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Editorial

The European Court of Justice and the Politics of Brexit—the *Wightman* Judgment

Brexit; EU law; European Union; Member States; Revocation; Withdrawal

The corrosive and lingering effect of acute Brexititis, the disease that has been inflicted on public life in the United Kingdom, has been hard to miss. So much so that it would be surprising if it did not touch the judiciary. This became abundantly clear two years ago, when English courts were asked to rule on the domestic constitutional requirements that ought to be complied with ahead of the notification to withdraw from the EU pursuant to art.50 TFEU. Those of us who live in the UK risk getting used to the nastiness that characterises the public debate about Brexit. Even we, however, will find it difficult to forget the front page of the *Daily Mail* with the headline "Enemies of the people" under the photographs of the three High Court Judges who had ruled that, under domestic constitutional law, notification to withdraw required an Act of Parliament.[1]

In the light of the above, it would be surprising if the Court of Justice of the European Court were left unscathed. Having held, entirely predictably, that the notification to withdraw under art.50 TEU could not justify a refusal to execute a European arrest warrant,[2] neither could it amount to a ground for annulment of a decision of a Board of Appeal of the EU Intellectual Property Office,[3] the European Court of Justice has recently ruled on a matter at the heart of Brexit: is the notification to withdraw revocable under art.50 TEU and, if so, under which conditions? This was the subject matter of the preliminary ruling in *Wightman* (C-621/18), in response to a reference by the Scottish Court of Session.[4] The Full Court held that a Member State that has notified its intention to withdraw from the EU in accordance with art.50 TEU has the right to revoke its notification unilaterally. Revocation should be unequivocal and unconditional. As for the decision to revoke, it should be in accordance with domestic constitutional requirements and should be addressed to the European Council in writing.

The judgment was handed down with extraordinary speed (in less than ten weeks after the reference was made, in less than two weeks after the hearing and in less than a week after Advocate General Sánchez Bordona had handed down his Opinion) and on a date that could not have been more aptly chosen, namely the day before the House of Commons was scheduled to vote on the UK-EU Withdrawal Agreement. As such, its political salience could not have been missed. And it was not, as the Court of Justice was criticised for its so-called political motives. Whilst not surprising, such criticism is hardly justified in the light of both the context and content of the judgment. In this respect, three points are worth raising.

First, in terms of the context within which the case reached Luxembourg, the Court responded to the request by the referring court for the reference to be determined expeditiously in accordance with the Court's Rules of Procedure.[5] Timing was of the essence, because, according to the domestic court, the Court's interpretation was necessary in order to clarify the options open to the Members of the House of Commons when they would vote on the art.50 Agreement. Put differently, the speed with which the Court of Justice dealt with the reference was merely in response to the request of the referring court. If anything, it was the British Government that had acted in a manner that was blatantly politically motivated, as it

[1] *Daily Mail*, 4 November 2016. The judgment of the High Court was upheld on appeal by the Supreme Court in *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 C.M.L.R. 15.
[2] *RO* (C-327/18 PPU) EU:C:2018:733.
[3] *Alcohol Countermeasure Systems (International) Inc v EUIPO* (C-340/17 P) EU:C:2018:965.
[4] *Wightman v Secretary of State for Exiting the European Union* (C-621/18) EU:C:2018:999. In the meantime, the General Court had found an action for annulment of the Council's authorisation of the Commission to negotiate under art.50 TEU inadmissible (*Shindler v Council* (T-458/17) EU:T:2018:838).
[5] Article 105.

had sought to prevent the reference from being made by challenging, unsuccessfully, before the UK Supreme Court the Scottish court's decision to refer.[6]

Secondly, and following from the above, the judgment in *Wightman* is premised on the prevailing role of the domestic court in the preliminary reference procedure under art.267 TFEU. The responsibility of the referring court to determine the need for and the relevance of the questions it would refer was stressed, and the presumption of relevance that EU law questions enjoy was pointed out. This was hardly novel. By responding to a "question of law, which represents a genuine and live issue, of considerable practical importance, and which has given rise to a dispute",[7] the Court of Justice followed its well-established case-law on the admissibility of preliminary references.[8] It is somewhat ironic that deference to the needs of the referring court should be viewed as an effort to intervene in the murky politics of Brexit.

Finally, the main thrust of the judgment in *Wightman* is firmly anchored in the sovereignty of Member States. After all, the right of a State to retain its status as a Member State of the EU is but the mirror image of its sovereign right to withdraw from the EU. And it is the sovereign right of a Member State not to be forced to withdraw from the EU against its will that explains the unilateral nature of the right to revoke the intention to withdraw.[9] In its judgment, the Court of Justice dismissed the submissions by both the Council and the Commission. In their interventions, the EU institutions had argued that revocation of the intention to withdraw should be subject to unanimous agreement by the European Council. As for the British Government, it had stated that it had no view on the substantive issue. It is indicative of the increasingly bizarre nature of the Brexit debate in the UK that such a solid acknowledgment of national sovereignty should be viewed as a political intervention by the EU Judges.

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[6] Permission to appeal determination: "In the matter of Secretary of State for Exiting the European Union v Wightman and others" (20 November 2018) (*https://www.supremecourt.uk/docs/reasons-for-the-determination-in-the-matter-of-secretary-of-state-for-exiting-the-european-union-v-wightman-and-others.pdf* [Accessed 22 January 2019]). The British Government also argued before the ECJ that the reference was inadmissible.

[7] *Wightman* (C-621/18) EU:C:2018:999 at [29].

[8] See, amongst others, *Gauweiler v Deutscher Bundestag* (C-62/14) EU:C:2015:400; [2016] 1 C.M.L.R. 1, and *American Express Co v HM Treasury* (C-304/16) EU:C:2018:66; [2018] 4 C.M.L.R. 22, as well as the case-law mentioned in *Wightman* (C-621/18) EU:C:2018:999 at [28], [30]–[32].

[9] In yet another acknowledgment of national sovereignty on the matter, whilst it pointed out the need for domestic constitutional requirements to be met, the Court refrained from expressing any view on what these would be. This was in contrast to AG Campos Sánchez-Bordona (AG Opinion in *Wightman* (C-621/18) EU:C:2018:978 at [145]).

Articles

Towards a Meaningful Prudential Supervision Dialogue in the Euro Area? A Study of the Interaction between the European Parliament and the European Central Bank in the Single Supervisory Mechanism
Fabian Amtenbrink* and *Menelaos Markakis
In the context of the introduction of the Single Supervisory Mechanism (SSM) as part of the European Banking Union, the European Central Bank (ECB) has been assigned specific supervisory tasks relating to credit institutions established primarily in the euro area. One particularly remarkable feature of this new legislation, notably when compared with the monetary policy tasks of the ECB, is the introduction of an explicit accountability framework with a particular focus on the relationship between the ECB and the European Parliament. It is this relationship, and mainly the so-called supervisory dialogue, that form the focal point of this contribution, which offers an assessment of the legal framework, as well as of the actual practice in these first years of the existence of the SSM, against a clearly defined notion of accountability. With regard to the actual practice, the contribution focuses on the exchanges between the chair of the ECB's main decision-preparing body on SSM matters, i.e. the Supervisory Board, and the European Parliament's Committee on Economic and Monetary Affairs.

Towards a European Framework for Foreign Investment Reviews
Jochem de Kok
The Regulation establishing a European framework for the screening of foreign direct investments into the EU followed a reignited debate on whether foreign investments, in particular from China, should be placed under greater scrutiny for their potential impact on security. While national security review mechanisms already exist in many Member States, a European approach is still lacking. The framework allows for a more co-ordinated approach, a limited degree of harmonisation and the first step towards a European review mechanism by assigning a formal role to the Commission. While leaving the ultimate authority to decide on whether to allow or block a transaction to the Member States concerned, the competence for the Commission to issue non-binding opinions is likely to place the Commission in a central role in investment screening.

European Constitutionalism and Constituent Power
George Duke
This article argues that attempts to construct a mixed constituent power fit for the purpose of grounding the legitimacy of the EU constitutional order are not only descriptively implausible, but also fail at the level of reconstructive normative justification. The source of this justificatory inadequacy is the notion of constituent power itself, which lacks the normative content to serve as the foundation for an account of constitutional legitimacy. Following a discussion of the motivations for the application of the concept of constituent power to Europe, the article argues that the concept is of little assistance for those seeking a normative justification for the Lisbon Treaty's constitutional status.

The European Disability Rights Revolution
Jeffrey Miller
Until recently, an EU citizen's legal standing to challenge disability discrimination was non-existent or sharply curtailed in most jurisdictions. The situation changed drastically with the adoption of Directive 2000/78, also known as the Employment Equality Directive. Most academic commentary has been highly critical of the judgments of the Court of Justice of the European Union (ECJ), taking it to task for failing to embrace the "social model of disability". In this article, I seek to demonstrate the value of analysing ECJ case law from a perspective other than the dominant paradigm, and to show how a different methodological approach can provide new insights into our understanding of the trajectory of the ECJ's jurisprudence. Instead of using the social model of disability to benchmark how the ECJ's case law has developed, I compare Directive 2000/78 and ECJ judgments to those of the Americans with the Disabilities Act and decisions of US courts.

Analysis and Reflections

After *Uber Spain*: The EU's Approach on the Sharing Economy in Need of Review?
Vassilis Hatzopoulos
The rapid development of the collaborative (or sharing) economy has disruptive effects both on the economic and the legal landscape of the EU and its Member States. While national regulators and courts have adopted greatly divergent approaches, Uber Spain *is the first occasion on which the ECJ discusses and qualifies the relationships developing in the two (or multi-) sided markets which characterise the collaborative economy. In so doing, the ECJ establishes the criteria which take the online platforms outside their mere intermediation function and into the provision of the underlying service. On this qualification rest the conditions under which online platforms should gain market access in the EU internal market; it may further have an impact on consumer protection and labour law. Because the criteria used by the Court are not all too clear and may not be applied in an all-encompassing manner and, further, run counter the approach followed, so far, by the Commission and by national authorities, fragmentation of the internal market emerges as a real risk. By refusing to acknowledge the disruptive effects of the collaborative economy, the Court implicitly but clearly calls in the EU legislature.*

The Judicial Interpretation of Harmonised Standards: *Anstar*
Pierluigi Cuccuru
The James Elliott *ruling opened the Court of Justice's doors to the interpretation of harmonised standards, i.e. technical specifications issued by private parties to implement EU law. Yet, on that occasion no real judicial engagement with the content of the standard occurred. The* Anstar *judgment represents the first occurrence of this type. The decision is remarkable as it outlines a brief* vade mecum *on the interpretation of harmonised standards, enucleating the basic elements that courts take into account when exercising their hermeneutic discretion. Moreover, the judgment confirms the Court's willingness to enter into technical standardisation and indirectly offers a chance to reflect on the interplay between judicial and scientific authorities within the European Standardisation System.*

The Faroe Islands: Possible Lessons for Scotland in a Post-Brexit Devolution Settlement
Jacques Hartmann
The Brexit referendum saw millions of people voting to "take back control" from Brussels. The decision to leave the EU and to return powers to the UK has created new constitutional complexity, especially for Scotland, which overwhelmingly voted to remain. The Scottish Government has made it clear that, despite the overall result, it wants to retain key benefits of EU membership, even if the rest of the UK leaves the EU and the Single Market. The difficulty now is finding a constitutional compromise that addresses the concerns of the Scottish Government as the UK leaves the EU in March 2019. The Faroe Islands' reserved powers model can potentially yield important lessons for Scotland. Despite refusing to accede with Denmark in 1973, the Faroes has developed a close relationship with the EU. The case of the Faroes shows that there are no legal barriers in EU or international law against Scotland following a similar path. A constitutional compromise can be achieved through the use of international legal personality and the political will to find a settlement.

Book Reviews

Between "Administrative Mindset" and "Constitutional Imagination". The Role of the Court of Justice in Immigration, Asylum and Border Control Policy
Daniel Thym
The Court of Justice is a central actor. It is the subject of many studies, most of which concentrate on the internal market or citizenship. By contrast, the role of judges in migration law is rarely discussed, although it is politically contested and features prominently in recent case law. That is why this contribution takes a bird's eye view on the role of the ECJ in that domain. It critically assesses a concern about "judicial passivism" among academic observers and demonstrates that there are good constitutional reasons why judges act carefully in migratory matters. Closer inspection of several dozen judgments shows that most of them are defined by an "administrative mindset"; they focus on statutory interpretation and seek to realise the position of the legislature. Any move towards a more ambitious "constitutional imagination" would require feedback loops between legal developments, political processes and broader societal debates.

Can Two walk Together, Except they be Agreed? Preliminary References and (the Erosion of) National Procedural Autonomy
Anna Wallerman
The Court of Justice's case law on procedures and remedies before national courts has been highly scrutinised and often criticised, in particular for intruding on the procedural autonomy of the Member States. This article argues that the responsibility for such a development lies at least partially with the national courts. Drawing on an empirical analysis as well as in-depth case studies, the article shows that national courts requesting preliminary references from the Court often actively seek an answer promoting European integration over national autonomy. Furthermore, the analysis suggests that when a national court assertively argues for the preservation of national procedural rules, it has a comparatively good chance of persuading the Court of Justice. The article concludes that there is still a case to be made for national procedural autonomy, but the success of that case depends upon the national courts' use of the preliminary reference procedure.

The Founding Myth of European Human Rights Law: Revisiting the Role of National Courts in the Rise of EU Human Rights Jurisprudence
Giacomo Delledonne* and *Federico Fabbrini
A conventional story argues that the ECJ developed a human rights jurisprudence in response to national pressures. The purpose of this article is to reconsider and nuance this simplistic understanding. First, the article underlines how the case law of the ECJ recognizing fundamental rights as general principles of EU law predates the Solange case law of national courts. Secondly, the article carries out a structural examination of fundamental rights in the founding EU member states and reveals that the mechanisms for human rights protection were weak—if not absent—in the majority of them. Thirdly, the article examines in depth the jurisprudence of national constitutional courts and emphasizes how even in states like Italy or West Germany in the 1950s and 1960s constitutional courts were anything but aggressive in protecting fundamental rights. In conclusion, the article suggests that the rise of an EU human rights jurisprudence should be seen as the result of a transnational development consisting of greater sensitivity towards human rights at all levels of government—and not of a supranational response to national pressures.

The Concept of 'Agreement' under Article 101 TFEU: A Question of EU Treaty Interpretation
Kelvin Hiu Fai Kwok
Despite the importance of the "agreement" concept under art.(1) TFEU, the concept remains underdeveloped by courts and commentators. This article reconstructs the "agreement" concept based on theories of legal interpretation and contract. It argues, based on a theoretical framework for EU Treaty interpretation and a broad, objective conception of an antitrust agreement, that the objectivity and correspondence requirements for contractual agreements have continuing relevance, while the precision requirement should be appropriately relaxed, for antitrust agreements. It advances three concrete proposals

emerging from the in-depth comparison between antitrust and contractual agreements, namely that the art.101(1) "agreement" concept embraces tacit collusion, encompasses concerted practices and decisions of associations, and is independent of subjective intentions.

Online Platforms and Selective Distribution: *Coty* Ruling Addresses Topical E-Commerce Issues
Katri Havu* and *Neža Zupančič
This contribution discusses the preliminary ruling in Coty *(C-230/16) in which the European Court of Justice addresses competition law ambiguities pertaining to selective distribution, in particular with respect to the use of third-party online platforms as a distribution channel. Importantly, the judgment confirms that suppliers of luxury products can prohibit authorised distributors from selling goods on general online platforms. This contribution analyses the ruling and discusses selective distribution, preserving a luxury or prestigious product image, and vertical agreements in the context of e-commerce.*

The Substance of Rights—New Pieces of the *Ruiz Zambrano* Puzzle
H.H.C. Kroeze
To promote and facilitate free movement in the European Union, Directive 2004/38 provides a generous regime for family reunification for EU citizens who move to a Member State of which they are not a national. In Ruiz Zambrano*, the European Court of Justice established a right to family reunification for citizens who reside in the Member States of which they are a national on the basis of art.20 TFEU if the refusal of such a right would deprive them of the genuine enjoyment of the substance of their rights as European citizens. A legal framework to determine the limits and conditions under which this right can be exercised is lacking, however. This paper investigates these limits and conditions through analysis of the case-law concerning art.20 TFEU. To shape this inquiry, a comparison is made between family reunification rights awarded by Directive 2004/38 and those derived from art.20 TFEU. The last part of the analysis explores the role of the right to family life in the art.20 TFEU case-law, and compares the protection of family life it offers to the threshold of art.8 ECHR.*

Brexit and public procurement: transitioning into the void?
Pedro Telles* and *Albert Sanchez-Graells
On 29 March 2017, the UK notified its intention to leave the EU. This activated the two-year disconnection period foreseen in art.50 TEU, thus resulting in a default Brexit at the end of March 2019. The firming up of a draft agreement on a transition period to run until 31 December 2020 could provide a longer timescale for Brexit, as well as some clarity on the process of disentanglement of the UK's and EU's legal systems. The draft transition agreement of 19 March 2018, updated on 19 June 2018 and still under negotiation at the time of writing, provides explicit rules on public procurement bound to regulate "internal" procurement trade between the UK and the EU for a period of over 15 months. However, the uncertainty concerning the future EU-UK relationship remains, and the draft agreement does not provide any indication on the likely legal architecture for future EU-UK trade, including through public procurement. The draft agreement has thus not suppressed the risk of a "cliff-edge" disconnection post-Brexit, but rather solely deferred it. The transition is currently not into an alternative system of procurement regulation, but rather into the void. There have also been very limited developments concerning the UK's and EU's repositioning within the World Trade Organisation Government Procurement Agreement (WTO GPA), which creates additional legal uncertainty from the perspective of "external" trade in procurement markets due to the absence of a "WTO rules" default applicable to public procurement. Against the backdrop of this legal uncertainty, this article critically assesses the implications of the 2018 draft transition agreement, both for the re-regulation of "internal" EU-UK procurement, and for the re-positioning of both *the EU and the UK within the WTO GPA, as the basis for their "external" procurement trade with third countries. The article concludes that it is in both the UK's and the EU's interest to reach a future EU-UK FTA that ensures continued collaboration and crystallises current compliance with EU rules, and to build on it to reach a jointly negotiated solution vis-a-vis the rest of WTO GPA parties, constituting a detailed case study that provides insights applicable to other areas of Brexit-related trade re-regulation.*