Court of Justice of the European Union and the United Kingdom after Brexit: Game Over?

Lazowski, A.

Court of Justice of the European Union and the United Kingdom after Brexit: Game Over?

Adam Łazowski
University of Westminster, Westminster Law School
Visiting Professor College of Europe (Natolin) and Ivan Franko State University of Lviv (Ukraine)

Abstract

One of the desiderata strongly pursued by the supporters of Brexit was to end the jurisdiction of the Court of Justice of the European Union in relation to the United Kingdom. While they seem to believe that the mission has been accomplished, this article proves that the game is not over yet. As it is frequently the case, the devil is in the detail. Firstly, the EU-UK Withdrawal Agreement envisages an important role for the CJEU and its case law in the post-Brexit legal environment. Secondly, even though the United Kingdom has taken control over its laws, many of them are retained EU laws, which only formally have been cut off from their original source. In reality, they remain legal transplants: EU regulations and directives wrapped in the Union Jack. This largely extends to jurisprudence of the CJEU predating the end of the transition period which has now become retained EU case law. Consequentially, the UK courts, even despite caveats laid down in the Withdrawal Act 2018, are likely to venture into the Luxembourg jurisprudence even if only as a persuasive source of inspiration.

Introduction

The United Kingdom left the European Union on 31 January 2020.[1] When eleven months later the transition period expired, many believed that the jurisdiction of the Court of Justice of the European Union has ended in relation to the former Member State. While, in general terms, it is true, there is more than meets the eye. Firstly, the EU-UK Withdrawal Agreement (EU-UK WA) envisages a limited, albeit direct, role for the CJEU in the post-Brexit architecture.[2] Not only the CJEU has the jurisdiction to adjudicate in cases, which were pending when the transition period came to an end, but it also has the authority to deal with new cases as envisaged by the EU-UK WA. Secondly, in general terms, its case law relevant for application of EU-UK WA is, depending on circumstances, either biding or a point of reference for UK courts. Furthermore, in the wake of Brexit, EU law ceased to apply to the UK, however the European Union (Withdrawal) Act 2018 (as amended) has turned large parts of EU *acquis* into UK retained EU law. Thousands of EU regulations, directives, and decisions have become either preserved or converted UK legislation.[3] Put differently, bulks of EU law have been turned into domestic legal transplants.[4] While, at face value, the emerging picture may give an impression of vast sways of sovereign UK laws, the reality is that all these 'new' pieces of legislation remain heavily anchored in EU secondary legislation, and its interpretation by the CJEU. The latter is also reflected in the Withdrawal Act 2018, which preserves the importance of the retained EU and domestic case law. This, however, is subject to several caveats. For instance, the Withdrawal Act 2018 waves from the highest courts of the United Kingdom the obligation to follow the pre-

[1] See further on political and legal aspects of Brexit, *inter alia*, F. Fabbrini (ed.), *The Law & Politics of Brexit* (Oxford: Oxford University Press, 2017); F. Fabbrini (ed.), *The Law & Politics of Brexit: Volume II. The Withdrawal Agreement* (Oxford: Oxford University Press, 2020); F. Fabbrini (ed.), *The Law & Politics of Brexit: Volume III. The Framework of New EU-UK Relations* (Oxford: Oxford University Press 2021); A. Łazowski and A. Cygan (eds.), *Research Handbook on Legal Aspects of Brexit* (Cheltenham: Edward Elgar, 2022).

[2] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ C 29/7 (hereinafter EU-UK WA).

[3] See further E. Duhs and I. Rao, *Retained EU Law. A Practical Guide* (London: The Law Society, 2021); C. Barnard, "Retained EU Law in the UK legal orders: continuity between the old and the new" in A. Łazowski and A. Cygan (eds.), *Research Handbook on Legal Aspects of Brexit* (Cheltenham: Edward Elgar, 2022).

[4] See, *inter alia*, H. Xanthaki, "Legal Transplants in Legislation: Defusing the Trap" (2008) 57 I.C.L.Q. 659.

Brexit jurisprudence of the CJEU. Under conditions laid down therein, they may depart from retained EU case law. Furthermore, any jurisprudence coming from CJEU after 1 January 2021 may, but does not have to, be taken into account by the UK courts. It simply does not belong to EU retained case law. Still, UK courts may venture into the jurisprudence coming from Kirchberg on voluntary basis.

With all of the above in mind, the argument pursued in the analysis that follows is that despite all the rhetoric, and the attempts to trump the importance of case law coming from Kirchberg plateau, it is destined to stay in the United Kingdom at least for quite a while. The analysis provided in the present article is structured in the following fashion. As a starting point the author looks at the general shape of the post-Brexit EU-UK legal framework. This opens the door for analysis of intertemporal arrangements applicable to cases involving the United Kingdom, which were pending when the transition period ended. A typology of new post-Brexit cases involving the UK that may reach the Luxembourg court, pursuant to the EU-UK WA, is discussed in turn. Finally, the impact of jurisprudence of the CJEU on UK courts in the post-Brexit legal environment is analysed in the closing section of the article.

Post-Brexit EU-UK legal framework and the CJEU: the big picture

The new EU-UK legal framework comprises four bilateral treaties. To begin with, the EU-UK WA regulates a plethora of technical separation issues, and thus it has facilitated an orderly exit of the United Kingdom from the European Union.[5] Despite its largely intertemporal character it cannot be confined to history books. To put it differently, it remains a part and parcel of the post-Brexit framework, and it will do so for years to come. Firstly, it provides a comprehensive set of rules governing the acquired free movement rights of UK citizens in the EU, and EU citizens in the UK. Secondly, it contains the contentious Protocol regulating the trade in goods between the Great Britain and Northern Ireland. Thirdly, it regulates the outstanding financial transfers between the EU and the UK. Yet, this is where its impact *pro futuro* largely ends. The rest is a matter of agreements signed at the end of 2021, and whatever the future negotiations may lead to. For the time being, the post-Brexit framework *sensu stricto* has at its heart the EU/Euratom-UK Trade and Cooperation Agreement,[6] which is supplemented by the Euratom-UK Agreement on Nuclear Energy[7] and the EU-UK Agreement on classified documents.[8] During the negotiations of the latter package one of the red lines of UK representatives was elimination of any traces of the CJEU. Thus, its originally planned role in the dispute settlement *modus operandi* was eventually dropped.[9] Furthermore, Art. 4(1) EU-UK TCA makes it clear that any interpretation of the EU-UK TCA by the judges at Kirchberg (and, for that matter also, by the UK courts) does not bind, respectively, the UK or the EU. While the CJEU has been successfully erased from the EU-UK TCA and the supplementing Agreements, this is not the

[5] See further, *inter alia*, M. Dougan, "So long, farewell, auf wiedersehen, goodbye: The UK'S withdrawal package" (2020) 57 C.M.L. Rev. 631; S. Peers, "The End – or a New Beginning? The EU/UK Withdrawal Agreement" (2020) 39 *Yearbook of European Law* (2020) 122; K. Bradley, "Agreeing to Disagree: The European Union and the United Kingdom after Brexit" (2020) 16 *European Constitutional Law Review* (2020) 379.

[6] 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 [2021] OJ L149/10 (hereinafter EU-UK TCA). See further, *inter alia*, P. Craig, "Brexit a drama, the endgame – Part II: trade, sovereignty and control", (2021) 46 E.L.Rev. 129; Peter Van Elsuwege, 'A New Legal Framework for EU-UK Relations: Some Reflections from the Perspective of EU External Relations Law' (2021) 6 *European Papers* 785; A. Łazowski, "Mind the Fog, Stand Clear of the Cliff! From the Political Declaration to the Post-Brexit EU-UK Legal Framework (Part I)" (2020) 5 *European Papers* 1105-1141; J. Larik and R. A. Wessel, "The EU-UK Trade and Cooperation Agreement: forging partnership or managing rivalry?" in A. Łazowski and A. Cygan (eds.), *Research Handbook on Legal Aspects of Brexit* (Cheltenham: Edward Elgar, 2022).

[7] 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 [2021] OJ L 150/1.

[8] Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning Security Procedures for Exchanging and Protecting Classified Information [2020] L 444/1463.

[9] See Article INST.16, Draft text of the Agreement on the New Partnership between the European Union and the United Kingdom, 12 March 2020, UKTF (2020) 14.

case of the EU-UK WA, where it has, at least potentially, an important role to play. It is at the heart of the next two sections of the present article.

Membership leftovers: jurisdiction of the CJEU in relation to cases pending at the end of transition period

Introduction

A *cliché* as it may be, any considerable change in a legal order, be it national or the EU, triggers intertemporal issues. In case of a withdrawal from the European Union this means, *inter alia*, the end of the jurisdiction of the CJEU. The question that the negotiators of EU-UK WA had to address was where to draw the line. As it is well known, and documented in the academic literature, the EU-UK WA envisaged a transition period akin of a legal conveyer belt.[10] Although the UK left the European Union on 31 January 2020, it was bound by EU law until the end of transition. Furthermore, the CJEU had full jurisdiction in relation to the UK, even though the UK judges retired from the bench on the day of Brexit.[11] Thus, in legal terms, for eleven months after the withdrawal it was largely as if Brexit did not happen. The big change came eventually on 1 January 2021 when the transition period came to an end. This is when intertemporal provisions on jurisdiction of CJEU, laid down in EU-UK WA, became of relevance.

To start with, in relation to all cases submitted against the United Kingdom, or brought by the former Member State against EU institutions, which were pending at the end of the transition period, the CJEU has the jurisdiction to proceed and to adjudicate (Art. 86 EU-UK WA). This extends to the references for preliminary ruling submitted by the UK courts, and registered by the CJEU by 31 December 2020 at the latest. Art. 89(1) EU-UK WA makes it clear that any judgments of the CJEU (or, when relevant, reasoned orders) delivered after 31 December 2020 have a binding force for, and in, the United Kingdom.[12] Furthermore, Art. 89(2) WA imposes an obligation on the United Kingdom to take all measures necessary to comply with infringement cases, should the Court of Justice find it to be in breach of EU law.[13] Arts. 90 and 91 EU-UK WA guarantee the right of intervention, and participation of the UK government in all proceedings at the CJEU involving the United Kingdom, as well as representation by UK lawyers of parties in case of preliminary rulings.[14] The above rules have proven to be not only theoretical propositions but, as a matter of fact, they have turned out to be of practical relevance. This is addressed in turn.

References for preliminary ruling submitted by UK courts

At the cut-off point, there was a total of twenty-five UK references for preliminary ruling, which were pending at the CJEU. This included the final six filed by the UK courts at the eleventh hour. These were submitted by a wide spectrum of the UK courts and tribunals, including the UK Supreme

[10] See, *inter alia*, K. Armstrong, "The Transition" in F. Fabrini (Ed.), *The Law and Politics of Brexit. Volume II. The Withdrawal Agreement* (Oxford: Oxford University Press, 2020) pp. 171-190; M. Dougan, "An airbag for the crash test dummies? EU-UK negotiations for a post-withdrawal "status quo" transitional regime under Article 50 TEU" (2018) 55 (Special Issue) C.M.L.Rev. 845.

[11] This was followed by the controversial ending of the term of Advocate General Sharpston on 10 September 2020. See further, *inter alia*, D. Vladimirovich Kochenov and G. Butler, "Independence of the Court of Justice of the European Union: Unchecked Member States power after the Sharpston Affair" (2021) 27 E.L.J.

[12] The same principle applied to judgments, and orders of the Court of Justice rendered during the transition period.

[13] In this respect the provision in question is modelled on the obligation resting on the EU Member States as per Article 260(1) TFEU.

[14] This right has been exercised by the UK Government in some but not all cases which reached the CJEU.

Court,[15] the Court of Appeal,[16] the High Court of Justice,[17] the Upper Tribunal,[18] the Employment Tribunals[19] as well as the First-tier Tribunals,[20] the Westminster Magistrates' Court,[21] the County Court in Birkenhead,[22] courts in Northern Ireland,[23] and Gibraltar.[24] The references covered several areas of EU law, including the procedural autonomy of the Member States (in the context of the system of judicial review in the UK), the European Arrest Warrant, free movement of persons, immigration, VAT, commercial agents or package holidays. In course of 2020 the UK courts submitted a total of 17 references, which – in statistical terms - was comparable to the previous years.[25] Therefore, taken out of the Brexit context, this state of affairs could have been perceived as business as usual. It was, however, the beginning of the end.

It is notable that during forty-seven years of UK's membership in the European Union, followed by the short transition period, the courts from the United Kingdom submitted 672 references for preliminary ruling. It has been a long and rich journey, which started with the first request in the seminal Case 41/74 *Van Duyn*[26] and ended on 30 December 2020, when the final reference from the UK as a Member State was submitted (Case C-709/20 *The Department for Communities in Northern Ireland*). It is worth remembering that many cases which originated from the UK courts, lead to groundbreaking judgments of the Court of Justice, including – to name a few - the landmark decisions on direct effect,[27] state liability,[28] free movement of goods,[29] free movement of persons,[30] right of establishment,[31] free movement of services,[32] or rights of third country nationals.[33]

Direct actions involving the United Kingdom

When the transition period came to an end there was also a handful of direct actions involving the UK, which were pending at the CJEU. When the present article was completed, two of them have already led to decisions of CJEU. On 4 March 2021 the Court in case C-664/18 *Commission v. UK*[34] ruled that the United Kingdom was in breach of Directive 2008/50 on ambient air quality by not

[15] Case C-578/19 *X v Kuoni Travel Ltd*, ECLI:EU:C:2021:213; Case C-410/19 *The Software Incubator Ltd v Computer Associates UK Ltd* ECLI:EU:C:2021:742; Case C-579/19 *R (on the application of Association of Independent Meat Suppliers and another) v Food Standards Agency* ECLI:EU:C:2021:665; Case C-156/20 *Zipvit Ltd v Commissioners for Her Majesty's Revenue & Customs* ECLI:EU:C:2022:2.

[16] Case C-279/19 *Commissioners for Her Majesty's Revenue and Customs (Agent innocent)* ECLI:EU:C:2021:473.

[17] Case C-168/20 *Joint Trustee (1) in Bankruptcy of Mr M. and Joint Trustee (2) in Bankruptcy of Mr M. v Mrs M, MH, ILA and Mr M* ECLI:EU:C:2021:907; Case C-206/20 *VA v Prosecutor of the regional prosecutor's office in Ruse, Bulgaria* ECLI:EU:C:2021:509; Case C□603/20 *PPU SS v MCP*, ECLI:EU:C:2021:231; Case C-700/20 *London Steam-Ship Owners' Mutual Insurance Association* ECLI:EU:C:2022:488.

[18] Case C-459/19 *The Commissioners for Her Majesty's Revenue & Customs v Wellcome Trust Ltd*, ECLI:EU:C:2021:209; Case C-255/19 *Secretary of State for the Home Department v O A*, ECLI:EU:C:2021:36; Case C-209/20 *Renesola UK Ltd v The Commissioners for Her Majesty's Revenue and Customs* ECLI:EU:C:2021:400; Case C-707/20 *Gallaher Limited v the Commissioners for Her Majesty's Revenue and Customs* (pending).

[19] Case C-624/19 *K and Others v Tesco Stores Ltd* ECLI:EU:C:2021.

[20] Case C-760/19 *JCM Europe (UK) Ltd v Commissioners for Her Majesty's Revenue and Customs*, ECLI:EU:C:2021:96; Case C-349/20 *NB, AB v Secretary of State for the Home Department; Intervenor: United Nations High Commissioner for Refugees* ECLI:EU:C:2022:151; Case C-607/20 GE *Aircraft Engine Services Ltd v The Commissioners for Her Majesty's Revenue & Customs* (pending); Case C-695/20 *Fenix International Limited v The Commissioners for Her Majesty's Revenue and Customs* (pending); Case C-706/20 *Amoena* ECLI:EU:C:2021:698.

[21] Case C-648/20 PPU *Svishtov Regional Prosecutor's Office v PI*, ECLI:EU:C:2021:187.

[22] Case C-708/20 *Seguros Catalane Occidente* ECLI:EU:C:2021:986.

[23] Case C-729/19 *TKF v Department of Justice for Northern Ireland* ECLI:EU:C:2021:275; Case C-247/20 *VI v Commissioners for Her Majesty's Revenue and Customs*, ECLI:EU:C:2021:275; Case C-709/20 *The Department for Communities in Northern Ireland* ECLI:EU:C:2021:602.

[24] Case C-705/20 *Fossil (Gibraltar) Limited v Commissioner of Income Tax* (pending).

[25] The numbers were as follows: 23 references for preliminary ruling in 2016, followed by 11 references in 2017, 14 references in 2018 and 18 references in 2019. See Annual Report of the Court of Justice of the European Union. Judicial Activity, 2020, at p. 230.

[26] Case 41/74 *Yvonne van Duyn v Home Office*, ECLI:EU:C:1974:133.

complying with its requirements in several parts of the country, including London.[35] The next one was a political heavyweight. In Case C-213/19 *Commission v. UK* the Court of Justice dealt with outstanding payments to the own resources of the EU budget, due on VAT and customs duties deducted in relation to import of textiles and footwear from China.[36] While the Court held that the UK was partly in breach of EU law, it left for the Commission to calculate how much money was exactly due to the EU budget. Then there was the first ever infraction against the United Kingdom submitted to the Court under Art. 260(2) TFEU. In case C-692/20 *Commission v. UK*[37], the applicant claimed that the former Member State failed to comply with judgment of the Court of Justice in case C-503/17 *Commission v. UK*.[38] In the latter ruling the UK was found to be in breach of Directive 95/60/EC on fiscal marking of gas oils and kerosene.[39] Since the UK failed to comply with the judgment, the European Commission triggered Art. 260 TFEU and requested imposition of a lump sum as well as a periodical payment. Should that request be entertained by the Court of Justice, it would – in all likelihood – worsen the post-Brexit toxic atmosphere in the EU-UK bilateral relations. For now, a highly hypothetical and speculative question remains what would happen if the authorities in London were to refuse to pay the penalties into the EU budget. As discussed later in the present article, this could potentially serve as a catalyst for triggering of the dispute settlement procedure envisaged in the EU-UK WA.

The United Kingdom submitted its last two actions for annulment as a privileged applicant in cases T-363/19 *UK v Commission*[40] and T-37/20 *UK v Commission*.[41] Both cases were unsuccessful. Case T-37/20 was not admissible, as the UK authorities missed the two months deadline for submission of actions under Article 263 TFEU[42], while case T-363/19 failed on merits. All in all, the authorities in London, after years of high-profile challenges to the legality of EU secondary legislation,[43] phased out that particular aspect of EU membership rather quietly.

---

[27] See, *inter alia*, Case 152/84 *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, ECLI:EU:C:1986:84; Case C-188/89 *A. Foster and others v British Gas plc*., ECLI:EU:C:1990:313; Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, ECLI:EU:C:2001:465; Case C-253/00 *Antonio Muñoz y Cia SA and Superior Fruiticola SA v Frumar Ltd and Redbridge Produce Marketing Ltd*., ECLI:EU:C:2002:497.

[28] Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, ECLI:EU:C:1996:79; Case C-392/93 *The Queen v H. M. Treasury, ex parte British Telecommunications plc*., ECLI:EU:C:1996:131, Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd*., ECLI:EU:C:1996:205

[29] See, *inter alia*, Case 7/78 *Regina v Ernest George Thompson, Brian Albert Johnson and Colin Alex Norman Woodiwiss*, ECLI:EU:C:1978:209; Case 34/79 *Regina v Maurice Donald Henn and John Frederick Ernest Darby*, ECLI:EU:C:1979:295; Case 121/85 *Conegate Limited v HM Customs & Excise*, ECLI:EU:C:1986:114; Case C-145/88 *Torfaen Borough Council v B & Q plc*., ECLI:EU:C:1989:593.

[30] See, *inter alia*, Case 30/77 *Regina v Pierre Bouchereau*, ECLI:EU:C:1977:172; Case C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen*, ECLI:EU:C:1991:80; Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, ECLI:EU:C:1992:296; Case C-413/99 *Baumbast and R v Secretary of State for the Home Department*, ECLI:EU:C:2002:493; Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, ECLI:EU:C:2004:639; Case C-209/03 *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills*, ECLI:EU:C:2005:169; Case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department*, ECLI:EU:C:2010:80; Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department*, ECLI:EU:C:2011:277; Case C-165/16 *Toufik Lounes v Secretary of State for the Home Department*, ECLI:EU:C:2017:862.

[31] See, *inter alia*, Case 81/87 *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.*, ECLI:EU:C:1988:456; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, ECLI:EU:C:2007:772.

New cases under the EU-UK Withdrawal Agreement

Introduction

The EU-UK WA also deals with new cases involving the United Kingdom, which may be submitted to the CJEU after 1 January 2021. As discussed in the exegesis that follows, EU-UK WA equips the UK courts with the jurisdiction to send references for preliminary ruling in selected areas. Furthermore, it also provides for the extended arms of the infringement procedures. Some of these regimes are time barred, others apply indefinitely.[44]

New references for preliminary ruling from the UK courts under the EU-UK Withdrawal Agreement

In principle the jurisdiction of the UK courts to send references for preliminary ruling ended on 31 December 2020. However, several exceptions to this general rule remain. The first relates to Part Two of the EU-UK WA, which regulates the acquired rights of EU citizens in the United Kingdom, and the UK citizens in the European Union.[45] In order to add an additional layer of protection, and to ensure uniform interpretation of relevant provisions, Art. 158 EU-UK WA provides for a tailor-made preliminary ruling regime, allowing the UK courts or tribunals to send references to the Court of Justice on interpretation of Part Two of the EU-UK WA. It should be noted, however, that it is not a permanent feature in the post-Brexit architecture but a temporary solution for the initial period following the UK's withdrawal from the European Union. Arguably, it is fit for purpose as practical problems with interpretation, and application of provisions on acquired rights are likely to arise in the coming years. Art. 158 (1) EU-UK WA provides that references may be submitted in cases which

---

[32] See, *inter alia*, Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department*, ECLI:EU:C:2002:434.
[33] See, *inter alia*, Case C-63/99 *The Queen v Secretary of State for the Home Department, ex parte Wieslaw Gloszczuk and Elzbieta Gloszczuk*, ECLI:EU:C:2001:488; Case C-235/99 *The Queen v Secretary of State for the Home Department, ex parte Eleanora Ivanova Kondova*, ECLI:EU:C:2001:489; Case C-257/99 *The Queen v Secretary of State for the Home Department, ex parte Julius Barkoci and Marcel Malik*, ECLI:EU:C:2001:491, Joined Cases C-411/10 & C-493/10 *N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, ECLI:EU:C:2011:865.
[34] Case C-664/18 *European Commission v United Kingdom of Great Britain and Northern Ireland*, ECLI:EU:C:2021:171.
[35] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] OJ L 152/1.
[36] Case C-213/19 *European Commission v United Kingdom of Great Britain and Northern Ireland* ECLI:EU:C:2022:167.
[37] Case C-692/20 *European Commission v United Kingdom of Great Britain and Northern Ireland* (pending).
[38] Case C-503/17 *European Commission v United Kingdom of Great Britain and Northern Ireland*, ECLI:EU:C:2018:831.
[39] Council Directive 95/60/EC of 27 November 1995 on fiscal marking of gas oils and kerosene [1995] OJ 1995 L 291/46.
[40] Case T-363/19 *United Kingdom of Great Britain and Northern Ireland v European Commission* ECLI:EU:T:2022:349.
[41] Case T-37/20 *United Kingdom of Great Britain and Northern Ireland v European Commission*, ECLI:EU:T:2020:637.
[42] Commission Decision (EU) 2019/1352 of 2 April 2019 on the State aid SA.44896 implemented by the United Kingdom concerning CFC Group Financing Exemption [2019] OJ L 216/1.
[43] See, *inter alia*, Case C-121/14 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, ECLI:EU:C:2015:749; Case C-209/13 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, ECLI:EU:C:2014:283; Case C-81/13 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, ECLI:EU:C:2014:2449; Case C-270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, ECLI:EU:C:2014:18; Case C-656/11 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, ECLI:EU:C:2014:97; Case C-431/11 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, ECLI:EU:C:2013:589.
[44] It should be noted that as of 31 January 2020, the United Kingdom can still request judicial review of EU acts. However, in the lack of special arrangement in the EU-UK post-Brexit framework, the standard rules laid down in Article 263 TFEU

commenced at the first instance within 8 years after the end of the transition period.[46] This tailor-made *modus operandi* is available to all UK courts or tribunals on voluntary basis. Therefore, unlike in the European Union, the UK courts or tribunals from which there is no further remedy have no obligation to proceed with references to the Court of Justice. As it is traditionally the case, references are admissible only if the national court or tribunal considers, and is able to prove, that the assistance of the judges at Kirchberg is necessary in order to render a ruling in the national case. Any judgments of the Court of Justice delivered under this extended arm of the preliminary ruling procedure will have a binding force *vis-à-vis* the United Kingdom. They will produce the same legal effects as the decisions of the Court of Justice have in the European Union, and its Member States.[47] Furthermore, all procedural rules applicable to Art. 267 TFEU apply *mutatis mutandis* to references submitted as per Art. 158 EU-UK WA. The United Kingdom is permitted to participate in proceedings at Kirchberg as if it were a Member State. The same applies to UK lawyers representing the parties, who are entitled to submit written and oral pleadings.[48]

The EU-UK WA also extends the application of Art. 267 TFEU to the UK courts or tribunals in three other areas. Depending on the circumstances, they have a right or an obligation to send references for preliminary ruling on interpretation or validity of EU budgetary rules listed in Art. 136 and Art. 138 (1-2) EU-UK WA. The same applies to Art. 12(2) second subparagraph, Art. 5, Art. 7-10 I/NI Protocol and EU legal acts listed in respective annexes as well as the Protocol on Sovereign Bases on Cyprus. Neither of these special regimes is time barred. Furthermore, it is worth noting that they apply to all UK courts or tribunals, including the Supreme Court, in the same fashion as Article 267 TFEU does in the Member States. For UK courts from which there is no further remedy this translates into the obligation to send references. The rules on the position of the United Kingdom's procedural rights, and legal representation are the same as it is the case of the already mentioned references on the rights of EU citizens. Any judgments rendered by the Court of Justice as per analysed *modi operandi* will be binding for the United Kingdom.

For the time being, all the above remain theoretical propositions. It is difficult to predict if options available to the UK courts would be utilised, and – if so – how much would this contribute to effectiveness of the relevant rules, and their uniform interpretation. The uncertainty is exacerbated by the Withdrawal Act 2018, which has served as the constitutional backbone for withdrawal from the European Union.[49] To paraphrase Craig, it is a cornerstone of the post-Brexit UK legal map.[50] When it comes to the post-Brexit interaction between the UK courts and the CJEU, s. 6(1b) of Withdrawal Act 2018 merits particular attention. It makes it unequivocally clear that UK courts or tribunals cannot refer any matters to the CJEU. This, however, should not be perceived as contravention of the

---

apply. This means that if the authorities in London express a desire to trigger the judicial review procedure, they have to do so as non-privileged applicants. This, of course, means that the locus standi would hinge upon compliance with the strict admissibility criteria. See, in relation to third countries and their *locus standi* under Article 263 para. 4 TFEU, Case T-65/18 *République bolivarienne du Venezuela v Council of the European Union*, ECLI:EU:T:2019:649; Case C-872/19P *République bolivarienne du Venezuela v Council of the European Union* ECLI:EU:C:2021:507.

[45] Arts. 9-39 EU-UK WA. See further, *inter alia*, C. Barnard and E. Leinarte, "Citizens' Rights" in F. Fabbrini (ed), *The Law & Politics of Brexit. Volume II. The Withdrawal Agreement* (Oxford: Oxford University Press 2020) pp. 107-130; M. Markakis, "Citizens' Rights after Brexit: The Withdrawal Agreement and the Future of Mobility Framework" in F. Kainerm and R. Repasi (eds), *Trade Relations after Brexit* (Baden Baden: Nomos and Hart, 2019) pp. 293-330; E. Spaventa, "The Rights of EU Citizens under the Withdrawal Agreement: A Critical Analysis" (2020) 45 E.L.Rev. 193; C. O'brien, "Between the devil and the deep blue sea: Vulnerable EU citizens cast adrift in the UK post-Brexit" (2021) 58 C.M.L. Rev. 431; E. Guild and S. Cox, "Immigration: EU citizens and the UK" in A. Łazowski and A. Cygan (eds.), *Research Handbook on Legal Aspects of Brexit* (Cheltenham: Edward Elgar, 2022).

[46] In relation to cases dealing with decisions falling under Art. 18 (1) EU-UK WA, Art. 18 (4) EU-UK WA and Art. 19 EU-UK WA the eight-year time limit has started to run from the date Art. 19 EU-UK WA applies.

[47] Art. 158 (2) EU-UK WA.

[48] Art. 161 (3) EU-UK WA.

[49] See, *inter alia*, P. Craig, "Constitutional Principle, the Rule of Law and Political Reality: The European Union (Withdrawal) Act 2018" (2019) 82 Modern Law Review 319; M. Elliott and S. Tierney, "Political pragmatism and constitutional principle: the European Union (Withdrawal) Act 2018" (2019) Public Law 37.

[50] P. Craig, "Brexit and the UK Constitution", in J. Jowell and C. O'Cinneide (eds), *The Changing Constitution*, 9th ed. (Oxford: Oxford University Press 2019) pp. 95-120, at p. 103.

discussed rules laid down in the EU-UK WA. Arguably, the jurisdiction based on the EU-UK WA has been tacitly smuggled *qua* s. 6(6A) of the Withdrawal Act 2018 implementing EU-UK WA. With this in mind a reminder is fitting that in accordance with the principle of parliamentary sovereignty, which is at the heart of the UK Constitution, the Parliament may adopt any legislation its members express a desire to.[51] This extends even to acts of Parliament, which may breach the United Kingdom's international commitments. Thus, section 6(6A) of the Withdrawal Act 2018 is not set in stone, making the domestic legal framework facilitating submission of references is potentially vulnerable.

References for preliminary ruling from the EU-UK arbitration panels

Controversially, the EU-UK WA envisages a direct role of the Court of Justice in the dispute settlement mechanism regulated in Arts. 167-181 EU-UK WA.[52] From the perspective of EU external relations *acquis* this is not a novelty by any stretch of imagination. In fact, comparable arrangements are provided in the Association Agreements with Ukraine,[53] Georgia,[54] Moldova,[55] and - in the negotiated but not yet in force - EU-Swiss Institutional Agreement.[56] Without going into details of the EU-UK dispute settlement *modus operandi*, a brief recap of the basic parameters is fitting to demonstrate the role the Court of Justice is destined to play. As the first step, any attempts at solving the disputes are made by the EU-UK Joint Committee.[57] If its efforts prove futile, in the next stage one of the sides may request creation of the arbitration panel.[58] This is when the Court of Justice may come into the equation. As per Art. 174 EU-UK WA a reference for preliminary ruling is compulsory if one of the following conditions is met. Firstly, the arbitration panel has to proceed with a reference if the dispute raises a matter of interpretation of an EU law concept. Secondly, a compulsory reference is also envisaged if the dispute touches upon the interpretation of EU law that is referred to in the EU-UK WA. Thirdly, a reference procedure has to be triggered if the dispute centers around compliance of the United Kingdom with a judgment of the Court of Justice rendered under the infringement procedures. The latter applies to both, cases which were pending at the CJEU when the transition period expired as well as to new cases submitted in accordance with Art. 87 EU-UK WA. With this in mind, both the dispute settlement procedure as well as the discussed preliminary ruling *modus operandi* equip the European Union with additional tools to secure compliance with EU law by the former Member State. The entire system has yet to be tested. It should be noted that the dispute settlement procedure was triggered for the very first time early in 2021 in relation to implementation of Ireland/NI Protocol. When this article was completed the dispute settlement procedure was effectively frozen with diplomatic negotiations about the future of the Ireland/NI Protocol taking place between the EU and the UK.[59]

---

[51] See further, *inter alia*, M. Elliott, "Parliamentary sovereignty in a changing constitutional landscape", in J. Jowell and C. O'Cinneide (eds), *The Changing Constitution*, 9th ed. (Oxford: Oxford University Press 2019), pp. 29-57.

[52] See further, *inter alia*, A. Dashwood, "The Withdrawal Agreement: Common Provisions, Governance and Dispute Settlement" (2020) 45 E.L.Rev. 183; J. Larik, "Decision-Making and Dispute Settlement" in F. Fabbrini (ed), *The Law & Politics of Brexit: Volume II. The Withdrawal Agreement* (Oxford: Oxford University Press 2020) pp. 191-210.

[53] Association Agreement between the European Union and the European Atomic Energy Community and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L 161/3.

[54] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part [2014] OJ 2014 L 261/4.

[55] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part [2014] OJ L 260/4.

[56] *Accord facilitant les relations bilatérales entre l'Union européenne et la Confédération suisse dans les parties du marché intérieur auxquelles la Suisse participe*, text available at: <https://www.dfae.admin.ch/dam/europa/fr/documents/abkommen/Acccord-inst-Projet-de-texte_fr.pdf >.

[57] Art. 169 EU-UK WA.

[58] Arts. 170-181 EU-UK WA.

[59] See Withdrawal Agreement: Commission sends letter of formal notice to the United Kingdom for breach of its obligations under the Protocol on Ireland and Northern Ireland, press release available at: <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1132>.

Extended arm of the infringement procedures: the general regime

Art. 87(1) EU-UK WA, which can be considered as *lex generalis*, provides that for a period of four years, that is until 31 December 2024, the European Commission may bring to the Court of Justice new cases against the United Kingdom. Art. 87(2) EU-UK WA adds that the infringement proceedings may be also brought if the United Kingdom fails to comply with decisions issued by the EU institutions, bodies, offices and agencies before the end of transition period, or after (providing that the procedures were pending on 31 December 2020).[60] All of this means that many infraction cases may be pending at the Court of Justice well into the other side of 2020s. Without a shadow of the doubt, it is an interesting arrangement, which merits a closer look.

To begin with, the provision in question makes it clear that should the European Commission decide to proceed, it is required to apply requirements laid down in Art. 258 TFEU.[61] Interestingly, neither Art. 259 TFEU nor Art. 260 TFEU is mentioned. As far as the former is concerned, the conclusion to be drawn is that the discussed regime does not allow the Member States to proceed with actions against the United Kingdom under Art. 259 TFEU.[62] The situation is more complex when it comes to the jurisdiction of the Court of Justice to impose financial penalties on the United Kingdom. One can argue that the omission of Art. 260 TFEU in the text of Art. 87(1) EU-UK WA means that the Commission and the Court of Justice cannot proceed with financial sanctions, should the United Kingdom fail to comply with a judgment rendered under Art. 87(1) EU-UK WA/Art. 258 TFEU. According to Peers, such an interpretation is strengthened by a reference to Art. 260 TFEU in Art. 160 EU-UK WA, which – as discussed in the next subsection of this article – creates a tailor-made infringement procedure applicable to breaches of rules governing payments to the EU budget.[63] Thus, if the *modus operandi* laid down in Art. 87(1) EU-UK WA were to extend also to Art. 260 TFEU, an explicit reference would have been inserted into its text. Lack of jurisdiction to impose penalties under Article 260 TFEU does not mean, however, that the UK would be off the hook in case of non-compliance with judgments rendered by the CJEU. Should that happen, it could trigger the general dispute settlement procedure laid down in EU-UK WA.

The *modus operandi* laid down in Art. 87(1) EU-UK WA applies to all instances when the United Kingdom prior to the expiry of the transition period failed 'to fulfil an obligation under the Treaties'. This notion, being a carbon copy of Art. 258 TFEU, should be interpreted accordingly. As evidenced by practice, it has been construed by the European Commission and the Court of Justice in a very generous fashion, covering many categories of breaches of EU law. Art. 87(1) EU-UK WA also clarifies that the procedure may be triggered in case of non-compliance with provisions of EU-UK WA, which governed the transition period.[64] With the above in mind, it is worth noting that in course of infringement proceedings against the UK, the European Commission is to use its discretion in the same fashion as it does so *vis-à-vis* the EU Member States. Furthermore, for the purposes of participation, representation and the right to intervene, the United Kingdom is treated as if it were a Member State of the European Union.[65]

It is too early to draw firm conclusions how this regime will work in practice; however, the early signals seem to imply that the European Commission is using the procedural arsenal available to it in a selective fashion. Throughout 2020-22 it issued a modest number letters of formal notice, and reasoned opinions. According to the data available at the website of the European Commission, as

[60] In such cases, as an exception from Art. 87(1) EU-UK WA, the four-year time limit is counted from the day when a decision is adopted, not from the day when the transition period ended.

[61] In general terms, this means that in order to progress with the case, the European Commission is required to use letters of formal notice and reasoned opinions.

[62] During 47 years of EC/EU membership the United Kingdom was involved in two such cases. See Case 141/78 *French Republic v. United Kingdom of Great Britain and Northern Ireland*, ECLI:EU:C:1979:225; Case C-145/04 *Kingdom of Spain v. United Kingdom of Great Britain and Northern Ireland*, ECLI:EU:C:2006:543.

[63] Peers, *supra* note 7, at 183.

[64] Arts. 126-132 EU-UK WA.

[65] For details see Articles 90-91 EU-UK WA.

things stood on 17 August 2022, there were a few dozens of active infringement cases at the administrative stage of proceedings against the United Kingdom.[66] As always, not all of them would necessarily lead to submission to the Court of Justice but some may, should the UK fail to comply with EU law, and the Commission decide that a further action is worth the candle.

Out of the infraction cases pending against the United Kingdom, it is worth mentioning a case for failure to terminate bilateral investment treaties between the UK and other Member States.[67] It is a consequence of the controversial judgment of the Court of Justice in case *Achmea*[68] and the commitment that the Member States have undertaken to make such agreements a thing of the past. Furthermore, in February 2022, the European Commission submitted an infringement case to CJEU, claiming that the judgment of the UK Supreme Court in case *Micula v. Romania* was in breach of EU law.[69] The latter was a part of litigation spree by the plaintiff, including several court cases in the EU Member States, and the CJEU.[70] This case is likely to stir controversies and, apart from anything else, it is one of the handful of infringement cases, where a potential breach of EU law is attributable to a national court.[71]

With the above in mind, general questions may be asked as to the merits of the above solutions, and the *raison d'être* behind them. Put differently, why include in the EU-UK WA such procedural mechanisms that are employable *vis-à-vis* the EU's former Member State. To begin with, it is a matter of principle. Until the end of the transition period, the United Kingdom was covered by the duty of loyal co-operation laid down in Art. 4(3) TEU, and all obligations stemming from it. It continues to do so in relation to the Withdrawal Agreement *qua* its post-membership version laid down in Art. 5 EU-UK WA. In many instances it is, first and foremost, a matter of rights of individuals laid down in EU primary and secondary legislation. While alleged breaches of EU law took place when the UK was still a Member State, or covered by the transition period, the negative effects may affect the beneficiaries of rights granted by EU *acquis* after 1 January 2021. One needs to remember that judgments rendered by the Court of Justice as per Arts. 258 and 260 TFEU serve not only public enforcement of EU law, and ultimately compliance by the Member States with their obligations. They also prove useful in private enforcement in national courts, where they can be used as evidence of breach of EU law.

One also needs to consider the potential effectiveness of Art. 87 EU-UK WA, and the *modus operandi* envisaged therein. As discussed above, it does not equip the Court of Justice with the jurisdiction to impose financial penalties as per Art. 260 TFEU. Thus, a genuine question arises whether the United Kingdom, should the Court of Justice declare it to be in breach of EU law, would have any incentive to comply with it. This should not be taken for granted. Arguably, while Art. 87 EU-UK WA may leave the judges at Kirchberg short of ammunition, the dispute settlement mechanism laid down in Arts. 167-181 EU-UK WA equips the arbitration panels with the power to impose financial penalties on the UK, or for that matter, also the EU. A reminder is fitting that judgments delivered by the Court of Justice will be binding on the United Kingdom, and it will have the obligation to take all necessary measures to comply with them. Art. 89 (1-2) EU-UK WA is unequivocal in this respect. Thus, cases of non-compliance would fall within the remit of the dispute settlement procedure laid down in the EU-UK WA.

---

[66] See https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&r_dossier=&noncom=0&decision_date_from=&decision_date_to=&active_only=0&DG=TAXU&title=&submit=Search

[67] Commission, Infringement package, 30 October 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/inf_20_1687

[68] Case C-284/16 *Slowakische Republik v Achmea BV*, ECLI:EU:C:2018:158.

[69] Supreme Court of the United Kingdom, Case *Micula and others (Respondents/Cross-Appellants) v Romania (Appellant/Cross-Respondent)*, [2020] UKSC 5.

[70] See further K. Struckmann and W. Catelle, "State aid and international investment arbitration: the Micula case – taking stock in an ongoing saga" (2021) 22 *ERA Forum* 101.

[71] Rare examples include Case C-154/08 *Commission of the European Communities v Kingdom of Spain*, ECLI:EU:C:2009:695; Case C-416/17 *European Commission v French Republic*, ECLI:EU:C:2018:811.

Extended arms of the infringement procedure: the special regimes

Art. 87 EU-UK WA is not the only infringement *modus operandi* laid down in the EU-UK WA. Three special regimes, which may be considered as *leges speciales*, are provided in Art. 160 EU-UK WA, Art. 12 (4) I/NI Protocol, and Art. 12 of the Protocol on Sovereign Base Areas of the UK in Cyprus. All three are presented in turn.

Art. 160 EU-UK WA applies to the obligations resting on the United Kingdom as per Arts. 136 TFEU and 138 (1-2) EU-UK WA.[72] Both provisions are a part and parcel of the Brexit financial settlement. The first regulates that EU *acquis* on own resources, as applied to financial years ending in 2020, binds the United Kingdom also after 31 January 2020. A non-exhaustive list of relevant legal acts is provided in the same provision.[73] Art. 138 (1-2) EU-UK contains a similar solution in relation to a wide suite of EU financial programs under the Multiannual Financial Framework 2014-2020 as well as the previous frameworks. For both purposes the United Kingdom is treated as if it still were a Member State. Should it act in breach of these legal acts, the European Commission has the jurisdiction to trigger infringement proceedings under both, Art. 258 and Art. 260 TFEU. This, of course, means that the Court of Justice has the jurisdiction to impose financial penalties on the United Kingdom. It is also worth noting that this special infraction regime is not time barred. Hence, at least potentially, the European Commission may file lawsuits for years to come, though, the end will eventually come when all accounts are settled. When this article was completed the procedure in question has not been triggered yet.

Art. 12(4) I/NI Protocol is part of the broader framework governing the implementation, application, supervision and enforcement of the I/NI Protocol. This, as evidenced by the first years of its application, is not only technically challenging but also politically contentious and toxic. The Protocol provides for a complex web of rules aimed at avoidance of hard border between the Northern Ireland and the Republic of Ireland. The consequences are plentiful. Firstly, the creation of customs checks between the Great Britain and Northern Ireland was necessary. Secondly, Northern Ireland remains partly covered by EU *acquis* listed in several annexes to the I/NI Protocol, which effectively translates into the participation in the chunk of the internal market (at least for the movement of goods). As anticipated, the practicalities of the new arrangements are not straight-forward by any stretch of imagination. With this in mind, Art. 12(4) I/NI Protocol provides that in relation to its Art. 12 (2) (second subparagraph)[74], Arts. 5[75], 7-10[76] as well as respective acts of secondary legislation annexed thereto, the relevant EU institutions, including the Court of Justice, have the powers and jurisdiction as provided in the EU Founding Treaties. This, in simple terms, means that both Arts. 258 and 260 TFEU apply. It should be noted that the enforcement regime *per se* is not time barred, however, its longevity is inextricably linked to the fate of the I/NI Protocol itself. The latter hinges upon the democratic consent, and the procedure laid down in Art. 18 I/NI Protocol.

The first real test has come early. Already in March 2021 the European Commission triggered the infringement procedure against the United Kingdom for a unilateral decision to temporarily wave the strict application of relevant EU rules.[77] Rather quickly it was frozen, just like the dispute settlement, to pave the way for a diplomatic solution. However, since January 2021 the European Commission has opened several infringement cases against the United Kingdom either for late/incomplete

[72] As noted by Peers, Art. 160 EU-UK WA applies without prejudice to Art. 87 EU-UK WA, and, when it comes to breaches of relevant rules committed before the end of the transition period, there is a potential overlap between both procedures. See Peers, *supra* note 7, at 184-185.

[73] It includes, *inter alia*, Council Decision 2014/335/EU, Euratom of 26 May 2014 on the system of own resources of the European Union, O.J. 2014 L 168/105.

[74] The obligation to exchange on monthly basis the information on application of Art. 5(1-2) I/NI Protocol.

[75] Customs and movement of goods.

[76] Respectively technical regulations, assessment, registrations, certificates, approvals, authorisations; VAT and excise duty; Single electricity market; state aid.

[77] Communication from the Commission. Adjustment of the calculation for lump sum and penalty payments proposed by the Commission in infringement proceedings before the Court of Justice of the European Union, following the withdrawal of the United Kingdom [2021] OJ C 129/1.

transposition of EU directives in relation to Northern Ireland or non-notification of domestic measures. In case of the latter, the European Commission is making use of combination of Articles 258 and 260(3) TFEU, which may potentially lead to imposition of financial penalties by CJEU. At the time of writing all these cases were at different stages of the administrative procedure.

Last but not least, Art. 12 of the Protocol on the UK Sovereign Bases in Cyprus provides the third special regime.[78] This Protocol is a consequence of the complex legal status of the Sovereign Base Areas, and effectively extends the application of several acts of EU *acquis* to them. As per Art. 12, the infringement procedures laid down in Arts. 258 and 260 TFEU also apply to secure compliance with the obligations laid down in this Protocol. It should be added that as per Art. 13 Protocol, the United Kingdom is responsible for the implementation and enforcement of the Protocol in question. At the time of writing, the procedure in question was still a theoretical proposition with no single case triggered by the European Commission.

In case of all special regimes the United Kingdom is treated as if it were a Member State. Therefore, it has the right to participate in the proceedings at the CJEU. Furthermore, lawyers who are authorized to practice before the UK courts, are treated as lawyers practicing in the EU Member States, thus eligible to plead at the CJEU.[79]

Finally, the way the enforcement machinery is designed in the EU-UK WA, it allows the European Commission to trigger simultaneously the infringement procedure and the dispute settlement mechanism laid down in the EU-UK WA. This, no doubt, may give additional political leverage. Paradoxically, the European Commission has more instruments to challenge a recalcitrant former Member State than it is the case with the current twenty-seven Member States.

Persuasive force of the Court of Justice of the European Union

Luxembourg effect – CJEU case law beyond borders of the European Union

The Court of Justice of the European Union has, without a shadow of the doubt, a central place in the legal order of the European Union. Over the decades it has shaped EU law, and it has contributed to its effectiveness. Interestingly, the jurisprudence coming from Kirchberg has a potential to radiate beyond the borders of the European Union. One can argue that it is a corollary of the Brussels effect.[80] As is well known, some third countries model their legislation on EU law, either because they have an obligation to do so under agreements concluded with the EU[81] or because they wish to do it voluntarily.[82] In such cases the law-drafters may go beyond the mere wording of EU regulations and directives. Indeed, case law of the CJEU may be very instructive for shaping of national laws modelled on EU *acquis*. It may also serve as a point of reference for national courts when they interpret the domestic legislation.[83] *Tour d'horizon* of agreements concluded between the EU and

[78] See G. Kentas, "A Critical Assessment of the Cyprus Protocol Annexed to the UK's Withdrawal Agreement: The Consensual Continuation of a Metacolonial Realm" (2018) 30 *The Cyprus Review* 317.

[79] See Art. 161 EU-UK WA in relation to the procedure laid down in Art. 160 EU-UK WA, and Art. 12 of the Protocol on Sovereign Bases. See also Art.12(7) I/NI Protocol.

[80] See further A. Bradford, *The Brussels Effect. How the European Union Rules the World* (Oxford: Oxford University Press 2020).

[81] For instance, Ukraine under the terms of the EU-Ukraine AA has to approximate its legislation with hundreds of EU regulations and directives. See, *inter alia*, G. Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area. A New Legal Instrument for EU Integration without Membership* (Leiden, Boston: Brill Nijhoff, 2016).

[82] This is the case in Switzerland, where the voluntary drive towards approximation is referred to as autonomous adaptation. See further Oesch, *Switzerland and the European Union. General Framework. Bilateral Agreements. Autonomous Adaptation* (Zurich: Nomos Verlag, 2018) pp. 139-153.

[83] See A. Reich and H. Micklitz (eds), *The Impact of the European Court of Justice on Neighbouring Countries* (Oxford: Oxford University Press 2020).

third countries demonstrates that only in a few cases the Luxembourg effect is explicitly prescribed.[84] The flagship examples are the Agreement on the European Economic Area,[85] some parts of the EU-Swiss framework,[86] and now – as discussed later in this section of the article - also the EU-UK WA. To a lesser degree the Association Agreements with Ukraine,[87] Georgia,[88] Moldova,[89] as well as the Enhanced Partnership Agreement with Armenia[90] demonstrate this phenomenon. At the same time the evidence has emerged that in some of the EU neighbouring countries judges have started on voluntary basis to open up to jurisprudence coming from Kirchberg.[91] This does not mean, of course, that judiciaries around the World are terribly eager to embrace EU law, and its interpretation by the CJEU. Indeed, judges may not be inclined to venture outside of their comfort zone for a host of reasons ranging from more general issues of prevalent judicial culture to mundane daily reality of adjudication. As is well documented in the academic literature, in many jurisdictions, including some of the states that aspire for the EU membership, judges engage with external, that is non-national sources of law with a great trepidation.[92] Many a times they operate in a binary word of binding, thus applicable, and non-binding, therefore non-existent sources of law.[93] Furthermore, the fact that a respective agreement does not envisage a binding obligation to take into account the Luxembourg jurisprudence may also be a decisive factor.[94] One should also remember that in countless jurisdictions judges operate under heavy pressure to proceed in timely fashion, which combined with varied language skills among members of the judiciary does not create a fertile ground for excursions into EU law. Even when the latter happen, the emerging picture is not always coherent and persuasive. References to EU law, including the jurisprudence of the CJEU, may be accidental, a proverbial cherry on the cake. Furthermore, the national judges not always will be on the same page as the CJEU. For instance, as Tobler noted,[95] some of the Swiss courts have experienced discomfort in following

[84] See J. Scott, "The External Influence of the Court of Justice of the European Union", in A. Reich and H. Micklitz (Eds), *The Impact of the European Court of Justice on Neighbouring Countries* (Oxford: Oxford University Press 2020), pp. 16-37.

[85] Art. 6 EEA Agreement provides that pre-EEA jurisprudence should be followed. See further, *inter alia*, P. Speitler, "Judicial Homogeneity as a Fundamental Principle of the EEA", in C. Baudenbacher (ed), *The Fundamental Principles of EEA Law. EEA-ities* (Springer, 2017), pp 19-33.

[86] See Art 16(2) EU-Swiss Agreement on Free Movement of Persons (Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons [2002] OJ L 114/6); Art. 1(2) EU-Swiss Air Transport Agreement (Agreement between the European Community and the Swiss Confederation on Air Transport [2002] OJ L 114/73).

[87] For instance, Art. 264 EU-Ukraine AA, which requires taking into account of CJEU case law in the state aid. As evidenced in the academic literature, the Ukrainian judges have started to venture into the case law in many areas covered by the EU-Ukraine AA. See further R. Petrov, "The Impact of the Court of Justice of the European Union on the Legal System of Ukraine" in A. Reich and H. Micklitz (eds), *The Impact of the European Court of Justice on Neighbouring Countries* (Oxford: Oxford University Press 2020), pp. 173-198, at pp. 193-196.

[88] Article 146 EU-Georgia AA provides that as part and parcel of approximation of Georgian law with EU public procurement directives, the relevant case law of the CJEU should be taken into account. In practice the excursions of Georgian judges into the Luxembourg jurisprudence go beyond the realm of public procurement. See further G. Gabrichidze, "The Impact of the Court of Justice of the European Union on the Georgian Legal System", in A. Reich and H. Micklitz (eds), *The Impact of the European Court of Justice on Neighbouring Countries* (Oxford: Oxford University Press 2020), pp. 241-261, at pp. 247-256.

[89] Art. 340 EU-Moldova AA provides a similar obligation in relation to interpretation of state aid rules as it is the case with Ukraine.

[90] Comprehensive and enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part [2018] OJ L 23/4.

[91] See, *inter alia*, A. Reich, "The Impact of the Court of Justice of the European Union on the Israeli Legal System", in A. Reich and H. Micklitz (eds), *The Impact of the European Court of Justice on Neighbouring Countries* (Oxford: Oxford

such controversial developments as the very creative jurisprudence of the Court of Justice on Regulation 261/2004,[96] in particular the *Sturgeon* case.[97]

Little wonder that when the United Kingdom opted to head for the EU exit door, the question emerged what would be the potential impact, if at all, of the existing and future jurisprudence of the CJEU on the United Kingdom, and its courts after it has left the European Union. The situation is, of course, very idiosyncratic. On the one hand, the United Kingdom is a former Member State, which for over 47 years was part of the EU legal order. Yet, on the other hand, the United Kingdom is formally - as of 31 January 2020 - a third country. So, with the above in mind, can its approach to the case law of the CJEU be juxtaposed with other cases of Luxembourg effect alluded to above? Since the levels of economic and legal integration envisaged in the EU-UK TCA are less ambitious than it is the case with the EEA, the Swiss model or, for that matter, the EU relations with the ENP *avant garde*, the UK is not – with a few exceptions – required to follow EU law *qua* its agreements with the European Union. Thus, as it is 'Taking Back Control' of its laws it is likely to gradually diverge from the EU standards enshrined in the UK legal orders (even in the areas falling under the level playing field provisions of EU-UK TCA).[98] However, the starting point is a very high level of legal integration, which is a direct consequence of decades of EC/EU membership. With this in mind, in this section of the article, an argument is put forward that for years to come the impact of EU law, including the jurisprudence coming from Kirchberg, will be felt in the UK courtrooms. This, in relation to pre-Brexit jurisprudence, is partly envisaged not only by the EU-UK WA but also by the Withdrawal Act 2018. Even though the EU-UK TCA formally ringfences the United Kingdom from the Luxembourg case law, the reality on the ground may – arguably – be very different indeed. This is further explored in turn.

Status of case law under the EU-UK Withdrawal Agreement

EU-UK WA attends to the status of case law of CJEU in the post-Brexit world. This is hardly surprising bearing in mind that several provisions contained therein are modelled on EU *acquis*.[99] Furthermore, numerous acts of EU legislation remain applicable to the United Kingdom after the end of the transition period. This applies, to some degree to the United Kingdom as such,[100] but, in particular, to the Northern Ireland *qua* the Ireland/NI Protocol, which – as already noted - lists dozens

University Press 2020), pp. 265-304, at pp. 276-303; U. Karan, "The Impact of the Court of Justice of the European Union on the Turkish Legal System", in A. Reich and H. Micklitz (Eds), *The Impact of the European Court of Justice on Neighbouring Countries* (Oxford: Oxford University Press 2020), pp.115-139, at pp. 124-139.

[92] In relation to the Western Balkans see, *inter alia*, S. Rodin and T. Perišin (Eds), *Judicial Application of International Law in Southeast Europe* (Springer, 2015).

[93] See, for instance, Z. Kühn, "Words Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement" (2004) 52 *American Journal of Comparative Law* 531.

[94] For instance, this was flagged as one of the reasons for lack of interest in Armenia. See N. Ghazaryan, "The Court of Justice of the European Union and the Armenian Legal Order" in A. Reich and H. Micklitz (Eds), *The Impact of the European Court of Justice on Neighbouring Countries* (Oxford: Oxford University Press 2020), pp. 199-220, at pp. 209-210.

[95] Ch. Tobler, "One of Many Challenges after 'Brexit'. The Institutional Framework of an Alternative Agreement - Lessons from Switzerland and Elsewhere?" (2016) 23 *Maastricht Journal of European and Comparative Law*, 575, at p. 583.

[96] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2004] OJ L 46/1.

[97] Joined cases C-402/07 and C-432/07 *Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v Condor Flugdienst GmbH (C-402/07) and Stefan Böck and Cornelia Lepuschitz v Air France SA (C-432/07)*, ECLI:EU:C:2009:716.

[98] See A. Cygan, "Taking back control: the challenges and opportunities of United Kingdom regulatory autonomy" in A. Łazowski and A. Cygan (eds.), *Research Handbook on Legal Aspects of Brexit* (Cheltenham: Edward Elgar, 2022).

[99] See, for instance, provisions on the acquired rights of EU citizens in the UK, and UK citizens in the EU, which are grouped in part two of EU-UK WA.

[100] See, in relation to references to EU law, Article 6 EU-UK WA.

of pieces of EU secondary legislation which remain applicable to that part of the United Kingdom.[101] The key rules are provided in Art. 4 paras. 4-5 EU-UK WA. The first deals with the jurisprudence of CJEU pre-dating the expiry of the transition period on 31 December 2020. It provides that it shall be employed for interpretation and application of relevant provisions of EU-UK WA or to concepts or provisions contained therein. The literal interpretation of the discussed rule is quite unequivocal. Both, all UK courts as well as all EU courts, including the domestic judicatures of the Member States, shall follow the Kirchberg jurisprudence predating the expiry of the transition period. At the same time, Art. 4 para. 5 EU-UK WA draws a distinct line between the obligation related to pre- and post-transition period case law. As for the latter, the obligation resting on the UK courts is softer, and requires taking 'due regard' of developments in Luxembourg. This is interesting for several reasons. Firstly, such jurisprudence, apart from any other relevant provision of EU law, may deal with the EU-UK WA itself.[102] Secondly, it may be hard to marry any divergence with the principle of good faith laid down in Art. 5 EU-UK WA. Finally, it is worth noting yet another idiosyncrasy of the I/NI Protocol. Art. 13 (2) I/NI Protocol treats all CJEU case law, irrespective of the time frame, just the same. Put differently, both pre- and post-transition jurisprudence shall be taken into account by the UK courts when interpreting the I/NI Protocol, including the legal acts listed in its annexes. The same rules apply also to the Protocol on Sovereign Base Areas on Cyprus.[103] Thus, in these two instances, the United Kingdom courts have much less room for manouvre. Time will tell how the discussed obligations turn into the reality.

At this juncture two more points merit attention. First, it is worth noting that Art. 163 EU-UK WA facilitates regular exchanges between the CJEU and the highest courts of the United Kingdom, akin of the judicial dialogue within the European Union. Exact modalities are still to be developed, though. Secondly, unlike in the case of courts of other EU neighbouring countries the language barrier will not be an issue for such a dialogue and potential Luxembourg effect. English remains an official language of the European Union, therefore a great majority of post-Brexit judgments are available in the language of Shakespeare. Thus, it will be primarily a matter of demands of adjudication, and – above all – the intention to engage with Luxembourg jurisprudence.

Status of EU case law under the Withdrawal Act 2018

Many supporters of the Leave camp parroted *ad nauseum* the mantra of taking back control of the borders, laws, and ending the jurisdiction of the CJEU. A clear-cut separation was the desired effect, which – as argued in this article – is easier said than done. Nothing else proves this point as strongly as solutions envisaged in the Withdrawal Act 2018. It is, as already alluded to, a piece of UK primary legislation which, on the one hand, repealed the European Communities Act 1972,[104] and thus cut off EU law from the UK legal orders, and, on the other hand, it provided a constitutional framework for the EU withdrawal. Even a quick glance at the way it retains EU law in the UK legal orders brings one back to the famous words of Lord Denning. In seminal case *Bulmer v Bollinger* he argued that "when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back."[105] Although this comparison was made in relation to consequences of accession to the then European Communities, it is equally relevant to the legal parameters of withdrawal from the contemporary European Union. The EU exit is, no doubt, an attempt to stop that tide, and to turn it around. This, as evidenced by Brexit, is a gargantuan, and

[101] This includes EU *acquis* on, *inter alia*, customs, protection of EU's financial interests, trade statistics, trade defence instruments, technical regulations, including CE marking directives and regulations, waste, pesticides and many others.
[102] See, for instance, Case C-30/22 *DV v Direktor na Teritorialno podelenie na Natsionalnia osiguritelen institut – Veliko Tarnovo*, pending.
[103] Art. 1 para. 2 Protocol.
[104] European Communities Act 1972 facilitated direct application of EU law in the UK legal orders. Bearing in mind the Constitutional law of the United Kingdom, in particular the foundational doctrine of parliamentary sovereignty, legal acrobatics were required to accommodate EC/EU law. See further D. Nicol, *EC Membership and the Judicialization of British Politics* (Oxford: Oxford University Press, 2001), pp. 76-116.
[105] *HP Bulmer Ltd & Anor v. J. Bollinger SA & Ors* [1974] EWCA Civ 14.

resource thirsty exercise. Removal of thousands of EU legal acts affecting may areas of law and their replacement with a new regime is a task for years, if not decades. With this in mind, the Withdrawal Act 2018 is nothing but a paradox. One the one hand, it was tailored to serve a legal vehicle for constitutional termination of the legal ties with the European Union. On the other hand, it preserves the existence of thousands of acts of EU legislation by transforming them automatically into UK retained EU laws.[106] Therefore, it merely creates an illusion that the UK legal order is now free of EU shackles. This may be hard to reconcile with the mantra of 'Taking Back Control', ever so gladly repeated by the leading Brexiters. The retained laws are not only limited to acts of EU legislation but also extend to case law of the Court of Justice of the European Union. This is where we witness yet another layer of the Brexit paradoxes. Not surprisingly then, in 2022, the UK government was busy planning a Brexit Freedoms Bill to repeal, at least formally, many EU retained laws.

As explained earlier in the preceding section of this article, the EU-UK WA provides a varied set of obligations sitting on the shoulders of UK courts to follow the Luxembourg jurisprudence. It is, however, limited to areas falling within the scope of EU-UK WA, including its protocols. In this respect, s. 6(3) Withdrawal Act 2018 goes, quite voluntarily, much further than it is required by the EU-UK WA. It provides that any questions regarding validity, meaning or effect of retained EU laws in the United Kingdom should be decided in accordance with any retained EU and domestic case law or general principles of EU law. This obligation is, however, subject to several caveats which merit a closer look.

To begin with, s. 6(3) of Withdrawal Act 2018 applies to jurisprudence as it stood on 31 December 2020, that is at the end of the transition period. In relation to any subsequent case law coming from Kirchberg, the courts of the United Kingdom are not bound by it, but they may have a regard to it pursuant to s. 6(2) of Withdrawal Act 2018. This solution laid down in UK law prima facie corresponds to the regime regulated by the EU-UK WA. Yet, in substantive terms it goes way beyond of what is required by the latter. From that point of view, Parliament voluntarily opted to maintain the effects of CJEU case law, even in areas where there is no international obligation to do so. While this may justifiably raise eyebrows, in a great scheme of things, and setting aside the politics of Brexit, it is a rather sensible solution taking into account almost five decades of EC/EU membership, and the already mentioned deep integration into the legal order of the European Union. It is also a logical corollary of retained EU legislation, which still fill the estuaries and rivers on the United Kingdom. It is interesting though, that s. 6 of Withdrawal Act 2018 is akin of two steps forward, followed by one step back. While it goes beyond of what is required by EU-UK WA, it also introduces several caveats. Section 6(4) of Withdrawal Act 2018, as well as Regulations adopted on its basis,[107] exempt from the obligation to follow retained EU case law several UK courts, including the UK Supreme Court, the High Court of Justiciary,[108] the Court of Appeal, the Scottish Inner House of the Court of Session, and the Court of Appeal in Northern Ireland.[109] It is also notable that Withdrawal Act 2018 permits, in general terms, a departure from retained EU case law by the same group of UK courts, which – however - is subject to a requirement that they may proceed accordingly but only following the application of test which is employed when the Supreme Court decides to depart from its own jurisprudence.[110] This, again, is from the perspective of UK law, a reasonable solution, allowing for necessary adjustments should the domestic legislation drift away from EU law.

It is notable that all the above does not stop the UK courts from relying on Luxembourg case law on voluntary basis. This applies to all courts of the land, including the UK Supreme Court. As evidenced by the judgment in *Uber* case, the justices at Westminster may have no reservations to use

[106] For a detailed account see, *inter alia*, E. Duhs and I. Rao, *supra* n 3, C. Barnard, *supra* n 3.
[107] The European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020.
[108] Subject to caveats laid down in s. 6(4b) Withdrawal Act 2018.
[109] This exception, however, is trumped in relation to what is required under the terms of EU-UK WA by Section 7A(1) of the Withdrawal Act 2018.
[110] S. 6(5) of Withdrawal Act 2018 and s. 5 of the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020. It should be noted, however, that courts listed in Regulations are "bound by retained EU case law so far as there is post-transition case law which modifies or applies that retained EU case law and which is binding on the relevant court."

the CJEU jurisprudence should it be necessary for interpretation of UK retained laws.[111] Furthermore, as explicitly regulated in s. 6(2) Withdrawal Act 2018, there is nothing stopping the UK courts from relying on judgments rendered by the CJEU after 1 January 2021. It may remain relevant in relation to EU legal acts, which have been turned into UK retained EU laws. Furthermore, it is inevitable that the CJEU will be called either by the European Commission, or national courts of the EU Member States, to interpret the EU-UK post Brexit framework, in particular EU-UK WA and EU-UK TCA.[112] While such judgments, and interpretation of respective agreements, will not be formally binding on the UK courts, it will be hard to simply ignore them in daily practice.

Luxembourg effect in operation

So far, despite several calls to proceed otherwise, UK courts have largely followed the jurisprudence of CJEU. It is uncontroversial in cases where UK courts had sought assistance of CJEU as per preliminary ruling procedure, and judgments were rendered by CJEU after completion of the transition period. The judgment of Supreme Court in *Kuoni* is a good example in this respect.[113] However, it is way more interesting to venture into post-transition period case law where the direct involvement of CJEU is no longer available. The early examples include judgments delivered by the Court of Appeal in March 2021 in *TuneIn v. Warner Music*[114] and *Lipton v BA City Flyer*[115].

TuneIn was a rather complex litigation between Warner Music/Sony Music and an American company *TuneIn* offering on-line radio services.[116] According to the applicant, *TuneIn* was liable for breach of copyright belonging to Warner Music. This claim was partly entertained by Birrs J at the High Court of Justice.[117] In turn, an appeal was submitted by *TuneIn*. The key legal issue addressed by the Court of Appeal was the notion of 'communication to the public', which is employed both, in EU law and international conventions to which the United Kingdom is a party to.[118] As noted by Arnold LJ, the CJEU has addressed the meaning of the notion in question in 25 cases with more pending when the Court of Appeal rendered its own ruling.[119] The key issue was, of course, whether the Court of Appeal should follow the jurisprudence of CJEU or, in the alternative, depart from it as it is permitted to do so by s. 6(3) of Withdrawal Act 2018. As the starting point, Arnold LJ reflected on this newly acquired power to 'Take Back Control' and depart from retained EU case law. As a general desideratum, Arnold LJ argued that it should be exercised with caution, exactly as it is the case with departure from case law of the House of Lords and the Supreme Court. In the case at hand, despite being encouraged by the appellant, Arnold LJ opted to stick to existing jurisprudence of CJEU. He did so for a number of reasons which merit a closer look. Firstly, since the end of transition period, the applicable UK law, that is s. 20 of the Copyright, Designs and Patents Act 1988 has remained unchanged. Secondly, Article 3(1-2) of the Information Society Directive gave effect to several international agreements to which the UK is a party. In the interest of consistency of

[111] *Uber BV and others v Aslam and others* [2021] UKSC 5. See in particular paras. 72, 88, 133 of the judgment.
[112] See Case C-479/21PPU *SN, SD, intervening parties: Governor of Cloverhill Prison, Ireland, Attorney General, Governor of Mountjoy prison* ECLI:EU:C:2021:929.
[113] *X v Kuoni Travel Ltd* [2021] UKSC 34. It followed here the already mentioned judgment of CJEU in Case 578/19 *X v Kuoni Travel Ltd* which had been delivered on the request of the Supreme Court itself.
[114] *TuneIn v Warner Music, Sony Music Entertainment* [2021] EWCA Civ 441.
[115] *Lipton v BA City Flyer* [2021] EWCA Civ 454.
[116] See paras 5-40 of the judgment for a detailed account of facts.
[117] *Warner Music, Sony Music Entertainment v TuneIn* [2019] EWHC 2923 (Ch).
[118] Respectively Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10; Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) [2006] OJ L 376/28; the International Convention for the Protection of Literary and Artistic Works (the Berne Convention); the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (the Rome Convention); the WIPO Copyright Treaty; the WIPO Performances and Phonograms Treaty.
[119] For a list see para 67 of the judgment.

interpretation of the latter it was essential to follow CJEU's jurisprudence. Deriving from it came the third argument:

> 'The CJEU has unrivalled experience in confronting this issue in variety of factual scenarios. Moreover, it has developed and refined its jurisprudence over time. The jurisprudence is not free from difficulty or criticism, but it does not follow that better solutions are readily to hand.'[120]

The fourth reason was rather case specific, and it was a reaction to submission of the appellant, who claimed that academic critique of the jurisprudence of CJEU was a reason enough to depart from retained EU case law. This has proven to be not a valid proposition as Arnold LJ was aware of breadth of literature praising the CJEU instead. The fifth reason not to depart from CJEU's jurisprudence was that case law of courts from other jurisdictions did not offer a satisfactory alternative due to different copyright regimes applicable therein. Another reason was that starting from the drawing board was unpersuasive in equal measure as it would have potentially undermined the legal certainty.[121] But, as often the case, CJEU case law is not standing still. In March 2021, that is three months after the end of transition period, there was further jurisprudence of CJEU which under the terms of Withdrawal Act 2018 does not belong to retained EU case law but UK courts may still treat it as source of inspiration, or – to use the words of the Act – 'have regard to'. Arnold LJ had no doubt this was the way to go in the case at hand. The judgment in *VG Bild* also dealt with the notion of 'communication to the public' and it was a part and parcel of *jurisprudence constante* of CJEU.[122] It gave the judges at Kirchberg a chance to polish the earlier case law. Furthermore, *VG Bild* was rendered by the Grand Chamber. It was also relevant for the case at hand.[123] The remainder of the judgment of Arnold LJ offers a very in-depth analysis of CJEU decisions, opinions of Advocates General as well as arguments submitted by the appellant. Rose LJ, also on the Bench for the case at hand, agreed with the general direction of travel, including the vital point that departure from retained EU case law should not be on the cards. Yet, she found the broad stroke analysis of CJEU case law conducted by Lord Justice Arnold to be not terribly helpful when going beyond the exact legal issues arising in the case at hand. It could, she argued, stop other UK courts from engaging with new jurisprudence of CJEU, treating such broad summaries of existing summaries as the applicable law. Sir Geoffrey Vos, Master of the Rolls, argued in the similar fashion, emphasizing that 'global summaries', as offered by Lord Justice Arnold, should be left to the world of academia.[124] He also reflected on the jurisdiction to depart from retained EU case law and why this was not an option in the case at hand. Firstly, it was a paradigm case, hence 'it would be inappropriate for the Court of Appeal to exercise its new-found power to depart from retained EU law.'[125] Bearing in mind the multifarious and international nature of the law in question, 'individualistic disharmony' was not a desideratum to follow. Last but not least, the test used by Lord Neuberger in *Knauer* was employed by Sir Geoffrey Vos.[126] In his words:

> 'the CJEU's approach to the law of infringement of copyright by communication to the public is neither impeding nor restricting the proper development of the law, nor its it leading to results which are unjust or contrary to public policy.'[127]

Hence, there were no grounds for the Court of Appeal to go it alone and depart from the jurisprudence of the CJEU.

---

[120] Para 80 of the judgment.
[121] Paras 78-83 of the judgment.
[122] Case C-329/19 *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz* ECLI:EU:C:2021:181.
[123] Para 90 of the judgment.
[124] Para 194 of the judgment.
[125] Para 197 of the judgment.
[126] *Knauer v Ministry of Justice* [2016] AC 908.
[127] Para 201 of the judgment.

A similar, but less nuanced approach, was also taken by the Court of Appeal a few days later in *Lipton*.[128] This time the dispute centered around a very much litigated matter of compensation for flight delays and cancellations. When it comes to EU law, the issue at hand is governed by directly applicable Regulation 261/2004. In the United Kingdom it belongs to retained EU law (as direct EU legislation), however, it has been already amended by UK secondary legislation to reflect changes required by Brexit and the end of transition period. Coulson LJ focused primarily on the CJEU's interpretation of 'extraordinary circumstances' which exculpate air carriers from the obligation to pay compensation for flight cancellations and flight delays.[129] It was Green LJ who turned the attention to the status of retained EU law, including retained EU case law.[130] A useful summary of key points deriving from the Withdrawal Act 2018 was provided and needs no detailed rehearsing here. However, a few conclusions reached by Green LJ merit attention. Firstly, retained EU laws should be given purposive interpretation, taking into account not only the provisions contained in the main body of legal acts but also in recitals of their preambles. Furthermore, EU-UK TCA should be considered and brought into equation. Most importantly, Green LJ made a very poignant point about the role of retained EU case law, which takes us back to the current high levels of legal integration between the European Union and the United Kingdom. This, however, is the point of departure after Brexit and the end of transition period. Arguably, from now on the EU and the UK are likely to follow different trajectories, at least in some areas of law. Inevitably, as Green LJ put it:

> 'As time moves on, and the case law of the CJEU evolves, the differences between the current state of EU law and that which the Court is to take account of might become more accentuated.'[131]

It will be even more so when EU secondary legislation develops in the future. This is inevitable as change is an inherent part of EU's DNA. In the UK itself, the drive to de-EU the statute book, which is so prevalent in the current political discourse, will most likely also contribute to lessening of importance of EU retained case law. Having said that, the emerging case law of UK courts shows that the judges are not willing to 'Take Back Control' over UK laws lock, stock, and barrel. The fresh evidence emerging from UK courtrooms proves that UK courts, even when under no obligation to do so, may treat jurisprudence of CJEU, including opinions of Advocates General, as persuasive sources of inspiration.[132] Although one, or a few, swallows do not make a summer, it is an early sign that despite the bombastic soundbites coming out of the political megaphones, the UK judges still see the intellectual benefits of post-membership ventures into case law of CJEU. As Arnold LJ seem to have argued in *TuneIn*, there is little point in departing from CJEU line of jurisprudence just for the sake of going it alone if interpretation provided by CJEU is useful and relevant. At the same time, it may well be that cases currently sitting in the dockets of UK courts and tribunals are still factually anchored in the pre-Brexit/end of transition times hence EU law was still applicable to the UK as per European Communities Act 1972.[133] The question remains whether the attitude will change when purely post-Brexit cases reach the UK courtrooms. In equal measure it is still unknown how the Supreme Court will go about its powers to depart from retained EU case law. As noted by Christopher Vajda, the former UK judge at CJEU, the Supreme Court has a particular responsibility in this regard

---

[128] It was followed by High Court of Justice in *Varano v Air Canada* [2021] EWHC 1336 (QB).
[129] Paras 1-50 of the judgment.
[130] Paras 51-84 of the judgment.
[131] Para 83 of the judgment.
[132] For instance, in *Civil Aviation Authority v Ryanair DAC* ([2022] EWCA Civ 76) the Court of Appeal followed retained EU case law as well as well more recent decisions of CJEU which were relevant for interpretation of retained Regulation 261/2004. See also the Court of Appeal in *Open Rights Group* [2021] EWCA Civ 1573; the Court of Appeal in *Raffaele Mincione v Gedi Gruppo Editoriale* [2022] EWCA Civ 557; Upper Tribunal (Immigration and Asylum Chamber) *AKO v The Secretary of State for the Home Department* [2022] UKAITUR PA094152018.
[133] As noted by Catherine Barnard, the Court of Appeal was criticised by some parts of the commentariat for its no nuance approach in this regard in *Lipton* and automatic application of rules on retained EU law. Similar patterns have emerged more generally in post-transition period case law. See Barnard (n 3) 105.

and an opportunity arises, it should use it transparently, encouraging interventions from interested parties.[134]

Last but not least, it is worth noting that while UK courts and tribunals seem comfortable to rely on CJEU case law, they have proven to be rather reluctant to explore the post-Brexit *modi operandi* for judicial dialogue with the CJEU. When this article was completed, not a single reference has been submitted by UK courts under the EU-UK WA, even though some cases could potentially benefit from involvement of the judges at Kirchberg *plateau*.[135]

Conclusions

The end of the transition period on 31 December 2020 was a watershed moment for both, the EU and the UK. The latter formally exited the legal order of the European Union with all consequences resulting from that. However, cutting such long lasting and deep legal ties is neither simple nor amounts to an easy and quick fix. Whether supporters of Brexit like it or not, the United Kingdom is likely to remain under the spell of EU law for years to come. It is a natural consequence of years of legal integration, the Dennigsonian tide of EU law, which cannot be easily turned back. This article demonstrates that while in general terms the jurisdiction of the CJEU no longer extends to the United Kingdom, it still has a direct or indirect impact on its legal orders. Firstly, the EU-UK WA envisages an important temporary, and - in places - even permanent direct role for the CJEU. Secondly, UK courts are likely to follow interpretation coming from Kirchberg either because they have an obligation to do so *qua* EU-UK WA or *qua* the Withdrawal Act 2018. They may also express a desire to follow Luxembourg case on voluntary basis. The emerging evidence proves this right, even though, in the long run the impact of CJEU jurisprudence, either as retained EU case law or otherwise, is likely to lessen. With this in mind it is apt to return to the question posed in the title of this article. The analysis presented above proves that when it comes to the UK and the CJEU, the game is not over yet.

[134] Christopher Vajda QC, "The UK courts and EU law post-Brexit" (2021) 20 Competition Law Journal 113, 115.
[135] See, for instance, interpretation of Part II EU-UK WA on residence rights by Upper Tribunal (Immigration and Asylum Chamber) in *Ghulam Batool et al v Entry Clearance Officer* [2022] UKUT 00219 (IAC).