

Brexit: Governance

Hello, my name is Vincent Power and I'm from A&L Goodbody, and in this Brexit soundbite I'm going to explore the somewhat obscure concept of governance. It's a topic which has become one of the top three issues in the EU-UK Brexit negotiations, and it's often mentioned but rarely explained. So I just want to explore what does this concept actually mean in practice.

The trade talks between the EU and the UK are reportedly held up by three items. Fisheries, the level playing field, and governance. Fisheries and the level playing field are easy to grasp, but what is governance?

Well, the EU has brought us lots of odd concepts over time. Commetology, subsidiarity, the tunnel, planification, and even actorness. But what is governance? Well, it's actually straightforward. It's how the arrangements between the UK and the EU are to be governed, are to be supervised.

Who, for example, is to decide disputes? For almost 50 years, for so long as the UK was part of the EU, it's actually been straightforward. The Court of Justice of the European Union in Luxembourg was there to decide disputes.

So when Ireland and the European Commission disagreed over whether Apple was or was not given state aid, the dispute was governed or decided by the courts in Luxembourg. The lower level court, the general court, has sided with Ireland, and at some stage in the next year or two, the senior court in Luxembourg will decide the dispute.

All very straightforward, all quite amicable. And the member states of the European Union have agreed that disputes will be governed or decided not by the member state courts, which could be seen as siding with the home state, nor would the dispute go outside the family to say the United Nations International Court of Justice and the Hague.

So all very nice the EU has a governance regime within the EU for EU member states. But when the UK government said it needs a separate governance regime you can see its point. The current UK government is determined to rid itself of the European Court of justice in Luxembourg so there'll have to be a special governance regime for any disputes or issues between the EU and the UK.

Under the earlier withdrawal agreement there were special rules established for governance including a joint committee which will initially be consulted if there is a dispute on the interpretation of the agreement and if no resolution is found then it can be referred to a panel for binding arbitration and if there is no compliance then the arbitration panel may impose financial penalties. And if there is a question of EU law the panel must refer issues to the Court of Justice of the European Union in Luxembourg. So despite the wishes of some in the UK, the Court of Justice still plays part of the regime.

Now what's the story here with the trade talks? So what is important is that if there are disputes between the EU and the UK we need a mechanism to ensure how they are governed or resolved. And it's vital to get that right now because there will be disputes. And if you haven't worked out the governance regime now in peacetime it's going to be much more difficult than the heat of battle. And regrettably there will be disputes between the EU and the UK.

They could even be bitter but whatever they are there should be procedures put in place now to deal with them. And you might say well wouldn't it be in everyone's interest just to reach a deal in governance?

Yes but where the difficulties lie is mainly over two issues. First each side differs on how and who decides disputes. The UK wants the tried and tested UK routes but the EU can object to those because they are the EU's tried and tested routes.

The UK according to the EU should have a new system and it should be a new regime which will take into account equally the interests of the UK and the EU and did not be decided by EU officials.

The second issue is more complex. The EU and the UK agreed the withdrawal agreement a year ago. The paint isn't fully dry on the agreement and already the UK government has tabled legislation in Westminster to allow the UK to break the agreement, to breach international law, albeit in a limited way.

The EU would say a breach of international law is a breach of international law and you can't say that it's a limited or once off breach. So when you think about it, on the 24th of January 2020 Boris Johnson signed the agreement, the withdrawal agreement in London and he described it as a quote "fantastic moment" end quote.

Nine months later he was tabling legislation to allow the UK government to breach it. So governance of the new trade agreement is going to be much more challenging. The EU says that with that sort of compliance record, there's need for very strict and very strong governance, and you need to get it right.

And that's the challenge. The regime that's going to be adopted has to work for the best of times and in the worst of times. So what is governance? It's how disputes between the EU and the UK will be resolved, and moreover how the relationship will be supervised and operated between the two close trading partners who need a regime to work.