

„BREXIT MEANS BREXIT“. REFLECTIONS ON THE LEGAL ASPECTS REGARDING THE EUROPEAN UNION AND THE UNITED KINGDOM

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Abstract

Following the referendum in which 17 million people voted to leave the EU, Theresa May – the British Prime Minister, has said in various occasions that "Brexit means Brexit"¹ and that there will be no attempts to stay within the European Union, even if the process is one complex, without precedent and without a clear result. Apart the political and economic dimensions this procedure implies, there are also some legal issue regarding how it should be done and what will be after "Brexit" will be concluded. Thus, this paper has as main purpose to underline some legal aspects regarding the Brexit and they will be reflected in the United Kingdom and at the European Union level. The research methodology of the paper is mainly qualitative, based on specialty literature review and analyze of regulations.

Keywords: *Public Law, European Union Law, Article 50, Lisbon Treaty, Common Market, UK referendum.*

1. Introductory notes about „Brexit“

At a simple search on Google using the word *Brexit*, it can be observed that one can obtain an astonishing result. More than 105,000,000 results in 0.85 seconds. This fact shows how important is this subject, how it generated discussions, documents, papers, point of view, journal articles from all over the world and from all the areas of society.

The word *Brexit* started to be used by politicians, mass-media and society in order to define the withdrawal from the EU of the United Kingdom. All the process started with the referendum results from Thursday 23 June, 2016, organized with the purpose Britons to decide whether the UK should leave or remain in the European Union. Leave won by 51.9% to 48.1%. The referendum turnout was 71.8%, with more than 30 million people voting. And starting for this pint it could be stated that the Brexit process begin.

¹ See, the official website of the BBC: <http://www.bbc.com/news/uk-politics-36782922>, accessed: 21.01.2017.

United Kingdom become part of the European Community (today, European Union) on 1st January 1973, after a process started years ago, on 1st August 1961 and in which, the UK faced some opposition from the French President of that time, the general Charellles de Gaulle.

Here, it has to be underlined that in the history of the European Union, there were some withdraw precedents, but none, of one Member State. Through these precedents, there were: [1]

- The Algeria case: Algeria left the then European Communities (EC) in 1962 but it was not a Member State and was, at that time, part of France.
- Greenland left the EC in 1985 but it was not a Member State but rather part of Denmark.
- Saint-Barthélmey left in 2012 but was a small island, it was also not a Member State.

Regarding the legal aspect of the process of Brexit, it should be underlined that before 1st December 2009- the date the Lisbon Treaty entry into force, this process could not be possible, at least in formal mode. The explanation regards the fact that the Treaty of Lisbon by its adoption and ratification of all EU member states amended the existing Treaties (Euratom Treaty, Treaty regarding the Functioning of the EU and the Treaty of the European Union) and introduced a provision that a EU member state could withdrawal from the EU in some conditions.

The Article 49 A of the Lisbon Treaty, which amended the Article 50 of the Treaty regarding the European Union is providing that:

1. „Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. 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 referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

5. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union”.

As it can be observed, in the formal aspects of the Treaty Article 50 TEU does not set down any substantive conditions for a Member State to be able to exercise its right to withdraw, rather it includes only procedural requirements. It provides for the negotiation of a withdrawal agreement between the EU and the withdrawing state, defining in particular the latter's future relationship with the Union. If no agreement is concluded within two years, that state's membership ends automatically, unless the European Council and the Member State concerned decide jointly to extend this period.

The legal consequence of a withdrawal from the EU is the end of the application of the EU Treaties in the state concerned from that point on. EU law ceases to apply in the withdrawing state, although any national acts adopted in implementation or transposition of EU law would remain valid until the national authorities decide to amend or repeal them. [2]

On these legal issues, the research of the paper will be based. As was already mentioned, this paper tries to underline some aspects about the Brexit process and to present some aspects in the law field, which regards the United Kingdom and the European Union.

2. General considerations of the Brexit Process

It was not until the Treaty of Lisbon entered into force on 1 December 2009 that EU law dealt explicitly with the possibility of a Member State withdrawing from the EU and provided a mechanism to address the issue. As just mentioned, the right to withdraw from the organization almost inevitably existed anyway because accession to the EU is not an irrevocable act. The Treaty of Lisbon introduced art.50 of the Treaty on the European Union („TEU“) which sets out a regime for a Member State to withdraw.[1]

The formal withdrawal process has many steps (see Fig. 1). It is initiated by a notification from the Member State wishing to withdraw to the European Council, declaring its intention to do so, followed by the answer in which it is indicating the principles for negotiations.

Figure 1: Steps of the withdrawal process from the EU



Source: European Parliament Briefing.(2016)/ Article 50 TEU: Withdrawal of a Member State from the EU, p. 4

UK sent its notification on 29 March 2017, addressed by the British prime-minister Theresa May to the president of the European Council – Donald Tusk. In the letter it is explained the process which the British Government intends to undertake, which is starting from the repeal of the European Community Act (ECA) from 1972 that gives effects to the EU law in the UK territory [3]. This process will concretized in a bill, already announced as Great Repeal Bill. The main issues of the Bill are:

- it will repeal the European Communities Act 1972
- the Bill will preserve EU law where it stands at the moment before leaving the EU. Parliament (and, where appropriate, the devolved legislatures) will then be able to decide which elements of that law to keep, amend or repeal once we have left the EU. The UK courts will then apply those decisions of Parliament and the devolved legislatures.
- the Bill will enable changes to be made by secondary legislation to the laws that would otherwise not function sensibly after leaving the EU.

After the formal notice, the period of 2 years for negotiations started. The period, can be extended by unanimous agreement. But, in the answer to the notification titled “European Council (Art. 50) guidelines for Brexit negotiations”, it was already stated the timeframe set out in Article 50 TEU ends on 29 March 2019.

Looking at the aspects of the Brexit process, it should be underlined that Article 50 of the TEU does not prescribe what would be the relationship between the EU and any Member State which leaves. Unless something is agreed otherwise, the Member State which leaves becomes a third State.

According to Article 50 itself at the end of this process, there could be the following results:

- divorce agreement, accompanied by transitional arrangements;
- an agreement to extend the negotiating period;
- no agreement with the result that the EU Treaties cease to apply at the end of 2 years.

Regarding these facts, it could be stated that the agreement based upon the negotiations between the EU and the leaving state is the key of the success finishing of all the process. In this case, the withdrawal agreement is not primary EU law, it is an international agreement – subject to the international law, since it is concluded between the EU and the withdrawing state and not between the latter and the rest of the Member States. [4]

3. Legal aspects of *Brexit* on the United Kingdom

The legal aspects of the Brexit starts from the referendum results. Implementing the EU referendum vote will institute major constitutional change in the UK. Because of its uncodified constitution, the UK lacks specific mechanisms

for constitutional amendment, in contrast to many other jurisdictions that make special provision for it [5].

One of the major legal consequences of the Brexit will be the application of the EU law. Since its foundation, there have been over 100,000 legislative instruments adopted by the EU and these are all part of EU law. In the Brexit case, the EU's treaties would cease to apply if the UK were and they will be no longer relevant in the UK courts or UK law.

The EU's regulations are directly applicable automatically. They do not need implementation into UK (or any Member State) law so, they are easier to deal with in the context of Brexit by than directives. Directives are the most difficult of the sources of EU law. They need to be implemented into Member State law. So, Member State law has to be amended to cope with the changes brought about by the directives. This means that unlike treaties or, for the most part, regulations which might simply be ignored after the UK has left the EU, the reality is that UK law will have been amended to implement directives [5].

Withdrawal from the Union would involve the unravelling of a highly complex skein of budgetary, legal, political, financial, commercial and personal relationships, liabilities and obligations [5]. Also the Brexit will have legal effects rights given to EU citizens, such as: trading rights, free movement rights, social rights, non-discrimination rights.

Scholars argued that over the longer term, disentangling the UK from the substantial body of EU legislation which applies in the UK would be a massive endeavor, which would take many years to complete [5].

Another important aspect of the UK is the so called devolved nations (Scotland, Wales, Northern Ireland). This is regarding the fact that from perspective of the UK Government, the British Constitution is unitary in nature. Foreign affairs are a reserved matter under Schedule 5 of the Scotland Act 1998, and this includes EU membership. Devolved authorities have no legal rights in this area, and, at most, may be consulted [5].

But even if these devolved authorities have not formal word to say in the Brexit process, the EU law is incorporated directly into the devolution statutes in Scotland, Wales and Northern Ireland. For example, section 29(2)(d) Scotland Act 1998 provides that Acts of the Scottish Parliament that are incompatible with EU law or with European Court of Human Rights are not law. The same is for provided in the Section 108(6) Government of Wales Act 2006 states that any act of the Welsh Assembly incompatible with EU law or the European Court of Human Rights, falls outside its competence. Section 24 of the Northern Ireland Act 1998 prohibits any legislation contrary to EU or European Court of Human Rights law.

General principles of EU law have been a very significant and growing feature of the common law world in both England and Wales as well as Ireland. Those principles would not be part of the Brexited UK law and may not be addressed in any withdrawal treaty. The British Courts have been influenced by concepts of EU

law such as *proportionality*, *non-discrimination* and they have entered the UK's legal toolkit. The process of unpicking and untangling EU law from the UK legal environment should not be underestimated [1].

All these demonstrates that even the British Parliament will repeal the European Community Act from 1972, this would not bring an end to the domestic incorporation of EU law in devolved nations. It would still be necessary to amend the relevant parts of devolution legislation [5].

The 40 years UK membership had a significant impact on the legal system of the country. There could be identified some major issues generated he Brexit [1]:

- *Competition law*. Many of the UK competition law principles were drafted after EU competition law, after Brexit it should be seen if the UK courts will follow the EU jurisprudence;

- *Standards in trade*. If exporters in the post-Brexit UK wanted to access the EU's internal market, then the goods and services would have to meet the EU's standards.

- *Contracts*. It is possible that in some contracts, the presence of a party in the EU may be required so as to perform the contract.

- *Banking and insurance*. The EU banking rules would, unless retained by way of an agreement, fall away in the context of the UK.

- *Research and funding agreement*. Many businesses have research agreements with

- universities and other research bodies. These educational counterparties to the companies are bringing to the agreement not only their educational expertise but also, in many cases, EU funding.

- *Environment*. The EU has influenced enormously the law relating to the environment (including planning) in the EU Member States. In this area would be very hard to make changes without affecting the general principles of EU environmental law, which are high principles recognized and partly accepted all over the world.

- *Pensions*. EU law has influenced the evolution of pensions law over time, particularly in the area of equality. It is generally assumed that Brexit would have little initial impact on pensions law but there would be an impact over time.

All these are few of the many legal, economical and political issues to be solved. The outcome of the Brexit talks will depend crucially on how the member-state governments, the European Commission, and the members of the European Parliament choose to approach them [8].

4. Legal aspects of *Brexit* on the European Union

The exit from the UE of the UK is a bidirectional process, it has not only implication on the UK, but is affecting also the European Union. First of all, it has to be underlined that is the first time in the history of the European construction

when this a Member State decide to leave the Union, and these process is complete new also for the EU, without a clear outcome. European governments and EU institutions have said that they are determined to protect the EU and the integrity of the European project. They do not want to water down the ideals of that project or give the UK a deal that might attract other countries down the same path. All European leaders know that a hard or disorderly Brexit would damage their own economies and citizens, not just those of the UK.

Brexit would change how EU institutions operate not just during the withdrawal period, but also afterwards. It would affect the balance of power among member states and therefore the policies that the EU would pursue. It would also change the resources upon which the EU could draw.

One of the biggest issue of leaving the EU of the UK is the impact this will have on the European economy and on the European Market. In 2015/2016 the UK made an estimated gross contribution (after the rebate²) of £13.6 billion. The UK received £2.8 billion of public sector receipts from the EU, so the UK's net public sector contribution to the EU was an estimated £10.8 billion [9].

Legally speaking, the UK will remain a member of the EU until its departure has been negotiated and will continue to contribute to the EU budget until it formally leaves³.

But also after leaving the EU, UK may still make financial contributions to the EU. the UK may pay to participate in some EU programmes like Horizon 2020, the EU's research and innovation programme, or any successor programme. The cost of participating in EU programmes will form part of the UK's exit negotiations [9].

Another important issue is the issue of the population and its influence on the EU institutions. The composition of the EU institutions are expected to change as of the day the withdrawal takes effect, with members from the withdrawing state losing their seats in the various institutions and bodies, although transitional arrangements might be required for the period immediately after that date [2].

The UK is the EU's third most populous member state, comprising 12.76% of the EU's overall population. This makes the UK an influential player in the Council of the European Union and in the European Parliament. UK representatives and nationals are currently present in all of the EU's core institutions [10]:

- The UK's Commissioner, Jonathan Hill, was responsible for financial stability, financial services and Capital Markets Union. He resigned after the Brexit results of the referendum.

- 1,126 British nationals are employed in the European Commission (3.8% of the total).

- The European Parliament (EP) has 751 members. It is unclear whether the UK's 73 seats would be lost or reallocated. The decision establishing the

² The UK receives a rebate from the EU which is deducted from its contribution. The rebate aims to correct the issue of the UK making relatively large net contributions to the EU.

³ More or less until 29 March 2019.

composition of the EP including the distribution of the seats among the Member States, is adopted by the European Council on the initiative of the EP and with its consent (Article 14(2) TEU)⁴.

Brexit could have the following policy implications [6]:

- an increased regulatory burden on EU businesses;
- weaker copyright protection in the EU;
- a smaller EU budget as a whole, with increased member-state contributions;
- a stronger push for tax harmonisation and higher taxation of financial transactions;
- less support for nuclear and unconventional energy sources.

One of the big legal issue is that concerning the post Brexit relation between the UK is the access of UK to the Common Market on one hand, and the maintaining of all four free movements in the UK of the EU citizens, on other hand. There could be identified some legal possible solutions to this situation.

One of the solution, could be that United Kingdom to join the European Economic Area (EEA). This solution is also known as the „Norwegian Model“. Another one is concluding a European Free Trade Agreement (EFTA) - like already Switzerland did in 1972. These solutions, will involve that the UK would have to accept much of the EU substantive regime relating to the four freedoms (to which the most visible is the free movement of persons) and competition law, as well as parts of the EU institutional regime and legal provisions. However, the decision will be, it will be hard to access the Common Market without accepting some legal dimensions which implies the four liberties. It was already stated the controlling the immigration to the UK is one of the big issue which conducted to the result of the referendum. This aspect was already underlined in a document of the British Government: [11] “UK will remain an open and tolerant country, and one that recognizes the valuable contribution migrants make to our society and welcomes those with the skills and expertise to make our nation better still. But in future we must ensure we can control the number of people coming to the UK from the EU”.

5. Conclusion

Even if „Brexit means Brexit“ and it become reality through the referendum, and the desire to leave the EU was officially communicated to the European Council on 29 March 2017, there are still a lot of unknowns to be identified and solved. This because EU law has created vast networks of rights and obligations, not only between Member States, but also for nationals of those States.

⁴ For example, European Council Decision 2013/312/EU of 28 June 2013 redistributing the seats among the Member States while allocating seats to Croatia and not exceeding the maximum of 751 seats.

There are still five possible outcomes of what “Brexit could mean” [8]:

- a comprehensive deal covering both the terms of Brexit and the details of the UK’s future relationship with the EU;
- a deal on Brexit only, plus transitional arrangements to tide matters over while the future relationship is determined;
- a Brexit deal only, with no transitional arrangements while future relations are agreed;
- no deal, with Brexit taking place after two years via Article 50’s automatic provision;
- a decision for the UK to stay within the EU after all.

Whatever Brexit „will mean“ at the end its legal implication on the UK and EU is a tremendous one considering the complexity of the EU law, principles and rights which have been applied and integrated in all spheres of the British society. Also, the EU will never be the same, after the conclusion of the Brexit process, and legally some countries and France and Germany could propose as a display of unity a deeper integration, especially in the Eurozone or could insist on the idea of multi-speed Union.

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