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BREXIT—WHAT IT IS AND WHAT IT MEANS

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For three and a half years now, political life in Europe has been overshadowed by Brexit, the announced withdrawal of the United Kingdom from the European Union. Rarely ever has one single political project had so much impact on the functioning of the European institutions, and indeed on the European integration as a whole, including its perception in the general public. Much has already been said and written about the June 2016 British referendum on leaving the European Union, and the political process before and after the vote, and much is still being written about the ongoing, apparently never-ending negotiating process since the British government formally declared its intention to leave the E.U. in March 2017. Brexit has found its way into virtually every part of European public life, such as business, sports, academia, entertainment, and political comedy. This Article focuses on some points of international and European law which the Brexit process necessarily raises, and which may be of some importance if one wants to understand the current debate in Europe as a lawyer. This includes looking at the legal basis of Brexit, the political process unfolding on that basis, and its immediate consequences. The article concludes with some tentative lessons that can be learned.

I. THE LEGAL BASIS FOR BREXIT: ARTICLE 50 TEU

For lawyers, it may seem natural to look first into the legal framework in which Brexit is happening. As a matter of law, Brexit is the withdrawal of a Member State from an international organization, more precisely the termination on the part of one State of the international treaties that form the basis of that organization. According to the rules laid down in the 1969 Vienna Convention on the Law of Treaties, such a termination or withdrawal may take

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place "in conformity with the provisions of the treaty."[1] And indeed, in the case of the European Union there are such provisions in place: Article 50 of the Treaty on European Union (TEU), inserted by the Treaty of Lisbon in 2007,[2] lays down the right to withdraw, the procedure to be followed, and the consequences of withdrawal.[3] Of the five paragraphs of Article 50, three are of particular relevance here.

A. *Paragraph 1*

Paragraph 1 of Article 50 stipulates the right to withdraw in somewhat cryptic terms when it allows Member States to "decide to withdraw." It is cryptic because to decide to do something is an internal process which, strictly speaking, does not need to be addressed or allowed in an international treaty. Any State can at any time "decide" various things and does not need authorization to do so. The only thing that needs to be regulated is how to put such decisions into operation on the international plane, and viewed in its context, that is what Paragraph 1 does. Taken together with Paragraphs 2 and 3, it becomes clear that Paragraph 1 establishes the right of every Member State to terminate membership in the European Union through a unilateral declaration. The European Council must be notified of the decision to withdraw,[4] and the termination of the treaty is as a legal effect tied to that notification in Paragraph 3.

That we are dealing with a *unilateral* right to withdraw was forcefully underlined by the European Court of Justice when it held, in *Wightman v. Secretary of State for Exiting the European Union*, that the State may reverse its sovereign decision to withdraw and revoke its notification of withdrawal at any time until the withdrawal has taken legal effect.[5]

Another thing in Paragraph 1 that is pure ornament from the perspective of international law is the stipulated "accordance with its own constitutional requirements" of the declaring Member

1. Vienna Convention on the Law of Treaties art. 54, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

2. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 1(58), Dec. 13, 2007, 2007 O.J. (C 306) 40.

3. Consolidated Version of the Treaty on European Union, art. 50, Oct. 26, 2012, 2012 O.J. (C 326) 43 [hereinafter TEU].

4. *See id.* art. 50(2).

5. Case C-621/18, Wightman v. Sec'y of State for Exiting the European Union, paras. 56-69, ECLI:EU:C:2019:999, available at http://curia.europa.eu.

State.[6] Could this mean that the notification of withdrawal is only legally effective if it occurs in compliance with applicable domestic law? In the case of Brexit, this became relevant when the U.K. Supreme Court held in *R (Miller and Another) v. Secretary of State for Exiting the European Union* that the notification of withdrawal was, under British constitutional law, not part of the prerogative of government, but needed to be authorized by an act of Parliament.[7] Still, as a provision in an international treaty, Article 50, Paragraph 1 cannot be read as making the effect of notification dependent upon compliance with national law. Rather, the phrase seems to underline that the constitutional law of the State concerned may create additional requirements for the "decision to withdraw," but that those conditions only matter on the domestic plane.

B. *Paragraph 2*

Beside the said notification, Paragraph 2 of Article 50 lays down some rules on negotiating and concluding a "withdrawal agreement." The provision contains substantive as well as procedural rules. As a matter of substance, it entails a binding obligation for the Union and for the withdrawing Member State to negotiate an agreement, constituting a modern example of what in international treaty law is called a *pactum de negotiando*.[8] Article 50, Paragraph 2 is most certainly not a *pactum de contrahendo*, because, considering its context, it does not create an obligation to actually conclude a withdrawal agreement. It merely requires the E.U. and the State to make in good faith every reasonable effort to bring about such agreement.

Secondly, Paragraph 2 makes clear that the E.U. itself is to become party to the agreement negotiated with the withdrawing State, not the remaining Member States individually.[9] From a legal perspective, this might seem a little bit surprising, considering that only the latter have concluded the founding treaties of the E.U., and only the Member States are parties to the Treaties which are now "ceasing to apply" for one of them. The European Union, as a separate subject of law,[10] is thus authorized in Article 50 to dispose

6. TEU, *supra* note 3, art. 50(1).

7. R (Miller and Another) v. Sec'y of State for Exiting the European Union [2017] UKSC 5 [124] (appeals taken from Eng. & Wales and N. Ir.).

8. On that concept s*ee* Hisashi Owada, *Pactum de Contrahendo, Pactum de Negotiando* (2008), in Max Plank Encyclopedia of Public International Law, https://opil.ouplaw.com/view/.1093/law:epil/9780199231690/law-9780199231690-e1451?print=pdf.

9. TEU, *supra* note 3, art. 50(2).

10. *Id.* art. 47.

of and make arrangements with regard to treaties to which it is not a party—they are for the Union *res inter alios acta*. This is legally remarkable, but not a problem under international law because, by ratifying Article 50, all Member States agreed to authorize the Union to represent them in the withdrawal process. However, the fact that the E.U. concludes the withdrawal agreement as a third party is bound to limit the matters of substance it can negotiate in such an agreement. It determines the "arrangements" the Union is allowed to make in this context—those "arrangements" may not *de facto* alter the substance of the E.U. Treaties which remain in force as between the remaining 27 Member States. It is probably open to debate how much "spillover" from the withdrawal "arrangements" into the body of E.U. law proper would be acceptable under these circumstances.

Which brings us to a third point of substance: Article 50, Paragraph 2 gives at least a sketchy idea of what the contents of the withdrawal agreement should be. According to the second sentence, the agreement is supposed to set out "the arrangements" for the withdrawal, taking account of the framework for the "future relationship" of the exiting State with the E.U. These phrases are rather vague and thus leave both sides plenty of room to design the topics, the order, and the timeframe of the withdrawal negotiations. It was an expression of that flexibility when the E.U. decided very early in the process that the negotiations would initially be exclusively about transitional arrangements for the withdrawal, and only if and when those were agreed upon would negotiations on a "future relationship," such as a free trade agreement or some kind of association, begin.[11]

A fourth point of substance concerns the actual relevance of the withdrawal agreement: Paragraph 3 makes clear that the agreement is not needed for the withdrawal to happen. Even if an agreement is not concluded or does not enter into force before two years have passed from the moment of notification, the Treaties "shall cease to apply" to that Member State due to that notification. It is therefore the unilateral notification that is the ultimate legal ground for the termination of treaty. As we said, Article 50 stipulates a unilateral right to withdrawal, not simply a right to negotiate one. The withdrawal agreement would be nice to have and would make life much easier for everyone because it would

11. *See* Press Release, European Council, European Council (Art. 50) Guidelines for Brexit Negotiations (Apr. 29, 2017), https://www.consilium.europa.eu/en/press/press-releases//04/29/euco-brexit-guidelines/ [https://perma.cc/DAP7-4STL].

soften the blow, but it is not legally required "for getting Brexit done." What is today usually called "hard Brexit"—a withdrawal without a transitional agreement—is actually provided for in Article 50, Paragraph 3, with the words "failing that."

Beside those points of substance, Article 50, Paragraph 2 contains certain rules of procedure: on the European Council, i.e., the Heads of State or Government, providing "guidelines" for the negotiations; on the European Commission, conducting the actual negotiations; on the Council acting by qualified majority, concluding the agreement; and on the necessity of getting the consent of the European Parliament. Thus, practically every major organ of the European Union has its own role in the process and the political authority or veto power resulting therefrom—which, of course, is bound to influence the process itself.

C. *Paragraph 3*

Paragraph 3 of Article 50 lays out the two-year period for negotiating the withdrawal agreement, as well as the possibility to extend this period if both the E.U. and the withdrawing Member State agree to do so. With Brexit, this extension has happened three times. The original date at the end of the two years, March 30, 2019, was first changed alternatively to April 12/May 22, 2019, and then to October 31, 2019 by decisions of the European Council upon request of the British government.[12]

Subsequently, as a consequence of the turmoil in British politics at the time, the request for yet another extension was laid down in a British statute, apparently binding the Prime Minister by domestic law to submit such a request to the European Council.[13] Prime Minister Boris Johnson complied with that law by sending an unsigned letter to Brussels on October 19, 2019 seeking a further extension until the end of January 2020, and at the same time sending a second letter underlining that he did not actually want another extension. Under international law, this might raise the question what the United Kingdom had actually declared, whether it had expressed the "agreement" required by Article 50, Paragraph 3 in a sufficiently clear manner. This is, of course, a matter of

12. European Council Decision 2019/476, 2019 O.J. (L 80) 2 (E.U.); European Council Decision 2019/584, ¶ 9, 2019 (L 101) 2 (E.U.).

13. *See* European Union (Withdrawal) (No. 2) Act 2019, c. 26 (U.K.), http://www.legislation.gov.uk/ukpga/2019/26/2019-09-09 [https://perma.cc/53FP-BG3V], *repealed by* European Union (Withdrawal Agreement) Act 2020, c. 1, § 36(f) (U.K.), http://www.legislation.gov.uk/ukpga/2018/16/section/3/enacted [https://perma.cc/9XPC-P9CJ].

interpretation, and the European Council, in its decision of October 29, 2019, took the official British position to be that the country had indeed agreed to another extension, and on that basis granted a flexible extension until January 31, 2020.[14] This might be one of the rare cases where under international treaty law, the declarations of a state on the international plane are interpreted in the context of its domestic political situation.

II. The Never-ending Process

The legal provisions laid down in Article 50 TEU are being applied for the first time in the case of Brexit. And as with everything being done for the first time—especially when the political and economic consequences are daunting—the road ahead is uncertain: we are testing the waters, stumbling, trying to find firm ground on which to consolidate our positions to establish a reasonable and dependable practice. That is basically what various actors have been doing since the beginning of 2017, both on the British and European sides. Positions have been taken, adjusted, and revised. And all that alongside the influence of growing populist movements in Britain and across Europe.

A withdrawal agreement was negotiated and accepted by the European Council on November 25, 2018,[15] then with a view of effecting the withdrawal two years after its notification on March 30, 2019. The Agreement contains provisions for individuals, companies, and public administrations, allowing them to adjust to the new legal state of affairs where E.U. law will eventually no longer apply as between the United Kingdom and other Member States. The Agreement provides for a transition period to last until the end of 2020, during which major parts of E.U. law continue to apply to and in the United Kingdom.[16] Also during that period, the U.K. and the E.U. are supposed to negotiate agreements on their future relationship, such as free trade and other cooperation procedures. The political declaration adopted on November 25, 2018[17] set out a somewhat loose framework for that future relationship.

Until a basis is found for the future trade relationship between the E.U. and the U.K., the E.U. has to take care to maintain peace and stability in the Republic of Ireland, its Member State, and for

14. European Council Decision 2019/1810, 2019 O.J. (L 278) 2 (E.U.).
15. 2019 O.J. (C 144) 1.
16. *Id.* at 54–57.
17. 2019 O.J. (C 66) 185.

that purpose, to make sure that no customs or border controls are reinstated on the border between Ireland and Northern Ireland. This is why the E.U. insisted on the so-called "backstop" in the Withdrawal Agreement, according to which the E.U. and the U.K. would both be part of a "single customs territory," effectively keeping the U.K. in the E.U. customs union until a new trade agreement between the two sides would have been concluded.[18]

Because this arrangement would have made an autonomous British trade policy dependent on the consent of the European Union, it proved impossible to find a majority to ratify it in the British parliament. Prime Minister Johnson, who came into office in July 2019, managed to negotiate with the European Commission a revised version of the "Protocol on Ireland/Northern Ireland" included in the Withdrawal Agreement in October 2019[19] which was then ratified by both sides. The revised agreement creates a somewhat curious status for Northern Ireland, making it exclusively part of U.K. customs territory, while providing certain arrangements that would treat the territory as if it were still part of the E.U. internal market.[20]

When this text was prepared in early November 2019, it was still unclear whether the withdrawal agreement, as amended in October 2019, would find the necessary approval in the British and in the European Parliament. The whole process, which had been going on for more than three years now, had led to a situation in which relevant actors in politics, business, and academia simply wanted to get it over with, with or without a deal, regardless of the costs or consequences. For some there was even a small chance that after the general election in December 2019 a new British government could have come into office which would actually revoke the withdrawal altogether and bring the Brexit nightmare to an end. Nothing of that happened, but it says something about the stability of British and European politics that more than three years after the British referendum that possibility legally and politically still existed.

III. Immediate Consequences

The legal consequences of Brexit are clearly spelled out in Article 50, Paragraph 3 TEU: the "Treaties", i.e. E.U. law in general,

18. *See* Article 6 of the Protocol on Ireland/Northern Ireland, attached to the Withdrawal Agreement, 2019 O.J. (C 144) 87.

19. *See* 2019 O.J. (C 384) 92.

20. *Id.* at 93.

shall cease to apply to the United Kingdom from the date on which the withdrawal takes effect. This is subject, of course, to everything that is contained in a withdrawal agreement, should such an agreement enter into force. If it does not, everything ends at midnight on "Brexit Day": the right of free movement of goods, workers, business and capital between the U.K. and the other E.U. Member States, all legal guarantees for individuals and companies derived from E.U. law, the legal mandate of the European Commission and of the European Court in respect of the United Kingdom and its citizens, the representation of the British people in the European Parliament, etc.

In the domestic legal order of the U.K., the supremacy of E.U. law will technically end. By statute, however, Britain has incorporated all E.U. law applicable at the moment of Brexit into domestic law, so that it can from then on be amended or abolished by domestic legislation.[21] What this will mean in practice is still unclear, which is true of so many things in British politics today. What has become clear by now, however, is that the whole Brexit process has already had serious effects on the political culture of the United Kingdom and its economy, and may even have serious consequences for its constitutional structure.[22]

As for the European Union and its Member States, they will have to adapt structures and procedures, adjust the E.U. budget, and rearrange the balance between different economic priorities among Member States. With the withdrawal of the United Kingdom, the E.U. is losing roughly 13% of its population, 15% of its economic output, and a strong market-oriented economy.[23] On a long-term basis, the role of public spending and regulation might increase due to a greater influence of the French model, which tends to find support in the Mediterranean Member States.

Moreover, the debate on Brexit might be a chance for the E.U. to reaffirm its identity as a complex European project, and for the Member States to re-assess the value of their membership, perhaps

21. *See* European Union (Withdrawal Act) 2018, c. 16, § 3(1) (U.K.), http://www.legislation.gov.uk/ukpga/2018/16/section/3/enacted [https://perma.cc/9XPC-P9CJ].

22. This may concern, for example, the relationship between the British government and the English courts which have censured the government twice on its way to "Brexit." But also the unity of the nation as such may be at stake, with Scotland making a point to stay in the E.U. and Northern Ireland developing closer custom ties with the Republic of Ireland . . . .

23. Matthias Ruffert, *How Will the E.U. Develop Without the United Kingdom?*, *in* Brexit—And What It Means 35, 36 (Stefan Kadelbach ed., 2019).

leading them to renew their commitment to the Union and to their constitutional principles. In particular, the rule of law has recently come under some pressure in some Member States.[24] But with the option to leave the E.U. proving to be so messy and disruptive in the case of Brexit, some State actors might perhaps accept the constitutional framework of European integration more readily than before.

And if anything good can be seen to come from three and a half years of Brexit process, it might be that is has not set in motion any major disintegration: No Member State government has, publicly at least, taken sides with the U.K. or seized the opportunity for demanding isolated privileges or opt-outs, as the U.K. had. In the shadow of Brexit, the E.U.-27 appears to be more united and much firmer in its European commitment than it was before 2017.

On the other hand, the E.U. might, as a consequence of Brexit, have to reconsider some of its substantive principles, such as unrestricted free movement in the internal market, as it seems that a wide-spread rejection of migration, also intra-E.U.-migration, into the U.K. was an important factor for triggering Brexit. The same public sentiment is being fueled by populist movements in Italy, France, the Netherlands, Poland, and Germany. The question could be asked if the unrestricted free movement laid down in E.U. law and the economic solidarity between European nations entailed by that freedom is asking too much of public opinion in many E.U. Member States.

Finally, a side note on a not so unimportant point: What will become of the English language in the E.U. institutions and meetings? Will it slowly disappear, now that the mother country has left the building? It may be hard to believe these days when in any international context the *lingua franca* is English, but according to the logic of Article 55 TEU, the English language is an official language of the E.U. only because the United Kingdom is a Member State. When this is no longer the case, the question can be asked whether English remains "official" in the E.U.[25]

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24. *Cf.*, *e.g.*, Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation (Werner Schroeder ed., 2019); Matthias Schmidt & Piotr Bogdanowicz, *The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Article 258 TFEU*, 55 Common Mkt. L. Rev. 1061–1100 (2018).

25. Even if the language has an official character in Ireland and Malta. *See* Constitution of Ireland 1937 art. 8(2); Constitution of Malta art. 5(2).

IV. Future Relations Between the E.U. and the U.K.

The future relationship between the E.U. and the U.K. must be developed once Brexit is sorted out, and it will surely be developed with the memory of that experience in mind. There will of course always be trade between the U.K. and the E.U. Member States, the question only is: on what legal basis? Different models are available that are labelled according to the respective E.U. partner countries, such as Norway (European Economic Area), Turkey (association with an institutional underpinning), Switzerland (dozens of individual agreements), or Canada (single, comprehensive trade agreement, in the form of CETA). The political declaration on the future relationship adopted by both sides in November 2018 is rather vague in this respect, as it merely lays down "parameters of an ambitious, broad, deep and flexible partnership."[26]

In any future trade arrangement, a dispute settlement procedure will have to be established, which can either lean towards arbitration under international trade law or towards extending the mandate of the European Court to E.U.-U.K. relations. Both concepts are being discussed at the moment, and the Political Declaration was worded very cautiously in this respect.[27]

In any arrangement, the E.U. must probably take care that it does not turn out too advantageous for the U.K., at least not compared to its membership in the internal market. Otherwise, other E.U. Member States, such as those dissatisfied with E.U. migration policy, might in the future want to get the same deal as the U.K. and embark themselves on a withdrawal adventure.

Several existing international regimes will continue to tie the U.K. and the E.U. together, such as NATO, the Council of Europe, the United Nations, and the World Trade Organization, although the U.K. will have to revive its WTO membership in its own right if it wants to participate in the global trade privileges and legal infrastructure it provides.[28]

V. Lessons to be Learned?

What can we learn from all that—as international lawyers, and maybe as Europeans? Four points come to mind. First, from a legal point of view, the Brexit process demonstrates yet again how flexi-

26. 2019 O.J. (C 66) 185.

27. *Id.* at 197.

28. That is, if the WTO dispute settlement system is still able to function. *See, e.g.*, Ting-Ting Kao, *The Trump Effect: Section 232 and Challenges to the Dispute Settlement Body at the World Trade Organization*, 51 Geo. Wash. Int'l L. Rev. 653, 658–59 (2020).

ble international treaty law is and what problems can arise from that flexibility. The European Union is a construct of international treaty law, and its Article 50 TEU leaves Member States and the European Commission plenty of room to decide on the contents of a withdrawal agreement and on the timeline of the withdrawal process. This underlines the international law character of the E.U., but at the same time it subjects the addressees of its legal rules, i.e. companies, individuals and administrations, to the vagaries of international politics. Efficient economic planning, security, and reliability in personal careers and lives, foreseeable application of the law—all that is made impossible if States apply flexibility between them in matters concerning everyone's life.

Second, because of Brexit, the E.U. is forced to reorganize itself. The U.K. contribution to its budget will disappear, its organs and institutions will no longer include representatives from the U.K., and U.K. citizens are no longer automatically in the recruiting pool for staff. This is going to change the face of the European institutions, but also of the integration process at large. A strong national economy, one centered upon a marked-oriented economic policy, will be missing. Not only because of that, a feeling of incompleteness is bound to take hold in common European policy.

Third, the remaining E.U. Member States and their societies are confronted with a debate on the value of European integration: what does that process mean to European nations, peoples, and societies. What is it worth to them? What will other governments do if in their countries populist movements get strong enough to advocate "E.U.-exit" in election campaigns? How will societies on the European continent react if any such movement gained a political majority? For a couple of months in 2018–19 it had appeared as if in Italy, one of the founding members of the E.U., it would become necessary to answer that question.

The fourth and last point might be a little provocative. The Brexit referendum in the U.K., like other episodes in the history of European integration, gives reason to think that if some political decision is both hugely important and immensely complicated, better don't ask the people!