

Wightman is not the road to never-never land (but would you rather plunge into the Brexit abyss?)

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These are uncertain times for the financial sector. At the time of writing, the fate of the so-called Withdrawal Agreement which is supposed to govern the UK's departure from the EU hangs in the balance. A disorderly Brexit is a real prospect. The likelihood of starting negotiations on a free trade agreement between the UK and the EU27, which is conditional on an orderly withdrawal from the EU, has sharply diminished. Indeed, even if the Withdrawal Agreement is agreed and negotiations on a free trade agreement with the EU begin, financial services may well find themselves towards the (proverbial) 'back of the queue'. There will be competing interests. It can be expected that significant political capital will first be spent on putting the Irish backstop issue to rest. At any rate, reduced cross-border mobility between the UK and the EU27 was always to be expected. It is a logical consequence of the UK's decision to leave the internal market. Both the UK government's White Paper on the Future Relationship between the UK and the EU,¹ as well as the so-called political declaration on the future relationship between the UK and the EU27,² make it clear that the best outcome that can be expected is reciprocal market access based on some form of 'equivalence'. For the uninitiated, equivalence provisions basically enable third country firms to access the internal market whilst complying with third country rules that are deemed 'equivalent' to EU rules. This equivalence system facilitates market access, but it is neither comprehensive in scope, nor is it a stable arrangement: equivalence decisions, which confirm that third country rules (and other relevant third country arrangements) are equivalent, are adopted by the European Commission which considers the decisions to be unilateral and discretionary acts of the EU and this discretion extends to repealing or amending these acts.³ As part of the negotiations on a future trade agreement (if indeed this stage can be reached), the UK government hopes to agree an equivalence framework that offers wider and more stable bilateral market access. Whether agreement on such an arrangement can be found remains uncertain. Whilst reduced cross-border mobility for the financial industry is a price that the UK government is willing to pay for Brexit, gaining a greater share of the UK based financial sector is a prize worth having for some of the EU27. It is well known that London based financial actors have been heavily courted by several Member States with established financial places. The interests of these Member States to make gains might well come to matter in negotiations over equivalence.

Finally, assuming that the UK will be free to enter into bilateral trade agreements with third countries post Brexit, negotiations with these countries will not be a piece of cake. Trade-offs will be inevitable; concessions will be required. Any sense of urgency on the part of the

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¹ HM Government, 'The Future Relationship between the United Kingdom and the European Union' (Cm 9593, July 2018) <<https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>>.

² Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, <<https://www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration>>.

³ European Commission, EU equivalence decisions in financial services policy: an assessment (SWD(2017) 102 final) 8.

UK government to conclude trade agreements post Brexit is unlikely to strengthen the UK's bargaining hand.

Yet among all the confusion and uncertainty of the last months, the Court of Justice of the European Union (the Court) delivered on 10 December 2018 a decision which, as a matter of law, charts a seemingly simple way out of the complications of the Withdrawal Agreement, the provisions on a backstop and so on. Wightman is the Court's decision on the right of a Member State to unilaterally cancel the withdrawal process from the EU. Specifically, the Court ruled that a Member State was free to unilaterally revoke the notification of its intention to withdraw from the EU as long as a withdrawal agreement had not entered into force, or in the absence of such an agreement, as long as the two-year period (possibly extended) set out in Art 50 TEU – the Treaty provision that governs the withdrawal process – had not expired.⁴ For the Court:

“In the absence of an express provision governing revocation of the notification of the intention to withdraw, that revocation is subject to the rules ... for the withdrawal itself, with the result that it may be decided upon unilaterally, in accordance with the constitutional requirements of the Member State concerned”⁵

However, there is of course a ‘complication’ with taking advantage of Wightman. Wightman presupposes that the UK decides in accordance with its constitutional requirements to cancel the Brexit process and to do this with the sole purpose of confirming its EU membership: unequivocally and unconditionally.⁶ If there is a lesson to be learned from Brexit, it is perhaps to expect the unexpected. Yet, the possibility that the UK chooses to cancel Brexit by taking the Wightman route strikes one nevertheless as very remote unless a second referendum is called for which would offer popular backing for EU membership. Taking this step will involve considerable risks and uncertainty, leaving other complications aside (timeframe, etc.). But perhaps the decision to use Wightman will be easier when teetering on the edge of the abyss.

That said, Wightman will not be the way to never-never land for the UK financial sector. It is plain that if the UK were to use the Wightman route, it would stay in an EU whose agenda on financial and banking regulation has moved on since the June 2016 referendum. Granted, the UK's terms as regards its Member State status would remain the same.⁷ The UK would continue to be outside of the Eurozone. As such, it would also continue to be part of the minority of Member States that are outside the Banking Union. However, it is plain that the EU's current agenda on financial regulation/supervision for the EU as a whole is set on a path that is at odds with the preferences of successive UK governments against further integration and centralisation of competences. I discussed in previous issues some of the Commission's most noteworthy reform proposals that are currently going through the EU legislative process: e.g. the proposals on the European System of Financial Supervision or its proposal on the supervision of central counterparties.⁸ What is more, Lord Hill, the UK Commissioner that was initially in charge of the Commission initiative on a Capital Markets Union (CMU) resigned in the wake of the referendum. The CMU, a project that was initially set to benefit the City of London, is no longer the Commission's olive branch to the UK.

Clearly the UK would also not be able to make a decision to stay in the EU conditional on the EU27 offering it reassurances on closer integration. Recall that the Court made it plain that confirmation of membership had to be unequivocal and *unconditional*. Gone are also the

⁴ Case C-621/18 *Wightman and others v Secretary of State for Exiting the European Union* ECLI:EU:C:2018:999.

⁵ Para 58.

⁶ Para 74.

⁷ Ibid.

⁸ P Schammo, The Commission's agenda on financial supervision: forging ahead of Brexit [please add]

reassurances that David Cameron secured from the EU when negotiating a so-called ‘new settlement’.⁹ I have summed up the arrangements’ main points with respect to economic governance in a previous editorial comment.¹⁰ In short, the relevant provisions were meant to ensure the co-existence between the UK and the Eurozone in the wake of the establishment of the Banking Union (BU) and further integration within the Eurozone. This ‘new settlement’ was conditional on the UK deciding to remain in the EU. Specifically, the main document – i.e., the decision of the heads of State or Government meeting in the European Council – was to take effect ‘on the same date as the Government of the United Kingdom informs the Secretary-General of the Council that the United Kingdom has decided to remain a member of the European Union’.¹¹ To be sure, some might be tempted to argue that the decision to revoke the withdrawal notification can serve as a means to fulfil this requirement. Recall that Wightman tells us that the purpose of the revocation of the withdrawal notification of a Member State is to confirm its EU membership under terms that are unchanged as regards its status as a Member State. However, to be successful this argument would *inter alia* presuppose that the set of arrangements that David Cameron negotiated survived the 2016 referendum and the 2017 decision of the UK to notify its intention to withdraw. Clearly however this was not the intention of the parties. The conclusions of the European Council to which the arrangements are attached make it plain that the intention was for the arrangements to ‘cease to exist’ if the result of the referendum was in favour of leaving the EU.¹² Hence, the arrangements will have ceased to exist after the ‘leave’ result of the first referendum and since they no longer exist, the outcome of a hypothetical second referendum would also be irrelevant.

Margaret Thatcher famously said ‘the lady’s not for turning’. In the very unlikely event where the UK government would consider a U-turn on Brexit, Wightman offers the UK a way to unilaterally draw a line under Brexit without having to make concessions to the EU27 or to negotiate new terms of membership. But the UK would not be able to expect concessions from the EU27 either. Wightman would also not draw a line under the political tensions which have characterised the relationship between the UK and the EU since the financial and sovereign debt crises. Political capital on both sides would need to be rebuilt. Yet given what is at stake, it would simply be irresponsible to treat the Wightman route as unworthy of serious considerations.

⁹ European Council, A new settlement for the United Kingdom within the European – Extract of the conclusions of the European Council of 18-19 February 2016, [2016] C69 I/1.

¹⁰ For details, see P Schammo, ‘The UK’s Five ‘noes’ on EU Economic Governance’ [please add]

¹¹ A new settlement (n 9), Annex I, section E, para 2.

¹² *Ibid*, para 4.