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Analyses on the Possible Brexit through the Lisbon Treaty

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Abstract: Europe is facing a social crisis like never before, and this comes just after an economical one. The huge flow of migrants that started crossing into Europe at the end of 2015 was just the straw that broke the camel for Great Britain, because the Brits were threatening to leave the EU for some time. Prime Minister David Cameron has warned his European counterparts that his country might leave if his demands are not met. He clearly affirmed that he wants to stay in the EU, but under different rules. He negotiated a package of reforms, demanding concessions from a frightened Brussels, that has seen almost inevitable the change in some EU treaty terms. The PM used the 2011 European Union Act at the negotiations, document which requires any EU treaty that passes new powers to Brussels to be put to an internal British referendum. On June 23rd there is set a referendum on the country's membership to the EU. But this amount of uncertainty led to the fall of the pound (reaching its lowest level since 2009), to fear for the investors and furious debates between the political parties. We shall further analyze the Lisbon Treaty, in order to better understand the legislation behind this European-wide tension, and to explain the implications of such an event.

Keywords: Brexit; European Union; referendum; Lisbon Treaty; United Kingdom; employees' rights; migration

1. Introduction

Voluntary Withdrawal from EU of a Member State- Before the Lisbon Treaty

It is necessary to state that never before since the creation of the Economic Community of Coal and Steel in 1951 until today, none of the member states left the EU, in neither of the versions in which it has presented itself. The possibility of voluntary withdrawal was not mentioned in the Constitutive Treaties, before adopting the Lisbon Treaty in 2009 (signed in 2007). But neither the Accession Treaties of every member state don't have such a clause, although in theory, this right is recognized. Procedural forms to support such an initiative were not established, and this is due to an accumulation of reasons.

According to the European doctrine, the lack of regulation in the EU is due to the absolute confidence that the countries' leaders have had in the stability and durability of the construction of Europe. And the presence of such regulations would have put to doubt the arrangement between the nations, allied to achieve common objectives, assumed by the founding Treaties. It would have boosted the risk of

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such an event, because the regulation should have been accompanied by a procedure and an overview of the possible consequences.¹

Two separate interpretations were generated due to lack of express clauses from the constitutive treaties. The first stipulates that unilateral right of withdrawal exists even in the absence of clear provisions under the right of any sovereign state to withdraw as a signatory to the treaties concluded. A second interpretation is that there exists a supreme commitment between the member states in order to accomplish the mission and the vision of the Union, evidence of the irreversible nature of unification, and so contrary to exit clause. Proof of the constant effort to maintain the integrity and unity of the European structure is the fact that exactly the concluding of the treaties is done indefinitely. Besides this there are restrictions on the right to renegotiate the treaties of accession² the *acquis communautaire* acceptance by all Member States the principle of solidarity and others.

Public international law and the Vienna Convention on the Law of Treaties (1969) are sources for a possible interpretation of this dispute. The *Pacta sunt servanda*³ principle is enshrined by the Vienna Convention, acknowledging the right to terminate a treaty. Situations where this might happen is either if that right is expressly provided⁴ or may be deduced from the content / nature of a Treaty⁵, or if applicable the *rebus sic stantibus* clause, meaning where there is a fundamental change of circumstances which has occurred with regard to those existing at the time of concluding a treaty which was not foreseen by the parties, if: the existence of those circumstances constituted an essential basis of consent to be bound by the treaty and this change had the effect of transforming the radical nature of the obligations remaining to be performed under the treaty.⁶

Of these three possibilities under the Vienna Convention only the last (*rebus sic stantibus*) may apply in case of withdrawal of an EU Member State given the "absence of a clause to that effect in the constituent treaties and the impossibility of deducting a right of withdrawal, or even approved, from the content or nature of the treaties"⁷. Also, extremely limited is the application of the doctrine that provides change of circumstances in exceptional situations, and a more permissive interpretation could endanger the very stability and inviolability of treaties.

¹Miheș, Andreea, Voluntary withdrawal and exclusion from the EU and Economic and Monetary Union, 2012, Juridice.ro <http://www.juridice.ro/201796/retragerea-voluntara-si-excluderea-din-uniunea-europeana-si-din-uniunea-economica-si-monetara.html>

²The renegotiation took place in favor of the UK in January 2016.

³The principle of binding force regarding treaties on legal pact.

⁴*Article 54 of the Vienna Convention*: "Termination of or Withdrawal From A Treaty Under Its Provisions Or By Consent Of The Parties. The termination of a treaty or the withdrawal of a party may take place: (a) In conformity with the provisions of the treaty; or (b) At any time by consent of all the parties after consultation with the other contracting States."

⁵*Article 56*: "Denunciation of or Withdrawal from a Treaty Containing No Provision Regarding Termination, Denunciation Or Withdrawal **1.** A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) A right of denunciation or withdrawal may be implied by the nature of the treaty. **2.** A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1."

⁶*Article 69*: "Consequences Of The Invalidity Of A Treaty **1.** A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force. **2.** If acts have nevertheless been performed in reliance on such a treaty: (a) Each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed; (b) Acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty. **3.** In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable. **4.** In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty."

⁷Miheș, Andreea, Voluntary withdrawal and exclusion from the EU and Economic and Monetary Union, 2012, Juridice.ro.

Sovereignty although cited in the existence of a right of withdrawal of states does not fully guarantee action. Miheş (2012) discusses the example of *Costa / E.n.e.l.*¹ in whose verdict rendered by the European Court of Justice noted the limitations of the principle of sovereignty by joining the EU and by signing the founding Treaties. Thus, the transfer to the European system from the law of the Member States of rights and obligations bring a permanent limitation of their sovereign rights. One element that distinguishes the constitutive treaties of other international treaties is the transfer of sovereignty of the first set Member States have limited their sovereign rights by creating a community of unlimited duration of operation, possessing its own institutions which subsequently acquired legal personality and to which powers have been transferred from its members.

In conclusion, we believe that states can invoke the sovereignty principle with great difficulty to denounce previously concluded treaties. Prior to adoption of the Lisbon Treaty (2009) there was only one theoretical possibility you could withdraw from the EU, based on negotiation, all of it embodied in an agreement ratified by all Member States.

The Lisbon Treaty

The Lisbon Treaty has brought enshrining the right to voluntarily and unilaterally withdraw by several provisions designed to shed light on this delicate issue. Art 59² "Voluntary withdrawal from the Union" enshrines explicitly the right of withdrawal of any EU Member State, in accordance with its own constitutional procedure. Thus, as a direct consequence, European law becomes inapplicable to the State which decides to withdraw, from the withdrawal date set in the agreement or up to 2 years from the date of notification of withdrawal, according to the Constitutional Treaty. The state which has undergone the procedure can change his mind later, wanting to be again a member state of the Union, but then it will be required to follow a new procedure for accession, like any new candidate (art. 49-The general procedure for accession).

Article 50, paragraph (1) of the TEU stipulates that "any Member State may, in accordance with its constitutional rules, withdraw from the Union" with procedural formalities set out in the following articles. Thus, the state shall notify the European Council regarding its intention to withdraw, and the Union shall negotiate and conclude an agreement with the state (agreement negotiated in accordance with art. 218 paragraph (3) TFEU). In it are inscribed the conditions for the withdrawal procedure, taking account of the nature of its future relationship with the Union. It shall be concluded by the EU Council, with the approval of Parliament, with a qualified majority. The state representative cannot attend for reasons of procedural matters at the debates in the European Council and the Council. Also, Article 50 sets out the conditions for termination of the application of EU law into national law, namely from the entry date into force of the withdrawal agreement or two years from notification of intention to withdraw. There is an exception though, if there is a unanimous decision to extend (the default delay) from the European Council, in agreement with the Member State that submitted procedure.

¹CJCE, decision from 15th July 1964, *Costa/E.N.E.L.*, 6/64, (Miheş, 2012).

²1. Any Member State may decide to withdraw from the EU in accordance with its own constitutional requirements. 2.A Member State which decides to withdraw shall notify the Council of its intention; the European Council shall examine that notification. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with the State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be concluded on behalf of the Union by the Council of Ministers, acting by a qualified majority, after obtaining the consent of the European Parliament. The representative of the withdrawing Member State shall not participate in Council of Ministers or European Council discussions or decisions concerning it. 3.This Constitution 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 ratification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, decides to extend this period. "

Article 50 of the T.E.U.

The wording of Article 50 TEU is very permissive, in that the State in question may either carry a negotiation followed by an agreement for the withdrawal to operate, or may be about a unilateral withdrawal. The state concerned is not required to sign an agreement that would draw new relations with the EU, negotiations could fail and still the notification of its intention shall take effect. In the absence of an agreement, the state will no longer be subject to union rules, even after the expiry of two years' time from the date of notice of its wish to withdraw. Each state has full freedom of decision and can act in accordance with their own constitutional rules, and the withdrawal decision cannot be censored at EU level.

Aside from the questions of the nature of the process, there is another aspect of the recall, which is highly debated in the current situation in the Union. After the announcement from the Great Britain of its intention to leave the Union, the EU could face a massive withdrawal of Member States who wish to negotiate separate agreements with numerous advantages, to determine their stay in the EU. The European Council was forced to negotiate special clauses in order to change Britain's intention to leave, and also to act with great care, in order to prevent a dissolution of the Union.

2. Brexit- General Discussion

Britain has a long history as a signatory of international treaties and as a reliable partner of various international alliances. FCO or Foreign Affairs Office of the British Government (Foreign and the Commonwealth Office) made a census of treaties, from 1834 to the present. The result was no less than 13,200 documents of bilateral treaties, agreements, pacts and acts establishing the UN and NATO.

The word that generates many disputes between the parties involved in the delicate situation with the possible Brexit is sovereignty. This supreme illustration of power, this quality to exercise unrestrained political power both internally and in relation to external forces cannot be taken away from what it is *de facto*. Parliament's sovereignty is and will remain intact even if the authority is delegated. The members of the Parliament can always abrogate treaties in force, whether we are talking here about the EU, NATO or the UN. Philip Stephens, Financial Times¹ editor, said about EU membership that it represents "the most extensive and complex exercise of delegation of authority to a supranational organization."

Britain, as a sovereign state, has global interests, which lead, in consequence, to extensive vulnerabilities. Economic and strategic interests weigh heavily in the balance, in trying to make a decision on leaving the EU. And the decision will take into account, of course, the implications of Brexit on the security and prosperity of the nation.

Implications of a Possible Brexit

Exiting from the European Union would have broad implications over the United Kingdom, especially adverse implications on a large number of fields. The main impact would be on the economy (remember that in late February 2016, the pound recorded a historic low, from its lowest level in 2009, and continued to fall). Secondly, national security would be at great risk, taking into account terrorist

¹Financial Times, http://www.ft.com/intl/cms/s/2/26b6a12c-daf2-11e5-a72f1e7744c66818.html?ftcamp=social/free_to_read/brexit_sovereignty_comment/awareness/editorial&segid=0100320#axzz41DSGPEp4.

threats and negative signals from some countries (Russia Korea Iran, etc.). Many analysts believe that Britain could better negotiate personal advantages remaining in the EU than outside it.

Countries outside the European Union who stand and watch this unwanted situation should realize the danger. Brexit would mean a severe blow, both "physical" and psychological, on a Europe already weakened. It would mean breaking the fifth largest economy of its market outlets, and the fifth largest arms buyer among its allies¹. Brexit campaigners believe that Britain is held in place by the European Union when it comes to progress; in theory, UK could continue external trade in the event of leaving the Eurozone. But in reality, the European Union would allow access to a restricted common market under special conditions. If we were to look at Norway or Switzerland, we would see that the UK should still accept free movement of people, along with a substantial payment to the EU budget, before having unrestricted access to the common market. In terms of the years 2000-2016, the EU has come to absorb about half of the total export mass of goods/products from the United Kingdom, while imports from the Union do not exceed 10%. British trade deficit is linked mainly to Germany and Spain, and not necessarily to the rest of the 25 Member states².

For some skeptics all these difficulties and restrictions which may be imposed in the event of a Brexit do not represent a major impediment, since the Kingdom would recover its sovereignty. This means regaining complete freedom of decision against the will of the EU which interferes in every sector of citizens' lives, from the bonuses received by bankers and limits to weekly working hours. Specialists wonder to what extent this statement is an illusion. For a completely globalized world, power is being used as the most powerful weapon. The British state gave up part of their sovereignty to be members of NATO, the IMF, the EU and so on. Alliances are a double-edged weapon: the act of signing treaties involves obedience to the collective rules, in exchange for compensatory gains.

The immigration issue is extremely sensitive in the current refugee crisis, and an integral part of the early 2016 Brexit negotiations. The year 2015 brought to Europe the largest flow of migration seen in modern times, coming from the Eastern part of the continent and from the Orient. Half of the migrants that are being accepted in the UK on a daily basis come from the EU, and there are no actual measures that the British Government can take in order to restrict them. Only in the case of a British exit-Brexit, this could be done, but restraining immigrants from coming to the UK has some cons, and the damage is yet difficult to estimate. We mean, of course, losing the access to the common market, plus Britain would lose the young workforce, most of them qualified, and the services sector would suffer a huge decline, since it is based on the Italian doctors, French bankers, Romanian IT specialists or Bulgarian builders.

Another area of activity that will suffer if a Brexit happens is science and research. Although Britain is a generous contributor to the EU fund, it attracts every year more research money than their pay. Between 2007 and 2013, the UK has contributed with over 5.4 billion Euro in the R&D (Research and Development) Fund of the Union, but attracted an enormous amount of 8.8 billion euro, cited Steve Connor, editor for The Independent.³

¹The Economist, <http://www.economist.com/news/leaders/21693584-leaving-eu-would-hurt-britainand-would-also-deal-terrible-blow-west-real-danger>.

² The Economist, <http://www.economist.com/news/leaders/21693584-leaving-eu-would-hurt-britainand-would-also-deal-terrible-blow-west-real-danger>.

³ The Independent, <http://www.independent.co.uk/news/uk/politics/eu-referendum-british-science-would-suffer-badly-in-event-of-a-brexit-scientists-warn-a6898376.html>.

Brexit- Effects on Workers' Rights

Frances O'Grady, general secretary of the largest union for workers in the Kingdom, warns that workers' rights are in danger in the possibility of a Brexit. Separating Britain from the European Union would adversely impact on the right to work, on maternity leave for women, on payroll and payments policy field between men and women, on redundancies and so on.

Kathleen Morrison, attorney for the law firm Brodies LLP, has offered for The Independent newspaper 11 examples of workers' rights from British law which came from European legislation.¹

3. Working Time

Employees' working programme was not highly regulated before the introduction into UK law of the 1998 act called UK Working Time Regulations (WTR). The regulations have met the implementation of the European Directive of Work (European Working Time Directive), and include 48 hours-working week, the right to have daily and weekly breaks, and working time limitations for workers on night period.

1. Vacations

The European Directive for the Work Program has prompted all Member States to give employees holidays of four weeks every year, period when they could exercise their right to leave (but leaving is up to workers). Since its adoption, however, Great Britain has brought changes to the UK legislation, meaning that now, the four weeks holiday was extended to five weeks of vacation annually.

2. Protection of Workers in Case of Business Transfer

Employees are protected by their rights when a business is changes ownership, and so they are transferred to the new owner; they are kept under the same terms and conditions as when they were employed. They are protected from dismissal due to a possible transfer, and in the case of major decisions regarding employees, they are informed and consulted.

3. Employees with Temporary Status

Also called agency workers, they are entitled to the same basic working conditions (right to be remunerated for their work and leave entitlements), as have the employees with a permanent status, but only if they had worked in a place for at least 12 weeks (3 months).

4. Collective Redundancies

If an employer wishes to start a series of collective redundancies of over 20 employees within 90 days, he is obliged by law to engage into collective consultations with the employees' representatives. Starting date of a round of negotiations must be established with a sufficient period of time ("in good time") before the actual redundancies.

5. Discrimination

Discrimination is not moral nor legally accepted in the UK, when it comes to gender maternity, race, religion, beliefs disability, age, sexual orientation or gender reassignment. There are also attempts to lessen the gap between the salaries received by male and female employees.

¹ The Independent, <http://www.independent.co.uk/news/business/news/eu-referendum-tucs-frances-o-grady-warns-that-workers-rights-are-being-forgotten-in-brexit-debate-a6897801.html>.

6. Fixed-Term Employees

EU laws prohibit less favorable treatment for fixed-term employees, compared with permanent workers.

7. Part-time Employees

Workers employed part-time are protected against less favorable treatment compared to permanent employees by the European law.

8. Maternity and Pregnancy

Some rights regarding pregnancy and child care period came from the European Union legislation, although British regulations go beyond what provides as a basis in the European legislation. Thus, the United Kingdom provides for a period of 52 weeks maternity leave for its female employees, unlike the European minimum of 14 weeks.

9. Parental leave

Employees who are eligible for parental leave are entitled to up to 18 weeks of unpaid leave for each child, a period that can be used until the child's eighteenth birthday.

10. Privacy

Data Protection Act in the United Kingdom (UK Data Protection Act) was specifically designed to implement the data protection system in the European Union and for its citizens. Workers' rights are being threatened by negotiations on the Brexit case, and principles such as paid holidays and the right to employment of part-time workers are on the list of cuts. European law mandates each Member State to comply with its agreements on workers' rights. For example, the principle of equal pay for equal work has existed since the formation of the Treaties.¹

On the other hand, there are opinions that wages will rise in the UK because of a limited access to employment of foreigners in the case of Brexit. The number of migrants will suffer a decline and existing workforce will have to be paid in addition to the current payroll. Lord Stuart Rose, former chief executive of Marks and Spencer, told *The Telegraph*² that Britain staying in the EU will mean "one way street" for immigrants. Labour migration to developed countries is constantly growing as, shown in recent statistics. Thus, in Great Britain, more than 257 000 citizens from the EU member states came to the UK in 2015, and more than 630 000 EU citizens were registered to receive a social insured number (National Insurance Number)

3. Conclusions

Permanent development of the European Union by increasing the number of new members with a high level of political and economic integration has changed the face of Europe, as it is known to us today. The European Union was established as a comprehensive cooperation project, with a distinct role in maintaining economic and social stability, peace and to ensure a "lifeline" for Member States which are in difficulty. All agreements signed so far have established a legislative framework of the

¹The Independent, <http://www.independent.co.uk/news/uk/politics/eu-referendum-workers-rights-paid-holiday-brexit-labour-angela-eagle-a6901146.html>

²The Telegraph, <http://www.telegraph.co.uk/news/newstoppers/eureferendum/12181385/Wages-for-British-workers-will-rise-in-the-event-of-a-Brexit-head-of-in-campaign-says.html>

European construction, leaving room for an increased level of integration of its members, and also ignoring an essential criterion: that of withdrawal of a state.

At the beginning, the economic crisis came from the United States (2008), and continued with a massive economic recession, political differences and extremist parties gaining ground in the last election, aging of population in the EU, exchange rate fluctuations, crisis and wars, migrants flow, and all this, however, confront us with problems whose solutions are proving to be extremely difficult. This raises the increasingly problematic question that an exit from a member country would pose to the European Union.

Close ties between states have prompted a considerable transfer of attributes that are nothing but enshrined the national sovereignty of each state. European institutions, empowered by the transfer of sovereignty, have attracted in recent years discontent from some states. Increasingly obvious politicization of EU directives and regulations which must be integrated into national legislation, contributions in cash for the survival of poor countries are reasons of dissatisfaction in strong democracies.

And given the current context, in which uncertainty leaves room for speculation and concern for the stability of the Union, and given the fact that no further than 2013 Greece was in a position to be saved with a huge financial aid to prevent its withdrawal, now the year 2015 brings a clear attempt of the UK to leave the Union, we consider justified treating this theme. Whether we are talking about the revanchist politics of Russia, or the terrorist threats and the expanding sphere of influence of ISIS (ISIL DAESH), nuclear proliferation, environmental degradation, huge debts from the states and diminishing resources, we understand how important the negotiation on a possible Brexit is.

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