



# Brexit: Towards an ‘EFTA-like’ dispute settlement mechanism

Steven Blockmans and Guillaume Van der Loo

The UK government of Theresa May is fond of saying that it wants a “deep and special partnership” with the EU after Brexit. But for more than a year, it has been conspicuously vague about what that relationship should amount to. To close the gap that had emerged with the hard and fast positions formulated in a transparent fashion by the European Commission’s negotiating team, the UK Department for Exiting the EU (DExEU) has issued a flurry of position papers of its own over the summer.

Even if the Commission has qualified these papers as “not satisfactory”, the position paper on “[Enforcement and dispute resolution](#)” of August 23<sup>rd</sup> reveals an uncharacteristic degree of sophistication: it gives a clear and concise account of the UK’s constitutional requirements, whilst describing the limitations of what is possible for the EU. What the paper does not do, however, is take position on which mechanism(s) should be introduced, and in which agreement(s), in order to endow the future bilateral relationship with the EU27 with the necessary judicial and enforcement backstops that would underpin the kind of ‘friction-free’ regulatory space that the UK government has been advocating.

The starting point of the UK government’s position paper is to end “direct jurisdiction” of the Court of Justice of the European Union (CJEU). Although the concept is mentioned seven times, it is not defined in the 14-page position paper. But by relying on this fuzzy term, which does not exist in EU law, DExEU seems to imply that an ‘indirect’ involvement of the CJEU is acceptable to the UK. In the paper, DExEU is flirting with an EFTA-like solution, but it does not spell out the inherent choices and consequences of such a future dispute settlement model.

## An end to CJEU jurisdiction for the UK?

‘Indirect jurisdiction’ of the CJEU exists in the form of preliminary ruling procedures (whereby UK courts and tribunals may or have to ask the Court for a decision on the legality and/or interpretation of EU law), and the application of the general principles of direct effect and supremacy of EU law over conflicting national law. While the CJEU’s indirect jurisdiction is far-reaching (i.e. Britain is

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bound by its rulings), UK citizens and companies have been able to have their EU law rights enforced, including in other EU member states. By only insisting that the UK should escape direct jurisdiction, DExEU leaves the door open for an indirect role for the CJEU post-Brexit. This constitutes a remarkable blurring of the red line that Prime Minister May drew at the Conservative Party conference last October, i.e. that the UK must “take back control” and leave the jurisdiction of the EU Court altogether.

In principle, a non-EU member state falls outside the CJEU’s jurisdiction, unless it has an agreement with the EU providing otherwise. The UK position paper offers a review of existing arrangements under third-party agreements with the EU. Thus, a trade agreement between the EU and the UK could easily be subject to an intergovernmental dispute settlement system or a WTO-like arbitration panel deciding cases (cf. CETA, the EU’s recently concluded agreement with Canada). But a narrow trade agreement would mean that many other bilateral arrangements in both economic (e.g. ‘Open Skies’ civil aviation; passporting rights for the City; etc.) and non-economic fields (e.g. European Arrest Warrant; Euratom) would be lost.

There are signs (not least in the latest batch of UK position papers) that suggest that the UK is keen to maintain the greatest possible single market access (barring free movement of people) and does not want to leave the customs union.<sup>1</sup> However, if a third country wants to sell into the single market, then it will have to adhere to the rules of that market. Ultimately, the final arbiter of those rules is the CJEU. The shallower a country’s market access, the more freedom any judicial mechanism can have from the Court but the weaker its enforcement will be. It is difficult to see how Brexiteers can expect to have this cake and eat it too.

Where an international agreement concluded by the EU contains provisions that replicate EU law, the CJEU has consistently taken the view that no separate body should be granted jurisdiction to give definitive interpretations of those provisions. The Court wants the full and final authority on all matters of EU law.

In its position paper, however, DExEU submits that:

it does not follow that the [CJEU] must be given the power to enforce and interpret international agreements between the EU and third countries, even where they utilise terms or concepts found in EU law. Nor is it a required means of resolving disputes between the EU and third countries on the interpretation or implementation of an agreement. The EU is able to (and does) agree to a wide range of approaches to dispute resolution under international agreements, including by political negotiation and binding third party arbitration.

The position paper does not distinguish between transitional and final arrangements, but there are increasing signs that the UK government is willing to accept a transitional role for the CJEU. This is just as well, since it is highly unlikely that the European Commission would agree to a ‘bespoke’ model for a transition period. Similarly, the idea that the EU would be willing to conclude a “deep and special partnership” agreement with the UK that replicates current arrangements but does not

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<sup>1</sup> See J. Pelkmans, [“The Brexit Customs Vision – Frictions and Fictions”](#), CEPS Commentary, 22 August 2017.

foresee a strong role for the CJEU, is pure “fantasy”, as senior EU officials and MEPs have said to the press.

The EU is a community of law, with the CJEU as the ultimate guarantor of legality and uniformity of the rules. It is established practice that any controversial third-party agreement is first put to the Court. Keen to preserve its monopolistic position in deciding on the shape and nature of the EU legal order, the CJEU insists on the “autonomy” of EU law being safeguarded in any new dispute settlement arrangements. In the past, this has led to the rejection of the draft European Economic Area Agreement (Opinion 1/91) and the draft agreement on the EU’s accession to the European Convention of Human Rights (Opinion 2/13). In the case of the EEA this led to the renegotiation of the EFTA Court’s jurisdiction (Opinion 1/92) to make sure that the position of the CJEU remained supreme. There is no doubt that the Article 50 withdrawal agreement and the future deep and special partnership agreement will have to pass the CJEU’s preliminary review before they too can be enacted.

### **Towards an EFTA-like model?**

In order to map out an appropriate enforcement and dispute settlement mechanism for future EU-UK relations, one would first need to know in rather precise terms the scope and contents of the future legal framework. At this point, however, it is not clear which elements will be covered in the withdrawal agreement and which in the future deep and special partnership agreement and it is therefore still too early to formulate the perfect solution for both agreements. Moreover, both agreements will most likely require several different dispute settlement procedures and enforcement mechanisms. What is clear at this stage is that the withdrawal agreement will address key issues related to citizens’ rights and (transitional) arrangements providing for the continued application of EU law, triggering the involvement of the CJEU.

In search of an appropriate dispute settlement and enforcement mechanism, DExEU mainly drew inspiration from the EFTA states’ participation in the EU Internal Market on the basis of the EEA Agreement. The drafters of the UK’s position paper realised that the EFTA/EEA model is an attractive option because the EFTA Court remains independent from the CJEU, while guaranteeing the homogeneity of EU law and respecting the autonomy of the EU legal order (as confirmed in Opinion 1/92). In principle, the EFTA model does not contradict the EU’s own “Position paper on Governance”, published on July 12<sup>th</sup>.<sup>2</sup> Moreover, the Presidents of both the EFTA Court and the CJEU have stressed that there is no need to reinvent the wheel and suggested the EFTA Court as a way out for the UK.<sup>3</sup> The easiest solution for this institutional problem would indeed be the UK’s continued membership of the EEA as a member of EFTA. However, because EFTA membership is not on the agenda of the UK government (perhaps as a consequence of Norway’s apprehension about the automaticity of the UK’s continued membership of the EEA), a tailor-made ‘EFTA-like’ scenario including some – but not all – key legal features of the EFTA/EEA model is the most plausible. In particular, the elements that ensure homogeneity with the autonomous EU legal order

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<sup>2</sup> European Commission, [Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom](#) under Article 50 TEU, 12 July 2017.

<sup>3</sup> See the LSE Brexit Blog of EFTA President Carl Baudenbacher, [“How the EFTA Court works – and why it is an option for post-Brexit Britain”](#), 23 August 2017.

(the red line for the EU), but which do not ‘directly’ submit the UK to the jurisdiction of the CJEU (the red line for the UK), are relevant.

For example, the EEA’s ‘twin pillar’ model, based on the EFTA Court (whose jurisdiction solely extends to the EFTA states in the EEA) and the CJEU, plus a joint committee that mediates between the two pillars, seems fitting for the Brexit context. For those provisions of the withdrawal agreement that continue to apply EU law, the agreement could set up a Court, composed of one or several UK judges with jurisdiction pertaining only to the UK. Similar to the EFTA Court, such a Court would be independent from the CJEU. In order to guarantee a homogenous interpretation, the joint committee would need to monitor the case-law of this new Court and the CJEU and would be required to take action if a difference in the case-law of the two Courts is noted – without affecting the case-law of the CJEU (see Article 105(2) EEA). The EEA agreement foresees that if the joint committee cannot find a solution, a dispute settlement mechanism needs to be activated. In this procedure, the Parties may ask the CJEU to give a binding ruling, but if they do not agree to do so, they may as a last resort take “safeguard measures” (e.g. temporary measures to remedy imbalances) or suspend (partially) the agreement. Such a mechanism would in all likelihood be acceptable to the UK because it would be in a position to veto the reference to the CJEU (the joint committee decides by consensus). A similar role for a joint committee is also suggested in the EU’s position paper on ‘Governance’, albeit with a right for either party to refer to the CJEU (so as to deny the UK a veto).

In order to ensure a homogenous interpretation of continued application of EU law in the UK, national courts could ask this new EFTA-like body for a preliminary ruling when questions on the interpretation of EU law arise. It also appears that the EEA’s requirement to follow CJEU case-law preceding the agreement would be acceptable for the UK as the pending Repeal Bill will oblige UK courts and tribunals to interpret – under certain conditions – “retained EU law” in accordance with any “retained case law” (i.e. pre-Brexit CJEU jurisprudence).<sup>4</sup> Similar to the EEA Agreement, a non-binding commitment could be foreseen to follow post-Brexit case law.<sup>5</sup>

The smooth functioning of the mechanism described above (or any other mechanism) would depend very much on the political climate post-Brexit and the judicial dialogue between the EFTA-like court and the CJEU. In comparison, the EEA parties never relied on the last-resort safeguard/suspension options and the relationship between the two Courts has been described as one of “mutual respect and dialogue”.<sup>6</sup> This constructive legal and political environment is the main reason why the EEA system is considered to work so well.

As stated above, an EFTA-like dispute settlement mechanism would only be required in those areas of the withdrawal agreement that foresee the continued application of EU law. For the other parts of the withdrawal agreement, including issues related to enforcement, a less far-reaching – and more traditional – dispute settlement mechanism could be used, premised on a central role for the joint committee. However, there is one crucial area where this mechanism would not be sufficient

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<sup>4</sup> UK Parliament, European Union ([Withdrawal](#)) Bill (2017-19), 13 July 2017

<sup>5</sup> For example, the Agreement between the EFTA States on the establishment of a Surveillance Authority and Court of Justice requires that both institutions “pay due account” to relevant rulings of the CJEU given after the signature of the EEA Agreement (Article 3). The UK’s Repeal Bill also states that domestic courts may (but are not obliged to) follow post-Brexit CJEU case law.

<sup>6</sup> Carl Baudenbacher, *op. cit.*

for the EU, i.e. the provisions on citizens' rights. The position papers of the EU and the UK reveal several incompatibilities in this area. In particular, the EU insists that the Commission and the Court retain their full enforcement competences (including the infringement procedure and preliminary ruling procedure) for the period that the rights are protected. It remains to be seen whether there is, as the Financial Times has reported, enough willingness in Brussels to make concessions to the UK on that question.<sup>7</sup>

The establishment of such an EFTA-like Court that can interpret rules identical to EU law will not be met with great enthusiasm by the CJEU, let alone by the actual EFTA Court. However, as long as this system respects the CJEU's exclusive jurisdiction (as described above), then the EU Court is unlikely to torpedo it. The current EFTA Court would no doubt see the creation of an EFTA-like Court as the arrival of a rival concubine. The fact that the Presidents of both the CJEU and the EFTA Court welcomed the UK with open arms in the EFTA system indicates that they want to remain the only institutions guaranteeing the legal homogeneity of the EU Internal Market, instead of jeopardising the well-functioning EEA/EFTA system by introducing a new court and a requisite form of trilateral cooperation to ensure homogeneity in the wider EU legal order.

### Fudging the status quo

As the softened stance by the DExEU reveals, the main difficulty for the UK government is political. UK ministers know that they need to compromise on Theresa May's red line. A hard Brexit would create major disruptions and leave citizens and business exposed to a gap in judicial protection (i.e. no locus standi, time-consuming procedures and weak enforcement).

To the average Joe, the decision to leave the EU was never really about the CJEU: most Brits don't even know about its existence. "Taking back control" has a much wider meaning: over immigration policy, and from the clutches of Brussels' so-called "unelected and overpaid bureaucrats and law-makers", as well a foreign court, especially one with "European" in its name. The imagination of leave voters is likely to be exercised more by rulings from 'Strasbourg' (i.e. the European Court of Human Rights) in high-profile cases about extradition and voting rights for prisoners than judgments from 'Luxembourg' (i.e. the CJEU) about the working time Directive and the location of euro-denominated derivatives' clearing facilities, even if the latter issues have gained emblematic significance for government ministers. With the new Labour position on a soft Brexit and the anticipated pressure on May's government from many 'remain' Tory MPs to soften its position, domestic political consensus may finally be emerging in the UK. The DExEU's position paper on enforcement and dispute settlement suggests a step in that direction, and heralds the possibility of a compromise with the EU. An EFTA-like dispute settlement mechanism nurtures the illusion of a break from CJEU jurisdiction and blurs Prime Minister May's red line while keeping the autonomy of the EU's legal order intact.

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<sup>7</sup> ["London and Brussels edge towards trade-off over citizen rights"](#), Financial Times, 20 July 2017.