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BROAD LEGAL ANALYSIS OF THE ARTICLE 50 OF THE TREATY ON EUROPEAN UNION

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Açar sözlər: *çıxış, müqavilə, akt, birtərəfli, beynəlxalq hüquq, federasiya, Avropa Şurası*
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Introduction

The Lisbon Treaty from 2009 introduced the possibility for individual member states to withdraw from the European Union (EU) on the basis of a unilateral decision. But is withdrawal democratically legitimate? The introduction of Article 50 TEU essentially erodes faith in the Union, thereby undermining constitutionalism in the EU. The divergent interpretations highlight the uncharted nature of the law in this field more generally and the procedure to follow in concluding the exit agreement in particular. As such, they are fully embedded in the Article 50 of TEU, and form an integral part of the evolving EU constitutional structure they underpin.

Analysis

It used to be thought that membership of the European Union was like a traditional marriage with no possibility for divorce. Th is state of affairs has changed with the coming into force of the Treaty of Lisbon on 1 December 2009. Member States can now opt for amicable divorce. Article 50 TEU provides that 'any Member State may decide to withdraw from the Union' on the basis of a negotiated 'arrangement' [1].

Article 50 TEU provides the following:

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

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

Neither the EC Treaty nor the TEU contained an express provision allowing the Member State the right to unilateral withdrawal. The reason for the absence of a relevant provision in an original EEC Treaty is not known, since the travaux pre´paratoires were not published. Three explanations were suggested [2]. The first one—the negligence of the drafters—is not convincing since a French proposal to include such a clause was rejected [3]. The second explanation that the absence may reflect the intention of the drafters to preclude a right to withdraw is also doubtful because the Federal Republic of Germany specifically reserved the right to reconsider its participation in the EEC if reunification with the German Democratic Republic should occur. The third one was found to be the most probable. The absence of the provision was rather to dissuade Member State from withdrawal than deny the existence of such a possibility.

Also, unilateral exit needs some clarifies. Arguably, this is facilitated in theoretical terms by Article 50 TEU. However, the political, economic and legal consequences would be too profound to make it a realistic scenario. To put it differently, it should be avoided at all costs. Both the theoretical and the practical take on unilateral withdrawal are presented in turn [4].

The issue of whether the Member State may still withdraw, given the lack of the provision on withdrawal, was discussed from time to time and became highly controversial. On one side this right was denied, while on the other it was argued that this right could be derived from the Treaties themselves and the principles of international law. The latter view found some support from the precedence of the British renegotiations of 1974 and the referendum of 6 June 1975 on British withdrawal from the Communities, which was not opposed as such.

Despite several threats of withdrawal, no state actually seceded from the EU. For instance, French policy of the empty chair, Great Britain's plans for withdrawal, Greece etc. [5]. Referring to the withdrawal of Greenland (Danish autonomous territory), it is sometimes given as an example of practical exercise of the right to withdraw. This however may be questionable due to the particular circumstances of this case: Greenland was not a direct member of the EC, but in a sense part of the territory of Denmark, and it was not Greenland who applied for withdrawal but rather Denmark, seeking redefinition of the application of the Treaties to its territory following a negative referendum in Greenland on continued EEC membership. The mechanism used for "withdrawal" of Greenland was the revision procedure laid down in the Treaties (e.g. Art. 236 EEC).

The Treaty of Lisbon "ends the mystery of how to withdraw from the EU" [6]. It offers a clear exit clause. The clause was transferred from the Constitutional Treaty with some technical adjustments only. The decision to keep the clause was contained in the IGC Mandate of December 2007. The provision was not further discussed. Discussions on the terms of Art. 50 TEU took place much earlier and they refer to Art. I-60 TCE or its predecessors.

In the TCE the provision for withdrawal was proceeded by the heading "Voluntary Withdrawal". There are no headings to the Articles in the Treaty of Lisbon, but obviously withdrawal under Art. 50 TEU has a voluntary character.

A. Lazowski notes that one cannot emphasize enough that withdrawal from the European Union will be a complicated affair with political, legal and economic strings attached [7].

The discussions on admissibility of withdrawal from the EC/EU before the Treaty of Lisbon take two main perspectives: international law perspective or federal one. International law arguments are used by those who perceive the EC/EU as an international organization (or structure) based on treaties and federal arguments by those who viewed it in the light of the autonomous character of its legal order, a new type of a federal polity not being, however, a state. These two assumptions may not necessarily lead to different conclusions, since for international law the character of a treaty, its terms, and the objectives and intentions of the parties are also essential points of departure to establish the right to withdraw.

A federal State can be defined as "a union of States in which both the federation and the Member States embody the constitutive elements of a State: legislative, executive and judicial power over territory and citizens. State authority is divided between the federation on the one side, and the Member States on the other, both of which possess certain assigned competences and functions". Moreover, a federation is a union under constitutional law in which the competences of each side are determined by the federal Constitution. The federal State is distinct from a confederation and also from an international organization. These two unions do not possess the character of a State because of the limitation of their competences to special matters and their lack of territorial and personal jurisdiction. They are governed by international law.

Although the EU is not a State, it has some characteristics of a confederation, it was not classified as such, due to its extensive legislative, executive and judicial competences. Moreover, except for two recent examples, confederation is a historic category. There is no general right to withdraw or secede from a federal state, neither under constitutional law nor international law. Under constitutional law, the constituent part of a federal state, with its territory and its population, may not unilaterally withdraw. A federal state is normally formed after voluntarily relinquishing the separate existence of units. The secession would thus result in destruction of the state's very foundation. It is crucial to keep the federation "indissoluble" than permit secession. The classic case is of the United States of America. The constitutions of some federal states may, however, provide for unilateral secession. For example, the Russian Constitution of 1977 expressly mentioned the right to unilateral withdrawal in Art. 72 ("Each Union Republic shall retain the right freely to secede from the USSR"), but this right appeared illusory. The right to secession was referred to in the Preambles to the Constitutions of Czechoslovakia of 1960 and Yugoslavia of 1974, but the right was not perceived as unilateral or unconditional. In the 1990s Yugoslav Constitutional Court in several cases on the legality of secession under the Constitution of 1974 determined unilateral secession unconstitutional. The Court emphasized that the secession, to be legal, requires a constitutional amendment. Similar conclusion could be drawn from the decision of the Supreme Court of Canada of 1998 on secession of Quebec. The Supreme Court of

Canada ruled that there is no right either under the Constitution or in international law for Quebec to secede unilaterally from Canada.

The issue of secession and self-determination was studied by the Venice Commission. The Commission has analyzed the constitutions of the Council of Europe member states, the Venice Commission's associate members and South Africa. It is clear from its Report that generally, the Constitution, as the basic law of the state, whether unitary or federal, is opposed to secession and instead emphasizes territorial integrity, indivisibility of the state and national unity. The constitutions of federal states examined by the Commission are silent on the possibility of secession, but the prohibition of secession follows from the provisions referring to values challenged by secession such as indivisibility, national unity and territorial integrity. The Report noticed also that "on balance, while in very general terms secession is alien to constitutional law, self-determination, primarily construed as internal, is an element frequently incorporated in constitutional law but needing to be dissociated from secession".

As far as international law is concerned, it does not confer any right to unilateral secession outside the colonial context [8]. Recently, however, there is support for the concept that the right to secession is allowed, although only as an ultima ratio, when human rights are seriously and persistently violated, when the oppression of a people is extreme [9].

Similarly, there is no general unilateral right to withdraw from a confederation under international law. A confederation is usually based on the treaty (not the constitution), thus the document governed by international law. It respects the sovereignty of its members and its constituting treaty can only be changed by unanimous agreement.

While recourse to the general rules of international law was possible in the absence of explicit provisions, formalization of the right of withdrawal in Article 50 neutralizes the application of general rules of international law because of the principle 'lex specialis derogate legi generali'. Releasing the EU from the strictures of international law means on the one hand, enhancing EU autonomy vis-à-vis that order, but on the other hand, it also means releasing Member States from the stricter conditions for withdrawal in international law[10]. Explicit regulation hardly represents a novelty in international public law since a significant number of international organizations regulate the same option along similar lines. But an important caveat applies to this trend: while denunciation and withdrawal are a regulated component of modern treaty practice, they are not that common for international organizations. Accordingly, if withdrawal regulation is not exceptional but not widespread either, the question which stands is why or for what purpose did the EU Member States decide to introduce an explicit provision on withdrawal, given the significant agreement among legal scholars about its facticity.

The rules applicable to federations are obviously not directly applicable to withdrawal of a State from its supranational organization. There are no specific rules of international law applicable to supranational organizations (the term is of a descriptive character only). They are governed by general international law if a specific matter is not regulated by the legal order of the organization. The question seems then to be to what extent the relevant treaty or treaties constituting supranational organization are governed by general international law, or in other words how the legal order of the organization as lex specialis derogates general rules.

The prevailing understanding of EC/EU law with regard to international law is that of an autonomous legal order, distinct either from constitutional law or international law. It was argued that since the EC treaty created "a new legal order" this principle may exclude the applicability of the usual rules of international law to treaty termination and withdrawal, especially because the methods to resolve disputes over its interpretation and application are exclusive (Art. 219, 292 EC). The execution of the Treaty was removed from the hands of the Member State and placed within the authority of the EC institutions. This third legal order is permanently binding on the Member State and prevails over conflicting national laws.

Under federal argument, there was no right to unilateral withdrawal from the EC/EU. Various elements of the EC/EU legal order could be emphasized in that regard. For some authors unilateral withdrawal would be incompatible with the objectives of the Treaties. The main goal was expressed in the preamble to the EEC Treaty, to strive for "an ever closer union among the European peoples". Moreover, the Treaty presupposed the definitive or irreversible character of the membership in the EC/EU (the Treaties were concluded for unlimited duration – Art. 312 EC, Art. 51 TEU-Nice). The other authors underline that the Member State might not withdraw since they were no longer the sole masters of the treaties (individuals became the new subjects of the Community) [11]. In this context some authors refer to the rule on primacy of EC law (EU law cannot be overridden by existing or subsequently enacted laws, including the decision on withdrawal). Moreover, the courts of some of the Member State expressly abrogated States' right to determine their relationship with the EU, including their right to unilateral withdrawal.

Pursuant to Art. 50.3 TEU, the Treaties shall cease to apply to the State in question from the date when the withdrawal agreement enters into force, which does not require unanimity in the Council (only qualified majority is required) or ratification by other Member State or, failing that, 2 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. Withdrawal under Art. 50 TEU is in fact a purely voluntary act (i.e. it is not dependent on the consent of the other Contracting Parties) [12].

There are no substantive conditions on a Member State's right to withdraw. The Member State that wishes to withdraw does not need to state reasons for its decision. Art. 50.1 TEU requires only the adoption of the decision in accordance with the constitutional requirements of the Member State. The purpose seems to be on the one hand to reassure the Member State that they will remain the "masters of the treaties"[13], and on the other hand to assure that the State's decision is duly taken and in accordance with the State constitution, in order to minimize possible abuse of the clause for political reasons. The fulfilment of constitutional requirements can only be verified by the Member State itself, not by the CJEU or the other Member State.

Pursuant to Art. 50.2 TEU, a Member State that decides to withdraw shall notify the European Council of its intention. In an earlier draft of the Constitutional Treaty (draft Art. 46) the organ first addressed by the Member State was the Council. The change seems to be the consequence of the change of the status of the European Council under the Treaty decided probably at a later stage in the Convention. The European Council has to provide guidelines in whose light the Union shall negotiate and conclude an agreement with the withdrawing State.

The withdrawal will certainly not just cause institutional changes for the EU. There could be also the problem of damages, or continued fulfilment of some earlier obligations for a certain period. In the amendment submitted to the Convention it was suggested that the provision should explicitly state that full account shall be taken of the possible consequences of such a withdrawal on the rights and obligations of natural and legal persons. All these issues have to be necessarily addressed by such agreement. Furthermore, withdrawal at a certain level of the Member State's economic integration may require maintenance of specific relations between the withdrawing state and the EU. That is why Art. 50 TEU requires that the agreement sets out the arrangements for the withdrawal, taking account of the framework for the State's future relationship with the Union.

The agreement shall be negotiated in accordance with the procedure provided for in Art. 218.3 TFEU on the conclusion of international agreements by the EU. Under this provision, the Commission has to submit the recommendations to the Council. The Council shall then authorize the opening of negotiations, adopt negotiating directives, and nominate the head of the Union's negotiating team. Art. 50 TEU is silent on the signing of the agreement (Art. 218.3 TFEU does not apply to signing). However, Art. 218.5 TFEU should be applied; the Council then authorizes the signing of the agreement. In the light of Art. 218 TFEU, the term "conclude" in Art. 50.2 TEU refers to the consent that is to be bound by the treaty. The Council makes the respective decision, acting by a qualified majority, after obtaining the consent of the European Parliament. Thus, the procedure laid down in Art. 50 TEU involves all decision-making institutions, including the European Council.

The qualified majority in the Council is defined in accordance with Art. 238.3 lit. b TFEU. The consent of the European Parliament is given by a majority of the votes cast (Art. 231 TFEU). At the early stage in 2003, the Praesidium offered "to adopt the voting rule corresponding to the substantive content of the agreement". The proposal was rejected because of its unclear meaning and implications. It was also suggested that a kind of actus contrarius should be applied. If unanimity in the Council is required for admission to the EU, it should also be required for withdrawal.

The present formula avoids all the complications that may arise with the unanimity rule and makes the agreement easier. There is no actus contrarius to the accession agreement, since the withdrawal agreement is the agreement of the EU, not of the Member State. Their ratification is not required.

Concluding all the aforementioned analysis, as an explanation of withdrawal, we may refer to P. Nicolaides, stating that 'withdrawal is a formal act that is unlikely to sever all links with the EU or confer real policy independence to the withdrawing country. It is neither possible, not desirable for a withdrawing country to get rid of all EU-based legislation. Moreover, non-application of EU law will require substantial re-legislation in the withdrawing country. Lastly, the fact that a country formally leaves the EU will not mean that it will stop being affected by developments in EU law [14].

In 2018, the EU adopted brand new European Union Withdrawal Act, which contains the supremacy of EU law (Section 5):

(1) The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day.

(2) Accordingly, the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day.

(3) Subsection (1) does not prevent the principle of the supremacy of EU law from applying to a modification made on or after exit day of any enactment or rule of law passed or made before exit day if the application of the principle is consistent with the intention of the modification.

Indicating the importance of the Article 50 of TEU and Withdrawal Act of 2018 for UK Brexit process, P. Craig mentioned that the European Parliament could therefore refuse to enact the statute, with the consequence that the Withdrawal Agreement could not take effect in national law, whatever its effect in international law. The danger is that this might be interpreted, in the context of Article 50(3) TEU, as failure to secure a Withdrawal Agreement, with the consequence that the UK would exit without an agreement at the end of two years [15].

Conclusion

Article 50 of the Treaty of Lisbon explicitly regulates withdrawal. Allegedly, formalization of withdrawal explodes two basic assumptions about the EU: that European integration is irreversible and that Member States have waived their right to dissolve the Union.

The voluntary membership in the EU underlined by the Treaty of Lisbon, i.e. by the withdrawal clause, became the constitutional element of the EU legal order. The Treaty of Lisbon made clear that for all the states, continued EU membership remains an option but is not a duty. This adds to the legitimacy of the Union, as no Member State is forced to participate. Clearly the option of withdrawal is more hypothetical than a real political option for some Member States. But it is also unrealistic in terms of law, because the European Union is more than a form of cooperation among states. The more the Union can be considered as based upon the constitutional rights and freedoms of individuals, the more the option of withdrawal becomes unacceptable for both a Member State's own citizens as well as for the citizens of the other Member States, who increasingly see themselves as holding a stake in that one Member State. Art. 50 TEU could be thus perceived as the provision harmonizing the two types of approaches to the EU: international and federal. Nevertheless, it perpetuates the hybrid character of the EU.

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Avropa ittifaqı haqqında müqavilənin 50-ci maddəsinin geniş hüququ təhlili

Xülasə

2009-cu il Lissabon Müqaviləsi ayrı-ayrı üzv-dövlətlərə Avropa İttifaqından birtərəfli qərar əsasında çıxmaq imkanı vermişdir. Lakin, nə Roma Müqaviləsində, nə də Maastrixt Müqaviləsində üzv-dövlətin birtərəfli qaydada üzvlükdən çıxmasına dair dəqiq müddəa nəzərdə tutulmurdu. Həmin müqavilələrin hazırlıq materialları dərc olunmadığına görə Avropa İttifaqı barədə ilkin müqavilələrdə müvafiq müddəanın olmamasının səbəbi məlum deyildir. Lissabon Müqaviləsinin 50-ci maddəsi isə birbaşa olaraq üzvlükdən çıxma məsələsini tənzim edir. Beləliklə, Avropa İttifaqı haqqında Lissabon Müqaviləsinin 50-ci maddəsi Avropa İttifaqına iki növ yanaşmanı harmonizasiya edən müddəa kimi qəbul edilə bilər: beynəlxalq və federal.

Подробный правовой анализ статьи 50-го договора о Европейском Союзе

Резюме

Лиссабонский договор 2009 года предоставил отдельным государствам-членам возможность выхода из Европейского Союза на основании одностороннего решения. Однако, ни в Римском Договоре, ни в Маастрихтском Договоре не содержалось четкого положения, позволяющего государству-члену право на односторонний выход. Причина отсутствия соответствующего положения в первоначальном Договоре о Европейском Союзе неизвестна, поскольку подготовительные материалы не были опубликованы. Статья 50 Лиссабонского договора прямо регулирует выход. Таким образом, статья 50 Лиссабонского Договора о Европейском Союзе может восприниматься как положение, гармонизирующее два типа подходов к ЕС: международный и федеральный.

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