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EU Withdrawal: Good Business for British Business?

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In this article Adam Łazowski argues that withdrawal of the UK from the EU is not good business for British business. It analyses two available modalities of EU withdrawal: a unilateral exit and a consensual divorce. Arguably neither of the two will free the UK from EU law. For that to happen, the British authorities would have to engage in the time consuming and resource thirsty exercise of clearing the UK legal orders from EU law. This, combined with uncertainty as to future relations with the EU, is destined to affect the UK business community and unlikely to bring desired efficiencies.

1 INTRODUCTION

Withdrawal from the EU, however tempting for some political circles, will have profound economic and legal consequences for EU citizens and the business community inside and outside of the Union.[1] First and foremost, however, it will affect nationals and companies of the withdrawing country. Current public discourse in the UK demonstrates that many will welcome the exit with a sigh of relief, allegedly allowing removal of regulatory burden stemming from EU law or, as the Eurosceptics put it colloquially, removal of Brussels red tape. This article argues that the only way to achieve that aim would be to leave the EU unilaterally and to remove *en bloque* all EU-based legislation from the UK legal orders. Although it may be a tempting proposition it would not be economically or legally viable, hence such hopes are rather ill-based and do not reflect reality. The simple truth is that the other EU Member States remain one of the main trading

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1 For academic appraisal of the legal effects of EU withdrawal see A. Łazowski, *Withdrawal from the European Union. A Legal Appraisal* (Edward Elgar Publishing 2016). See also A.F. Tatham, *Don't Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon*, in *EU Law after Lisbon* 128 (A. Biondi, P. Eeckhout & S. Ripley, eds, Oxford 2012); H. Hofmeister, *Should I Stay or Should I Go?- A Critical Analysis of the Right to Withdraw from the EU*, 16 Eur. L.J. 589 (2010); A. Łazowski, *Withdrawal from the European Union and Alternatives to Membership*, 37 Eur. L. Rev.. 523 (2012); P. Nicolaides, *Withdrawal from the European Union: A Typology of Effects*, 20 MJ 209 (2013); C.M. Rieder, *The Withdrawal Clause of the Lisbon Treaty in the Light of EU Citizenship: Between Disintegration and Integration*, 37 Fordham Intl. L.J 147 (2013).

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partners of the United Kingdom therefore, should the EU exit come to fruition, it is in the interest of the British business community to proceed with a properly negotiated withdrawal guaranteeing a continued access to the internal market. This would require a good deal of regulatory convergence, whereby Britain would have to accept parts of the EU *acquis* without participation in EU decision-making. An area where the negative consequences would be particularly visible, but not covered in the withdrawal negotiations, are trade relations with third countries. The EU is a party to countless trade agreements with the rest of the World, and this includes a plethora of free trade agreements. By leaving the EU, the UK will no longer be a party to any of these. One should not be blinded by a mirage that they can be re-negotiated with ease. Quite to the contrary, it will take years to accomplish, not to mention that the *status quo* of the existing regimes would not be guaranteed. Bearing the above in mind, the key question, therefore, emerges: is EU withdrawal good business for British business?

The starting point of this article is a brief analysis of modalities for EU withdrawal (section 2). The impact of EU exit on the business community will largely depend on the post-divorce settlement, therefore it is crucial to unlock some of the myths surrounding exit from the EU (section 3). The impact of withdrawal on trade with third countries is discussed in section 4. It will be argued that the EU exit will bring years of uncertainty, while the legal detachment from the EU is neither going to be an easy nor a straight-forward exercise.

2 LEGAL MODALITIES OF EU WITHDRAWAL

Since the Treaty of Lisbon Article 50 TEU provides for an exit clause.[2] Its wording is rather general, regulating only some basic legal parameters of EU withdrawal. In a nutshell, they are as follows. A Member State may express a desire to leave the EU and for that purpose it should inform the other Member States of its intentions. For the EU this triggers an obligation to commence negotiations of a withdrawal agreement, which will be conducted and concluded by the EU and the withdrawing country. If such an agreement is not negotiated within two years, the EU Founding Treaties will cease to apply to the withdrawing country, unless the European Council takes a decision to extend this transitional period. In terms of substance of such negotiations, Article 50 TEU is rather cryptic. It provides that

[2] Prior to the Treaty of Lisbon neither TEU nor EC Treaty contained rules on withdrawal from the EU. This, however, did not mean that EU exit was not theoretically possible as standard rules of public international law applied. See, *inter alia*, H. de Waele, *The European Union on the Road to a New Legal Order - the Changing Legality of Member State Withdrawal*, 12 Tilburg For. L. Rev. 169 (2004–2005); J.A. Hill, *The European Economic Community: The Right of Member State Withdrawal*, 12 Ga. J. Intl. & Comparative L. 335 (1982); J.H.H. Weiler, *Alternatives to Withdrawal from an International Organisation: the Case of the European Economic Community*, 2 Isr. L. Rev. 282 (1985).

an agreement should regulate the terms of withdrawal, 'taking account future relations' between the parties. Last but not least, Article 50(5) TEU makes it clear that any country that leaves the EU and then decides to re-join the club would have to go through the entire accession procedure.[3]

There is no doubt that these general rules will need to be supplemented by practice that will fill numerous lacunas left by the Treaty creators. How and when this will happen is, for the time being, a question without answer. Yet, it is perfectly reasonable to make some assumptions and suggestions how such rules should look like. For that purpose a teleological interpretation of Article 50 TEU will be pursued. Furthermore, an attempt will be made to draw experience from the accession process as some elements of the well-established *modus operandi* for EU enlargements may apply *mutatis mutandis* to EU exit.[4]

The first important question that needs to be answered is whether Article 50 TEU allows for a unilateral exit from the EU. In this respect, two schools of thought have emerged. Numerous scholars argue that the wording of Article 50 TEU leaves no doubts that a withdrawal may be a one-sided affair.[5] If one pursues a literal interpretation of the provision, such an argument has merits. This author has, however, offered in another publication on the topic, a different way of reading Article 50 TEU. It takes into account the economic and legal environment of the E U, which arguably precludes a literal interpretation of the exit clause.[6] The EU is much more than a political alliance of twenty-eight Member States. It is the biggest trade block in the World founded on a unique legal order.[7] Bearing this in mind it seems fitting to argue for a teleological interpretation of Article 50 TEU. As soon as that is taken on board, the possibility of a unilateral withdrawal becomes a mere theoretical proposition, which is highly unlikely to turn into reality. From the business point of view it would amount to cutting all direct economic ties between the UK and the EU, undermining those businesses that

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3 This, as the pre-accession rules stood at the time of writing (an unlikely to change in the foreseeable future), covers EU law in its entirety. It includes compulsory, yet phased-in participation in, the Schengen *acquis* as well as Economic and Monetary Union. If the United Kingdom were to leave the European Union and then re-apply for membership it would no longer be entitled to the plethora of opt-outs it has been benefiting from ever since the Treaty of Maastricht entered into force.

4 For the most recent experience see A. Łazowski, *EU Do Not Worry, Croatia is Behind You: A Commentary on the Seventh Accession Treaty*, 8 Croatian Y.B. Eur. L. & Policy 1 (2012).

5 See, for instance, Tatham, *supra* n. 1 at 152.

6 Łazowski, *Withdrawal from the European Union. A Legal Appraisal*, *supra* n. 1.

7 As proclaimed by the Court of Justice in the seminal case *Van Gend en Loos* (see Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration ECLI:EU:C:1963:1). For a commentary see, inter alia, P Pescatore, *Van Gend en Loos, 3 February 1963 - A View from Within,* in The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty 3 (M P Maduro & L Azoulai eds, Hart Publishing 2010); B de Witte, *The Continuous Significance of Van Gend en Loos,* in The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty 9 (M P Maduro & L Azoulai eds, Hart Publishing 2010).

benefit from trade across the English Channel.[8] As will be explored further in the next section of this article, it will not detach those companies, at least, *ab initio* from EU law. Such interpretation triggers a question about the nature of the two-year deadline laid down in Article 50 TEU. Arguably, it is an instruction to negotiators of a withdrawal agreement, a warning against unnecessary procrastination during the withdrawal negotiations. A disorderly divorce is in the interest of neither the withdrawing country nor the EU. Therefore, it is reasonable to assume that failure to negotiate a withdrawal agreement within two years is most likely going to result in a decision of the European Council extending the deadline. A teleological interpretation of Article 50 TEU suggests that it is based on a presumption that if any withdrawal actually takes place it will have to be based on properly negotiated terms of exit and on regulating future relations. If there is anything that the business community particularly dislikes, it is uncertainty. While the EU exit is a big gamble in lots of respects, a Treaty-based withdrawal should provide a solid legal basis for the divorce and post-divorce relations. This will never be the case with a unilateral withdrawal.

Following on the assumption that the best way forward, should the withdrawal option be chosen, is a Treaty-based exit, it is worth delving into the legal character of such an agreement as well as its potential contents. As far as the first is concerned, Article 50 TEU leaves no doubts that a withdrawal agreement will formally be an international treaty concluded between the E U and the withdrawing country. Bearing in mind its potentially rich substance, it is likely to be a mixed agreement. Therefore, it will require not only approval of the EU and the UK but also ratification by all other Member States.[9] This will be neither easy nor fast. Being an international treaty concluded as per Articles 50 TEU and 218(3) TFEU, it will fall within the jurisdiction of the ECJ as per Article 218(11) TFEU and the standard action for annulment (Article 263 TFEU). This may translate into lengthy litigation, which will not provide for the certainty the business community desires.

One additional point needs to be made at this stage of the analysis. As well-established in the jurisprudence of the ECJ, provisions of international agreements to which the EU is a party can be invoked in national courts in accordance with the doctrine of direct effect.[10] It should be noted, however, that in the case of some trade agreements recently concluded by the EU, particularly

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8 For other consequences of unilateral withdrawal see further, *inter alia*, Łazowski, *Withdrawal from the European Union. A Legal Appraisal*, *supra* n. 1.

9 See further on mixed agreements, *inter alia*, C. Hillion & P. Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010).

10 See, for instance, Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A.*, ECLI:EU:C:1982:362; Case C-192/89, *S. Z. Sevince v. Staatssecretaris van Justitie*, ECLI:EU:C:1990:322; Case C-63/99, *The Queen v. Secretary of State for the Home Department, ex parte Wieslaw Gloszczuk and Elzbieta*

the Association Agreements with Ukraine,[11] Georgia[12] and Moldova,[13] the Council decisions on signing of these agreements contain provisions going against the case-law of the Court by precluding their direct effect.[14] These caveats appear in unilateral EU decisions, therefore they are not subject to negotiations with third countries. One can imagine the temptation on the EU side to have such a clause inserted into a decision on signing of the withdrawal agreement. Should that happen, British companies and citizens would be deprived of the possibility of invoking their rights based on the withdrawal agreement directly in the courts of EU Member States.

As already mentioned, in a very general fashion Article 50 TEU gives an indication that it should regulate the terms of withdrawal, taking account of future relations between the 'divorcee' and the EU. Here again, one may consider at least two alternative interpretations of this provision. The first is to treat the term 'taking account of future relations' as an instruction to include in the withdrawal agreement only basic parameters of a 'post-divorce arrangement'. This, however, would create considerable uncertainty as to the details of future relations, which cannot be welcome to the business community. Thus, the second interpretation of Article 50 TEU may be preferable assuming a withdrawal agreement covering in a complex fashion the terms of withdrawal and the aftermath of EU exit. This would not be the case in a scenario where the UK becomes an EEA-EFTA Member State. If this option were pursued, the withdrawal agreement would only cover terms of exit, while the EEA Treaty would regulate future relations between the UK and the EU. It is notable, however, that for this to materialize at least two additional treaties would be required – one on accession to EFTA (*a conditio sine qua non* for the EEA eligibility) and another on accession to the EEA. Since this

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Gloszczuk, ECLI:EU:C:2001:488; Case C-265/03, *Igor Simutenkov v. Ministerio de Educación y Cultura and Real Federación Española de Fútbol*, ECLI:EU:C:2005:213.

11 Association Agreement between the European Union, the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, OJ L 161/2014, p. 3.

12 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, OJ L 261/2014, p. 4.

13 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, OJ L 260/2014, p. 4.

14 Council Decision 2014/295/EU of 17 Mar. 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Preamble, Art. 1, and Titles I, II and VII thereof, OJ L 161/2014, p. 1; Council Decision 2014/494/EU of 16 Jun. 2014 on the signing, on behalf of the European Union, and provisional application of the 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, OJ L 261/2014, p. 1; Council Decision of 16 Jun. 2014 on the signing, on behalf of the European Union, and provisional application of the 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, OJ L 260/2014, p. 1.

scenario is very unlikely, it will not be discussed any further for the purposes of this article, yet the experience of the EEA and also of the Swiss model will serve as a point of reference for the analysis that follows.

Arguably, 'post-divorce' relations will create most problems during the negotiations of the withdrawal agreement. Experience with a variety of agreements concluded with EU neighbouring countries demonstrates a rule of thumb.[15] The closer the economic integration the more comprehensive the obligation to approximate national law with the EU *acquis*, which – in some cases – has evolved into an obligation to apply EU law. Bearing this in mind one has to assume that if the UK wishes to benefit from the Internal Market *in toto* or parts thereof, it will have to comply with selected pieces of EU legislation. As well-known from the experience of the EEA and EU-Swiss relations, a major bone of contention will be the *modus operandi* for securing homogeneity of the legal space thus created between the withdrawing country and the EU. While the EEA system is dynamic, the Switzerland model is, with a few exceptions, static. To put it differently, the EEA-EFTA countries are under a general obligation to follow developments in EU law while the Swiss authorities may proceed according to their wishes on a case-by-case basis. One thing, however, both systems have in common. Neither the EEA-EFTA countries nor Switzerland have the right to participate in EU decision-making as such. Their involvement is limited to the level of working groups and therefore is referred to as decision-shaping.[16] The key question that will have to be answered during the withdrawal negotiations is which of the two models would be acceptable to both sides and to what extent a former EU Member State should be allowed to participate in EU decision-making. This will largely be determined by the intensity of post-divorce relations between the two sides. The rule of thumb is: the weaker the links, the weaker the involvement; the stronger the links, the more extensive the involvement. The decision on the future relations will also very heavily affect the business community. Until the basic determinants are agreed on, it is very difficult, if not impossible to evaluate the exact impact the withdrawal will have on British companies. Irrespective of that, however, it is clear that exit from the EU will not free British companies from the curbs of EU law. Those who believe otherwise are in for a nasty surprise. This is further elaborated in the next section of this article.

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[15] Of particular importance will be experience gained in the negotiations with EFTA countries of the European Economic Area Agreement. See further, *inter alia*, M. Robinson & J. Findlater (eds), *Creating a European Economic Space: Legal Aspects of EC-EFTA Relations* (Irish Centre for European Law 1990); S. Norberg et al., *EEA Law. A Commentary on the EEA Agreement* (Fritzes Wolters Kluwer Sweden 1993).

[16] For comparative analysis see, *inter alia*, A. Łazowski, *Enhanced Multilateralism and Enhanced Bilateralism: Integration without Membership in the European Union*, 45 Com. Mkt. L. Rev. 1433 (2008).

3 *FAREWELL* EU LAW?

The EU legal order is not perfect. A *cliché* it may be, but most of the legislation, be it domestic, international or EU, cannot be categorized in simplistic way as good or bad. An ultimate assessment depends on a variety of factors and, first and foremost, on the perspective of a person making a judgment. If one takes as an example EU consumer protection or competition legislation, the assessment will vary depending on whether the evaluation exercise is conducted by consumer associations or businesses. The first is more likely to praise the legislation or to criticize it for not sufficiently covering or protecting consumer rights. The latter will probably have a rather contrasting take on such EU *acquis*: anything from a nuisance to a straightjacket for business. Such contrasting views are inevitable but the reason why this is mentioned at this stage of the analysis is of outmost importance. Withdrawal from the EU, whether unilateral or consensual, will not per se detach the UK from EU law. Quite the contrary, in order to 'de-EU' the UK legal orders one would have to engage in a very complex and time-consuming exercise of sifting through the EU and domestic legislation with the view of selecting legal acts that would be repealed, amended or kept in force in the wake of a withdrawal. This should be conducted robustly, taking all advantages and disadvantages of EU legislation into account. A simplistic approach that all EU law is bad or good should be avoided at all costs. The basic parameters of this exercise will be determined by the model of withdrawal opted for and, if a consensual exit is chosen, on the terms of the post-divorce relations. As explained above, the deeper the involvement in the Internal Market, the more legal convergence will be required. This in itself will not allow the UK to proceed with a complete detachment from EU law. Even a unilateral withdrawal will not, per se, guarantee the severance of legal ties with the Union.

In the first instance the withdrawal from the EU would merely mean that the EU Founding Treaties would cease to apply to the UK and the jurisdiction of the ECJ would come to an end. In this respect, the choice between unilateral or consensual exit makes no difference. The real question is, though, what would happen to hundreds of legal acts that form the EU *acquis*. In this respect, a number of scenarios can be developed. To begin with, one would expect that the UK would repeal the European Communities Act 1972 to sever the links and to cut off the UK legal orders from the influence of EU law.[17] This, though, would only block direct application of the Treaties as well as EU regulations and decisions. It would also preclude reliance on the direct effect of EU directives as well as international treaties concluded by the EU. Furthermore, EU framework decisions

[17] See further G. Howe, *The European Communities Act 1972*, 49 Intl. Aff. 1 (1973).

would cease to apply in the UK.[18] However, many associated measures would have to be taken. National rules giving effect or supplementing regulations or transposing directives/framework decisions will remain in force, and frequently their EU origin would remain unnoticed, until identified, declared undesirable and repealed accordingly. From this perspective, an inordinate unilateral withdrawal or badly planned consensual divorce may have considerable implications for the business community, as it would create a legal cacophony of considerable proportions. This is explored further below.

Starting with EU regulations, contrary to the common perception their direct applicability, based on Article 288 TFEU, does not make them self-contained legal regimes not requiring action of domestic legislators. While EU Member States are not allowed to copy regulations into their national laws,[19] they frequently remain under an obligation to provide a domestic legal framework to facilitate the direct application of EU regulations.[20] Hence, the final outcome is frequently a patchwork of EU regulations and supplementing domestic measures.[21] In preparation for EU withdrawal, much can be learned from the accession process. During the period preceding the membership of the EU future Member States have to approximate their national legal orders with the EU *acquis*, including regulations.[22] For that purpose EU regulations are largely copied into national

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[18] Following the exercise of the grand JHA opt-out in December 2014 the United Kingdom is still bound by several pre-Lisbon Treaty framework decisions. This includes, for instance, Framework Decision 2002/584/JHA of 13 Jun. 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18 Jul. 2002, p. 1. For a full list of pre-Lisbon measures still applicable to the United Kingdom see: Council Decision 2014/857/EU of 1 Dec. 2014 concerning the notification of the United Kingdom of Great Britain and Northern Ireland of its wish to take part in some of the provisions of the Schengen *acquis* which are contained in acts of the Union in the field of police cooperation and judicial cooperation in criminal matters and amending Decisions 2000/365/EC and 2004/926/EC, OJ L 345/2014, p. 1; 2014/858/EU: Commission Decision of 1 Dec. 2014 on the notification by the United Kingdom of Great Britain and Northern Ireland of its wish to participate in acts of the Union in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon and which are not part of the Schengen acquis, OJ L 345/2014, p. 6.

[19] See for instance Case 93/71, *Orsolina Leonesio v. Ministero dell'agricoltura e foreste*, ECLI:EU:C:1972:39, Case 34/73, *Fratelli Variola S.p.A. v. Amministrazione italiana delle Finanze*, ECLI:EU:C:1973:101; Case 18/72, *NV Granaria Graaninkoopmaatschappij v. Produktschap voor Veevoeder*, ECLI:EU:C:1972:108; Case 50/76, *Amsterdam Bulb BV v. Produktschap voor Siergewassen*, ECLI:EU:C:1977:13; Case 94/77, *Fratelli Zerbone Snc v. Amministrazione delle finanze dello Stato*, ECLI:EU:C:1978:17.

[20] See, for instance, Case 39/72 *Commission of the European Communities v. Italian Republic*, ECLI:EU:C:1973:13.

[21] *Societas Europaea* is a very good example in this respect. The legal regime is composed of Council Regulation (EC) No. 2157/2001 of 8 Oct. 2001 on the Statute for a European company (SE) (OJ L 294/2001, p. 1), Council Directive 2001/86/EC of 8 Oct. 2001 supplementing the Statute for a European company with regard to the involvement of employees (OJ L 294/2001, p. 22) as well as domestic laws implementing the Directive and filling the gaps left by the EU legislator in the Regulation.

[22] For in-depth analysis of pre-accession approximation conducted in the current candidate and potential candidate countries of the Western Balkan region see, *inter alia*, A. Łazowski & S. Blockmans, *Between*

laws, however, subsequently and taking effect on the day of accession, such domestic rules, which mirror self-executing provisions laid down in regulations, are repealed. In the case of withdrawal from the EU the situation would be just the reverse. It is imperative that the automatic repeal of EU regulations on the day of withdrawal should coincide with the removal of all domestic provisions filling gaps left by the EU legislator. Otherwise such national provisions would frequently make little sense and be largely devoid of purpose. Furthermore, EU regulations have largely replaced national rules in several areas, including, *inter alia*, financial services, transport, food production or agriculture. Thus, in order to secure legal certainty at the time of withdrawal the UK authorities would have to engage, well ahead of the EU exit, in a proper screening of the UK legal orders with the view of having a 'complete inventory' of applicable EU regulations. This should be combined with a detailed action plan for their replacement by statutory instruments or acts of parliament. For the rest, a list of domestic measures complementing EU regulations that are destined for repeal should be provided. This complex exercise would have to be conducted in an orderly fashion, subject to a robust and consistent methodology. Such a scenario would apply chiefly in case of unilateral withdrawal from the EU. Bearing in mind the already argued preference of a Treaty-based exit, it is necessary to add one more crucial element to this jigsaw puzzle. Looking at the examples of the EEA or the Swiss model, one can assume that the withdrawal agreement will require the UK to comply with a list of EU regulations as a *conditio sine qua non* for access to the EU internal market. If that were to happen, it would have to be taken into account for purposes of the legal detachment exercise. To put it differently, while making an inventory of EU regulations and their domestic implementing measures, the UK authorities would also have to list those EU regulations and the relevant national provisions that would remain in force *after* the divorce.

The situation would be different with EU directives or framework decisions, which always require transposition into national laws. Although, as per jurisprudence of the ECJ, directives may produce direct effect, this does not amount to their direct applicability.[23] Withdrawal from the EU would mean that the UK implementing measures will be detached from their original source but, unlike in the case of regulations, there would be no immediate threat to legal

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Dream and Reality: Challenges to the Legal Rapprochement of the Western Balkans, in *The Application of EU Law in the Eastern Neighbourhood of the European Union. Towards a Common Regulatory Space?* 108–133 (R. Petrov, P.Van Elsuwege eds, Routledge 2014).

[23] For the past forty years this has been a hotly debated topic in the academic literature. See, for instance, A. Dashwood, *From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity?*, 9 Cambridge Y.B. Eur. Leg. Stud. 81 (2006–2007); P. Craig, *The Legal Effect of Directives: Policy, Rules and Exceptions*, 34 Eur. L. Rev. 349 (2009).

certainty. Domestic implementing measures will turn into mere legal transplants,[24] some of which will lose their *raison d'être* and will become obsolete. A good example would be sections of the Extradition Act giving effect to the Framework Decision 2002/584/JHA on the European Arrest Warrant, which is inextricably linked with EU membership.[25] The same would apply to some directives which are devoid of purpose in a non-membership legal environment. It is notable that from the day of withdrawal, the UK would cease to be bound by the principle of loyal cooperation laid down in Article 4(3) TEU and thus would be free to repeal national provisions transposing the undesired EU directives, framework decisions or parts thereof. Just like in case of the EU regulations, full detachment from the EU *acquis* would go well beyond a mere repeal of the European Communities Act 1972. For that exercise the UK would again benefit, at least as far as methodology is concerned, from the lessons of the accession process. Prior to approximation with the EU *acquis*, accession countries are advised, in the first place, to screen their national legal orders as to compliance with EU law with the view of identifying legislative gaps. Subsequent approximation then aims at filling those gaps.[26] In case of withdrawal, a similar exercise would have to be conducted. The aim would be first to identify which domestic provisions actually originate in EU directives or a few framework decisions still applicable to the UK. It may well turn out that many national laws criticized by the business community as allegedly originating from the EU are, in fact, home-made nuisances or straightjackets. One should not forget that over the past years the EU has been engaged in a de-regulation exercise of considerable proportions and numerous pieces of EU legislation have been repealed as a result. Hence, not all red tape is necessarily coming from the other side of the Channel. Preparation of such an inventory of EU directives and their national implementing measures would be the starting point. What would follow should not be, however, a straight-forward 'repeal or keep' exercise. A detailed analysis would be necessary which of those national measures would need to stay, as a matter of principle, however subject of some fine-tuning. Consumer protection, employment, insurance or environmental protection are ideal examples to demonstrate this point. All are inherent parts of the legal landscape in economically and politically developed countries. Hence, it

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[24] H. Xhantaki, *Legal Transplants in Legislation: Defusing the Trap*, 57 Intl. & Comparative L. Q. 659 (2008).

[25] Council Framework Decision 2002/584/JHA of 13 Jun. 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L 190/1. The only exception would be if the withdrawal agreement provided for application of the European Arrest Warrant to the United Kingdom after the EU exit. This, *ab initio*, should not be excluded bearing in mind unquestionable (though controversial) security credentials of the EAW.

[26] One should note that, at least as far as the current candidate and potential candidates of the Western Balkans are concerned, approximation is frequently part of state creation exercise. To put it differently, while approximating their national legal orders with EU *acquis* are involved in an exercise that goes well beyond filling in the existing gaps but amounts to the creation of entire areas of law from scratch.

is impossible to imagine the UK legal orders without a comprehensive legal regime covering these well-established areas of law. Furthermore, as already mentioned in relation to EU regulations, the legal detachment exercise would also be influenced by the exact content of the withdrawal agreement. Since the latter is likely to require the UK to either apply or to approximate its national legislation with the EU *acquis* post-divorce, the domestic measures giving effect to EU directives listed in the withdrawal agreement would need to be maintained in the UK legal orders.[27]

As this analysis demonstrates, bidding farewell to EU law will not be a straight-forward exercise. It will be a time-consuming and resource-intensive process irrespective of whether an EU exit takes the shape of unilateral withdrawal or a consensual divorce based on a proper legal framework. Although the latter would guarantee more legal certainty in the long-term, it would, inevitably, be preceded by a considerable degree of uncertainty as to the future arrangement applicable on the date of withdrawal. Judging by the experience gained from the complex negotiations with the EFTA countries before the creation of the EEA[28] or talks with Switzerland leading up to conclusion of the Bilateral I and Bilateral II packages,[29] the negotiations will be lengthy and will centre around two main areas. First, the share of the Internal Market that would be offered to the withdrawing country. Second, the scope of regulatory engagement required post-exit is likely to be a bone of contention. In this regard, one would expect the toughest negotiations to cover rules securing the homogeneity of the legal regime. The question is to what extent the UK, after its withdrawal from the EU, should be bound by EU law, its future developments and the jurisprudence of the ECJ. As for the first, the withdrawal agreement is likely to contain lists of EU secondary legislation the UK would still be bound by, irrespective of whether a law application or a law approximation model is opted for. As already mentioned, the determination of whether the model should be dynamic or static will definitely be

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27 The obligation to apply EU law is well known in the European Economic Area, the Swiss model or the Energy Community, whereby the EU and third countries created joint European Legal Spaces. This obligation should be distinguished from the obligation to approximate domestic rules with EU *acquis*, that is, to create domestic legal transplants *sans* a European Legal Space. It should be also noted that three Association Agreements concluded recently between the European Union and Ukraine, Georgia and Moldova fall short of imposing a requirement to apply EU law. However, they condition access to parts of the EU Internal Market on comprehensive approximation of national laws with EU *acquis*. For that purpose, these Agreements contain a plethora of annexes listing EU *acquis* that domestic legal orders have to be approximated with and provide detailed deadlines for that purpose. See further, *inter alia*, Łazowski, *supra* n. 16.

28 See S. Norberg et al., *supra* n. 15.

29 See further on the Swiss model, *inter alia*, L. Goetschel, *Switzerland and European Integration: Change Through Distance*, 8 Eur. For. Aff. Rev. 313 (2003); S. Breitenmoser, *Sectoral Agreements between the EC and Switzerland: Contents and Context*, 40 Com. Mkt. L. Rev. 1137 (2003); F. Emmert, *Switzerland and the EU: Partners, for Better or for Worse*, 3 Eur. For. Aff. Rev. 367 (1998).

the most difficult issue to address. The question is whether the UK should have the obligation to follow all new EU *acquis* covered by the withdrawal agreement (dynamic model) or if it would have the right to opt-in according to its preferences (static model). Either way it would probably require participation in decision-shaping at the EU level, short of fully fledged contribution to decision-making. This is the case in the EEA model and partly in the EU-Swiss framework, to the extent that the latter imposed on Switzerland an obligation to apply the EU *acquis*.[30] In the withdrawal negotiations the dynamic model would probably be preferred by the EU, the static by the U K. To reconcile such opposing positions would be very hard, indeed. Another, though related, issue that the negotiators would have to address is the extent to which the UK courts would be bound by the interpretation of relevant legal acts by the ECJ. One of the weaknesses of the existing arrangement with Switzerland is the lack of judicial means of securing the homogeneity of interpretation of EU law. Unlike in the EEA, where this task is attributed to the EFTA Court,[31] the EU-Swiss model provides neither for joint judicial authority nor access of Swiss courts to the ECJ or the EFTA Court. This proves to be not sustainable. Therefore, it is rather likely that the negotiators of the withdrawal agreement will have to address that issue, too.

4 THE EXTERNAL DIMENSION OF AN EU EXIT

EU withdrawal would also have an external dimension, with an impact on the British business community. The EU is a party to hundreds of international treaties, including agreements covering trade matters, be it liberalization of trade or creation of free trade areas and in case of Turkey, of a customs union. These agreements with third countries are either concluded by the EU itself or by the EU and its Member States. Here the impact of EU exit will not be addressed during the withdrawal negotiations as these matters would require the involvement of all the third countries the EU has concluded agreements with. Hence, as a matter of principle, they will cease to apply to the United Kingdom as of the date of withdrawal, irrespective of *modus operandi* chosen for that purpose. For a withdrawing country this triggers a fundamental question on how to proceed.[32] One option would be to commence negotiations with the third countries of future trade agreements, before the EU withdrawal. In purely

[30] See further A. Łazowski, *supra* n. 16.
[31] See *The EEA and the EFTA Court, Decentred Integration* (Hart Publishing 2015).
[32] It is notable that the European Union will also have to engage in negotiations with these third countries with which it has the agreements. Similarly to the accession process it will be necessary to agree on tailor-made protocols reflecting the departure of the United Kingdom.

theoretical terms this is a sound proposition, yet it does not reflect a myriad of issues that will make this a problematic exercise. To begin with, third countries may approach such requests for negotiations with trepidation, taking into account the simple fact that the United Kingdom would remain a Member State until the date of EU exit and this may be marred with uncertainty. Indeed, one has to take into account the possibility of reversal of plans during the withdrawal negotiations and a decision on continued EU membership. The negotiations of new agreements with third countries would then be conducted in vain. The second option would be to commence trade negotiations with third countries as soon as the EU exit materializes. This, however, would leave a major legal vacuum as the old EU agreements would cease to apply and the future ones would be subject to negotiations. During that period the British businesses would likely be losing free or preferential access to the markets of these third countries with which the EU has trade agreements. Furthermore, to assume that, if such negotiations commenced, the United Kingdom would be a successful as the EU had been in the past may prove an illusion. The persuasive force of a medium-sized country is very much different to that of the biggest trade block in the World. Thus, at the end of the day the United Kingdom is likely to be worse off.

This example again demonstrates that EU withdrawal would not be as straight-forward as some may think. It is likely to take years to negotiate satisfactory solutions in negotiations of trade agreements with the third countries, which, in turn, will require a major effort on the part of the United Kingdom public administration. Needless to say that it will be a resource-intensive exercise that may not be ideal when pursuing austerity policies. It will also contribute to uncertainty underpinning the withdrawal process, as the results of the negotiations would be impossible to determine in advance. Hence businesses exporting goods or services to third countries will be in suspense for considerable periods, not to mention that the outcomes of these negotiations may not be satisfactory.

5 CONCLUSIONS

EU withdrawal is likely to have a considerable impact on the British business community. Exact economic implications will not be known before 'Brexit' actually taking place; therefore any analysis in this respect carries a fair degree of speculation. Most recent studies indicate, however, that departure from the EU will not bring the businesses desired efficiencies but, *au contraire*, it is very likely to be

detrimental.[33] The legal implications of an EU exit are, in comparison, easier to determine as they are based on a number of objective factors. As this analysis demonstrates, the exact legal parameters of EU withdrawal hinge upon the model that will be chosen for future relations between the United Kingdom and the EU. This will remain unknown until negotiations are completed. The fact that there is no prior experience in this respect means that both sides will step into the unknown. Furthermore, a clear lack of compelling alternative to EU membership brings a lot of uncertainty into equation. As argued in this article, a unilateral withdrawal should be taken off the cards *ab initio.* It is a tempting intellectual exercise but not a realistic proposition. Even if opted for, it would not guarantee the legal detachment from the EU that some circles are dreaming of. Consensual divorce based on a withdrawal agreement would not guarantee that, either. As Lord Denning famously argued, EU law is an incoming tide that cannot be held back.[34] To reverse it would be an exercise of massive proportions. If not conducted in a meticulous and sober fashion, the British business community will have to face a long period of trade in an environment characterized by uncertainty, including the possibility of considerable and long-lasting disruptions of trade with the EU and many third countries. Furthermore, the benefits of the internal market will only be guaranteed if the post-divorce solution provides for a degree of regulatory convergence, along the lines 'more for more', which are so well-known from the recent negotiations of Association Agreements with Ukraine, Moldova and Georgia. A complete detachment from EU law seems to be neither realistic nor possible.

However, one has to address the argument made earlier that EU law, just like domestic legal orders, has as many advantages as it has flaws. From the perspective of the British businesses it may be more effective to address those flaws from the inside; that is, by retaining EU membership and engaging in reforms. Arguably, the energy and resources used for the EU exit may better be used in pursuing genuine reforms of the internal market and the surrounding regulatory framework. The balance of competences review conducted by the Foreign and Commonwealth Office is, for that purpose, a very good starting point.[35] Equally plausible are efforts undertaken by the European Commission to clear the EU

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[33] See, for instance, Centre for European Reform, The economic consequences of leaving the EU. The final report of the CER commission on the UK and the EU single market, available at: http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2014/report_smc_final_report_june2014-9013.pdf.

[34] 'But 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.' Lord Denning MR in *H.P. Bulmer Ltd. and Another v. J. Bollinger S.A. and Others* [1974] Ch. 401, 418.

[35] For a detailed assessment of this exercise see M. Emerson (ed.), *Britain's Future in Europe. Reform, Renegotiation, Repatriation or Secession?* (CEPS 2015).

legal order of obsolete and undesired legislation (REFIT Programme) and the policy of the new Commission to table fewer proposals.[36] In the same vein the European Commission should be expected to refrain from presenting proposals for legislation, which have no serious chance of turning into laws. The case of a proposal for a Regulation on the right to strike has quickly turned into a textbook example of dubious practice that serves little purpose.[37]

Irrespective of whether the option of EU withdrawal is chosen or a preference is given to continued membership, subject to de-regulation and reforms, one thing is certain. The United Kingdom government needs to develop a solid policy, which is bullet-proof to political shenanigans but based on substantive and sober assessment of the balance sheet. What is required before any steps towards a withdrawal from the EU are taken, including a referendum, is an honest and merit-based answer to a fundamental question: is EU exit good business for business? This article argues that it is not. It is a perfect recipe for years of uncertainty and, most likely, an arrangement for future relations with the European Union, which will make the UK and its businesses worse off for years to come.

[36] See Annex to the Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2015 A New Start, COM(2014) 910 final.

[37] Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM (2012) 130 final.