Why the European Council Must not Reject an Article 50 Extension Request

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The Brexit saga continues to evolve from day to day, and even hour to hour. Notwithstanding the so-called Benn Act (the European Union (Withdrawal) (No 2) Act 2019), there is huge uncertainty whether the UK Government will formally request an extension, in case no deal can be reached on the Withdrawal Agreement at the impending European Council meeting. There is also speculation that, even if an extension is requested, the European Council could refuse it. In light of the unanimity requirement in Art 50(3), commentators speculate that it would take but a single Member State to oppose an extension for the United Kingdom to crash out of the EU without a "deal".

This blogpost argues that, as a matter of EU law, the European Council is *not* entitled to refuse the United Kingdom's request for an extension, in the present circumstances. In a nutshell, the argument runs as follows. The decision to ask for an extension emanates from the United Kingdom's highest authority, its sovereign Parliament (as confirmed by the UKSC in the prorogation cases). It is a democratic decision which the EU must respect, for else it would be expelling a Member State against its own sovereign and democratic will. Art 50 does not allow this, as the ECJ confirmed in Wightman. The European Council may determine the length of the extension, and impose certain conditions, in agreement with the United Kingdom. But it cannot refuse this extension.

The starting point for underpinning this thesis is the judgment in *Wightman*. It is a ruling which is too often overlooked in the sound-and-fury of the Brexit debate. The ECJ established that the withdrawing Member State can revoke its Art 50 notification as long as the two-year period (or longer, if extended) has not come to an end. That is not the question before us here. However, the Court's reasoning to arrive at this conclusion is indeed highly relevant. The starting point is that the Court established that Art 50 pursues two objectives, "namely, first, enshrining the sovereign right of a Member State to withdraw from the European Union and, secondly, establishing a procedure to enable such a withdrawal to take place in an orderly fashion" (paragraph 56).

Three points stand out.

An orderly withdrawal

First, the orderly withdrawal objective is highly relevant to a no-deal scenario. The Court also spoke about the effects of a Member State's withdrawal, by pointing out that "any withdrawal of a Member State from the European Union is liable to have a considerable impact on the rights of all Union citizens" (paragraph 64), and by

recalling that citizenship of the Union is intended to be the fundamental status of nationals of the Member States. This is a succinct but clear reference to some of the key negative effects, in terms of loss of rights, of any withdrawal.

Those negative effects risk being much more significant in the case of a disorderly, "no-deal" exit, compared to an orderly one, regulated by a withdrawal agreement. They are not confined to public authorities or to the economy, but extend to fundamental rights of millions of citizens. In particular, the citizenship rights of EU citizens in the UK, and UK citizens in the EU, are gravely at risk in a no-deal scenario. The need to avoid such negative effects, or to mitigate them as much as possible, is a clear obligation imposed on the EU institutions and on the Member States, because it is at the heart of what the EU stands for.

Constitutional requirements

Second, the Court established that, from the perspective of the withdrawing Member State, the whole of the Art 50 process is governed by that State's "constitutional requirements". The text of Art 50 refers to those requirements only once, in its first paragraph, which is concerned with the decision to withdraw. It does not mention the possibility of a revocation of the Art 50 notification at all. But the Court found that such a revocation is permissible, provided the Member State concerned complies with its constitutional requirements.

It is that Member State's sovereign right ultimately to choose not to withdraw. Revocation brings the Art 50 process to an end. Given that both the start and end of the process (by way of revocation), are predicated on respect for the withdrawing State's constitution, it follows that, where that State has decided not to leave without an agreement, this should again be respected as an expression of its sovereignty. In other words, the text of Art 50(1) must be read as extending to the whole of the withdrawal process.

This is reinforced by the emphasis the Court places on democracy as an EU value (paragraph 62). That is not a token reference. The Court reads that value into the withdrawing Member State's constitutional requirements: a refusal to recognise that State's sovereign right to revoke its Art 50 notification would mean that that State could be forced to leave the European Union against its wish "as expressed through its democratic process in accordance with its constitutional requirements" (paragraph 66). The Benn Act is wholly equivalent: the expression of the UK's sovereign parliament's wish not to leave without an agreement.

No expulsion

Third, the Court emphasised that Art 50 does not allow for a Member State to be forced to leave the EU, against its sovereign will. That not only flows from the principle of democracy as an EU common value, or the fundamental respect for national sovereignty (see also Art 4(2) TEU); it is confirmed by that provision's drafting process, in the course of which amendments to allow the expulsion of a

Member State were rejected “on the ground (…) that the voluntary and unilateral nature of the withdrawal decision should be ensured” (paragraph 68). A refusal to grant the Art 50 extension, requested pursuant to an Act of Parliament, would constitute the UK’s expulsion from the EU.

The overall argument is not refuted by the unanimity requirement in Art 50(3), which governs the European Council’s decision to extend the Art 50 process. The obligation to respect the withdrawing Member State’s constitutional and democratic decision to ask for an extension does not make that requirement redundant. First, there is the need to determine the duration of the extension. Second, the European Council may impose certain conditions, in order to protect the EU’s fundamental interests. Third, there may be cases in which the European Council is not satisfied that the extension request embodies a constitutional and democratic decision, and instead considers that it constitutes a tactical ploy. Fourth, it is not inconceivable that, in certain circumstances, the protection of the EU’s own values and interests may wholly outweigh the withdrawing Member State’s desire to extend.

In the present case it is clear that the extension request is not tactical, and that the protection of the EU’s values and interests does not outweigh the UK Parliament’s wish not to leave without a deal. The extension may be politically inconvenient. It may be seen to require further scarce political capital to be spent on the Brexit process, rather than on more constructive EU policies. It may have some impact on the proper functioning of the EU institutions. But surely the widespread and very negative effects of a no-deal Brexit are much worse, also for the EU, and indeed for its citizens. No-deal may literally be a case of life-or-death for some people because of impaired access to medication, and many grave consequences for millions of others. It is clear how the balance of interests must tilt.

A matter of the rule of law

The European Union is governed by the rule of law, which entails that all decisions of the EU institutions are subject to judicial review. A European Council decision to refuse an extension could be challenged in court, even if it results from one Member State’s veto. EU law does not include a political-question doctrine, at least not in the strong sense of excluding judicial review of certain types of decisions. Moreover, all decisions must be reasoned, and their reasoning must withstand judicial scrutiny (a principle which the UK Supreme Court also employed in the prorogation cases).

On the procedural side, it is even doubtful whether the European Council would need to receive a formal extension request, signed by the Prime Minister or by anyone else who is authorised to act for the United Kingdom. The terms and purpose of the Benn Act are utterly clear, and constitute full authority for the European Council to act. Art 50(3) does not mention a request for an extension by the withdrawing Member State. All it states is that the extension must be agreed with that State.

Imagine for a moment the chaos which would result from the UK considering that it has not left the EU, and the European Council taking the position that it has. Or

the chaos resulting from the doubtful legality of an extension refusal, and from court challenges which will take time to be resolved.

I conclude that, in the present circumstances, the European Council is under an obligation to extend the Art 50 process, so as to respect the UK's democratic and sovereign will; to facilitate an orderly withdrawal; and to protect the EU's own interests, and the rights and interests of its citizens. The US Supreme Court once stated that the US Constitution is not a suicide pact (Kennedy v Mendoza-Martinez, 372 U.S. 144 (1963)). Nor was the two-year deadline in Art 50, and its potential extension, ever intended to promote a disorderly no-deal, with potentially catastrophic consequences.
