

# Obligations of the United Kingdom under the Withdrawal Agreement concerning the application of European Union law<sup>1</sup>

**Miłosz Gapsa**

PhD candidate, Doctoral School of Social Sciences, Department of European Constitutional Law, University of Lodz, ORCID: 0000-0002-0986-5591; e-mail: milosz.gapsa@edu.uni.lodz.pl

## I. Introduction

*Brexit means Brexit.*<sup>2</sup>

Theresa May, Prime Minister  
of the United Kingdom from 2016 to 2019

It is already a trivialeity to repeat that Brexit is an unprecedented event, not only on a European scale, and contrary to the *raison d'être* of the European Union (EU).<sup>3</sup>

<sup>1</sup> The paper was prepared based on the author's master thesis, entitled "Agreement on the withdrawal of the United Kingdom from the European Union and control of its implementation", defended at the University of Lodz in July 2021 under the supervision of prof. dr hab. Anna Wyrozumska. The author wishes to acknowledge the role of the peer reviewers, whose comments were very helpful.

<sup>2</sup> Euronews, *Watch: Theresa May's best Brexit lines*, YouTube, <https://www.youtube.com/watch?v=oRDfFJAu6Bo> [Accessed 15 Feb 2022].

<sup>3</sup> Ch. Hooton, J. Stone, *Brexit: Article 50 was never actually meant to be used, says its author*, Independent, 6 July 2016, <https://www.independent.co.uk/news/uk/politics/brexit-cu-referendum-britain-theresa-may-article-50-not-supposed-meant-to-be-used-trigger-giuliano-amato-a7156656.html> [accessed: 20 Jun 2022].

However, this is a necessary fact to assume to proceed meaningfully in any way to analyse its effects (not only of legal nature).

From an international legal point of view, it means the withdrawal of a state from a particular international organisation, which, given its unique nature, means that ‘Brexit and its aftermath will produce more, rather than less, international law’.<sup>4</sup> Currently, the relationship between the EU and the United Kingdom (UK) is governed by four international agreements:<sup>5</sup> Trade and Cooperation Agreement,<sup>6</sup> Agreement for Cooperation on the Safe and Peaceful Uses of Nuclear Energy,<sup>7</sup> Agreement concerning security procedures for exchanging and protecting classified information<sup>8</sup> and Withdrawal Agreement.<sup>9</sup>

Nevertheless, a so-called orderly Brexit would have been impossible if it were not for the conclusion of the Withdrawal Agreement, following the procedure laid down in Article 50 TEU.<sup>10</sup> Despite fierce negotiations,<sup>11</sup> such a bilateral agreement was signed on 24 January 2020, and it provides for the terms of British withdrawal from the EU.<sup>12</sup> Under its provisions, the UK ceased being a Member State of the

<sup>4</sup> J. Larik, *Brexit, the EU-UK Withdrawal Agreement, and Global Treaty (Re-)Negotiations*, *American Journal of International Law* 2020, vol. 114, no. 3, p. 462.

<sup>5</sup> A. Łazowski, *Mind the Fog, Stand Clear of the Cliff! From the Political Declaration to the Post-Brexit EU-UK Legal Framework – Part I*, *European Papers* 2020, vol. 5, no. 3, p. 1121 et seq.

<sup>6</sup> Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (signed 30 December 2020, provisional application 1 January 2021 to 30 April 2021, effective 1 May 2021) OJ L 149/10.

<sup>7</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the European Atomic Energy Community for Cooperation on the Safe and Peaceful Uses of Nuclear Energy (signed 30 December 2020, provisional application 1 January 2021 to 30 April 2021, effective 1 May 2021) OJ L 150/1.

<sup>8</sup> Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information (signed 30 December 2020, provisional application 1 January 2021 to 30 April 2021, effective 1 May 2021) OJ L 149/2540.

<sup>9</sup> Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (signed 24 January 2020, entered into force 1 February 2020) OJ L 29/7.

<sup>10</sup> Consolidated version of the Treaty on European Union [2008] OJ C115/13. More about the procedure itself: A. Wyrzomska, *Article 50. Voluntary Withdrawal from the Union* in: H.-J. Blanke, S. Mangiameli (eds), *The Treaty on Union (TEU). A Commentary*, Berlin 2013.

<sup>11</sup> See B. Martill, *Deal or no Deal: Theresa May’s Withdrawal Agreement and the Politics of (Non-)Ratification*, *Journal of Common Market Studies* 2021, vol. 59, no. 6, pp. 1607–1622; F. Fonseca Morillo, *Acerca del Brexit*, *Tiempo de Paz* 2021, no. 140, pp. 29–37.

<sup>12</sup> See A. Dashwood, *The Withdrawal Agreement: common provisions, governance and dispute settlement*, *European Law Review* 2020, vol. 45, no. 2, p. 183.

EU on 1 February 2020.<sup>13</sup> However, to prevent an abrupt change in the legal regime (so-called *cliff-edge*), it was assumed that until 31 December 2020 the UK would be treated similarly to a Member State (*transitional period*), i.e. it would be subject to the full jurisdiction of the Court of Justice of the European Union (CJEU) and all EU law, but without any influence on its content.<sup>14</sup> From 1 January 2021, the UK is already both *de iure* and *de facto* the third state to the EU. In order to avoid legal uncertainty, especially for citizens, the Withdrawal Agreement provides that in strictly defined cases the UK remains obliged to comply with EU law to a certain extent.

The purpose of this article is to define the areas and principles governing the continued application of EU law binding on the UK, and the means of resolving international disputes relating thereto. For this purpose, chiefly two methods of legal analysis were employed: dogmatic (analysis of the legal text) and functional (anticipation of the effects of its application). However, this article does not deal with the British further obligations under the external *acquis* of the EU.<sup>15</sup> Nevertheless, as the Withdrawal Agreement is an international treaty, it is first necessary to define to which territory EU law contained therein continues to apply.

## II. Territory of the United Kingdom where EU law continues to apply

Law is always enforced within a certain territory.<sup>16</sup> The imperial past makes it difficult to clearly define the precise territory of the UK.

In the Withdrawal Agreement, the parties decided that EU law, by which the UK remains bound, is to be applied primarily within the territory of the United Kingdom of Great Britain and Northern Ireland *sensu stricto*, i.e. England, Wales, Scotland and Northern Ireland. As regards the territory of Gibraltar and the British Crown Dependencies (the Channel Islands and the Isle of Man) only in so far as it applied to them before the entry into force of the Withdrawal Agreement. Concerning the British military bases in Cyprus (misleadingly referred to as 'sovereign

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<sup>13</sup> Notice concerning the entry into force of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community OJ L29/189.

<sup>14</sup> Regulated in Part Four (Transition) of the Withdrawal Agreement.

<sup>15</sup> See M. Cremona, *The Withdrawal Agreement and the EU's international agreements*, *European Law Review* 2020, vol. 45, no. 2, pp. 1237–1250.

<sup>16</sup> As government and a defined territory are one of the criteria for statehood: Montevideo Convention on Rights and Duties of States adopted by the Seventh International Conference of American States, 26 December 1933, 165 LNTS 19, art I. See J. Crawford, *Brownlie's Principle of Public International Law*, 9th edn, Oxford 2019, pp. 118–119.

zones' in, *inter alia*, the Polish, French and Spanish versions)<sup>17</sup> its subsequent application was limited to the extent necessary to ensure the implementation of the relevant Protocol attached to the Withdrawal Agreement.<sup>18</sup> An even narrower sphere was adopted for the British overseas territories, such as Anguilla, Bermuda, the British Antarctic Territory, and the Falkland Islands – only as regards their relations with the EU.<sup>19</sup>

As a result, after Brexit EU law is not applied uniformly within the UK *sensu largo*. Undoubtedly, the complexity of the forms and statuses of the constituent parts of the UK posed a challenge during the negotiation of the Withdrawal Agreement and may constitute the reason for the inclusion of three Protocols (concerning Northern Ireland, Gibraltar, and the British military bases in Cyprus respectively). They modify both the scope and the very principles of application of EU law in the territories covered. The purpose of this article is to give a general overview of the areas and rules of application of EU law in the UK after Brexit, so the Protocols to the Withdrawal Agreement will not be the subject of further consideration.<sup>20</sup>

### III. Areas where the UK has committed to continue to apply EU law

The extent of the continued validity of EU law in the UK can be considered in two ways: either by carefully analysing the technical methods of its incorporation into the Withdrawal Agreement or by its subject matter.

Two legislative techniques have been employed to indicate EU law further binding on the UK. The first, and more frequent, is the precise pointing of the legal act in question in the text of the Withdrawal Agreement, e.g. Article 70(c) pertaining to the Directive on privacy and electronic communications.<sup>21</sup> The second is the reference to a group of rules governing a specific subject matter, e.g. Article 70(5) of

<sup>17</sup> Polish: *strefy suwerenne*, French: *zones de souveraineté*, Spanish: *zonas de soberanía*.

<sup>18</sup> It is worth noting that British military bases in Cyprus were established following the Treaty concerning the Establishment of the Republic of Cyprus (signed and entered into force 16 August 1960) 382 UNTS 9.

<sup>19</sup> Withdrawal Agreement, Article 3.

<sup>20</sup> More on the Protocol concerning Northern Ireland: M. Gapsa, *Renegocjacja albo jednostronne środki ochronne, czyli brytyjskie stanowisko wobec Protokołu irlandzkiego*, *Europejski Przegląd Sądowy* 2022, no. 3, pp. 35–39; M. Gapsa, *(Non)consent mechanism in the Protocol on Ireland/Northern Ireland?* in: M. Dworski, M. Wallner (eds), *Irlandia 1921–2021. Studia i szkice o państwie, prawie i polityce*, Warsaw 2022 (awaiting publication).

<sup>21</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L201/37.

the Withdrawal Agreement relating to “any other provisions of [EU] law on the protection of personal data.”

The Withdrawal Agreement equally provides a detailed definition of EU law as: ‘(1) the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community, the Treaties of Accession and the Charter of Fundamental Rights of the European Union, (2) the general principles of the EU law, (3) the acts adopted by the institutions, bodies, offices or agencies of the EU, (4) the international agreements to which the EU is party and the international agreements concluded by the Member States acting on behalf of the EU, (5) the agreements between the Member States entered into in their capacity as the Member States of the EU, (6) acts of the Representatives of the Governments of the Member States meeting within the European Council or the Council of the European Union, and (7) the declarations made in the context of intergovernmental conferences which adopted the Treaties.’<sup>22</sup> It is worthwhile to note the explicit mention of general principles of EU law, the Charter of Fundamental Rights of the European Union and acts which are merely related to EU law, such as agreements between the Member States which they have entered into as the Member States of the EU. The identification of EU international agreements is particularly important given the already mentioned external *acquis* and its continued application to the UK. However, this issue is not comprehensively addressed in the Withdrawal Agreement.<sup>23</sup> Nonetheless, the definition of EU law in question is adopted merely to identify acts that continue to bind the UK. Moreover, the explicit mention of the general principles of EU law as an integral part of it shapes the obligation to implement EU law (this issue is described in section IV).

Based on its duration, EU law that continues to bind the UK can be divided into two sub-categories. The first includes provisions potentially in force even for decades to come. In this regard, the most important group are the provisions governing the rights of EU citizens. Two fundamental principles apply to them, i.e. the prohibition of discrimination on grounds of nationality<sup>24</sup> and the provision of legal protection to beneficiaries for life.<sup>25</sup> The rights of EU citizens consist primarily of the right of residence.<sup>26</sup> In this respect, the Withdrawal Agreement refers directly, *inter alia*, to Article 21 TFEU (freedom of movement), Article 45 TFEU (freedom

<sup>22</sup> Withdrawal Agreement, Article 2(a).

<sup>23</sup> More detailed regulations are contained in Part Four on the transitional period: M. Cremona, *op. cit.*, p. 244–246. Generally: J. Larik, *op. cit.*

<sup>24</sup> Withdrawal Agreement, Article 12, referring to Article 18 TFEU (Combating discrimination on grounds of nationality).

<sup>25</sup> Withdrawal Agreement, Article 39.

<sup>26</sup> Withdrawal Agreement, Articles 13–23.

of movement for workers) and Article 49 TFEU (prohibition of restrictions on the freedom of establishment).<sup>27</sup> The second group of rights are labour privileges and mutual recognition of professional qualifications.<sup>28</sup> In this matter, the detailed rules governing the free movement of workers within the EU continue to apply in the UK.<sup>29</sup> The last group of rights in this category consists of entitlements involving the coordination of social security systems.<sup>30</sup> Unfortunately, the persons entitled to exercise these rights have been indicated in an extremely complicated way, which may make it difficult to exercise them in practice.<sup>31</sup>

Intellectual property protection represents another substantial area where the UK remains committed to EU law. It includes protected plant varieties, registered designs, and geographical indications, among others. Of particular importance is the commitment of the UK to continue to protect EU trademarks such as Tokay wine, Parma ham and Champagne.<sup>32</sup> This solution ensures an equitable position for EU goods in the UK market. Of course, the EU is committed to providing identical protection for UK trademarks.

Subsequently, the provisions of the Withdrawal Agreement apply to personal data obtained by the UK in connection with its membership in the EU. Their further processing must comply with the provisions of the General Data Protection Regulation.<sup>33</sup> The Protocol (No 7) to the TFEU on the Privileges and Immunities of the EU, *inter alia*, also applies further.<sup>34</sup> This ensures the protection of EU assets, such as the inviolability of premises, buildings and property in the UK, and the obligation of secrecy for British officials working for the EU.<sup>35</sup>

<sup>27</sup> Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C115/47.

<sup>28</sup> Withdrawal Agreement, Articles 24–29.

<sup>29</sup> Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union Text with EEA relevance [2011] OJ L141/1.

<sup>30</sup> Withdrawal Agreement, Articles 30–36.

<sup>31</sup> H. Verschuere, *The complex social security provisions of the Brexit withdrawal agreement, to be implemented for decades*, European Journal of Social Security 2021, vol. 23, no. 1, p. 17.

<sup>32</sup> Withdrawal Agreement, Articles 54–61; European Union Committee, *Brexit: the revised Withdrawal Agreement and Political Declaration*, House of Lords 2019–21, Paper 4, paras 62 et seq.

<sup>33</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L199/1.

<sup>34</sup> Protocol (No 7) on the privileges and immunities of the European Union [2012] OJ C326/266.

<sup>35</sup> Withdrawal Agreement, Articles 101–119.

The second sub-category relates exclusively to the unfettered cessation of the legal effects of membership of the UK in the EU. It concerns the areas of police and judicial cooperation in criminal, civil and commercial proceedings, ongoing administrative, customs and public procurement proceedings, issues involving Euratom, and the financial obligations of the UK to the EU. In this regard, the European Arrest Warrant (EAW) is particularly noteworthy. The UK is obliged to continue to apply EU law in this area, but only concerning EAWs where the requested person was arrested before the end of the transition period, irrespective of the decision of the executing judicial authority as to whether the requested person is to remain in detention or be provisionally released.<sup>36</sup> The situation of those who have not been arrested under an EAW before the end of the transition period is dealt with in the Trade and Cooperation Agreement,<sup>37</sup> and this issue was the subject of a preliminary ruling in *Governor of Cloverhill Prison and Others*.<sup>38</sup>

The rule of international law that allows amending any part of an international agreement by the conclusion of another treaty by the same parties applies for both above sub-categories.<sup>39</sup> Thus, the parties may amend the Withdrawal Agreement, among others concerning the duration of EU law continuing to bind the UK. It is worth noting further that the above discussion is not exhaustive and refers to the provisions of the Withdrawal Agreement that the author considered most relevant.

#### IV. Principles on the application of EU law by the UK

Beyond merely defining the scope of EU law that continues to bind the UK, the rules on its application are crucial. In this respect, five principles can be distinguished from the text of the Withdrawal Agreement:

Firstly, the main obligation of the UK is to apply EU law in good faith. This is also the name given to Article 5 of the Withdrawal Agreement codifying this rule. It follows from its wording that:

The Union and the United Kingdom shall, in full mutual respect and good faith, assist each other in carrying out tasks which flow from this Agreement.

<sup>36</sup> Withdrawal Agreement, Articles 62(1)(b) and 185.

<sup>37</sup> Trade and Cooperation Agreement, Article 632.

<sup>38</sup> Case C-479/21 PPU *SN and SD, intervening parties: Governor of Cloverhill Prison and Others*, ECLI:EU:C:2021:929.

<sup>39</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 39: "A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide." J. Crawford, *op. cit.*, p. 371–372.

They shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this Agreement and shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement.

This Article is without prejudice to the application of Union law pursuant to this Agreement, in particular the principle of sincere cooperation.

This provision equally refers to elements of the EU principle of sincere cooperation (which finds its legal basis in Article 4(3) TEU), understood more broadly than the principle of *pacta sunt servanda* in international law, as it additionally provides for the obligation to support each other.<sup>40</sup> It is worth adding that the obligation to refrain from adopting any measure which jeopardises the fulfilment of the obligations assumed is already contained in the principle of *pacta sunt servanda*, although not explicitly.<sup>41</sup> However, although the UK has committed itself to more than solely applying EU law in good faith, it cannot be stated that it must abide by the principle of sincere cooperation contained in Article 4(3) TEU. The unique act which sets out the international legal obligations of the UK because of Brexit is the Withdrawal Agreement, not the TEU. Incidentally, it should be noted that the application of EU law in good faith can only be comprehensive and complete. It is impossible to fulfil international legal obligations in bad faith.<sup>42</sup> Acting in bad faith means failing to comply with international obligations. The opposite of fulfilling obligations in good faith is not fulfilling them and not acting in bad faith. This position is confirmed by the judgement of the International Court of Justice in *South West Africa*, in which the Court rejected the argument of the South African government that lack of good faith is established by the evidence of a party's apparent bad faith.<sup>43</sup> This understanding of the performance of obligations in good faith is also

<sup>40</sup> See A. Dashwood, *op. cit.*, p. 186.

<sup>41</sup> Report of the International Law Commission on the Work of Its Eighteenth Session, Draft Articles on the Law of Treaties, with commentaries, 23rd. Sess., UN doc. A/CN.4/191 (4 May–19 July 1966), Art. 26 & commentary, p. 211, para. 4, reproduced in Yearbook of the International Law Commission (YILC) 1996, vol. II: “Some members felt that there would be advantage in also stating that a party must abstain from acts calculated to frustrate the object and purpose of the treaty. The Commission, however, considered that this was clearly implicit in the obligation to perform the treaty in good faith and preferred to state the *pacta sunt servanda* rule in as simple a form as possible.”

<sup>42</sup> H. Kelsen, *The Law of the United Nations: a Critical Analysis of its Fundamental Problems*, New Jersey 2000, p. 89.

<sup>43</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971 p. 16, paras 128–129. See HM Government, *EU Exit: Legal position on the Withdrawal Agreement*, Cm 9747, December 2018, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/761153/EU\\_Exit\\_-\\_Legal\\_position\\_on\\_the\\_Withdrawal\\_Agreement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/761153/EU_Exit_-_Legal_position_on_the_Withdrawal_Agreement.pdf) [Accessed 14 Feb 2022], para 14.

affirmed by the reaction of the EU to the announcement of the possible adoption of the Internal Market Act by the UK, which was said to breach the international obligations as set in the Withdrawal Agreement.<sup>44</sup> In an official letter to the UK government (*letter of formal notice*), the EU explicitly pointed to the attempted breach of specific articles of the Withdrawal Agreement and good faith.<sup>45</sup>

Secondly, the scope of EU law still binding on the UK is determined based on the state of the law on the last day of the transitional period, i.e. 31 December 2020.<sup>46</sup> However, this is a principle with several exceptions.<sup>47</sup>

Thirdly, the UK must ensure that the EU law by which it remains bound causes the equivalent legal effect as it has in the EU and its Member States,<sup>48</sup> and is interpreted and applied following the methods and general principles of EU law.<sup>49</sup> This means that natural and legal persons must be entitled to rely directly on EU law contained in the Withdrawal Agreement where it satisfies the conditions of direct effect.<sup>50</sup> Fulfilling this obligation requires the UK to ensure that EU law can be directly applied, and that inconsistent or incompatible national rules can be dis-applied.<sup>51</sup> In effect, this implies the right of UK judicial authorities to apply adequate compensatory measures following principles of EU law, such as, *inter alia*, the right to compensation against the state derived from the CJEU judgments in *Francovich*<sup>52</sup> and *Brasserie du pêcheur*.<sup>53</sup> It is for this purpose that the Withdrawal Agreement provides for a precise definition of EU law.

<sup>44</sup> L. O'Carroll, *Government admits new Brexit bill 'will break international law'*, The Guardian, 8 September 2020, <https://www.theguardian.com/politics/2020/sep/08/government-admits-new-brexit-bill-will-break-international-law> [accessed 14 Feb 2022].

<sup>45</sup> European Commission, *Letter from Vice-President Maroš Šefčovič to David Frost*, 15 March 2021, [https://ec.europa.eu/info/sites/default/files/lettre\\_to\\_lord\\_frost\\_1532021\\_en.pdf](https://ec.europa.eu/info/sites/default/files/lettre_to_lord_frost_1532021_en.pdf) [accessed 21 Jun 2021].

<sup>46</sup> Withdrawal Agreement, Article 6(1): "With the exception of Parts Four and Five, unless otherwise provided in this Agreement all references in this Agreement to Union law shall be understood as references to Union law, including as amended or replaced, as applicable on the last day of the transition period."

<sup>47</sup> These relate in particular to the Protocol on Northern Ireland, which is not the subject of consideration in this article.

<sup>48</sup> Withdrawal Agreement, Article 4(1) first paragraph.

<sup>49</sup> Withdrawal Agreement, Article 4(3).

<sup>50</sup> Withdrawal Agreement, Article 4(1) second paragraph.

<sup>51</sup> Withdrawal Agreement, Article 4(2).

<sup>52</sup> Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, ECLI:EU:C:1991:428.

<sup>53</sup> Joined cases C-46/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland* and C-48/93 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, ECLI:EU:C:1996:79.

The compatible application of EU law links inextricably with the case-law of the CJEU. Under Article 4(4) of the Withdrawal Agreement, EU law binding on the UK is interpreted following CJEU case law before the end of the transitional period.<sup>54</sup> The date of the end of the transitional period is key here, as until the end of the transitional period the UK was treated similarly to a Member State and was fully subject to the jurisdiction of the CJEU.

Finally, the UK has committed to ‘have due account’ (French: *tenir dûment compte*) of CJEU case law issued after the end of the transitional period, relating to EU law still binding on the UK.<sup>55</sup> In addition, under Article 162 of the Withdrawal Agreement, the European Commission enjoys the right to submit written and, with consent, oral observations to the UK courts if the pending case concerns EU law contained in the Withdrawal Agreement. The UK Supreme Court and the CJEU are additionally required to engage in a dialogue like that between the CJEU and the courts of the Member States.<sup>56</sup> After the end of the transitional period, the UK no longer falls under the jurisdiction of the CJEU, which means that its decisions are not binding. However, consistent implementation of the Withdrawal Agreement by the parties requires an identical understanding of legal concepts, facilitated in particular by CJEU rulings under Article 267 TFEU (preliminary rulings). For this reason, a ‘due account’ by the UK courts is advisable but it does not mean agreeing to and following a ruling.

It is worth recalling that all the above obligations are of an international legal nature. Nevertheless, they require enforcement within the internal constitutional order of the UK. This state has adopted a dualistic concept of the relationship between domestic law and international law.<sup>57</sup> The translation of the international legal obligations in question into domestic law has been achieved through two acts: European Union (Withdrawal) Act 2018 (EUWA 18)<sup>58</sup> and European Union (Withdrawal Agreement) Act 2020.<sup>59</sup> By way of example, the procedural power

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<sup>54</sup> Withdrawal Agreement, Article 4(4): “The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period.”

<sup>55</sup> Withdrawal Agreement, Article 4(5): “In the interpretation and application of this Agreement, the United Kingdom’s judicial and administrative authorities shall have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period.” European Union Committee, *op. cit.*, paras 40–42.

<sup>56</sup> Withdrawal Agreement, Article 163.

<sup>57</sup> For detailed description: J. Crawford, *op. cit.*, p. 58–73.

<sup>58</sup> European Union (Withdrawal) Act 2018 c. 16.

<sup>59</sup> European Union (Withdrawal Agreement) Act 2020 c. 1.

for natural and legal persons to rely directly before UK courts on EU law further binding on the UK, and the obligation to respect CJEU judgments passed before the end of the transition period and to 'have due account' of those delivered after follows from section 7A of the EUWA 18.

## V. Jurisdiction over EU law still binding on the UK

The way in which the UK applies EU law, by which it remains bound, can sometimes initiate international disputes (only between the UK and the EU, never its Member States). One of the obligations is that compromises must be achieved through cooperation and consultation within the Joint Committee, the forum for permanent EU-UK contact that oversees the application of the Withdrawal Agreement.<sup>60</sup> The special arbitration panel is the sole body with the power to arbitrate disputes arising from the application of the Withdrawal Agreement. It uses the premises of the Permanent Court of Arbitration, although it is not part of it. Its rulings are final and binding, and its jurisdiction is mandatory and exclusive. Non-compliance with its rulings may give rise to enforcement mechanisms: the lump sum or periodic penalty payment,<sup>61</sup> or suspension of obligations under the provisions of the Withdrawal Agreement (except for Part Two on Citizens' Rights) or any part of any other agreement concluded between the EU and the UK, under the conditions laid down therein.<sup>62</sup>

However, the jurisdiction of the arbitration panel only concerns disputes arising from the application of the Withdrawal Agreement and is not strictly related to EU law still binding on the UK. The CJEU has exclusive and final jurisdiction over all such disputes (five different proceedings):

Firstly, under Article 174 of the Withdrawal Agreement, the CJEU decides disputes arising during the proceedings before the arbitration panel relating to the interpretation of EU law to which the UK remains bound or to the enforcement of a CJEU judgement made against the UK. Thus, the arbitration panel makes a quasi-request for a preliminary ruling to the CJEU, as it cannot itself rule on the matter. This solution ensures the coherence of EU law and follows the CJEU judgement in *Achmea*.<sup>63</sup>

<sup>60</sup> Withdrawal Agreement, Article 167.

<sup>61</sup> Withdrawal Agreement, Article 178(1).

<sup>62</sup> Withdrawal Agreement, Article 178(2).

<sup>63</sup> Case C-284/16 (Grand Chamber) *Slowakische Republik v Achmea BV*, ECLI:EU:C:2018:158; A. Dashwood, *op. cit.*, p. 191.

Secondly, the CJEU has the power to make a binding judgement in all proceedings commenced before the end of the transitional period, which involve the UK.<sup>64</sup> With the end of the transitional period, there were still 21 preliminary questions from UK courts awaiting the Court's response.

Thirdly, the CJEU has jurisdiction over matters brought by the European Commission against the United Kingdom in three cases:

- for failure to comply during the transitional period with its obligations under the Treaties or Part Four of the Withdrawal Agreement (concerning the transitional period).<sup>65</sup> The Commission's action can be taken to four years after the end of the transitional period, and be based either on Article 258 TFEU – failure of a Member State to fulfil its Treaty obligations – or on the second subparagraph of Article 108(2) TFEU – concerning State aid;
- for failure to comply with an EU decision addressed to a natural and legal person in the UK,<sup>66</sup> which were taken before the end of the transitional period or in the course of administrative enquiries instituted before the end of the transitional period.<sup>67</sup> The procedural requirements are the same as in the previous case;
- or for failure to comply with accepted financial undertakings.<sup>68</sup> The Commission's action is not limited in time and may be based on Article 258 TFEU or Article 260 TFEU – concerning the lump sum or penalty payment.

In addition, the CJEU still deals with new preliminary questions brought by the courts of the UK. The first category<sup>69</sup> concerns interpretations of EU law that continue to bind the UK under Part Two of the Withdrawal Agreement (Citizens' Rights). UK courts can purely submit such a request, in principle, in cases commenced at first instance within eight years of the end of the transitional period. The second category<sup>70</sup> covers the EU law referred to in Part Five of the Withdrawal Agreement on UK financial obligations. In this case, this right is unlimited in time. In both cases, the UK courts have not yet exercised this right. Nevertheless, this is a right of the UK courts, not an obligation,<sup>71</sup> although one wonders whether it is affected by the good faith principle of Article 5 of the Withdrawal Agreement.

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<sup>64</sup> Withdrawal Agreement, Article 86.

<sup>65</sup> Withdrawal Agreement, Article 87(1).

<sup>66</sup> Withdrawal Agreement, Article 87(2).

<sup>67</sup> Withdrawal Agreement, Article 95(1).

<sup>68</sup> Withdrawal Agreement, Article 160.

<sup>69</sup> Withdrawal Agreement, Article 158.

<sup>70</sup> Withdrawal Agreement, Article 160.

<sup>71</sup> See H. Verschuere, *op. cit.*, p. 21.

As a side note, it is worth being mindful that in all the above cases, the CJEU's jurisdiction is based solely on the provisions of the Withdrawal Agreement that constitute arbitration clauses from the perspective of Article 272 TFEU:

The Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law.

In all proceedings, the UK can appear before the CJEU enjoying the same powers as an EU Member State, as established, *inter alia*, in Articles 90, 91, 161(2) and (3) of the Withdrawal Agreement.

## VI. Conclusion

In conclusion, contrary to the populist assertions of the pre-Brexit referendum campaign, the withdrawal of the UK from the EU did not result in a complete 'liberating' this state from EU law and the jurisdiction of the CJEU. By accepting international legal obligations, in the form of the Withdrawal Agreement, the UK has committed to continue to comply with EU law in selected areas, like data protection or intellectual property. In some cases, EU law is to be applied long-term (rights of EU citizens – until the right holders lose their rights), in others, it is solely due to the fading out of the effects of EU membership (judicial and police cooperation). Nevertheless, the ways in which EU law is applied, to which the UK has also committed itself, are important. In addition to the standard principle of good faith (here in a sense closer to the principle of sincere cooperation), the UK must ensure that natural and legal persons can directly invoke EU law contained in the Withdrawal Agreement before its courts. Moreover, this law must continue to be binding and be interpreted and applied following general principles of EU law, based on CJEU case law. In addition, the UK remains subject to the jurisdiction of the CJEU but limited by the provisions of the Withdrawal Agreement and exclusively concerning acts of EU law binding on it. Considering the above, it is only possible to speculate whether Theresa May, when she uttered the words *Brexit means Brexit*, meant exactly this legal international position of the UK after Brexit.

## Abstract

On December 31, 2020, the transitional period established by the Agreement on the withdrawal of the United Kingdom from the European Union expired. With its end, the United

Kingdom is already *de iure* and *de facto* the third state to the European Union. Relations between these entities are currently governed only by public international law, of which the Withdrawal Agreement is a part. Under its provisions, the United Kingdom undertook to continue to comply, to a certain extent, with individual acts of EU law. The purpose of this article is to present the British obligations regarding continued compliance with EU law: which acts are at stake, how they are to be applied and how the control of their continued implementation is regulated.

**Key words:** Brexit, Withdrawal Agreement, good faith, arbitration clause

## Obowiązki Zjednoczonego Królestwa, wynikające z Umowy o wystąpieniu, w zakresie dalszego stosowania prawa Unii Europejskiej

### Streszczenie

Z dniem 31 grudnia 2020 r. zakończył się okres przejściowy, ustanowiony na mocy umowy o wystąpieniu Zjednoczonego Królestwa z Unii Europejskiej. Po jego upływie Zjednoczone Królestwo jest już *de iure* i *de facto* państwem trzecim wobec Unii Europejskiej. Relacje między tymi podmiotami reguluje obecnie jedynie prawo międzynarodowe publiczne, którego część stanowi umowa o wystąpieniu. Zgodnie z jej postanowieniami Zjednoczone Królestwo zobowiązało się do dalszego przestrzegania w określonym zakresie poszczególnych aktów prawa UE. Celem niniejszego artykułu jest przedstawienie, jak kształtują się brytyjskie zobowiązania odnoszące się do dalszego przestrzegania prawa UE: o jakie akty chodzi, jak mają być one stosowane oraz jak uregulowana jest kontrola ich dalszego stosowania.

**Słowa kluczowe:** Brexit, umowa o wystąpieniu, dobra wiara, klauzula arbitrażowa