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The UK-EU Withdrawal Agreement: dispute settlement and EU powers

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Summary

The UK-EU Withdrawal Agreement (WA) includes provisions for dispute settlement where the UK and EU disagree over the interpretation or application of the Agreement. An UK-EU Joint Committee has general oversight in relation to the implementation and application of the WA. Where there is a dispute, the UK and EU will initially seek to resolve it within the Committee. Where this is not possible, the dispute may be referred to an arbitration panel which can make binding rulings. The Court of Justice of the EU (CJEU) will provide interpretations of questions of EU law to the panel. Failure to comply can result in the imposition of a lump sum or ongoing penalty payment, and non-compliance would ultimately entitle the complainant to suspend certain treaty obligations or elements of other UK-EU agreements. This dispute settlement process will come into operation after the end of the post-Brexit transition period (31 December 2020).

During the transition period, EU law and the powers of EU institutions and bodies apply to the UK as if it remains an EU Member State. The WA also extends these powers to apply in relation to alleged breaches of the WA during the transition period. It was on this basis that the European Commission launched infringement proceedings against the UK on 1 October 2020 in relation to an alleged breach of the WA. This followed the Government's introduction of the Internal Market Bill in 2020 which includes provisions enabling the Government to disapply elements of the WA Protocol on Ireland/Northern Ireland.

Following the end of the transition period, the CJEU will have jurisdiction in a limited set of areas. This includes over cases that were ongoing before the end of the transition period. It will also have jurisdiction to give rulings relating to the WA citizens' rights provisions for a further eight years. EU institutions and bodies will also have powers in relation to certain provisions of the Protocol on Ireland/Northern Ireland.

1. Introduction

Arrangements relating to the UK's exit from the EU are covered by the Withdrawal Agreement (WA) agreed by the UK Government and EU in October 2019. The WA was ratified by both the UK and EU in the days leading up to the UK's withdrawal from the EU on 31 January 2020, and came into force immediately following the UK's exit.

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The WA provides for a transition period, during which EU law (with a few exceptions) continues to apply to the UK, and the UK remains part of the EU Single Market and Customs Union.¹ The transition period ends on 31 December 2020. The WA establishes a Joint UK-EU Committee to oversee the implementation of the Agreement. It has a number of decisions it needs to take before the end of the transition period, in order to implement arrangements envisaged by the WA. These include tasks relating to the implementation of the WA Protocol on Ireland/Northern Ireland (See Commons library briefing paper 8996, [The UK-EU Withdrawal Agreement Joint Committee: functions and tasks](#)).

In September 2020, the UK Government introduced the Internal Market Bill which included controversial clauses which would enable the Government to disapply parts of the Protocol on Ireland/Northern Ireland. This led to the launch of infringement proceedings by the European Commission against the UK for a breach of the WA. The WA enables the European Commission to bring infringement proceedings and refer potential breaches of EU law to the Court of Justice of the EU (CJEU), as if the UK is a Member State, until the end of the transition period (and for four years after the end of transition period for breaches committed before the end of the transition period). It also extends this power to apply in relation to alleged breaches of the WA during the transition period.

The WA also establishes a dispute settlement process for where the UK and EU disagree over the interpretation or application of the Agreement, but this comes into operation after the end of the transition period.

In the meantime, the UK and EU have been in formal negotiations over their future relationship since March 2020 with the aim of having new arrangements in place on 1 January 2021.² These negotiations are ongoing, but will need to be concluded in the Autumn to also provide time for the EU's internal processes prior to ratification. If the EU and UK do not resolve their disagreement over the provisions of the Internal Market Bill then it is unlikely that agreement will be reached on the future relationship in time for the end of the transition period. Alternatively, progress in both the Joint Committee discussions on implementation of the Northern Ireland Protocol and the EU-UK future relationship negotiations could enable a resolution of the disagreement over the Bill's provisions. The Internal Market Bill and EU proceedings in relation to it are discussed in more detail in section 5.

The dispute settlement process established by the WA is discussed in section 2 below. The ongoing role of EU institutions and CJEU jurisdiction in relation to the UK both before and after the end of the transition period is discussed in sections 3 and 4.

2. The dispute settlement process

Part Six of the WA covers institutional and final provisions. These include provisions relating to:

- i) Consistent interpretation and application of the agreement, including the ongoing jurisdiction of the CJEU in certain specified areas (Title I);

¹ See House of Commons Library Insight, [Brexit next steps: The transition period](#), 31 January 2020.

² See House of Commons Library Insight, [UK-EU future relationship: Can a deal be reached in time?](#), 1 September 2020

- ii) Institutional provisions, including the establishment of a Joint Committee to oversee the implementation of the WA (Title II); and
- iii) Dispute settlement, including an arbitration process if the Joint Committee is unable to resolve a dispute (Title III).

2.1 The Joint Committee

The Joint Committee has responsibility for “implementation and application” of the Agreement (Article 164). It is co-chaired by the UK and the EU. The Chancellor of the Duchy of Lancaster, Michael Gove, co-chairs for the UK (with the Paymaster General, Penny Mordaunt, as his alternate). European Commission Vice-President Maroš Šefčovič co-chairs for the EU. The Committee’s decisions are taken by “mutual consent”, meaning both sides need to agree.

There are six ‘Specialised Committees’ that sit below the Joint Committee. These include committees covering citizens’ rights, financial provisions and the Protocol on Ireland/Northern Ireland. Only the Joint Committee can take binding decisions, but these specialised committees can make recommendations or draw up draft decisions for the Joint Committee.

Where there is a dispute regarding the interpretation or application of the Agreement, the WA states that the EU and UK will endeavour to resolve the dispute “by entering into consultations in good faith, with the aim of reaching a mutually agreed solution”. Where either the UK or EU wish to commence consultations in relation to a dispute, they will provide written notice to the Joint Committee (Article 169).

2.2 The arbitration procedure

Disputes that cannot be resolved in the Joint Committee may be referred to an arbitration panel. The arbitration arrangements are set out in Articles 170 to 181 of the WA. As with all the institutional provisions of the WA, these provisions remained unchanged in the final text from the version of the WA agreed by Theresa May’s Government and the EU in November 2018. However, these provisions differed from an earlier version of the text put forward by the EU in March 2018 (which the UK Government did not agree with) which involved referral of unresolved disputes by the Joint Committee to the CJEU rather than an arbitration panel. The role of the CJEU in the Title III arbitration process is limited in the final WA text to providing interpretations of EU law. Professor Steve Peers of the University of Essex suggests that the dispute settlement provisions in the WA are “broadly similar” to the dispute settlement rules of the World Trade Organization (WTO).³

Establishment of arbitration panel

Article 170 of the WA provides that if no mutually agreed solution has been reached in the Joint Committee within three months following a request by either party for consultations in relation to a dispute, then either party can request the establishment of an arbitration panel. The request will be made in writing to the other party and to the International Bureau of the Permanent Court of Arbitration (PCA).⁴ If mutually agreed, the dispute can be referred to the arbitration panel within the first three months of dispute consultations being initiated.

³ Steve Peers, [Analysis 3 of the Revised Brexit Withdrawal Agreement: Dispute settlement](#), *EU Law analysis blog*, 18 October 2019.

⁴ The PCA is an international organisation established in 1899 to facilitate arbitration and other forms of dispute resolution between states. [122 states](#) have acceded to one or both of the PCA’s founding conventions.

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Article 171 of the WA sets out how the arbitration panel should be established. The Joint Committee should adopt a list of 25 persons able to serve on an arbitration panel by the end of the transition period (31 December 2020). The UK and EU will each propose ten and they will jointly propose five persons to act as panel chairs.

The panel members should be independent from and not hold positions in or serve under the UK Government, EU institutions and EU Member State governments. Article 171 (2) specifies that they should have qualifications required to hold the highest judicial office in their respective countries or “jurisconsults of recognised competence” and should be experts in EU law and public international law.

An arbitration panel should be established within 15 days of a request to establish one. The panel will have five members: two each from the UK and EU listed nominees, and one from the list of jointly proposed chairs. The members of the panel select the chair. Where they cannot agree on a chair within 15 days, the UK or EU can ask the secretary-general of the PCA to select the chair by lot.

The list of possible arbitration panel members should be adopted by the Joint Committee by the end of the transition period. But if the list has not been adopted when the establishment of an arbitration panel has been requested, then the UK and EU will nominate two persons each to serve on the panel. A chair would then be mutually agreed. If there is no agreement on a chair, the secretary-general of the PCA will propose a chair after consulting the UK and EU. This person will be appointed unless the UK and EU object within five days.

In the event of a failure to constitute an arbitration panel within three months of a request to establish one, the secretary-general of the PCA can appoint the panel if requested to do so by either the UK or EU.

The arbitration panel’s deliberations

The arbitration panel will give its ruling on the dispute within 12 months of being established (Article 173). If it is unable to do so, the chair will notify the two sides in writing and explain why. The UK or EU can also submit a request for the case to be considered urgent. If the panel agrees on the urgency of the case, it will “make every effort” to rule within six months.

The arbitration panel will “make every effort” to take decisions by consensus. Where it cannot reach a consensus, a majority vote will be taken. But dissenting opinions will not be published. Rulings will be binding on the UK and EU. The reasoning behind any findings and conclusions will be set out in rulings. Rulings will be made publicly available “subject to the protection of confidential information” (Article 180).

The independence of the arbitration panel members and their deliberations is emphasised in Article 181. It states that they “shall not take instructions from any organisation or government”. A code of conduct is set out as part of a separate annex to the agreement (Part B of Annex IX).

Rules of Procedure on dispute settlement are also set out in Annex IX to the WA. This contains substantial further details on rules of communication between parties and arbitration panels; the appointment and replacement processes of panellists; payment of panellists; and the general operation of the actual panels, including how hearings are to be set up and structured. The Code of Conduct in Part B sets out the steps that panel members must follow to prove their independence (e.g. disclose any associations or interests that may impact on their impartiality, and how they intend to carry out their arbitral duties with both diligence and independence).

The role of the CJEU in arbitration

Under Article 174, where any dispute between the parties involves questions regarding the interpretation of concepts or provisions of EU law, the arbitration panel must refer questions regarding that interpretation to the CJEU. The CJEU's ruling on the matter will be binding on the arbitration panel.⁵

Either the UK or EU can also submit a request to the arbitration panel to refer a matter to the CJEU if they think it relates to a question of interpretation of EU law. In such cases, the arbitration panel will need to agree that it relates to a question of interpretation of EU law before referring the matter to the CJEU.

The time limits applicable to arbitration are suspended where a reference to the CJEU has been made. The arbitration panel must await the CJEU's ruling and is required to give a ruling only after 60 days have passed following receipt of the CJEU's ruling.

The panel also refers the matter to the CJEU if the dispute relates to a question of whether the UK has complied with a CJEU judgment relating to a case brought before the end of the transition period. The CJEU continues to have jurisdiction in relation to the UK, as if it is a Member State, during the transition period (Article 131). Its judgments continue to have binding force in such cases brought before the end of the transition period, even if the judgment is not handed down until after the end of the transition period (Article 89) (see section 3 below).

The arbitration panel's ruling and compliance

Article 175 stipulates that the arbitration panel's rulings are binding on the EU and UK, and that both parties "shall take any measures necessary to comply in good faith with the arbitration panel ruling".

Where the panel has ruled in favour of the party making the complaint (the complainant), the other party (the respondent) should notify the complainant within 30 days of notification of the time it considers it will require to comply with the ruling. If there is disagreement between the parties over how long is needed to comply, the complainant can request the arbitration panel determine what a "reasonable period of time" for compliance will be. Any such agreed period can be extended if the parties mutually agree (Article 176).

Where the complainant considers that the respondent has failed to comply with the arbitration panel ruling, it can ask the panel to rule on this. Here too there is an obligation to refer questions about the interpretation of EU law to the CJEU (Article 177).

Remedies for non-compliance

Where a panel finds that the respondent did not comply with the panel ruling in a reasonable period of time, Article 178 sets out what "temporary remedies" exist for the complainant. The complainant can ask the panel to impose a "lump sum or a penalty payment" on a non-complying respondent; the panel will determine the seriousness of the breach of obligations and the duration of any non-compliance when setting such a sum or payment.

If the sum or payment has not been paid one month after the arbitration panel has determined it, or if the respondent persists in not complying with the panel's ruling on the dispute six months after the initial ruling then Article 178(2) provides that the complainant

⁵ A Joint Committee as a non-EU body would not, in the words of the CJEU in [Opinion 1/91 on the EEA Agreement](#), be able to "interpret provisions in substance identical to EU law". In this case, a Joint Committee could not make decisions which may have any effect on the application or interpretation of EU jurisprudence or restrict the CJEU's interpretation of rights within the Treaties.

would then be entitled to suspend any part of the WA temporarily, except Part Two (citizens' rights provisions). It can also suspend parts of any other agreement between the UK and the EU (under conditions set out in that agreement).

The complainant would need to notify its intended action to suspend parts of the WA or other agreements to the respondent. Any suspension of agreement provisions would need to be "proportionate to the breach of obligation concerned". The respondent can request a further ruling from the arbitration panel if it thinks the suspensions of obligations is disproportionate.

The suspension of obligations is intended to be temporary and must be applied "only until any measure found to be inconsistent with" the WA has been withdrawn or amended, or until the EU and the UK "have agreed otherwise to settle the dispute" (Article 178(2)).

Article 179 provides for a review of any action taken to suspend treaty obligations following non-compliance with an arbitration panel ruling. The respondent will notify the complainant of any measures taken to comply and can request an end to the suspension of obligations or to any ongoing penalty payment. If the two parties do not agree on whether the respondent has now complied with the original ruling, then either party can request that the arbitration panel again rule on the matter.

If the arbitration panel finds that the respondent has now complied, the complainant is then obliged to terminate the suspension of obligations. The penalty payment shall also be terminated. Here too, if issues of interpretation of EU law arise, the arbitration panel must refer them to the CJEU. The suspension of treaty obligations and the penalty payment should also be terminated if the complainant has not asked the arbitration panel to rule within 45 days of the respondent notifying of its compliance and requesting these be terminated.

3. The transition period

The dispute settlement process set out in Part Six, Title II of the WA will not come into operation until after the end of the transition period (Article 185).⁶ As set out in Part Four of the WA, during the transition period EU law will continue to apply to the UK, with a few exceptions (Article 127). The EU institutions, including the CJEU will continue to exercise their powers in relation to the UK. In particular, the CJEU will have jurisdiction in relation to the UK as if it were a Member State, as provided for in the EU Treaties. The powers of EU institutions and bodies, including CJEU jurisdiction, will also apply in relation to interpretation and application of the WA (Article 131).

This means that the European Commission will continue to be able to bring infringement actions of the kind referred to in Article 258 TFEU. Both the Commission and Member States can bring a case to the CJEU where they consider a Member State has failed to fulfil an obligation under the EU Treaties (Articles 258 and 259 TFEU), and the CJEU can ultimately impose financial penalties (Article 260 TFEU) (see box 1). The WA allows them to use these powers in relation to the UK during the transition period for an alleged breach of the WA. The Commission used these powers to initiate infringement proceedings against the UK on 1 October for an alleged breach of the WA (see section 5).

⁶ Article 185 on the entry into force and application of the WA specifies that these provisions will apply from the end of the transition period.

Member States and EU institutions can also bring cases to the CJEU challenging the legality of EU actions and the CJEU can declare such actions void (Articles 263 and 264 TFEU). Furthermore, the CJEU has the jurisdiction to give preliminary rulings concerning the interpretation of the EU Treaties and the validity and interpretation of acts of the EU institutions and bodies. Courts in the Member States can request rulings from the CJEU on such matters (Article 267 TFEU).⁷

The UK will be treated as if it were a Member State in relation to the above matters during the transition period. Under Article 127(6) of the WA references to Member States in EU law are understood to include the UK apart from a few exceptions⁸

Box 1: EU infringement procedure

Under Article 131 of the WA, the powers of the EU institutions and bodies will continue to apply to the UK during the transition period. These will also apply in relation to interpretation and application of the WA.

This means that the power of the European Commission to bring infringement proceedings of the kind set out in Article 258 of the Treaty on the Functioning of the EU (TFEU) will apply.

Under the infringement procedure, if the Commission considers that a Member State (including the UK during the transition period) has failed to fulfil an obligation under the EU Treaties (or the WA in the case of the UK during the transition period) it may send a letter of formal notice to the State concerned requesting further information. The State is requested to send a detailed reply within a specified period, usually two months. If the Commission concludes that the State is failing to fulfil its obligations under EU law, it may send a reasoned opinion: a formal request to comply with EU law. It requests that the State inform the Commission of the measures taken, within a specified period, usually two months. If the State still doesn't comply, the Commission may decide to refer the matter to the CJEU.

Under Article 260 TFEU, where the CJEU finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take necessary measures to comply with the judgement of the Court. Where the Commission considers that the State has not complied with the judgement it can bring the case before the CJEU again and specify a [lump sum and/or penalty payment](#) (an ongoing payment for periods of non-compliance calculated on the basis of a [daily rate](#)) to be paid by the non-complying State.⁹ The CJEU will then rule on whether or not the State has complied and may impose a lump sum or penalty payment on the State concerned.

4. CJEU jurisdiction after the transition period

Part Three of the Withdrawal Agreement covers separation provisions, intended to allow ongoing process at the end of the transition period to come to an orderly end. Title X covers ongoing union judicial and administrative procedures. It provides that the CJEU will continue to have jurisdiction in any proceedings brought by or against the UK before the end of the transition period (Article 86).

If the European Commission considers that the UK has failed to fulfil an obligation under the EU Treaties or under Part Four of the WA (the transition provisions) before the end of the transition period, the European Commission can bring the matter before the CJEU in the four years after the end of the transition period (Article 87).

⁷ See Commons Library Insight, [Brexit next steps: The Court of Justice of the EU and the UK](#), 7 February 2020.

⁸ See section 5 of Commons Library briefing paper 8453, [The UK's EU Withdrawal Agreement](#)

⁹ Article 260 TFEU states that the CJEU can specify a lump sum or penalty payment. But both a lump sum or penalty payment can be levied. This occurred for the first time in [Case C-304/02 Commission v French Republic](#) when the CJEU ordered France to pay *both* a lump sum fine and a periodic payment for a serious and persistent failure to comply with EU law

Judgments of the CJEU handed down before the end of transition period, and judgments after the end of the transition period in cases related to the UK brought before the end of the transition period, will have binding force in the UK. The UK is expected to take measures to comply with any such judgments (Article 89).

As well as its role in the dispute settlement arbitration process and continuing role in cases launched before the end of the transition period, the WA also provides for continuing CJEU jurisdiction over the UK in a limited set of areas after the end of the transition:

Citizens' rights

In relation to Part Two of the WA (covering citizens' rights), UK courts can refer questions about the interpretation of these provisions to the CJEU for a preliminary ruling for a period of eight years following the end of transition (Article 158). UK courts will be required to comply with the interpretation of the EU law provided by the CJEU in its judgment and apply this to resolving the question before the UK court.

Financial provisions

The CJEU will continue to be able to rule on infringement proceedings and have jurisdiction to give preliminary rulings in relation to the UK, as if it were a Member State, in relation to the interpretation and application of EU law referred to in aspects of the financial provisions in Part Five of the WA (Article 160). These relate to: i) EU law relating to own resources until 2020 (Article 136); and ii) EU law relating to the implementation of EU programmes under the 2014-2020 Multiannual Financial Framework (MFF) or previous frameworks (Article 138(1) or (2)).

Protocol on Ireland/Northern Ireland

EU institutions and bodies have powers after the transition period in relation to certain provisions of the Protocol. Article 12(4) of the Protocol states that EU institutions and bodies shall have "the powers conferred upon them by Union law" in relation to Article 12 (2), Article 5 and Articles 7 to 10 of the Protocol. These cover exchange of information; the provisions on customs and movement of goods relating to Northern Ireland; technical regulations, VAT and excise law, electricity markets, and state aid law as applicable to Northern Ireland. Article 12 (4) specifies that in particular, the CJEU shall have the jurisdiction provided for in the EU Treaties in relation to these provisions. UK courts will also be able to seek preliminary rulings from the CJEU regarding the interpretation of these provisions in the same way and under the same conditions as Member State courts. Article 12 (5) specifies that EU acts adopted in relation to these provisions will have the same effect in relation to the UK as they would in the Member States of the EU.

Under Article 10 (1) of the Protocol EU state aid law shall apply to the UK "in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol." Under EU state aid laws, the European Commission has strong powers to assess and declare whether state aid is compliant with EU law

Article 13 (2) of the Protocol also provides that the provisions of the Protocol referring to EU law shall be interpreted in conformity with the caselaw of the CJEU. This would also include caselaw after the end of the transition period.

Article 13 (3) provides that where the Protocol makes reference to an EU act, that the reference should be understood as also referring to any amendments or replacements to that act. In addition, under Article 13 (4) where the EU adopts new acts that also fall within the scope of the Protocol, the Joint Committee is expected to take decisions to either incorporate the act in the list of acts covered by the Protocol or examine other

possibilities to maintain the good functioning of the Protocol. Where the Joint Committee is unable to reach a decision in this regard, the EU will be entitled to take “appropriate remedial measures”.¹⁰

Protocol relating to UK sovereign bases in Cyprus

As with the Protocol on Ireland/Northern Ireland, EU institutions and bodies have powers after the transition period in relation to provisions of the Protocol on UK sovereign bases in Cyprus.

Article 1 of the Protocol provides that the provisions of this Protocol when referring to concepts or provisions of EU law should be interpreted and applied in conformity with CJEU caselaw. This would also include caselaw after the end of the transition period.

Article 12 provides that EU institutions and bodies “shall have the powers conferred upon them by Union law in relation to this Protocol and provisions of Union law made applicable by it” in respect of the Sovereign Base Areas in Cyprus and persons residing or established in them. The CJEU shall have the jurisdiction provided for in the EU Treaties in relation to this Protocol, and EU acts will have the same legal effects in the Sovereign Base Areas as it does in the EU Member States.¹¹

Direct effect of the WA and references to EU law by UK courts

More broadly Article 4 of the WA provides that WA provisions should have primacy and direct effect in UK law, in the same way that provisions of EU law had primacy and direct effect in UK law during UK membership of the EU (and in the transition period). Direct effect applies where the WA provisions are clear, precise and unconditional.¹² The significance of the WA having direct effect in UK law is that its provisions can be relied upon directly before UK courts. This part of the WA is given effect by section 7A of [the EU \(Withdrawal\) Act 2018](#).¹³ Section 7A gives supremacy and direct effect to the relevant provisions of the WA (and any EU law rendered applicable to the UK by the Withdrawal Agreement) in much the same way as the EU Treaties were granted supremacy and direct effect by the [European Communities Act 1972](#), when the UK was a Member State.

Under Article 4 (4) of the WA UK courts will be under a duty to interpret references to EU law in the WA in line with judgments of the CJEU made before the end of the transition period. Article 4(5) requires that judgments of the CJEU handed down after the end of transition should be given “due regard” by UK courts when interpreting and applying the WA. As noted above, Article 13 of the Protocol on Ireland/Northern Ireland and Article 1 of the Protocol on UK sovereign bases in Cyprus go beyond this in requiring conformity with CJEU caselaw (in relation to these Protocols) both before and after the end of the transition period.

¹⁰ For more details on the Protocol on Ireland/Northern Ireland see Commons Library briefing paper 8713, [The October 2019 EU UK Withdrawal Agreement](#)

¹¹ See Steve Peers, [Analysis 3 of the Revised Brexit Withdrawal Agreement: Dispute settlement](#), *EU Law analysis blog*, 18 October 2019, for annotation of WA provisions relating to dispute settlement and continuing CJEU jurisdiction.

¹² These criteria were first established by the CJEU in [Case 26/62 Van Gend en Loos v Nederlandse Administratie der Belastingen ECLI:EU:C:1963:1](#)

¹³ Inserted by Section 5 of the [European Union \(Withdrawal Agreement\) Act 2020](#).

5. The Internal Market Bill: EU begins infringement proceedings against UK

On 1 October 2020, the European Commission began a formal infringement process against the UK for an alleged breach of its obligations under the WA. This followed the Government's introduction of the Internal Market Bill in the House of Commons on 9 September.

5.1 The Internal Market Bill

The UK legislation, if adopted, would give UK Ministers powers to prevent the application of, and unilaterally reinterpret and disapply parts of the Protocol of Ireland/Northern Ireland. It also includes a clause (Clause 45) stating that these powers will be regarded as legally effective notwithstanding any incompatibility or inconsistency with "any relevant international or domestic law". With regard to the relevant powers in the Bill, this clause also disapplies Section 7A of the [EU \(Withdrawal\) Act 2018](#) which gives effect to Article 4 of the WA in UK law (Article 4 providing for the primacy and direct effect of the WA in UK law).¹⁴

5.2 EU requests that UK withdraws measures in Bill

At the request of the EU, an extraordinary meeting of the WA Joint Committee was held on 10 September to discuss the Bill and its repercussions. Following the meeting, the European Commission issued a [statement](#), describing clauses in the Bill relating to the application of the Northern Ireland protocol as (if they became law) "an extremely serious violation of the Withdrawal Agreement and of international law". The Commission said this would "undermine trust and put at risk the ongoing future relationship negotiations".

The Commission said that if adopted as proposed, the draft bill would be in clear breach of substantive provisions of the Protocol: including Article 5 (3) and (4) and Article 10 relating to custom legislation and State aid. It said the legislation would also breach the direct effect of the WA (Article 4) and the "good faith" obligation of the WA (Article 5) given that it would jeopardise the attainment of the objectives of the WA.

Commission Vice-President Maroš Šefčovič (the EU co-chair of the Joint Committee) called on the UK government to withdraw these measures from the draft Bill "by the end of the month" and said that he had reminded the UK that the WA "contains a number of mechanisms and legal remedies to address violations of the legal obligations contained in the text – which the European Union will not be shy in using".¹⁵

On 11 September Mr Šefčovič sent a [letter](#) to the UK co-chair of the Joint Committee Michael Gove. The letter described the Bill as a "clear and explicit violation of both the letter and the spirit" of the WA and in particular the Protocol on Northern Ireland/Ireland and the "good faith" clause (Article 5). He restated the EU position that the UK should urgently withdraw the measures and that this be done by the end of the month "in order to be able to restore trust and engage in our bilateral discussions in the framework of the EU-UK Joint Committee".

¹⁴ For further detail of the Internal Market Bill see Commons Library briefing paper 9003, [United Kingdom Internal Market Bill 2019-21](#)

¹⁵ European Commission, [Statement by the European Commission following the extraordinary meeting of the EU-UK Joint Committee](#), 10 September 2020.

On 22 September, Mr Šefčovič said that the EU was “studying all legal options on the table” if the UK did not withdraw the measures.¹⁶ In a statement following the Joint Committee meeting on 28 September, the UK Government said that the measures would not be withdrawn.¹⁷ The Internal Market Bill completed its [House of Commons stages](#) on 29 September. It not expected to be considered in the House of Lords any earlier than mid-October.

5.3 EU issues formal notice to UK

In a [statement](#) on 1 October, the European Commission President Ursula von der Leyen referred to the Commission’s request to the UK to remove the “problematic” parts of the Internal Market Bill by the end of September. She said the draft Bill was “by its very nature a breach of the obligation of good faith laid down in the Withdrawal Agreement” and if adopted in its current form would be “in full contradiction to the Protocol on Ireland/Northern Ireland”. As the deadline had lapsed the previous day and the problematic provisions not been removed, she said that the Commission had decided that morning to send a letter of formal notice to the UK. She said that this was the first step in an infringement procedure. The letter invites the UK to send its observations within a month. She said the Commission would continue to work hard towards a full and timely implementation of the WA.

The Commission’s press notice on the launch of the infringement process refers to a breach of the UK’s obligations under Article 5 of the WA. This Article states that the EU and the UK “must take all appropriate measures to ensure the fulfilment of the obligations arising from the Withdrawal Agreement, and that they must refrain from any measures which could jeopardise the attainment of those objectives”. They should also co-operate “in good faith” in carrying out the tasks stemming from the WA.

The Commission said that the UK has until the end of October to submit its observations to the letter of formal notice. After examining these observations, or if no observations have been submitted, the Commission “may, if appropriate, decide to issue a Reasoned Opinion”.¹⁸

The press notice also referred to the provisions in the WA giving the CJEU full jurisdiction and the European Commission its powers as under the EU Treaties in relation to the UK during the transition period, also as regards the interpretation and application of the WA (Article 131). As explained in section 3 this means that the European Commission continues to be able to bring infringement actions against the UK, in relation to compliance with both EU law and the WA.

Possible next steps

The Times reported on 10 September that internal advice from the European Commission’s legal service said the Commission could initiate such proceedings against the UK for breach of the Article 5 good faith obligations before the Bill is adopted. The legal advice also refers to the CJEU’s powers to impose a lump sum or penalty payment following such proceedings. However, it notes that “given the length of the pre-litigation

¹⁶ *Financial Times*, [Brussels renews legal threat over UK internal market bill](#), 22 September 2020.

¹⁷ UK Government, [Meeting of the Withdrawal Agreement Joint Committee on 28 September](#), 28 September 2020.

¹⁸ European Commission, [Withdrawal Agreement: European Commission sends letter of formal notice to the United Kingdom for breach of its obligations](#), 1 October 2020.

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phase, it is unlikely that the case against the UK can be brought to the court before the end of the year”.¹⁹

As noted in section 3, following the formal notice, the Commission can then issue a “reasoned opinion” if it still considers that the UK is in breach of its obligations. The reasoned opinion must set out a detailed statement of the reasons why the Commission considers the UK is in breach and it will specify a date for compliance. There is [usually a deadline of two months to comply](#). Following this, the Commission may decide to refer the matter to the CJEU. Steve Peers explains that the Commission could ask the CJEU to fast track the case, which could otherwise take 12-18 months.²⁰

The Commission legal advice also refers to the WA’s dispute settlement mechanisms, which can also result in financial penalties and ultimately suspension of treaty obligations. As noted above, these mechanisms will be operational following the end of the transition period.

On 22 September, Ireland’s Foreign Minister Simon Coveney suggested that the pause between the Commons’ and Lords’ stages of the Bill would provide a window of opportunity for the UK and EU to address the issues that the controversial Bill clauses propose to deal with (relating to checks on goods moving from Northern Ireland to Great Britain and the application of EU state aid rules in Northern Ireland). He said if the UK and EU were successful in negotiating a free trade agreement over the coming weeks this would make the legislation irrelevant.²¹ This hints at a scenario, also mooted by a number of [commentators](#), whereby progress in agreeing a UK-EU free trade deal to come in force at the end of the transition period would lead to the UK Government dropping the clauses from the Bill prior to or during the House of Lords stages. Katy Adler of the BBC [reported](#) on 1 October that the EU was also hoping for such a scenario, also aided by progress in the Joint Committee on implementing the Northern Ireland protocol. Mr Coveney has said there will be no agreement on the future UK-EU relationship if the Internal Market Bill measures are not withdrawn.²² France’s Europe Minister Clement Beaune [expressed the same view](#) on 1 October.

¹⁹ *The Times*, [EU threatens sanctions in row over Brexit withdrawal treaty breaches](#), 10 September 2020.

²⁰ See [twitter thread](#) by Steve Peers on 1 October 2020 which discusses the possible steps in the infringement process.

²¹ RTÉ, [Opportunity to address Brexit legislation concerns – Coveney](#), 22 September 2020.

²² Irish Examiner, [Simon Coveney: No Brexit deal if Britain threatens to undermine previous agreements](#), 11 September 2020.

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