Can Brexit be stopped under EU Law?

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Ominous clouds are gathering and the terrain underfoot increasingly resembles a quagmire on the Brexiteers 'sunlit uplands'. The latest reminders that the reality will be significantly different from their utopia of a prosperous global Buccaneering Britain has come in the form of a trade dispute between the U.S. and a Canadian aircraft manufacturer which could have a devastating impact on the Northern-Irish economy where the manufacturer has a significant base; and the threat from a gang of countries that they will not accept a proposed agreement (one of the few agreements for now) between the EU and UK as to the divvying up of agricultural import quotas after Brexit. Perhaps most galling on this front is the fact that the gang involves those with whom it was hoped trade deals would be swiftly struck; including the U.S. and New Zealand.

It is therefore unsurprising that the chatter about revoking the Art. 50 notification to withdraw from the EU – itself waxing and waning since the referendum vote – has become louder in recent days; spurred on by a freedom of information request seeking the government's legal advice on the question. The debate on whether notification could be 1revoked had reached something of a standstill in the aftermath of the *Miller* litigation before the UK Supreme Court where an opportunity for clarity on the question was lost as both parties to the litigation proceeded on the basis that such notification was not revocable, and attempts to get the CJEU to rule on the issue in separate litigation was thwarted by the Irish Courts. Thus, the issue is still unresolved. In this post I want to make the case that an Art. 50 notification is not revocable. The argument, in summary, is this: the text of Art. 50 itself is inconclusive and there are compelling consequential reasons for finding that such notification is not revocable in that allowing the UK to revoke its notification could create serious moral hazard risks which could undermine the rule of law in the EU, the authority of the EU Courts and make the Union ungovernable in the future.

Arguments based on Art. 50 itself

Influential voices have weighed in on the question, arguing that an Art. 50 notification is indeed revocable including former director-general of the Council of the EU's legal service, Jean Claude Piris as well as the House of Lords EU Committee. The argument for its revocability centre on two main pillars: arguments based on international law and the text of Art. 50 itself.

Arguments based on international law

This argument runs as follows: as the Treaties are agreements between sovereign states, the sovereignty of each EU member state includes the right to notify to withdraw but also the right to revoke such notification at any stage prior to actual withdrawal. As such, the right to revoke is essentially read into the sovereignty of EU Member States.

The sovereignty of the EU's member states – and the agency, rights and duties that accompany it – are, of course, recognised and upheld by International law. However the problem here is that international law is not directly relevant to the question. It is uncontroversial that international law recognises the general right to accede to and withdraw from international treaties as a function of the sovereignty of states, however international law also recognises that where states have agreed to regulate matters in a particular way, particularly in the terms of an international treaty, the treaty provisions will be applied over general international law. As such, Art. 50 is a lex specialis, which would be enforced by any tribunal hearing any dispute about the logistics of withdrawal over the provisions of general international law and in particular the general rights and duties of sovereign states. Thus, the general point about international law is subject to the Art. 50 procedure which simply begs the question: does Art. 50 allow for a revocation of notification of withdrawal?

Another tack taken along these lines is recourse to Art. 68 of the Vienna Convention of the law of treaties. This

provision clearly and unambiguously states that 'A notification [for withdrawal] may be revoked at any time before it takes effect'. However, it is not clear that this is completely relevant to Art. 50 (for one thing, it stipulates a slightly different procedure which includes the possibility of other states objecting to the withdrawal), but even if it was, the European Union is not about by it. Not all EU member states are signatories to the convention (Romania, for example, is not a signatory) but more significantly, the EU itself is not a signatory. As such, it does not bind EU law (I'm assuming, I think correctly, that this issue does not form part of customary international law as per, for example, the CJEU's *Firma Brita* decision) and can therefore have no direct bearing on the revocation question under Art. 50. Therefore, the legal question invariably turns to the interpretation of Art. 50 itself.

The text of Art. 50

Two issues in the text of art. 50 have been prominent in the revocation debate: the legal relevance of 'intention' and the relationship between 'intention' in Art. 50 (2) and 'withdrawal' from the EU in Art. 50(5).

Various claims have been made about the legal significance of 'intention' to the effect that it has no legal status or that the law recognises that intention can be overturned as it is not a binding commitment. However, the role and relevance of intention in the law is contingent; in some contexts intention is very relevant, even central (such as in crime of murder) in others completely irrelevant (such as strict liability for harm caused). 'The law', therefore, does not have any general position on the role and relevance of intention; it will depend on the 'the law' in question and here we are concerned with EU law. I know of no provision of EU law, nor do proponents offer any specific authority in support, on the status of an 'intention' under EU law.

However, even were intention to have an autonomous meaning under EU law, there are good reasons to believe that the legally relevant act under Art. 50 is not 'intention' but 'notification'. Only a formal and clear act of notification can provide the requisite certainty and clarity which the law is called upon to provide in the withdrawal procedure. It is notification which starts the clock ticking on the two year time period under Art. 50(3) TEU, not the 'intention'.

Relatedly, the arguments based on the difference between Art. 50(2) and 50(5) do not change this position. The idea here is that given that 50(2) only speaks of 'intention' to withdraw, and the fact that 50(5) on the procedures for readmission only relate to withdrawal, that Art. 50 envisages that there is a difference between an intention to withdraw and actual withdrawal such that the former is revocable but that latter is not. Put another way, if notification and withdrawal were synonymous under Art. 50, then the procedure for reapplying under art. 50(5) would explicitly refer also to notification. However the problem here is that there is no definition of 'withdrawal' under Art. 50(5). The legal effect of leaving the EU is that EU law ceases to apply (subject to whatever agreement is put in place between the parties in its lieu). This is covered by art. 50(3) which clearly states that this state of affairs (the closest Art. 50 comes to a definition of withdrawal), occurs two years from notification (unless otherwise agreed by the parties). There is nothing here to suggest that Art. 50(3) envisages that this notification could be contingent on some other intervening act such as a revocation of such notification.

Therefore, it is submitted, that the evidence on the text of art. 50 TEU as to whether notification can be revoked is at best inconclusive, at worst, points in favour of a no-revocation position.

Consequential reasons against revoking notification.

However this is not the only reason why notification cannot be revoked. Arguably a more significant reason against permitting revocation is the moral hazard risk involved. Moral hazard is a familiar term in economic theory which entails the idea that an actor can make a risky or potentially costly decision knowing that it is unlikely to bear the cost of that decision based on past behaviour. It was prominent in debates about Greece's bail-outs after the Euro-crisis ('if we cancel Greek debt now, then future Greek governments will continue to borrow and spend recklessly, safe in the knowledge that they will not be left shouldering the costs of their spending as we've bailed them out before'). Let's imagine, then, that things come to a head: the UK is so unprepared, banks leave London en masse and Japanese car manufacturers flee such that the UK government decides the only way to prevent economic catastrophe is to notify the European Council of its intention to withdraw its notification of its intention to withdraw from the EU. EU Member states deliberate on whether to

accept it and the Court of Justice of the EU (CJEU) has to decide. It may suggest that this is a political matter and, if everyone is in agreement, then such revocation would be valid under EU law. There would probably be a lot of peeved EU Member States; annoyed that the UK is playing games with its own economy, its international standing and the EU project. They might be tempted to not accept the revocation and force the UK out. But their better judgement will prevail, they will look at the figures, they'll look at the economic damage Brexit will cause to the EU's economy (and particularly their national economies), they'll think about the potential loss of citizenship rights of 65 million EU citizens and think better of it. Revocation of notification will be accepted and everything will return as it was to 22 June 2016.

However, then think about the long term implications of this acceptance of revocation. Even if it is generally accepted that Brexit will leave the UK worse off than the EU, the EU will still suffer. It has undergone a crisis of confidence after Brexit along with all the other fires it has recently fought including Greece, the Eurozone and its twin rule of law and refugee crises. Even if the domino effect of other Member States following the UK out the exit door did not transpire, any state withdrawing does raise profound existential questions for the bloc. Allowing the revocation of an Art. 50 notification would create significant moral hazard risks by putting a potentially powerful weapon in the hands of individual member states, particularly smaller states. This could be used to gain leverage in bargaining over unpopular laws or policies or even to overturn unpopular CJEU decisions. We don't need to look very far to see how this could play out. A future Greece wishing to force euro debt cancellation or mutualisation could invoke Art. 50 to push others around to their position; a disgruntled Poland or Hungary, smarting at rule of law procedures, refugee quotas, or both, could communicate its intent to withdraw under Art. 50,; even Europhile Ireland, uncomfortable with an adverse CJEU judgment on state aid involving Apple tax breaks or how policy-making on corporate tax harmonisation is proceeding undermining its efforts to keep corporate taxes low to attract inward investment, could provide Art. 50 notification. This would hinder the development of EU policies on a whole host of issues and threaten the authority of EU law and the EU Courts. Of course their bluff could be called, the Member States could ignore their pleas for policy-change or overturning a CJEU ruling. However if the gambit didn't pay off, the threatening state could simply withdraw the notification of intent before they formally left following the Brexit precedent. Leaving the door open to such strategic manipulation of EU decision-making processes would undermine the rule of law in the Union, the authority of its courts, and the integrity of EU governance. It is pretty clear that the CJEU could not open the door to such a risk under its watch. Considering these scenarios, it is almost certain to find that notification cannot be withdrawn for these significant policy reasons.

Of course, where the political will was present to prevent Brexit, some sort of solution could be found under EU law. A stage-managed 'Potemkin Brexit' could be arranged whereby the UK formally leaves, but keeps the rights and duties of membership under a status-quo-preserving transnational agreement, and re-joins under Art. 50(5) on the terms it currently enjoys. Such political will is, however, currently in short supply on both sides. And it would merely vindicate the position that an Art. 50 notification cannot be withdrawn under EU law.

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