



HM Government

Enforcement and dispute resolution

A FUTURE PARTNERSHIP PAPER

The United Kingdom wants to build a new, deep and special partnership with the European Union.

This paper is part of a series setting out key issues which form part of the Government's vision for that partnership, and which will explore how the UK and the EU, working together, can make this a reality.

Each paper will reflect the engagement the Government has sought from external parties with expertise in these policy areas, and will draw on the very extensive work undertaken across Government since last year's referendum.

Taken together, these papers are an essential step towards building a new partnership to promote our shared interests and values.

Enforcement and dispute resolution: a future partnership paper

Executive summary

1. In leaving the European Union, we will bring about an end to the direct jurisdiction of the Court of Justice of the European Union (CJEU). The UK and the EU need therefore to agree on how both the provisions of the Withdrawal Agreement, and our new deep and special partnership, can be monitored and implemented to the satisfaction of both sides, and how any disputes which arise can be resolved.
2. The UK wants to:
 - maximise certainty for individuals and businesses;
 - ensure that they can effectively enforce their rights in a timely way;
 - respect the autonomy of EU law and UK legal systems while taking control of our own laws; and
 - continue to respect our international obligations.
3. The UK will take steps to implement and enforce our agreements with the EU within our domestic legal context. This will include providing for the appropriate means by which individuals and businesses can rely on and enforce rights contained in any agreements. This will be underpinned by the creation of international law obligations which will flow from our agreements with the EU. The UK has a long record of, and remains fully committed to, complying with international law.
4. There are a number of existing precedents where the EU has reached agreements with third countries which provide for a close cooperative relationship without the CJEU having direct jurisdiction over those countries. There are a variety of ways in which the parties to those agreements have reassured each other on both the implementation of, and enforcement and dispute resolution under, the agreements.
5. The UK will engage constructively to negotiate an approach to enforcement and dispute resolution which meets the key objectives of the UK and the EU, underpinning the deep and special partnership we seek.

Introduction

6. EU law has direct effect within the legal orders of the Member States, a principle to which the UK gives effect through the European Communities Act 1972 (ECA). When the UK leaves the EU and repeals the ECA, the EU Treaties, the jurisdiction of the CJEU and the doctrine of direct effect will cease to apply in the UK. This means the question of domestic implementation of UK-EU agreements will be addressed through the UK's domestic legal order. The UK will work with the EU on the design of the interim period, including the arrangements for judicial supervision, enforcement and dispute resolution.
7. It is in the interests of both the UK and the EU – and of our citizens and businesses – that the rights and obligations agreed between us can be relied upon and enforced in appropriate ways. It is also in everyone's interest that, where disputes arise between the UK and the EU on the application or interpretation of these obligations, those disputes can be resolved efficiently and effectively.
8. The UK views enforcement and dispute resolution as two distinct issues, and it is not necessary, or indeed common, for one body to carry out both functions in this way.

The United Kingdom's guiding principles

9. As we exit the EU, the UK wants to agree an orderly withdrawal and establish a new, deep and special partnership with the EU. The UK has also made clear that in order to avoid any cliff-edge as we move from our current relationship to our future partnership, people and businesses in both the UK and the EU would benefit from an interim period, where this is necessary for the smooth and orderly implementation of new arrangements.
10. The success of the future partnership will depend on mutual respect. We will be starting from a strong position: our shared commitment to upholding the rule of law and to meeting our international obligations, and our intention to comply with the agreements reached between us, are not in doubt.
11. In designing the future partnership, the UK's aims are to:
 - maximise certainty for individuals and businesses;
 - ensure that they can effectively enforce their rights in a timely way;
 - respect the autonomy of EU law and UK legal systems while taking control of our own laws; and
 - continue to respect our international obligations.
12. The Government will work with the devolved administrations in Scotland and Wales, the Northern Ireland Executive (on return), and the governments of Gibraltar, the other Overseas Territories and the Crown Dependencies as we progress negotiations with the EU. We recognise Scotland and Northern Ireland have separate legal systems to England and Wales and the Crown Dependencies, Overseas Territories and Gibraltar are constitutionally separate from the UK and have distinct interests. We will fully engage with their respective governments to ensure their priorities on these issues are taken into account. Specifically, the UK will be mindful of the particular circumstances of Northern Ireland and its unique relationship with Ireland.

Legal context

13. EU membership has meant an intrinsic link between the EU's legal order and the legal systems in the UK. Withdrawal from the EU will mean a return to the situation where the UK and the EU have their own autonomous legal orders. The Withdrawal Agreement and the future partnership must respect the autonomy and integrity of both legal orders.

The position in UK law

14. Under the UK's constitutional arrangements, the agreements we expect to reach with the EU will not automatically become part of the UK's internal legal order. It will therefore be necessary for the UK to enact domestic legislation to give effect to them. This is because the UK has a dualist rather than a monist legal system, which means its treaty obligations do not automatically form part of its internal legal order. In this respect the UK is no different from any other dualist State, including some Member States of the EU, such as Ireland, Denmark and Sweden.
15. Future agreements between the UK and the EU will be like all other international agreements to which the UK is a party, including at present the EU Treaties. The UK implemented those EU Treaties by enacting the ECA, which made EU law – including the principles of direct effect and supremacy of EU law – part of the UK's internal legal order. The Repeal Bill, which was introduced in Parliament in July, contains a provision that will repeal the ECA when the UK leaves the EU.
16. The UK will be bound by the agreements with the EU as a matter of international law, and will be subject to whatever international enforcement mechanisms the agreements contain. If the UK needs to take steps in its domestic law in order to give effect to those obligations, the UK will do so. The domestic implementation of such agreements will therefore be set out in clear and binding domestic legislation, and be capable of scrutiny by the EU and third countries.
17. When it implements these agreements in its domestic law, the UK will also as appropriate provide for an effective means for individuals to enforce rights under the agreements, and challenge decisions of the competent authorities concerning those rights. The exact means of redress will depend on the nature of the dispute, and the approach taken to disputes of that nature in UK legal systems. However, in each case the mechanism will be effective and meaningful, in accordance with the normal principles of administrative law.

The position in EU law

18. Following the UK's withdrawal, the CJEU will continue to interpret EU law and be the ultimate arbiter of EU law within the EU and its Member States.
19. The EU's position is that there are limitations, under EU law, as to the extent to which the EU can be bound by an international judicial body other than the CJEU. Where an international agreement concluded by the EU contains provisions which are in substance identical to EU law, the CJEU has taken the view that no separate body should be given jurisdiction to give definitive interpretations of those provisions. However, 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.

20. For example, many EU free trade agreements with third countries include provisions on resolving disputes through a binding arbitration model in addition to mechanisms for political agreement. Examples include the EU-Canada Comprehensive Economic and Trade Agreement (CETA), the EU-Singapore Free Trade Agreement as well as the Ukraine and Moldova Association Agreements. There are currently no precedents for the CJEU to act as the means of enforcing an international agreement between the EU and one or more third countries.
21. Even where agreements refer to terms or concepts in EU law, those agreements can be enforced or interpreted outside the EU by means other than the CJEU. This can be through political bodies, or through judicial or quasi-judicial bodies. For example, under the European Economic Area (EEA) Agreement, the European Free Trade Area (EFTA) Court can interpret and enforce the agreement, which includes terms and concepts of EU law, in the EFTA States that are within the EEA¹. The EFTA Court does not bind the EU or its institutions, and so the model is compatible with EU law.

Enforcement of the agreements

22. The UK's position is that where the Withdrawal Agreement or future relationship agreements between the UK and the EU are intended to give rise to rights or obligations for individuals and businesses operating within the UK then, where appropriate, these will be given effect in UK law. Those rights or obligations will be enforced by the UK courts and ultimately by the UK Supreme Court². UK individuals and businesses operating within the EU should similarly be provided with means to enforce their rights and obligations within the EU's legal order and through the courts of the remaining 27 Member States.
23. This means, in both the UK and the EU, individuals and businesses will be able to enforce rights and obligations within the internal legal orders of the UK and the EU respectively, including through access to the highest courts within those legal orders. This would be the case in respect of both the Withdrawal Agreement, including an agreement on citizens' rights, and the future partnership.
24. Ending the direct jurisdiction of the CJEU in the UK will not weaken the rights of individuals, nor call into question the UK's commitment to complying with its obligations under international agreements. The UK's commitment to the rule of law has been built over centuries, and reaffirmed time and again by effective, independent courts. That commitment to the rule of law means that anyone seeking redress within the UK's legal systems will know they will be judged by clear rules applied in accordance with the law by the UK's expert, independent and internationally respected judiciary.

¹ The EFTA States are Norway, Iceland, Switzerland and Liechtenstein, but the EFTA Court's jurisdiction does not extend to Switzerland as it is not a member of the EEA.

² Noting that for Scottish criminal cases, the High Court of Justiciary (sitting as an appeal court) is the final court of appeal (see <https://www.supremecourt.uk/docs/jurisdiction-of-the-supreme-court-in-scottish-appeals-human-rights-the-scotland-act-2012-and-the-courts-reform-scotland-act-2014.pdf>).

Dispute resolution

25. Establishing a deep and special partnership with the EU will require a new dispute resolution mechanism to address any disagreements between the UK and the EU on interpretation or application. This is distinct from the question of how rights and obligations agreed will be implemented and enforced in the UK and the EU.
26. It is in the interests of both parties to agree a dispute resolution mechanism. This will ensure a shared understanding of any agreements, both in terms of interpretation and application. These mechanisms can also help ensure the uniform and fair enforcement of the agreements. Without a dispute resolution mechanism, divergent interpretations and disagreements on application are likely to go unresolved and undermine the effective functioning of the future partnership.
27. There are a number of scenarios which might result in a dispute arising between the UK and the EU.
 - **Implementation:** one party considers that the other has not appropriately or properly implemented the agreement, for example in domestic law.
 - **Subsequent actions:** one party considers subsequent legislation or executive actions or decisions of the other party to be incompatible with the obligations under the agreement.
 - **Divergence:** the way in which the agreement, or implementing legislation, is interpreted by the parties' respective courts, or other bodies or agencies, has diverged in areas where the parties had agreed to seek to avoid divergence.
28. Dispute resolution mechanisms are common within international agreements. The form these mechanisms take varies considerably across the spectrum of agreements, given the different areas of international cooperation, and consequently the varied nature of potential disputes that could arise. The appropriate dispute resolution mechanism is dependent on the substance and context of each agreement.
29. However, one common feature of most international agreements, including all agreements between the EU and a third country, is that the courts of one party are not given direct jurisdiction over the other in order to resolve disputes between them. Such an arrangement would be incompatible with the principle of having a fair and neutral means of resolving disputes, as well as with the principle of mutual respect for the sovereignty and legal autonomy of the parties to the agreement. When entering into international agreements, no state has submitted to the direct jurisdiction of a court in which it does not have representation.

Precedents

30. There are a number of existing models and approaches which provide the context for the mechanisms for resolving disputes between the UK and the EU. They cover a range of agreements which vary in substance and level of cooperation. These models and approaches carry advantages and disadvantages. For this reason they are presented here purely illustratively, and without any commitment to include any specific aspects in the design of our future partnership. Nonetheless, they set out a number of ways in which the parties to international agreements, including the EU, have obtained assurances that obligations in those agreements will be enforced, that divergence can be avoided where necessary, and that disputes can be resolved. These different models and approaches are not mutually exclusive, and dispute resolution mechanisms can combine a number of these together.

Joint Committee

31. One common approach in international agreements is to establish a Joint Committee. These tend to involve nomination or participation in equal number by both parties at a Governmental or diplomatic level. The functions of a Joint Committee need not be restricted to dispute resolution, and can also cover the wider supervision and monitoring of the proper functioning of the agreement, as well as agreeing measures to deal with any circumstances not foreseen by the agreement.
32. Committees comprised of representatives from both parties are frequently established as part of free trade agreements, such as in the EEA agreement and the North American Free Trade Agreement (NAFTA). Such a forum is also commonly found in agreements on justice and security.
33. Joint Committees can also be underpinned by technical groups, made up of working level representatives of both parties, to discuss the day to day operation of the agreements where appropriate.
34. For many aspects of agreements, Joint Committees and technical groups can be the sole route for resolving disputes. In areas of international cooperation, including on law enforcement and criminal justice cooperation, it is common to leave dispute resolution to governmental or diplomatic dialogue through bodies akin to a Joint Committee. However, in respect of some elements of agreements, additional binding mechanisms may be appropriate or desirable; such mechanisms can provide greater certainty in resolving disputes which may be particularly important in areas seeking to maximise business confidence and certainty.

Arbitration models

35. In addition to Joint Committees, many international agreements, particularly those focused on trade and economic cooperation, feature arbitration models as a stage of dispute resolution. These include a number of free trade agreements to which the EU is a party, such as CETA with Canada and the EU-Vietnam FTA, as well as agreements not involving the EU, such as the New Zealand-South Korea FTA.
36. Arbitration models are less common in non-economic areas of agreements – for example, the agreement on extradition between the EU and the US, the EU-Australia Passenger

Name Record agreement and the EU-Japan Mutual Legal Assistance agreement do not contain arbitration procedures for the resolution of disputes. The focus of the dispute resolution mechanisms for these agreements is political consultation.

37. The WTO's dispute settlement system provides for consultations between the parties to a dispute. If these are unsuccessful a request can then be made for the WTO Dispute Settlement Body (DSB) to establish an arbitration panel. This panel can then make a ruling which is binding on the parties. The WTO also has a permanent Appellate Body which can hear appeals from rulings of the arbitration panels. There has been criticism that while effective, WTO dispute resolution procedures can take too long.
38. As noted above, there are limitations to the matters on which the EU can subject itself to the binding decisions of a quasi-judicial or judicial authority, like an arbitration panel. The arbitration panel cannot adjudicate on matters of interpretation of EU law so as to bind the EU and its Member States.
39. The wide adoption of arbitration panels as the dispute resolution mechanism for international trade disputes, principally through the WTO, shows such a model can provide important reassurance to businesses and industry.

Reporting and monitoring requirements

40. A reporting or monitoring clause is a provision which requires or enables a party to the agreement or a body created by the agreement to evaluate the implementation of that agreement. The purpose of such a clause would be to enable both parties to the agreement, or a body created by the agreement, to evaluate the ways in which domestic legislation or processes are compatible with the agreement, or monitor the progress in domestic implementation of the agreement.
41. Reporting and monitoring provisions are relatively common in international agreements. As part of the Schengen Agreement, the EU and Norway and Iceland agree to monitor and review each other's relevant case law as part of a Joint Committee to ensure uniform interpretation and application. Iceland and Norway are required to submit a report detailing how their administrative authorities and courts have interpreted and applied the Schengen Agreement. Additionally, the Lugano Convention, concerning civil judicial cooperation between EU Member States and EFTA States, provides for an information exchange system whereby relevant judgements made by courts within the Lugano Convention are made available to others via a central depository.
42. Outside specific international agreements, ongoing dialogue on domestic policy measures is common in international relations. For example, the US and EU conduct a twice yearly dialogue on financial regulation through the Joint EU-US Financial Regulatory Forum.

Reference to pre-agreement CJEU decisions

43. Where agreements between the EU and third countries replicate language which is identical in substance to EU law, it may be agreed that those terms should be interpreted and applied in line with any relevant interpretations of the CJEU which preceded the agreement.

44. The EEA Agreement, for example, requires that any provisions of the Agreement which are identical to rules of, or acts done under, the EU Treaties, should be implemented and applied in conformity with CJEU decisions prior to the date of signature of the Agreement. This is without prejudice to treatment of CJEU case law arising after the date of signature, which is discussed below.
45. In the UK, the Repeal Bill will give pre-exit CJEU case law the same binding, or precedent, status in UK courts as decisions of our own Supreme Court to ensure a smooth and orderly exit.

Reference to post-agreement CJEU decisions

46. In agreements between the EU and third countries, where cooperation is facilitated through replicating language which is identical in substance to EU law, these agreements can specify that account is to be taken of CJEU decisions when interpreting those concepts. This is relevant where both parties agree that divergence in interpretation would be undesirable, for example, for operational reasons such as continued close cooperation with EU agencies.
47. Agreements which utilise this approach do not always require account be taken solely of post-agreement CJEU judgements. Some include a two-way requirement for the case law of both the CJEU and the courts of the other party to be taken into account.
48. Article 105 of the EEA Agreement requires that the parties will seek ‘as uniform an interpretation as possible’ of the provisions of the Agreement, and requires that the case law of both the CJEU and the EFTA Court be kept under constant review. Responsibility for addressing any divergence in approach between the CJEU and the EFTA Court falls to the EEA Joint Committee. The EFTA States which are members of the EEA have given further effect to this by providing, in Article 3 of the Surveillance and Court Agreement³, that the EFTA Court should ‘pay due account’ to relevant CJEU decisions that arise after the signature of the EEA agreement.
49. Similarly, Article 9(1) of the agreement between the EU and Iceland and Norway extending the Schengen acquis to those countries requires the parties to keep under constant review the evolving case law of the CJEU and the courts of Iceland and Norway.
50. A further example is Protocol 2 of the Lugano Convention which requires that the courts of the contracting States should ‘pay due account to the principles laid down by any relevant decision delivered by courts of the other Contracting States concerning provisions of this Convention’.
51. The value of such arrangements lie where there is a shared interest in reducing or eliminating divergence in how specific aspects of an agreement with the EU are implemented in the EU and the third country respectively. The extent to which this approach may be valuable depends on the extent to which there is agreement that divergence should be avoided in specific areas.

³ The Surveillance and Court Agreement (SCA) is an agreement between the EFTA States, and is not an agreement between the EU and the EFTA States.

Supervision and Monitoring

52. Both the UK and the EU will have an interest in ensuring there is some degree of supervision or monitoring to enable the proper functioning of the agreements. This will contribute to their smooth implementation, application and functioning. This also helps avoid disputes arising: an effective mechanism will identify potential issues early and try to resolve them before they escalate into formal disputes. Overseeing the proper functioning of the agreement is usually undertaken jointly by both parties or in some instances independent bodies are established to fulfil this function.
53. As noted above, many international agreements establish some form of Joint Committee which can be responsible for supervision and monitoring of the agreement.
54. Within the EU, the European Commission provides the supervisory function to ensure that Member States are complying with the terms of an EU international agreement. In some cases, EU agreements provide for the creation of a corresponding independent supervisory authority which performs a similar, albeit modified, role for the other party. For example, the EEA Agreement provides for the creation of the EFTA Surveillance Authority. The Surveillance Authority is responsible for ensuring fulfillment of obligations under the EEA agreement by the EFTA States.

Provision for voluntary references to CJEU for interpretation

55. In agreements which utilise concepts of EU law, and in which some means of reaching a binding interpretation of those concepts is sought, an approach which has been adopted is a reference for an interpretation to the CJEU. The result of such a reference would be a binding determination of the meaning of substantive EU law.
56. This approach can apply in respect of both judicial and political dispute resolution models. For example, Article 403 of the EU Moldova Association Agreement requires that an arbitration panel established to resolve disputes shall, where the dispute concerns interpretation of EU law, refer the question to the CJEU and be bound by its interpretation.
57. The EEA Agreement provides that where an unresolved dispute concerns the interpretation of provisions of that Agreement which are identical in substance to corresponding EU rules, the contracting parties may agree to request the CJEU to give a ruling on the interpretation of the relevant rules⁴.
58. In the case of the Moldova Association Agreement, the responsibility to make a reference rests with the arbitration panel, while in the case of the EEA it is a matter to be decided jointly by the contracting parties. These examples do not involve one party to the agreement deciding, unilaterally, to seek a binding interpretation of the agreement from the CJEU.

⁴ Article 111.3 of the EEA Agreement.

Remedies

59. The mechanisms outlined in this paper exist to both avoid disputes arising and where necessary resolve them. However, there may be instances where agreement is not reached, and most agreements include provisions outlining what actions parties can take in this event, either directly by the parties themselves or via a potentially binding arbitration panel or similar vehicle. It is important to be clear when negotiating an international agreement what the consequences will be for either side in the event of a breach of its terms.
60. In international agreements, final remedies are principally retaliatory in nature and implemented unilaterally by the parties. This includes the ability to take safeguard measures to mitigate any negative effects from the other party's noncompliance as well as the option to suspend all or part of the agreement (or several linked agreements), or, ultimately, withdraw from the agreement (or several linked agreements). The ability of the European Commission and the CJEU within the EU legal system to impose sanctions, such as fines for non-compliance with EU rules, is exceptional.
61. In CETA, if one party fails to comply with the arbitration panel's final report on a dispute, the other party is entitled to either suspend obligations or receive compensation. Obligations may only be suspended up to the level of the nullification and impairment caused by the original breach. These remedies are temporary, and lifted when the losing party takes the necessary measures to comply.
62. If the parties to the EEA Agreement cannot reach a resolution at the Joint Committee, then in order to remedy possible imbalances" the agreement permits them either to take a "safeguard measure" or treat part of the agreement as suspended. Safeguard measures are unilateral measures permitted by the agreement where "serious economic, societal or environmental difficulties of a sectoral or regional nature liable to persist are arising".
63. If a party to the WTO does not comply with a ruling by the arbitration panel within a 'reasonable period', the losing party must enter into negotiations with the complainant to determine mutually acceptable compensation. If no agreement on compensation is reached within 20 days, the complainant may ask the DSB for permission to retaliate. Retaliations are intended to be temporary and designed to encourage the other country to comply.
64. Remedies can also be prescribed for in international agreements on security issues. For example, both the EU-Australia agreement on Passenger Name Records and the EU-US on terrorist financing provide for suspension of the agreement in the event a dispute cannot be resolved.

Conclusion

65. The agreements governing the UK's withdrawal from, and future partnership with, the EU will cover a broad range of areas of cooperation. Those agreements should set out clear means by which the terms of the agreements should be implemented and enforced within the UK and the EU. They should also establish a mechanism for the resolution of disputes concerning those agreements.
66. As outlined in this paper, the approaches towards enforcement and dispute resolution should:
 - maximise certainty for individuals and businesses;
 - ensure that they can effectively enforce their rights in a timely way;
 - respect the autonomy of EU law and UK legal systems while taking control of our own laws; and
 - continue to respect the UK's international obligations.
67. There is no precedent, and indeed no imperative driven by EU, UK or international law, which demands that enforcement or dispute resolution of future UK-EU agreements falls under the direct jurisdiction of the CJEU.
68. The precedents examined in this paper demonstrate that there are a number of additional means by which the EU has entered into agreements which offer assurance of effective enforcement and dispute resolution and, where appropriate, avoidance of divergence, without necessitating the direct jurisdiction of the CJEU over a third party. Such an arrangement, whereby the highest court of one party would act as the means of enforcing or interpreting an agreement between the two parties, would be exceptional in international agreements.
69. The UK will therefore engage constructively to negotiate an approach to enforcement and dispute resolution which meets the key objectives of both the UK and the EU in underpinning the effective operation of a new, deep and special partnership.

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