Cognitive Illusions in Legal Interpretation

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In the light of current happenings (e.g. judicial decisions) in certain Member States, many attempt to interpret or explain the withdrawal process under Article 50 TEU. The “exit” narrative seems dominant in journalism and academia: Grexit, Dexit, Dutch Exit, Huxit, Polexit, Frexit, Sloven Exit, etc. However – as Brexit has shown – exiting the EU is neither a black-and-white question, nor an ultimately good or bad decision. Some news portals frequently portray (not so odd) Constitutional Court decisions or current political events as declarations of withdrawal from the EU. These simplistic approaches are battle-ready political weapons in the hands of social media influencers and politicians on both pro and con EU sides, shaping public opinion based on disinformation. This brings to mind the Machiavellian philosophy of the Prince, where the “end justifies the means”. This is an irresponsible mistake that misdirects public discourse.

The “Association” problem: does everything really coincide?

Without submitting to conspiracy theories, the Brexit campaign is a teachable example of these phenomena for (i) overamplifying the significance of a singular event, (ii) linking it to other simultaneous events happening in close geographic proximity, (iii) drawing far-reaching conclusions from this, (iv) contemplating future scenarios, (v) via a medium reaching a large population. There is some evidence of how the online path to Brexit was shaped and measured by social media, but we will probably never know the whole truth.

Our ability to process large quantities of information coming at us at a rapid pace is called perceptual organization. To make sense of the world we need to organize incoming sensations into information and our perceptions may unconsciously lead us into illusionist traps. One of the basic theses of psychology is the Law of Association. It rests on the premise that the human brain tends to associate things that occur close to each other in time or space. As finding connections among things occurring closer together is also the principle of learning, it is hard to consciously distinguish between reality and illusion using the Law of Association. Especially if some events, court decisions or declarations of heads of states or prominent politicians, are considered to be representations of a certain reality.

Same time, same space happenings in the Europe of constitutional diversity

When Hillion wrote on the Hungarian-Polish withdrawal in April 2020, I considered his textual interpretation of Article 50 a bit ambiguous. In early 2020, several uncertainties had the EU "run for her money". Brexit became delivered on 31 January 2020. Then, COVID-19 consumed the world and filled the plates of world leaders. Simultaneously, several Eurosceptic theories spread all over Europe and the marathon negotiations for the next seven-year budget for the EU (MFF) began. In this climate, the German Federal Constitutional Court (GFCC) issued its notorious 5 May PSPP decision, declaring an EU legal act *ultra vires*, for overstepping the competences set out in the Treaties, based on Germany's *"Integrationsverantwortung"*, a constitutional responsibility for the European integration process. The German ruling – which was not the first in this line of argumentation – was considered an alarm bell that could tear the EU apart with one toll, causing a heavy headache. Presumably, however, nobody recommended Germany to exit the EU. The EU emerged into being united in constitutional pluralism and this heterogeneity was verbalized in "United in diversity". The EU comprises the sovereign legal systems of the Member States and of the *sui generis* EU legal order. Even if the CJEU has established the principle of primacy in Costa v ENEL, this could not imply hegemony in any way. We can consider the abovementioned Karlsruhe judgment or the recent Polish ruling as elements of European constitutional dialogue. However, according to Alexander Thiele, the two judgments are not equal. Without going into details here, one thing is obvious: the legal dilemma exists.

I added constitutional discourse to this withdrawal-themed analysis because I intend to show that external conditioning may unconsciously affect our (cognitive) associations on a certain topic. Since Brexit was on the agenda, many articles have linked happenings (e.g. the Greek debt crisis) to an automatic exit (Grexit), or have drawn similar conclusions by interchanging the function and role of different procedures under European law. When articles talk about alleged omissions of MSs or breaches of EU law and recommend triggering Article 7 TEU instead of initiating an infringement proceeding (Article 258 of the TFEU), media often creates news in a way mentioned above. Some – very radical – articles talk about exclusion as a sanction if a MS is non-compliant. However, the Treaties are silent on exclusion. Sometimes articles draw conclusions that non-compliant MSs are on the "exit path" without a formal decision in accordance with their constitutional requirements and its (direct) communication to the European Council (EC). However, different procedures (Art. 25 TFEU, Art. 7. TEU, Art. 50 TEU) have different functions, and mixing them up misleads and distorts public opinion. In my professional understanding, this is a fatal mistake.

An atypical interpretation of Art. 50 TEU

Christophe Hillion published his op-ed on the interpretation of the forms of decision-making and notification to the EC under such circumstances. The novelty of his

writing is that he links breaches of EU law by MSs to a withdrawal decision. Hillion argued that, in essence, breaches of obligation and/or failures to fulfill obligations under the Treaties, can be considered as an expression of the intention to withdraw. He declared that a "state that does no longer (wish to) apply the EU Treaties, and particularly the core requirements of membership, in law and in fact withdraws from the Union." This is, he argued, because other MSs lose trust in that state, while, the "continuous defiance towards membership obligations would ultimately amount to an activation of the withdrawal process as envisaged in Article 50 TEU". Hillion lined up several arguments according to which Hungary and Poland are consistently rejecting Treaty provisions that were accepted as binding upon accession. He based this on some infringement proceedings concerning the rule of law and democracy, judicial independence and other issues (C-286/12, C-78/18, C-66/18 cases of Hungary, and C-619/18, C-791/19 cases of Poland), besides citing institutional documents related to Article 7 TEU. Namely, a motion for resolution of the European Parliament (Hungary) along with the Commission's reasoned proposal in accordance with article 7(1) TEU regarding the rule of law in Poland were cited as the "unprecedented activation" of Article 7 TEU. Hillion also considered "withholding of foreign assistance and cooperation programmes" as signs of the intention to withdraw, along with "recent emergency measures taken in the midst of the COVID-19 crisis". In his view, these can be assessed as decisions to quit, because if Hungary and Poland wanted to stay, they would comply with Treaty provisions. Hillion argued that both accession and exit are the results of a voluntary decision by a MS. Conversely, he considered that non-compliance is an expression of the intention to leave, while raising the question whether the EU should ultimately acknowledge such choice or the "EU [can] force that state to meet its duties against its will".

Hillion interpreted the forms of (withdrawal) decision-making and notification, stating that Article 50(2) TEU does not impose any formal requirements on notification and thus may take many forms, including the expression of intent. Hungarian legal terminology would describe this "expressive behavior" as "implied conduct". In Hillion's view, this is supported by the *Wightman*-judgment. However, he argued that the requirement of written form is only applicable to the revocation, not to the decision or notification. On this basis, he argued that the decision to withdraw was already taken by implied conduct in Hungary and Poland. In his view, the appropriate EU institutional response would be for the EC to issue the guidelines for negotiating withdrawal under Article 50 (2) TEU. The issuance of the guidelines, however, requires a consensus, therefore, pragmatically, he proposes the joint treatment of the Hungarian and Polish exit negotiations. He argues that without the joint treatment, one of the MSs would veto the guidelines in the other's case and *vice versa*. If I am right, this would mean that neither MS intends to exit. Finally, since – in his view – the decisions have already been notified, after the two-year period, the Treaties would no longer apply. However, it is not clear from which "implied conduct" this two-year period is calculated.

An open conclusion: calling for a Treaty-based interpretation

Even if I find Hillion's interpretation thought-provoking, I suggest looking a bit closer at Art. 50 TEU (and the CJEU cases) to set some things straight. The withdrawal-clause states that "Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements."

Article 50 lays down the right of a MS to withdraw unilaterally and voluntarily, accompanied by some elements similar to denunciation (unilateral decision) and, at the same time mutual agreement (possibility of negotiation). The "exit-decision" is based on a sovereign deliberation in accordance with relevant constitutional requirements. The Hungarian Fundamental Law does not recognize state decision-making by implied conduct, neither does – presumably – the Polish, or any other constitution.

The form of the notification [Art. 50 (2)] comes into play only if a decision to withdraw was made under Article 50 (1). Para. (2) declares that "A Member State which decides to withdraw shall notify the European Council of its intention." As no decision has been taken on withdrawal in the discussed states, talking about formal conditions for notification is moot. Thus Art. 50 (2) presupposes that the MS has complied with para. (1). Moreover, – as I argued in 2018 before the *Wightman*-judgment was delivered – using the word "intention" suggests that even if the decision is made on the basis of internal law, it is under European law still just an intention (not a "decision") until it is successfully delivered to the EC. AG Sánchez-Bordona, in his opinion in *Wightman* (point 100), came to the same conclusion: "Intentions are not definitive and may change. Whoever notifies his intention to a third party may create an expectation in that party, but does not assume an obligation to maintain that intention irrevocably. For that effect to be produced, the communication of that intention would have to refer expressly to it being irrevocable." Although Art. 50 (2) does not set out a specific written form, it mentions notification, i.e. communication through words (terminologically speaking: active communication). Such communication then shall be addressed to the EC. No decision to withdraw can therefore be implied. Also, it would be more than contradictory to consider that a decision to withdraw can be communicated in an implied way, while revoking it would require written notice.

If we would agree to talk about formalities and would accept that such decision was made, an obvious question would still arise. Which implied conduct do we consider as the exit decision? If we accept that the date of the implied decision and notification coincide, the two-year period would start from there.

"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" [Art. 50 (3)]. In my view, "Treaties shall cease to apply" does not mean automatic withdrawal. The Article does not refer to an "exiting State". It merely indicates that the State

concerned will be placed in a “Treatyless-vacuum” (with no rights or obligations) – it does not end the contractual link between MS and EU *ipso iure*. This legal relationship, established by the Treaty of Accession, cannot be terminated *ipso iure,* merely due to lapse of time, with membership established for an indefinite period.

Summing up, there are legal tools under the Treaties, like infringement proceedings, to enforce MS compliance with EU law. Other tools are regulated by Article 7 TEU for major breaches. The withdrawal clause (Art. 50 TEU) can only be triggered by the MSs. The EC did not deal with Article 50 (1), i.e. did not question the UK’s decision when it accepted their notification as legitimate, made by a sovereign state. Consequently, the EC or any other institution has no competence to interpret the decision or its legal basis made under Article 50 (1). Only the CJEU has the right to interpret the TEU.

A little doubt in doubtlessness

Academics, scientists, professionals can argue, and reach extremely valuable and logical conclusions. However, legal professionals and journalists have an immense responsibility in this exercise as when these scientific (and sometimes pseudo-scientific) arguments are (ab)used by different interest groups they may mislead lay people, the actual beneficiaries of the integration. Scientific work and professional results may support political ambitions with unforeseeable consequences and lay voters fall into traps of cognitive illusions. Especially in the digital world, where (dis)information spreads at an unstoppable speed, with virtually no control over content. In this post, I merely intended to seed the cloud of doubtlessness with some much-needed doubt.

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