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Article

Courting controversy? The constitutional implications of the Court of Justice of the European Union's involvement in the resolution of disputes after Brexit

Niall O'Connor*, Anastasia Karatzia† and Theodore Konstadinides‡

ABSTRACT

The article sheds light on the under-discussed, but nonetheless constitutionally significant issue of the changing landscape for dispute resolution between the United Kingdom (UK) and the European Union (EU) post-Brexit. This pertains, in particular, to the Court of Justice of the European Union's (CJEU) likely involvement in the resolution of disputes between the two parties across the arrangements governing both the UK's withdrawal from and future relationship with the EU. The authors explore the dispute resolution mechanisms under the Withdrawal Agreement and the Trade and Cooperation Agreement (TCA), as well as the Court's 'legacy role' in relation to (former) EU law concepts beyond the confines of the two Agreements. This article thereby evaluates the constitutional importance of the future role of the CJEU as a dispute settlement forum in these contexts, including the relationship between sources of 'norms' and the extent to which the UK will remain subject to its jurisdiction, or at least its influence, in the long term, whether directly or indirectly. It is argued that the CJEU's influence, as well as the authority of EU law in the UK more generally, is now mediated through domestic law concepts, such as the recently devised concept of 'assimilated EU law', which replaces 'retained EU law', and which have the capacity to obfuscate the constitutional origins and thereby the constitutional legacy of EU-derived concepts. The article further contends that the ostensibly restricted involvement of the CJEU in the UK–EU relationship after Brexit must be appraised through the prism of the Withdrawal Agreement and TCAs' provisions, which possess uniform legal force in both jurisdictions. The Agreements indicate a more expansive and enduring constitutional role for the CJEU and EU law concepts broadly speaking, than the one the then UK Government has publicly conceived. Consequently, a notable dissonance emerges between the political objective of 'taking back control' and the reality created by the legal framework governing the UK's cooperation with the EU including the mechanism for resolving future disputes. Despite Brexit, the CJEU will continue to shape the constitutional

* Niall O'Connor, Essex Law School, University of Essex, Wivenhoe Park, Colchester, CO4 3SQ, UK. Tel: +44 (0) 1206 874108; Email: n.oconnor@essex.ac.uk

† Anastasia Karatzia, Essex Law School, University of Essex, Wivenhoe Park, Colchester, CO4 3SQ, UK. Email: a.karatzia@essex.ac.uk

‡ Theodore Konstadinides, Essex Law School, University of Essex, Wivenhoe Park, Colchester, CO4 3SQ, UK. Tel: +44 (0) 1206 874273; Email: t.konstadinides@essex.ac.uk

contours of the relationship between domestic and Union law as well as between domestic sources of law, for many years to come.

I. INTRODUCTION

Few issues, other than perhaps the ending of freedom of movement, animated the post-Brexit negotiation of the new relationship between the European Union (EU) and the UK more than the then UK Government's insistence that the somewhat ambiguously termed 'direct' jurisdiction of the Court of Justice of the European Union (CJEU) should come to an end once the UK had departed from the Union.[1] In many respects, any ongoing role for the CJEU became emblematic of the UK's continued constitutional subjugation to EU law more generally, a situation that was deemed incompatible with the former's newly found independent status. The overarching aim of the UK in designing any new dispute resolution mechanism was therefore to 'respect the autonomy of EU law and UK legal systems while taking control of our own laws'.[2] The Government's post-Brexit negotiating position can be contrasted with the dearth of meaningful discussion concerning the CJEU during (and indeed before) the Brexit referendum campaign, and may evidence wider Government hostility towards supranational courts—or indeed the role of courts more generally—in acting as a potential brake on legislative activity.[3] To some extent, the UK Government's opposition to any ongoing role for the CJEU also reflects a deeper misunderstanding of that court's role in the resolution of disputes while the UK was a Member State of the EU.[4]

Within this context of scepticism and misunderstanding as to the place of the CJEU within the EU and the domestic legal and constitutional orders, the overarching aim of this contribution is twofold. The first aim is to delineate the dispute resolution mechanisms under the Withdrawal Agreement (WA) and the Trade and Cooperation Agreement (TCA) within their wider constitutional context. Much of the existing commentary on dispute resolution under the Withdrawal Agreement and the TCA is largely confined to immediate reactions in the wake of those agreements being reached; to the form of dispute resolution mechanisms under those agreements; or to predictions about the resolution of specific types of dispute, for example disputes concerning trade and investment.[5] More recent contributions assess the CJEU's role in relation to other 'international' courts and dispute resolution bodies beyond the context of Brexit.[6] The focus of the current article is on the (jurisdictional) relationship between the CJEU and domestic courts in the UK post-Brexit, building on existing literature that examines the relationship between the CJEU and the national

[1] HM Government, 'Enforcement and Dispute Resolution', Future Partnership Paper, August 2017, 2.

[2] ibid 1.

[3] See Theodore Konstadinides, 'Judicial Independence and the Rule of Law in the UK after Brexit' Review of European Administrative Law Blog, 10 December 2021 <https://realaw.blog/2021/12/10/judicial-independence-and-the-rule-of-law-in-the-uk-after-brexit-by-theodore-konstadinides/> accessed 13 December 2024.

[4] Bar Council, 'Written Submission to the House of Lords Justice Sub-Committee Inquiry: Brexit: Enforcement and Dispute Resolution', para 4.

[5] Steve Peers, 'So Close so Far: The EU/UK Trade and Cooperation Agreement' (2022) 59 CMLRev 49; Catherine Barnard and Julien Miéral, 'UK-EU Dispute Resolution, After the Transition Period', UK in a Changing Europe, 8 October 2020; Stefano Fella, 'The UK-EU Withdrawal Agreement: Dispute Settlement and EU Powers', House of Commons Library Briefing Paper No 9016, 2 October 2020; Alex Stojanovic and James Kane, 'UK-EU Future Relationship: Dispute Resolution', Institute for Government, 18 February 2020; Davor Jancic, 'Brexit and Dispute Resolution: the UK's Mini Victory?', UK in a Changing Europe, 10 December 2018; Raphael Hogarth, 'Dispute Resolution after Brexit', Institute for Government, 6 October 2017.

[6] Jed Odermatt, 'The Court of Justice of the European Union and International Dispute Settlement: Conflict, Cooperation and Coexistence' (2022) 24 CYELS 88; Francisco de Abreu Duarte, '"But the Last Word Is Ours": The Monopoly of Jurisdiction of the Court of Justice of the European Union in Light of the Investment Court System' (2020) 30 EJIL 1187; Eleanor Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) 22 MJ 35; Matthew Parish, 'International Courts and the European Legal Order' (2012) 23 EJIL 141.

courts of the Member States, but within the new legal landscape created by Brexit, with the CJEU and the UK courts now operating in separate (diverging) legal systems.[7]

It is suggested that Brexit has led to the 'international' characteristics of the CJEU being further emphasized, both in its relations with domestic courts (outside of the EU) and in its persistent and increasingly confrontational view of its own autonomy in relation to other international dispute resolution bodies. More recent developments, for example in relation to the Ireland/Northern Ireland Protocol (INIP), now known as the Windsor Framework (WF) and the abolition of 'retained EU law' as a category in law, also allow for these mechanisms to be evaluated in their wider domestic and Union constitutional context, including their influence on the relationship between sources of norms.[8]

The evaluation of the dispute resolution mechanisms under the Brexit legal arrangements complements the second—and interrelated—aim of the contribution, which is to evaluate the importance of the precise future role of the CJEU as a dispute settlement forum, including the extent to which the UK will remain subject to its influence in the long term, despite the Government's desire to prevent this. It will be argued that the apparently limited role of the CJEU in the post-Brexit UK–EU dispensation must be viewed in light of the terms of the Agreements themselves, which in many respects suggest a much more ambitious ongoing role for the Court than the one publicly predicted by the UK Government.[9] This article suggests that the 'involvement' of the CJEU in the resolution of post-Brexit disputes must be assessed holistically, and thereby beyond the 'formal' role of the CJEU envisaged by those international agreements reached between the EU and UK.[10] The post-Brexit dispute resolution mechanisms are relatively new, untested, and consequently not currently under much strain. Recent UK legislation also provides for an attempted rationalization of the relationship between domestic and Union sources of rights and obligations. The time is therefore apt to explore the permeability of the new systems to concepts derived from the EU legal framework in the face of the UK's desire to distance itself further from any ongoing role for the CJEU. Despite the absence of formal dispute resolution proceedings to date, recent judgments of domestic courts suggest a deeper role for concepts of EU law, notably relating to the protection of fundamental rights, which in turn indirectly preserve the influence of the CJEU post-Brexit.[11]

Viewed in this way, the CJEU may have a more forceful ongoing role than hitherto suggested in both the literature and political discussions. The CJEU, as the body tasked with ensuring the uniform interpretation and application of EU law across all Member States, is committed to safeguarding its position within the EU's constitutional order. As such, evading the Court's jurisdiction in practice will prove challenging and EU law will play an essential role both in resolving disputes and in shaping the constitutional contours of the future relationship between the EU and UK legal orders. The idea that the CJEU's jurisdiction in the UK is to be 'phased out' over time is an oversimplified representation of an intricate constitutional relationship. It is a view that tends to undervalue the legacy effect both of the CJEU and of concepts of EU law within

[7] Dana Burchardt, 'The Relationship between the Law of the European Union and the Law of its Member States—a Norm-Based Conceptual Framework' (2019) 15 EuConst 73; Tomi Tuominen, 'Reconceptualizing the Primacy-Supremacy Debate in EU Law' (2020) 47 Legal Issues of Economic Integration 245; Takis Tridimas, 'Brave New World: Dispute Resolution Under the EU–UK Trade and Cooperation Agreement' in Maren Heidemann, *The Transformation of Private Law—Principles of Contract and Tort as European and International Law* (Springer 2024).

[8] Steve Peers, 'The End—or a New Beginning? The EU/UK Withdrawal Agreement' (2020) 39 YEL 122; Alan Dashwood, 'The Withdrawal Agreement: Common Provisions, Governance and Dispute Settlement' (2020) 45 ELRev 183; Michael Dougan, *The UK's Withdrawal From the EU: A Legal Analysis* (OUP 2020), ch 6.

[9] See Reuters, 'UK says Johnson had "positive" meeting with EU's von der Leyen' 8 January 2020.

[10] Adam Lazowski, 'Court of Justice of the European Union and the United Kingdom after Brexit: Game Over?' (2023) 47 ELRev 666; Takis Tridimas, 'Dispute Resolution under the EU-UK Trade and Cooperation Agreement: "Purgatorial Complexity"' in Christina Deliyanni-Dimitrakou, Hélène Gaudin and Eugénie Prevedourou (eds), *Le droit européen, source de droits, source du droit: mélanges en l'honneur de Vassilios Skouris* (Mare & Martin 2022) 655.

[11] *AT v SSWP* [2022] UKUT 330 (AAC); *AT v SSWP* [2023] EWCA Civ 1307.

the domestic legal order.[12] This becomes salient when one reframes the relationship between the EU and the UK not as a contest between competing 'systems' but rather in terms of sources of 'norms' incorporated into the UK's constitutional architecture.[13] Of course, the added complication brought about by Brexit is that this new relationship now consists of formally 'independent' legal systems, thereby necessitating a reconceptualization of the legal tools used to mediate that relationship, notably in their 'domestication' within UK law.

The CJEU will continue to act as a 'supreme' arbiter when it comes to the interpretation and application of EU law, while also adapting its methods and general principles of interpretation applicable within the EU legal order and in its relations with the UK. Indeed, the CJEU's alertness to the preservation of the autonomy of EU law is likely to be heightened in these previously untested circumstances of disentanglement and potential doctrinal divergence between the EU and UK legal orders. It is submitted in this contribution that the UK's desire to avoid the reach of the CJEU has led to a number of (unnecessary) complexities within the new dispute resolution framework, both from a principled and practical perspective. In particular, the existing system has set the stage for potential ongoing tensions between the respective roles of the CJEU and domestic courts in the UK. The precise extent of the CJEU's role—both within and beyond the Withdrawal Agreement and TCA—is therefore likely to remain contentious, especially in areas where EU law intersects with devolved competences in the UK's devolved administrations. This was most recently seen in the controversy surrounding the Court's ongoing role in Northern Ireland.[14]

Our assessment of the CJEU's dispute resolution role within the new judicial architecture underpinning the EU–UK relationship is structured as follows:

Section II commences by contextualizing the significance of dispute resolution within the Brexit process.

Section III then explores the first of two models for resolving disputes between the UK and the EU, namely those established under the Withdrawal Agreement. Apart from the UK's aspirations to phase out the CJEU's jurisdiction and the CJEU's emphasis on maintaining the integrity of EU law and the EU legal order, there is an additional 'structural' complexity in the design of these mechanisms that casts a shadow over future dispute resolution between the two parties. In particular, the new structures have thus far been marked by a conspicuous absence of consideration regarding the users of the system. In particular, the structures are so complex that they undermine legal certainty at a 'micro' level, which is the level of particular disputes. We argue that a higher degree of continuity with existing mechanisms would have been preferable.

Section IV evaluates the dispute resolution arrangements found within the TCA and questions the extent to which the Withdrawal Agreement dispute resolution mechanisms have provided a blueprint for the TCA. It is argued that this might offer at least some degree of continuity among the two parallel systems despite the differing formal roles of the CJEU under each agreement. It is also contended that to ignore the CJEU's ongoing role risks upsetting the EU's constitutional arrangements with the potential effect of undermining aspects of the Withdrawal Agreement and future relationship between the EU and the UK, and which thereby affects legal certainty on a 'macro' level. Ultimately, where the CJEU is best placed to settle a dispute, whether due to its adjudicative expertise or its role in the EU's legal order, its rulings may be difficult to overlook, despite the UK's insistence that the CJEU will not have a formal role. As we shall see, there are significant practical and legal difficulties caused by the UK's desire to avoid the jurisdiction of the CJEU.

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

[13] See Burchardt (n 7) on the relationship between the EU and the Member States.

[14] 'Brexit: Why is there a row over the European Court of Justice?' (*BBC News*, 27 February 2023) <https://www.bbc.co.uk/news/uk-northern-ireland-58889543> accessed 13 December 2024.

Section V finally examines the future (indirect) involvement of the CJEU and concepts of EU law as mediated through domestic constitutional and legal concepts.

II. THE SIGNIFICANCE OF THE POST-BREXIT DISPUTE RESOLUTION MECHANISMS

In light of the complexity of—and competing interests involved in—the negotiation and application of international agreements, it is a common practice for such agreements to be accompanied by some form of mechanism designed to address disputes concerning their scope, interpretation, and enforcement.[15] The more complex the potential problems under an agreement, the more likely the agreement is to include dispute resolution provisions.[16] The EU–UK Withdrawal Agreement and TCA are no different, save to the extent that these agreements arose in the unusual circumstances of one state seeking to diverge from an already-existing highly integrated political, legal, and economic union, with all the added complexity this entails. While there are many potential consequences of divergence from existing EU rules, including business costs and disruptions to the domestic devolution settlement, there is also the strong possibility of disputes arising with the EU in accordance with the terms of the TCA.

As discussed throughout this contribution, the TCA read alongside the Withdrawal Agreement is largely concerned with continuity rather than divergence, and yet the risk of divergence can arise not only from the UK actively seeking to do so, but also from a failure to 'keep up' with EU standards.[17] Divergence may also come from the UK's higher courts, which enjoy the power to depart from 'retained EU case law', that is decisions of the CJEU handed down prior to the end of the transition period. The Retained EU Law (Revocation and Reform) Act (REULA) 2023 has introduced new procedures for departing from what is now known as 'assimilated EU case law', which is discussed further below. Although the UK has not yet sought to diverge significantly from the EU in most regulatory fields, there is no doubt that the ability to deviate from EU rules was both a key motivation for Brexit and a core negotiating objective of the UK Government.[18] As such, there was a heightened desire on the part of the UK to prioritize its own national sovereignty and judicial system over the establishment of supranational mechanisms for resolving disputes. This approach can be seen throughout the Brexit negotiations, notably in the UK's failed attempts to negotiate directly with Member State governments, thereby bypassing the EU institutions.[19] It can also be seen in the agreed dispute resolution system, which is closer to the preferences of the UK than the EU.[20]

Writing before the adoption of the TCA, Frennhoff Larsén and Khorana drew a distinction between the EU's 'integrationist' approach to negotiation, which involves close inter-institutional engagement, and open and interest-based discussions aimed at solving problems transparently, and the UK's 'distributive' approach, which was characterized by adherence to predetermined positions and a dearth of consultation.[21] The integrationist approach has as

[15] Barbara Koremenos, 'If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?' (2007) 36 JLS 189.

[16] ibid.

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

[18] Financial services, in particular, is an area where (former) EU legislation has been reformed, although outside of the context of the REULA 2023: Financial Services and Markets Act 2023.

[19] Kalypso Nicolaïdis, 'Brexit Arithmetics' in John Armour and Horst Eidenmüller (eds), *Negotiating Brexit* (Hart 2017); Magdalena Frennhoff Larsén and Sangeeta Khorana, 'Negotiating Brexit: A Clash of Approaches?' (2020) 18 Comparative European Politics 858, 864.

[20] Tridimas (n 7).

[21] Frennhoff Larsén and Khorana (n 19) 859.

its goal the increase in joint gains for all parties involved in the negotiations. The distributive approach, by contrast, focuses on achieving the aims of one party where these aims conflict with those of the other party, that is it is an approach based on positions (choices already decided upon) rather than interests.[22] Once these positions have been established, it is difficult to deviate from them for fear of losing face.[23] One of the clearest examples of such a position was the UK's red line that the CJEU would not have any oversight over the withdrawal and future trading relationship, which had the consequence of constraining the nature of the new relationship between the two parties.[24]

It has been suggested that allowing the CJEU to have jurisdiction over the Withdrawal Agreement and TCA was politically unviable because, as the EU's highest court, it could never be considered a 'neutral' actor.[25] Of course, it can be questioned whether any court can ever truly be neutral (particularly with regard to the precepts of its own legal system), and there has long been hostility towards the influence of the CJEU over domestic law.[26] As a consequence, the UK's Brexit negotiating position excluded much of the Union's existing judicial and dispute resolution architecture, leading to the need to develop new judicial or non-judicial fora to resolve disputes. A further consequence of this approach was to rule out any post-Brexit trading relationship beyond the barest of free trade agreements, which would itself have consequences for the dispute resolution mechanisms chosen to govern the future relationship. Inevitably, there are trade-offs between on the one hand, the efficiency of any new system and, on the other hand, its ability to deliver legal certainty. Similarly, the effectiveness of any enforcement mechanism encounters challenges related to national sovereignty and the UK's negotiating objectives.[27] While it may be unusual to entrust jurisdiction over an international agreement to a court of one of the parties, the reality is that the Withdrawal Agreement and TCA were reached in the unique circumstances of a Member State leaving the EU, with an existing court, the CJEU being the ultimate authority on the meaning of EU law and which thereby makes the avoidance of its juridical expertise all the more complex.

It is almost certain that future disagreements will arise between the UK and EU after Brexit in that 'just about any provision of the withdrawal agreement, or of any agreement on the future relationship, could give rise to disputes'.[28] It is also possible that disputes surrounding the Withdrawal Agreement and TCA are more likely to arise due to the dualist nature of the UK legal system, whereby international agreements or treaties do not themselves produce any effect in UK domestic law. Rather, for such agreements to have any legal effect, their key provisions must be incorporated into domestic legislation.[29] For the Withdrawal Agreement, this is achieved through the European Union (Withdrawal Agreement) Act 2020, while the TCA is incorporated via the European Union (Future Relationship) Act 2020. Dualism is linked to the concept of parliamentary sovereignty, whereby Parliament can make or unmake laws as it sees fit, regardless of their compatibility with any international agreement.[30] At the same time, although the doctrine of parliamentary sovereignty

[22] ibid 859, 860.

[23] ibid 867.

[24] Theresa May, 'The Government's Negotiating Objectives for Exiting the EU', speech given at Lancaster House, 22 May 2017.

[25] Stojanovic and Kane (n 5) 2; Gerard Hogan, 'Should Judges be Neutral?' 72 (2021) NILQ 63.

[26] See Policy Exchange, 'Policy Exchange's Judicial Power Project Responds to Government Paper on European Court of Justice Post-Brexit' 2017.

[27] Hogarth (n 5) 4.

[28] ibid 6.

[29] Roger Masterman, 'Reasserting/Reappraising Dualism', UK Constitutional Law Blog, 7 December 2021.

[30] *DTI v International Tin Council* [1990] 2 AC 418.

remains a fundamental principle of UK constitutional law, treaty obligations remain legally binding upon the UK under international law. It is evident, therefore, that the dualist nature of the UK legal system heightens the possibility for disputes surrounding the compliance of domestic legislation with the withdrawal and trade agreements negotiated with the EU.

As discussed further below, the most prominent disputes to arise so far have concerned the UK's purported attempts to dilute the provisions of the then INIP. Disputes are also almost certain to arise between the central UK Government and the devolved administrations in Wales, Scotland, and Northern Ireland. Proposed provisions of domestic internal market law, for example, conflicted with Scotland's desire to align with EU rules (to facilitate future readmission to the Union in the event of independence) and Northern Ireland unionists' concerns about further divergence with the rest of the UK.[31] Such 'internal' disputes fall largely outside the scope of the present discussion, which focuses on the mechanisms applicable between the EU and the UK, including the ability of individuals within the UK to rely directly on EU-derived rights.

III. DISPUTE RESOLUTION MECHANISMS UNDER THE WITHDRAWAL AGREEMENT

The Withdrawal Agreement provides for several distinct dispute resolution mechanisms depending on the nature and timing of the dispute. Broadly speaking, the categories of disputes discussed here are: disputes that arose prior to the end of the transition period (Section III.A) on 31 December 2020; general disputes that arose after the end of the transition period (Section III.B); disputes relating to the Citizens' Rights provisions of the Agreement (Section III.C.i); and disputes surrounding the WF post-transition (Section III.C.ii). Categories A, (Section III.C.i) and (Section III.C.ii) provide for a particularly extensive continued role for the CJEU in the resolution of disputes. Outside of these specific contexts, the formal role of the CJEU under the Withdrawal Agreement has been confined to those aspects involving *EU law*.

As we shall discuss in this section, UK courts were bound by decisions made by the CJEU where these were handed down prior to the end of the transition period prescribed by the Withdrawal Agreement.[32] Article 4(4) WA also stipulates that any references to concepts or provisions of EU law within that Agreement are to be interpreted and applied in accordance with pre-transition CJEU case law. Article 4(5) WA similarly provides that 'due regard' should be had to post-transition case law of the CJEU. These provisions complement Article 4(1) and (2) of the WA, which govern the effect of the Agreement and any EU law made applicable under it. However, the precise role of the CJEU within the wider constitutional framework of EU–UK relations remains ill-defined and controversial, in no small part due to the inclusion in the Withdrawal Agreement of such nebulous terms as 'concepts', 'methods', and 'general principles' of Union law discussed below.

A. Disputes that arose prior to the end of the transition period

For the duration of the transition period, the EU enforcement regime that applied to the UK did not fall far from the dispute resolution apparatus applicable to EU Members States, with the CJEU also enjoying oversight of the interpretation and application of the Withdrawal Agreement itself, again until the transition period ended.[33] The UK thereby remained subject to possible infringement proceedings, annulment actions and preliminary

[31] Marshall, Rutter and Mills-Sheehy (n 17) 30.
[32] *Revenue and Customs v Perfect* [2022] EWCA Civ 330.
[33] Art 131 WA.

references in the same way as any current EU Member State. As such, the effect of EU law was particularly strong in the immediate post-Brexit domestic legal landscape, with the UK recognizing the legal repercussions of a sudden departure from the Union's dispute resolution framework.

This aspect of the Withdrawal Agreement dispute resolution mechanism has already been put to (limited) use during the action against the UK in relation to the then Internal Market Bill. On 1 October 2020, the Commission issued a formal request for information, noting that certain aspects of the Internal Market Bill were in breach of the UK's continuing obligation to act in good faith under Article 5 WA.[34] In particular, the notice alleged that the then Bill, if adopted without amendment, would infringe the INIP to the Agreement to the extent that it purported to allow the UK Government to disregard the legal effects of the Protocol. The offending provisions were dropped from the final text of the Internal Market Act 2020. Had the dispute continued, the next step in the process would have been for the Commission to issue a reasoned opinion formally requesting that the UK comply with its obligations under the Withdrawal Agreement.

The Commission may eventually have decided to refer the case to the CJEU under Article 258 of the Treaty on the Functioning of the European Union (TFEU). This would have moved the process from the administrative phase (involving the dialogue between the Commission and the UK) to the judicial phase, which involves the CJEU. As part of this judicial phase under Article 258 TFEU, the Commission could have obtained a declaration from the CJEU that the UK had violated its obligations under the Withdrawal Agreement and/or the Protocol. The UK would then have a legally binding obligation to comply within a reasonable time period. If the UK did not comply, the Commission could have brought a second case under Article 260(2) TFEU asking the CJEU to impose financial penalties on the UK for failure to comply with the Court's first judgment.

The role of the CJEU was thereby vital in ensuring compliance with the Withdrawal Agreement, in the same way that it is imperative for the CJEU to ensure compliance with the Treaties and EU legislation.[35] Article 86 WA also granted the CJEU 'jurisdiction in any proceedings brought by or against the UK before the end of the transition period', including the possibility of hearing preliminary references from the UK courts. At the same time, Article 87 WA ensures that the Commission can bring proceedings under Article 258 TFEU against the UK within 4 years of the end of the transition if it considers that there has been a failure to fulfil an obligation arising up until 31 December 2020. This is one of the ways in which the CJEU retains a role in the Brexit legal framework including regarding disputes that arose before the end of the transition period.[36]

B. Disputes arising after the end of the transition period

General disputes arising after the end of the transition period are subject to the dispute resolution mechanisms introduced by Part Six, Title III of the Withdrawal Agreement. The starting point is Article 167 WA, which obliges the UK and the EU to 'make every attempt, through cooperation and consultations, to arrive at a mutually satisfactory resolution of any matter that might affect [the operation of the Agreement]'. The Agreement then provides

[34] European Commission, 'Withdrawal Agreement: European Commission Sends Letter of Formal Notice to the United Kingdom for Breach of its Obligations', 1 October 2020; Select Committee on the Constitution, 'UK Internal Market Bill', 14 October 2020, Evidence Session No.5; Mark Elliott, 'The Internal Market Bill: A Perfect Constitutional Storm', Public Law for Everyone, 9 September 2020.

[35] For a wider discussion on the logic behind extending the public enforcement procedure to the WA, see Lazowski (n 10) 675.

[36] See Case C-692/20 *Commission v UK* ECLI:EU:C:2023:707 in which the CJEU imposed a fine on the UK for failure to comply with an earlier judgment from 2018: Case C-503/17 *Commission v UK* ECLI:EU:C:2018:831.

for a mechanism for resolving disputes between the UK and the EU, which closely resembles the dispute resolution mechanisms of the 2014 Association Agreements between the EU, Ukraine, Georgia, and Moldova.[37]

Article 168 WA provides that recourse shall not be had to any other dispute resolution procedure than that set out in the Agreement. Any disputes arising out of the Agreement will be adjudicated, in the first instance, by the UK–EU Joint Committee.[38] If the consultations within the Joint Committee fail to reach a conclusion, then the dispute is sent to an arbitration panel in accordance with Article 170 WA, with the panel being composed of experts nominated by the UK and the EU under the conditions set out in Article 171 WA. The parties are obliged to comply with any ruling issued by the panel and failure to do so can lead to either a financial penalty or a temporary suspension of aspects of the Agreement (apart from the Citizens' Rights provisions). Any suspension of obligations needs to be proportionate to the breach.

In order to ensure the uniform interpretation and application of EU law, the Agreement also envisages an important potential role for the CJEU in the resolution of disputes. The CJEU enjoys exclusive jurisdiction over issues relating to the interpretation, application, or enforcement of EU law pertaining to disputes under the Withdrawal Agreement. This power of the CJEU can be traced back to Article 19(1) of the Treaty on European Union (TEU), which provides that the CJEU 'shall ensure that in the interpretation and application of the Treaties the law is observed' which is now reflected in Article 174 WA. Post-transition, any arbitration panel needs to submit the EU law issue to the CJEU for adjudication, which the CJEU will interpret and apply in a uniform manner. In fact, Article 174 WA sets out a number of broadly defined situations where the arbitration panel *must* ('shall') submit a dispute to the CJEU namely when the dispute raises: (i) a question of interpretation of a *concept* of EU law; (ii) a question of interpretation of a provision of Union law referred to in the Withdrawal Agreement; or (iii) a question of whether the UK has complied with its obligations under Article 89(2) WA to abide by CJEU judgments relating to matters that arose prior to the end of the transition period. The rulings of the CJEU will be binding on the arbitration panel and thus to the parties to the dispute. The binding nature of CJEU judgments (where it has jurisdiction) has long been a legal requirement.[39] The normal Treaty rules on preliminary rulings from national courts apply to references to the CJEU from the arbitrators.

Two of the above-mentioned situations stipulated in Article 174 WA directly relate to the interpretation and application of the Withdrawal Agreement, as they refer to provisions and obligations set out in the text of the Agreement. The first situation, however (ie where the dispute raises a question of interpretation of a *concept of EU law*) is notably broad. It does not sit well with typical EU law terminology used in the Treaties, which is usually more precise in this regard by referring, for example, to specific legal instruments (EU regulations, EU directives, etc) or legal principles (EU general principles), or values (eg Article 2 TEU), albeit that the latter two categories can themselves be rather ill-defined. In fact, the word 'concept' does not appear at all in the TEU, but it was manifest in the seminal *Costa v ENEL* judgment where the CJEU emphasized that the transfer of the rights and obligations arising under the Treaty carry a limitation of sovereign rights for Member States of which no unilateral act can prevail against a *concept* of the Community.[40] Hence, within the realm of the EU

[37] Barnard and Miéral (n 5).

[38] Art 169 WA.

[39] Opinion 1/92 pursuant to the second subparagraph of Article 228(1) of the EEC Treaty—Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area ECLI:EU:C:1992:189.

[40] Case C-6/64 *Costa v ENEL* ECLI:EU:C:1964:66.

constitutional system, the term 'concept' assumes a broad and encompassing nature, representing a significant proposition that forms the underlying foundation of the constitutional order as a whole.[41]

In *Costa v ENEL*, the invocation of the 'concept' served inter alia as a tool employed by the CJEU to strengthen and solidify the position of EU law as a cohesive and universally applicable framework across the Union. Through this strategic approach, the CJEU aimed to establish a sense of uniformity and generality in the application of EU law. This interpretative method, characterized by its open-textured nature, has its basis within the Treaties themselves, particularly in the provisions on the values that are expressed in Article 2 TEU. In more recent years, the CJEU's case law on these values has advanced the EU's constitutional system creating what has been referred to by some commentators as an 'Article 2 TEU +' method opening new opportunities to bring matters within the scope of the EU law imposing substantive obligations which translate EU values into its legal framework.[42] For instance, the CJEU has incorporated a host of demands posed by the principle of solidarity, protected under Article 2 TEU, in its case law.[43]

Determining whether a specific aspect of a dispute will therefore involve a unilateral act challenging a 'concept' of EU law can be a difficult task, and achieving a clear-cut division of competences under the Withdrawal Agreement will often be impractical or unfeasible. For instance, while the broad terminology in the Withdrawal Agreement may not be indicative of the limiting effect of post-Brexit laws, it may render it challenging to delineate the jurisdiction of the CJEU or to limit the instances where the arbitration panel is obliged by the Agreement to submit a dispute to the CJEU. Either party can request that the matter be forwarded to the CJEU, in which case the panel must provide reasons for its assessment as to whether the interpretation of EU law is or is not raised. The novelty of the UK–EU arrangements can be seen in the fact that such issues do not frequently arise under other EU-third country agreements, for example, the EU–Canada Trade Agreement (CETA). CETA did not provide a possibility for a reference to the CJEU on a point of EU law and thus the CETA tribunals would not be faced with a decision as to whether an EU law point is raised.

Difficulties may therefore arise in delineating cases that involve concepts or provisions of EU law. There has similarly been a long line of complex case law governing the question of whether a dispute falls within the *scope* of EU law, that is whether it concerns an issue of EU law. The term 'scope of EU law' is rather nebulous and includes, but is not confined to, cases where the Member States implement EU law or when they derogate from EU law.[44] It is not necessarily expansive and the CJEU has found that the mere fact that a dispute arose in a field over which the EU had competence was not enough to bring the case within the scope of EU law.[45] Similarly, under the doctrine of *acte clair*, a national court is under no obligation to refer a question to the CJEU where the CJEU has already issued a ruling on the interpretation of the relevant provision or where the correct application of EU law is so obvious that there is no room for doubt and therefore no need for the CJEU to issue a ruling.[46] It is not at all clear how this existing jurisprudence will apply to the panel's discretion in deciding

[41] See Constanze Semmelmann, 'General Principles of EU Law: The Ghost in the Platonic Heaven in Need of Conceptual Clarification' (2013) 2 Pittsburgh Papers on the European Union 4.

[42] See on the 'Article 2+' method: Theodore Konstadinides and Niamh Nic Shuibhne, 'A Constitutional Reading of Union Citizenship' in Leonard Besselink, Nicola Lupo and Mattias Wendel (eds) *Research Handbook on EU Constitutional Law* (Edward Elgar 2024).

[43] Floris De Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (OUP 2015).

[44] Case C-260/89 *ERT* ECLI:EU:C:1991:254.

[45] Case C-206/13 *Siragusa* ECLI:EU:C:2014:126.

[46] Case C-283/81 *CILFIT* ECLI:EU:C:1982:335.

whether a case raises a 'question of interpretation of a concept of Union law', or how the interpretative provisions in Article 4 WA might interact with these requirements.

The intention may be that the existing jurisprudence on Article 267 TFEU will not apply to the panel's discretion, perhaps as an attempt to diversify dispute resolution post-Brexit from that existing prior to the UK's departure from the Union. In this instance, a new body of case law will have to emerge to clarify the terminology used in the Withdrawal Agreement and the exact dynamics between the arbitration panel and the CJEU through this new quasi-preliminary reference procedure. However, given the wide application of EU law, it is difficult to imagine a situation where a dispute in hand does not touch on EU law and therefore should not be submitted to the CJEU. By way of contrast and as highlighted below, the approach elsewhere in the Withdrawal Agreement has been to carve out specific areas such as citizens' rights or the INIP where CJEU jurisdiction is made more definitive.

A closer look into this mechanism also reveals that it is explicitly confined to the *interpretation* of EU law provisions or concepts, rather than to their application or implementation. These terms can be difficult to distinguish in practice in that the interpretation of EU law may also involve consideration of how it is applied or implemented. Article 267 TFEU by way of contrast, allows a national court to refer a preliminary question to the CJEU to rule on the interpretation or *validity* of EU law. Article 174 WA would seem to have excluded the ability of the panel to refer to a question on the validity of EU law. This is not surprising given that preliminary rulings questioning the validity of EU law are considered to be an alternative to the demanding standing test for direct actions under Article 263 TFEU.[47] Individuals who do not satisfy the standing test can resort to their national courts, which can then send a preliminary reference request to the CJEU. It would sit at odds with the purpose of the Withdrawal Agreement to maintain a mechanism that would allow for such an indirect challenge to an EU law measure by an arbitration panel set up in an agreement with a third country. In practice however, distinguishing questions that concern the interpretation of EU law from those concerning the validity of EU law may prove to be a difficult task, in the same way as the distinction between interpretation and application is more blurred in practice than in theory.

Beyond the lack of clarity regarding the functioning of the Withdrawal Agreement's referral mechanism, a more contentious issue relates to the CJEU's actual perception of the mechanism vis-à-vis its own legal autonomy. The CJEU itself has emphasized the significance of its role as sole arbiter on issues of EU law. The *Achmea* decision, denying the jurisdiction over intra-EU disputes of investment tribunals established under Bilateral Investment Treaties (BITs), is indicative of the CJEU's reasoning predicated on the idea that the lack of possibility for judicial review where issues of EU law might be engaged deprives EU law of its uniformity and full effectiveness.[48] In this way, the CJEU privileges the autonomy of the EU legal order in such a way as to build barriers between that court and other dispute settlement bodies.[49] This line of argument was echoed in the CJEU's seminal Opinion 2/13 in which a broad conception of the *autonomy* of Union law in Article 344 TFEU was adopted, with the consequence of inhibiting the EU's accession to the European Convention on Human Rights (ECHR). The potential overlap between the roles of the

[47] Alexander Kornezov, 'Locus Standi of Private Parties in Actions for Annulment: Has the gap been Closed?' (2014) 73 CLJ 25; Theodore Konstadinides, *The Rule of Law in the European Union: The Internal Dimension* (Hart 2017) 109, 111–117.

[48] Case C-284/16 *Slowakische Republik v Achmea BV* ECLI:EU:C:2018:158; Dashwood (n 8) 183, 189–192; Steffen Hindelang, 'Conceptualisation and Application of the Principle of Autonomy of EU Law: The CJEU's Judgment in *Achmea* put in Perspective' (2019) 44 ELRev 102. The *Achmea* approach has been extended beyond the context of BITs between Member States to include multilateral agreements to which the EU itself, as well as non-EU countries are party: Case C-741/19 *Republic of Moldova v Komstroy LLC* ECLI:EU:C:2021:655.

[49] Odermatt (n 6) 91; Panos Koutrakos, 'The Autonomy of EU Law and International Investment Arbitration' (2019) 88 Nord J Intl L 41.

CJEU and the European Court of Human Rights (ECtHR) over the interpretation and application of EU law was seen as particularly problematic.[50] The referral mechanism under the Withdrawal Agreement is strikingly similar to that found within the agreement governing the EU's accession to the ECHR, with the CJEU finding that the draft agreement was not compatible with EU law (and its structured network of principles) in its Opinion 2/13.[51] Indeed, under the Withdrawal Agreement, the arbitration panel has been given a similar power to decide whether or not a dispute touches upon the interpretation of EU law, which opens up similar criticisms to those found in Opinion 2/13.

It can be noted that, in contrast to the ECtHR, which was the forum at dispute on that occasion, any arbitration panel under the Withdrawal Agreement would instead operate entirely outside of the institutional and judicial framework of the EU and is not an international court as such.[52] Even when the arbitration panel decides that a dispute between the EU and the UK does not involve a concept of EU law, the panel is under an obligation to give reasons for its assessment and the parties to the dispute may ask for its review.[53] Following such a review, there appears to be no further recourse to the CJEU, with the arbitration panel's ruling being final and legally binding.[54] A decision of the arbitration panel to abstain from referring a dispute to the CJEU is also not subject to review by the CJEU. Nevertheless, it is clear from this discussion on the Withdrawal Agreement that there is a continued formal role for the CJEU even in those areas where an attempt has ostensibly been made to exclude its jurisdiction, for example in the development of new dispute resolution mechanisms in the form of arbitration. As we will now see below, there are additional aspects of the Withdrawal Agreement where the CJEU's continued jurisdiction post-transition is made explicit.

C. The preservation of the CJEU's jurisdiction post-transition

The CJEU continues to enjoy jurisdiction over certain provisions of Part Five of the Withdrawal Agreement concerning the financial settlement, as well as matters relating to the UK army bases in Cyprus.[55] Of particular relevance though to the present discussion of the constitutional implications of the CJEU's continued involvement in the resolution of post-Brexit disputes are those provisions of the Withdrawal Agreement relating to (i) citizens' rights and (ii) the INIP, or the Windsor Framework as it is now known. As we shall see, both fields have profound consequences for human and constitutional rights protection, which signals a prominent ongoing role for the CJEU.

(i) Disputes relating to citizens' rights

The role of the CJEU in disputes relating to citizens' rights post-transition is even more enduring than for general disputes arising before the end of the transition period. Article 158 WA provides that, where a case concerning citizens' rights has commenced before a UK court or tribunal within *eight years* (with the possibility of an extension in certain cases) of the end of the transition period, a preliminary reference may be made to the CJEU. Cases concerning Article 19 WA which governs residence documents, can be heard by the CJEU

[50] Opinion 2/13 of the Court, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms–Compatibility of the draft agreement with the EU and FEU Treaties ECLI:EU:C:2014:2454.

[51] ibid para 167; Gráinne de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 4 AJIL 653.

[52] Dashwood (n 8).

[53] Art 174(2) WA.

[54] Art 175 WA.

[55] Art 160 WA; art 12 Protocol Relating to the Sovereign Base Areas of the UK in Cyprus.

eight years from the date of the provision's application, with the dispute settlement provisions discussed above also applying to any dispute arising *before* the end of the transition. The dispute resolution mechanism applicable to post-transition citizens' rights issues is fundamentally akin to the existing preliminary reference request process under the EU Treaties, albeit that there is no *obligation* on any domestic courts to make a reference to the CJEU.[56] The effects of a decision by the CJEU are the same as those found under Article 267 TFEU. Essentially, this obliges UK courts to follow the rulings of the CJEU even in instances where such rulings may clash with provisions of domestic law.

The citizenship provisions are to be further overseen by the Independent Monitoring Authority, which has powers similar to the Commission's in investigating alleged breaches of the Treaties. The Commission has already successfully challenged the UK's implementation of the Citizens' Rights provisions, for example the requirement to reapply for settled status after having previously been granted pre-settled status under the EU Settlement Scheme, which was found to be incompatible with the Withdrawal Agreement.[57] In another case, the domestic courts recognized an ongoing role for important EU constitutional concepts within the context of the Citizens' Rights provisions of the Withdrawal Agreement, notably the fundamental rights found within the Charter.[58]

In *AT*, the Charter was held to be applicable within the context of UK regulations purporting to exclude those with pre-settled status from enjoying equal access to benefits.[59] The case was brought within the scope of the Charter due to the temporary right of residence found in Article 13 WA for those holding pre-settled status, and which reflects a modified form of the residence rights found in Article 21 TFEU. Article 4(3) WA provides that EU law concepts found within the Withdrawal Agreement are to be 'interpreted and applied in accordance with the methods and general principles of Union law', which includes the Charter.[60] This decision, which was unsuccessfully appealed to the Court of Appeal, may well end up being referred to the CJEU to deliver a preliminary ruling. This case is particularly interesting in its illustration of both the formal or 'direct' jurisdiction of the CJEU under the Withdrawal Agreement, but also its more 'indirect' influence through the pre-Brexit interpretation of concepts of EU law, for example, fundamental rights, which are then applied within the context of the Agreement.

Citizens' rights protection is clearly an area of great sensitivity, imbued as it is with rights concepts deriving from EU law and as such, the CJEU has been granted a relatively strong role in this field. This role can perhaps be contrasted with the diminished role of the Commission, which does not have the power to bring infringement proceedings against the UK in relation to citizens' rights. Indeed, the rights protected under Part Two of the Agreement are enforceable not only by the Parties themselves, but also by individuals who enjoy directly effective rights deriving from the Agreement.[61] A similarly sensitive aspect of the Withdrawal Agreement relates to the WF, which has particular implications for the ongoing role of the CJEU in Northern Ireland and evidences the 'constitutional' implications of the continued application of EU law concepts within the context of the Good Friday Agreement (GFA).

[56] Catherine Barnard and Emilija Leinarte, 'Citizens' Rights' in Federico Fabbrini (ed), *The Law and Politics of Brexit* (OUP 2020) 107, 123.

[57] *R (on the Application of the IMA) v Home Secretary* [2022] EWHC 3274 (Admin).

[58] *AT v SSWP* [2023] EWCA Civ 1307.

[59] Following on from cases relating to facts that arose prior to the end of the transition period: Case C-709/20 *CG v The Department for Communities in Northern Ireland* ECLI:EU:C:2021:602; *Fratila and Another v Secretary of State for Work and Pensions* [2021] UKSC 53.

[60] art 2 WA.

[61] Barnard and Leinarte (n 56) 118.

(ii) Disputes relating to the WF

EU law is deeply embedded within the WF, which provides for the ongoing application of certain EU law provisions, particularly governing the single market in goods, to Northern Ireland on a 'dynamic' basis, that is, there is an obligation of continued alignment with those rules.[62] Article 5(4) and Annex 2 WF provide a list of EU law provisions that will continue to apply to and in the UK in respect of Northern Ireland. In addition, concepts of EU law must continue to be interpreted in accordance with the CJEU's case law as it evolves, with the CJEU also enjoying full (direct) jurisdiction over matters relating to the implementation of Articles 5 and 7–10 WF.[63] The rights protected by the Protocol are also capable of direct effect where the relevant criteria are met, with both domestic courts and the CJEU also enjoying judicial review powers in relation to the Protocol.[64]

In addition to these provisions governing customs, the movement of goods and related trade matters, Article 2(1) WF contains a commitment to the non-diminution of rights protected at the end of the transition period in so far as they relate to the rights and equality protections granted under the GFA. This has already acted as a powerful constraint on the ability of the UK to legislate (in Northern Ireland) in such a way as to undermine these protections, notably in relation to the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, concerning prosecutions arising from the conflict in Northern Ireland, as well as the Immigration Act 2023 concerning deportations to Rwanda.[65] This non-diminution obligation is accompanied by a seemingly narrower but nonetheless more forceful, commitment to align with EU law developments in relation to the equality legislation listed in Annex 1 WF. The latter requires Northern Ireland law to 'keep pace' with Annex 1 EU equality law developments, while the former obligation should prevent the UK from amending former EU law, at least as it relates to Northern Ireland, in such a way as to undermine the equality section of the GFA.[66]

Domestic courts are obliged to interpret the Protocol 'in conformity' with CJEU case law. This obligation is more extensive than that found in Article 4 WA in that the courts in Northern Ireland must continue to track future developments in CJEU case law.[67] Moreover, Article 2 WF is directly effective, which opens up the possibility for further litigation concerning the diminution of rights caused by Brexit in Northern Ireland.[68] Finally, the Northern Ireland courts have noted the ongoing relevance of the Charter under the Protocol, which stands in contrast to the Charter's exclusion from the category of retained EU law.[69] Taken together, these provisions allow for both a direct and indirect role for the CJEU in the interpretation of rights, which may itself trigger the non-diminution obligations in the Protocol, albeit that the CJEU does not enjoy (direct) jurisdiction over Article 2 WF.[70]

[62] art 13(3) WF; Lisa Claire Whitten, 'Post-Brexit Dynamism: The Dynamic Regulatory Alignment of Northern Ireland Under the Protocol on Ireland/Northern Ireland (2022) 73 NILQ 37.

[63] Art 12(4) WF.

[64] Arts 12(5) and 13(4) WF; Art 7A EU(W)A 2018; Billy Melo Araujo and Lisa Claire Whitten, 'Judicial Review and the Protocol on Ireland/Northern Ireland', Post-Brexit Governance NI Explainer No 5, April 2022.

[65] *Northern Ireland Human Rights Commission's Application and JR295's Application and In the Matter of The Illegal Migration Act 2023* [2024] NIKB 35; *Dillon and others and In the Matter of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 and the Secretary of State for Northern Ireland* [2024] NIKB 11.

[66] The scope of the dynamic alignment obligations remains unclear, particularly with regard to tracking CJEU case law: Eleni Frantziou and Sarah Craig, 'Understanding the Implications of Article 2 of the Northern Ireland Protocol in the Context of EU Case Law Developments' (2022) 73 NILQ 65.

[67] Art 13(2) WF; C R G Murray, 'From Oven-Ready to Indigestible: The Protocol on Ireland/Northern Ireland' (2022) 73 NILQ 8, 12.

[68] *Re Spuc Pro–Life Ltd* [2022] NIQB 9 [77].

[69] ibid [78]; s 5(4) EU(W)A 2018.

[70] Aoife O'Donoghue, 'Article 2 in Context' in Federico Fabbrini (ed), *The Law and Policy of Brexit: Volume IV* (OUP 2022) 89, 100.

All relevant UK courts have been granted the power to make preliminary references to the CJEU to request a ruling on the validity or interpretation of the Protocol and relevant rules, thereby essentially replicating the already-existing EU enforcement mechanism, as set out in Article 267 TFEU.[71] In this way, the CJEU's pre-existing jurisdiction is largely preserved, with the Protocol granting the CJEU a similar role to that found in Article 131 WA. It is important to note, however, that jurisdiction under Article 12 WF and Article 131 WA is mutually exclusive. Article 12 WF allows for the Parties to rely on a dispute resolution mechanism that is essentially synonymous with existing EU law in the guise of Article 258 TFEU, with the Commission enjoying the power to initiate infringement proceedings against the UK for violations of EU law as applicable in Northern Ireland. Such proceedings could eventually lead to a binding declaration by the CJEU that certain prescribed provisions of the Protocol have been violated.

In the same way as a UK court can make a preliminary reference request post-transition, national courts of other Member States will have the same course of action under Article 267 TFEU. Therefore, the interpretation and application of the legislation set out in Annex 2 will likely be shaped by preliminary rulings resulting from requests from *other* Member States' courts. As such, the role of national courts of the EU's Member States as venues for the resolution of disputes affecting the UK and their impact on shaping the UK legal landscape post-Brexit cannot be discounted.

The WF, which essentially consists of a reworking of the Protocol's provisions, allows for the continued—albeit reduced—alignment of Northern Ireland with rules governing the EU's single market for goods. Article 13(3a) of the amended Protocol provides for a 'Stormont Brake' on the application of amended or replaced EU laws relating to certain aspects of the Protocol to Northern Ireland, subject to the arbitration process in the case of a dispute, which is now accompanied by a soft law accelerated compliance process. The Stormont Brake sits alongside the wider power of the UK Government to object to the application of new EU rules in Northern Ireland under Article 13(4) WF. Crucially, however, the as-yet untested jurisdiction of the CJEU over the Protocol emerges from the new arrangements unscathed, although the reduction of EU law applicable in Northern Ireland does reduce the possibility of the CJEU exercising that jurisdiction in practice.[72] That is not to say that the CJEU has no role in overseeing the Brake's operation in that the latter applies when there has been a significant change from existing EU law, which may itself raise questions of EU law over which the CJEU continues to enjoy jurisdiction. The CJEU may also be asked to rule on the interpretation of EU law or on the question of whether challenged legislative provisions might be severable.[73]

Overall, there has been no adjustment to the jurisdiction or role of the CJEU when compared to the original Protocol. The WF essentially constitutes an admission on the part of the UK Government of the CJEU's ongoing role in Northern Ireland, while the reduction in the applicable legislation to Northern Ireland allows the Government to laud the corresponding reduction in the potential scope of the CJEU's involvement.[74] Both Parties have further committed to resolving disputes surrounding the Protocol through dialogue within the existing structures, with the WF also ending (for now) the dispute between the EU and the UK concerning the implementation of the Protocol.

[71] art 12(6) and (7) WF.

[72] Steve Peers, 'The Windsor Framework: Limiting the Scope of EU Law in Northern Ireland in Practice, though not in Theory (Part 1)', EU Law Analysis Blog, 4 March 2023.

[73] Steve Peers, 'Just Say No? The new 'Stormont Brake' in the Windsor Framework (Part 2)', EU Law Analysis Blog, 5 March 2023.

[74] art 13(3a) WF; C R G Murray and Niall Robb, 'From the Protocol to the Windsor Framework' (2023) 74 NILQ 1, 9.

As mentioned, the Commission had launched infringement proceedings against the UK under Article 131 WA in October 2020 with regard to proposed (and eventually abandoned) provisions of the then Internal Market Bill, which had granted ministers the power unilaterally to disapply aspects of the WF.[75] This was followed in March 2021 by further infringement proceedings concerning the UK's decision to delay the full application of the WF, which had led to the Commission activating the mechanisms provided for in Article 12 WF for breach of the Protocol, as well as the 'good faith' requirements in Article 5 WA, the latter of which would have formed the basis for the invocation of the dispute settlement process found within the Withdrawal Agreement.[76] Finally, in June 2022 the Commission launched infringement proceedings against the UK concerning (among other alleged violations of the Protocol) the proposed Northern Ireland Protocol Bill, which would have overridden core parts of the WF.[77] Clause 13 of the Bill purported to remove the jurisdiction of the CJEU in relation to the enforcement of aspects of the WF, while Clause 20 would have absolved national courts and tribunals of their obligation to interpret the Protocol in accordance with CJEU case law, both of which illustrate the antipathy of the UK Government towards the CJEU's continued role despite having already agreed to the provisions of the existing Protocol.

These disputes concerning the WF are illustrative of the overlapping sources that govern the new EU–UK relationship with dispute resolution mechanisms deriving from pre-existing Union law, the Withdrawal Agreement and the TCA. The disputes surrounding the Protocol were eventually resolved at the political level through the negotiation of the WF. Under this Framework, the EU has committed to dropping the infringement proceedings against the UK for failure to implement the Protocol in full, while for its part, the UK has committed to not taking the Protocol Bill any further.[78] The fact that the disputes did not reach the stage of involving the CJEU, or the invocation of the dispute resolution mechanisms envisaged under the withdrawal and future relationship arrangements beyond the issuing of notifications, is perhaps indicative of a wider reluctance to allow disagreements to develop into more 'formal' disputes. This reluctance resembles that of EU Member States to initiate proceedings against each other before the CJEU, despite the Court having competence to hear such disputes.[79] After all, the Withdrawal Agreement itself includes a best endeavours clause whereby the Parties will seek a negotiated settlement before commencing legal proceedings.[80] The WF makes the recommencement of legal proceedings less likely in the short term, but the continued role of the CJEU as well as the status of EU law in Northern Ireland remain contentious within the wider context of the Framework's perceived threat to Northern Ireland's constitutional position as an integral part of the UK.

IV. DISPUTE RESOLUTION UNDER THE TRADE AND COOPERATION AGREEMENT

The overarching goal of the UK Government in negotiating the TCA was that any dispute resolution process be 'appropriate to a relationship of sovereign equals'. In its negotiation

[75] European Commission (n 34).

[76] European Commission, 'Withdrawal Agreement: Commission sends Letter of Formal Notice to the United Kingdom for Breach of its Obligations under the Protocol on Ireland and Northern Ireland', 15 March 2021; Jan Wouters, 'Dispute Settlement' in Christopher McCrudden (ed), *The Law and Practice of the Ireland—Northern Ireland Protocol* (CUP 2022) 55, 60.

[77] European Commission, 'Commission Launches Infringement Proceedings against the UK for Breaking International Law and Provides Further Details on Possible Solutions to Facilitate the Movement of Goods between Great Britain and Northern Ireland', 15 June 2022.

[78] Reuters, 'Britain to Drop Planned Northern Ireland Protocol Bill', 27 February 2023.

[79] Art 259 TFEU.

[80] Art 169 WA.

mandate, the UK Government suggested that a model might be drawn from existing free trade agreements, such as that between the EU and Canada. Yet, this aspiration came with limitations. First, dispute resolution regimes in existing EU free trade agreements come in different shapes and forms: there is no uniform dispute resolution regime characterizing these agreements.[81] Second, all current EU free trade agreements are essentially agreements between the EU and a third country that was never part of the EU. The post-Brexit dynamic has allowed for the establishment of *sui generis* dispute resolution mechanisms. As we have observed, this includes a sustained role for the CJEU as a dispute resolution forum for aspects of the Withdrawal Agreement. Undoubtedly, the main challenge in the design of the dispute resolution mechanism under the TCA was the need to manage divergence as opposed to convergence.

The Political Declaration recognized these dynamics by stating that the future relationship would need to take account of the unique period of the UK's membership of the EU, which has resulted in 'a high level of integration between the Union's and the United Kingdom's economies, and an interwoven past and future of the Union's and the United Kingdom's people and priorities'.[82] Although it did not set out a detailed system of dispute resolution, Part IV of the Declaration provided an overview of the key characteristics of the system, which for the most part are reflected in the final arrangements set out in the TCA. There was provision for a Joint Committee 'responsible for managing and supervising the implementation and operation of the future relationship and facilitating the resolution of disputes'.[83] Additionally, the Declaration provided for an independent arbitration panel should the Joint Committee not reach an agreement. This anticipated mechanism bears a strong similarity to those already set out in the Withdrawal Agreement. There is also a clear link between both Agreements in that a failure to comply with the terms of the Withdrawal Agreement can eventually lead to retaliation under the TCA.

It is certainly to be welcomed that there is a measure of continuity between the Withdrawal Agreement and TCA's dispute resolution mechanisms. As the Withdrawal Agreement and the TCA are effectively governing the same relationship (UK–EU) over successive time periods, it would have been a mistake to create an artificial dividing line between the mechanisms developed to govern withdrawal on the one hand and the future relationship on the other. Some common principles also govern the two mechanisms, such as the requirement of cooperation and exclusivity. These principles are expressed in Articles 167 and 168 WA and are reflected in Articles 1 and 698 TCA, which highlight the need for consultation rather than confrontation. A further requirement of the TCA was that it comply with the Political Declaration's overarching ambition of respecting the *autonomy* (again) of the UK and EU legal orders.[84]

In terms of its material scope of application, in contrast to certain provisions in the Withdrawal Agreement, no provisions of the TCA have a direct effect and therefore cannot be relied on by individual litigants.[85] There is also clear emphasis in Article 4 of the Agreement that the TCA is a creature of *international* law and not EU law and that it should be interpreted in accordance with the sources of international law, including customary international law and the 1969 Vienna Convention on the Law of Treaties, rather than EU law

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

[82] Revised text of the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom as agreed at negotiators' level on 17 October 2019, to replace the one published in OJ C66I of 19.2.2019, para 5.

[83] ibid para 126.

[84] ibid para 22.

[85] For a critical view on the lack of direct effect under the TCA see Tridimas (n 7).

or UK domestic law. In tune with this change in emphasis, the Political Declaration's articulation of the Parties' intention to maintain a role for the CJEU as the sole arbiter of Union law is not reflected in the text of the TCA. Article 4 TCA further asserts that: '[f]or greater certainty, an interpretation of this Agreement or any supplementing agreement given by the courts of either Party shall not be binding on the courts of the other Party'. This absence of a recognition of the CJEU's role contrasts with the Withdrawal Agreement's explicit recognition of a continued role for the CJEU in the interpretation of EU law. As explained earlier, under the Withdrawal Agreement, if a dispute raises a question of interpretation 'of provisions or concepts of Union law', the arbitration panel should refer the question to the CJEU for a *binding ruling* as regards the interpretation of EU law. When a dispute does not raise such a question, there cannot be a reference to the CJEU. The only explicit continued role for the CJEU foreseen by the TCA is its ongoing jurisdiction over EU programmes in which the UK chooses to participate in, for example Horizon Europe.[86] Even so, we argue below that the CJEU and concepts of EU law will have a legacy impact within domestic law.

The overarching goal of dispute resolution under the TCA is set out under Article 734 as being to 'establish an effective and efficient mechanism for avoiding and settling disputes between the Parties concerning the interpretation and application of this Agreement and supplementing agreements with a view to reaching, where possible, a mutually agreed solution'. The dispute resolution mechanisms set out in the TCA are certainly complex and run alongside the already complicated dispute resolution architecture found in Articles 167–181 WA. They can be found in Part Six and are made up of the main dispute resolution procedure (Section IV.A) and specialized dispute resolution procedures (Section IV.B). It follows that the convolution of dispute resolution mechanisms as set out in the TCA warrants rigorous scrutiny both in their standalone capacities and in their interrelation with the established Withdrawal Agreement framework.

A. Main dispute resolution procedure

The default or main dispute resolution procedure in the TCA can be found in Articles 734–760. As with the Withdrawal Agreement, all disputes are initially handled through political consultation at the level of either the Partnership Council or the specialized committees. Failing resolution, and within 3 months, the dispute can then be submitted for formal arbitration by an arbitration panel with the power to issue binding decisions.[87] The panel, which is composed of three members (including a chair), should reach a decision by consensus where possible and within 130 days.[88] The arbitration panel will then make a ruling on whether compliance has been achieved in accordance with the timetable agreed by the parties.[89] Penalties can then be incurred until the dispute is resolved, for example, a suspension of obligations.[90] For some cases, the suspension of obligations must apply in the same part of the TCA, but cross-retaliation is allowed for other parts.[91]

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

[86] art 728 TCA.
[87] arts 739–45 and 752 TCA.
[88] art 754 TCA.
[89] arts 747 and 748 TCA.
[90] art 749 TCA.
[91] Stefano Fella, 'The UK-EU Trade and Cooperation Agreement: Governance and Dispute Settlement', House of Commons Library Briefing Paper No 09139, 3 August 2021 10.

lack formal dispute resolution arrangements altogether and is therefore more laconic than the Withdrawal Agreement. This is perhaps unsurprising given the necessarily dynamic and evolving nature of the new relationship between the Parties.[92]

B. Specialized dispute resolution procedures

Designing dispute resolution mechanisms for the TCA was a difficult task given that the precise commitments contained in the Agreement vary depending on the particular field in question, with some being linked to international standards and others more closely aligning to existing EU or UK rules. Within certain fields such as employment standards, the UK accepted the principle of 'non-regression' and agreed to strive to improve standards. Enforcement also varies across the different areas. Some areas require operationally independent and impartial enforcement authorities while others rely on domestic administrative and judicial bodies to enforce domestic law and ensure effective remedies. The diversity of these various commitments raises significant questions as to the design and effectiveness of any bespoke dispute resolution mechanism covering these fields. The precise nature of the dispute resolution mechanisms in the TCA therefore depends on the field in question. As such, the UK may be confronted with situations whereby certain areas that otherwise fall within the exceptions to the main dispute resolution procedure under the TCA, may feed back into the normal process.

Article 735 TCA lists the areas that are excluded from the main dispute resolution procedure, some of which either have their own procedure or no dispute resolution procedure at all. The most important exclusion for our purposes concerns certain aspects of the LPF, which includes competition law and the 'future review' aspects of the rebalancing clauses triggered by possible future divergence from labour and environmental standards. The LPF Title is composed of horizontal provisions setting out special procedures for consultation and the appointment of expert panels to resolve disputes in these areas. Some aspects of the LPF are excluded entirely from the normal procedures, while other areas are fully included. For certain aspects of the LPF, a modified version of the normal rules applies while for others, a different process is set out in the text of the LPF Title itself, which is the case for non-regression rules on labour and environmental standards as they existed at the end of the transition.[93] The LPF somewhat constrains the ability of the UK to diverge from existing EU standards in these fields, for example, through the amendment or repeal of former EU law, more on which is discussed below.

The overarching purpose of the LPF is to ensure fair competition through non-regression and rebalancing rules which seek to prevent regulatory divergence from impacting trade or investment.[94] While these rules fall well short of the dynamic alignment provisions found within the WF, they nevertheless provide a continued indirect role for the CJEU's case law interpreting and applying former EU legislation. The specific protections granted to the rights falling within the scope of the LPF, while primarily concerned with fair competition, that is they have an economic justification, are also reflective of fundamental rights within the EU legal order. In particular, the Solidarity Title of the Charter contains protections for employment and environmental rights, which again demonstrates the role of the withdrawal and future relationship arrangements in bridging domestic law and constitutional concepts within EU law. Additionally, labour and environmental standards, which are particularly

[92] Maddy Thimont Jack and Jill Rutter, 'Managing the UK's Relationship with the European Union', Institute for Government, February 2021, 7; House of Commons Library, 'The EU-UK TCA: Level Playing Field', Briefing Paper 9190, 20 May 2021.

[93] Steve Peers, 'Analysis 4 of the Brexit Deal: Dispute Settlement and the EU/UK Trade and Cooperation Agreement', EU Law Analysis, 8 January 2021.

[94] Arts 387 and 411 TCA.

sensitive areas, are governed by provisions on consultation and expert panels, which are to be formed by the Trade Specialized Committee on the Level Playing Field for Open and Fair Competition and Sustainable Development. The depth and coverage of the TCA dispute resolution mechanisms will therefore substantially affect the degree of commitment of the UK as an independent country and partner to the EU.

The political context and negotiating objectives of both the UK and the EU are therefore crucial to understanding the dispute resolution mechanisms now found within the TCA.[95] It might be said that the whole purpose of Brexit was to allow the UK (at least the freedom) to diverge from EU regulatory standards. The EU, on the other hand, was eager to prevent the UK from unfairly competing on social, environmental, and competition rules, hence the Union's insistence on some form of LPF within the TCA. This commitment to managing regulatory divergence could already be found in the EU–UK Political Declaration of 17 October 2019. With the precise mechanics of the LPF left to be worked out at that time, the UK continued to pursue a position of reliance on international standards, which the EU viewed as largely insufficient to prevent regulatory competition.[96] The final LPF provisions therefore represent a compromise between the EU's earlier insistence on explicit binding requirements and the UK's wish to rely more heavily on international standards and existing domestic provisions. What we are left with might be referred to as *managed regulatory autonomy*, that is the UK, in theory, has the power to diverge from EU rules, but in practice such divergence will be carefully scrutinized by the EU, which may choose to trigger the TCA dispute resolution mechanisms in response. What is more, the EU might gain further competence in areas that are affected by the TCA, which may require the UK to act to maintain regulatory equivalence.

As the agreement reached between the EU and the UK was not characterized as a 'mixed agreement', which would have necessitated the involvement of the 27 Member States, it was not subject to approval in national parliaments, thereby avoiding (at least for now) the intervention of national courts as new stakeholders in the post-Brexit dispensation.[97] The national governments did, however, have the ability to refer a question to the CJEU on the validity or interpretation of the TCA, as Belgium did during the ratification of the CETA agreement with Canada.[98] Notwithstanding the lack of a similar challenge to the TCA, the findings of the CJEU in Opinion 1/17 are partly transposable to the dispute resolution mechanisms in the TCA.

In the CETA case, the CJEU was asked for an opinion on the compatibility with EU law of CETA's chapter on investor-state dispute settlement given that Belgium had expressed concerns as to the compatibility of the novel investment court system with the autonomy of the EU law and EU fundamental rights. In Opinion 1/17, the CJEU began by noting that the Union has the right to enter into international agreements that may confer the power on an international tribunal to interpret that agreement, so long as such a tribunal does not have the ability to interpret or apply EU law. It held that CETA conferred no such power on any CETA tribunal.[99] The CJEU further emphasized that any tribunal found in an international agreement to which the Union is a party should be accessible and independent and respect the fundamental rights found in the Charter, for example Article 47 on the right to an

[95] For a discussion see Tridimas (n 10).

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

[97] Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited* (Hart 2010).

[98] Opinion 1/17 Accord ECG UE-Canada ECLI:EU:C:2019:341. See for analysis of the Court's 'principled, policy and procedural pragmatism', Panos Koutrakos, 'The Anatomy of Autonomy: Themes and Perspectives on an Elusive Principle', ECB Legal Conference 2019 90, 95.

[99] Opinion 1/17 (n 98) para 136.

effective remedy and to a fair trial, regardless of the fact that the non-EU party is not bound by these provisions.[100]

Thus, following this Opinion, in order to be compatible with EU law, any dispute resolution mechanism must not undermine the autonomy of the EU legal order or prevent the Union's institutions from complying with their constitutional obligations deriving from EU law.[101] In the same Opinion, the CJEU found that when a dispute arises relating to the interpretation and application of the international agreement, the domestic law of one of the parties (including EU law) was to be considered a question of fact. The CETA tribunal was therefore required to 'follow the prevailing interpretation' given by the CJEU or domestic courts, demonstrating the tight hold that the CJEU continues to exercise over the interpretation of concepts of EU law, without which any dispute resolution mechanism is likely to violate the principle of the autonomy of EU law.[102] Member State courts have similarly been seen to safeguard domestic constitutional provisions in the face of international agreements to which the Union is party, with the Irish Supreme Court, for example, finding that the investment chapter of CETA violated the Irish Constitution by being incompatible with the country's judicial and legislative sovereignty, as well as the democratic nature of the Irish state.[103] This was largely due to the lack of democratic oversight provided by the CETA Joint Committee which enjoys the power to interpret and amend CETA, with the tribunal's judgments becoming automatically binding in Irish law, essentially leading to parallel court systems. Compliance with this judgment will either require a constitutional amendment or changes to Irish legislation to reduce the enforceability of CETA tribunal judgments within domestic law.[104]

As is the case with any agreement entered into between the EU and a third country, disputes arising between the EU and the UK over the future relationship are also likely to be subject to the jurisdiction of the CJEU to the extent that those agreements form part of EU law, unless the parties have provided for permissible alternative mechanisms in their agreement, such as arbitration. The TCA, as an agreement entered into by the Union, will also fall within the jurisdiction of the CJEU vis-à-vis the actions of the EU institutions, which must act compatibly with the Treaties, including Union fundamental rights, in all of its actions. We have already seen that the Withdrawal Agreement and the Political Declaration explicitly recognized the ongoing jurisdiction of the CJEU over matters concerning the interpretation of EU law, whereas the TCA is lacking in this respect.

It should now be clear that, despite attempts at excluding the CJEU's jurisdiction from both the Withdrawal Agreement and TCA, the Court will continue to play both a formal (direct) and informal (indirect) role across both Agreements, particularly concerning aspects of fundamental constitutional importance within the EU legal order, including fundamental (social and environmental) rights and citizenship. Given the dualist nature of the UK legal system, these Agreements require implementation within domestic law. In addition, the UK took unilateral domestic law measures to ensure continuity with existing EU law in order to avoid a sudden departure from such concepts post-Brexit. It is argued here that the latter constitute a further conduit through which the influence of both EU law and the CJEU continues to be in evidence beyond the Withdrawal Agreement and TCA, despite the UK's

[100] ibid para 222.

[101] ibid paras 106–161; Niamh Nic Shuibhne, 'What is the Autonomy of EU Law, and Why Does that Matter?' (2019) 88 Nord J Intl L 9.

[102] Opinion 1/17 (n 98) para 131.

[103] *Patrick Costello v the Government of Ireland, Ireland and the Attorney General* [2022] IESC 44.

[104] Patrick Leonard, '*Patrick Costello v the Government of Ireland, Ireland and the Attorney General*: Obstacles to the Ratification of CETA in the Irish Constitutional Context' (2023) Foreign Investment Law Journal 1.

desire to erode the relevance of EU constitutional concepts such as direct effect and general principles within the domestic legal order.

V. THE LEGACY EFFECT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN DOMESTIC LAW POST-BREXIT

As discussed above, the UK has always made clear that it would end the direct jurisdiction of the CJEU after Brexit. In her Lancaster House Speech, former Prime Minister Theresa May declared that 'we will take back control of our laws and bring an end to the jurisdiction of the European Court of Justice in Britain'.[105] The meaning of 'direct jurisdiction' remains ambiguous, but it has been suggested that it could refer to a combination of direct effect, the CJEU's interpretative role and the binding status of CJEU rulings.[106] This approach was formalized in the White Paper on the Great Repeal Bill, which eventually became the 2018 Withdrawal Act. In that White Paper, the Government insisted that '[o]ur courts will be the ultimate arbiters of our laws', and 'in leaving the EU we will bring an end to the jurisdiction of the CJEU in the UK'.[107] As such, an issue that had garnered very little attention during the Brexit referendum campaign namely the role of the CJEU, had become a UK red line for the Brexit negotiations. In reality, this follows on from a long history of UK (Government) antipathy towards the CJEU which can be partially traced back to the absence of a codified UK constitution (and 'constitutional' court with the ability to strike down laws) and perhaps, the frequent confusion of the ECtHR for the CJEU.[108]

We have already demonstrated above that the UK has largely been unsuccessful in its ambitions entirely to end the jurisdiction of the CJEU, which continues to exercise direct and indirect influence over both the Withdrawal Agreement and TCA, albeit that its formal role within the UK legal order has been curtailed. Beyond the Withdrawal Agreement and the TCA, the CJEU will also continue to play an indirect role in the resolution of disputes *within* the UK. The CJEU's continued influence will be mediated via domestic mechanisms such as the European Union (Withdrawal) Act (EU(W)A) 2018, which preserves existing CJEU case law as retained EU law. The term 'retained EU law' is used in the 2018 Act to encompass a number of broad elements, namely: EU-derived domestic legislation, for example, domestic legislation implementing an EU directive (Section 2); direct EU legislation not requiring domestic implementation, for example EU regulations (Section 3); any EU rights, obligations etc. available in domestic law by virtue of Section 2(1) of the European Communities Act 1972, for example directly effective provisions of EU directives (Section 4); general principles of EU law (Section 5); and finally, retained case law (Section 6).

This category of 'retained case law' is then divided into two subsets: retained EU case law and retained domestic case law. The former is composed of decisions handed down by the CJEU 'related to anything to which retained EU law applies', while the latter concerns decisions of domestic courts, again 'related to anything to which retained EU law applies'. Under the 2018 Act, retained EU case law is endowed with the same status as a decision of the UK Supreme Court. The UK Government has extended the power to depart from retained EU case law beyond the Supreme Court to lower courts such as the Court of Appeal of England and Wales, where those courts consider it 'right to do so'.[109] This decision was controversial,

[105] Lancaster House Speech (n 24).

[106] Stojanovic and Kane (n 5) 22.

[107] David Davis, 'Legislating for the United Kingdom's Withdrawal from the European Union', 30 March 2017.

[108] Raphael Hogarth and Lewis Lloyd, 'Who's Afraid of the ECJ? Charting the UK's Relationship with the European Court', Institute for Government, December 2017 11.

[109] The European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525).

and if the status granted to retained EU case law is to have any meaning, lower courts should not have been endowed with the power to depart from CJEU decisions concerning retained EU law. In addition, the general thrust of the withdrawal legislation is about ensuring continuity, including in its instructions to the courts. For example, the UK courts may continue to have 'regard' to CJEU decisions even after the transition period, even though they are only bound by pre-transition case law relating to retained EU law, including modifications to that law, to the extent that case law is consistent with the intention behind the modification.

While the above categorizations seem straightforward on their face, the reality is that the precise scope of 'retained EU law' remains unclear. For example, the extent to which the modified principle of supremacy found within Section 5 EU(W)A 2018 applies to retained EU law is ambiguous, including how far the EU concept of primacy as devised by the CJEU should guide the interpretation of the now domesticated concept of supremacy.[110] If we further take the example of Section 4 EU(W)A 2018, directly effective provisions of EU directives fall within its scope, but without the corresponding directive becoming part of domestic law. Indeed, it is the 'right' rather than the text of the provision itself that has been retained, and only if it is 'of a kind' already recognised by the CJEU or domestic courts at the end of the transition period. This involves litigants having to examine closely any existing case law to determine whether a provision of a directive has already been recognized as conferring rights. This task is further complicated by Section 4(3) EU(W)A 2018, which specifies that the exclusions found in Section 5 EU(W)A 2018 apply here. A notable feature of Section 5 is that it excludes the EU Charter of Fundamental Rights from domestic law post-transition. The CJEU has, at times, relied on the Charter and a directive in tandem to reinforce its conclusion that a particular provision of a directive has a direct effect.[111] The consequences of this approach for the classification of a right as 'of a kind' already recognised by the CJEU or domestic courts remain uncertain.

The exclusion of the Charter also constitutes a significant departure from the general thrust of the withdrawal arrangements, which, as mentioned, are ostensibly about providing continuity and legal certainty. This abstention is also subject to the exceptions contained in Section 5 EU(W)A 2018, which preserves fundamental rights that exist independently of the Charter, and Schedule 1 which sets out that these principles, so long as recognised before the transition ended, can be used as principles of interpretation. As such, UK courts could continue to use EU general principles in order to interpret the meaning of provisions in retained EU law. While this is true, under Schedule 1 EU(W)A 2018, parties will no longer be able to assert in proceedings that EU general principles have been breached, inclusive of, but not limited to, fundamental rights.

It is clear, then, that there remain significant issues in determining the precise scope of 'retained EU law', with consequent implications for the scope of both retained EU case law and retained domestic case law, the definition of which depends on the underlying scope of retained EU law and which has attendant consequences for the continued influence of the CJEU in the interpretation of domesticated Union law. As such, while the Union now lacks legislative competence in the UK, save to the limited extent that EU legislation will continue to apply for example under the WF, the impact of Union law is likely to be felt in UK courtrooms for years to come.[112]

Retained EU law as a category was itself abolished from 31 December 2023, in accordance with the terms of the REULA 2023. Nevertheless, the above-discussed ambiguities concerning retained EU law will continue to cast doubt on the precise scope and content of

[110] Emily Hancox, 'Interpreting the Post-Brexit Legal Framework' (2021) 80 CLJ 428; s 6(6) EU(W)A 2018.
[111] Case C-214/16 *King* ECLI:EU:C:2017:914.
[112] Lazowski (n 10).

what is now to be known as 'assimilated EU law'. This Act modifies the relationship between retained EU law and domestic law while also repealing the preservation of (already domesticated) EU-derived concepts such as general principles, direct effect, and supremacy, albeit that pre-existing provisions will continue to apply to legal proceedings relating to events occurring prior to the end of 2023.[113] Ministers also have the power to amend or restate retained or assimilated EU law and may preserve pre-existing effects deriving from EU law, which could potentially include the general principles, direct effect, supremacy, or retained case law although without preserving those concepts within domestic law *per se*.[114]

The 2023 Act clearly falls well short of the wholescale removal of retained EU law that had been anticipated, with the general sunsetting of retained EU law now abandoned in favour of the more targeted repeal of specified legislative provisions.[115] Indeed, the requirement for the UK to comply with the Withdrawal Agreement can act as a constraint on the UK's ability to depart from pre-existing EU law—whether retained or assimilated—and which again preserves core constitutional concepts such as general principles in the interpretation of the Withdrawal Agreement.[116] Similarly, a decision to diverge from the standards of social and environmental rights protection provided for in the LPF of the TCA may lead to retaliation from the Union, thereby acting as a further barrier to departure from EU-derived rights.

Of particular relevance for the CJEU's influence over domestic law are those provisions introducing new mechanisms to facilitate departure from assimilated EU case law, which imply that the CJEU now has the status of a 'foreign' court in the UK and should therefore be treated as such, that is, its rulings will have persuasive effect only.[117] However, since the end of the transition period, the CJEU has been in the unusual position among such foreign courts of having its status of its case law explicitly articulated in primary UK legislation. Assimilated EU case law will also continue to provide an indirect role for EU constitutional concepts and thereby the CJEU's interpretation of such concepts. As such, the practical implications of any future departure from CJEU judgments can hardly be understated in light of the parallel development of post-exit CJEU case law.

The UK courts are particularly likely to continue to look to the CJEU for guidance on those legal fields that until now have been heavily influenced by EU law, such as employment law and competition law. However, they will lack a key mechanism to do so given that they will not be permitted to address a preliminary reference to the CJEU except in the field of citizenship rights and the WF, where references are permitted for cases arising beyond the transition period. Perhaps of greater significance will be the ongoing (domestic) interpretative effect of EU-derived concepts, with the domestic courts already having recognised that the fact that a measure was enacted to implement EU law is an important factor to consider within the wider interpretative matrix.[118]

In the same way as the UK must generally comply with its obligations under the Withdrawal Agreement, retained or assimilated EU case law must be interpreted in conformity with relevant separation agreement law, which thereby limits the ability of domestic courts to depart from assimilated case law.[119] Once fully enacted, the 2023 Act will add

[113] ss 3 and 5 REULA 2023.

[114] ss 9 and 11–16 REULA 2023; Explanatory Notes to the Retained EU Law (Revocation and Reform) Act 2023, para 52; ss 12 and 13 REULA 2023.

[115] s 1 REULA 2023.

[116] s 7C EU(W)A 2018.

[117] s 6 REULA 2023; the provisions in section 6 are due to be commenced from 1 October 2024: The Retained EU Law (Revocation and Reform) Act 2023 (Commencement No. 2 and Savings Provisions) Regulations 2024 (SI 2024/714).

[118] *E-Accounting Solutions Ltd (t/a AdvanceTrack) v Global Infosys Ltd (t/a GI Outsourcing)* [2023] EWHC 2038 (Ch) [13].

[119] s 6(6A) EU(W)A 2018.

another layer of complexity to the already complex interrelationship between domestic law and EU-derived sources. This is likely to enhance the judiciary's role in managing these ambiguities and in determining the relationship between different sources of law. The new procedure in the Act, which allows for references to higher courts relating to the departure from assimilated case law in cases of 'general public importance', also echoes elements of the CJEU's own system for preliminary references.[120]

All of this being said, there are likely to be very few instances of explicit conflict or contradiction between the interpretation of EU law adopted by the CJEU and the relevant domestic implementing legislation. One area where there has been tension between EU law and the approach favoured by the UK legislature can be found in the context of paid annual leave. This tension is well illustrated in *King*, a dispute that originated in the UK courts and concerned the retroactive payment of an allowance in lieu of annual leave that had either not been taken or had been unpaid.[121] UK law provided that workers are not entitled to 'carry over' periods of untaken leave into the next holiday year.[122] The CJEU found this rule to be incompatible with the right to paid annual leave in Article 7 of the Working Time Directive (WTD), which enjoys vertical direct effect, given that King was unable to benefit fully from his entitlement to annual leave and was dissuaded from taking such leave in the first place.[123] The CJEU's conclusion was reinforced by reference to Article 31(2) of the Charter, which recognises paid annual leave as a fundamental right and which has since been found to be horizontally directly effective.[124]

Cases such as *King* may well be decided differently by domestic courts given the gradual erosion of EU-derived concepts within the changed UK constitutional architecture represented by retained and now assimilated EU law.[125] The Working Time Regulations 1998, which implement the Working Time Directive into domestic law, clearly constitute retained EU law in accordance with Section 2 EU(W)A 2018. As 'assimilated' law in accordance with the terms of the REULA 2023, this legislation remains vulnerable to amendment or repeal. Furthermore, Section 2 REULA 2023 removes directly effective rights that had previously been preserved in accordance with Section 4 EU(W)A 2018, for example, Article 7 WTD, thereby compounding the removal of Article 31(2) of the Charter from domestic law which had already taken place under the 2018 Act, with the right to paid annual leave constituting an 'essential principle' of Union social law, but without necessarily having been elevated to the status of a general principle.[126]

It is only retained (assimilated) EU case law that survives relatively unscathed from the recent reforms, thereby preserving an ongoing, indirect role for the jurisprudence of the CJEU. The *King* case is illustrative of an area in which the domestic courts may well pursue a different interpretation to that adopted by the CJEU, particularly given the deregulatory bent of the 2023 Act, and in an area that is unlikely to affect trade or investment to the extent required to trigger the application of the LPF's remedial provisions. Domestic courts are, however, likely to depart from existing case law cautiously, despite the introduction of new procedures within the REULA 2023, with those courts perhaps continuing to acknowledge the 'unrivalled experience' of the CJEU and the 'highly persuasive' nature of its case

[120] s 6 REULA 2023.
[121] Case C-214/16 *King* ECLI:EU:C:2017:914.
[122] Reg 13(9) Working Time Regulations 1998 (SI 1998/1833).
[123] Directive 2003/88/EC [2003] OJ L299/9.
[124] Joined Cases C-569/16 and C-570/16 *Bauer and Willmeroth* ECLI:EU:C:2018:871.
[125] Lord Sales, 'EU Retained Law: Purposive Interpretation when the Constitutional Architecture Changes', Annual Lecture of the UK Association for European Law, 20 November 2023.
[126] Joined Cases C-569/16 and C-570/16 *Bauer and Willmeroth* ECLI:EU:C:2018:871 para 83.

law in addressing issues arising within the scope of assimilated EU law.[127] At the same time, the domestic courts will not automatically follow developments in CJEU case law, notably where that case law marks a departure from a pre-existing approach.[128] There has also already been judicial recognition of the fact that CJEU case law should be relied on within the domestic context only to the extent that they are directly relevant, and with the further caveat that EU-derived legal concepts might enjoy a different meaning within their new constitutional context, whether under the Withdrawal Agreement, TCA, or retained and assimilated EU law.[129] Domestic rulings have further demonstrated a willingness to depart from retained EU case law where the reasoning of the CJEU has been 'bald', or where there are only few decisions concerning a particular issue.[130] It remains to be seen whether a similar approach will be adopted in relation to the new tests for departing from assimilated case law adopted by the 2023 Act.

VI. CONCLUSION

This article has sought to examine the labyrinthine dispute resolution mechanisms encompassed by both the Withdrawal Agreement and TCA, shedding light on the esoteric constitutional issues arising from the post-Brexit dispute resolution system, while also considering the essential role of the CJEU within these frameworks. It is clear that the CJEU has a strong ongoing formal role, particularly with regard to aspects of the Withdrawal Agreement, despite the then UK Government's insistence that the Court's jurisdiction in the UK would end. It was also shown that the purported exclusion of the CJEU from the TCA sits uneasily with existing principles of EU constitutional law, including the CJEU's place as the body with responsibility for the interpretation and application of EU law.

The adjudication of post-Brexit disputes and the constitutional ramifications emanating from the intricate nexus between EU law and the CJEU's hermeneutics thereof require an ongoing constitutional role for the latter within the domestic legal order. As discussed, the topic of the CJEU's jurisdiction has regained prominence in deliberations concerning the applicability of EU law in Northern Ireland and the CJEU's role, culminating in the WF. This has added a whole new dynamic to the discussion about dispute resolution post-Brexit. Given the context of ongoing contention surrounding the new arrangements between the EU and the UK, it might have been thought that the post-Brexit mechanisms for resolving disputes between the Parties would be tested much earlier and perhaps much more frequently than initially foreseen. The breathing space required to negotiate the new settlement surrounding the WF has had the consequence that the new post-Brexit dispute resolution mechanisms remain largely unused. Similarly, recent domestic case law demonstrates the continued uncertainty surrounding the precise role of concepts of EU law, and thereby of the CJEU under the new EU–UK arrangements, an uncertainty that may be compounded by the recent change in government.[131]

Furthermore, the legacy effect of the CJEU as now mediated through domestic legal concepts such as assimilated EU law, will remain significant over the longer term. In essence, while the UK may now possess the authority to diverge from established EU regulatory standards, such departure may lead to the activation of the dispute resolution mechanisms

[127] *TuneIn Inc v Warner Music UK Ltd & Anor* [2021] EWCA Civ 441 [80], [91].
[128] *Tower Bridge GP Ltd v HMRC* [2022] EWCA Civ 998 [119].
[129] *TuneIn Inc v Warner Music UK Ltd & Anor* [2021] EWCA Civ 441 [183]; *R (on the Application of the IMA) v Home Secretary* [2022] EWHC 3274 (Admin) [132], [192].
[130] *Industrial Cleaning v Intelligent Cleaning Equipment* [2023] EWCA Civ 1451 [83], [85].
[131] *AT v SSWP* [2023] EWCA Civ 1307.

outlined in the TCA. Thus, the undeniable reality remains that the CJEU is poised to exert an ongoing (albeit at times indirect) regulatory and judicial influence within the UK legal order. In the intricate terrain of post-Brexit dispute resolution dynamics, there is little room for the logic of 'taking back control'. Instead, the enduring interplay between the pillars of sovereignty (autonomy) and cooperation (interdependence) will persist, with the indomitable presence of the CJEU casting its constant, looming shadow over the British constitution within this reconstructed post-Brexit context governing the plurality of sources of legal norms.

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