5

Dispute Settlement

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5.1 Introduction

This chapter examines the system of dispute settlement that is applicable to the Protocol. This system presents a rather unique combination of, on the one hand, continued jurisdiction of the Court of Justice of the European Union (CJEU) and, on the other hand, an arbitration procedure. As has been rightly observed,[1] these are two very different enforcement mechanisms. The former (the CJEU) relies on an existing supranational court which monitors respect for the EU legal order, works together with national courts, and allows some measure of access to individuals. The role of the CJEU is controversial: its case law and jurisdiction were one of the political drivers of the proponents of the withdrawal of the UK from the EU. The latter (arbitration), in contrast, represents a much more traditional public international law method that is new and available only to the parties of the Withdrawal Agreement (WA).

5.2 Jurisdiction of the CJEU

5.2.1 Provisions of the Protocol

Regarding the jurisdiction of the CJEU, the Protocol itself contains explicit provisions. Protocol Article 12(4) provides:

> As regards the second subparagraph of paragraph 2 of this Article, Article 5 and Articles 7 to 10, the institutions, bodies, offices, and agencies of the Union shall in relation to the United Kingdom and natural and legal persons residing or established in the territory of the United Kingdom have the powers conferred upon them by Union law. In particular, the Court of Justice of the European Union shall have the jurisdiction provided for in the Treaties in this respect. The second and third paragraphs

[1] Joris Larik, 'Decision-Making and Dispute Settlement' in Federico Fabbrini (ed), *The Law and Politics of Brexit* (Oxford University Press 2020) 191, at 198.

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> of Article 267 TFEU [Treaty on the Functioning of the European Union] shall apply to and in the United Kingdom in this respect.

In other words, the Protocol confers 'full jurisdiction' upon the CJEU to oversee the operation of EU law applying to Northern Ireland in relation to certain areas, essentially to attain the Protocol's not explicitly stated objective of protecting the integrity of the internal market.[2] These are: customs and movement of goods (Article 5), as well as the monthly exchange of information on this matter (Article 12(2), second subparagraph); technical regulations (Article 7); value added tax (VAT) and excise (Article 8); the Single Electricity Market (Article 9); and state aid (Article 10). This jurisdiction of the Court does not stand alone: it goes hand in hand with the exercise, in these areas, of 'the powers conferred upon them by Union law' by 'the institutions, bodies, offices, and agencies of the Union', in other words, with the continuous evolution of the *acquis* of the Union. And that *acquis*, by Protocol Article 12(5), must produce in the UK 'the same legal effects as those which they produce within the Union and its Member States'. This means with all the features of EU law, including primacy, direct effect, state liability, and so on. If this does not constitute the acceptance by the UK of a major limitation of sovereignty, notably without any representation of the UK in the decision-making and adjudicatory processes of the EU, it would be difficult to identify what is.

The 'jurisdiction provided for in the Treaties' covers the totality of the well-known proceedings before the CJEU, including infringement procedures brought by the Commission and the preliminary rulings procedures based on questions from national courts, both in the UK and in EU member states. There is also the possibility of the imposition of lump sums and penalty payments.[3]

It is interesting to consider which parts of the Protocol do *not* fall firmly within the competence of EU institutions, bodies, offices and agencies, or within the jurisdiction of the CJEU. The matter is less obvious than it sounds, especially for provisions which cross-reference to Protocol Articles 5 to 10, such as Protocol Article 11, on 'other areas of North–South cooperation'. The reference to the requirement of consistency with 'the arrangements set out in Articles 5 to 10' in that Article seem to imply that, if only indirectly, it cannot be excluded that the jurisdiction of the CJEU

[2] House of Lords, European Union Committee, *The Protocol on Ireland/Northern Ireland*, Ninth Report of Session 2019–21, 1 June 2020, HL Paper 66, paras 107 and 256.
[3] Ibid.

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may be triggered in the many domains listed there, such as environment, health, agriculture, transport, education and tourism, energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport. On the other hand, where no such cross-reference is included, it seems clear that no powers of EU institutions, bodies, offices or agencies or CJEU jurisdiction apply. This is the case, for instance, with the many provisions of EU law in the area of protection against discrimination, contained in the measures listed in Annex 1 to the Protocol, to which reference is made in Protocol Article 2(1). In other words, although this EU non-discrimination law remains binding on the UK with regard to Northern Ireland, and must be implemented 'through dedicated mechanisms', there is no EU competence to enforce these through the regular EU institutions, such as the CJEU.

Delicate questions may arise with regard to Protocol Article 6, 'protection of the *UK* internal market'. This Article has not been brought under the jurisdiction of the CJEU, but its first paragraph especially raises intricate questions on judicial protection in case of export restrictions or prohibitions flowing from the application of EU law. It is stipulated that such provisions of Union law 'shall only be applied to trade between Northern Ireland and other parts of the United Kingdom to the extent strictly required by any international obligations of the Union'. To this is added, somewhat cryptically, the obligation that '[t]he United Kingdom shall ensure full protection under international requirements and commitments that are relevant to the prohibitions and restrictions on the exportation of goods from the Union to third countries as set out in Union law'. One may think of export prohibitions or restrictions imposed by binding UN Security Council resolutions. This being said, purely unilateral EU export prohibitions or restrictions, such as, for instance, those imposed in relation to the Covid-19 pandemic, do not appear to fall under this provision.

Two more procedural aspects are dealt with in paragraphs 6 and 7 of Protocol Article 12. Paragraph 6 confirms that lawyers authorized to practise before the courts or tribunals of the UK shall 'in every respect' be treated as lawyers authorized to practise before the courts or tribunals of member states.[4] The latter paragraph stipulates that in cases brought before the CJEU, the UK may participate in CJEU proceedings 'in the same way as a Member State' – without, however, any longer having a judge on the Court – and a comparable clause regarding lawyers

[4] Compare Art 94(2) WA.

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authorized to practise before UK courts applies with regard to the representation or assistance of a party before the CJEU.[5]

Last but not least, it is important to note that there is no time-limit to the jurisdiction of the CJEU, unless one reads the 'democratic consent' clause of Article 18 of the Protocol to be such: it may indeed be such a time-limit if, either within four years after the end of the transition period (ie, by 31 December 2024) or after the end of any subsequent period of four years, the Northern Ireland Assembly votes against the continued application of Protocol Articles 5 to 10. In that case, the CJEU's jurisdiction will, of course, also lapse, subject to a transition period.[6]

5.2.2 Practical Application

Protocol Article 12(4) came to life in the spring of 2021 with tensions between the UK and the EU regarding the former's unilateral decisions to delay the application in full of EU law made applicable by the Protocol. The dispute had been building up since December 2020. At the Joint Committee (JC) meeting of 17 December 2020, the UK made a unilateral declaration concerning the certification required for food imports into Northern Ireland, setting out the practice it intended to put in place as regards imports of those products into Northern Ireland, 'during a maximum time period of three months after the end of the transition period'. The UK had committed itself to the fact that, '[d]uring the above-mentioned period of time, the UK authorities will take all necessary measures to ensure compliance with the Protocol and relevant Union law as of 1 April 2021', and it had accepted that 'this solution is not renewable'.[7]

However, less than three months later, the UK decided unilaterally to depart from the rules of the Protocol: on 3 March 2021 the Secretary of State for Northern Ireland announced before the UK Parliament that the UK government would extend certain 'grace periods' and make provision for further flexibilities not provided for in EU law. Later that day, the UK informed its traders that they could continue to move products of animal

[5] For the latter, compare the slightly different wording of Art 91(3) WA. Interestingly, it follows from the formulation of Art 12(7)(b) WA that such lawyers may represent or assist any party, including adversaries of the UK authorities in the dispute at hand.

[6] See further Chapter 10.

[7] See https://ec.europa.eu/info/sites/default/files/brexit_files/info_site/2._export_health_certificates_ukeu_declarations_to_publish.pdf.

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origin, composite products, food and feed of non-animal origin and plants and plant products from Great Britain to Northern Ireland without the need for official certification until 'at least 1 October 2021'.[8] Furthermore, in early March 2021, the UK had updated its guidance on the sending of parcels to and from Northern Ireland[9] and on travelling with pets from Great Britain to Northern Ireland,[10] aspects which had not been the subject of an understanding between it and the EU.

On 15 March 2021, the Commission informed the UK government that it considered the UK's unilateral action to be a violation of Protocol Article 5(3) and (4), read in conjunction with relevant EU law listed in Protocol Annex 2, and in itself to be a violation of the duty of good faith provided for in Article 5 WA.[11] The Commission responded in two ways, which interestingly illustrate the two main dispute settlement mechanisms discussed in the present chapter.

First, as regards the substantive breaches of the Protocol, the Commission referred to Protocol Article 12(4) and announced that it was initiating infringement proceedings by sending a letter of formal notice to the UK government pursuant to this provision, in conjunction with Article 258 TFEU. The UK had one month to respond to the formal notice.[12] On 14 May 2021, the UK government replied.[13] Around the same time, Lord Frost, the UK's representative, publicly observed that the Protocol, in its current form, did not meet the challenges that the situation in Northern Ireland posed.[14] The implementation of the WA, including the Protocol, and the Trade and Cooperation Agreement

[8] See www.gov.uk/guidance/export-or-move-composite-food-products.

[9] www.gov.uk/guidance/sending-parcels-between-great-britain-and-northern-ireland.

[10] www.gov.uk/taking-your-pet-abroad/travelling-to-an-eu-country-or-northern-ireland.

[11] Letter of 15 March 2021 addressed by Commission Vice-President Maroš Šefčovič, EU Co-chair of the Joint Committee, to Lord David Frost, UK Minister of State.

[12] 'Commission Formally Launches Infringement Proceedings against London for Breach of Northern Ireland Protocol' *Agence Europe* (15 March 2021).

[13] 'London Responds to Commission's letter of formal notice on Northern Ireland Protocol, but is challenging scheme' *Agence Europe* (17 May 2021). On 15 April 2021, following a meeting with Commission Vice-President Šefčovič and Minister Frost, Lord Frost issued a statement saying that recent meetings had begun to '*clarify*' things and create '*positive momentum*', but that '*difficult issues*' remained: 'Discussions with EU Should Continue to Address Problems of Implementation of Protocol on Ireland/Northern Ireland' *Agence Europe* (16 April 2021).

[14] See 'Lord Frost Calls on EU to Show Pragmatism on the Protocol after Meetings with a Number of Business and Community Representatives in Northern Ireland' (11 May 2021) www.gov.uk/government/news/lord-frost-calls-on-eu-to-show-pragmatism-on-the-protocol-after-meetings-with-a-number-of-business-and-community-representatives-in-northern-ireland. On 16 May Lord Frost published an op-ed in which he

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(TCA) was discussed by the European Council on 24–25 May 2021. The Council 'invite[d] the Commission to continue its efforts to ensure full implementation of the Agreements' and stressed that '[t]he EU will remain united in its engagement with the UK'.[15]

Second, the Commission considered that the UK's unilateral measures also violated the duty of 'good faith' under Article 5 WA. This provision requires that both parties not only must take all appropriate measures to ensure the fulfilment of the obligations arising under the WA but also must refrain from any measure which could frustrate the attainment of its objectives, including the results prescribed by Protocol Articles 5(3) and (4), read in conjunction with Article 4 WA, which requires the UK to give full effect to applicable provisions of EU law. The UK authorities' authorization of individuals to disregard EU law, 'even though it is directly applicable to them by virtue of Article 5(3) and (4) of the Protocol read in conjunction with Article 4 of the Withdrawal Agreement', was seen as especially problematic by the Commission.[16]

This second complaint, regarding a breach of 'good faith', apparently does not fall within the Commission's infringement action. Rather, the Commission expressed its intention to 'provide written notice to the Joint Committee to commence consultations under [WA] Article 169 . . ., as a first step in the dispute settlement process set out in [WA] Title III of Part Six . . .'.[17] This brings us to the second dispute settlement applicable to the Protocol, namely the arbitration procedure.

5.3 Arbitration Procedure

The Protocol itself does not specifically mention other forms of dispute settlement between the parties, such as the arbitration procedure laid down in the WA. However, the 'dispute settlement' Title in Part Six WA

criticized the EU's 'purist views' and indicated that the UK was considering 'all our options' regarding the Protocol: 'The EU Must Stop Point Scoring and Work with Us to Protect Peace' *Daily Mail* (16 May 2021) www.dailymail.co.uk/debate/article-9582447/LORD-FROST-EU-stop-point-scoring-work-protect-peace.html. On 20 May 2021 Lord Frost suggested that the UK may invoke Protocol Article 16 in light of the difficulties raised by the Protocol: 'Ex-UK Brexit Negotiator: EU Vaccine Move Is to Blame for Northern Ireland Issues' *Politico* (20 May 2021) www.politico.eu/article/former-uk-brexit-negotiator-says-eu-move-to-blame-for-northern-ireland-problems/.

[15] European Council Conclusions, 24–25 May 2021, paras 13 and 14.

[16] Letter of 15 March 2021 of Maroš Šefčovič to Lord Frost.

[17] Ibid.

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applies to the Protocol, 'without prejudice to [its] provisions'.[18] As a consequence, the exclusivity clause of Article 168 WA applies: 'For any dispute between the Union and the United Kingdom arising under this Agreement, the Union and the United Kingdom shall only have recourse to the procedures provided for in this Agreement.'

This implies concretely that in the event that the JC is not able to reach agreement on a dispute, 'arbitration under the terms of the Withdrawal Agreement will be the end result',[19] except where a remedy is explicitly provided for in the Protocol. An example where arbitration could well arise would concern the provisions in Protocol Article 5 on customs and movement of goods, including the definition of goods 'at risk'.[20]

Before having recourse to the arbitration procedure, the EU and the UK must 'endeavour to resolve any dispute regarding the interpretation and application of the provisions of this Agreement by entering into consultations in the Joint Committee in good faith, with the aim of reaching a mutually agreed solution'.[21] If no mutually agreed solution has been reached within three months after a written notice has been provided to the JC, Article 170(1) WA stipulates that the EU or the UK may request the establishment of an arbitration panel. Such request must be made in writing to the other party and to the International Bureau of the Permanent Court of Arbitration (PCA); it must identify the subject matter of the dispute to be brought before the arbitration panel and a summary of the legal arguments in support of the request.

The arbitration panel must be composed of five members. It must be established within fifteen days of the date of a request.[22] The EU and the UK must each nominate two members to the panel from among the persons on the list of twenty-five persons which has been established by

[18] Protocol Art 13(1), third sub-para.

[19] House of Lords, European Union Committee, *The Protocol on Ireland/Northern Ireland* (n 2) para 270.

[20] Ibid, para 274. See also the testimony of Dr de Mars before the House of Lords European Union Committee, according to whom

> the Protocol is 'beautifully silent' as to how any disagreement would be resolved, 'but if there is no agreement and if the parties are not both happy with saying that EU tariffs apply on all products going from Great Britain to Northern Ireland, then one of the two parties is likely to start consultations in the Joint Committee leading to arbitration on that point'.
>
> (ibid, para 102)

[21] Art 169 WA.

[22] Art 171(3) and (4) WA.

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the JC in December 2020.[23] That list comprises persons whose independence is beyond doubt, who possess the qualifications required for appointment to the highest judicial office in their respective countries or who are jurisconsults of recognized competence, and who possess specialized knowledge or experience of EU law and public international law. It also contains five persons which the EU and the UK have jointly proposed to act as chairperson of an arbitration panel. The chairperson must be selected by consensus by the nominated panel members from those five persons.[24] The WA provides for a procedure if the EU and the UK fail to establish an arbitration panel within three months from the date of the request made pursuant to Article 170.[25]

The time frame of the procedure is laid down in Article 173: the arbitration panel must notify its ruling to the EU, the UK and the JC within twelve months from the date of its establishment.[26] There is also a possibility of an expediated procedure: within ten days of the establishment of the panel, the EU or the UK may submit a reasoned request to the effect that the case is urgent. In that case, the panel must give a ruling on the urgency within fifteen days from the receipt of such request, and if it accepts that urgency has been established, it must make every effort to notify its ruling within six months from the date of its establishment.[27] The panel must make every effort to take decisions by consensus, but where this is not possible, 'the matter at issue shall be decided by a majority vote', without the possibility of any published dissenting opinions.[28]

Even in this very 'classical' arbitration procedure, the CJEU lurks around the corner. The Court makes a surprise comeback under Article 174 WA for '[d]isputes raising questions of Union law'.[29] Where

[23] Pursuant to Art 171(1) WA: Decision No 7/2020 of the Joint Committee establishing a list of 25 persons who are willing and able to serve as members of an arbitration panel under the Agreement, OJ 2020 L443/22.

[24] If they are unable to agree on the selection of the chairperson, the EU or the UK may request the Secretary-General of the PCA to select – within five days – the chairperson by lot from among those five jointly proposed persons: Arts 171(5), sub-para 2, and (6) WA.

[25] It is then for the Secretary-General of the PCA, upon request by either the EU or the UK, within fifteen days, and after consultation with the EU and the UK, to appoint persons who fulfil the aforementioned requirements of independence and competence to constitute the arbitration panel: Art 171(9) WA.

[26] If the arbitration panel considers that it cannot comply with this time limit, its chairperson must notify the EU and the UK, stating the reasons for the delay and the date on which the panel intends to conclude its work: Art 173(1) WA.

[27] Art 173(2) WA.

[28] Art 180(1) WA.

[29] Title of Art 174 WA.

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a dispute 'raises a question of interpretation of a concept of Union law, a question of interpretation of a provision of Union law referred to in this Agreement or a question of whether the United Kingdom has complied with its obligations under Article 89(2)',[30] the arbitration panel may not decide on 'any such question'; rather, it must request the CJEU to give a ruling on the question. The CJEU is given jurisdiction to give such a ruling, 'which shall be binding on the arbitration panel'.

It has been correctly observed that neither party can force the arbitration panel to request a ruling from the CJEU.[31] However, the EU and the UK are allowed to make submissions to the arbitration panel to the effect that a request to the CJEU be made. In responding to these submissions, the panel must provide a reasoned assessment. Within ten days, either party may request the panel to review its assessment, and a hearing must be organized within fifteen days for the parties to be heard on the matter. The arbitration panel must again provide reasons for its ultimate assessment.[32]

While there is as of yet no practice with regard to Article 174 WA, one may expect some vexing questions to arise. For instance, the Article 5 WA duty of good faith mentioned in Section 5.2.2 of this chapter will probably be seen by some as a notion of public international law, whereas others will point to the striking resemblance of the formulation of this obligation to the principle of sincere co-operation laid down in Article 4(3) TEU.[33]

With regard to compliance, Article 175 WA stipulates that the arbitration panel ruling is binding on the EU and the UK, and that they must take 'any measures necessary to comply in good faith with the arbitration panel ruling and shall endeavour to agree on the period of time to comply with the ruling'. As to the latter, it is for the respondent, if the panel has ruled in favour of the complainant, to notify the latter of the 'reasonable period of time' it considers it will require for compliance.[34] If there is disagreement between the parties on the reasonable period of time to comply with the arbitration panel ruling, the original panel can be requested to determine the length of that period of time.[35] The respondent must notify the complainant before the end of that period of any measure it has taken to

[30] Art 89(2) WA concerns the obligation of the UK to comply with a judgment in which the CJEU has found that the UK has failed to fulfil an obligation under the Treaties or under the WA.
[31] Larik (n 1) 207.
[32] Art 174(2) WA.
[33] See Jan Wouters, 'The Institutional Dimension of the EU–UK Relationship after Brexit' (2020) 25(4) *European Foreign Affairs Review* 613, 627. See also Chapter 8.
[34] Art 176(1) WA.
[35] Art 176(2) WA.

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comply with the arbitration panel ruling.[36] If, at the end of the reasonable period of time, the complainant considers that the respondent has failed to comply with the panel ruling, it may request the original panel to rule on the matter. The panel must notify its new ruling to the EU and the UK within ninety days of the date of submission of such request.[37] If the case referred to the panel raises the question of EU law as defined above, the panel must request the CJEU to give a ruling.[38] If the panel rules that the respondent has failed to comply, it may, at the request of the complainant, impose a lump sum or penalty payment to be paid to the complainant.[39] If there is continued non-compliance, or non-payment, the complainant will be entitled, upon notification to the respondent, to suspend relevant obligations under the WA.[40] Such suspensions must 'be temporary and shall be applied only until any measure found to be inconsistent with the provisions of this Agreement has been withdrawn or amended' or until the EU and the UK 'have agreed to otherwise settle the dispute'.[41] The original arbitration panel may be asked to rule on whether the notified measure after penalty or suspension brings the respondent into conformity with the WA.[42]

5.4 Conclusion

Aware of the challenges that implementation of the WA would pose, the parties found it 'essential to establish provisions ensuring ... binding dispute-settlement and enforcement rules that fully respect the autonomy of the respective legal orders of the Union and of the United Kingdom as well as the United Kingdom's status as a third country'.[43] This chapter has considered the detailed and complex provisions that the EU and the UK agreed to in order to meet those objectives. At the moment, the dispute settlement process of the Protocol combines traditional international arbitration with a significant role for the CJEU, but

[36] Art 177(1) WA.
[37] Art 177(2) WA.
[38] Art 177(4) WA.
[39] Art 178 WA.
[40] Art 178(2) WA.
[41] Art 178(5) WA. For a further discussion, including of the possibility to suspend 'parts of any other agreement between the Union and the United Kingdom' (Art 178(2) first para, sub b WA), see Larik (n 1) 208.
[42] Art 179 WA.
[43] WA, 11th recital of the preamble. On the repeated emphasis in the WA on the autonomy of the EU's and the UK's legal orders, see Wouters (n 33) 628.

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this hybrid approach remains controversial. The UK government's July 2021 proposals for renegotiating the Protocol proposed the eradication of the role of the CJEU in the governance of the Protocol as one of its key demands.[44] It is clear that challenging times lie ahead for both the CJEU and the arbitration panels.

[44] HM Government, *Northern Ireland Protocol: The Way Forward* (CP 502, July 2021), paras 41, 67.

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