Brexit: Is everything going to change in law, so that very little would change in fact?

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'A full calorie Brexit or Brexit lite?', Marko Milanovic has asked on this blog. The different modalities of Brexit are rooted in Article 50 TEU, which foresees a period of two years to negotiate the precise terms of UK's exit and a future relationship between the UK and the EU. Moreover, the referendum does not have any self-executing legal effects. It will now be on the UK government to decide when (and whether?) Article 50 should be triggered. We agree with Marko's excellent analysis and believe that, in principle, a number of lite exit diets could be created. What is also possible is that we would get three parallel Brexits, some with more calories than others. England and Wales could leave on different terms than Northern Ireland (which may at least theoretically even stay via the Republic of Ireland); and it is possible that Scotland would continue the UK's membership with some revisions – and as an independent state.

Brexit lite: replacing EU law with international treaty law

Article 50 does not exclude – perhaps it even encourages – the conversion of a full-fledged membership into a 'Switzerland-plus-minus' arrangement. Hence the phrasing in Article 50(2) TEU: '[T]aking account of the framework for its [of the exiting member state] future relationship with the Union.' If it were envisaged from the outset that this relationship would be the same as the relationship between the Union and e.g. Panama, this phrasing would have been completely redundant. Yet, any Conservative PM would probably have difficulties accepting a single market deal with the present free movement of people package. It is difficult to imagine, on the other hand, that the EU could give the UK an asymmetric free movement deal, without people. But then, there is some room to manoeuvre. First of all, the UK can hardly afford complete exclusion from the single market and to stay in it for some purposes, it will need to accept certain concessions in other areas. Further to that, several categories of 'free movers' exist in EU law: people who have been in the host member state for five years and those who have not; workers and job-seekers; students; but also students with and students without UK grants; economically self-sufficient people. There are social benefits involved and there is the question of access to the NHS, for example.

It cannot be excluded that a 'Switzerland-plus-minus' deal would be concluded in the end. Both sides agree to certain concessions and the new UK government goes home presenting the new deal to its public in terms of public international treaty law rather than EU law: this is what we agreed to and not what the EU imposed on us. What looked either black or white before suddenly appears to have more shades. The reality may be that many EU rules continue to apply by virtue of a complex and cumbersome collection of bilateral (or perhaps mixed?) agreements. Of course, the UK would no longer be represented in EU institutions, and the democratic deficit would be even worse, but the new government could play the card of the UK being outside of the EU.

Can we have three parallel Brexits?

Now, turning to the scope for Brexits of different calories, or of different speeds in more conventional EU language. The political leaders in Northern Ireland and Scotland have immediately pointed out that the vote in England is taking their territories out of the EU against the wishes of their own people. It is certainly wrong to assume that all Scottish or Northern Ireland votes for the UK to stay in the EU would in the new circumstances translate into votes for secession from the UK. It is clear, however, that if the referendum rules had stipulated for a double-majority (a majority of all votes cast in the UK as a whole combined with a majority in all constitutive UK countries), the exit referendum would have been unsuccessful. While EU membership is not a devolved competence under UK constitutional law, certain related consequences of the EU exit may well be.

With regard to Northern Ireland, the Good Friday Agreement predicates the current constitutional arrangement on the

‘wish’ of the people and the right of self-determination, and explicitly allows a referendum on unification with the Republic of Ireland. For an expansion of the territory of an EU member state a precedent already exists – East Germany. If Northern Ireland were to unify with the Republic, the territory would continue in the EU on the Republic’s legal arrangement. Even without speculating about this possibility, the Good Friday Agreement was built on the premises that both Ireland and the UK are EU member states. Some modalities of this Agreement would indeed be difficult to implement without the overarching and unifying EU legal framework in the picture. Imagine how things would change when customs (including customs controls!) would need to be re-introduced.

Another important point is that Irish nationality laws extend the right to claim Irish citizenship to a number of residents of the isle of Ireland as a whole. According to the 2011 census, 20% of the population of Northern Ireland holds an Irish passport, with 28% of people identifying as Irish. It seems logical that following the Brexit referendum result the number would only increase (even beyond those who self-identify as Irish; as EU citizenship can indeed be a useful thing), and this is confirmed by recent reports of a dramatic rise in applications. The exit of Northern Ireland as a part of the UK would then create a situation in which the territory would be outside of the EU, but a large number of its population would be EU citizens. *Mutatis mutandis*, the situation looks a little bit like Greenland (except that in Greenland virtually everyone is a Danish national). Northern Ireland’s exit may thus be ‘lite’ in any case, even without any further referendum complications under the Good Friday Agreement, and regardless of how things look at the conclusion of the Article 50 deal for the UK.

Scotland and another independence referendum

In 2013, one of the authors of this post argued on this blog (and later in this full-fledged article) that – at the time still potential – Brexit would undermine the legitimacy of a prior – at the time also potential – Scottish vote to stay in the UK. The legal mechanics at the Scottish independence referendum were such that Scotland would have exited not only the UK, but also the EU, unless negotiated otherwise. Scotland would need to join the EU as a new state via Article 49 TEU, which would require approval (i.e. ratification) of the accession agreement by all member states. This is where things could become complicated for reasons that have little to do with Scotland (e.g. the Spain-Catalonia dynamics, the Cyprus problem, etc). Given the special nature of the EU legal order and the importance of the rights stemming from EU citizenship, the argument advanced in 2013 was that Scots had a right to know whether or not they were deciding for the UK within or outside of the EU. The two referenda fell too close to each other. In order to ensure the clarity standards required at territorial referenda, the UK would either need to resolve its EU status first, or allow time for its own territorial status to sink in after the unsuccessful Scotland independence vote. This did not happen.

In the new circumstances, the calls for another Scottish independence referendum are entirely legitimate. Nicola Sturgeon now knows that she has a penalty kick in the injury time, but she also knows that she cannot score with a bad kick. And for a good kick, timing is very important. Should she take this ‘penalty’ before the UK gets its Article 50 package from the EU or wait until such a deal is on the table, so that she can build her campaign on the opposition to this deal? If the UK no longer has access to the single market, her arguments would be economic in nature. If ‘Switzerland-plus-minus’ is negotiated, her arguments could potentially be even stronger: the UK would be paying and obeying the EU, but it would not be voting and deciding. In any case, Nicola Sturgeon will have strong cards to play. She seems to be quite cautious at the moment. Another independence referendum is in the air – but when exactly does she want it to happen? And she also talks about Scottish negotiations with the EU.

What now are the EU options for Scotland in law? As a part of the UK, Scotland would simply be a part of the negotiated Article 50 deal, it is difficult to imagine that the EU would agree only to an Anglo-Welsh exit if the UK still existed within its current borders. After all, England and Wales are not for the UK what Greenland is for Denmark. Scotland can thus become an EU member state only via independence and for that Sturgeon will soon need to make her referendum demands more concrete. A referendum would still be risky for her: a penalty kick is always a small victory but it can also lead to a big disappointment! If Scotland votes for independence, however, its EU membership would be much more straightforward than it was in 2014; Scotland could even become an EU member state from

the moment of independence and the moment of the rump UK's withdrawal (depending on the Brexit timeline). This would happen by virtue of a parallel application of Articles 48 and 50 TEU.

During the previous Scotland independence campaign, a major problem was that EU institutional arrangements were only designed for 28 states. It was argued by some that the EU legal order already was implemented in Scotland and that an independent Scotland could thus bypass Article 49 TEU via Article 48. The problem of this argument was that Scotland would have become the 29th member state for which no provisions were made in the Treaty. But now the UK is bound to withdraw, while there still is space for 28 member states in the Treaty. This time Scotland really could *stay* via Article 48 revision rather than join anew via Article 49. While even Article 48 requires unanimity, the important difference is precisely in that it means *staying* rather than joining anew. And the Treaty will need to be revised anyway to reflect the UKs withdrawal. In comparison with Article 49 procedure, it is less likely that 'Route 48' would lead to blockades. The Treaty revision would, of course, need to reflect that Scotland was a much smaller state that the UK.

Would Scotland be the successor state of the UK? Definitely not in terms public international law in general, but quite possibly for the purposes of the TEU. Would Scotland inherit UKs opt-outs? In principle that would also be quite possible as they are currently applicable to Scotland anyway and Scotland would not be a new 'clean slate' member. How about Scotland's currency? With the EU membership enigma resolved, this may be the most difficult nut to crack in the end. While the Euro opt-out would remain in place legally, the sterling opt-in may not be available politically.

Conclusion

In sum, several scenarios now exist and even the extreme scenario is perfectly legally plausible: Northern Ireland in the EU as a part of the Republic of Ireland, Scotland in the EU as an independent state, and England and Wales having access to the single market via the public international treaty law bypass rather than direct EU law highway. Even if the extreme scenario did not happen, a 'Switzerland-plus-minus' arrangement is highly likely, as is another Scottish independence referendum; while Northern Ireland's exit would be different in any case because of the Good Friday Agreement and the relatively high proportion of population who would remain EU citizens (or be at least eligible for EU citizenship) even if Northern Ireland remained in the UK.