

ARTICLE 50 - TREATY ON EUROPEAN UNION

PART I

1. INTRODUCTION

- 1.1 This paper is directed towards Article 50 of the Lisbon Treaty, and its proper meaning and effect. I have watched the comings and goings of the politicians as they present themselves before the television cameras, explaining the various issues which have arisen. This has been going on for many weeks and months with little prospect of a satisfactory conclusion. There is one striking feature of the seemingly never ending discussions, forecasts, opinions and the like: that is, a complete failure on all sides to keep in mind, or refer to, Article 50 and its terms. This paper is intended to remedy that shortcoming.
- 1.2 In June 2016 the people of the United Kingdom were invited to vote in a Referendum on the question whether the UK should remain in or leave the European Union. For some years there had been growing dissatisfaction with the European Union, but such problems as they were, could not be resolved by the usual parliamentary processes. And so it was decided to consult the people on the issue. The people responded with a decisive vote in favour of the leaving the EU: 17.4 million voted in favour, and 16 million voted to remain. Thereafter it was the responsibility of Parliament to give effect to the decision of the British people.

2. ARTICLE 50 - TREATY ON EUROPEAN UNION (TEU)

- 2.1 This Article contains the legal mechanisms for a Member State of the EU to withdraw from, and leave, the EU. The Article reads as follows:

“Article 50 - Treaty on European Union (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) 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 & 5...".

3. COMMENTARY

- 3.1 The Article is well drawn and to the point, that is to say the unilateral decision of a departing state to leave the EU. The procedure applies to each of the 28 nations of the EU; *"in accordance with its own constitutional requirements"*. The first step along the road to departure is for the departing Member State to notify the European Council of its intention to do so. This the UK did on 29th March 2017, after 498 MPs in the House of Commons voted to trigger Article 50. The next step was for the EU. It had to negotiate and conclude a Withdrawal Agreement with the departing state, setting out the arrangements for its withdrawal (paragraph 2 above).

Paragraph 3 of Article 50 provides for the time and occasion of the departure. It was expressed in the first instance as the date of entry into force of the Withdrawal Agreement, at which time the Treaties should cease to apply to the state in question. Alternatively, should no Withdrawal Agreement be concluded within the two year period from the date of notification, the Treaties should similarly cease to apply to the departing state.

These arrangements for the departure of a Member State are sensible and well-constructed, and have the advantage of brevity. Obviously, any departure is likely to be time consuming and contentious; and discussions and dissensions may well abound. Giving the parties two years to come to a final position seems most reasonable, as necessary to prevent talks from going on interminably without any foreseeable conclusion. It should be noted that on the expiry of the two year period without any Withdrawal Agreement being in place, the departing member automatically leaves the EU without any further debate or discussion. Certainty is restored.

- 3.2 There is, however, one important qualification. In paragraph 3 of Article 50 one finds the possibility of an extension to the two year period. At the end of the paragraph there appears this proviso:

“unless the European Council, in agreement with the Member State concerned unanimously decides to extend this period.”

This proviso was obviously regarded as important, and not a casual matter. All the parties, including the departing state, have to agree on any proposed extension of time, unanimously. One further point should be noted. The proviso relates to *“this period”*. The only period stated in paragraph 3 is the two year period.

One can well see why the proviso was required. A situation might very well arise in which a Withdrawal Agreement was close to a conclusion, with a few items yet to be agreed. But so near to finality that within a short period success could be achieved. In these circumstances it might be better to take a chance rather than close down the negotiations. The position might be different if the discussions became interminable and out of hand, with no end in sight. The proviso could not be used to reopen, or continue, never ending debate. Nor can it be used as a general power to extend time.

- 3.3 Ironically, that outcome is just what has occurred. The clear objective of Article 50 is to facilitate the departure of a Member State as speedily as possible with the minimum of delay. It must not be forgotten that Article 50 and its application are subject to European Law as is plain from its language; the Article is a treaty provision and can only be amended or altered in accordance with the requirements of the Treaties. UK domestic laws come in behind European law, for the purpose of giving effect to treaty obligations.

Absent the proviso to Paragraph 3 of the Article, there would be no provision in Article 50 for any extension of time. Had that been the case, the UK would have left the EU not later than the 29th March 2019. There would have been no escape from that outcome. But there was an escape, namely, the proviso to paragraph 3 in Article 50 (see above). The Prime Minister has evinced an intention to utilise the proviso to obtain an extension of time beyond *“this period”*. The question is: has she lawfully done so?

4. SUBSEQUENT EVENTS

4.1 On 29th March 2017 the Prime Minister notified the EU of the intention of the UK to quit the EU. That began the two year period ending on 29th March 2019 at 11pm. It has been the expectation of the nation for the last two years that the UK would indeed depart from the EU on that date. However, the Prime Minister could not face the prospect of leaving the UK without “a deal”. She was and remains determined to get approved by Parliament a deal proposed by her which would stop the two year period running. So far she has failed by huge majorities. Many MPs are content to leave the UK with no deal and there is massive support for that. However, the Prime Minister wished to extend the time of departure from the EU, which she could do by the operation of Article 50, paragraph 3, and its proviso.

As the 29th March approached it became urgent for the Prime Minister to move the exit date back to allow her the breathing space she required. On 14th March a government motion was passed authorising her to seek an extension of time from the EU. This she did, requesting a postponement of the exit date from the 29th March until the 30th June. That request was flatly rejected; but up to this point the Prime Minister had acted lawfully and within her remit. Had the EU accepted the proposals of the Prime Minister, the exit date could have been lawfully changed, in accordance with the provisions of Article 50, to the 30th June 2019. That did not happen due to the rejection of her proposals.

4.2 The EU had some different proposals of its own. They were as follows:

First, the EU expressed a willingness to agree to an extension of the exit date until the 12th April, if the UK voted down for a third time her proposals, which had been on the table for many weeks. (The UK did so)

Second, if her proposals were not voted down, but were accepted by the UK on the third time of asking, the exit date would be postponed until the 22nd May.

Mrs May accepted these proposals with alacrity; the Government position appears to be that the exit date is “officially delayed”.

4.3 In my opinion the purported arrangements agreed for an extension of time were unlawful and *ultra vires*. They cannot legally change the exit date without agreeing a new date; nor can the exit date be extended save in accordance with the authority of the House of Commons and the EU, and the procedural terms of Article 50. There appears to be no evidence that any such authority has been sought; nor that any proper regard has been had to the terms of Article 50.

What was proposed by the EU was not an extension of time for the exit date under Article 50. The proposal was an offer of two options:

First, resulting in a delay until the 12th April; and second, a possible delay until the 22nd May. Those proposals self-evidently were not an application for an extension of time pursuant to the provisions of Article 50, paragraph 3 as extended.

- 4.4 It follows that these arrangements, agreed by Mrs May, cannot be effective to vacate or replace the exit date of the 29th March 2019.

PART II

5.

- 5.1 Since writing Part I of this paper, some new material has emerged and come to light. On 25th March 2019 the Government issued a note entitled “Legislating for the extension of Article 50”. The note refers to the Agreement reached with the EU for the extension of Article 50, and states under paragraphs 3 and 4:

“3. However, the agreement reached with the EU provides for two possible durations:

- a. An extension to 11pm on 22 May 2019 if the House of Commons approves the Withdrawal Agreement by 29 March; or*
- b. An extension to 11pm on 12 April 2019 if it does not, before which the UK would need to put forward an alternative plan on decide to leave without a deal.*

4. The Government has therefore laid today, Monday 25 March, a draft SI under Section 20(4) that provides for both these possibilities; ...”

These explanations clearly resonate with the remarks made previously by the author. The Agreement provides for two possible durations; whereas the proviso to paragraph 3 provides for a unanimous decision “to extend this period”. The two concepts are wholly different. Extending “this period” is one outcome; two possible durations, without any certainty, are certainly something else, not authorised anywhere in Article 50. If one can have two hypothetical durations, can one make an Agreement under Article 50 which includes more than two durations – a kind of take your pick deal? It is obvious that such an arrangement would be incompatible

with the need for an orderly, or credible exit from the EU. The conclusion, I would suggest, is that the Agreement used and implemented by the Prime Minister, Mr Barnier and President Tusk was unlawful and *ultra vires* Article 50. It was without any legal foundation in accordance with Article 50. Purporting to use their Agreement as compliance with the requirements of Article 50, paragraph 3, and in particular its proviso, was unsustainable. That meant that the illegal nature and purpose of the Agreement invalidated it; there was no unanimous decision to “extend this period”. The requirements of Article 50 were ignored. It was not an application to extend this period as required by the proviso.

- 5.2 Next, on or about the 14th March the Government issued a note entitled Parameters of Extending Article 50. It contained *inter alia* the following statement:

“What are the legal requirements for an Article 50 Extension set out in the EU Treaties?”

The Article 50 period is set at 2 years unless, as provided for in Article 50 “the European Council, in agreement with the Member State concerned, unanimously decides to extend [it]”. Article 50 does not establish any upper limit on the length of an extension. However, given the Article 50 period is explicitly time-limited, any extension would have to set a specific end date, because it is necessary for reasons of legal certainty to be clear on the date on which the UK will leave the EU.”

- 5.3 It is at this point that there occurs a curious mishap. The first and second lines of the quotation purport to be an accurate reproduction of Article 50. They are not. If one looks at Article 50, it is apparent that the last three words of paragraph 3 are “extend this period”; but in the quotation the last two words are “extend [it]”. So the version put out by the civil servants was false. The differences in meaning between the two versions were considerable.

(a) **The true version**

Under this version the EC and the Member State can agree to extend “this period”. This period is the two year period after which the Member State ceases to be a member of the EU automatically. But it would appear that the power to extend Article 50 can only be used once; “this period” appears to be limited to the two year period, making it clear that no further extensions to Article 50 could be made. That would certainly curtail any power to make any further extension.

(b) **The false version**

The last four words of this version of Article 50 now read “decides to extend it”. The wording of this version is apt to enable the Prime Minister to seek as many extensions to the Article 50 process as she wishes; she is no longer inhibited by the restrictions contained in Article 50. It is relevant to point out that in the Parameters paper there appears this statement at paragraph 2:

“This paper provides a factual summary to inform parliament’s debate on that motion”.

- 5.4 So the civil servants responsible for briefing parliament to enable an informed debate to take place, themselves were misleading it. The alteration of the text of Article 50, and of the proviso to paragraph 3, must have been deliberate.

The beneficiary of this misconduct was the Prime Minister, who could and did arrange for extensions of time without hindrance. The text of the Parameters paper makes it clear that the civil servants had no qualms about extensions or their supposed length and legal foundation. October 31st 2019 is the latest.

This is a truly alarming state of affairs; it should be exposed sooner rather than later.

6. **CONCLUSIONS**

Stating the outcome shortly, it would seem to be as follows:

- (i) The application by the Prime Minister for an extension of time until June 30th under the proviso to Article 50, made on or about the 14th March 2019, was legally valid, but was rejected by the EU.
- (ii) This was followed by the Agreement proposed by the EU. It did not comply with the terms of the proviso; nor was Article 50 referred to or relied on by the EU. It was not effective to stop the Article 50 process running up to and including the 29th March at 11 p.m. Whichever way one looks at it, the Agreement was either unlawful or made for an unlawful purpose or *ultra vires*. That means that the UK left the EU on the 29th March 2019 by default as there was no valid or lawful impediment to prevent it.

- (iii) Recently the EU has imposed a further extension of time on the UK until the 31st October 2019. This imposition cannot be supported by the terms of Article 50, which seems to have been ignored. It is an example of the willingness of the relevant parties to agree extensions of time without limitation, no doubt based on the notes issued by the civil service.
- (iv) The irony seems to be that ever since the 29th March 2019 , the United Kingdom has left the European Union “ without a deal “. I need hardly point out that there are consequences for the European Election.

Blackstone Chambers

3rd June 2019

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