Brexit Referendum and Article 50 of the Treaty on European Union

A Legal Trap: the Need for Legislation

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Article 50 provides the only means for the UK to withdraw from the Union by agreement under the Treaty. But it is also a trap. A correct understanding of its meaning and implications is therefore of vital importance. The two-year "drop dead" timeline which requires unanimity of the 27 Member States (MSs) for any extension of the period for negotiations between the UK and the EU, and the fact that there is no provision for withdrawing from the notification process once started. leaves the UK completely exposed in its negotiating position. **The UK is bound to forfeit its Treaty rights irrevocably in advance of negotiations under the article: the Union is then completely free to give nothing in return.**

ARTICLE 50

The article, read with Article 218(3) Treaty on Functioning of the EU, envisages 8 or 9 steps/legal instruments to achieve exit by a MS:

1. A Decision by the leaving Member State *in accordance with its constitutional requirements* to withdraw,

2. Obligatory Notification of any such decision once made, by the MS to the European Council of Heads of State (EC),

3. Recommendations from the Commission to the Council of Ministers ("Council") (Art 218(3),

4. Provision by the EC of "Guidelines" "in the light of" which the Agreement of the withdrawal arrangements is to be negotiated. between the MS and the representative of the Council of Ministers, based on the Recommendations of the Commission,

5. A "Framework for the MS's Future Relationship with the Union" which must be "taken account of" in the Negotiation,

6. A Council decision in light of the Commission recommendations authorising the start of negotiations and nominating a lead negotiator/team,

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7. Negotiations achieving agreement within 2 years of the Notification (2 above) or a longer period if agreed by the Council (all 27 unanimously) and the MS,

8. Conclusion of the agreement between the MS and the EU, ie by the Council acting by qualified majority vote (QM) with the consent of the Parliament.

OR

9. Failure to agree before expiry of the period (including any such extension), whether by absence of agreement between the negotiators, or failure by the Council to achieve a QM or by the Parliament to agree.

10. The Treaties cease to apply to the MS in question on entry into force of the agreement or such expiry i.e. if there is no completely concluded agreement (including Council and Parliament decisions) by that time the MS is expelled with nothing.

The EC and the Council (which have different remits under this process) act throughout in the negotiations in the absence of the withdrawing MS. But all other EU business continues (for legal purposes) as before.

MATTERS ARISING

UK decision to withdraw.

Art 50 recognises that this must satisfy our constitutional requirements. Under UK law the power to adhere to, and withdraw from, treaties is *prima facie* a matter for the executive under the Royal Prerogative. However any field of the prerogative may be fettered by occupation by statute. In the case of the EU Treaties the European Communities Act 1972 implements the Treaties with sweeping effects on UK domestic law, public and private, and international relations. And in particular by giving effect in UK law to any directly applicable rights arising from the Treaties, so that citizens have and continue to acquire rights from the Treaties by virtue of the 1972 Act. Any decision to withdraw from the Treaties will involve a decision to repeal, or radical amendment of, that Act and of the vast range of laws, rights and obligations which take effect under it. It is impossible to imagine a more fundamental change of our laws as they apply directly to citizens. It is inconceivable that the courts would hold that such a change remains possible by unfettered executive action. Primary legislation is required.

It has been the law since 1611 (Case of Proclamations) that the Executive has no power to affect the rights and obligation of citizens except by statute.

So no decision has yet been made and no obligation to notify yet arises and legislation is required to authorize it.

The referendum was advisory, has no binding effect in law, confers no power in law and cannot constitute a decision of the UK to withdraw.

It is a matter of policy for Parliament to set the terms of the legislative authority to

negotiate the withdrawal; but Parliament should, and surely would, not leave the matter completely at large, as it is now as the result of the almost complete absence of definition of the "Leave" referendum decision.

Notification.of the Decision

If the UK Parliament by statute confers power on UK Government Ministers to withdraw from the EU Treaties they may do so in accordance with the powers conferred. "Notification" of the decided intention to withdraw is a formal, explicit act of the greatest significance which cannot be inferred or assumed from the circumstances. But note that once the decision is lawfully made the MS is bound to notify.

For reasons below the power to do this must be exercised with the greatest caution, if ever. Indeed the right to withdraw was probably designed to discourage its use.

Recommendations by the Commission and Guidelines by the EC

These need to be in place before negotiations can commence. It may well be argued that they can be given only after notification, with implications for the steps occupying the deadline period for actual negotiations (see below).

It is not clear whether these are public acts - presumably so.

Framework of a Future Relationship

It is unclear whether this is a separate instrument or more in the nature of a required negotiating objective nor whether it is for bilateral agreement or prescribed by the EC, the Council or its negotiator.

But clearly since this is to be taken account of in the course of reaching agreement it must be settled in the course of negotiations at the latest.

On timing, similar questions arise as to whether settling this accounts for part of the 2 year + period - see below.

Time period and failure to agree.

As explained, if there is no effective concluded agreement by the end of the 2 year period from notification (unanimously extended if applicable), the MS loses its membership and gets nothing. It will be in the same position as a third country with the benefit of no special trading or other Treaty relationship with the Union or its Members. And rights acquired by virtue of the Treaties will fall away

On the face of it this requires not only the negotiations but all the steps listed at items 3 to 8 above to be achieved within that period. The MS has little or no influence on this.

In particular the Council or Parliament can sabotage the process by delay

and witholding consent, in good faith or bad.

In short once the MS has notified it is in a trap.

Can an MS which seeks to withdraw escape this outcome?

While it would be possible to achieve exit by a new special Treaty the Union will surely insist on Article 50. Moreover the UK has agreed to article 50 under Lisbon.

Can agreement be achieved before article 50 is activated by Notification, thus escaping this "Catch 22"?

It might be possible for the MS to require agreement in advance of deciding to withdraw, perhaps invoking the need in advance for the Recommendations, Guidelines and/or Framework. But the Union will likely refuse to do so and there is a good arguable case that to do so would not be lawful on the ground that such instruments are designed for the formal negotiations.. Moreover such an understanding would be close to impossible to enforce. Nor would it preclude delay by the Council or Parliament frustrating the process. And it has now been publicly ruled out by the 4 Heads of State of Union countries and the President of the Commission.

Very likely the Union has an obligation to negotiate in good faith but this is slight comfort and likely impossible to enforce.

It may be that there is an implicit power for an MS to withdraw its Notification before expiry of the Period, thus retaining its membership. But this is very doubtful and it would surely be reckless to embark on such a serious process without the certainty of knowing that such an escape route was available. [But now see Annex to this Note dated 3 July 2016]

Conclusion

Article 50 is the only prescribed legal route for withdrawal but since its use would expose the UK to huge political, economic and legal risks without effective recourse it would seem reckless folly to invoke it. Certainly at the very least such a decision should not be taken without the most careful reflection on the implications and the fullest preparations for the consequences.

The Brexit problem and the limitations of Article 50 are essentially political and must ultimately be solved by political means.

Parliament must sanction what the Government does and only Parliament can take away rights which it has conferred and authorise the giving of notification under Article 50.

ANNEX

Withdrawing from Withdrawal: Can an Article 50 Notification be reversed?

1. It has been suggested that an Article 50 Notification can be withdrawn, or reversed once given, before the entry into force of a "withdrawal agreement" or the expiration of the two years (or longer if extended by the other MSs unanimously) Period. We firmly believe on the balance of the arguments on this question of EU law that this is not possible. But in any event it would be a reckless strategy to trigger Article 50 on the assumption that such reversal was possible and then find out – too late – that it was not.

ARGUMENTS

IN FAVOUR OF BEING ABLE TO WITHDRAW NOTIFICATION

2. The House of Lords EU Select Committee in its 11th Report ("The Process of withdrawing from the European Union", HL 138, 4 May 2016) concludes its discussion on the right to reverse an application to withdraw from the EU Treaties before the conclusion of the negotiations to the effect that;

"There is nothing in Article 50 formally to prevent a Member State from reversing its decision to withdraw in the course of the withdrawal negotiations. The political consequences of such a change of mind would, though be substantial."

The Committee based its conclusions on the evidence of two witnesses: Sir David Edwards (a former judge of the European Court of Justice) and Professor Derrick Wyatt QC (Emeritus professor of law, Oxford University).

3. The evidence of Sir David was that "It is absolutely clear that you cannot be forced to go through with it [withdrawal] if you do not want to: for example if there is a change of Government". But Sir David at least to the Committee gives no further justification for this view and his assertion of it.

4. The evidence of Professor Wyatt pointed to the following; the fact that the Treaties generally aimed for people to stay (and therefore by implication that in construing Article 50 words unexpressed should be read in to achieve that result), the fact that there was nothing in the article to say you could not withdraw notification and the fact that it was not 'sense' that if a MS could change its mind and re-apply after two years of giving notice that it should not be able to withdraw its notice before the expiration of two years to achieve the same result.

AGAINST BEING ABLE TO WITHDRAW NOTIFICATION

5. First, comfort should not be drawn from the silence of the article on the question of whether reversal of Notification is open to a withdrawing MS. Just because the Article does not prohibit reversal does not mean that it is possible. Rather such silence is a problem because it omits to address the possibility at all. Indeed the Committee's reasoning is incomplete. It is insufficient to conclude that "nothing in Article 50 prevents" reversal: a firmly reasoned conclusion is required that the article (by necessary implication since it is silent) positively allows it. In UK language an implied term must be discovered. Note in this connection, that it was thought necessary to make express special provision in Article 50(5) for the right of a withdrawing MS to reapply for membership later although that right is already conferred by the general terms of article 49.. Note also, that it is not clear what such an implied term would provide: presumably it would allow use of such a procedure more than once. Finally note, that what is being implied is another possible step in the procedure set out in the article and its provision is incomplete; for example suppose that an MS withdrew its notice to consider the position but then reapplied to withdraw: would the two year period run afresh or would the time used so far remain "on the clock"?

6. *Secondly, as to the legal character of the problem and the general principles of interpretation applicable.* The legal consequences of a triggering of Article 50 flow from the notice, which on the face of the article leads automatically to loss of membership, either by consensual withdrawal, if timely agreement is reached and EU Council and Parliament approval obtained, or by unilateral expulsion, if the period expires without agreement. The question is whether a power can be implied in EU law to reverse the effect of this notice: the question is not whether the MS can change its decision, which would have no effect in itself under the article.

7. The resolution of this question of course ultimately lies with the European Court of Justice (ECJ), which will apply its usual purposive standards of construction having regard to the applicable Treaty General Principles. Highly relevant are the principles of mutual co-operation and fidelity in Article 4(3): MSs must with "sincere co-operation assist" one another and the Union in carrying out Treaty tasks, must take "any appropriate measure to ensure fulfilment" of Treaty obligations, and must "facilitate achievement of the Union's tasks" and "refrain from any measure which could jeopardise [its] objectives". The power of a MS to withdraw in Article 50 conflicts with these principles. The article will therefore be interpreted restrictively to that extent.

8. We agree with Professor Wyatt that there is a general sense in which the meaning of the Treaties and the instincts and actions of all the Institutions of the Union will be to preserve the Union and wherever possible accommodate the different interests of each Member State. We have seen this in the past in relation to Ireland and Denmark. We have also seen it in relation to the United Kingdom; British rebate and in the adjustments on financial services' regulation, social benefits and the concept of "Ever Closer Union" offered before the Brexit Referendum. Indeed these accommodations are examples of MSs acting in accordance with their obligations of mutual co-operation and fidelity.

9. But these were accommodations to continuing members. It needs to be borne in mind that a MS invoking, or considering invoking, Article 50 is embarking on a course whereby it will cease to be a MS. It is not surprising if the article favours the remaining states at the expense of the withdrawer. The objective will be the quickest and most efficient disengagement possible with the least cost and damage to the remaining MSs and the ongoing Union. Nor is it surprising if the article presents an unattractive and inconvenient prospect to the possible withdrawing MS. It is not, generally speaking in the interests of the Union for a state to withdraw and the Treaty is hardly likely to encourage it. The point is illustrated by the setting of the Period initially at 2 years, which is very widely recognised as insufficient to agree provisions needed to cover the interests of the withdrawing state, and in particular wholly inadequate for achieving a sufficiently reliable "framework for a future relationship",

10. So there must come a point at which accommodations are inimical to the interests of the Union as a whole, at least as seen by the majority of its Members, and at this point the Institutions of the Union will not wish nor be under an obligation to accommodate change and the Treaties will be interpreted to preserve as much of the Union as possible.

11. Article 50, it will be said, is a complete and sufficient code to deal with the wish of a MS to withdraw. It sets out in some detail every step that needs to be taken in the process. But as described in our first note it is written so as strongly to discourage withdrawal by providing a trap for the withdrawing State. This is entirely logical, or to use Professor Wyatt's word makes 'sense", because the Treaties do not want to encourage withdrawal. They want the Union to be preserved. If it were possible for MSs to threaten and indeed give Notification of withdrawal but then step back, this process would become a routine method of negotiating blackmail and an interpretation which if allowed would make no 'sense'.

12. If, on the other hand, a MS embarks on Article 50 but then firmly decides it would prefer after all to remain a member, and the other MSs and the Parliament accept this, the article provides a means of achieving ongoing continuity of membership: negotiations can begin for accession under Article 49 (with no doubt due consideration of any rebates, opt-outs etc) and the Article 50 period can be extended until the accession treaty comes into effect. Crucially, this method remains under the exclusive control of the remaining MSs and the Parliament.

13. The fact that a MS which has withdrawn, can re-apply for membership after the process of withdrawal is complete does not at all suggest that it can step back during the Notification period. The other MSs might not want a withdrawing MS to return or, if they did, not on the same terms (e.g. no British rebate or opt-outs, including the Euro).

14. The ordinary rules of interpretation should be applied to the interpretation of Article 50. The words of the Article mean what they say and no provision can be implied that is not absolutely necessary to give effect to the Article or was contemplated by the Contracting Parties before the Article came into effect as evidenced in the *travaux preparatoires.* So far as we are aware there is nothing in the *travaux* that helps.

15. The ordinary rule in English law is that once notice of termination is lawfully given under a contract it can only be withdrawn in accordance with the terms of the contract or the further agreement of the other parties. This is in the interest of certainty and finality.

CONSEQUENCES FOR THE UNITED KINGDOM

16. In our view the balance of the argument strongly supports the conclusion that there is no right to withdraw Notification once given. Certainly there is a very substantial and unacceptable risk that this is so.

17. It is of course possible, as the House of Lords Report says, for the United Kingdom to change its mind "reversing its decision to withdraw" but that is simply the converse of a domestic political decision to 'leave'. But if the UK did change its mind it could only stop the Article 50 process with the EU's agreement or re-apply for membership to continue.

18. It would be possible for the UK to seek a preliminary ruling from the ECJ on the question of the whether a Notification could be reversed but to decide to withdraw without the benefit of such a ruling would be unwise at best and probably downright reckless, unless we were ready to abandon all the advantages of membership while receiving no consideration or accommodation in return.

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