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BREXIT: AN (IR)REVERSIBLE DECISION?

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Since the British Parliament rejected on January 15 the withdrawal agreement negotiated for almost two years between the government of Prime Minister Theresa May and the European Union (which had in the meantime already been approved by the European Council last November),[1] the ever-greater uncertainty surrounding Brexit has intensified. Presently the United Kingdom is before a political impasse, marked by increasingly polarized positions, without any signs of a realistic compromise,[2] which is particularly disturbing less than two months away from 29 March 2019, the expected date of withdrawal from the EU.

In the midst of this political turmoil, the Court of Justice of the European Union recently clarified the options available to the British Government and Parliament, by confirming in the already famous *Wightman* judgment, in response to a reference from a Scottish court, that until the date of withdrawal the United Kingdom, if it so chooses, is entirely free to unilaterally revoke the notification of its intention to leave the EU, thus putting an end to the withdrawal procedure and remaining a Member State in the Union.[3]

This decision has the significant practical effect of making it clear that the decision of the United Kingdom to initiate the withdrawal procedure is neither irreversible nor its eventual revocation depends on the unanimous approval of the remaining 27 Member States, contrary to what had been defended by many, including the Council and the European Commission.

Thus, in addition to withdrawal from the Union *without agreement* ("*No Deal Brexit*", a scenario which, although the most harmful from all perspectives, is becoming dangerously likely), and to *withdrawal with an agreement* (a more and more distant possibility, in view of the difficulty in finding alternative solutions to the agreement reached between the British Government and the EU), a third possibility, the reversal of the decision to leave, or "*No Brexit*" (which in all likelihood would only be possible following a second referendum), cannot be excluded.

Brexit and the *Wightman* case

In the referendum of June 23, 2016, the majority of British voters voted for the UK to leave the EU. The right of secession and the withdrawal procedure are established in Article 50 of the Treaty on European Union (TEU), which provides that the procedure must be initiated by the withdrawing Member State by delivering a notification to European Council of its intention to leave. This notification triggers a two-year period for the Member State and the Union to negotiate the conditions of withdrawal. After the expiry of the two-year period, even in the absence of an agreement, the State shall automatically cease to be a member of the Union, unless the European Council unanimously agrees to extend that period, with the agreement of the Member State concerned.

[1] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (available here), endorsed by the European Council in its special meeting of 25 November 2018 (European Council conclusions available here).

[2] Sir Ivan Rogers [the former UK Permanent Representative to the EU], *Where did Brexit come from and where it is going to take the UK*, Lecture at the UCL European Institute, 22 January 2019, available here.

[3] Judgement of the Court of Justice (Full Court) of 10 December 2018, *Andy Wightman et al. contra Secretary of State for Exiting the European Union*, C-621/18, ECLI:EU:C:2018:999, available here.

The "Article 50" notification was delivered by the British Government to the European Council on 29 March 2017, when the two-year deadline for the negotiations began. On 29 March 2019 the UK will therefore leave the Union unless the deadline is extended (one of the options currently under discussion in the UK Parliament, but which, even if a consensus political is reached, would in any event depend on the unanimous agreement of the remaining 27 Member States in the European Council).

In the course of the negotiations, and subsequently to the United Kingdom Supreme Court having ruled in *Miller* that the British (unwritten) constitution require the approval of the withdrawal agreement by Parliament,[4] several members of the House of Commons, the Scottish Parliament and the European Parliament, led by Andy Wightman, lodged a petition for judicial review before the Court of Session (*Outer House*) in Edinburgh in December 2017 seeking clarification as to whether, and on what terms, the notification of the intention to withdraw may be revoked and inviting the court to refer the question to the Court of Justice for a preliminary ruling.

Although at first instance the court refused to accept the case (considering that the question was hypothetical and, in any event, it violated the parliamentary sovereignty of the UK Parliament), on appeal the Court of Session (Inner House) admitted the petition and decided on 3 October 2018 to refer a question to the Court of Justice, on the grounds that there was indeed a doubt as to the interpretation of Article 50 and the Court's reply would clarify the options available to members of the UK Parliament when they would have to decide on the approval (or the rejection) of the withdrawal agreement reached between the UK and the EU.

The judgment of the Court of Justice

Immediately recognizing the "fundamental importance" of the implementation of Article 50 to the UK and the constitutional order of the Union, as well as the urgency of a ruling, the Court decided to hear the case by the Full Court (the only case to be so heard last year) and under the expedited procedure.[5] The judgment was delivered within a record time on 10 December 2018, just over two months after the reference was received and only six days after the heading of the Opinion of Advocate General Campos Sánchez-Bordona.[6]

The United Kingdom Government limited itself to arguing before the Court that the reference was inadmissible because it was hypothetical (since the Government had no intention to revoke the Article 50 notification) and did not reflect any specific dispute. However, the Court agreed with the referring court and declared the application admissible. Under settled case law questions referred for a preliminary ruling enjoy a presumption of relevance and, moreover, not only the procedural mechanism for judicial review used was entirely legitimate under Scottish law, but there was indeed a dispute before the national court, for which the interpretation of a provision of EU law (in this case, Article 50 TEU) was objectively necessary.

Before the Court there were two confronting interpretations of Article 50, both of which admitted the possibility of revocation of the notification of intention to withdraw, but under different conditions. The applicants claimed that a Member State has the right to unilaterally

[4] Judgement of the United Kingdom Supreme Court of 24 January 2017, *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)*, [2017] UKSC 5, available here.

[5] Order of the President of the Court of Justice of 19 October 2018, *Andy Wightman et al. contra Secretary of State for Exiting the European Union*, C-621/18, ECLI:EU:C:2018:851, available here.

[6] Conclusions of Advocate-General M. Campos Sánchez Bordona delivered on 4 December 2018, C-621/18, *Andy Wightman et al. contra Secretary of State for Exiting the European Union*, available here.

revoke the Article 50 notification, provided it complies with its national constitutional requirements. On the contrary, the European institutions (the Council and the Commission) disputed the unilateral nature of this right, alleging the need to avoid the risk of abuse by the Member State concerned, in particular the "tactical" use of revocation with a view to reopening a new two-year negotiation period or to improving the terms of an already negotiated agreement. For that reason, they argued, revocation should be conditional on the unanimous approval of the European Council (that is, the remaining 27 Member States), by applying by analogy the procedural rule of Article 50 on the extension of the negotiation period.

Article 50 does not expressly address the issue of revocation of the notification of intention to withdraw, and in its wording therefore neither prohibits nor authorizes the unilateral revocation. Following the Advocate General the Court noted, however, that by referring to the "*intention*" to withdraw from the Union the wording of Article 50 suggests that the notification is revocable, since an *intention* by its nature is neither definitive nor irrevocable.

More important, for the Court, was the fact that Article 50 pursued two distinct purposes or objectives. On the one hand, paragraph 1 gives each Member State the "*sovereign right*" to withdraw from the Union in accordance with its constitutional requirements, a right which does not depend on the agreement of the other Member States or the institutions of the Union, but only "*on its sovereign choice*". On the other hand, paragraphs 2 and 3 set out the withdrawal procedure which consists of three phases: *(i)* notification to the European Council of the intention to withdraw, *(ii)* the negotiation and conclusion of an agreement and *(iii)* the withdrawal itself, on the date of entry into force of that agreement or, in the absence of agreement, two years after notification (unless the European Council, acting unanimously and with the agreement of the Member State, decides to extend that period).

As the Court rightly found, the sovereign nature of the right of withdrawal causes the revocation of the intention to withdraw (which forms part of the exercise of the right of withdrawal and is thus subject only to the constitutional requirements of the Member State concerned) to have a substantive nature, which is *fundamentally different* from the procedural rule which requires the unanimous consent of the other Member States in the event of a request for an extension of the negotiating period, meaning that the application of the latter rule by analogy in this case is not admissible.

Above all, the Court unequivocally stated that a Member State *cannot be forced to withdraw from the Union against its will*, underlining the context of Article 50 and the fundamental values of the European Union (in particular freedom, democracy and a closer union between the peoples of Europe), as well as the *fundamental status* of European citizenship recognised to nationals of Member States, whose rights would be affected by the eventual departure of a Member State from the Union. To make the revocation of the Article 50 notification conditional upon the approval of the other Member States, the Court noted, would transform a sovereign right into a *conditional right subject to an approval procedure*, an outcome which would be incompatible with those fundamental values.

In support of this interpretation, the Court also recalled the *travaux préparatoires* of the equivalent provision to Article 50 in the 2004 Constitutional Treaty (which, after having been rejected by referendums in France and the Netherlands, was subsequently replaced by

the Treaty of Lisbon),[7] in the context of which provisions to allow the expulsion of a Member State or to avoid the risk of abuse during the withdrawal procedure had been discussed and rejected on the grounds that it was necessary to ensure the voluntary and unilateral nature of the withdrawal decision. Moreover, the Vienna Convention on the Law of Treaties of 1969 (the main international law instrument on treaties, which was also considered in the *travaux préparatoires* of the Constitutional Treaty) provides that in the case of a treaty authorizing the withdrawal of Member State, the withdrawal notification may be revoked at any time before it has taken effect.

All of the above led the Court to conclude that the withdrawing State, which remains a full Member State of the EU until an withdrawal agreement has entered into force or the two-year period provided for in Article 50 (3) has expired (possibly further to an extension), retains up to that moment the right to unilaterally revoke the notification of its intention to leave, in accordance with its constitutional provisions. The only formal requirements established by the Court is that the revocation must be delivered in written and in unambiguous and unconditional terms, thereby putting an end to the withdrawal procedure.

Comment

In a markedly complex and troubled political process such as Brexit, the very existence of the *Wightman* judgment is somewhat surprising. The applicants are active politicians and members of three parliaments (the House of Commons, the Scottish Parliament and the European Parliament), who most probably chose the Court of Session in Edinburgh to submit their petition for judicial review because they believed, not without reason, that the application would be more likely accepted by a Scottish court (in the 2016 referendum , 62% of Scottish voters were in favour of the UK staying in the European Union). Even so, the case was initially declared inadmissible and it was only on appeal that it was admitted and a reference was made to Court of Justice. (The UK Government subsequently attempted to appeal to the UK Supreme Court in London, which refused permission to appeal[8]).

Faced with the reference for a preliminary ruling, it would be practically impossible for the Court of Justice to refuse to hear the case. In addition to the obvious importance of the case for the UK and for the constitutional law of the Union itself, the Court of Justice generally adopts a position of considerable deference to the national court in the context of a reference for preliminary ruling, which constitutes the main procedural mechanism to ensure uniform application of EU law. But also because, in the present case, the procedure used was legitimate under Scottish law (it had already been accepted in previous preliminary ruling cases, as noted by the Advocate General) and it was clear that the question referred to the Court on the interpretation of Article 50 was decisive for the resolution of the dispute pending before the national court.

We must acknowledge that on the substance the position adopted by the Court revealed independence and even to some extent courage, since it was contrary to the views of the European Commission, responsible for conducting the withdrawal negotiations on behalf of the EU, and of the Council, which represents the 27 remaining Member States, in the context of the most serious political crisis for the future of the European Union of recent times.

The analysis of the Court of Justice (and of the Advocate General, whose convincing conclusions

[7] Article I-60 of the Treaty establishing a Constitution for Europe, 29 October 2004 OJ C 310, 16.12.2004, p. 1.

[8] *UK Supreme Court, In the matter of Secretary of State for Exiting the European Union (Appellant) v Wightman and others (Respondents), Permission to appeal determination*, 20 November 2018, available here.

were in essence followed by the Court) departed from the recognition of the *sovereign nature* of the right of withdrawal, enshrined in the TEU since the Treaty of Lisbon, sovereignty which would be put in question if the revocation of the notification of intention to withdraw could be conditioned by other Member States. In the interpretation of Article 50 the Court also attributed, correctly, a decisive importance to the fundamental values of the Union (in particular *democracy* and *the attainment of a closer union between the European peoples*, as well as to the *European citizenship* of nationals of the Member States), since the decision from one Member State to withdraw undoubtedly affects the interests of all citizens of the Union, not only those of the Member State concerned, but also those of other Member States. It would be clearly against those values if, in the course of the withdrawal procedure, a Member State that had democratically decided to revert its intention to withdraw were nevertheless obliged to leave (and all European citizens forced to suffer the negative consequences resulting thereof) because of a lack of unanimity in the European Council, which could result from a veto of only one other Member State, and for reasons not necessarily connected to the withdrawal procedure.

The Court of Justice did not expressly address the risk of misuse of the right to withdraw, which was the main concern of the Commission and the Council. In this respect, and as rightly pointed out by the Advocate-General, the existence of a right cannot be conditioned by its possible abusive *exercise*, which will always be a pathological situation which may be combated with the appropriate legal instruments. In particular, such action on the part of a Member State would be contrary to the principles of good faith and sincere cooperation (enshrined in Article 4 (3) TEU) and to the general prohibition of abusive practices enshrined in the case-law, and could be so declared by the Court of Justice.[9] On the other hand, although the possibility of abuse cannot be completely excluded, the reversal of an Article 50 notification constitutes a decision of such importance for the political and constitutional life of the Member State concerned – which, in the case of the United Kingdom, would necessarily require Parliamentary approval, and in all probability a second referendum – that in reality such decision could hardly be taken lightly and for mere tactical interests.

In *Wightman*, the Court of Justice confirmed that Brexit is not a "one-way street with no exits" and that, if the United Kingdom so decides, it has the option of unilaterally putting an end to the withdrawal process and remaining in the Union. Not being at all certain that this will be the outcome of this troubled story, a purely *unilateral* decision nevertheless appears to be less and less likely. Under the British constitution the eventual reversal of Brexit would most probably imply the holding of a second referendum with a majority favourable to "Remain". However, even if until 29 March a political consensus were formed in the British Parliament for convening a new referendum (and at present this is far from the political reality), it would be impossible to carry it out in the very short time available. This means that should the United Kingdom wish to unilaterally revoke its intention to withdraw, in practice it would always be forced to request the extension of the two-year period in accordance with Article 50 – and to ask for the unanimous agreement of the other Member States.

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[9] Sir David Edward QC, Sir Francis Jacobs QC, Sir Jeremy Lever QC (*retired*), Helen Mountfield QC and Gerry Facenna QC, "*In the matter of Article 50 of the Treaty on European Union – Opinion*" (the "Three Knights Opinion"), 10 February 2017, available here.

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