

15 January 2018

TF50 (2018) 22 – Commission to EU 27

Subject: Internal EU27 preparatory discussions on the framework for the future relationship: "Governance"

Origin: European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU

Remarks: These slides are for presentational and information purposes only and were presented to the Council Working Party (Article 50) on 11 January 2018. The contents are without prejudice to discussions on the framework of the future relationship.

Published on the TF50 website on 15 January 2018

Internal preparatory discussions on
framework for future relationship

Governance

AD HOC WORKING PARTY ON ARTICLE 50 (*Seminar mode*)

11/01/2018

A. Introduction

I. The three components of governance of an international agreement

II. The relevant legal instruments to be covered

III. Basic legal requirements flowing from ECJ case law

I. The three components of governance of an international agreement

1. Ongoing management / supervision:

Joint Committee



2. Dispute settlement

Political (Joint Committee)

Judicial (Arbitration)



3. Enforcement after dispute settlement

Sanctions



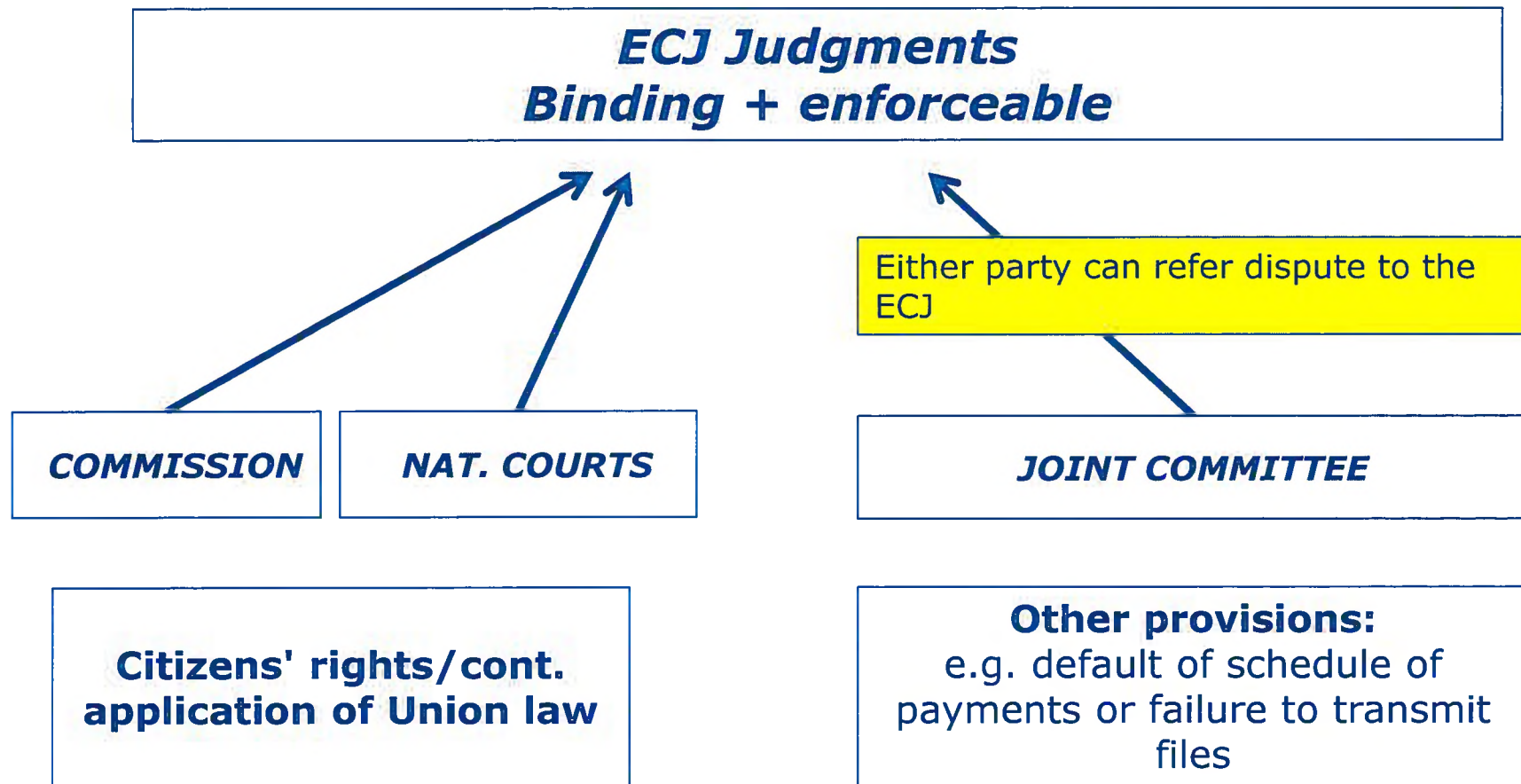
II. The relevant legal instruments to be covered

1. The Withdrawal Agreement

- Overall governance of Withdrawal Agreement
- Special governance for citizens' rights chapter
- Other separation issues
- Special governance in case of a transition period: normal rules pursuant to Articles 258 et seq. TFEU

Overall governance of the Withdrawal Agreement

(Principles Paper on Governance, July 2017)



Special governance for citizens' rights chapter (Joint Report, Dec. 2017, § 37-41)

CJEU	<ul style="list-style-type: none">• UK Courts shall have due regard to relevant decision of the CJEU after the specified date.• Mechanism enabling UK courts or tribunals to decide, having had due regard to whether relevant case-law exists, to ask the CJEU questions of interpretation of those rights where they consider that a CJEU ruling on the question is necessary for the UK court or tribunal to give judgment in a case before it (mechanism available for litigation brought within 8 years).
Other mechanisms	<ul style="list-style-type: none">• Exchange of case law between the courts and regular judicial dialogue.• Cross interventions (for the UK government before the CJEU, for the Commission before UK courts).
Implementation and application	<ul style="list-style-type: none">• In the UK, this role will be fulfilled by an independent national authority; its scope and functions, including its role in acting on citizens' complaints, will be discussed between the parties in the next phase of the negotiations and reflected in the Withdrawal Agreement.

III. Basic legal requirements flowing from ECJ case law (1)

- An agreement with judicial bodies in principle possible – but constraints:
- Dispute settlement may not bind EU, internally, to a particular interpretation of EU law
- Judicial body may not interpret provisions in substance identical to EU law
- Joint Committee decisions must not affect ECJ case-law


III. Basic legal requirements flowing from ECJ case law (2)

- No powers to rule on respective competences of EU and Member States
- No organic links (no judges sitting in double capacity)
- ECJ rulings must be binding

B. Ongoing management and supervision: Joint Committee (I)

CETA – Joint Committee

Tasks

- Responsible for all questions concerning trade and investment between the Parties and the implementation and application of CETA.
- Supervises and facilitates the implementation and application of CETA and furthers its general aims; supervises the work of all specialised committees and other bodies established under CETA.
- Seeks appropriate ways and methods of preventing problems, or of resolving disputes regarding the interpretation or application of CETA.
- Is informed of  Dispute Settlement


Powers

- Delegate responsibilities to the specialised committees.
- Consider or agree on amendments as provided in CETA.
- Adopt interpretations of the provisions of this Agreement, which shall be binding on dispute settlement bodies.
- Take such other action in the exercise of its functions as decided by the Parties.

B. Ongoing management and supervision: Joint Committee (II)

Ukraine DCFTA – Association Council

Tasks

- Supervises and monitors the application and implementation of the DCFTA. It examines any major issues arising under the DCFTA and any other bilateral or international issues of mutual interest.
- Forum for exchange of information on Union and Ukrainian legislative acts, both under preparation and in force, and on implementation, enforcement and compliance measures.
- Role in  Dispute Settlement


Powers

- Delegate responsibilities to the specialised committees.
- In line with the objective of gradual approximation of Ukraine's legislation to that of the Union, the Association Council may update or amend the Annexes to the DCFTA, taking into account the evolution of EU law.
- It may also take decisions as regards further market opening if the Parties agree that the measures covered by the Title on Trade and Trade-related Matters have been implemented and are being enforced.
- It may also make recommendations.

B. Ongoing management and supervision: Joint Committee (III)

EEA Agreement – Joint Committee

Tasks

- Ensures the effective implementation and operation of the EEA Agreement. To this end, it carries out exchanges of views and information and take decisions in the cases provided for in the EEA Agreement.
- Consultations take place on Commission proposals for new Union acquis that the EEA/EFTA States will also apply to them.
- Keeps under constant review the development of the case law of the Court of Justice of the European Communities and the EFTA Court to preserve the homogeneous interpretation of the Agreement.
- Role in  Dispute Settlement

Powers

- Delegate responsibilities to the specialised committees.
- Can amend the Annex to the EEA Agreement setting out the EU acquis that applies also the EEA/EFTA States.
- If no agreement on the updating of the Annex is possible, the Joint Committee examines all possibilities to maintain the good functioning of the EEA Agreement.

C. Dispute Settlement

I. Political vs. judicial dispute settlement

- Political dispute settlement: typically Joint Committee
- Judicial dispute settlement: typically arbitration panel – question of involvement of ECJ

II. 3 Existing governance models - Overview

CETA	Ukraine Association	EEA			
<p><i>Does not rely on EU law or EU law concepts.</i></p> <p>Classical international law mechanism: following a dialogue phase, disputes can be submitted to arbitration. Arbitral rulings are binding on the parties.</p> <p>No involvement of the ECJ.</p> <p>Specific dispute settlement system for investment disputes (Investment Court System).</p>	<p><i>Relies in part on EU law and EU law concepts.</i></p> <p>Classical international law mechanism: following a consultation phase, disputes can be submitted to arbitration. Arbitral rulings are binding on the parties.</p> <p>Where a dispute raises a question of interpretation of EU law, the arbitration panel must request an ECJ ruling. The ECJ ruling is binding on the arbitration panel.</p>	<p><i>Relies heavily on EU law and EU law concepts.</i></p> <p>Interpretation / application of the Agreement...</p> <table border="1" data-bbox="1146 552 2022 724"> <tr> <td data-bbox="1146 552 1585 724"> <p>...in the EEA/EFTA countries: EFTA Surveillance Authority + EFTA Court</p> </td> <td data-bbox="1585 552 2022 724"> <p>...in the EU: Commission + ECJ</p> </td> </tr> </table> <p>Mechanisms for ensuring homogeneous interpretation of the Agreement in the EU and in the EEA/EFTA countries.</p> <p>Disputes between EU and EEA/EFTA countries go to the Joint Committee. When the Joint Committee is unable to settle a dispute within 3 months:</p> <ul style="list-style-type: none"> → if dispute concerns provisions that are identical to EU law, parties can jointly submit to the ECJ; → if dispute concerns other provisions, each party can submit it to arbitration. 		<p>...in the EEA/EFTA countries: EFTA Surveillance Authority + EFTA Court</p>	<p>...in the EU: Commission + ECJ</p>
<p>...in the EEA/EFTA countries: EFTA Surveillance Authority + EFTA Court</p>	<p>...in the EU: Commission + ECJ</p>				

III. Analysis of existing governance model 1: CETA

- Classic international law arbitration – no EU law concepts – no ECJ
- Difficult to use for Withdrawal Agreement, given multiple reliance on EU law concepts
- Conceivable for future relations agreement(s), depending on content

IV. Analysis of existing governance model 2: Ukraine Association

- Classic international law arbitration – reliance on EU law concepts – preliminary reference to ECJ
- Conceivable for both Withdrawal Agreement and for future relations agreement(s)

V. Analysis of existing governance model 3: EEA

- Heavy reliance on EU law concepts
- Limited inter-party dispute settlement
- Strong enforcement on either side, through Commission + ECJ and through multilateral bodies: ESA + EFTA Court
- EEA: multilateral dispute settlement mechanism not transposable to a bilateral EU-UK

VI. The situation as regards Switzerland

- Shortcomings of the existing framework i.e., not a model

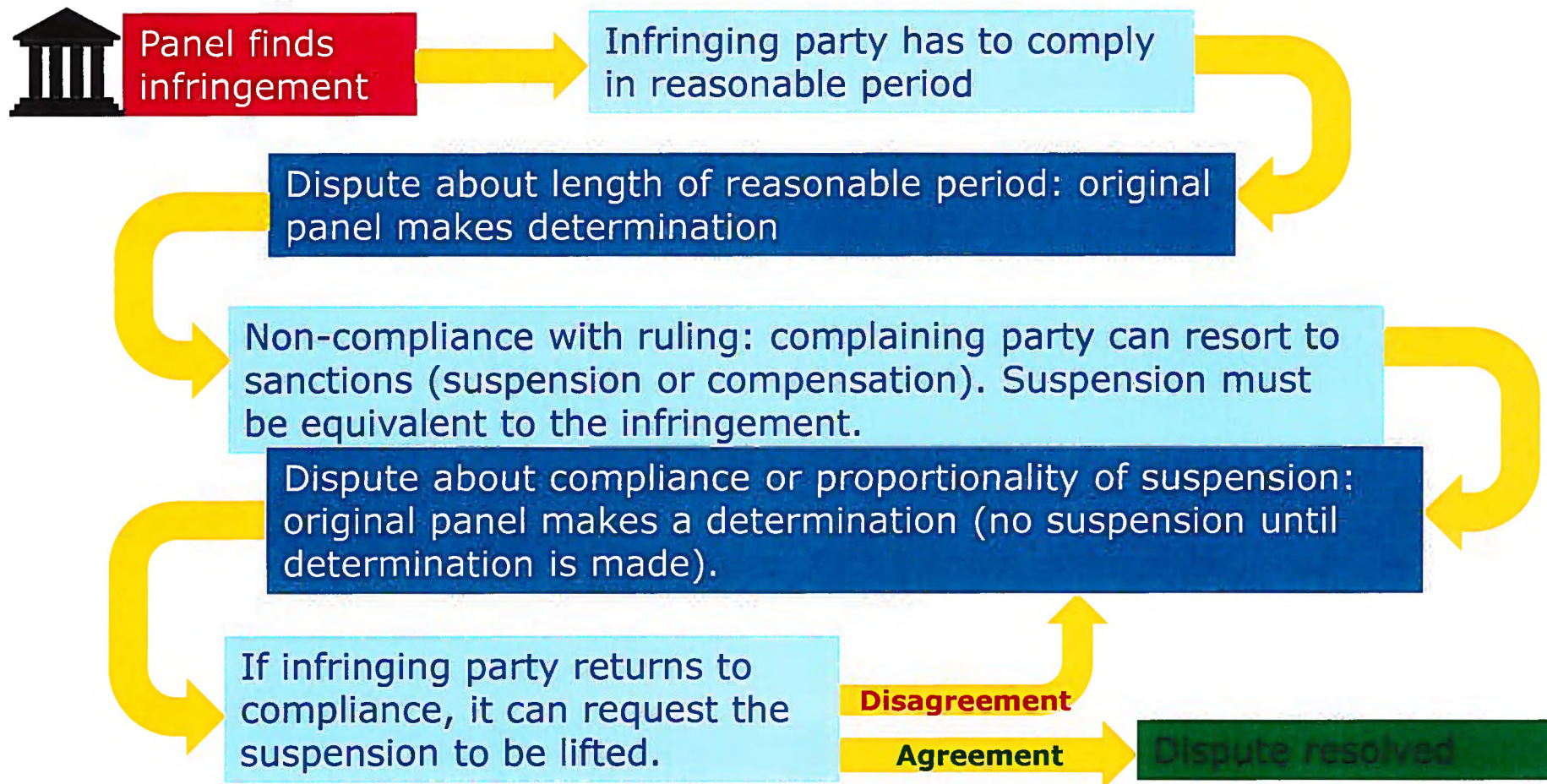
VII. Conclusions on dispute settlement

- For the Withdrawal Agreement
- For the future relations agreement(s)

D. Enforcement post dispute-settlement

I. Enforcement process post dispute settlement

Example: CETA



At any time, the complainant may request the respondent to provide an offer for temporary compensation and the respondent shall present such offer.

II. Enforcement post dispute settlement - Available sanctions

Agreement	Available Sanctions
CETA	<ul style="list-style-type: none"> • Suspend obligations or receive compensation. • The suspension of obligations must be limited at a level equivalent to the nullification / impairment caused by the violation.
Ukraine DCFTA	<ul style="list-style-type: none"> • Respondent shall, if so requested by the complainant, present an offer for temporary compensation. • If no agreement on compensation is reached, the complainant is entitled to suspend obligations at a level equivalent to the nullification / impairment caused by the violation.
EEA	<ul style="list-style-type: none"> • Where a dispute cannot be resolved in the JC, a party may, in order to remedy possible imbalances: <ul style="list-style-type: none"> ➤ either take a safeguard measure; ➤ proceed to suspend the affected part of the Agreement • Safeguard measures must be restricted to what is strictly necessary in order to remedy the situation. • If a safeguard measure creates an imbalance, the other party may take such proportionate rebalancing measures as are strictly necessary to remedy the imbalance.