of the association agreement structure, the White Paper suggests two concrete institutions:
  - A political 'Governing Body', setting the general direction for the future relationship; and
  - A managerial Joint Committee, directed by the Governing Body and responsible for management and oversight of the implementation of the Association Agreement.
- The White Paper also argues for a 'regular and formal dialogue' between the UK Parliament and the European Parliament.

Oversight and management

As noted, the UK White Paper suggests that two core institutions be in charge of the management and development of the future relationship: a 'Governing Body' and a 'Joint Committee'. The 'Joint Committee' has functions that are broadly comparable to the Committee agreed under the draft Withdrawal Agreement, as discussed in Section 2 above. However, the draft Withdrawal Agreement does not come with a 'Governing Body'.

This two-tier institutional setup appears to be more a reflection of the EU's own governance structure than of the EU's international agreements and their structures. The 'Governing Body' is intended to be composed of heads of states as well as presidents of EU institutions and would be in charge of broad policy. In this sense it echoes the role of the European Council more than any bodies at the heads of other EU

[24] Opinion 1/92 ECLI:EU:C:1992:189 [18-19]
[25] Christina Eckes, International Rulings and the EU Legal Order: Autonomy as Legitimacy? accessed 9 April 2018

association agreements, which are usually termed 'Association Councils' and are composed purely of EU representatives, rather than Member State representatives.[26]

The key difference between association agreements and what the UK is proposing is that countries in an association agreement are intending to *join* the EU, whereas the UK and EU in future will be managing a relationship that will not result in one party adopting all of the other's rules. The UK White Paper consequently suggests that the body at the head of this association agreement should not solely represent the EU, but rather represent all relevant intergovernmental and supranational partners to the agreement.

Little detail is presented on the specific role that inter-parliamentary cooperation will play in the future relationship; the White Paper merely notes that it should be maintained through formal exchanges. However, the formal mechanisms that the EU Treaty sets up for inter-parliamentary dialogue will not function in full after Brexit; many of those mechanisms are there to support the functioning of the EU's principle of subsidiarity and the national parliaments' ability to protest EU legislation which they believe violates this principle, as discussed above.[27] This function of national parliaments will no longer be relevant to the UK following Brexit, as EU legislation will not apply to the UK unless the Joint Committee governing the association agreement opts into it. Joint Committee agreement thus takes the place of national parliamentary oversight of EU legislative function. It remains to be seen to what extent either the EP or the UK Parliament can play a role in governing the future relationship.

Dispute settlement

The White Paper on the Future Relationship also sets out a UK-EU dispute resolution framework that would cover the majority of the agreements concluded under the suggested association framework, where binding obligations arise from these agreements.

The UK's proposals for dispute settlement are two-tier:

- In the first instance, all disputes between the parties must be raised before the Joint Committee, where a mutually agreed solution will be sought.
- Should that not prove possible within a reasonable timeframe, one of the parties may refer the dispute for arbitration by an ad-hoc, independent arbitral tribunal.
- Where disputes relate to any area of the association agreement covered by a so-called 'common rulebook', either the Joint Committee or the arbitral tribunal can make a preliminary reference to the CJEU to obtain a binding interpretation of the relevant rule.

The first two are standard proposals for international agreements; most trade agreements, and many of the EU's existing association agreements, have a two-level dispute settlement process in place that involves a first

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26 See, for example, the EU-Ukraine Association Agreement and the EU-Moldova Association Agreement, as identified by Catherine Barnard and Emilija Leinarte.

27 For an overview, see the European Parliament's 'Relationships with national parliaments' website.

'political' resolution stage and a second 'arbitral' resolution stage. The exceptions to this model are the EU itself, and the EEA Agreement, which does not provide for a second-stage 'arbitral' resolution process.

Again, as with most other international (trade) agreements, the White Paper makes no provision for private claims against either party for breach of rights under the association agreement. So claims in the UK would be dependent on domestic implementation of any agreements concluded under the association framework, with only the implementing legislation being directly challengeable.

Most interesting about the proposals outlined above are the ways in which the CJEU would continue to play a role in the governance of the UK-EU relationship in future dispute settlement. While it is largely excluded from participating in the dispute settlement directly, its indirect participation is dependent on the extent to which the UK wishes to 'opt in' to existing EU frameworks.

The proposal in the White Paper for a 'common rulebook' on trade in goods, for example, comes with the caveat that UK courts must continue to heed CJEU case law in these areas. However, preliminary references on issues relating to the 'common rulebook' are ruled out by the White Paper. In terms of governance, then, only where the CJEU has incidentally already ruled on a similar dispute will its case law be of interest to the UK.

In areas outside a 'common rulebook', domestic courts are permitted to consult CJEU jurisprudence, but are under no obligation to do so. Where substantial divergence between court interpretations of any aspect of law under the association agreement emerges, the White Paper suggests that this *could* be resolved by the Joint Committee. This would be unprecedented and probably controversial, however; the Joint Committee would be a non-representative, remote executive body, which would presumably here be given the power to direct the UK courts to interpret given areas of law in a specific way.

As Professor Catherine Barnard and Emilija Leinarte concluded:

> In sum, the degree of influence of the EU Court over the UK's judiciary will to a large extent depend on how much EU law will be let into the domestic system: the deeper the relationship, the bigger the role for the EU Court. A full stop to the jurisdiction of the CJEU would be a reality in case of a 'no deal' Brexit, and even in this situation the Withdrawal Act makes clear that the British courts may still take account of the case law of the Court of Justice because given the volume of EU law which is incorporated into UK law, the case law of the Court will have influence for decades to come.

Enforcement following dispute settlement

In the event of non-compliance with either the agreement or a resolution to a dispute, the White Paper suggests that suspension of concessions (and where possible, 'localised' – in the same area of the agreement where the breach has taken place) or financial penalties may be appropriate measures by which to mitigate harm. Both suspensions of concessions and penalties must be temporary and proportionate.

These again are normal enforcement mechanisms in international (trade) agreements. The one key difference is that the WTO allows for so-called 'cross-retaliation', whereby the focus is on undoing the harm

caused by a breach in monetary terms rather than on suspending benefits that are *alike*. This compensates for situations where one party significantly outperforms the other in a given area of trade: for instance, if nation X is in breach of provisions relating to trade in motor vehicles, to the benefit of its domestic industry, suspension of obligations relating to the car industry only makes sense for nation Y if it *has* an equivalently sized car industry. The UK White Paper proposals do not *per se* rule this out, however; it has been suggested by Catherine Barnard and Emilija Leinarte that they are better interpreted as only precluding 'cross-agreement-retaliation', meaning that violations of the economic agreement should not be met by suspensions of the security agreement.

3. Summary of UK and EU Positions

3.1 Withdrawal Agreement

Governance Area	EU Position	UK Position
Ongoing Management and Supervision	Joint Committee	Joint Committee
Dispute Settlement	During transition: Commission, CJEU Post-transition: generally 1) Joint Committee 2) CJEU; in specific areas, 1) CJEU and national authorities (CMA, citizens' rights)	During transition: Commission, CJEU Post-transition: generally 1) Joint Committee 2) NOT CJEU; in specific areas, 1) CJEU and national authorities (CMA, citizens' rights)
Enforcement following Dispute Settlement	During transition: EU law penalty payments; suspension of concessions by EU alone Post-transition: suspension of concessions (proportionate and temporary), except regarding citizens' rights	During transition: EU law penalty payments; Post-transition: Suspension of concessions (proportionate and temporary), except regarding citizens' rights

3.2 Future Relationship Agreement(s)

Governance Area	EU Position	UK Position
Ongoing Management and Supervision	Art 50 Task Force slides suggest Joint Committee 'typical'	Governing Body; Joint Committee
Dispute Settlement	Needs to respect the role of the CJEU and the autonomy of the EU legal system. Art 50 Task Force slides note Joint Committee is 'typical'; notes Ukraine	Joint Committee; arbitration with references to CJEU regarding common rulebook interpretations of EU law

	model (involving arbitration and references to CJEU on interpretation of EU law) 'possible', and a simpler arbitration model (CETA) 'possible' if future relationship quite narrow	
Enforcement following Dispute Settlement	Art 50 Task Force slides suggest suspension of concessions and compensation (proportionate)	Suspension of Concessions in the same 'area' (or agreement); compensation (proportionate)

3.3 Areas of disagreement

The governance of the future relationship, in many ways, has become less difficult to agree, with the publication of the UK's White Paper, than governance of the draft Withdrawal Agreement may prove to be. The UK and the Commission's Article 50 Task Force have set out broadly comparable models, involving a Joint Committee and arbitration with a possibility for sectoral CJEU references as the primary dispute settlement and oversight/management mechanisms. The two sides also appear to agree on a combination of suspension of concessions and sanctions as being appropriate enforcement mechanisms. While details on these matters will need to be negotiated, and while the EU to date has been silent on its views of an intergovernmental policy-making body like the UK's proposed Governing Body, there are no obvious points on which the positions diverge.

The same cannot be said for the Withdrawal Agreement. Tony Connelly of RTE reported as recently as 3 September 2018 that governance remains one of the 'outstanding issues' regarding a Withdrawal Agreement, next to geographical indicators and the Irish border. Key parts of the Commission's proposals on dispute settlement, and enforcement in particular, remain contested. Its suggested roles for the CJEU in dispute settlement relating to Part Three of the Withdrawal Agreement and the Protocol on Ireland and Northern Ireland, and for the CJEU as the 'stage 2' settlement body following a Joint Committee impasse more generally, have not been agreed to by the UK; nor have the proposed provisions relating to unilateral sanctions for non-compliance by the UK during the transition period, and the general ability to apply sanctions post-transition, again with CJEU oversight. The heavy involvement proposed for the CJEU even post-transition is unlikely to become agreeable to the UK, given that a lot of ultimate decision-making power would then lie with a body that has no UK representation on it. An alternative that would satisfy both parties, however, has not to date been put forward.

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