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BREXIT: OPTIONS FOR A FUTURE UK-EU DISPUTE SETTLEMENT MECHANISM

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THE LAW SOCIETY OF ENGLAND AND WALES

This paper outlines the Law Society's views on the building blocks needed to construct a fair, transparent and accessible mechanism for the resolution of disputes between the UK and the EU after the UK leaves the EU.

In this paper we:

- Examine the mechanisms currently in use between the EU and third countries.
- Highlight the elements of each that may need to be replicated by EU and UK negotiators when constructing a mechanism to enforce the final EU-UK agreement.
- Explore the characteristics of the Court of Justice of the European Union (CJEU) in its role as an arbiter of legal disputes between national governments and the EU institutions.

EXECUTIVE SUMMARY

The UK will become a third country in terms of its institutional relationship with the European Union (EU) in March 2019.

The Law Society does not think that the CJEU should have direct jurisdiction over the final agreement within the UK. After its withdrawal from the EU, the UK will no longer have judges on the CJEU and it may not be possible for UK lawyers to represent clients before the CJEU. The UK will no longer have the ability to vote on the content of EU law or to intervene in proceedings before the Court. Furthermore, judgments made by UK courts on aspects of EU law will no longer be relevant to the judicial systems of the EU27. This would be the case in particular if the new agreement were to grant jurisdiction to the CJEU over cases involving sensitive policy areas, such as criminal justice or personal data. In such cases, a strong link between the dispute settlement mechanism and the UK legal system would be needed.

Furthermore, the type of dispute resolution mechanism used in the final UK-EU agreement will depend on how deep or ambitious that agreement is: the more comprehensive the agreement, the more robust the dispute settlement mechanism will need to be. For example, a deal that grants rights to individuals will require a resolution mechanism that allows access for individuals.

On this basis, the Law Society calls on the UK Government to create a separate dispute settlement system.

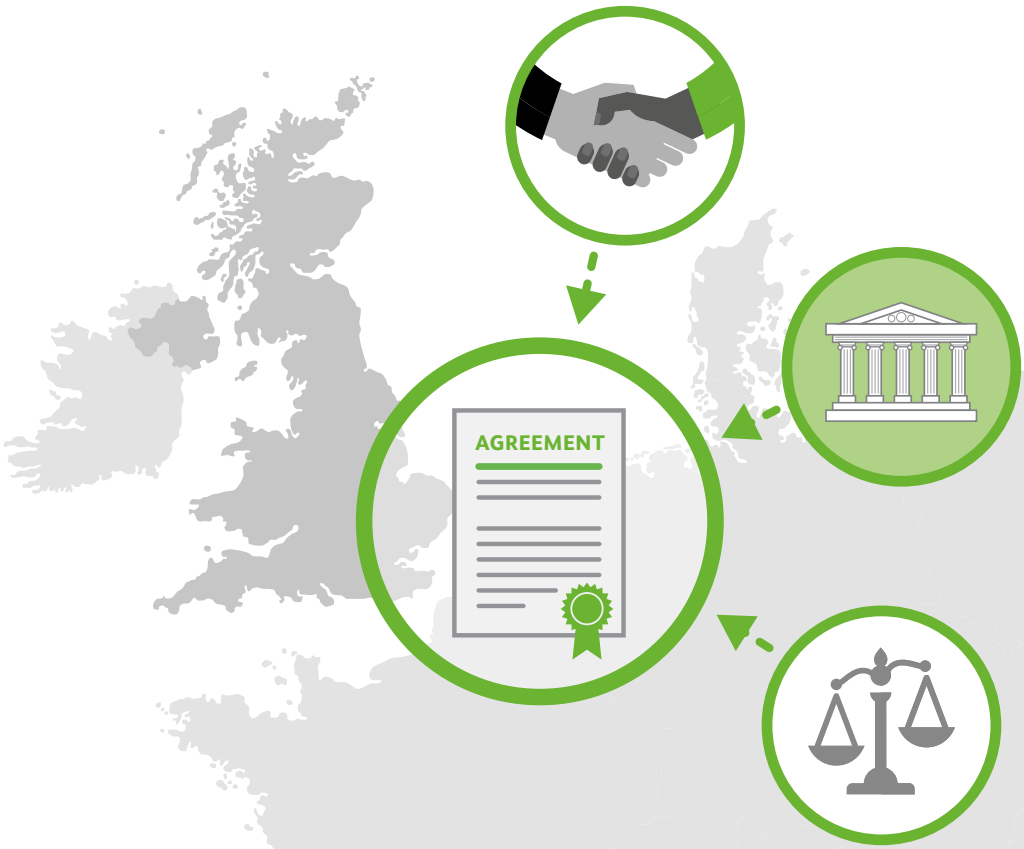
The system chosen should have a connection with the UK's legal systems. This would enable the UK to secure an ambitious and deep relationship with the EU in trade, justice and security cooperation and in the fight against serious crime and terrorism.

The UK Government should also consider the following key principles for any future dispute resolution settlement:

- The chosen dispute settlement system should apply across all strands of the final UK-EU deal.
- The mechanism put in place should continue to grant access to individuals to enforce their rights. This can be modelled on the CJEU or EFTA Court preliminary ruling system, under which national courts could refer cases to the new tribunal. Alternatively, an appellate system could be pursued, such as the one under the CETA agreement for settling financial disputes.
- The system chosen should not discourage individuals or businesses from taking cases to the tribunal for reasons related to the expense or waiting times involved.
- There should be a clause in the agreement, implemented into UK law, to create convergence between the decisions made by the dispute settlement mechanism, the UK courts and the CJEU judgments. This clause could be modelled on Protocol 2 of the Lugano Convention, under which national courts are to take due account of each other's judgments.
- There should be a mechanism for dialogue between the UK and the EU that can take effect in cases where there is a danger of a substantive divergence – either due to case law or legislative developments.

There are several options available that the UK Government could consider as a basis for a new dispute settlement system:

- A comprehensive European Economic Area and European Free Trade Association (EEA-EFTA) based model, which includes a court that has jurisdiction over disputes arising from or in connection to the agreement in the UK and to which both parties (i.e. the UK and EU), as well as individuals and businesses, can appeal to ensure that the agreement is correctly applied and interpreted in the UK.
- A model based on the EU's Comprehensive Economic and Trade Agreement with Canada (CETA), which is mainly governed by a state-to-state mechanism and may include a dispute settlement body for a number of limited and specific areas to which individuals and businesses can appeal.
- A special mechanism, which is tailored specifically to the new agreement.



INTRODUCTION

There are three different stages to the UK's withdrawal from the EU: withdrawal from EU membership, a transitional period and the new UK-EU relationship. Each stage will require a specific dispute settlement mechanism, either via the CJEU or through the creation of a new mechanism.

Each agreement will need to provide for a dispute resolution mechanism to ensure that all parties share a consistent understanding of the deal negotiated by the UK and the 27 EU member states (EU27), in terms of its interpretation, application and enforcement.

The draft text of the Withdrawal Agreement, which was made public on 19 March 2018, sets out in detail the agreed terms of the UK's withdrawal from the EU. The agreed text on transition maintains the present regime of dispute settlement until the end of the transition period, meaning that the UK will remain under the jurisdiction of the CJEU during that time.

The draft text also provides for a separate dispute resolution and enforcement regime for the strand of the agreement concerning citizens' rights, which will involve the granting of limited jurisdiction to the CJEU for a term of eight years. At the time of writing, the negotiating parties are yet to agree on the terms of a dispute resolution system to be used in the enforcement of the wider Withdrawal Agreement.

This paper focuses on the method of dispute resolution chosen for the final UK-EU agreement, governing the relationship between the two blocs after Brexit.

Characteristics of the CJEU

As an EU member state, the UK currently falls under the jurisdiction of the CJEU. The CJEU is the institution responsible for interpreting EU law to make sure it is applied in the same way in all EU countries. It also settles legal disputes between national governments and EU institutions. The EU treaties differ from other international treaties as they deepen the level of cooperation between states to include rights and obligations for individuals. To give effect to these treaty rights, individuals in the EU have access to the CJEU through their national courts by using the preliminary ruling system (when challenging the national application of EU law), and in some cases they may have direct access to the CJEU (when challenging EU law).

The CJEU's judgments are declaratory. Only in very rare cases can the CJEU impose a financial penalty on a member state for non-compliance. If a case originates from a national court, the CJEU decides only on the interpretation of the EU law in question. The national court retains sole jurisdiction over national law, including the provision of judicial remedies (for example imposing a penalty, enforcing a right or making another type of court order).

A role for the CJEU during transition?

The first stage of the UK's exit from the EU will be outlined in the terms of the Withdrawal Agreement. This agreement sets out a transitional period which will replicate the status quo, and which will provide for the continued application of all rights and obligations derived from the EU's treaties, while at the same time giving effect to the UK's withdrawal from the EU. In the transitional period the UK's institutional links to the EU will be severed while the legal framework continues to apply. The CJEU continues to have jurisdiction during this period over the whole body of EU law and UK courts will continue to have the right to make references to the CJEU.

After the transitional period, the UK becomes a third country vis-à-vis the EU's legal framework. The new agreement then comes into effect. However, the Withdrawal Agreement already includes a specific set of rights for EU citizens in the UK, and UK citizens in the EU that will apply after the end of the transitional period. These provisions are intended to ensure that EU citizens living in the UK (as well as UK citizens living in the EU) will continue to have the right to reside and work in the country of their choice, as they have done to date under EU law.

The UK-EU27 have agreed that the CJEU will have limited jurisdiction to interpret this agreement for eight years following the end of the transitional period. Accordingly, the UK courts can refer cases to the CJEU and a separate independent authority will be established in the UK that will also have the ability to refer cases to the CJEU where it considers that the UK is in breach of its obligations under the Agreement.

During the transitional period, the Law Society believes that the CJEU should retain jurisdiction over the UK, as the parties aim to retain the status quo. In the event that the transitional period will be relatively short it would be too burdensome and time-consuming to establish a separate dispute settlement mechanism solely for the period of transition. Furthermore, as the Withdrawal Agreement will provide for the continued application of citizens' rights and rights of free movement, it is logical for the CJEU to have a jurisdiction for a limited period after the UK exits the EU legal framework.

UK legal professionals should continue to be entitled to plead before the CJEU to ensure the application of the rule of law and to allow lawyers to continue to work on cases referred to the CJEU from UK courts.

Models for the final UK-EU dispute resolution mechanism: EFTA and CETA

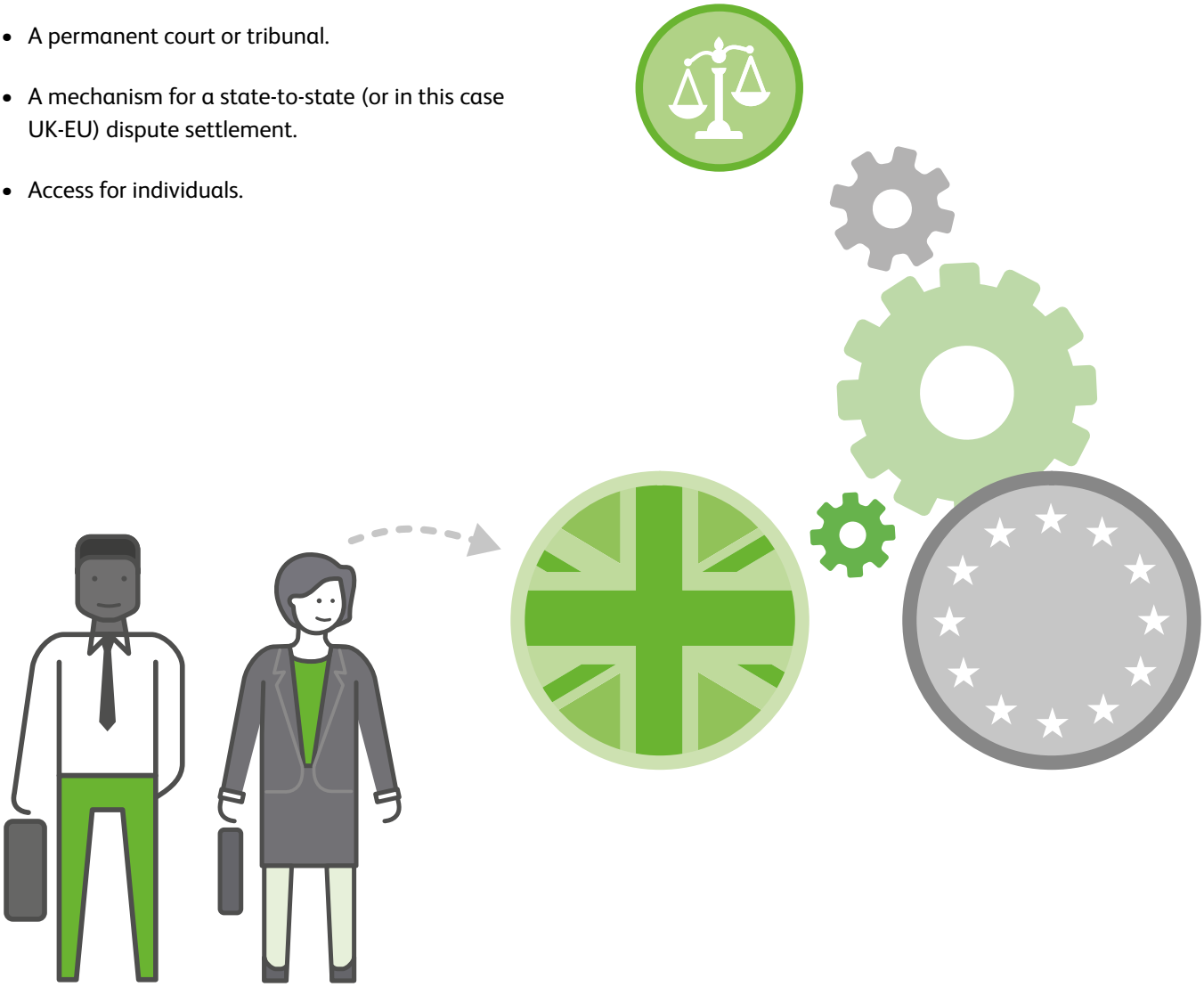
The type of dispute resolution mechanism chosen in the final agreement will depend on how deep the future UK-EU partnership is intended to be: as stated above, the more comprehensive the agreement, the more robust the dispute settlement mechanism will need to be.

As a starting point, the UK could consider two different models for dispute resolution currently employed by the EU: those adopted under the CETA (investor-state dispute settlement) system and the EEA (EFTA Court) agreements. Both mechanisms have the following in common:

- A permanent court or tribunal.
- A mechanism for a state-to-state (or in this case UK-EU) dispute settlement.
- Access for individuals.

The EEA agreement provides for a court-led process through the EFTA Court, whereas arbitration dominates the CETA process, in which parties mediate and, only if the case is not resolved within a specific time, is a reference for arbitration then made.

The CETA investor-state dispute settlement system applies only to investment disputes and does not apply to the entirety of the CETA agreement, unlike the EFTA Court, which has jurisdiction over all elements of the EEA agreement. This distinction is important as it means that individuals can only appeal under CETA to the dispute settlement system in limited cases.



A new mechanism, or using an existing one?

It is likely that the UK Government will seek to create a special mechanism to fit the final UK-EU agreement. In her Mansion House speech in March, the Prime Minister said that the UK will look to construct a 'completely independent' arbitration mechanism. While the UK's preferred model has not yet been set out, the language used by the Prime Minister suggests that the UK envisages the conclusion of a UK-EU free trade agreement (FTA), which would employ an arbitration mechanism common to agreements under international law.

In other parts of the same speech however, the Prime Minister suggested that the UK would look to maintain close levels of cooperation with the EU in specific economic sectors. For example, the UK would look to take part in and benefit from the work of European agencies like the European Medicines Agency. As we set out above, a more comprehensive dispute settlement mechanism with a wider scope of application would be required should the UK and EU conclude an agreement that goes beyond the limited scope of a FTA. In such a case, the mechanism chosen would need to reflect the depth of the relationship set out in the agreement.

The first choice to be made in negotiations is the depth of the relationship that the UK seeks to maintain with the EU and the level of UK-EU cooperation in all areas. If the UK chooses to maintain a range of areas of cooperation, and in particular where this cooperation leads to the granting of rights to individuals, the Law Society considers that individuals would require access to the dispute settlement mechanism. In such a case, the arbitration model would not provide an adequate solution.

Individuals may be granted access to such a court or tribunal in different ways:

- Referrals from the national courts – this is the CJEU and EFTA Court model.
- By appeal – as is the case in CETA, where the arbitration mechanism also provides for a more court-like appeal process.

It is important that the process for obtaining a hearing from the court or tribunal is neither too expensive nor prohibitive regarding the grounds of jurisdiction under which a case can be heard. Both of these aspects have an undue influence on the ability of individuals to bring their cases and thus enforce their rights.

The end of the direct effect and supremacy of EU law

Whatever dispute settlement system is chosen, there will be a change to the manner in which the case law from the dispute settlement mechanism is applied in the national courts. Currently, EU law has direct effect and supremacy over national law. This means that EU law, provided that it is clear and precise (thus meeting the criteria for direct applicability), can be directly relied on in national courts. Furthermore, if there is a clash between EU law and provisions of domestic law, EU law is given primacy.

Direct effect and supremacy will cease to apply as the UK-EU relationship shifts from a EU law-based system to a public international law-based system. For example, although the EFTA Court has a similar role in the legal systems of the EEA-EFTA states as the CJEU has in EU member states (including equal access for individuals), there is no direct effect or supremacy included in the EEA-EFTA framework. Therefore, UK courts will no longer be bound by judgments from the new dispute settlement mechanism as a matter of course.

Given the presence of the doctrine of precedent in the UK system however, it may be possible to grant the Supreme Court, for example, the ultimate right to settle disputes on the UK side. Convergence between the EU and the UK may then be preserved by adding a clause to the new agreement whereby the UK Supreme Court or national courts will take due account of the case law of the CJEU, in cases where the provisions of the new agreement are materially similar to those set out in the EU treaties. This point is reflected in the approach of the UK Government. In her Mansion House speech, the Prime Minister conceded that, where appropriate, 'our courts will continue to look at the CJEU's judgments'. Where this might be the case, the agreement should be clear in setting out the conditions under which the UK courts are to take CJEU judgments into consideration.

The question that remains is whether a simple interpretation clause will be sufficient. This will depend on the nature of the agreement.

If the agreement creates rights or obligations for individuals, it may be necessary to create mechanisms to ensure that the individuals have access to the Supreme Court to challenge the UK interpretation of the agreement. One way to do this would be by granting the independent body overseeing the agreement in the UK (newly created for the purposes of the withdrawal agreement) the right to bring infringement actions in the UK. Another way would be to allow individuals to bring enforcement cases in the UK courts as a means of ensuring that the UK Government fulfils its obligations under the agreement. Both routes mirror the access available to individuals on the EU side under the CJEU.

It is vital that the final mechanism is efficient in its delivery of rulings. A backlog in the system could result in parties being able to take commercial advantage of the uncertainty caused by such delays.

Potential problems with a joint UK-EU judicial panel

Some commentators have suggested that a joint UK-EU judicial panel should be the model pursued by the parties in such a case. However, it is unlikely that this will be a viable option.

The CJEU will insist that any references from the EU courts or cases where it has jurisdiction under EU law, or cases where the clauses of the new UK-EU agreement are effectively the same as EU law, must still be made to the CJEU. The CJEU has supreme autonomy in construing all EU measures to ensure that they comply with EU law and that they are applied uniformly and consistently in all member states. Accordingly, any panel is likely to have jurisdiction only on the final interpretation of the UK side of the agreement, with the CJEU retaining jurisdiction on the EU side. This could create divergent or inconsistent judgments.

To ensure cohesion between the CJEU and the new court or tribunal, the agreement should provide that the two courts (both the UK-EU panel and the CJEU) take due regard of each other's judgments in cases where the terms of the UK-EU agreement and the EU treaties are reflective.

The new agreement should contain a political chapter for dispute settlement: a procedure or forum for the UK Government and the EU to exchange views in cases where there is a danger for serious divergence of interpretation and where this divergence threatens the functioning of the agreement. This political chapter would serve to enhance cooperation between the parties. However, it would not serve as an alternative to the establishment of a dispute settlement and enforcement mechanism. Instead, it would allow the parties to resolve political disputes relating to the over-arching agreement.

CONCLUSION

In this paper we have summarised the dispute mechanisms currently used between the EU and third countries, and set out our views on the essential elements needed for creating a fair, transparent and accessible UK-EU dispute resolution mechanism after Brexit.

We believe that any UK-EU dispute resolution mechanism should have several key principles:

- It should be more robust than those used in FTAs.
- The same system should apply across all strands of the final deal.
- It should continue to allow individuals access to enforce rights granted to them under the final UK-EU agreement.
- It should be efficient, affordable and unrestrictive for different parts of the agreement.
- It should provide for the creation of convergence between decisions made by it, the UK courts and the CJEU.
- There should be scope for UK-EU political dialogue where there is a danger of divergence in interpreting the terms of the agreement.

We hope the UK Government takes these issues into consideration in the rest of the Brexit negotiations.

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