

# European Court of Justice and international agreements

## SUMMARY

As a subject of public international law, the European Union (EU) concludes international agreements with other subjects of international law, i.e. international organisations and states. The EU may enter into such treaties on its own, or jointly with its Member States – depending on the area of competence (exclusive EU competence or shared competences) to which the treaty in question applies. The European Court of Justice (ECJ) enjoys specific competences with regard to the conclusion, interpretation and application of international treaties to which the EU is a party. The ECJ can verify the compatibility of an international agreement with the EU Treaties either ex-ante or ex-post. Furthermore, international treaties concluded by the EU are considered as acts of the institutions and may be subject to interpretation by the Court, especially in the preliminary reference procedure.

As a rule no ECJ jurisdiction is envisaged in EU free trade agreements (FTAs), as dispute settlement is carried out through a joint committee, followed by arbitration. In certain specific cases, such as in the European Economic Area and the EU-Turkey Customs Union, the ECJ may have direct involvement in the enforcement of the agreement.

The EU-UK Withdrawal Agreement and the EU-UK Trade and Cooperation Agreement (TCA), however, diverge on dispute settlement rules and the role of the ECJ. In the former, the ECJ maintained its jurisdiction during, as well as beyond, the transition period with regard to specific chapters; the ECJ also has the final word on interpreting EU law applied in virtue of the agreement. Conversely, the TCA includes a role for the Court only in regard to the United Kingdom's participation in EU programmes, and its dispute settlement rules vary throughout the agreement.



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## Introduction

As a subject of international law, the European Union (EU) concludes international treaties (agreements) with other subjects of international law, i.e. international organisations and states, as set out in [Article 218](#) of the Treaty on the Functioning of the European Union (TFEU). The EU may enter into such treaties on its own, or jointly with its Member States – depending on the area of competence (exclusive EU competence or shared competence) to which the treaty in question applies. As the judicial body of the EU, the European Court of Justice (ECJ) enjoys specific competences with regard to the conclusion, interpretation and application of international treaties to which the EU is a party. This briefing outlines those competences, indicating their legal basis in the EU Treaties and highlighting the most relevant case law of the ECJ, as well as providing additional details on the Court's role in the context of international trade agreements. International agreements concluded by the EU become part of the EU legal order from the moment of their entry into force.<sup>1</sup> From the perspective of Member States' legal orders, such agreements enjoy the same rank as acts of EU law.<sup>2</sup> However, within the EU legal order, international agreements – considered as acts of secondary law – rank **below the primary law** contained in the Treaties,<sup>3</sup> and therefore are subject to preventive (*ex-ante*) and subsequent (*ex-post*) control of their legality by the European Court of Justice (see below).

## Control of compatibility with EU Treaties

### Ex-ante control of legality

Article 218(11) TFEU provides that a Member State, the European Parliament, the Council or the European Commission may obtain the opinion of the ECJ as to whether an envisaged agreement (international treaty) is compatible with the Treaties. This task includes verifying as to whether the conclusion of the agreement in question remains within the scope of EU competence and the powers of its institutions ([Opinion 2/91 ILO](#)). Furthermore, the agreement may not impair the autonomy of the EU legal order in any way, especially by a system of judicial control provided by that agreement ([Opinion 1/00 European Common Aviation Area](#)). The Member States and the EU institutions mentioned in Article 218(11) (i.e. the European Parliament, Council and Commission) **may** submit an envisaged agreement for verification by the ECJ, but are not under a duty to do so. Importantly, the ECJ may not examine such an agreement on its own motion (*ex-officio*). However, in [Opinion 2/94 ECHR](#), the ECJ pointed out that it may issue an opinion on the EU's competence to enter into a possible international agreement before negotiations begin or a text of that agreement is drafted. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the EU Treaties are revised (following the applicable procedures).

### Ex-post control of legality

The mechanism for preventive control of an international agreement's legality under the EU Treaties does not preclude subsequent control of its legality by the ECJ, i.e. after it has already entered into force ([Case C-25/94 Commission v Council \(Fishery Agreement\)](#)). This is because within the hierarchy of acts constituting the EU legal order, international agreements are placed below the EU Treaties.

### Action for annulment

An international agreement can therefore be the subject of an action for annulment brought under [Article 263](#) TFEU, according to which the ECJ reviews the legality not only of legislative acts, but also *inter alia* 'acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties'. Since the ratification of an international agreement takes place via an act of the Council, it is subject to the Court's review under Article 263 TFEU.<sup>4</sup>

It should be borne in mind that 'the action for annulment can usually only eliminate the effects occurring within the Union, while it does not affect the international legal effects (vis-à-vis the treaty party as a third party)',<sup>5</sup> i.e. the effects of the ECJ's decision have an effect within the EU legal order, but do not affect the EU's rights and duties under public international law.

Once an international agreement has already entered into force, an ECJ decision on its incompatibility with the EU Treaties would not have the automatic effect of setting aside the EU's obligations vis-à-vis the other parties to the agreement existing under public international law<sup>6</sup> (as a body of law distinct from EU law). An argument in favour of this arrangement is the text of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,<sup>7</sup> which, although it has not yet entered into force, may be considered to reflect general principles of international law, as it adapts the [Vienna Convention on the Law of Treaties](#) – itself a codification of customary international law<sup>8</sup> – to international organisations. Furthermore, 17 EU Member States have ratified that Convention (Denmark, Sweden, Estonia, Bulgaria, Cyprus, Greece, Spain, Germany, Netherlands, Belgium, Italy, Austria, Croatia, Hungary, Czechia, Slovakia, Malta), as has the United Kingdom. Article 27(2) of that Convention provides that: 'An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty'. Furthermore, Article 46(2) of that Convention provides that: 'An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance'. However, it should equally be borne in mind that the EU has not acceded to the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, and its possible accession would be, possibly, subject to preventive control by the ECJ.

### Preliminary reference ruling

The preliminary reference procedure set out in [Article 267](#) TFEU may be used not only to seek interpretation of EU law (see below), but also to ascertain whether an EU act is compatible inter alia with the EU Treaties (including the [Charter of Fundamental Rights](#), which became a source of primary law following the entry into force of the Lisbon Treaty), and with general principles of EU law. Given that international treaties concluded by the EU are considered as acts of the institutions ([Case C-321/97 Andersson](#); [Case 181/73 Haegeman](#)) and may be subject to interpretation by the Court in the preliminary reference procedure ([Case C-53/96 Hermès](#)), it is also possible to test their compatibility with the EU Treaties and general principles of EU law within the framework of the preliminary reference procedure.<sup>9</sup>

### ECJ role at the interpretation and application stage

International treaties concluded by the EU are considered as acts of the institutions and may be subject to interpretation by the ECJ, especially in the preliminary reference procedure.<sup>10</sup> This was the case, for instance, with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), interpreted in [Case C-53/96 Hermès](#), or in earlier cases, including the Association Agreements with Greece ([Case 181/73 Haegeman](#)) and with Portugal ([Case 104/81 Kupferberg](#)), concluded before these two countries became EU Member States. An important aspect of the ECJ's power of interpretation is linked to the application of international treaties, and in particular whether specific rules contained in them are self-executing (i.e. directly applicable in the EU) or require implementing provisions to be enacted by the EU or its Member States.<sup>11</sup> According to the ECJ, 'a provision in an agreement concluded by the European Union with a non-member state must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure'.<sup>12</sup>

Examples of international agreements the direct effect of which has been analysed by the ECJ, include the Kyoto Protocol ([Case C-366/10 \*Air Transport Association of America\*](#)), the United Nations (UN) Convention on the Law of the Sea ([Case C-308/06 \*Intertanko\*](#)), the Montreal Convention ([Case C-344/04 \*IATA\*](#)), the Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean ([Case C-213/03 \*Pêcheurs de l'étang de Berre\*](#)), and the Aarhus Convention ([Case C-240/09 \*Lesoochránárske zoskupenie VLK\*](#)). A significant number of cases have concerned agreements creating close links between the EU and a given partner country (especially association, pre-accession, cooperation and cooperation for development agreements).<sup>13</sup> For instance, interpreting the European Communities-Russia Partnership Agreement, the ECJ held that its Article 23(1), setting out the principle of non-discrimination, has direct effect and can be invoked by an individual before national courts.<sup>14</sup> Before Poland's accession to the EU, the ECJ found that Article 43 of the European Economic Community-Poland Association Agreement, creating the right of establishment for Polish citizens in EU countries, also had direct effect and conferred rights on individuals.<sup>15</sup>

Furthermore, the ECJ's right to interpret provisions of international agreements uniformly across the EU is important vis-à-vis the legal orders of the Member States, in order to ensure that all Member States comply with the international agreements to which the EU is a party. The procedural framework for this verification is provided by the preliminary reference procedure,<sup>16</sup> in which national courts may seek clarification from the ECJ as to whether a national rule of a given content is compatible with one of the international agreements to which the EU is a party.<sup>17</sup>

## ECJ role under association agreements

### Ankara Agreement: Possibility to submit dispute directly to ECJ

The [Agreement creating an association between the European Economic Community and Turkey](#), informally known as the EU-Turkey Association Agreement or the Ankara Agreement, was signed in Ankara on 12 September 1963 and entered into force on 1 December 1964. Dispute resolution under the Agreement is regulated in Article 25. Under para. 1 of that article, the EU and Turkey may submit to the Council of Association any dispute relating to the application or interpretation of the Agreement which concerns the EU, an EU Member State or Turkey. The Council of Association consists of members of the governments of the EU Member States and members of the Council and of the Commission, on the one hand, and of members of the Turkish government on the other, as stipulated in Article 23 of the Agreement. Under Article 25(2), the Council of Association may settle the dispute by decision but it may also decide to submit the dispute to the ECJ 'or to any other existing court or tribunal'. Given that the Association Council acts unanimously (Article 23 para. 3), Turkey (or any EU Member State) could veto a decision to refer a case to the ECJ. However, to date the possibility of submitting a dispute to the ECJ has not been used.<sup>18</sup> Nonetheless, it should be kept in mind that the ECJ has interpreted the Ankara Agreement as an act of EU law under the preliminary reference procedure, responding to legal questions submitted by courts from EU Member States.<sup>19</sup>

### Possibility of referring the interpretation of EU law to the ECJ

Given that the interpretation of EU legislation is an exclusive task of the ECJ, a panel or other body set up under an association agreement may not engage in such interpretation on its own. However, a dispute between the EU and a country associated with it may require such an interpretation. For this reason, some association agreements provide for a clause allowing involvement of the ECJ. This is the case with the association agreements the EU has concluded with Georgia, Moldova and Ukraine.<sup>20</sup>

For instance, Article 267 of the [Association Agreement with Georgia](#) (2014) provides that, if a dispute 'concerning the interpretation and application of a provision of this Agreement which imposes upon a Party an obligation defined by reference to a provision of Union law' arises, 'the arbitration panel

shall not decide the question, but request the [ECJ] to give a ruling on the question.' A ruling of the ECJ is then 'binding on the arbitration panel.' This clause has not yet been used in practice.<sup>21</sup>

The [Association Agreement with Moldova](#) (2014), provides in Article 403 for referrals to the ECJ with regard to disputes concerning the interpretation and application of a provision of that Agreement relating to gradual approximation contained in Chapter 3 (Technical Barriers to Trade), Chapter 4 (Sanitary and Phytosanitary Measures), Chapter 5 (Customs and Trade Facilitation), Chapter 6 (Establishment, Trade in Services and Electronic Commerce), Chapter 8 (Public Procurement) or Chapter 10 (Competition) of Title V (Trade and Trade-related Matters) of this Agreement, or which otherwise imposes upon a Party an obligation defined by reference to a provision of Union law. In such cases, the arbitration panel may decide the question but must request a ruling from the ECJ which is binding on the panel. This clause has not yet been used in practice.<sup>22</sup> An analogous provision can be found in Article 322 of the [Association Agreement with Ukraine](#). As in the case of Georgia and Moldova, it has not been applied in practice.<sup>23</sup>

## Role of ECJ in enforcement of recovery decisions: Exclusive right to suspend Commission's enforcement decision

Article 430 of the [EU-Moldova Association Agreement](#) provides that where the European Commission implements EU funds directly or indirectly by entrusting budget implementation tasks to third parties, a decision taken by the Commission under the Agreement which imposes a pecuniary obligation on persons other than states, is enforceable in Moldova. The suspension of its enforcement may not be ordered by any Moldovan court, but only by a decision of the ECJ. Nonetheless, Moldovan courts have jurisdiction over complaints that enforcement is being carried out in an irregular manner. Analogous provisions can be found in Article 400 of the [EU-Georgia Association Agreement](#) and Article 8 of [Annex XLIII of EU-Ukraine Association Agreement](#). Specifically, Article 400 of the EU-Georgia Agreement explicitly provides that the legality of the enforcement decision of the pertinent EU authorities is subject to control by the ECJ, and that ECJ judgments given under an arbitration contract within the scope of anti-fraud provisions are also enforceable on the same terms as Commission recovery decisions.

## ECJ case law as a source of binding interpretation of association agreements

Association agreements may refer to ECJ case law as a binding standard of interpretation of EU law, which in turn is treated as the standard for interpreting the association agreement itself. Thus, Article 264 of the [EU-Ukraine Association Agreement](#) provides that Articles 262 (competition law), 263(3) (transparency of financial relations between public and private actors) and 263(4) (compensation to entities of general economic interest) of the Agreement will be interpreted 'using as **sources of interpretation** the criteria arising from the application of Articles 106, 107 and 93 of the Treaty on the Functioning of the European Union, **including the relevant jurisprudence of the Court of Justice of the European Union**, as well as relevant secondary legislation, frameworks, guidelines and other administrative acts in force in the European Union.'

Article 340 of the [EU-Moldova Association Agreement](#) provides that State aid shall be assessed on the basis of the criteria arising from the application of the competition rules applicable in the EU, in particular Article 107 TFEU and '**interpretative instruments** adopted by the EU institutions, **including the relevant jurisprudence** of the Court of Justice of the European Union'. Similarly, Article 153 of the [EU-Ukraine Association Agreement](#) concerning legislative approximation provides that '**due account** shall be taken of the **corresponding case law** of the European Court of Justice'. An analogous provision can be found in Article 146 of the [EU-Georgia Association Agreement](#) and Article 237 of the [EU-Moldova Association Agreement](#).

## ECJ role under the European Economic Area agreement

The European Economic Area (EEA), consists of EU Member States plus three of the four countries of the [European Free Trade Association \(EFTA\)](#) – Iceland, Liechtenstein and Norway (Switzerland is an EFTA member, but does not participate in the EEA). The [Agreement on the EEA](#) entered into force on 1 January 1994. The Agreement makes references to the ECJ on numerous occasions:

- Article 6 provides that the provisions of the EEA Agreement, 'in so far as they are identical in substance to corresponding rules ' of the EU Treaties and secondary EU legislation 'shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the [ECJ] given prior to the date of signature of this Agreement.'
- Article 105(2) obliges the EFTA Committee to 'keep under constant review the development of the case law of the [ECJ] and the EFTA Court.'
- Article 106 provides for an information exchange mechanism between the ECJ and EEA, ensuring, inter alia, the transmission to the ECJ of decisions of EEA supreme courts interpreting the EEA Agreement; such decisions are then classified and published by the ECJ,
- Article 111 provides for a dispute resolution mechanism; if a dispute concerns the interpretation of provisions of the EEA Agreement, which are identical in substance to corresponding rules of the EU Treaties or secondary EU law, and if the dispute has not been settled within three months after it has been brought before the EEA Joint Committee, the contracting parties to the dispute may agree to request the ECJ to give a ruling on the interpretation of the relevant rules.
- Protocol No 34 provides for the possibility of preliminary references by EEA states to the ECJ on questions concerning the interpretation of the EEA Agreement.

### EFTA Court and the ECJ

The EEA Agreement set up the [EFTA Court](#), vesting it with jurisdiction with regard to those EFTA states which have signed up to the EEA. The EFTA Court deals mainly with infringement actions brought by the EFTA Surveillance Authority against an EFTA state with regard to the implementation, application or interpretation of EEA law rules, for giving advisory opinions to courts in EFTA states on the interpretation of EEA rules and for appeals concerning decisions taken by the EFTA Surveillance Authority. As former president of the EFTA Court, Professor Carl Baudenbacher, points out that the EEA is the only association agreement of the EU which obliges the associated countries to have their own court.<sup>24</sup> However, this does not mean that the ECJ's case law is irrelevant for the EEA states. In fact, EEA law is based on the fundamental principles of homogeneity and reciprocity, which is ensured not only through legislative enactments, but also in the guise of judicial homogeneity which, according to Carl Baudenbacher, 'has three aspects: substantive, effect-related and procedural'.<sup>25</sup> Substantive homogeneity refers to the same interpretation given to the fundamental freedoms, competition law, State aid law and harmonised economic law. Effect-related homogeneity refers to the actual content of the rights granted to individuals under EEA law. Finally, procedural homogeneity refers to the interpretation of the rules concerning procedure before the EFTA Court.<sup>26</sup> However, this does not mean that the EFTA Court considers ECJ case law as a source of binding precedent. Should a discrepancy arise between the EFTA Court's case law and ECJ case law, there is the option of referring the case to the ECJ under Article 111(3) EEA, which, however, requires the consent of the EU and EFTA sides; this option has not been used so far.<sup>27</sup> Nonetheless, in general it can be said that the EFTA Court 'loyally follows relevant ECJ (and General Court) case law as far as it is available and as far as the facts are identical'.<sup>28</sup>

## ECJ role with regard to the EU-UK agreements

On 1 February 2020, the United Kingdom formally [withdrew](#) from the EU, on the basis of a negotiated agreement between the two parties, in accordance with the provisions of [Article 50 of the Treaty on European Union \(TEU\)](#). The [Withdrawal Agreement](#) established a transition period

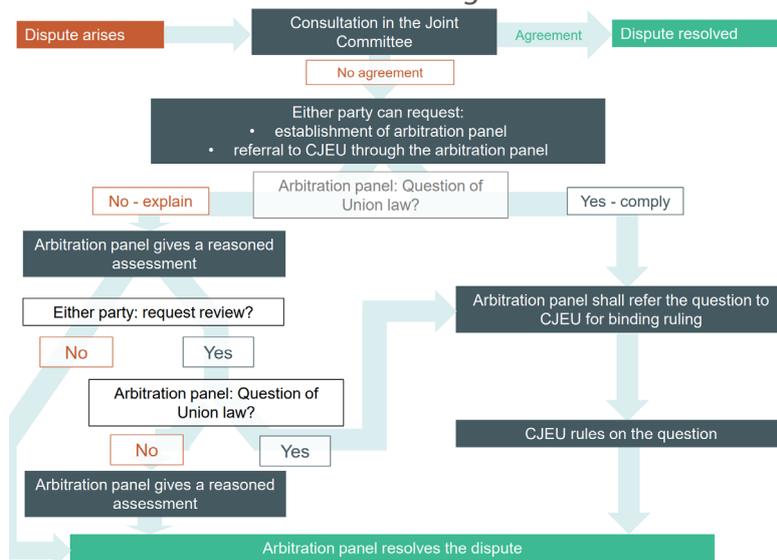
until 31 December 2020, during which the EU *acquis* (with some exceptions) continued to apply to the United Kingdom, but without the former Member State retaining any representation in the EU decision-making process. This period was used to negotiate another agreement to regulate the relationship between the European Union and the United Kingdom as of 1 January 2021. The [EU-UK Trade and Cooperation Agreement](#) (TCA) was signed on 30 December 2020 and applied provisionally from 1 January 2021. The European Parliament [consented](#) to the agreement on 28 April 2021 and the agreement thereafter entered into force on 1 May 2021, after the Council had formally concluded it. The final text was [published](#) in the *Official Journal* on 30 April 2021.

Although in both negotiations the EU aimed to ensure a prominent role for the Court in the interpretation and dispute settlement of the agreements, due to the United Kingdom's opposition to any ECJ involvement, the two agreements have different dispute settlement rules, including different roles for the Court. Whereas the [Withdrawal Agreement](#) maintained the usual ECJ jurisdiction during the transition and also envisages a role for the ECJ beyond that period with regard to specific chapters, the TCA does not include a role for the Court, with the exception of ECJ jurisdiction over the United Kingdom's participation in EU programmes. Nevertheless, there is a link between the two agreements, namely that [failure](#) to comply with a ruling under the Withdrawal Agreement's dispute settlement rules may lead to retaliation under the TCA.

## The Withdrawal Agreement

The Withdrawal Agreement's [mechanism](#) for settling disputes is based on an arbitration procedure. Accordingly, should the political consultation in the Joint Committee (i.e. the body governing the agreement) regarding the dispute not lead to agreement (first step in the procedure), either party can request the establishment of an independent arbitration panel (five arbitrators) which has to give a ruling within 12 months, or earlier in urgent matters. If the dispute raises a question of interpretation of EU law, the arbitration panel must request a ruling on the question from the ECJ, which will be binding upon the panel. If the dispute does not concern an interpretation of EU law, the panel issues a reasoned assessment, which may be reviewed at the request of either party. The panel's final ruling is binding on both the EU and the United Kingdom, and compliance must be ensured within a reasonable period of time. The panel is competent to decide on all issues related to compliance with the ruling, and may impose a lump sum or penalty payment on the non-compliant party. Should non-compliance persist after a certain time, the complainant can suspend any provision of the agreement, other than the citizens' rights provisions, or parts of any other EU-UK agreement. The suspension must be proportionate and temporary (until compliance is achieved or the dispute is settled).

Figure 1 – Dispute settlement in the Withdrawal Agreement



Source: [European Commission](#), July 2020.

A major concession from the EU, the arbitration procedure was not included in the European Union's initial proposal for an agreement, as EU negotiators first insisted that the ECJ should be the ultimate arbiter of disputes concerning EU law and the application of the Withdrawal Agreement. Some [experts](#) have raised doubts concerning the compatibility of the dispute settlement arrangements with the autonomy of EU law, although, as mentioned above, the competence of the arbitration panel does not extend to questions of EU law, which remain the exclusive competence of the ECJ. They argue that the restrictive interpretation of the ECJ of its own jurisdiction and of the autonomy of EU law might raise some problems for the Withdrawal Agreement's dispute settlement mechanism in future, although this also would ultimately be a matter for the ECJ to decide.

Beyond dispute settlement, Article 4 of the agreement further clarifies that all provisions of the agreement and the EU legislation applied in virtue of the agreement, will have the same legal effects in the United Kingdom as in the EU and its Member States, including [direct effect](#), where applicable. The United Kingdom had to implement Article 4, including by adopting primary domestic legislation, and empowering its judicial and administrative authorities to disapply any inconsistent or incompatible national provisions. Moreover, the concepts or provisions of EU law referred to in the agreement are to be interpreted and applied in accordance with the methods and general principles of EU law; this includes ensuring conformity with the ECJ case law handed down before the end of the transition period, while UK authorities should give 'due regard' to ECJ case law established after the end of the transition.

The agreement maintains the jurisdiction of the ECJ regarding: Part Two on citizens' rights; Part Three on other separation provisions; Part Four on the transition period; and certain provisions of Part Five (the financial settlement). The role of the ECJ in the application of the citizens' rights provisions is set out in Part Six of the agreement (Articles 158, 159). A United Kingdom court or tribunal may address a question for preliminary ruling to the ECJ, if it arises in a case started at first instance within eight years of the end of the transition period, or from the date of the entry into force of the agreement (1 February 2020) if the case concerns an application for residence documents during the transition period. The ECJ preliminary rulings will have the same legal effects in the United Kingdom as in the EU and its Member States. As regards Part Three on other separation provisions, EU judicial and administrative processes ongoing at the end of the transition period will be finalised according to EU rules. The ECJ remains competent for all judicial cases to which the United Kingdom is a party, including for requests for preliminary rulings from United Kingdom courts initiated before the end of the transition period. Full ECJ jurisdiction applied in virtue of Part Four in the transition period, during which all the EU institutional, supervision and enforcement mechanisms continued to apply to and in the United Kingdom. The European Commission may bring new infringement cases against the United Kingdom before the ECJ for four years after the end of the transition period in cases of failure to fulfil an obligation under the Treaties or under Part Four of the agreement before the end of the transition period. It may also initiate new State aid cases against the United Kingdom during a four-year period after the end of the transition period, for aid granted before its end.

European Court of Justice jurisdiction was also maintained over certain provisions of the financial settlement (Part Five), in particular as regards the application, after 31 December 2020, of EU legislation on own resources relating to financial years up to 2020, as well as EU law applicable after 31 December 2020 related to the United Kingdom's implementation of EU programmes and activities committed under the 2014-2020 multiannual financial framework (MFF) and previous MFFs, until the closure of those programmes or activities. In this area, the [Court](#) will be competent, for an indefinite period, to hear European Commission infringement actions against the United Kingdom for failure to fulfil an obligation, and for the sanctions procedure in case of non-compliance with a Court judgment; as well as any questions for preliminary ruling (Article 160). Article 12(4) of the Ireland/Northern Ireland Protocol provides that the ECJ will have jurisdiction, without any end date, as provided under the EU Treaties in matters laid down in Article 5 (customs and movement of goods), Article 7 (technical regulations, assessments, registrations, certificates, approvals and

authorisations), Article 8 (VAT and excise), Article 9 (single electricity market), and Article 10 (State aid) of the Protocol. Likewise, Article 267 TFEU (second and third paragraphs), concerning preliminary reference rulings, also 'apply to and in the United Kingdom in this respect'.

Finally, EU Member States will have the right to refer questions for preliminary ruling to the ECJ concerning the interpretation of the Withdrawal Agreement, and the resultant decisions will be notified to the United Kingdom (Article 161(1) Withdrawal Agreement). In such cases, the United Kingdom may participate in the procedure in the same capacity as an EU Member State (Article 161(3) Withdrawal Agreement). Preliminary reference procedures launched by EU national courts regarding the citizens' rights part are not subject to any time limit.

## EU-UK Trade and Cooperation Agreement (TCA)

Unlike the Withdrawal Agreement, the [EU-UK TCA](#) – an international agreement negotiated under Article 218 TFEU – does not include a role for the ECJ, with the exception of a limited role regarding United Kingdom participation in EU programmes (Article 728: Recovery and enforcement). The TCA's [dispute settlement provisions](#) do not retain ECJ jurisdiction over questions related to the interpretation of EU law – as the courts of the parties have no jurisdiction in the resolution of disputes under the agreement (Article 754). The TCA will be [interpreted](#) in accordance with public international law, including the 1969 Vienna Convention on the Law on Treaties. According to [experts](#), should the ECJ have to rule on a dispute related to the TCA on the EU side (brought under the preliminary reference procedure), such a ruling would not be binding on the United Kingdom.

The extensive dispute settlement [mechanism](#) established by the TCA (Part Six) provides, in a first stage, for consultations in 'good faith', held in the Partnership Council (the principal body governing the agreement) or in one of the specialised committees. If consultations fail or are not held, the complainant party may request the establishment of an arbitral tribunal, made up of three arbitrators selected from a list established by the Partnership Council. A ruling must be delivered within 130 days from the date of establishment of the arbitration tribunal or, in any case, no later than 160 days. Also within 100 days (or no later than 130 days), the tribunal must deliver an interim report, which either party may request to review. If no request is made, then the interim report becomes the final ruling of the arbitration tribunal. In urgent matters, these deadlines are halved. At any time, however, the parties may reach a mutually agreed solution outside the arbitration panel. The rulings of the arbitration tribunal are binding on the parties, but they do not create rights or obligations for natural or legal persons. Also, the arbitration tribunal cannot judge the legality of a measure that supposedly breaches a TCA obligation under the domestic law of the parties; therefore its rulings cannot bind the domestic courts of the parties.

The proceedings of the arbitration tribunal may be suspended for no more than 12 months at the request of both parties. If none of the parties requests the resumption of the tribunal's work at the expiry of the suspension period, then the dispute settlement procedure is terminated. Detailed rules of procedure for dispute settlement, as well as a code of conduct, are annexed to the TCA.

The party found to be in breach of an obligation must take the necessary measures to comply with the arbitration ruling, which it must notify to the complainant within 30 days. Parties may also agree on a 'reasonable period of time' to comply. In case of non-compliance, the complaining party may request compensation or may temporarily suspend obligations under the treaty, in the same area or in other areas in Part Two (trade, transport, fisheries and other arrangements). Some obligations under the TCA may not be suspended. The arbitral tribunal must decide, if requested, whether the suspension is proportionate to the violation. The suspension ends when compliance is achieved.

The dispute settlement [procedure](#) does not apply to certain parts of the TCA, which have specific rules for settling disputes or variations to the elements of the main mechanism. These include, among others, Part Three (law enforcement and judicial cooperation in criminal matters); Part Four (thematic cooperation); some areas in the trade chapter, including some parts of the level playing field title, medicinal products, trade remedies, cultural property, small and medium-sized

enterprises; and the Security of Classified Information Agreement, supplementing the TCA. For example, Part Three on law enforcement and judicial cooperation in criminal matters has an entirely political [procedure](#) for dealing with disputes, whereas Part Four has no dispute settlement option.

Finally, the TCA provides for a link with the Withdrawal Agreement by allowing the suspension of certain obligations under the TCA if the other party persists in not complying with an arbitral ruling relative to an 'earlier agreement' (Article 749(4)). As mentioned above, the Withdrawal Agreement also envisages that, if a party persists in its non-compliance with an arbitration panel ruling, the other party may suspend obligations under any other EU-UK agreement.

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## ENDNOTES

- <sup>1</sup> See e.g. [Case 181/73 Haegeman](#).
- <sup>2</sup> Francesca Martines, '[Direct Effect of International Agreements of the European Union](#)', *European Journal of International Law* 25.1/2014, p. 133.
- <sup>3</sup> R. Geiger, in *European Union Treaties: A Commentary* (C.H. Beck 2015), p. 794.
- <sup>4</sup> M. Kotzur, in: *European Union Treaties: A Commentary* (C.H. Beck 2015), p. 878.
- <sup>5</sup> *ibid.*
- <sup>6</sup> R. Geiger, in *European Union Treaties: A Commentary* (C.H. Beck 2015), p. 794.
- <sup>7</sup> [Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations](#), 1986.
- <sup>8</sup> ICJ case concerning the [Gabčíkovo-Nagymaros Project](#), *I.C.J. Reports* 1997, p. 38, para. 46.
- <sup>9</sup> Morten Broberg, '[The Preliminary Reference Procedure and Questions of International and National Law](#)', *Yearbook of European Law*, Volume 28, Issue 1, 2009, pp. 362–389, p. 375.
- <sup>10</sup> [Case 181/73 Haegeman](#); [Case C-321/97 Andersson](#).
- <sup>11</sup> For a detailed analysis of this issue see Martines, *op. cit.*
- <sup>12</sup> [Case C-240/09 Lesoochranárske zoskupenie VLK](#), para. 44. See also: Case [C-265/03 Igor Simutenkov](#), para. 21 and [Case C-372/06 Asda Stores](#), para. 82.
- <sup>13</sup> See e.g. ECJ Cases: [C-17/81 Pabst & Richarz](#); [C-192/89 Sevince](#); [C-416/96 Eddline El-Yassini](#); [C-37/98 Savas](#); [C-63/99 Głoszczuk](#); [C-162/00 Pokrzęptowicz-Meyer](#); [C-265/03 Simutenkov](#); [C-97/05 Gattoussi](#).
- <sup>14</sup> [C-265/03, Simutenkov](#), para. 29.
- <sup>15</sup> [C-63/99 Wiesław Głoszczuk](#), para. 38.
- <sup>16</sup> For an overview of this procedure see e.g. R. Mańko, [Preliminary reference procedure](#), EPRS, 2017.
- <sup>17</sup> See e.g. [Case 104/81 Hauptzollamt Mainz v C.A. Kupferberg & Cie KG aA](#).
- <sup>18</sup> Van Mersuwege & Chamon, *op.cit.*, p. 46.
- <sup>19</sup> See e.g. D. Thym, [Constitutional Foundations of the Judgments on the EEC-Turkey Association Agreement](#) in Daniel Thym and Margarite Zoetewij-Turhan (eds.): *Rights of Third-Country Nationals under EU Association Agreements. Degrees of Free Movement and Citizenship*, Brill Nijhoff 2015.
- <sup>20</sup> Van Mersuwege & Chamon, *op.cit.*, p. 46.
- <sup>21</sup> At the time of writing there was no ECJ case-law interpreting the EU-Georgia Association Agreement at all. See [Eur-Lex database search](#).
- <sup>22</sup> At the time of writing there was no ECJ case-law interpreting the EU-Moldova Association Agreement at all. See [Eur-Lex database search](#).

- <sup>23</sup> At the time of writing there were [four cases of the General Court](#) mentioning the EU-Ukraine Association Agreement, but they were brought as direct actions, and not as references under Article 322 of the Agreement.
- <sup>24</sup> C. Baudenbacher, 'The EFTA Court' in C. Baudenbacher (ed.), *The Handbook of EEA Law*, Springer 2016, p. 139.
- <sup>25</sup> C. Baudenbacher, 'The EFTA Court' p. 145.
- <sup>26</sup> C. Baudenbacher, 'The EFTA Court', p. 145-147.
- <sup>27</sup> C. Baudenbacher, 'The Relationship...!', p. 191.
- <sup>28</sup> C. Baudenbacher, 'The Relationship Between the EFTA Court...!', p. 192.

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