SHEPHERD+ WEDDERBURN

Scottish Public Law Group – Annual Conference, 19 June 2017

The Impact of Brexit on Regulatory Governance
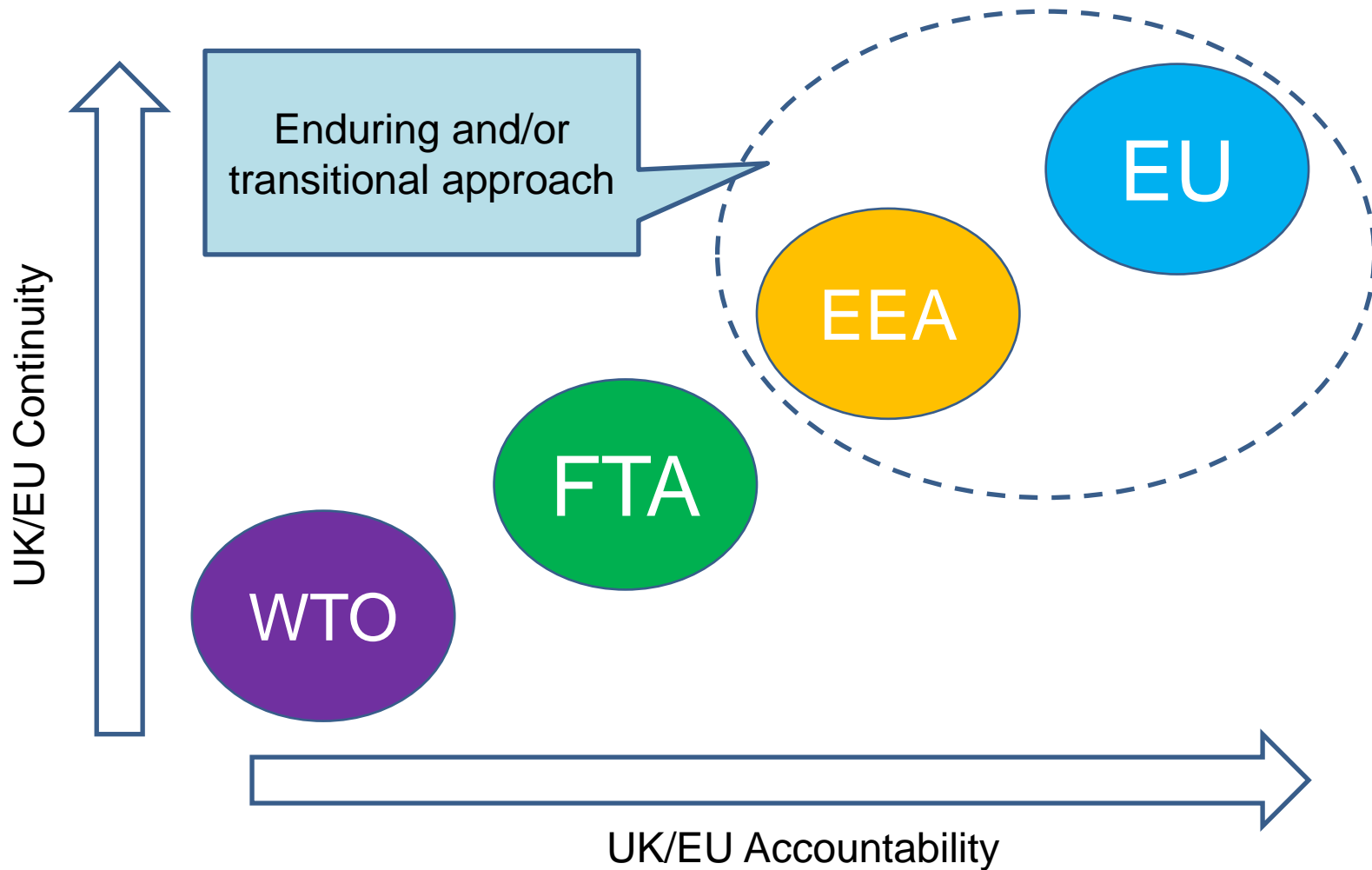## Thoughts from an Internal Market Perspective

Gordon Downie
19 June 2017

Regulatory Governance & Brexit

Internal Market – Future Regulatory Governance 'Models'

Internal Market – Regulatory Governance – Pre-Brexit

"the 1972 Act effectively constitutes EU law as an entirely new, independent and overriding source of domestic law, and the Court of Justice as a source of binding judicial decisions about its meaning"

Internal Market – Regulatory Governance – Pre-Brexit

EU Law and UK Regulation

- EU internal market law / regulatory governance status in UK constitutional law terms

- Policy implications:
  - Consumer protection (regulation of end-user tariffs)
  - Infrastructure investment (public interest control)
  - Subsidy policy (support for nuclear)

- Institutional implications:
  - Role of EU Commission / agencies in UK rule / decision making
  - Participation of UK agencies in EU-wide initiatives (e.g., ECN)
  - Regulatory independence (e.g., sector regulators)
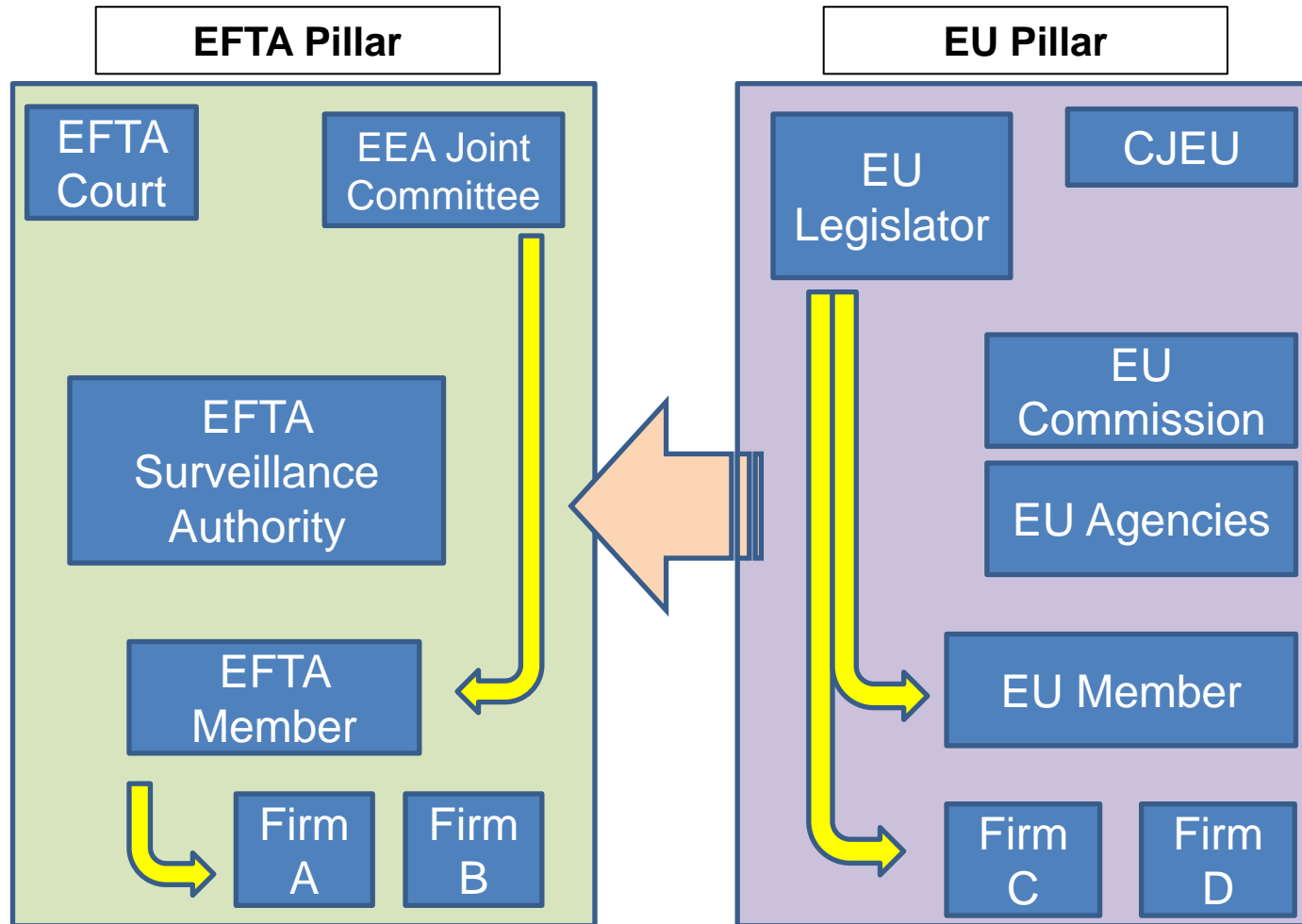 - Allocation of competencies (e.g., regulator / Member State)

Participating in EU Regulation Post-Brexit

"Full participation in the internal market should therefore be possible for participants from all Third Countries which agree to the rules and principles of the Internal Electricity Market, including neutral judicial oversight"

Participating in EU Regulation Post-Brexit

- Withdrawal treaty identifies "contours" of future relationship with EU (and nature of IM participation?) and, in that context, provides for transitional arrangements

- Legal regime from end of transitional period:
  - Depends on whether UK as IM 'rule taker' or not
  - Consequences for common governance / oversight model

- Legal regime from April 2019 to end of transitional period:
  - Withdrawal treaty would provide for legislative 'machinery'
  - Transitional arrangements, '*would need to be governed by EU law and the associated judicial system*' …

Regulatory Governance - the EEA 'Rule Taker' Model

Regulating the UK 'Internal Market' after Brexit

"In the longer term, one issue that could be considered is whether, assuming that the general stance of policy remains anti-subsidy, it would be appropriate for the UK to create an "internal" discipline on subsidy policy, at least by reference to the devolved nations or regional investment policy"

Regulating the UK 'Internal Market' after Brexit

- Implications of post-transition relationship with EU / IM for development of regulatory policy within the UK (as well as UK-level policy)

- Allocation of 're-patriated' policy competencies as between UK Government and Devolved Administrations

- Scope to develop UK (or GB) 'internal market' policy, e.g., as regard subsidy / state intervention (and governance / oversight arrangements)

- Governance and oversight arrangements during the post-April 2019 transitional period (by virtue of 'Great Repeal Bill' and progeny)

Holding Regulators to Account Post-Brexit

"As with any wide-ranging agreement between states, the UK will seek to agree a new approach to interpretation and dispute resolution with the EU. This is essential to reassure businesses and individuals that the terms of any agreement can be relied upon, that both parties will have a common understanding of what the agreement means and that disputes can be resolved fairly and efficiently"

Holding Regulators to Account Post-Brexit

- Fundamental shift in nature of legal / constitutional relationship with the IEM

- Implications for dispute resolution:
  - Shift to Treaty-based DR mechanisms (e.g., BITs / ECT etc.)
  - End to direct effect
  - Access to justice for non-Treaty players

- Implications for policy and decision-making:
  - downgrading of UK participation in policy-making bodies
  - review of ACER etc. decisions affecting UK market participants

- Position of Devolved Administrations under new arrangements, e.g., in terms of legislative competence