

EU-UK BREXIT AGREEMENT AND ITS MAIN LEGAL EFFECTS

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Abstract

The United Kingdom withdrew from the European Union on 31 January 2020. On 29 March 2017, the UK practically initiated formally the withdrawal procedure, in accordance with Article 50 TEU, informing the European Council of its intention to leave the European Union. In less than three years, the UK ratified the Withdrawal Agreement, with the purpose that the Agreement would enter into force on 31 January 2020 and, implicitly, produce legal effects. Of all the consequences of this withdrawal, naturally, we will focus on those which have legal implications, being however closely related to all the other effects, about which a lot has been written, and it certainly will be written in the years to come.

Keywords: *Withdrawal Agreement; UK; EU; legal dimension; free movement of persons.*

1. General considerations

Reflecting on my personal concerns in the matter, I found that, for the first time, I was put in the position to define the concept of "Brexit" for the drafting of a paper¹, published in 2018, which placed the notion among the specific terms of EU law. The definition that I proposed², has been partly adopted. This study is a prolongation of my demarches³ in the field. The debut was immediately after the United Kingdom of Great Britain and Northern Ireland⁴ "activated" Article 50 of the Treaty on European Union which had been introduced by the Treaty of Lisbon⁵. This particular article stipulates the possibility of a state to withdraw from the EU. The United Kingdom announced such an intention, initially at a declaratory level, subsequently initiating the actual procedure established by the Treaty. The proposed definition highlighted, even in anticipation, some possible legal consequences given the novelty, but also the courage of such an approach.

It was of pronounced technical nature, if we consider the limitations set immediately after the announcement of such an intention by the United Kingdom. However, over time, the boundaries of the negotiations have alternated between flexibility and rigidity, with the parties being aware of the consequences, in particular, of the negative consequences caused by the "success" of achieving the goal of withdrawing the United Kingdom from the EU. Most of them refer to the capitalization of benefits obtained with consistent efforts from the part of the decision makers, but also of all the citizens of the European Union, namely the freedoms of movement by affecting, at the same time, people, services, goods, capitals and payments.

2. Withdrawal of the United Kingdom from the European Union. A first legal consequence: the Withdrawal Agreement

It is well known that the withdrawal of the UK was primarily aimed at the European Union as a subject

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¹ *Enciclopedia juridică (literele A-C)*, Universul Juridic Publishing House, Bucharest, 2018.

² Proposed definition: "Brexit" is a "pun" ("Br" - British and "exit" - exit) used to denote Britain's withdrawal from the European Union. In this regard, on 23 June 2016, a referendum was held, following which British citizens expressed their option for the United Kingdom to renounce at the status of Member State of the European Union. The result of the referendum leads to the first situation where Art. 50 of the Treaty on European Union is applied. By virtue of this article, any Member State may decide, in accordance with its constitutional rules, to withdraw from the Union. Following the stages involving the executive and the legislature (to which the supreme court was added), the United Kingdom notified its intention to the European Council (on 29 March 2017). The European Council, finding that the procedure was initiated, adopted the guidelines under which the Union negotiated and concluded an agreement with the United Kingdom laying down the conditions for the withdrawal. The Agreement is negotiated with the participation of the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy, concluded on behalf of the Union by a Council acting by a qualified majority, after obtaining the consent of the European Parliament. The cessation of the Treaties of the European Union with respect to the United Kingdom shall take effect on the date of entry into force of the withdrawal agreement, and if such an agreement does not take effect, the cessation of effects takes place two years later from the notification of the European Council on the withdrawal intention (i.e. on 29 March 2019). The exception is if the European Council, in agreement with the United Kingdom, decides unanimously to extend this period. The United Kingdom is not taking part in the debate or in the decisions of the European Council and the Council on its withdrawal from the European Union. In the event that the United Kingdom wishes to become a Member State of the European Union again, it is necessary to submit a new application for membership, following the entire procedure "(For the final definition, see, *Legal Encyclopedia (letters A-C ... op cit.*, pp. 481).

³ See: Augustin Fuerea, *BREXIT - Limitele negocierilor dintre Uniunea Europeană și Marea Britanie (libertățile de circulație a persoanelor și serviciilor - efecte juridice, și nu numai)*, Revista de Drept Public, no. 4/2016, pp. 106-112; *Brexit - trecut, prezent, viitor - mai multe întrebări și tot atâtea răspunsuri posibile*, Judicial Courier, no. 12/2016, pp. 631-633; *Actualitatea aplicării principiului liberei circulații a persoanelor, în contextul BREXIT*, in Ion M. Anghel, *Reglementări ale Uniunii Europene de un interes aparte - sui generis, pentru România*, Universul Juridic Publishing House, Bucharest, 2017, pp. 117-129.

⁴ Hereinafter referred to as the United Kingdom/UK.

⁵ On 1 December, 2009.

of international law of special nature, which, with the entry into force of the Treaty of Lisbon, acquired legal personality⁶. Paradoxically (or not!), three articles away from the one by which EU legal personality is conferred, the possibility for a Member State to withdraw from the EU⁷ is enshrined, for the first time at this level, by an instrument of primary law⁸ producing legal effects. Less well known is the simultaneous withdrawal of the UK also from the European Atomic Energy Community, another subject of international law, which, unlike the European Union, is the type of unequivocal international organization.

In this sense, by carefully, correctly and completely perusing the title of Withdrawal Agreement, we can easily ascertain the truth of the above, meaning that its name is as follows: "Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community"⁹. Thus, the complexity of the issue is commensurate.

The rigour with which we proceed, in our analysis, is given by the overwhelming interest on this withdrawal process, and which is unprecedented in the history of the European Union. It represents a theoretical, doctrinal interest, on the one hand, but also a pragmatic and applied interest, on the other hand. We are talking about the withdrawal of a "big", strong state, with a history worthy of all admiration, which influenced the evolutionary course of the European Union, not only from a strictly economic perspective, but also from a pronounced cultural perspective, and more. That is why the consequences of such a withdrawal are multiple. We are talking about those, already stated, as being of economic nature, joined by others of political, legal, psychological, philosophical nature, to which many others can be added.

Regardless of what we might say, the EU does not seem to be the same without the UK as a Member State. It is something that we feel, not something that we just say.

Our interest is both general, meaning an interest expressed by all other EU Member States or non-members (located in Europe or on other continents), and particular resulting, without a doubt, from the large number of EU citizens of Romanian origin, but also of citizens who have the citizenship of origin of other EU Member States, who emphasized the principle of freedom of movement.

Of all the consequences of this withdrawal, we will naturally focus on those which have legal implications, being however closely related to all the

other effects, about which a lot has been written, and it certainly will be written in the years to come.

Remaining on the technical field of our concerns in this part of the research, it is worth mentioning that, in addition to this Withdrawal Agreement, the European Union and the UK negotiated a second agreement, namely: the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, on the one hand, and the United Kingdom of Great Britain and Northern Ireland, on the other hand¹⁰.

The solidarity, at EU level, between Member States ("large" or "small") materialized in the negotiation and conclusion of such general, and not individual agreements (with each and every state) or with groups of Member States, according to criteria more or less objective.

Such an event, with historical resonance brings inevitably together a series of lessons, conclusions which aim, among other things, from a strictly legal perspective, to substantiate procedures on the withdrawal of an EU Member State, perhaps symmetrical to those on the accession to the European Union, including a transition period which would reduce the multiple negative consequences for all parties involved.

The United Kingdom withdrew from the European Union on 31 January 2020. Without going into details, we would like however to draw your attention on the following aspects: on 23 June 2016, the UK held a referendum on its status as an EU Member State. The result of the vote¹¹ was quite tight, with 52% voting in favour and 48% against (the ratio between Eurosceptics and Euro-optimists), among British citizens who participated in the referendum; on 29 March 2017, the UK practically initiated the withdrawal procedure, in a formal sense, in accordance with Article 50 TEU, informing the European Council of its intention to leave the European Union; in less than three years (30 January 2020), the UK ratified in turn the Withdrawal Agreement so that, on 31 January 2020, the Agreement could enter into force and, implicitly, have legal effect; with the entry into force of the Withdrawal Agreement, the transitional period set to end on 31 December 2020 began.

⁶ Art. 47 TEU: "The Union has legal personality".

⁷ For details on EU primary law, see Augustina Dumitrașcu, Roxana-Mariana Popescu, *Dreptul Uniunii Europene. Sinteză și aplicații*, 2nd edition, revised and added, Universul Juridic Publishing House, Bucharest, 2015, pp. 117-119.

⁸ There have been and still are many debates, in the doctrine and practice of the field, as to whether the non-existence of such a legal basis would not have given the UK the opportunity to withdraw from the EU.

⁹ Published in OJ C 381, on 12 November 2019.

¹⁰ Published in OJ L 444, on 31 December 2020.

¹¹ Regarding the result of the vote in Scotland and Northern Ireland, see Laura-Cristiana Spătaru-Negură, *Dreptul Uniunii Europene – o nouă tipologie juridică*, Hamangiu Publishing House, Bucharest, 2016, p. 253.

3. Agreement on the withdrawal of the United Kingdom from the European Union. Technical aspects

Given the rather long period of the United Kingdom's presence in the European Union (over 45 years), the above-mentioned procedural steps were accompanied by a series of legal instruments which were naturally followed by a political statement establishing the framework for future EU-UK relations¹².

Historically, we believe that an important role in resolving the UK's withdrawal from the EU lies in that "new agreement for the UK within the EU"¹³ according to the extract from the European Council conclusions of 18 and 19 February 2016¹⁴, in accordance with which the UK and the EU, at their December reunion, and the members of the European Council agreed to work closely together to identify mutually satisfactory (not beneficial) solutions in all four areas mentioned in the British Prime Minister's letter of 10 November 2015¹⁵.

Thus, after a series of often difficult demarches and negotiations, the two involved parties concluded that "it is necessary to provide reciprocal protection for Union citizens and for United Kingdom nationals, as well as for their family members, where they have exercised free movement rights before¹⁶ the UK withdrew from the EU based on the principle of non-discrimination. At the same time, the conviction that "the rights deriving from periods in which those people have benefited from social security insurance"¹⁷ must be protected, but also that "an orderly withdrawal through various separation provisions is necessary in order to prevent disruption and to provide legal certainty to citizens and economic operators, as well as to judicial and administrative authorities in the Union and in the United Kingdom"¹⁸ was an important argument that laid the groundwork for the adoption of the Withdrawal Agreement¹⁹.

A quantitative analysis of the Withdrawal Agreement highlights that the Agreement includes: a preamble; 21 titles (which are incorporated, according to the rules of legislative technique at EU level in 6 parts, as follows: none in Part I; 4 in Part II; 13 in Part III, none in Part IV and Part V; 4 in Part VI); 18

chapters, as subdivisions of some of the 21 titles²⁰ and 185 articles. It should be noted that Part I and Part V do not know the subdivisions of "titles" and "chapters", Parts II and III being complete parts that bring together both "titles" and "chapters". Part V consists exclusively of "chapters" and Part VI of "titles" only.

Therefore, and from this perspective, we consider the Withdrawal Agreement as being equally complex and diverse. The basic element of the Agreement is the "article". The 185 articles are distributed, depending on the previously mentioned complexity of such an approach, within the parts, as follows: Part I: 8 articles; Part II: 29 articles; Part III: 88 articles; Part IV: 7 articles; Part V: 25 articles and Part VI: 28 articles. In descending order, we find that the largest number of articles belong to Part III (88), followed by Part II (29), Part VI (28), Part V (25), Part I (8) and Part IV (7). We have carried out this more than necessary quantitative analysis, in this first stage of the implementation of the Withdrawal Agreement, precisely because, starting from it, we can arrive at the substantive analysis of the issues, a qualitative analysis, which can allow us, by using including mathematical criteria, to identify the main priorities of the EU and, implicitly, of the Member States for the continuation of the dialogue with the United Kingdom as a former important Member State, from all possible perspectives. Only such a continued dialogue, within the legal parameters offered by the Agreement is likely to lead, for the parties involved, at the maximization of possible advantages, but also at the minimization of the inevitable disadvantages (not possible, this time) for the parties.

The structural elements, previously mentioned, are completed by 3 Protocols²¹, of which 2 have no less than 16 annexes, and the aspects of legislative technique are also interesting.

4. Some legal aspects of the Withdrawal Agreement

From legal perspective, it is very important the extent to which European Union law will be still enforceable after the Withdrawal Agreement starts producing its effects. According to its preamble, and not only²², but also subject to the conditions laid down

¹² Available at [https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:12019W/DCL\(01\)&from=MT](https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:12019W/DCL(01)&from=MT).

¹³ Published in OJ C 69, on 23 February 2016.

¹⁴ Idem.

¹⁵ The four areas are: economic governance; competitiveness; sovereignty and immigration. The letter can be accessed at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf

¹⁶ Preamble to the Withdrawal Agreement.

¹⁷ Idem.

¹⁸ Idem.

¹⁹ We appreciate that this approach was responsibly undertaken, considering the fact that, in law, "liability has more meanings (...): political liability, criminal liability, disciplinary liability" (according to Elena Emilia Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, ProUniversitaria Publishing House, Bucharest, 2013, p. 13).

²⁰ We used the expression "of some of the titles" because the 18 chapters are distributed only in 4 titles. Most of them (17) do not benefit from the chapter structure. In the same direction, it should be noted, by way of exception, that Part IV does not know the subdivision of "titles", but knows directly that of "chapters", counting 7 chapters.

²¹ Protocol on Ireland / Northern Ireland, Protocol on areas of sovereignty in Cyprus, Protocol on Gibraltar. A material error should be noted in OJ C 384 I, on 12 November 2019, in the numbering of titles, in the sense that instead of Title IX of Part III (Art. 79-85) Title IV is entered.

²² We consider Art. 50 TEU and Art. 106 TEURATOM.

in the very content of the Agreement, both Union and Euratom law cease in its entirety "to apply to the United Kingdom starting with the date of its entry into force". The "orderly withdrawal" of the United Kingdom from the Union and Euratom has been and still is the main objective of the Withdrawal Agreement. Such an objective concerns, in particular, the area directly and immediately affected, with medium and long-term consequences, namely that of the freedoms of movement.

The intention stated and pursued in practice is to ensure a natural legislative framework, in such an exceptional situation for the reciprocal protection of Union citizens, but also of United Kingdom nationals, to which are inevitably added family members of those who have benefited from a right deriving from the status of citizen of the European Union, along with many other rights, namely the right to free movement. For the sake of clarity, we mention that we are referring to those beneficiaries who exercised their right before the date set by the Agreement. The aim is to create all the guarantees that their rights under the Agreement are enforceable and based on the principle of non-discrimination. Correlatively, it is recognized, after intense negotiations, that it is necessary to protect the rights deriving from periods when those people have benefited from social security insurance. In this sense, the specialized doctrine²³ refers to the issues that are, naturally, generated by the free movement of workers aiming, including, the scope of application of Art. 45 TFEU²⁴. Among these, the following are noticeable: "the meaning given to the notion of worker; the rights of intermediate categories (e.g. jobseekers); the types of restrictions that states may justifiably impose on workers and their families, as well as the social or other rights that family members enjoy under EU law"²⁵.

The Withdrawal Agreement aims, inter alia: at avoiding disruption while ensuring the legal security of citizens and economic operators or judicial and administrative authorities in the Union and in the United Kingdom; establishing a transition or implementation period; preparing and concluding new international agreements of its own, including in areas of Union exclusive competence²⁶; fulfilling mutual commitments undertaken while the United Kingdom was a member of the Union through a single financial settlement; establishing provisions ensuring overall

governance, in particular binding dispute-settlement and enforcement rules that fully respect the autonomy of respective legal orders of the Union and of the United Kingdom, as well as the United Kingdom's status as a third party, in relation to the Union, but also to each of its Member States; concluding separate protocols²⁷ to the Withdrawal Agreement, etc.

We consider that a particular aspect of the Withdrawal Agreement, in the context of the developments that take place in the field of personal data protection, is given by Art. 71 which, in the three paragraphs, regulates precisely this field. Data subjects outside the United Kingdom benefit from such protection, with the application of the European Union law in the matter, according to para. (1), subject to two conditions, namely: the data had to have been processed in the United Kingdom in accordance with EU law prior to the transitional period (point (a)) and the data had to have been processed in the United Kingdom under the [Agreement] after the end of the transitional period (point (b)).

There is of course an exception from the rules presented above provided in the second paragraph of Art. 71. Thus, the provisions of para. (1) "do not apply to the extent that the processing of personal data (...) benefits from an adequate level of protection". Decisions made by an implementing act concerning a third country, a territory or one or more specified sectors of a third country or an international organization²⁸ are referred to hereby.

The equivalence between the levels of personal data protection in the EU and the UK is a principle that is ensured in the application of the Agreement in this field²⁹.

Regarding the transition period for the application of the Withdrawal Agreement, it is clear from the provisions of Art. 126 that it was a relatively short period (1 year), having already been concluded on 31 December 2020. Part V of the Withdrawal Agreement, which contains transitional provisions, refers, next to the transitional period, to the following aspects: the scope of the transitional provisions (Article 127); institutional provisions (Article 128); specific provisions on the Union's external action (Article 129); special provisions on fishing opportunities (Article 130); monitoring and ensuring compliance (Article

²³ Paul Craig, Gráinne de Búrca, *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*, 6th edition, Hamangiu Publishing House, Bucharest, 2017.

²⁴ Article 45 TFEU: '1. Freedom of movement for workers shall be guaranteed within the Union. 2. Free movement shall entail the elimination of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. 3. Subject to restrictions justified on grounds of public policy, public security or public health, freedom of movement for workers shall entail the right: (a) to accept actual employment offers; (b) to move freely within the territory of the Member States for that purpose; (c) to stay in a Member State in pursuit of gainful employment in accordance with the laws, regulations and administrative provisions governing the employment of workers of that State; (d) to remain in the territory of a Member State after having been employed in that State, under conditions which shall be the subject of regulations adopted by the Commission. 4. The provisions of this Article shall not apply to employment in the public administration.'

²⁵ Paul Craig, Gráinne de Búrca, *op. cit.*, p. 829.

²⁶ Article 3 TFEU.

²⁷ *Pre-cited*.

²⁸ Article 45 para. (3) of Regulation (EU) 2016/679. To these are added the provisions of Directive (EU) 2016/680, Article 36 para. (3).

²⁹ Article 71 para. (3).

131) and the extending of the transition period (Article 132).

The most debated issue has been and will continue to be the issue of the place of the Withdrawal Agreement in the legal order of the European Union, respectively among the European Union's own legal instruments. Being the first of this kind, the Withdrawal Agreement came after the EU acquired legal personality, becoming implicitly a subject of international law. In order to correctly identify its legal nature, it is necessary to briefly analyze the parties of the Agreement (the UK, on the one hand, and the EU, on the other), but also the steps taken to negotiate, sign, approve, conclude and ratify by the EU institutions empowered through the Lisbon Treaty, by the Member States. Only then can we draw conclusions about the place of the Withdrawal Agreement in the hierarchy of European Union rules within or outside the "five main levels"³⁰.

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5. Conclusions

The present research is only the beginning of similar, subsequent demarches, which will increase their consistency as time passes, which will bring to light many of the difficulties of multiple nature, including legal difficulties that, at the moment, we can only intuit or perhaps anticipate. Particular attention will continue to be paid, from the point of view of the analysis we will carry out, to all those "issues" concerning the regulations that make up the substantive law of the European Union, to which the Withdrawal Agreement makes numerous references, to which new meanings or interpretations of habits that occurred, regarding the freedoms of movement or even the external action of the European Union which the UK also referred to, have been over time added.

³⁰ Paul Craig, Gráinne de Búrca, op. cit., p. 116.