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The ECJ's Wightman ruling, the “Brexit” process and the EU as a constitutional entity

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Introduction

The escalating events around the UK's withdrawal from the European Union (“Brexit”) seem to suggest that commenting on any event beyond a 48-hour period is futile. However, some events are relevant not only for the question whether “Brexit” may happen at all, but also for the ongoing character of the EU as a constitutional entity. The Grand Chamber ruling in the dispute of Wightman and others with the Secretary of State for Exiting the European Union¹ certainly is of ongoing relevance beyond the heat of the day, while it may also impact on the direction the “Brexit” train is taking. This case note initially assesses the ruling's relevance from that constitutional perspective, as a basis for delving into the remaining options for the UK and the EU in the withdrawal proceedings, and returns to the question how the European Parliament and the European Court of Justice itself may further impact on that process in the light of Wightman. We conclude that the Court's solution to the contradiction had to address the apparent contradiction between the EU's special constitutional character as a Community of law founded for an unlimited duration and creating supranational rights for its citizens on the one hand and the option for a Member State to unilaterally leave that Union, thereby severing the bond between the Union and a part of its citizens on the other hand not only strengthens the character of the EU as a constitutional entity, but also changes the parameters of the “Brexit” process. For convenience, the long phrase “the UK's withdrawal from the European Union “ will be abbreviated to “Brexit”. The inverted commas around that term pay tribute to the fact that it is a misnomer: if Brexit truly meant Brexit it would only affect Great Britain. “Brexit” instead is set to drag

¹ Case C-621/18 Wightman et al EU:C:2018:999

Northern Ireland alongside Great Britain out of the EU, although the voters in Northern Ireland in their majority preferred to remain in the Union.

Summary of the case

The Grand Chamber ruling responded to a reference by the Scottish Court of Session, which had again been seized in the second instance by a group of claimants comprising members of the Westminster parliament, of the Scottish parliament and of the European parliament. The claimants sought clarification of the question whether the UK could unilaterally revoke the notification of its intention to withdraw from the European Union of 29 March 2017 (“Article 50 notification”), explicitly asking for a reference to the ECJ under Article 267 TFEU. While the admissibility of the reference request was disputed before the national courts, the Court of Session reasoned that at least the Members of the Westminster Parliament had a legitimate claim to know what options the UK retained should it decide not to ratify the draft withdrawal agreement. The choice of options would be relevant for their vote in the House of Commons on that withdrawal agreement, which is required under section 13 of the European Union (Withdrawal) Act (UK): if the only alternative to accepting the draft withdrawal agreement was that the UK ceases to be an EU Member State without an agreement, they might vote differently than they would if the UK could also revoke the “Article 50 notification”. Against some expectations to the contrary on social media, the Court accepted that the reference was admissible, signalling some courage by not shying away from answering a question of law with eminent political consequences. The Court also held that the UK could unilaterally revoke its withdrawal notification, as long as this revocation is “unequivocal and unconditional” and definitely “brings the withdrawal procedure to an end”. (paragraph 74, “tenor”).

The EU’s constitutional character after Wightman

The Grand Chamber ruling is a remarkable piece of legal reasoning delivered in a very short time span. The Court had to address a contradiction created with including Article 50 TEU in the Treaty of Lisbon, which had been subject of extensive debate in the Convention on the Future of Europe.² The debate raged between the representatives of the UK, who contested the idea of an ever closer union, and representatives from Member States such as Germany, Luxembourg, the Netherlands and Portugal, who were concerned that the provision could be used for political blackmail through threatening “exit”, and would compromise the constitutionalisation project. The European Parliament wished to include a clause enabling the EU to expel a Member State, in order to reinstall the power balance between Union and its Member States after Article 50 was introduced. French representatives promoted making withdrawal conditional on irreconcilable differences between the withdrawing Member State and the rest of the EU, which would have moved the provision closer to divorce proceedings.

The Wightman court does not engage much with the travaux préparatoires. Instead, and convincingly, it latches on a different constitutional argument, namely the contradiction between the EU’s special constitutional character and the option of a Member State to withdraw from the Union. Ever since the famous cases *Van Gend & Loes* and *Costa v ENEL*, the character of European Union law has been differentiated from “ordinary international law” by its supranational character. In these rulings the ECJ had relied on many factors, including the foundation of a Community for an unlimited duration,³ which seems to constitute a certain tension with according Member States the authority to withdraw unilaterally from the Union. The Wightman court did not, however, refer to these rulings

² Eeckhout, P. & Frantziou, E., 2017. Brexit and Article 50 TEU: A Constitutionalist Reading. *Common Market Law Review*, 54(3), 695, 703-707

³ Now Article 356 TFEU,

from the foundational phase. Instead, it refers to the 1986 *Le Vert*⁴ ruling, where the ECJ had first recognised the Treaties as constitutional charter of the then EEC, and the contested 2014 Opinion on the EU's accession to the European Convention on Human Rights.⁵ That opinion again differentiates the EU Treaties from "ordinary international treaties", affirming that they create a "new legal order for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those states, but also their nationals".⁶ The supranational character of the European Union thus is epitomised by the pooling of sovereignty and the endowing of nationals of its Member States with rights, in particular in relation to EU citizenship as a fundamental status. The Court does not use the term "supranational", but instead to the "constitutional structure of the European Union and the very nature of that law", which stems from an "independent source" and is characterised by "primacy" and "direct effect of a whole series of provisions which are applicable to their nationals and the Member States themselves" (paragraph 45 *Wightman*). While this language is repetitive of former case law, the equation of both Member States and citizens as right-bearing entities is a more recent development. The Court further stresses the "structured network of principles, rules and mutually interdependent legal relations binding the European Union and its Member States as well as the Member States to each other",⁷ awarding the authors of network theory as a new European integration theory⁸ the satisfaction of being the new authority in EU law. The ruling is also one of the few where the Grand Chamber refers to the EU's purpose of creating "an ever-closer union among the peoples of Europe" (Article 1 TEU, first recital to the TFEU's preamble), making explicit that the aim to "eliminate barriers which divide Europe", though only mentioned in the 2nd preamble to the TFEU, is an element of the ever-closer Union. (*Wightman* ruling paragraph 61). Both the ever-closer union and the aim to eliminate barriers which divide Europe have thus been elevated to pillars of the EU's constitutional values.

All these principles seem to stand in diametrical opposition to a Member State's option to withdraw unilaterally from the Union. However, the Grand Chamber manages to derive from the principles of liberty and democracy as two of the six fundamental values underpinning the European Union⁹ the free and voluntary commitment of the Member States to the Union as one of the fundamental values of the Union. Instead of a countervailing principle to the very being of the Union as a new legal order with constitutional aspirations, striving to achieve an ever-closer union between the Member States and their citizens, and endowing citizens with European rights, some of which constitute their fundamental status, the option of Member States to leave the Union acquires its own principled dimension which supports this very character of the EU. The stress is on the voluntary character of withdrawal, rendering the EP's idea that the withdrawal should be balanced by expulsion not only as a not accepted, but instead as an erroneous thought, alongside the French idea to impose conditions such as alienation (see paragraph 69 of the *Wightman* ruling).

⁴ Case 294/83 EU:C:1986:166

⁵ Opinion 2/13 EU:C:2014:2454

⁶ Paragraph 44 of the *Wightman* ruling, paragraph 157 of Opinion 2/13, taking up language from *Van Gend and Costa* as well.

⁷ Paragraph 45 *Wightman* ruling, with reference to the 2018 *Achmea* ruling Case C-284/16 EU:C:2018:158, paragraph 33 with further references

⁸ See, for example, T Börzel & Heard-Lauréote, K., 2009, *Networks in EU Multi-Level Governance: Concepts and Contributions* *Journal of Public Policy* 29 (2), 135-151; see also E. Sørensen & Torfing, 2007, *Theories of Democratic Network Governance*, New York: Palgrave Macmillan.

⁹ The remaining values are human dignity, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These are all "common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail" (Article 2 TEU)

All this also means that the prerogative of Member States to withdraw, and to revoke the notification of any intention to withdraw, are derived from the essence of European Union law autonomously. The Vienna Convention on the Law of Treaty acquires the status of an auxiliary instrument helping to interpret the general principles of EU law (paragraphs 70, 71 Wightman ruling), while the Advocate General had used the convention as a separate general principle of Union law (paragraphs 77-85). The Court thus followed the “Constitutionalisation” idea submitted by Eeckhout and Frantziou,¹⁰ though it also coupled it with a strong emphasis on the autonomy of the Union legal order.

As a consequence of this ingenious argument, the Court manages to equip the right to revoke the notification of an intention to withdraw with an inherent limitation. It is granted not only to safeguard the voluntary membership in the EU with the related pooling of sovereignty, but also in order to safeguard the very bases of the EU legal order, including the strong position of citizenship as a fundamental status. This is the reason that Member States cannot be beholden to their intention to withdraw, if that intention no longer exists. This context lends meaning to the requirement that the revocation must be unequivocal and unconditional, which is central to the Court’s reasoning. Any forces within a Member State which are discontent with the intention to withdraw, and a change of the constitutional position of the Member State, only exist to support the ever-closer union, and the stability of citizenship rights. The UK would not be able to use its sovereignty to revoke the notification in order to extend the negotiation period unilaterally: this would not constitute an unconditional and unequivocal revocation. The sole purpose of the revocation is to end the withdrawal procedure, and to re-establish UK membership in the EU with exactly the same conditions that Member State enjoyed before it notified the Council of its intention to withdraw. This was a privileged status, according to which countries as poor as Romania paid part of the UK’s contribution to the Union, and the UK did not participate in the more recent and more mature elements of the integration project such as monetary union and EU migration policy. However, the revocation could not be used to change the condition of membership. Thus, there would not be an option to transport the so-called “Cameron deal” into the UK’s membership. That deal, as may be recalled, limited the rights of EU citizens to equal treatment if they migrated to the UK. Its legality under EU law was always dubious, exactly because EU citizenship is a fundamental status of citizens of Member States. The Court stops short of endorsing the demands of initiatives such as the “3 Million”¹¹ to maintain the citizenship rights of the British subjects¹² after the UK’s withdrawal from the EU (paragraph 64), but it also did not endorse the idea of limiting citizens’ rights

The impact on the continuing “Brexit” process

Extended options for the UK – with a twist

In the first reactions to the ruling, it has been regretted that the Court is not clearer on the conditions for revoking the notification, or endorses the explicit references by its AG to the non-abusive character of any such revocation.¹³ However, the conditions of sincerity and unconditionality are actually clear, and may be viewed as constraining. They exclude a tactical handing in of the notice, as suggested by McCrae. Instead, a serious change of the Westminster parliament’s position is necessary. This does not mean that there cannot be another change of mind in the future. However, there

¹⁰ Above footnote 2

¹¹ <https://www.the3million.org.uk/>

¹² British citizenship is not a rights-based status, but rather a concept much more flexible and still derived from a monarchical perspective, see on this with more detail Guild, E., 2016. *Brexit and its Consequences for UK and EU Citizenship - or Monstrous Citizenship*. Boston & Leiden: Brill & Nijhoff.

¹³ Ronan McCrae, 2018, Brexit II? The legal issues of revoking the notification to leave the EU but then notifying to leave again, <http://eulawanalysis.blogspot.com/2018/>

is the clear option of a revocation to be invalid, if it is only given for tactical reasons, such as overcoming domestic weaknesses of a government by effectively prolonging the negotiation period.

Nevertheless, the UK now has essentially been given a legal confirmation that the three options consistently stressed by Donald Tusk seriously exist: leaving the EU with the proposed agreement, leaving the EU without agreement, and remaining within the EU, with all the preferential treatment the UK enjoyed compared to other Member States before March 2017.

The meaningful vote of the Westminster parliament under the European Union (Withdrawal) Act 2018 has become more meaningful indeed. If the Prime Minister's proposal to endorse the Draft Withdrawal Agreement is not supported by a majority in parliament in mid-January, MPs are free to table a motion requiring the Prime Minister to revoke the withdrawal notice. It is not difficult to derive from the Supreme Court's Miller ruling on the necessity of a parliamentary authority to withdraw from the Union that such a motion would not be negligible for the Prime Minister. The argument could be made that proceeding without a revocation towards the "cliff edge Brexit" would not be constitutional under UK law.

Extended options for the EU institutions? Potential for further ECJ rulings

This also hints at the options for the EU Institutions: The Council could well form the opinion that the withdrawal notice has been affected by unconstitutionality under such circumstances, and that it may no longer act on it.

If the Council instead acts upon such a withdrawal notice, there is the option for other institutions, such as the European Parliament or other Member States, to challenge such action before the Court of Justice. While the General Court has held that an action by individual citizens challenging the withdrawal notice is not accessible,¹⁴ that same ruling also recognises that the actions of the Council endorsing the withdrawal notice do have legal effect. The Shindler claimants were just not directly affected, and had no standing as non-privileged claimants. However, the EU institutions and Member States' standing before the Court is not conditional on their being directly affected.

Conclusions

The Wightman ruling constitutes a very interesting source of reasoning, and possibly a confirmation of a more courageous court under the current presidency. It also has the potential to make January 2019 more interesting – though any hope of reversing "Brexit" would only have a basis if substantive change of the sentiments on which British exceptionalism is based occur. This is not a given at all, as indicated by the reluctance of the Westminster parliamentary opposition to adopt a firm position on this question.

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¹⁴ Shindler and Others v Council. Case T-458/17, a judicial review is pending.