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Of courts, politics and EU law: The UK Supreme Court's failure to refer and its consequences

ALBERTO MIGLIO (*)

The much-awaited judgment of the UK Supreme Court in the *Miller* case has attracted mixed commentaries. Some have praised it as a well-balanced piece of judicial wisdom that upholds a fundamental constitutional principle and reinstates Parliament at the centre of the political debate (Peers, Solanke). Others have criticized it as a missed opportunity, especially for refusing the devolved assemblies a say in the Brexit process (Dawson). This post does not have the ambition to provide a comprehensive overview of the judgment, a task that others have already accomplished (Elliott, R. Craig, Davies), and that the author would be too ill-equipped to undertake. Its purpose is rather to propose some reflections on a point that should have caught the attention of the lawyer familiar with European Union law.

The question brought to the courts in the *Miller* case – Is it for Parliament or for the Government to trigger Brexit? – is certainly one of national law. This follows from the wording of Article 50(1) TEU, which provides that a Member State may decide to withdraw from the European Union «in accordance with its own constitutional requirements». Yet this question of purely internal law is intertwined with questions of EU law. One of those is whether the notice of the intention to withdraw from the Union, once given, may be revoked.

It is a point that Article 50 TEU does not regulate expressly. Article 50(2) TEU only provides that the notice marks the beginning of the exit process. It is only after notification that both parties – the EU and the withdrawing Member State – are expected to negotiate an agreement to regulate the exit. If negotiations are successful and the agreement is concluded within two years from the notice, or a longer period in case the European Council decides to extend the deadline,

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the withdrawal will be consensually regulated. If, on the contrary, no agreement is reached, when the time limit expires the EU Treaties will cease to apply to the departing Member State, which will suddenly become a third country: the hardest of possible Brexits, much harder than the "hard Brexit" currently envisioned by the UK Prime Minister.

Article 50 TEU is silent on whether this process may be stopped at any stage between the notice and the deadline. Silence, it is known, may have different meanings. It could signify, for instance, that revocability is an issue left to national law. There would seem to be some merit in this proposition: if it is for the withdrawing Member State to decide, according to its own constitutional rules and procedures, how the notice is to be given, why should it not be a matter for the State to decide whether the march towards exit can be reversed?

Yet, this view is untenable. First, the procedure devised by Article 50 TEU has a well-defined turning point, which is the notice. Before the intention to withdraw is notified, the EU is not involved and every question on the steps to be followed – for instance, on the value of a referendum on withdrawal, on the need and degree of parliamentary involvement – is solely a matter of national law. By contrast, after notice is given, the EU steps in. From this moment on the process of withdrawal becomes bilateral and the procedure is regulated by Article 50 TEU. The mere fact that the Treaty does not settle the question *expressly* does not mean that it is not a question of EU law.

Second, this conclusion is supported by the express *renvoi* to national law, which only relates to the steps preceding the notice and does not extend to what comes next. If a reference to national law was needed to clarify that part of the procedure falls outside the scope of EU law, *a contrario* all other aspects of the withdrawal procedure should be deemed to be regulated by the Treaties, expressly or impliedly. The fact that the solution to the problem of revocability may depend on international law does not contradict this conclusion. The silence of Article 50 could well signal a gap that has to be filled by referring to general international law: apparently most commentators share this view, since arguments on revocability usually revolve around the controversial customary nature and the equally controversial interpretation of Article 68 of the Vienna Convention on the Law of Treaties (see especially Streeten, Rylatt, Munari). But whether there is actually a gap to be filled by customary international norms or Article 50 TEU prevails instead as a special rule is itself a question of interpretation of Article 50, which can only be answered by the Court of Justice.

Third, even if those arguments were to be disregarded despite their strength, it would be unreasonable to view the revocability of the notice solely as a question of domestic law. Once the EU, through the notification, has been involved in the withdrawal process, the question whether the notice may or may not be revoked is no longer of interest

to the departing Member State alone. The Union and the other Member States have an equally important and legitimate interest in knowing whether the process can be reversed. Thus, the answer cannot be different from Member State to Member State: ultimately, it cannot depend on national law alone, but needs to be determined uniformly by EU law.

Of course, this does not amount to denying that the domestic law of the Member State concerned is *also* relevant. Revocation of the notice could be permitted under EU law but precluded by domestic constitutional law. In such case, the Member State concerned would be barred from revoking the notice by its internal constraints, despite the more liberal stance taken by the EU legal order. The reverse would not be true: if EU law does not permit revocation, then it does not matter whether domestic law allows it and departure becomes unavoidable once notice is given.

Knowing whether the notification may be revoked is crucial, as it is a variable likely to affect the behaviour of all relevant players in the Brexit process (Davies). These include the UK Government and the EU institutions involved in the negotiating process, since the issue is likely to affect the conduct and outcome of the negotiations, but also the UK Parliament which has now been granted the right to decide on the triggering of the withdrawal mechanism, the other Member States and the citizens at large.

Given the importance of the reversibility question for Brexit, any opportunity to decide it at an earlier stage, before notification is made, should have been welcomed and seized. As some authors have pointed out, the *Miller* case provided precisely such opportunity (see, for instance, Peers, Sarmiento, Lang, Sanchez Graells, Solanke). Although the question of revocability was not actually litigated, both the High Court and the Supreme Court assumed the answer to this controversial question of EU law as the starting point of their analysis. Thus, since the issue was relevant for deciding the case, both the High Court and the Supreme Court would have been entitled to refer a question for preliminary ruling to the Court of Justice in Luxembourg, the only judicial body competent to authoritatively settle issues of interpretation of EU law. Indeed, references for preliminary ruling enjoy a presumption of relevance (see, *ex multis*, case C-210/06, *Cartesio*, EU:C:2008:723; case C-399/11, *Melloni*, EU:C:2013:107; case C-62/14, *Gauweiler*, EU:C:2015:400), meaning that the Court of Justice will provide an answer unless

> «it is quite obvious that the interpretation, […] sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted» (*Gauweiler*, para. 25).

Moreover, the UK Supreme Court not only had the power to make the reference, but also a duty to do so. According to Article 267(3) TFEU, where a question concerning the interpretation of a provision of the EU Treaties is raised in a case pending before a court against whose decisions there is no judicial remedy under national law, the national court is obliged to submit the question to the Court of Justice of the European Union.

For the obligation to arise, two further conditions must be satisfied: the question must be controversial and the answer needed in order to adjudicate the case. Both requirements were manifestly met in the *Miller* case.

No one seriously doubts that the issue of whether a Member State may revoke its decision to leave the European Union is controversial. It has been fiercely debated among scholars for months following the Brexit referendum and ingenious arguments have been made in support of both positions (see, among others, Piris, P. Craig, Syrpis, Streeten, Rylatt, Eeckhout & Frantziou, Sari, Munari, Tosato). Thus, as the question is clearly one of EU law as demonstrated above, the first condition was met.

What about the second? In all stages of litigation, the parties agreed that an Article 50 notice is irrevocable. Like the High Court, the Supreme Court relied on this assumption without questioning it. It admittedly refrained from «expressing any view» on the issue, but proceeded on the premise that the parties' understanding was correct, namely that «once the United Kingdom gives Notice, it will inevitably cease at a later date to be a member of the European Union and a party to the EU Treaties» (para. 26 of the judgment).

The Court's main argument in support of Parliament's right to decide on the initiation of the withdrawal process is based on the special nature of the European Union legal order and the magnitude of change leaving the European Union would bring to the UK constitution.

At para. 81, the Court stated:

> «A complete withdrawal represents a change which is different not just in degree but in kind from the abrogation of particular rights, duties or rules derived from EU law. It will constitute as significant a constitutional change as that which occurred when EU law was first incorporated in domestic law by the 1972 Act. And, *if Notice is given, this change will occur* irrespective of whether Parliament repeals the 1972 Act. It would be inconsistent with long-standing and fundamental principle for such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone» (emphasis added).

This statement makes sense only if such fundamental constitutional change is an inevitable consequence of notifying according to Article 50 TEU. The Court expressed this assumption in even clearer terms at para. 92, where it distinguished

> «between (i) ministers having a freely exercisable power to do something whose exercise may have to be subsequently explained to Parliament and (ii) ministers having no power to do that thing unless it is first accorded to them by Parliament. The major practical difference between the two categories, *in a case such as this where the exercise of the power is irrevocable*, is that the exercise of power in the first category pre-empts any Parliamentary action» (emphasis added).

The Supreme Court seems to assume that whether the notification is revocable «would make no difference to the outcome of these proceedings» (para. 26; nevertheless, the exact meaning of this quote is controversial), but this proposition is logically untenable: if the process is reversible, it is not the notice, but only the failure to withdraw it that brings about a fundamental constitutional change requiring Parliamentary approval. Since the Supreme Court premised the judgment on the irrevocability of the notice, deciding on that very issue, although incidentally, was a necessary step to solve the case. Ironically, in the same judgment the Supreme Court recognized the duty of all UK courts «to refer unclear points of EU law to the Court of Justice» (para. 64). Despite this statement, it refrained from performing that very obligation when EU law required it to do so.

The Court's reluctance to make a reference for preliminary ruling is understandable in light of the high political pressure surrounding the *Miller* case – remember the infamous front page of the Daily Mail the day after the High Court's judgment. But as a matter of law, the existence of an obligation to refer questions of EU law to the Court of Justice may not depend on the importance or the political sensitivity of the case. Quite to the contrary, the higher the stakes, the more compelling the duty to abide by the rules.

In addition, while upholding the right of Parliament to decide on withdrawal, by refusing to have the Court of Justice involved and the revocability dilemma solved once and for all, the Supreme Court actually did a disservice to Parliament (Sanchez Graells). Understandably, attention is now being paid to how Parliament can effectively constrain the Government in the negotiations (see Peers, King, Davies), a problem the judgment left for politics to resolve. There have been claims that Parliament should attempt to impose a negotiating position, such as retention of at least some degree of participation in the internal market (see, for instance, Fabbrini). Yet, any condition the

UK Parliament is able to obtain by amending the Article 50 Bill clearly has a different value depending on whether the notification is revocable. If Brexit is inevitable after notice, then Parliament cannot effectively make the withdrawal subject to any condition: if negotiations do not deliver the expected outcome, Parliament will be left with the choice to consent to ratification of the eventual withdrawal agreement or not, but will not be able to reverse the process. By contrast, if the notice can be revoked, it may decide to prevent the exit if it deems the eventual outcome of the negotiations unacceptable. Although this possibility appears extremely remote today, this might not necessarily be the case in two years' time.

In conclusion, what are the consequences of the Supreme Court's reliance on the irrevocability argument and of its refusal to refer the question to the Court of Justice?

First, an opportunity to obtain a preliminary ruling on a highly controversial question has been lost, but others may come in the next months. Legal proceedings have been initiated before the High Court in Dublin with the purpose of determining whether a Member State can revoke an Article 50 notification unilaterally or whether that act requires the consent of the other Member States. The plaintiffs will seek to convince the High Court that it should refer a question for preliminary ruling to the Court of Justice, although from the information available it is hard to predict whether the reference may be deemed admissible. Eventually, the way to Luxembourg may not go through London, or even through Dublin, but the Court of Justice is likely to get involved sooner or later.

Second, although the failure of a court of last instance to refer a question for preliminary ruling as required by the Treaty undoubtedly amounts to a breach of EU law obligations, the breach is unlikely to be sanctioned in any way. In particular, it is totally implausible that the Commission would start infringement proceedings against the United Kingdom, as some authors have suggested (Lang). There is no reason why the Commission should do so, as that action would be highly unpopular and would hardly provide incentives for compliance with EU law.

Equally implausible are actions for damages brought by individuals against the State (a possibility mentioned by Peers). The applicants would have to demonstrate that they have suffered a loss and that the loss is a direct consequence of a sufficiently serious breach of an EU law provision intended to confer rights on individuals. A violation of the duty to refer can be qualified as "sufficiently serious", since the Court of Justice – in the *Köbler* and *Traghetti del Mediterraneo* cases (case C-224/01, EU:C:2003:513 and case C-173/03, EU:C:2006:391, respectively) – mentioned non-compliance with such obligation as one of the indicators of the seriousness of the breach. However, it is extremely unlikely that the applicants can prove either

that a provision granting rights to them has been infringed or that they have suffered a loss as a direct consequence of the Supreme Court's failure to refer in the Miller case – where, by the way, none of the parties requested the Court to do so.

The consequences on the UK political dynamics may be of greater importance. Even after the Supreme Court's judgment, revocation of the notice is not necessarily precluded as a matter of UK constitutional law. After all, albeit accepting the parties' assumption, the Court wisely noted that it had not expressed any view on the issue of revocability, which is thus left open. But once Parliament finally authorizes the notice on the – arguably wrong – assumption that there is no way back, is the chance of future revocation not already undermined by the Parliament's commitment to Brexit?

Ironically, the fight for the rights of Parliament might have ultimately undermined the best chance Remainers had to have a say in the withdrawal process.

30 January 2017