

EDITORIAL COMMENTS

Withdrawing from the “ever closer union”?

The British Prime Minister, Theresa May, has announced that her Government “will invoke Article Fifty [TEU] no later than the end of March next year”.¹ The ensuing notification to the European Council will have at least three important implications. First, it will confirm that the UK has formally decided to leave the Union; second, it will initiate the negotiations of the EU-UK withdrawal agreement; and finally, it will foreshadow the new form of UK interaction with the process of European integration.

Confirmation

Despite lingering disagreements as to its mandate to notify,² the UK Government’s message has been unambiguous. Domestically, the establishment of a Department for Exiting the EU,³ and the constitution of a “Brexit Cabinet Committee”⁴ operationalize the official mantra that “Brexit means Brexit”. At the European level too, the intention of the UK Government was made explicit when it announced that the UK would not hold the 2017 presidency of the Council.⁵ The Council Decision adopted in response to that announcement indeed shows that the message came through loud and clear.⁶ Its Preamble underlines that “[a]lthough no notification has as yet been received under Article 50 TEU from its government, a Member State has

1. See speech at 2016 Conservative Party conference: <www.politicshome.com/news/uk/political-parties/conservative-party/news/79517/read-full-theresa-mays-conservative>.

2. See judgment in *R (Miller and others) v. Secretary of State for Exiting the European Union*, [2016] EWHC (<www.judiciary.gov.uk/judgments/r-miller-v-secretary-of-state-for-exiting-the-european-union/>) in which the High Court of Justice of England and Wales found that the Secretary of State does not have the power under the Crown’s prerogative to give notice pursuant to Article 50 TEU for the UK to withdraw from the EU, pointing instead to a need for a vote by Parliament before notification. The judgment is appealed to the Supreme Court. Cf. *McCords (Raymond) Application* [2016] NIQB 85, also appealed.

3. Department for Exiting the European Union, <www.gov.uk/government/organisations/department-for-exiting-the-european-union>.

4. “Brexiters win half the seats on new Brexit cabinet committee” *Financial Times* (14 Oct. 2016), <www.ft.com/content/db54f2ca-9210-11e6-a72e-b428cb934b78>.

5. <www.independent.co.uk/news/uk/politics/uk-gives-up-presidency-of-eu-council-to-focus-on-brexit-negotiations-a7145801.html>.

6. Council Decision (EU) 2016/1316 of 26 July 2016 amending Decision 2009/908/EU, laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council; O.J. 2016, L 208/42.

made it known publicly that it will withdraw from the Union. The order of presidencies of the Council should be amended to take account of that circumstance, without prejudice to the rights and obligations of that Member State”.

The anticipation of the UK’s notification was already apparent in the immediate aftermath of the Brexit referendum, held on 23 June 2016. Regretting the result, the other EU Heads of States or Government, meeting informally – and symbolically – à 27, held that it was “up to the British government to notify the European Council of the UK’s intention to withdraw from the Union [adding that] this should be done as quickly as possible [and that there would] be no negotiations of any kind before this notification has taken place”.⁷ They also laid out the path to the future EU without the UK, “starting ... a political reflection to give an impulse to further reforms, in line with [their] Strategic Agenda, and to the development of the EU with 27 Member States”.⁸ Further discussions took place at another such EU27 meeting in Bratislava, on 16 September 2016,⁹ two weeks before the British Prime Minister’s announcement about invoking Article 50 TEU.

The timing of the notification was left to the UK Government’s discretion. Delaying the process allegedly gave it time to develop its negotiating strategy and avoided “setting the clock ticking until [its] objectives [were] clear and agreed.”¹⁰ At the same time, there have been strong arguments in favour of a swift notification. One important element, acknowledged by the UK Prime Minister herself, was the growing internal pressure to deliver on Brexit before the general elections in 2020: “Having voted to leave, I know that the public will soon expect to see, on the horizon, the point at which Britain does formally leave the European Union. So let me be absolutely clear. There will be no unnecessary delays in invoking Article Fifty. We will invoke it when we are ready. And we will be ready soon.”¹¹

Exogenous elements may have also contributed to the UK Government’s decision to start the process soon, not least the important EU events that are scheduled for 2019. European elections are to be held in May that year, following which a new Commission including a new High Representative will have to be appointed and take office in the autumn. In addition, the European Council will replace the President of the European Council whose term of

7. Statement, Informal meeting at 27, Brussels, 29 June 2016, <www.consilium.europa.eu/en/press/press-releases/2016/06/29-27ms-informal-meeting-statement/>.

8. *Ibid.*

9. <www.consilium.europa.eu/en/meetings/european-council/2016/09/16-informal-meeting/>.

10. Conference speech 2016, cited *supra* note 1. Further on the aftermath of the referendum, see “Editorial Comments: ‘True is it that we have seen better days’”, 53 *CML Rev.* (2016), 875.

11. Conference speech 2016, cited *supra* note 1.

office comes to an end in October 2019, while the negotiations of the new multiannual financial framework, to be agreed by 2020, will be in full swing. As the withdrawing State remains in principle a fully-fledged member until effective departure,¹² further delay in the notification could mean that, unless decided otherwise, the UK would have to take part in all these processes, perhaps only a few months before exiting. While possibly problematic for other Member States, such UK participation would undoubtedly put the Government in an awkward position *vis-à-vis* the public. This may have added pressure to notify by early 2017. To be sure, the Government's position would have been rather untenable had it not notified before the UK was due to take over the Council presidency in the second half of 2017 and which it has formally given up because of its withdrawal.

Negotiations

Once the UK has formally notified the European Council of its intention to leave, negotiations on the “arrangements” of the withdrawal may begin.¹³ The European Council will, by consensus and without the UK's participation,¹⁴ establish the “guidelines” for the Union to negotiate and conclude the withdrawal agreement.¹⁵

This agreement is indeed negotiated and concluded as an *EU* agreement, in accordance with Article 218(3) TEU. The Commission¹⁶ will recommend the opening of negotiations to the Council, which then adopts the decision to that effect, and nominates an EU negotiator or head of the EU negotiating team. Whether the Commission will be alone in this task or part of a broader negotiating team remains to be seen.¹⁷

12. See e.g. Statement, Informal meeting at 27, Brussels, 29 June 2016, cited *supra* note 7.

13. According to Art. 50(2) TEU, only the EU is bound to negotiate; the UK remains free not to engage in these negotiations and to wait for the end of two-year period for its withdrawal to become effective.

14. See Art. 50(4) TEU.

15. Art. 50(2) TEU.

16. Since it is unlikely that the withdrawal agreement will deal exclusively or principally with the Common Foreign and Security Policy.

17. The Council appointed one of its directors to head the “Task Force on the United Kingdom”: see e.g. “Belgian diplomat to head EU's Brexit taskforce”, *The Guardian* (26 June 2016) <www.theguardian.com/politics/2016/jun/26/belgian-diplomat-to-head-eus-brexit-task-force>; the Commission President appointed a former Commissioner as “Chief Negotiator in charge of the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 of the TEU”, <europa.eu/rapid/press-release_IP-16-2652_en.htm>; and, although it does not have an express role in the negotiations, the European Parliament has its representative on Brexit matters “who will help prepare the EP position in the negotiations”, <www.europarl.europa.eu/news/en/news-room/20160908IPR41661/parliament-appoints-guy-verhofstadt-as-representative-on-brexit-matters>.

The withdrawal agreement will not itself establish the new relationship between the UK as ex-Member State and the EU. That will be the subject of a separate agreement to be concluded *after* withdrawal, once the UK has become a third State. However, this does not mean that the two processes will be entirely disconnected. For the terms of the withdrawal agreement must take “account of the framework for [that] future relationship”. While it is first and foremost deemed to establish the technical “arrangements” to ensure an orderly withdrawal (e.g. the treatment of EU officials from the UK, of EU citizens living in the UK and UK citizens living in the EU, transitional financial arrangements, relocation of EU agencies based in the UK, etc.), it may also aim at establishing a bridge to a potential future EU-UK agreement, post exit.

For example, the British Prime Minister has evoked the UK’s intention to maintain free trade in the fields of goods and services with the EU after withdrawal.¹⁸ Should the EU27 share this objective, the withdrawal agreement could logically contain provisions to avoid the emergence of obstacles to trade in these areas (both in terms of tariffs and technical barriers) between the time of withdrawal and the (later) entry into force of the future agreement. One option could then be for the withdrawal agreement to comprise transitional periods whereby relevant EU norms (including e.g. on State aids and competition rules) would continue temporarily to apply following withdrawal, under the supervision of an agreed system of surveillance and dispute settlement.¹⁹ This interim arrangement would ensure a level of homogeneity of the rules and their application in the relevant fields to preserve market access, possibly until the new agreement enters into force.

Whether the UK Government would agree to such an arrangement is uncertain, particularly in view of its intention to introduce a Great Repeal Bill so that “[t]he authority of EU law in Britain will end” upon withdrawal, including that of the European Court of Justice.²⁰ Indeed, it could be argued that extending the application of EU rules might not be necessary since the planned Great Repeal Act would convert EU law into British law, thus ensuring that the same rules would continue to apply.²¹ For some time at least the EU and UK regulatory systems would be textually identical thereby allowing continued free trade, if respective rules were interpreted

18. See 2016 party conference speech, cited *supra* note 1, and UK Prime Minister’s press conference following the European Council meeting in October 2016.

19. In consideration of Opinion 1/91, *EEA (I)*, ECLI:EU:C:1991:490, and Opinion 1/92, *EEA (II)*, ECLI:EU:C:1992:189.

20. See Conference speech 2016, cited *supra* note 1; see also “Theresa May pitches for a ‘long’ Brexit”, *Financial Times* (6 Nov. 2016).

21. Conference speech 2016, cited *supra* note 1.

homogeneously. However trade could become more problematic should the two systems begin to diverge (e.g. on food labelling), and/or if other important rules (e.g. on State aids) were not similarly interpreted and applied, thereby distorting competition.²² In other words, without a UK verifiable commitment to follow core EU market principles and regulatory developments in the relevant fields, or without some form of institutional mechanisms to ascertain regulatory and interpretative consistency, access to the EU markets for its goods and services might well deteriorate.

Indeed, among the countless thorny issues to be handled in the post-notification phase, the external implications of such transitional arrangements would also have to be considered. One obvious external consideration is their WTO compatibility. Moreover, if some internal market rules were to continue temporarily to apply in the post-exit UK, such interim measures would possibly have to be replicated in the broader EEA context so as to preserve the latter's homogeneity, thereby involving the agreement of the three EEA EFTA States. That points to necessary consultation and cooperation with these associated States during the negotiations. All the more so since the UK will likely have to withdraw from the EEA too in accordance with Article 127 EEA.

Once negotiated, the Council will conclude the withdrawal agreement by qualified majority,²³ after obtaining the consent of the European Parliament. Article 50 TEU does not foresee ratification by each Member State as in the case of Accession Treaties. No Member State can therefore veto its entry into force. As a consequence, and this may have been the drafters' intention, the withdrawal agreement may be applied swiftly. Of course, the procedure does not preclude the involvement of Member States, but limits it to the initial phase and in a different form, when the European Council consensually establishes the negotiating guidelines. Thus apart from that of the EU, the only ratification required for the agreement to enter into force is that of the UK. Importantly, if such ratification were to fail, it would not in principle be withdrawal itself that would be halted, but the entry into force of the agreement on the negotiated terms of withdrawal.²⁴

One particular question in this context is whether the withdrawal process can be stopped once notification is served, if the State concerned changes its

22. See, in this sense: "Brussels asks UK to detail deal with Nissan", *Financial Times* (7 Nov. 2016).

23. Art. 50(2) TEU. Art. 50(4) TEU foresees that such a qualified majority is defined in accordance with Art. 238(3)(b) TFEU.

24. Art. 50(3) TEU foresees that the Treaties cease to apply to the withdrawing State from the date of entry into force of the withdrawal agreement, or failing that, two years after the notification.

position. Article 50 TEU is ambiguous on this point. On the one hand, paragraph 3 foresees that “the Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification..., unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period”. One reading could be that there is no turning back once the mechanism is triggered, the only possible adjustment to the process being that the European Council and the State concerned alter the moment upon which the Treaties cease to apply to the latter.²⁵ Such a strict reading would indeed dissuade any member from (ab)using the procedure to obtain concessions from its peers, and/or to gauge what exit terms it could obtain, while keeping the assurance of full membership should it consider those unattractive. To be sure, Article 50 TEU foresees that an ex-Member may always ask to be re-admitted, on the basis of Article 49 TEU.²⁶

On the other hand, the remaining Member States might still be open to abort the withdrawal process following a genuine change of intention of the State concerned.²⁷ Founded on respect for democracy and given its core objective to integrate the peoples of Europe, the EU (and its Member States) could not force a member out against its (altered) will. This seems to be the view of European Council President, Donald Tusk. Speaking on the process of withdrawal which is about to start, he declared that “[w]e will conduct the negotiations in good faith, defend the interests of the EU 27, minimize the costs and seek the best possible deal for all. But as I have said before, I am afraid that no such outcome exists that will benefit either side. Of course it is and can only be for the UK to assess the outcome of the negotiations and determine if Brexit is really in their interest.” In his view, thus, the British people could still change their mind and decide to stay in the Union, even after the end of the negotiations.

If interruption of the process was thus conceivable, the question would then be whether termination would merely be contingent on the State concerned informing its peers of its change of mind, or whether certain formalities would have to be fulfilled. For instance, would a formal reaction of the European

25. See e.g. para 10 of the High Court’s judgment in *R (Miller and others)*, cited *supra* note 2, and the Report of the House of Lords Select Committee on the Constitution, *The invoking of Article 50* (13 Sept. 2016), pt. 12.

26. Art. 50(5) TEU.

27. Piris, “Article 50 is not for ever and the UK could change its mind”, *Financial Times* (1 Sept. 2016) <www.ft.com/content/b9fc30c8-6edb-11e6-a0c9-1365ce54b926>; “Article 50 author Lord Kerr says Brexit not inevitable”, BBC (3 Nov. 2016), <www.bbc.com/news/uk-scotland-scotland-politics-37852628>; see also Craig, “Brexit: Foundational Constitutional and Interpretive Principles: II” <ohrh.law.ox.ac.uk/brexit-foundational-constitutional-and-interpretive-principles-ii/>.

Council, which is initially notified of the intention in the first place, be warranted?²⁸

Participation

Should the notification from the UK be served in March 2017, it will coincide with the celebrations of the 60th anniversary of the Treaty of Rome, which in the words of the Italian Ministry of Foreign Affairs, hosting the party, "... is an opportunity to reaffirm the commitment to a stronger Union with the involvement of all the EU Member States that share the need to continue on the path to integration based on the set of shared values, ideas and hopes of the Founding Fathers".²⁹ People may have different views as to whether this concomitance is fortunate, but it does beg the question of what the envisaged UK departure will mean for the process of European integration that will be celebrated next year. Indeed, can withdrawal be reconciled with the objective of an "ever closer union among the peoples of Europe"?

Article 50 TEU finds its origin in the defunct Treaty establishing a Constitution for Europe. The provision was thus a part of the formal constitutionalization of the EU, which was deemed to lead to further integration. In that context, the express acknowledgement of the possibility to leave was not only meant to ascertain that withdrawal, should it ever occur, would have to follow EU rules. It was also envisaged as a safety valve to reassure more sceptical Member States by offering the option to leave if further integration were to become disagreeable,³⁰ instead of allowing any of them to dilute, or indeed attempt to obliterate, the core aims of the EU constitutional order.³¹

The right to withdraw may thereby be construed as the latest, and most advanced, incarnation of constitutional devices to cater for the needs of less integrationist members; these included, for instance, the subsidiarity principle, enhanced cooperation, opt-outs, Article 4(2) TEU. The right to

28. See further Hillion, "Le retrait de l'Union européenne – une analyse juridique" (2016) RTDE (forthcoming).

29. <www.esteri.it/mae/en/sala_stampa/archivionotizie/comunicati/2016/02/riunione-dei-ministri-degli-esteri.html>.

30. See explanations of Article I-59 of the draft Treaty establishing a Constitution for Europe included in Annex 2; CONV 724/1/03 REV 1, 28 May 2003, <register.consilium.europa.eu/doc/srv?l=EN&f=CV%20724%202003%20REV%201>; see also Kerr's statement to the BBC, cited *supra* note 27.

31. "UK keen to delete 'ever closer union' from EU treaty", <euobserver.com/political/121607>. See also former UK Prime Minister Cameron's speech at the European Council of 18–19 Feb. 2016, following the agreement on "A new settlement for the United Kingdom in a reformed European Union", <www.gov.uk/government/speeches/pms-statement-following-european-council-meeting-19-february-2016>.

withdraw also epitomizes the notion that participation in the European integration process is voluntary, in line with the founders' call "upon the other peoples of Europe who share their ideal to join in their efforts", enshrined in the Preamble to the Treaty of Rome and still featuring in the TFEU.³²

Indeed, the very expression "join in their efforts", translated in French as "s'associer à leur effort", is sufficiently broad to allow for different types of participation, of which membership is but one. In other words, non-membership (including ex-membership) does not automatically result in non-participation in the European integration process. The network of EU association agreements with third European States *not* seeking membership, such as the EEA, or the bilateral arrangements with Switzerland, is a useful reminder of this point. Against this background, withdrawal can be conceived not as a rejection of the European integration process in general, but as the choice of an alternative form of "joining in the effort". It is perhaps in this light that one should understand the British Prime Minister's depiction of the future UK-EU deal as "a mature, cooperative relationship that close friends and allies enjoy", including "cooperation on law enforcement and counter-terrorism work ... [involving] free trade, in goods and services ... [giving] British companies the maximum freedom to trade with and operate in the Single Market – and [letting] European businesses do the same here".³³

The introduction of Article 8 TEU by the Treaty of Lisbon, on the relationship with neighbouring countries, should also be recalled in this context. Codifying the neighbourhood policy the EU developed in the aftermath of the 2004 expansion as a potential alternative to further enlargement, the provision establishes a specific mandate for the EU to develop a "special relationship" with neighbouring States, aimed to "establish an area of prosperity and good neighbourliness founded on the values of the Union" involving "the possibility of undertaking activities jointly".³⁴ Neighbouring European States, which the UK as ex-Member State would become, may thus be associated to the pursuit of EU aims without being full members.³⁵

32. See, in this respect, para 27 of the Conclusions of the European Council of 27 June 2014, <www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/143478.pdf>.

33. See Conference speech 2016, cited *supra* note 1.

34. Whether this provision was ever envisaged as a post-membership device is a moot point. Suffice to recall that in its initial formulation in the draft Treaty establishing a Constitution for Europe, the withdrawal clause was inserted in Title IX along with the accession and suspension clauses respectively, which followed Title VIII on the EU's relations with its neighbourhood.

35. For more, see Piris, "Which options would be available to the United Kingdom in case of a withdrawal from the EU?" (2015) CSF-SSSUP Working Paper No 1/2015.

These considerations should frame the negotiation process that is about to begin, at least on the EU side. The withdrawal agreement will have to address the still immeasurable list of practical issues associated with the UK's disentanglement from the EU. But it should also lay the grounds for the new relationship, which could encapsulate another form of participation in the European integration process, and possibly a different contribution to the noble goal of "an ever closer union *among the peoples of Europe*" (emphasis added).