
Preliminary Ruling Concerning the Interpretation of Article 50 TEU

Patricia Tuitt

Disclaimer

This publication takes the form of a mock judgement of the Court of Justice of the European Union, responding to a request for a preliminary ruling on the question of whether a Member State of the European Union who has notified the European Council of its intention to withdraw from the European Union retains the right to revoke that notification during the transitional or implementation period of a withdrawal agreement which has entered into force.

The mock judgement reproduces, unamended, sentences/paragraphs from the judgement of the Court of Justice of the European Union in Case C-621/18 *Wightman v Secretary of State for Exiting the European Union*. Except insofar as the mock judgement adduces propositions relating to the question of whether revocation during the course of a withdrawal agreement transitional or implementation period is possible, it does not purport to be the author's original work.

JUDGMENT OF THE COURT (Full Court)

18 November 2019

(Reference for a preliminary ruling - Article 50 TEU - Entry into force of a withdrawal agreement pursuant to Article 50(2) - Consequences of a “transitional” or “implementation” period - Whether a right to revoke a notification by a Member State of its intention to withdraw from the European Union subsists during a withdrawal agreement ‘transition’ or ‘implementation’ period - Conditions).

Judgment

1. This request for a preliminary ruling concerns the interpretation of Article 50 TEU.
2. The request has been made in proceedings between Patricia Tuitt and the Secretary of State for Exiting the European Union (United Kingdom), concerning the possibility of revoking the notification of the intention of the United Kingdom of Great Britain and Northern Ireland to withdraw from the European Union during the transitional or implementation period of the withdrawal agreement concluded in pursuance of Article 50(2) TEU, which entered into force on 32 January 2020.

Legal context

European Union Law

3. Under Article 50 TEU:

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) [TFEU]. 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) [TFEU].

3. Preliminary Ruling

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.’

The dispute in the main proceedings and the question referred for a preliminary ruling

4. On 32 January 2020, a withdrawal agreement made between the United Kingdom government and the European Union entered into force after having been approved by the United Kingdom Parliament in accordance with the United Kingdom’s constitutional arrangements. The withdrawal agreement contained a transitional or implementation period during which the UK would be bound to the European Union Treaty framework until 31 December 2020 or later date

5. On 33 January 2020, an application for judicial review was lodged in the Administrative Division of the High Court (United Kingdom) in which the applicant sought a declarator specifying whether a right to revoke the notification to withdraw from the European Union subsists during the withdrawal agreement transitional or implementation period, and, if so, how that notification can be revoked. The applicant wishes to know whether the notification referred to in Article 50 TEU can be revoked before the expiry of the transitional or implementation period laid down in the withdrawal agreement. She asked the High Court to refer a question on that issue to the Court of Justice for a preliminary ruling. In response, the Secretary of State for Exiting the European Union argued that the question was hypothetical and academic, in view of the United Kingdom government’s stated position that the United Kingdom ceased to be a Member State of the European Union from the moment that the withdrawal agreement entered into force.

6. By order of 34 January 2020, the referring court granted the request of the applicant that a reference for a preliminary ruling be made under Article 267 TFEU. The referring court considers that it is neither academic nor premature to ask the Court of Justice whether it is legally possible for a Member State, to revoke the notification made under Article 50(2) TEU and to remain in the European Union during a transitional or implementation period of a withdrawal agreement. It considers that the matter is uncertain because, on its face, Article 50 does not envisage a transitional or implementation period of the kind that the withdrawal agreement concluded between the United Kingdom and the European Union constructs.

7. In those circumstances the High Court decided to refer the following question to the Court of Justice for a preliminary ruling:

‘Where, in accordance with Article 50 [TEU], a Member State has concluded a withdrawal agreement which contains a transitional or implementation period during which the Member State is bound to the European Union Treaty framework, does EU law permit that Member State to revoke its notification of intention to withdraw from the European Union, and, if so, subject to what conditions and with what effect relative to the Member State remaining within the European Union?’

Consideration of the question referred

8. The United Kingdom government argues that the question referred is inadmissible because it is hypothetical. In particular, the United Kingdom government submits that from the date of entry into force of the withdrawal agreement, the UK ceased to be a Member State of the European Union, and, therefore, logically, no right to revoke its notification exists. Further, the United Kingdom government asserts that there is no concrete dispute, since the question referred addresses events that have not occurred and will not occur, since, even if permissible, it has no intention of revoking its notification of its intention to leave the European Union.

9. Questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgments of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 25, and of 7 February 2018, *American Express*, C-304/16, EU:C:2018:66, paragraph 32).

10. There is no doubt as to the relevance of the question referred, since it concerns the interpretation of a provision of EU law — primary law, in this case — and that question is precisely the point at issue in the dispute in the main proceedings.

11. It is in no way obvious that the question referred, regarding the interpretation of Article 50 TEU, bears no relation to the actual facts of the main action or its purpose, or concerns a hypothetical problem. It follows that the question referred is admissible.

Substance

12. The applicant relies on the fact that Article 50 does not expressly provide for a transitional or implementation period of the kind which the withdrawal agreement that is the subject of this preliminary ruling constructs. She maintains that a Member State can leave the European Union only in accordance with the terms of Article 50. Where a Member State seeks to leave the European Union by way of a withdrawal agreement, the applicant asserts that the Member State in question does not leave the European Union until the European Union Treaty framework no longer applies to it. She argues that during the operation of the withdrawal agreement transitional or implementation period, the United Kingdom cannot be said to have “withdrawn” from the European Union, because the EU Treaties continue to apply. The applicant asserts that if the UK has not formally “withdrawn” from the European Union, it ought to be able to revoke its notification of its intention to withdraw, provided that revocation is exercised in accordance with the UK’s constitutional requirements,

13. The Council and the Commission have expressed concern that a Member State could at any time use its right of revocation as leverage in negotiations. If the terms of the withdrawal agreement did not suit that Member State, it could threaten to revoke its notification and thus put pressure on the EU institutions in order to alter the terms of the agreement to its own advantage. In order to guard against such risks, the Council and the Commission propose that Article 50 TEU should be interpreted as allowing revocation, but only with the unanimous consent of the European Council. As regards the single issue of whether a right of revocation, if it exists, can be exercised unilaterally or only with consent, this Court sees no reason to depart from its earlier decision in *Wightman* [2018].

14. This Court considered the question of revocation of an Article 50 notice of intention to withdraw from the European Union in *Wightman* [2018]. At paragraph 75 of its judgement, the court concluded that

Article 50 TEU must be interpreted as meaning that, where a Member State has notified the European Council, in accordance with that article, of its intention to withdraw from the European Union, that article allows that Member State — for as long as a withdrawal agreement concluded between that Member State and the European Union has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in Article 50(3) TEU, possibly extended in accordance with that paragraph, has not expired — to revoke that notification unilaterally, in an unequivocal and unconditional manner, by a notice addressed to the European Council in writing, after the Member State concerned has taken the revocation decision in accordance with its constitutional requirements. The purpose of that revocation is to confirm the EU membership of the Member State concerned under terms that are unchanged as regards its status as a Member State, and that revocation brings the withdrawal procedure to an end.

15. On the face of it, this Court’s judgement in *Wightman* is against the applicant, for she asserts a right of revocation in spite of the fact that the withdrawal agreement concluded between the UK and the European Union has entered into force. However, the Court in *Wightman* was not asked to consider a situation in which a withdrawal agreement, although having entered into force, does not, as Article 50(3) seems to envisage, take the Member State outside of the European Union Treaty framework.

16. Article 50(3) TEU determines when the withdrawal of the Member State concerned from the European Union will take effect, in providing that the Treaties are to *cease to apply to that Member State from the date of entry into force of the withdrawal agreement* or, failing that, two years after the notification by that Member State of its intention to withdraw. That maximum period of two years applies unless the European Council decides, unanimously and in agreement with the Member State concerned, to extend it (emphasis added).

17. The withdrawal agreement concluded between the UK and the European Union, which is the subject of the present dispute, is one in which the Treaties continue to apply after the date of entry into force of the withdrawal agreement. Indeed they apply until 31 December 2020 in any event,

and, according to Articles 126 and 132 of the withdrawal agreement, can continue to apply until 31 December 2022.

18. During the withdrawal agreement transitional or implementation period, the UK will have all the rights and obligations enjoyed by other Member States of the European Union, save for decision making powers (see Article 7 and Article 128). For example, Article 4 preserves the supremacy of EU law in all its meanings, including as comprised in the principle of direct effect. Further, according to Article 87(1), the UK is potentially subject to the jurisdiction of this Court for up to four years after the end of the transitional period.

19. The transitional or implementation period has all the appearance of an Article 7 TEU suspension, and not, as would be expected, an Article 50 withdrawal in which, according to the wording of subsection 3 of Article 50, the European Union Treaties “shall cease to apply” to the Member State in question.

20. *Wightman* was correct insofar as it can be interpreted as meaning that a right of revocation is lost when a withdrawal agreement comes into force and the European Union Treaties cease to apply. However, that is not the case in the present dispute, and, therefore, *Wightman* cannot be read as providing an answer to the question raised by the applicant in the present proceedings.

21. It must be noted that, since citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see, to that effect, judgments of 20 September 2001, Grzelczyk, C-184/99, EU:C:2001:458, paragraph 31; of 19 October 2004, Zhu and Chen, C-200/02, EU:C:2004:639, paragraph 25; and of 2 March 2010, Rottmann, C-135/08, EU:C:2010:104, paragraph 43), any withdrawal of a Member State from the European Union is liable to have a considerable impact on the rights of all Union citizens, including, inter alia, their right to free movement, as regards both nationals of the Member State concerned and nationals of other Member States. Any doubt over whether a Member State has formally withdrawn from the European Union should be resolved in a way that preserves those fundamental rights.

22. There is considerable doubt over the question of whether Article 50 intended that a Member State who remains subject to European Union law because of the operation of a withdrawal agreement transitional or implementation period will be considered to have withdrawn from the European Union - with all the loss to citizens’ rights which withdrawal entails.

23. To conclude that a Member State has withdrawn from the European Union in circumstances where that Member State remains bound to the European Union Treaty framework would be inconsistent with the Treaties' purpose of creating an ever closer union among the peoples of Europe.

24. It follows from the foregoing that Article 50 (3) must be interpreted and applied strictly. On a strict interpretation, a Member State who seeks to withdraw from the European Union by way of a withdrawal agreement must await a time when the European Union Treaties "cease to apply" to that Member State before it can be said that - in legal terms- the state in question is no longer a Member State of the European Union.

25. If the transitional or implementation period contained in the withdrawal agreement is construed as having the effect of withdrawing a member state from the European Union, the strict terms of Article 50 will be circumvented - at the expense of citizens' rights.

26. It follows that the mere entry into force of a withdrawal agreement does not lead inevitably to the withdrawal of that Member State from the European Union. The precise terms of the withdrawal agreement must be scrutinised in light of the express words and purposes of Article 50 TEU.

27. In view of all the foregoing, the answer to the question referred is that Article 50 TEU must be interpreted as meaning that where a Member State has concluded a withdrawal agreement with the European Union, it remains a Member State of the European Union until such time as the European Union Treaties cease to apply to that Member State in accordance with Article 50(3). Until the European Union Treaties cease to apply, the Member State in question is entitled to revoke its notification of its intention to withdraw from the European Union unilaterally, in an unequivocal and unconditional manner, by a notice addressed to the European Council in writing, after the Member State concerned has taken the revocation decision in accordance with its constitutional requirements. The purpose of that revocation is to confirm the EU membership of the Member State concerned under terms that are unchanged as regards its status as a Member State, and that revocation brings the withdrawal procedure to an end.

On those grounds, the Court (Full Court) hereby rules:

Article 50 TEU must be interpreted as meaning that where a Member State has ratified a withdrawal agreement which contains a transitional or implementation period during which the Member State remains bound to the European Union Treaty framework, that withdrawal agreement cannot be construed as having the effect of withdrawing that Member State from the European Union. For as long as the Member State remains bound to the European Union Treaty framework it is entitled to consider itself a full member of the European Union, and is entitled to revoke its notification of intention to withdraw from the European Union unilaterally, in an unequivocal and unconditional manner, by a notice addressed to the European Council in writing, after the Member State concerned has taken the revocation decision in accordance with its constitutional requirements. The purpose of that revocation is to confirm the EU membership of the Member State concerned under terms that are unchanged as regards its status as a Member State, and that revocation brings the withdrawal procedure to an end.