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How should financial governance disputes be resolved after Brexit?

Financial governance is complex and dynamic, and disputes between the UK and EU will inevitably emerge. How should they be resolved? Elizabeth Howell (LSE) sets out three possible models.

In the field of financial governance – the mechanisms that support the regulation and supervision of the financial markets – a number of UK/EU legal disputes may emerge post-Brexit. In a recent [article](#) in the Modern Law Review, I examine the UK's current track record at the European Court of Justice (CJEU) and explore some potential future challenges. The article then assesses the strengths and weaknesses of three different institutional models, including the associated design challenges that negotiators may encounter in the attempt to devise a post-Brexit dispute settlement system.



The Court of Justice of the European Union, Luxembourg. Photo: [Gwenael Piaser](#) via a [CC-BY-NC-SA 2.0 licence](#)

Recent legal challenges that the UK has brought to the CJEU have ranged from opposing caps on bankers' bonus to contesting short selling rules, and such cases highlight the propensity for disagreements to emerge in this highly dynamic area. With respect to future financial governance disagreements, possible challenges could include complaints in relation to the EU's third-country equivalence process, as well as in relation to the EU's legislative policy on the oversight of non-EU central counterparties (although technical, this sector matters greatly to the financial system as a whole).

The prospect of future legal disputes raises the connected question as to the appropriate forum for hearing such challenges. While arguments can be made for securing a central role for the CJEU in the short term (when many UK/EU disputes may directly relate to questions of EU law), over the longer term, it may be undesirable for the CJEU to be chosen as the final dispute resolution forum. A common feature of many international agreements is that they do not grant one party jurisdiction over the other in relation to dispute resolution.

Three alternative models are worth examining:

- The proposed bilateral Swiss/EU institutional framework
- the regional EFTA Court, particularly the possibility of the UK 'docking' at it (in essence, enabling the UK to access the EFTA Court without having to sign up for the full *acquis* of European Economic Area (EEA) law); and
- the international World Trade Organisation (WTO) resolution system.

Each has its own pluses and minuses, and all three bring a valuable perspective to this challenging debate.

The bilateral Swiss/EU situation is significant, as there are some notable similarities between the UK/EU and the Swiss/EU negotiations. First, Switzerland is neither an EU member state nor an EEA state. Next, for both the UK and the Swiss, the negotiations are not between equals; it is the pitting of the supranational EU club against a non/soon to be non-member. The geographical proximity of both countries to the EU also affects the negotiations: the closer the non-member, the greater the intensity of the relationship. Indeed, the EU has been witnesses [linking the granting of Single Market access rights to the political progress of the Swiss institutional negotiations](#). The EU is also taking care to treat the UK and Switzerland *pari passu*; it does not wish to set precedents for one jurisdiction that the other may then claim.

If a close future alliance emerges between the UK and EU, then the proposed Swiss/EU system for dispute resolution (which has a significant institutional role for the CJEU) could be utilised. Nonetheless, the innovative EFTA docking solution may be preferable, subject to building in the necessary adaptations. The EFTA model is more intricate, but it can also offer more leeway, including in relation to respecting the UK's stance on the CJEU. This route is relevant to investigate because it could include the UK securing a future bespoke agreement with the EU (rather than joining the EEA, the so-called 'Norway option') whilst granting the EFTA institutions a role in dispute resolution.

Ideologically, this could have attractions for the UK; EFTA is not a supranational institution and it has a different ethos focused on free trade rather than pursuing further political integration. Moreover, the EU has accepted the EFTA Court system, and has in the past offered it as a solution to the Swiss situation, suggesting this may be acceptable to the EU. At the same time, this model could hit political roadblocks given that EFTA generally follows the case law of the CJEU. There could also be jurisdictional complexities with respect to the applicability of the current EFTA model to equivalence disputes, although the mutual respect that has developed over the years between the EFTA Court and CJEU may mitigate these to an extent.

If the future negotiations deteriorate, however, then a looser arrangement that draws on the international WTO model may be the only realistic system on which to start designing a future dispute settlement system. The WTO has a well-developed, largely successful quasi-judicial system. This could be utilised in the UK/EU's future arrangements, including for financial governance disputes. Although the WTO is not a standard-setter and the question of market access rights to the EU would remain dependent (in the first instance) on the EU's third country frameworks, the WTO settlement mechanisms could provide a neutral system for settling future disputes.

There are limitations to this procedure, including how far the regime can engage in the review of particular EU/UK disputes concerning equivalence, yet the WTO may be open to policing denials or revocations with respect to whether these are compatible with WTO standards.

Moreover, although the WTO's Appellate Body faces existential challenges, a number of [functional solutions](#) have been mooted with a view to ensuring that it remains operational. While it remains unclear whether these will be sufficient, in principle such WTO mechanisms could be transferable in relation to future UK/EU disputes. Nevertheless, for the WTO system to have traction, astute political effort will also be required to persuade stakeholders of the merits of a 'new' international court having the jurisdiction to rule on aspects of UK policy.

This post represents the views of the author and not those of the Brexit blog, nor LSE.