The Brexit Papers

Dispute Resolution

Paper 10

Bar Council Brexit
Working Group
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THIRD EDITION

Brexit Paper 10: Dispute Resolution and Enforcement Mechanisms post-Brexit

Introduction

1. This Paper assesses possible dispute resolution models for the various arrangements that may be agreed between the UK and the EU and/or the remaining members of the EU ("EU27") as part of the Brexit process. There are two important but overlapping distinctions to bear in mind:

1.1. the process for resolving inter-state disputes and compliance issues (referred to here as "dispute resolution"); and

1.2. the opportunity for private individuals and operators to enjoy and directly enforce rights conferred on them under the arrangements without having to lobby their own government or the EU institutions to take action on their behalf (referred to as "enforcement").

1.3. Each is addressed in turn below.

Dispute resolution: Why is it important?

2. Given the large number of countries involved, their divergent national interests and the importance (economic and otherwise) of international trade in goods and services, there is bound to be disagreement on the correct interpretation and application of any transitional and future trading arrangements between the UK and the EU27. That is so even though the parties are starting from largely convergent legal systems.

3. As the UK starts developing its own independent trade policy, it may adopt measures that promote its own domestic industries, protect national security or pursue divergent social-economic interests relating to matters such as public health, environment, labour standards and consumer protection[1]. The EU27 may do the same, resulting in divergences. Conceivably, there could be increased temptation to protect national champions if relations between the UK and the EU27 descend into rivalry. One

[1] For example, the recent Conservative manifesto indicates that the Government may introduce restrictions on foreign ownership of British companies to preserve national security, essential services and critical national infrastructure such as telecoms and utilities.

can therefore anticipate disputes regarding the scope and meaning of the terms of the agreement(s) and the consistency of measures adopted at national or EU level.

4. Dispute resolution threatens to be a potential deal breaker in the forthcoming Article 50 Council negotiations. Whilst the Government in the White Paper recognises the importance of dispute resolution, it sets out a "redline" that "taking back control" means leaving the jurisdiction of the European Court of Justice ("CJEU"). However, the Council in its Negotiating Guidelines is adamant that the role of the CJEU must be preserved to ensure its autonomy and legal order[2].

The Role of the CJEU

5. The EU is protective of the CJEU and will not allow its competence to interpret the Treaties and determine the validity of the acts of the EU institutions to be undermined in this future scenario by parallel or overlapping competence being given to other supra-national courts. That is not just protectionism but to ensure clarity, uniformity and legal certainty so that there is only one authoritative ruling that needs to be applied within the domestic legal systems of the EU.

6. In Opinion 1/91, it rejected the dispute resolution mechanisms in the draft EEA Agreement on the basis that the establishment of the proposed EEA Court would risk inconsistent judgments. Similarly, in 2014, it rejected the draft agreement for the EU's accession to the ECHR because it would result in issues of EU law being determined by an external court, bypassing the exclusive jurisdiction of the CJEU.

7. The Council is standing by its core principle that "*nothing is agreed until everything is agreed*"[3] – this means that no agreement on individual rights, sectoral matters or financial issues will be finalised until dispute resolution is resolved. In the lead up to the agreement of the EEA Agreement, dispute resolution proved to be the most difficult issue – necessitating the request of two Opinions from the CJEU – which postponed negotiations on other aspects. The United Kingdom Government would be well advised to pursue dispute resolution proactively as a first priority.

Application to Brexit

8. Dispute resolution is potentially relevant at four different phases of the withdrawal process:

[2] Council Guidelines 29.4.2017, paras 17 and 23. See also the Annex to the Commission's *Recommendation for a Council Decision authorising the opening of negotiations with the United Kingdom setting out the arrangements for its withdrawal from the EU* (COM (2017) 218 final) 3.5.2017, paras 17 and 39-43.

[3] Council Guidelines, para 2.

8.1. Negotiation phase: Continuing application of EU law during the immediate two year negotiation period post service of the Article 50 notification and any agreed extension(s)[4].

8.2. Withdrawal: Interpretation and dispute settlement for the withdrawal agreement negotiated pursuant to Article 50 TEU, in the event that disputes arise between the UK and EU27 as to the correct interpretation of the departure terms or material compliance with them.

8.3. Transitional period: Wider transitional arrangements for any intervening period between the UK's departure and the time needed to negotiate and implement a trade agreement – although ultimately a matter for negotiations, the EU Parliament has indicated that transition will be for a maximum of three years post 2019[5]; some argue that a further "adjustment period" is necessary to allow companies and individuals to adapt to the new regime put in place.

8.4. Future Free Trade Agreement ("FTA") The ultimate dispute resolution mechanisms in any final UK/EU27 free trade agreement.

9. Possible models are set out in section E below with an assessment of their relative merits at each of the above stages.

Enforcement of individual rights

10. Resolution of inter-State disputes is only part of the equation; a closely linked consideration is whether the new arrangements are intended to provide individual rights or simply provide for enforcement on a state-to-state basis.

Why is enforcement important?

11. At the moment, individuals or companies can challenge domestic measures that they consider infringe their EU rights by complaining to the European Commission or by commencing litigation proceedings before the national courts against their own government or against another Member State. They can also bring proceedings against domestic or EEA companies to enforce Treaty rights which have horizontal direct effect (for example, competition law or state aid rules). National courts are under a duty to ensure that those EU rights are effective and provide appropriate relief. If there is any uncertainty regarding the interpretation of the EU provisions and/or their validity, the national court can make a preliminary reference to the CJEU.

[4] The prospect of any extension is slim given the European Parliament elections in 2019 and the expiry of the EU Commission's term in 2019.

[5] Para 28 of its resolution – see:https://dl.dropboxusercontent.com/content_link/TwK2U37J9DgCoVjwPjxnBZyfNgyB8fWci7t4L8S9xABsW9ASH6XrBeq5vZOA1xWJ/file

12. Similarly, individuals can challenge EU measures by bringing a direct action before the EU General Court (subject to standing requirements). Those remedies will no longer be available post Brexit.

13. Going forwards, whilst the GRB will replicate EU-derived rights into domestic law, that will only give individuals a domestic law right of action against their own government and/or against other entities operating *within the United Kingdom*. It will not work for cross-border or pan-European situations. This is particularly important in the context of acquired EU rights: that is, rights which nationals of the UK and EU 27 States have acquired in each other's territory during the UK's membership of the EU and which survive Brexit as a result of the agreed terms of withdrawal.[6] It will not provide extra-territorial protection before the English courts against foreign governments or foreign companies[7]. Similarly, due to the loss of directly enforceable Treaty rights, there would be no cause of action for English citizens or companies to bring proceedings against those defendants before courts in other Member States.

14. It may be that the new arrangements will not be intended to have direct effect and individuals will be left to indirect means of redress, by complaining to national governments and lobbying them to refer or intervene in disputes under the new FTA or, failing that the WTO. But if EU acquired rights are going to continue to have effective protection (whether just for a limited transitional period or longer) and the new FTA is envisaged to confer individual rights, there will need to be some independent forum for adjudicating individual complaints and providing redress.

Effectiveness of relief

15. Another important aspect is not just the forum for determining the scope and effect of individual rights but also the effectiveness of any relief granted. That raises issues regarding standing, interpretation and procedural rules, availability and quality of remedies, timing of relief and also appeal procedures against a ruling at first instance. The range of possible remedies can encompass interim relief, declaration of breach, orders to secure compliance in future and/or retrospective or prospective compensation.

16. There is also an issue whether the ruling of the settlement body is legally binding between the parties to the dispute only or whether it would have a wider scope. A wider application would bring in concepts of direct applicability and sincere cooperation akin to the existing EU regime which would cut across the UK Government's red lines. It is probably sufficient that any ruling is admissible as

[6] Or, possibly, under the general law. See the Bar Council Brexit Paper, Brexit and Acquired Rights.

[7] Further, without the Recast Brussels Regulation ("RBR"), there would be common framework for establishing jurisdiction or recognition and enforcement of English judgments in the EU27. English Claimants would, in the absence of an equivalent, would have to resort to common law connecting factors to establish jurisdiction without the automatic recognition and enforcement procedures in the RBR.

evidence in proceedings involving other parties (including those brought before national courts by individuals) and it is left to the judge to assess the appropriate degree of weight to give to it in all the circumstances of the case.

17. For companies with multi-jurisdictional operations, particularly in regulated markets, there may also need to be an element of consistency across the UK and the EU27. There will also need to be equality of treatment between operators to ensure a level playing field that does not distort competition.

Application to Brexit

18. Enforcement also needs to be considered at each of the four phases identified above:

18.1. Negotiation phase: Presumably there is "no Brexit without exit" and EU law rights will continue to apply and be effectively enforced with all available remedies (including before the Commission and the CJEU) up until 30 March 2019. If an extension is necessary, the UK may try to seek to agree modifications to that regime, but in reality the EU27 are likely to insist on maintaining the status quo(s) (including the role of the CJEU) as a condition of giving unanimous consent for any extension.

18.2. Withdrawal: The withdrawal agreement negotiated pursuant to Article 50 TEU will need to deal with the treatment of acquired rights and/or ongoing investigations or appeals that are currently pending or straddle the exit date.

18.3. Transitional period: Companies and individuals will need legal certainty and a mechanism to enforce their continuing rights during the interim period before the new arrangements are finalised. It is not clear yet whether some or all of the terms of any transitional agreement will confer individual enforceable rights or leave enforcement to inter-State action. If they do have direct effect[8], some form of supra-national quasi-judicial enforcement mechanism will be necessary to ensure the protection of individual rights against the UK Government during the transitional period – contrary to the Council Guidelines, it need not necessarily be the CJEU provided effective protection is assured[9].

[8] "Direct effect" is used in the narrow sense of conferring an individual right that is enforceable before national courts – it does not convey "direct applicability" – i.e. having an overriding nature that automatically disapplies or takes precedence over conflicting national legislation.

[9] The Council's preference for the CJEU in the Guidelines is predicated on the need to preserve uniformity and supremacy of the principles laid down by the CJEU, recognised in Opinion 1/1991, and minimise the risk of its rulings being undermined by a parallel forum that could reach a divergent opinion of the same matters. However that risk could be reduced through the application of some duty on the dispute resolution body to have regard or ensure consistency with CJEU rulings: for a more detailed explanation see the parallel paper on Status of EU law post Brexit.

18.4. FTA: it is not clear whether it will be acceptable to the UK for the UK/EU27 FTA to confer enforceable individual rights on UK and EU citizens[10]. If so, there will need to be an appropriate enforcement mechanism, which may be direct via litigation, arbitration or indirect via complaints to national governments, EU or supra-national bodies. The EU has made clear that it will only accept a judicial, or least a quasi-judicial body, for dispute resolution in the FTA.

Possible models

19. There are a number of existing dispute resolution models that can be drawn upon as possible templates for inclusion in the withdrawal, transitional or FTA Agreement.

WTO

20. The European Union has included dispute settlement mechanisms based on the WTO dispute settlement mechanism in all of its Free Trade Agreements since 2000 and considers that it has worked well.

WTO	Mechanism	**Inter-State Dispute Resolution in the Dispute Settlement Understanding ("DSU")** Multiple options available: • 60 day Consultation between the parties (Art 4 DSU) • 60 days Arbitration, conciliation and mediation (Art 5) • If no amicable solution then request referral of complaint to ad hoc adjudication Panel of 3-5 members
	Appeal	• Appeal to Appellate Body comprised of 7 independent experienced members • Appeal limited to issues of law not fact • Can uphold, modify or reverse legal findings
	Status of ruling	• Binding (Compliance over 90%) • Retaliatory measures permitted in event of non-compliance
	Principles applied	• Applies international law and Vienna Convention • Literal interpretation rather than purposive construction
	Individual rights	• No direct effect

[10] Article 30.6.1. of the Canada- EU Agreement (CETA) provides that its provisions cannot be "directly invoked in the domestic legal systems of the parties". See also Article 17.15 of the EU-Singapore Agreement. That is consistent with the position under the WTO: see Case C-89/99 Schieving-Nijstad a.o. Robert Gruenveld [2001] ECR I-5851. However the UK's relationship with the EU is different as (i) it is a former member of the EU so citizens have acquired vested rights over a period of 40 years that are now being removed or curtailed and (ii) the UK has a proximate land border with the EU so there is greater impact of any restrictions on trade or services and/or distortions of competition.

		• Individuals have to persuade national government to bring a complaint against another Contracting State or intervene if existing dispute under Art 10 DSU. • Indirect effect: Inconsistent measures can be set aside and ensure consistent interpretation
	Remedy	• ADR - Mutually acceptable amicable solution preferred (+50%) • DSB Recommendation or ruling that measure must be withdrawan – Art 21 surveillance secures prospective compliance through withdrawal within acceptable period (20%) • Determination of fault after litigation phase • Retaliation (suspension of concessions or other obligations in that sector) if measure not withdrawn • No interim relief • Urgent procedures for perishable goods • Voluntary temporary compensation where withdrawal of measure is not possible immediately • No damages or remedy for past breach
	Timescale	• Approx 10 months

Switzerland Bilaterals

21. Switzerland has agreed a series of bilateral agreements with the EU on free trade, insurance, customs since 1972 with a further series of bilaterals concluded on free movement of persons, technical trade barriers, public procurement and specific industry sectors in 1999 and 2004.

SWISS	Mechanism	**Inter-State Dispute Resolution to a Joint Committee (Art 27)**
	Appeal	• No appeal procedure
	Status of ruling	• Binding as matter of international law • Ultimate remedy is termination and all bilateral agreements are linked so if all of them would be terminated on breach of one.
	Principles applied	• Applies EU law in certain sectors • International law and Vienna Convention
	Individual rights	• No direct effect

	Remedy	• Attempt to reach mutually acceptable solution within 3 months • Order to put end to the incompatible practice within specified period • Other party permitted to adopt safeguard measures that it considers appropriate (including withdrawal of tariff concessions) in event of non-compliance • Other party can levy compensatory charge on the imported product

Investment Treaties

22. Since 2009, the EU has included investor-to-state dispute settlement mechanisms in trade and investment agreements. In November 2015 the EU agreed on a reformed investment dispute settlement approach, which involves a new dispute settlement mechanism by creating a permanent Investment Court System (ICS) and the introduction of clearer and more precise rules on investment protection.

Bilateral Investment Treaties (IICSIT)	Mechanism	• Allows claims by investors against State regarding investment issues • Parties can select arbiters for the Panel
	Appeal	• No appeal on merits • Award can be referred to ad hoc Committee for review on narrow grounds relating to procedural irregularity rather than substantive error • Award can be annulled in whole or part and remitted to Panel
	Principles applied	• Non discrimination principles and equal treatment
	Individual rights	•
	Remedy	• Can award damages • Award is binding on the parties • Recognised and enforced by national courts

Singapore/EU Agreement

23. The EU and Singapore agreed the text of an FTA in September 2013, with advanced regulatory frameworks for many service sectors (including telecoms and financial services), reduction of technical trade barriers, IP, competition with higher levels of protection than under WTO and TRIPS. The CJEU confirmed in May 2017 that it is a mixed agreement, with shared competence between the EU and the Member States, which needs to be ratified by their federal and regional governments.

Singapore EU	Mechanism	**Inter-State Dispute Resolution -** Multiple escalating options available: • 30 day Consultation between the parties (Art 15.3) • If no amicable solution then referral of complaint to Arbitration Panel of 3 members from list (Art 15.4) 15.21) • Expressly reserve right to use WTO DR as alternative (Art
	Appeal	• No appeal mechanism
	Status of ruling	• Binding on parties - required to comply within reasonable period • Suspension permitted in event of non-compliance
	Principles applied	• Applies international law and Vienna Convention • Literal interpretation rather than purposive construction • Applies principles established by WTO (Art 15.18)
	Individual rights	• Does not create individual rights or obligations (art 15.19) • Ruling is published so may be admissible in court
	Remedy	• Urgent procedure on request • Interim Report with findings of fact and recommendations within 90 days (Art 15.7) • Opportunity for parties to submit comments or ask panel to review specific aspects • Final Report within 150 days • Parties required to comply in good faith within mutually agreed reasonable period and notify measures taken (Art 15.10/15.11) • Mutually agreed compensation or suspension of relevant obligations if non-compliance (Art 15.12)

Canada /EU FTA

24. In February 2017, the EU concluded the Comprehensive and Economic Trade Agreement (CETA) trade deal between the EU and Canada which develops the WTO dispute resolution model. The chosen model is unusual as it provides for multi-channel dispute resolution for different sectors, with arbitration as the principal mechanism[11]. The new CETA arrangements are currently being tested in proceedings commenced by the Belgian Government.

	Mechanism	• Different mechanisms for some sectors e.g. investments, environment and trade and labour issues

[11] The EU- South Korea FTA also provides for an arbitration system

CETA		• Some sectors are carved out of the dispute resolution mechanism altogether e.g. competition and trade. • Carve out for WTO process – mutually exclusive choice - have to waive right to bring claim elsewhere if use CETA mechanisms • First resort to consultation and mediation for conciliatory settlement between parties – confidential and not admissible in court • Claim submitted to Arbitration Panel comprised of 3 members (EU, Canada and third party states) who decide by consensus, failing that by majority. • Validity of acts of EU institutions are exclusive competence of the CJEU (Art 20).
	Appeal	• Appellate Tribunal allow review of errors of law, fact and procedural irregularity (like GC)
	Principles applied	• Apply principles of international law and purposive interpretation following Article 31 Vienna Convention • Also take into account relevant interpretations in reports of WTO Panels and the WTO Appellate Body
	Individual rights	• No direct effect • Individuals and companies have to get States to act on their behalf provided there is an appropriate measure to contest Contentious remedy only not advisory
	Remedy	• Contracting States submit to binding nature of Panel ruling and must comply with its Final Report • 20 days for State to indicate measures it will adopt to secure compliance • Can award temporary damages for loss if non-compliance • Temporary suspension of obligations if non compliance with report • No interim relief – just urgent procedure • CETA Joint Committee may give prospective binding guidance after dispute concluded • Enforced as ICSID award

EEA Model

25. The EEA Model has adopted a two-pillar structure because the EEA EFTA States have not transferred any competences regarding surveillance and judicial review to the EU. In addition, the EEA/EFTA States are constitutionally unable to accept binding decisions made by the EU institutions and the CJEU directly. The EFTA Court, based in Luxembourg, is responsible for the judicial control of the EEA EFTA States, Iceland, Liechtenstein and Norway, while the CJEU exercises judicial control over the EU Member States.

26. In the event of a dispute on the interpretation or application of the EEA Agreement between institutions in the EU and EFTA pillars, Article 111 EEA foresees a

procedure for reaching an agreement between the Contracting Parties in the EEA Joint Committee. This procedure has never been used in practice.

27. There have been suggestions that the EFTA Court or a sub-chamber within the EFTA with jurisdiction over disputes involving the UK could be used as a potential mechanism, either for the transitional period or post- Brexit.

EFTA/ EEA	Mechanism	• Original mechanism for EEA Court rejected in Opinion 1/91 as a threat to the EU autonomous legal order because of the risk of inconsistent interpretation of EU law concepts • EFTA Court determines disputes for EFTA States – CJEU determines disputes for EU States and institutions • Direct actions and preliminary references (optional not mandatory even for courts of last resort)
	Appeal	• None
	Principles applied	• Principle of homogeneity means consistent interpretation applied in practice but EFTA Court has departed from CJEU rules on occasion
	Individual rights	• No direct effect but once implemented into national legal order, individuals can rely and enforce before national courts. • Preliminary rulings from national courts to the EFTA Court and the CJEU • Complaints to the Surveillance Authority
	Remedy	• Preliminary rulings are advisory – not binding on national courts. • Can declare state liability and award damages for loss • Interim relief available

Analysis

28. In the February 2017 White Paper, the UK recognises that "fair and equitable implementation of our future relationship with the EU requires provision for dispute resolution". However, it does not indicate any preference and merely analyses it from the perspective of the final FTA not any other agreements. It concludes that the actual form of dispute resolution will be a matter for negotiations between the UK and the EU. It is silent as to whether any FTA should confer individual rights, although it is clear that any rights will not be able to undermine sovereignty.

29. Helpfully the UK Government is open to new mechanics and does not regard itself as being constrained by precedent. It accepts that different dispute resolution

mechanisms could apply to different agreements, depending on how the new relationship with the EU is structured[12].

30. It is highly unlikely that any Free trade agreement will be concluded with the EU27 without some form of supra-national dispute resolution mechanism. The EU is unlikely to accept that a purely national mechanism (such as national courts) will be sufficient for inter-State disputes, especially those involving sensitive issues such as state aid, subsidies, dumping, and services of general economic interest.

31. The Council's insistence on the role of the CJEU does not appear justified in this context when it has accepted other mechanisms in other FTAs. It is unlikely that the Council will accept a Joint Committee model similar to that in the Swiss arrangements which are now regarded as old-fashioned. The question will be whether it will accept a quasi-judicial mechanism instead.

Concluding recommendations

32. Returning to our four key phases:

32.1. **Negotiation period**: – the role of the CJEU will need to continue during the initial 2 year period phase and the EU27 are likely to insist on its continuation during any extension. That will preserve the effect of individual rights until the actual date of exit

32.2. **Withdrawal Agreement**: The EU is insistent that the CJEU must maintain autonomy over the interpretation of the Withdrawal Agreement. Since it will be an EU act under Article 50 TEU, the EU will insist that the CJEU has last say on interpretation of its terms and there will still be the automatic right for institutions to seek an Article 218 Opinion or other Member States to seek a preliminary reference on its interpretation and application in individual disputes.

32.3. It is unlikely that the EU will accept a conciliatory mechanism like the Swiss bilaterals. There will be complications if there are disputes between the EU and UK (e.g. financial exit arrangements) and it is clear that there will need to be some independent supranational form of judicial adjudication.

32.4. In terms of enforcement, the EU also insists on the CJEU's oversight of individual citizens' rights for the duration of their lifetime – which in the case of long term rights such as mortgages and pensions could last for more than 25 years – and may not even have arisen yet. and may not even have arisen yet. The question is: what entitlement, of what duration, can be negotiated between the UK and EU27? There may be scope for a domestic judicial or quasi-judicial form of enforcement at that point, subject to effective relief; and the content of the agreed entitlement, and the basis for its enforcement, would have to operate reciprocally.

32.5. For ongoing pending administrative and judicial proceedings, it is likely that appeal rights before the General Court and CJEU will need to be respected, which could last

[12] White Paper, para 2.10 at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf.

for up to 10 years. It will have to be determined whether this appellate jurisdiction needs to extend to investigations that commence after March 2019 but which relate to facts arising before the exit date.

32.6. The negotiation of the withdrawal agreement will need to be concluded by October 2018 at the latest, to allow time for ratification and UK Parliamentary approval. It would be too risky to allow dispute resolution to threaten the conclusion of the withdrawal agreement, meaning the UK was forced to leave without a deal and trade purely on WTO terms. Given the magnitude of that risk and the time pressures, it would be best to resort to pre-existing judicial architecture, with established composition and rules of procedure, to ensure a smooth transition and minimal upheaval for states and businesses.

33. If the jurisdiction of the CJEU were not acceptable to the UK government, then a possible solution might be to set up a specialist section within the EFTA Court to adjudicate disputes. It could also be used for preliminary rulings from the UK courts in individual claims in relation to acquired rights. The British Judge and Advocate General could be transferred from the CJEU as UK representatives. The EFTA Court operates in English, and produces clearly reasoned judgments to a relatively short timescale; and its rulings are not binding but merely advisory.

34. Transitional period: any transitional agreement will need to be negotiated before the UK's exit in March 2019. For the reasons above, we would recommend using a specialist section created within the EFTA Court to oversee inter-state disputes and individual claims. It may also be possible to use the wider EEA Agreement as a basis for or in lieu of a specific transitional treaty so that, subject to necessary consents, the UK could seamlessly transition from EU membership to EFTA membership without creating a hiatus in individual rights and business continuity. That outcome, it may be argued, is the minimum the EU should provide when Article 50 TEU has failed to provide for transitional measures to protect vested rights and ensure legal certainty and proportionate interference with rights as a result of the tight exit procedure.

35. FTA Period: The EU is likely to use the CETA arrangements as a starting point for dispute resolution. This would not be a bad outcome and could result in a flexible multi-level dispute resolution mechanism, with sector-specific solutions. The use of mediation and consultation as ADR in the first instance is advisable, as a large proportion of WTO disputes are resolved that way without further escalation.

36. Disputes between the UK and other States could be resolved by an arbitration panel. Disputes between the UK and the EU institutions could be resolved by referral to an international panel or tribunal with competence to issue binding rulings, provide declarations of breach and specify remedial measures. Whether compensation will be awarded for past breach, or prospectively for non-compliance with rulings, will be a matter for negotiation.

37. In terms of enforcement, if the provisions of the UK-EU FTA are intended to confer individual rights, the first port of call should be the national courts of the Member States. However, the CJEU is likely to insist on exclusivity in interpreting the terms of the agreement as an act of the EU institutions. There may well need to be some mechanism for

obtaining an Advisory Opinion in disputes before national courts or for national courts to have due regard to CJEU rulings, and an obligation of consistent interpretation to ensure equality, legal certainty and the maintenance of a level playing field.

Brexit Working Group

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