House of Commons European Scrutiny Committee

Call for Evidence on the Institutional Framework of the UK/EU Trade and Cooperation Agreement

Submission on Dispute Resolution and the role of the Court of Justice of the European Union

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About Us

We are a team of legal academics from the University of Essex School of Law with a research focus on European Union (EU) law, including its continued influence in the United Kingdom (UK) post-Brexit.

Dr O'Connor's research covers the broad fields of EU law and employment law, with an emphasis on the influence of EU fundamental rights concepts on the domestic employment relationship in the UK.

Dr Karatzia's research focuses on two streams: Citizens' participation in European law and decision-making (with a focus on the European Citizens' Initiative), and financial/banking law.

Professor Konstadinides' research covers the fields of constitutional and administrative law, EU law and constitutional theory.

Collectively, we have a particular interest in the mechanisms for the resolution of disputes found within both the Withdrawal Agreement and the Trade and Cooperation Agreement (TCA). Our submission therefore focuses on the fourth question outlined in the Call for Evidence on the key features and legal implications of the TCA's dispute resolution mechanisms with a particular consideration of the UK's judicial and regulatory autonomy.

Introduction

The complexity of and competing interests at stake in international agreements mandate some form of mechanism for the resolution of disputes. The Withdrawal Agreement and TCA are no different and yet they arose in the unusual circumstances of one state seeking to diverge from an already-existing highly integrated international organisation. The context of withdrawal from the EU therefore heightens the likelihood of disputes between the EU and the UK. We have already witnessed emerging disputes surrounding the Northern Ireland Protocol (NIP) to the Withdrawal Agreement, but another likely avenue for disagreement is the extent of the UK's ability to exercise its regulatory autonomy to diverge from existing EU rules. There are many potential consequences of such divergence, including business costs, but our focus is on the possibility of disputes arising with the EU in accordance with the terms of the TCA.

The structure of our submission is as follows. We begin in Section I with an analysis of the dispute resolution procedures provided for in the TCA and examine their place in the wider framework of UK/EU dispute resolution, including the Withdrawal Agreement. In Section II, we consider the likely legal and policy implications of this dispute resolution architecture for the UK, notably its implications for the UK's regulatory autonomy and ability to diverge from existing EU rules.

I. Dispute Resolution under the EU-UK Trade and Cooperation Agreement

1. Background to the Trade and Cooperation Agreement

The UK negotiation mandate for the TCA stipulated that any dispute resolution process should be 'appropriate to a relationship of sovereign equals' and suggested that a model might be drawn from existing free trade agreements, for example that between the EU and Canada. The aspiration that a dispute resolution model could be drawn from existing free trade agreements came with limitations. First, dispute resolution regimes in existing EU free trade agreements come in different shapes and forms: there is no uniform dispute resolution regime characterising these agreements.[1] Second, all current EU free trade agreements are, essentially, agreements between the EU and a third country that was never part of the EU. The post-Brexit dynamic has allowed for the establishment of *sui generis* dispute resolution mechanisms, including a continued role for the Court of Justice of the European Union (CJEU) as a dispute resolution forum for aspects of the Withdrawal Agreement. Undoubtedly, the main difficulty in the design of the TCA dispute resolution mechanism was the need to manage divergence rather than convergence.

The Political Declaration recognised these dynamics by stating that the future relationship would need to take account of the unique period of the UK's membership of the Union, which has resulted in 'a high level of integration between the Union's and the United Kingdom's economies, and an interwoven past and future of the Union's and the United Kingdom's people and priorities'.[2] Although the Political Declaration did not set out a detailed system of dispute resolution, Part IV of the Declaration provided an overview of the key characteristics of the system, which for the most part are reflected in the final arrangements set out in the TCA. First, there was provision for a Joint Committee 'responsible for managing and supervising the implementation and operation of the future relationship, and facilitating the resolution of disputes (....)'.[3] Second, the Declaration provided for an independent arbitration panel should the Joint Committee not reach an agreement. As we discuss below, this anticipated mechanism bears a strong similarity to those already set out in the Withdrawal Agreement.

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[1] See DG for Internal Policies of the Union Study for the European Parliament AFCO Committee 'The Settlement of Disputes Arising from the United Kingdom's Withdrawal from the European Union' PESP 596.819 - November 2017.

[2] Revised text of the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom as agreed at negotiators' level on 17 October 2019, to replace the one published in OJ C 66I of 19.2.2019, para 5.

[3] ibid para 126.

2. Relationship between the Withdrawal Agreement and the Trade and Cooperation Agreement

It is certainly to be welcomed that there is a measure of continuity between the Withdrawal Agreement and TCA's dispute resolution mechanisms, and it would be a mistake to create an artificial dividing line between the mechanisms developed to govern withdrawal on the one hand and the future relationship on the other. Some common principles govern the two mechanisms, namely the requirement of cooperation and exclusivity. These principles are expressed in Articles 167 and 168 of the Withdrawal Agreement, which highlight the need for consultation rather than confrontation. The principles are also reflected in Articles 1 and 697 of the TCA. A further requirement of the TCA was that it respected the Political Declaration's overarching ambition of respecting the autonomy of the UK and EU legal orders (paragraph 122). To ensure the proper functioning of the entirety of the future relationship, the Parties committed to engaging in regular dialogue and to establish robust, efficient, and effective arrangements for its management, supervision, implementation, review, and development over time, and for the resolution of disputes and enforcement.

In terms of its material scope of application, by contrast to certain provisions in the Withdrawal Agreement, no provisions of the TCA have direct effect. There is also clear emphasis in the Agreement that the TCA is a creature of international law and not EU law and that it should be interpreted in accordance with the sources of international law, including customary international law and the Vienna Convention, rather than EU law. In tune with this change in emphasis, the Political Declaration's articulation of the Parties' intention to maintain a role for the CJEU as the sole arbiter of Union law is not reflected in the text of the TCA. This, however, contrasts with the Withdrawal Agreement's recognition of a continued role for the CJEU in the interpretation of EU law.

Under the Withdrawal Agreement, if a dispute raises a question of interpretation 'of provisions or concepts of Union law', the arbitration panel should refer the question to the CJEU for a *binding ruling* as regards the interpretation of EU law. When a dispute does not raise such a question, there will not be a reference to the CJEU. By contrast, the CJEU has been given no

such formal role under the TCA, although it will have a legacy impact as discussed below. The TCA can also be characterised by its instability given that it can be reviewed every five years. Although this is a common practice with bilateral trade agreements, it must be remembered that the TCA arose within a context of (contested) divergence from an existing trade arrangement, with the precise intention of creating a new and stable settlement between the UK and the EU.

The dispute resolution mechanisms set out in the TCA are certainly complex and run alongside the already complicated dispute resolution architecture found in Articles 167–181 of the Withdrawal Agreement. The dispute settlement provisions of the TCA can be found in Part Six and are made up of the main dispute resolution procedure and specialised dispute resolution procedures.

3. Main dispute resolution procedure

The default or main dispute resolution procedure in the TCA can be found in Articles 734–760. As with the Withdrawal Agreement, disputes are settled by arbitration panels with the power to issue binding decisions. All disputes are initially handled through political consultation at the level of either the Partnership Council or the Specialised Committees. After three months, the dispute can then be submitted for formal arbitration (Articles 739–745 and 752). The panels, which are to be composed of three members (including a chair), should reach a decision by consensus where possible (Article 754) and within 130 days. The arbitration panel will then make a ruling on whether compliance has been achieved in accordance with the timetable agreed by the parties (Articles 747 and 748). Penalties can then be incurred until the dispute is resolved, for example a suspension of obligations (Article 749).

Finally, although there are special provisions in the Withdrawal Agreement for certain areas such as citizens' rights and the NIP, the TCA goes much further in carving out exceptions to the main procedures in the form of specialised dispute resolution mechanisms for law enforcement, judicial cooperation, fisheries, and parts of the Level Playing Field (LPF), for example labour and social as well as environmental standards. Parts of the TCA also lack formal dispute resolution arrangements altogether.[4]

4. Specialised dispute resolution mechanisms

Designing dispute resolution mechanisms for the TCA was a difficult task given that the precise commitments contained in the Agreement vary depending on the particular field in question, with some being linked to international standards and others more closely aligning to existing EU/UK standards. Within certain fields, for example employment standards, the UK accepted the principle of non-regression and agreed to strive to improve standards. Enforcement also varies across the different areas, with some areas requiring operationally independent and impartial enforcement authorities while others rely on domestic administrative and judicial bodies to enforce domestic law and ensure effective remedies. The diversity of these various commitments raises significant questions as to the design and effectiveness of any bespoke dispute resolution mechanism covering these fields. In contrast to disputes regarding the rest of the Agreement, which are largely dealt with under the main dispute resolution procedure, disputes concerning the exempt areas found in Article 735 are dealt with under the LPF Title of the TCA. The LPF Title is composed of horizontal provisions setting out special procedures for consultation and the appointment of expert panels to resolve disputes.

From the above it can be deduced that the precise nature of the dispute resolution mechanisms in the TCA depends on the field in question. For example, while the main dispute resolution mechanisms are entirely excluded for some areas, they do apply to others with more narrow exceptions. As such, the UK may be confronted with situations where certain areas that otherwise fall within the exceptions to the main dispute resolution procedure under the TCA, may feed back into the normal process. Additionally, labour and environmental standards, which are particularly sensitive areas, are governed by provisions on consultations and expert panels which are to be formed by the Trade Specialised Committee on the Level Playing Field for Open and Fair Competition and Sustainable Development. The depth and coverage of the TCA dispute

[4] Maddy Thimont Jack and Jill Rutter, 'Managing the UK's relationship with the European Union', Institute for Government, February 2021, 7, in footnote. See also House of Commons Library, 'The EU -UK TCA: Level Playing Field', Briefing Paper 9190, 20 May 2021. Available from: https://researchbriefings.files.parliament.uk/documents/CBP-9190/CBP-9190.pdf

resolution will, therefore, substantially affect the degree of commitment of the UK as an independent country to the EU following withdrawal.

The political context and negotiating objectives of both the UK and the EU are crucial to understanding the dispute resolution mechanisms now found within the TCA. It might be said that the whole purpose of Brexit was to allow the UK (at least the freedom) to diverge from EU regulatory standards. The EU, on the other hand, was eager to prevent the UK from unfairly competing on social, environmental and competition rules, hence the Union's insistence on some form of LPF within the TCA. This commitment to managing regulatory divergence can be found in the EU-UK Political Declaration of 17 October 2019. With the precise mechanics of the LPF left to be worked out, the UK continued to pursue a position of reliance on international standards, which the EU viewed as largely insufficient to prevent regulatory competition.[5] The final LPF provisions represent a compromise between the EU's earlier insistence on explicit binding requirements and the UK's wish to rely more heavily on international standards and existing domestic provisions. What we are left with might be referred to as *managed regulatory autonomy*, i.e., the UK, in theory, has the power to diverge from EU rules, but in practice such divergence will be carefully scrutinised by the EU, which may choose to trigger the TCA dispute resolution mechanisms in response. There may be parallels to be drawn between the existing post-Brexit scenario and the position of the UK prior to joining the then European Economic Community. The EU might gain further competences in areas that are affected by the TCA, which may require the UK to act to maintain regulatory equivalence.

II. Impact of the TCA on the UK's Regulatory Autonomy

Perhaps somewhat counterintuitively, the TCA read alongside the Withdrawal Agreement is largely concerned with continuity rather than divergence, i.e., it emphasises the potential legal consequences of the UK diverging significantly from existing EU rules. Yet, the risk of divergence can come not only from the UK actively seeking to do so, but also from a failure to

[5] Kenneth Armstrong, 'An "Uneven Level Playing Field" —The EU/UK Trade Agreement', The Brexit Effect, 14 January 2021.

'keep up' with EU standards.[6] Although the UK has not yet sought to diverge significantly from the EU in most regulatory fields, there is no doubt that the ability to deviate from EU rules was both a key motivation for Brexit, but also a core negotiating objective of the UK Government. As such, there was a heightened desire, on the part of the UK, to prioritise national and parliamentary sovereignty over the creation of supranational dispute resolution mechanisms as evidenced in the specialised dispute resolution provisions of the TCA discussed above.

The potential outcome of a dispute depends on the precise field in question, but the TCA does provide for two broad measures in the event of regulatory divergence. First, tariffs (or other measures) can be taken in the event of divergence from the non-regression rules, i.e., non regression from EU regulatory standards as they existed at the end of the Brexit transition period. In addition, the TCA provides for what are known as 'rebalancing measures' in the event of regulatory divergence between the EU and the UK with a material impact on trade and investment. This contrasts with the temporary remedies available under the Withdrawal Agreement. The term 'rebalancing measures' is left undefined, but it is likely to include tariffs. The decision to adopt rebalancing measures can also be sent for arbitration. Any reaction must be necessary and proportionate and disturb the Agreement's functioning to the least extent possible. If there is frequent use of the rebalancing measures, the entire Trade Title can be reviewed to ensure that commitments remain appropriately balanced.

Divergence from EU rules is not only the preserve of the Government or Parliament but may also come from the UK's higher courts. The UK has always made clear that it would end the direct jurisdiction of the CJEU after Brexit. Nevertheless, as it has been illustrated, the CJEU will continue to have jurisdiction over aspects of the Withdrawal Agreement, including citizens' rights and the NIP. The CJEU will also continue to have an influence via domestic legislative mechanisms such as the EU (Withdrawal Act) 2018, which preserves existing CJEU case law as 'retained EU case law' (Section 6).

[6] Joe Marshall, Jill Rutter and Jeremy Mills-Sheehy, 'Taking Back Control of Regulation Managing Divergence from EU Rules' Institute for Government, May 2021 8.

This category of 'retained case law' is then divided into two subsets: retained EU case law and retained domestic case law. The former is composed of decisions handed down by the CJEU 'related to anything to which retained EU law applies', while the latter concerns decisions of domestic courts again 'related to anything to which retained EU law applies'. Under the 2018 Act, retained EU case law is endowed with the same status as a decision of the UK Supreme Court or the High Court of Justiciary. Only those courts have the power to depart from their own case law. Nevertheless, the UK Government has extended the power to depart from retained EU case law beyond the Supreme Court to lower courts such as the Court of Appeal of England and Wales.[7] As such, these courts may have the opportunity to make policy decisions to depart from existing EU regulatory standards as interpreted by the CJEU. There is nothing inevitable about this and the courts may have 'due regard' to future decisions of the CJEU. The UK courts are particularly likely to continue to look to the CJEU for guidance on those legal fields that until now have been heavily influenced by EU law. These include for instance, employment law and competition law. Again, this emphasises that although Brexit returns certain freedoms to political and judicial actors, the exercise of that freedom is likely to be more difficult in practice. Sources of EU regulation will continue to have an indirect or legacy effect in the UK well beyond Brexit.

Conclusion

According to European Commission President von der Leyen, the TCA comes with 'real teeth - with a binding dispute settlement mechanism and the possibility for unilateral remedial measures where necessary.'[8] As submitted, however, the TCA's dispute resolution mechanisms are complex and difficult to navigate. They have been designed for the unique context of a former large member state of the EU with the potential to act as a regulatory competitor into the future. As such, the TCA dispute resolution procedures may well act as a barrier, or at least a disincentive, for the UK to deviate from existing EU regulatory standards. This is before even considering the other potential negative consequences of divergence, including imposing

[7] The European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 SI 1525 of 2020. See also the 'Government response to consultation Response to the consultation on the departure from retained EU case law by UK courts and tribunals', October 2020, Available from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/926811/departure-eu-case-law-uk-courts-tribunals-consultation-response.pdf

[8] Speech by President von der Leyen at the European Parliament Plenary on the EU-UK Trade and Cooperation Agreement, 27 April 2021. Available from: https://ec.europa.eu/commission/presscorner/detail/it/speech_21_1967

additional burdens on businesses wishing to trade both within the UK and with the EU as well as placing strains on the devolution settlement.

It is imperative that legal certainty and clarity is preserved in the rules which govern the post-Brexit relationship between the two parties and the dispute resolution procedures. This includes compliance in the UK with the agreed changes to the laws in accordance with the TCA and the Withdrawal Agreement as well as guidance from public authorities for potential litigants to argue for the protection of or departure from retained EU law.