Beyond Notification: How to Leave the European Union without Using Article 50 TEU

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Leonard Besselink: Beyond Notification: How to Leave the European Union without Using Article 50 **TEU**

In legal terms, the referendum on EU membership in the UK is an advisory abrogative referendum. It needs to be given effect, if at all, by the competent authorities, primarily Parliament. Moreover, on all parts there is the desire to fill the void of an abrogation of EU law. This requires an interpretation by all concerned of the referendum results, which British politicians are now fully engaged in. It also requires an interpretation of the relevant constitutional rules and principles that may be involved. Article 50 TEU on the withdrawal from the EU is now reproduced in all major European newspapers, and politicians, journalists and lawyers seem to be attributed a prominent role in this. In this blog I explain that its role is largely overestimated, firstly because whatever meaning it

may have, it is subjected to political reality as interpreted by the actors involved, and secondly because it has little legal meaning. I moreover point out that the most obvious interpretation of the referendum result for Scotland may actually make recourse to Article 50 superfluous.

Withdrawal: political revolution and the law

Withdrawal from the European Union in this case involves undoing the work of integrating one of the largest economies of Europe into a common and internal market with now 27 other member states, which together form a public entity aimed at the common good of its citizens. It is a process aiming at disruptions of a political nature, that inevitably has economic dimensions. It is not a natural process, but an historical, conscious, purely man-made revolution. Even the most peaceful of revolutions that we have witnessed in Europe since the end of WWII, such as the ending of the dictatorship of the colonels in Greece, the end of Iberian fascism in Portugal and Spain, and the Fall of the Wall, are evidence that revolutions cannot be accommodated by the law in force at the time they take place. This is also the case for the European Union and the breaking away of the UK. Politics is decisive as to the legal manner in which to accommodate matters in the post-revolutionary regime, not the law that was valid previously. This was even the case with the least messy of constitutional revolutions, the German one: the Germans had introduced a fine provision in their *Grundgesetz*, Basic Law, that specified how Germany would constitutionally be unified once East and West would join (Article 146 GG) – when it was unified, it was not used at all.

This historical evidence makes it unlikely to believe that this would be any different with the revolutionary break away of the UK from the Union at which the referendum aspires. This would also require us to be cautious in giving Article 50 TEU more than a quite modest role to play.

Prevalent opinion, however, has it that the law is decisive in the political process that must follow the British electorate's wish to leave the Union. Unfortunately, Article 50 TEU has very little to offer beyond offering a pretty vague procedural path, which can hardly be more than one option among several. This is because Article 50 had a different major function: that of acknowledging the unilateral right of member states to leave the Union, on top of which it provides a possibility for the Union unilaterally to end the operation of the Treaties for a break-away state.

Beyond "notification"

Let us make it plausible that Article 50 provides us little and what it provides is optional in the sense of providing only one option between several. Suppose that a

member state were to withdraw without the "notification" mentioned in Article 50, that would of course not be able to stop the withdrawal.

Article 50 TEU does not indicate the form that a "notification" should take, yet this expression now seems generally to be interpreted as referring to a formal declaration – a curious thing: a formal declaration of which it is unknown what form it should take. Nor does Article 50 indicate the moment at which such "notification" would need to be given. Absent these elementary starting points, also the much celebrated "two year period" becomes meaningless. This being the case, it is difficult to understand Article 50 as implying a legal obligation under EU law on the part of a break-away member state authority to give a "notification". On top of this, the actual wording of Article 50 also makes clear that there is no necessity to come to an agreement with the EU either, since it provides for a lapse of the Treaties vis-à-vis such a member state in the absence of an agreement.

Of course, a competent member state authority might notify the intention to withdraw, and say it does so under Article 50 TEU, with the result that, if nothing else happens, the EU would consider the Treaties no longer applicable to that member state after two years. But this is only one way of saying that what we are confronted with is a set of *unilateral acts of a member state and of the EU* ending the operation of the Treaties with regard to that state.

This brings us to the real function Article 50 TEU was intended to have: it was introduced in the abortive Constitutional Treaty to remove doubt that member states can unilaterally withdraw from the Union – a view that was previously rejected by most European lawyers (though not by the head of the Legal Service of the Commission, Dewost, giving testimony in the *Maastricht* case at the German Constitutional Court). This right of unilateral withdrawal is codified in the first paragraph of Article 50 TEU, just as the two years presumption in the third paragraph amounts to the recognition of the unilateral right on the part of the Union to consider the Treaties no longer operative towards a break-away state, should it be unable or unwilling to come to any understanding on the situation. Amendments proposed during the Convention on the Future of Europe which either tried to deny the right of unilateral withdrawal as such, or made withdrawal dependent on a mutual agreement, were not adopted in the final text of the Constitutional Treaty, which is now Article 50 TEU.

Scotland (and possibly Northern Ireland) remaining and England and Wales withdrawing

The answer to the question what "withdrawal" means in the context of the Brexit is not straightforward. The United Kingdom is not a unitary state, and politically it

is certain that a clear majority in all the Scottish voting districts voted to remain in the Union – something that is not quite true for Northern Ireland, though also in this part of the UK a majority expressed a vote to remain in the Union. Scotland remaining in the Union, while England and Wales leave, has historical precedents in the history of EU law, as the history of the relations between Greenland and the EU amply demonstrates. As a matter of fact, there are several member states where the Treaties and secondary EU law apply only to certain parts of the state's territory. This is so for the United Kingdom (see Article 355 TFEU), but also for France. The Kingdom of the Netherlands is another example: EU law does not apply in the Caribbean autonomous countries of the Kingdom, and even with regard to the autonomous country of the Netherlands within the Kingdom EU law only applies to the part on the European continent. We have the example of the island of St Maarten or Saint-Martin, of which the French half is within the European Union and Union law applies and the other (Dutch) half is outside the Union. Interestingly, there is an open border between these two parts on the basis of an old treaty between France and the Netherlands. So we have a present-day example of one island of which part is within the Union and the rest outside it, without a physical border and border guards at the frontiers. It is not fanciful to think there might soon be another island part of which is inside and another part outside the Union.

Indeed, the withdrawal of England and Wales from the Union can take the legal shape of changing the provision on the territorial application of the Treaties. Practically, Article 355(5) of the Treaty on the Functioning of the Union could be amended so as to include a provision that, "notwithstanding Article 52 TEU", which states that the Treaties apply to the United Kingdom, "the Treaties do not apply to England and Wales" – these latter words could be inserted after letter (a) of the present Article 355, fifth paragraph.

This elegant legal solution would live up to the results of the British referendum, and would not involve the use of Article 50 TEU. This option has a few important advantages, though some are contingent on political developments. One advantage is that the time game that is being played is indeed left to politics and not squeezed into the lawyerly deformity called Article 50. Another advantage of this approach is that Northern Ireland and Scotland do not need to become independent and secede from the UK – it would save at least one repetitive referendum.

The impact of excluding England and Wales from the operation of the Treaties is such that it would need to be accompanied by an arrangement on the position of England and Wales towards the European Union, but this should be done anyway

in a separate treaty, assuming that England would somehow want to benefit from a special relation with the EU – as would be the case with something like the status of Turkey or EFTA countries.

There are of course also snags. The most obvious one is that if Scotland remains within the UK and within the EU while England is out, there would be an open border. In the absence of a physical border with border controls combined with the absence of a public registry of inhabitants and their residence rights, retaining free movement of persons for Scotland only would practically amount to factual free movement for EU citizens within England and Wales as well. But since some people think that the Common Travel Area between the UK and Ireland could be retained also after a Brexit, and prominent Brexit campaigners are reneging on the claimed desirability of eliminating free movement of persons altogether, in exchange for access to the EU internal market, this disadvantage may weigh today less than we thought only a week ago.

However this may be, this way of keeping part of Britain in the European Union would obviate any resort whatsoever to Article 50 TEU, whatever this provision might or might not have to offer.

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