

Law of the European Union

Name

Institution

Date

a. Introduction

Following 23 June 2016 referendum results in the UK and the subsequent electoral victory by opponents of European Union the common concern to all and sundry who are involved is the answer to the question what next?¹ The most automatic answer to this situation is the invoking of Article 50 of the Treaty of European Union.² Markedly that is where the theory ends, and practical applicability of both legal and political procedures come into play. Additionally, concerns are rife as to the repercussions of the democratic decisions made during the Brexit vote.

b. Background and rationale of Article 50

Prior to the Lisbon Treaty, the European Union did not have a withdrawal provision. Thus, the members' right to withdraw was a highly contentious issue. Fundamentally, the proponents for the inclusion of Article 50 relied on international customary law concept of *clausula rebus sic stantibus* that has been expressly stipulated in Article 62 of the Vienna Convention on the Law of the Treaties that provided a legal conduit for unilateral detachment from transnational conventions.³ Correspondingly, the German constitutional court ruling on Maastricht Decision affirmed this argument and stated that unilateral detachment was necessary for the preservation of the national sovereignty consistently with Article 38 of the German Constitution.⁴

¹ Tim Oliver, "Brexit: What Happens Next?" [2016] 16.2 *LSE IDEAS Strategic* 1

² Vaughne Miller and Arabella Lang, "Brexit: how does the Article 50 process work?" [2016] 7551 *House of Commons* (Briefing Paper) 6

³ Eva-Maria Poptcheva, "Article 50 TEU: Withdrawal of a Member State from the EU" [2016] PE 577.971 *European Parliamentary Research Service* 2

⁴ Manfred Wiegandt, "Germany's International Integration: The Rulings of the German Federal Constitutional Court on the Maastricht Treaty and the Out-of-Area Deployment of German Troops." (1995) 10:2 *American University International Law Review*, 889, 890-904 ;see also Joachim Wieland, "Germany in the European Union - The Maastricht of the Bundesverfassungsgericht" [1994] 5 *EJIL* 259-266 ; see also Steve Boom, "The European Union after the Maastricht Decision: Will Germany Be the "Virginia of Europe?" (1995) 43:2 *The American Journal of Comparative Law*, 177-226

In contrast, opponents of voluntary unilateral detachment from the European Union argue that the objective of integration was to amount to a supranational organization and therefore the application of Article 62 of the Vienna Convention on the Law of the Treaties is misplaced. Additionally, Article 53 of Treaty on the European Union and Article 356 Treaty on the Functioning of the European Union prohibits the notion of a member state ending its engagement with the European Union.⁵ Uniquely, Treaty on the European Union does not support the notion of unilateralism undertaken by European Union member states that are inconsistent with the principles of the Union as stipulated in the dictum of *Flaminio Costa v ENEL*.⁶

c. Decision to withdraw

According to Article 50(1) of Treaty on the European Union, a member state that opts to terminate her membership to the union must do so using its own constitutional procedures. Consequently, many have argued that this does not trigger the legal procedure for withdrawal.⁷ In fact, the United Kingdom referendum is more of a reversible opinion rather than a formal notification.⁸ Thus, a member state just like the United Kingdom can still backtrack on the referendum decision if a formal notification has not been made consistently to Article 50(2) of Treaty on the European Union.⁹ Incidentally, failing to trigger Article 50(2) could have both some benefits and disadvantages.

Comparatively, the United Kingdom is likely to negotiate their way out of the Union without being bound by the two-year limit set by Article 50. This is likely to give both the United

⁵ Thomas Eger and Hans-Bernd Schöfer, *Research Handbook on the Economics of European Union Law* (Edward Elgar Publishing, 2012) 376

⁶ [1964] Case 6/64; see also William Phelan, “The Troika: The Interlocking Roles of Commission v Luxembourg & Belgium, Van Gend en Loos, and Costa v Enel in the Creation of the European Legal Order” [2013] 431 *Trinity College Dublin* (IIS Discussion Paper) 4

⁷ Phedon Nicolaidis, “Withdrawal from the European Union: A Typology of Effects” [2013] 20:2 *MJ* 209, 211

⁸ Robert Schütze, *European Constitutional Law* (Cambridge University Press, 2012) 62

⁹ Paul Jenkins, “Countdown to the Referendum” [2016] *Matrix International* 2

Kingdom and the other European Union members' ample time to deliberate on the issues that are afflicting the union and forestall further withdrawals on similar grounds. Equally, the threat of United Kingdom triggering Article 50(2) may compel other member states to make fundamental concessions. However, other European Union members will only make such concessions taking note of the geopolitical importance of the United Kingdom and its bargaining power both politically and economically.¹⁰ Likewise, reluctance to enable Article 50(2) will also give member states a considerable amount of time to draft alternative steps that would determine if there is need to remain or trigger a withdrawal. On the downside, it is rather unclear of the legality of pursuing these negotiations as they are not explicitly provided for under Article 50. Due to this realization, negotiations in good faith could be difficult as other parties may not be convinced of the sincerity of the member state that is intending to withdraw from the Union. Similarly, other member states may decline to hold negotiations if Article 50 (2) has not been effected.¹¹

The treaty falls short in creating time frames on the procedures between exercising the provisions of Article 50(1) and Article 50(2). This means that member states will exhibit reluctance to negotiate with the state that is intending to withdraw for fear of engaging in ad infinitum negotiations which are not resource-efficient. The decision to exercise Article 50(1) without following it up with a formal application could have politically unfavourable effects. Firstly, other European Union member states have no power to obligate any state that has exercised Article 50(1) to follow it up with a formal application as outlined in Article 50(2). Thereupon, other European Union member states will remain helpless as long as the member state intending

¹⁰ Martin Trybus and Luca Rubini, *The Treaty of Lisbon and the Future of European Law and Policy* (Edward Elgar Publishing, 2012) 82

¹¹ Stefano Fugazzi, *Brexit?* (Lulu.com, 2015) 25-30

to withdraw has not breached the fundamental principles that could warrant suspension under Article 7 of the Treaty on the European Union.

Markedly, it may be difficult to rationalize to the citizens of the United Kingdom as to what is holding back the triggering of Article 50(2) since a vast majority of them who participated in the referendum preferred the exit option. Should a member state intending to withdraw go ahead and trigger Article 50(2) it will have conceded its bargaining power of decision especially if it opts to rescind in the future. On the upper side, the negotiations will be structured and definite, and all the involved parties are likely to engage with them in good faith. In the case of the United Kingdom, the vast majority of the electorate who elected to leave in the referendum vote will now see their decision honoured. Additionally, the process is likely to be prompt due to a fixed schedule provided for by the Treaty on the European Union.

d. The nature of the negotiations

Enabling Article 50 (2) is likely to result in unfavourable negotiations depending on the issues that should be deliberated on. Some issues are complex and time-consuming, therefore, making the two-year timeframe look terribly inadequate. Besides, failure to provide for sufficient time to deliberate on some issues may result in the adoption of poor deals that may, in turn, become ineffective or unsustainable in the long run. The United Kingdom case could have more undesirable effects due to the political repercussions such as the transition process and the cessation threat posed by Scotland.

Comparatively, once Article 50 (2) is activated the bargaining power of the member state that is intending to exit is severely downgraded. Following the statements made by the current Foreign Affairs Secretary, Boris Johnson stated that United Kingdom will have placed itself in a

disadvantageous position if it makes a formal application consistently with Article 50(2) due to there is no substantive consensus among the political class. This one-sidedness could result in the member state intending to withdraw being a passive participant on the issues that are pertinent to it. In the wake of this realisation parties are not likely to conduct negotiations in good faith.

Additionally, the member state will not only find itself grappling with the problem of a decreased bargaining power but also they will not be allowed to sit at the same table with other European Union member state. The withdrawing member state can only draft proposals that are to be looked into by other European Union member states during negotiations. The recommendations arrived by these member states could end up being unfavourable because alterations could be made without consulting the withdrawing state.

e. Is it loyalty to the member or the process?

Another overriding problem is the issue of loyalty concerning the state that has either signified its intention by exercising Article 50(1) or the one that has made a formal application consistently with Article 50(2). The former scenario is likely to propose reforms that should be undertaken before it can decide to remain or jump ship. The underbelly of instituting utilising this route is that other contracting member state must be willing to negotiate under such conditions. Certainly, the success or failure will be hugely dependent on the bargaining power of the state that is intending to leave.

Accordingly, other member states are likely to be loyal to the state that has signified its intention to detach itself from the Union, but they would not be loyal to the negotiation itself. In comparison, a member state that activates Article 50(2) will definitely experience a different situation. Due to the certainty of the legal framework, other European Union member states are

likely to be loyal to the negotiation but not to the state party that has expressed its intention to sever its ties with the Union. Both these scenarios are likely to negatively affect the state party that has signified its intention to sever ties with the Union.

f. Conclusion

Certainly, there are two competing schools of thoughts concerning withdrawal of a European Union member state from the organization. The proponents' arguments are found on the premise that it is provided for in the treaty under Article 50 read together with Article 62 of the Vienna Convention on the Law of the Treaties that provided a legal conduit for unilateral detachment from extraterritorial conventions. Conversely, the opponents counter arguments are founded on the basis that the European Union was designed to be supranational and withdrawal will be similar to cessation. Likewise, Article 53 of Treaty on the European Union and Article 356 Treaty on the Functioning of the European Union forestall the notion of a member state detaching itself from the European Union.

However, withdrawal from the union as per the provisions of Article 50 is indeed not a straight forward procedure. Interestingly, Article 50(1) allows member states to decide using their own constitutional means. But it is the making of formal notification consistently with Article 50(2) that sets the process in motion. Notably, there is no transitional timeframe between Article 50(1) and 50(2). Markedly, the repercussions are different as those member states who have exercised Article 50(1) are still able to rescind and participate actively on issues arising from such decisions. On the other hand, exercising Article 50(2) greatly diminishes the bargaining power of the contracting state that intends to detach itself from the Union.

Certainly, the application of Article 50 is superficial and does not by itself push for the withdrawal process. It is reliant on both the member state intending to withdraw and other member states that would be tasked to conduct negotiations. Critically looking at this provision, one can effectively state that the drafters did not anticipate of the glaring gaps that could result in invoking of this provision or they intentionally did not want this provision to achieve its intended purpose.

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