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# Leaving the European Union, the Union way

## A legal analysis of Article 50 TEU

### Abstract

The outcome of the UK referendum on membership of the EU prompted a considerable interest in the modalities of a state's withdrawal from the Union. This policy analysis examines the specific provisions governing this process, viz. Article 50 TEU, and its function in the European integration process.

### 1 Introduction

The Treaty on European Union (TEU) explicitly foresees that a Member State may leave the EU. According to Article 50 TEU, the withdrawal process begins when, having 'decide[d] to withdraw from the Union in accordance with its own constitutional requirements', a member notifies the European Council 'of its intention'. The latter then agrees on the guidelines for negotiating a EU agreement with the state concerned, which is to be concluded by the Council by qualified majority, with the consent of the European Parliament. In the event, the EU treaties would in principle cease to apply to the departing state once the exit agreement came into force, or in the absence thereof, two years after the European Council has been notified. It is also foreseen that should the former Member State intend to re-join the Union, it would have to apply on the basis of Article 49.

Article 50 TEU has generated considerable academic interest following its introduction in EU law,<sup>1</sup> but predominantly since the UK voted in favour of leaving the Union, a vote that could prompt its first ever activation. Following a closer

look at the terms of Article 50 TEU (2), this chapter discusses whether the Member States' ability to leave the Union as introduced by the Lisbon Treaty is entirely new (3). It then questions the rationale for its acknowledgement from the perspective of the EU legal order and, more specifically, for the latter's central aim of an 'ever closer union amongst the peoples of Europe' (4).

It will hopefully become clear that the inclusion of a withdrawal clause in the Treaty on European Union means that it is subject to EU rules rather than governed by the classic canons of public international law. Moreover, and somewhat paradoxically, the recognition of a right to leave can contribute to the pursuit of an 'ever closer union among the peoples of Europe' precisely by making it possible for a state to step out of, rather than hold up the integration process.

### 2 A closer look at the EU withdrawal procedure

Although Article 50 TEU acknowledges the possibility for any Member State to withdraw from the Union under its

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<sup>1</sup> A non-exhaustive list of references is included at the end of this analysis.

own constitutional rules, the formulation of the provision suggests that it is *not* an absolute and immediate power.<sup>2</sup> Only the *decision to depart* is taken in accordance with the state's domestic law, whereas EU law governs the *departure itself*.<sup>3</sup> The EU exit procedure is thus not premised on a 'state primacy' conception of the power to secede.<sup>4</sup> Indeed, by speaking of '[a]ny Member State', instead of referring to the 'High Contracting Parties' of Article 1(1) TEU,<sup>5</sup> Article 50(1) TEU embeds the states' ability to withdraw within the EU legal order. The success of any exit initiative therefore depends not only on the member's intention, but also on the fulfilment of the procedural and substantive requirements of Article 50 TEU specifically, and on its compliance, regarding the Member State, with the rules and principles underpinning the EU legal order more generally, under the control of the European Court of Justice.

In this respect, Article 50 TEU indicates that the *decision* to withdraw and its *notification* to the European Council are both subject to conditions.<sup>6</sup> The European Council, to which the decision has to be notified, should therefore be assured that the latter conforms to the state's internal 'constitutional requirements'.<sup>7</sup> If for example the decision to withdraw is challenged before a domestic court, and/or if

the notification is served without adequate legal authority,<sup>8</sup> the European Council would arguably have to pause and wait for that court's judgment and/or obtain clarification of the validity of that notification before formally acknowledging receipt. Indeed, it is only if this notification is acknowledged as such that the withdrawal process begins, and in particular that the clock starts ticking for the purpose of terminating the application of the EU treaties to the departing state, in accordance with Article 50(3) TEU.

Moreover, the *exclusive* authority of domestic constitutional requirements is predicated on the assumption, given that state's membership, that these conform to the general requirements of EU law and especially to the values enshrined in Article 2 TEU.<sup>9</sup> Hence, *formal* compliance with domestic constitutional requirements might not suffice to validate the initial withdrawal decision under Article 50 TEU, if that decision was taken in the midst of internal constitutional turmoil, and consequently, if the appropriateness of such requirements was in doubt in relation to EU standards.<sup>10</sup> For instance, the European Council would have grounds to question the validity of a notification if the decision to withdraw was taken after significant modifications to the national constitution,

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<sup>2</sup> Raymond J. Friel, 'Providing a Constitutional framework for withdrawal from the EU: Article 59 of the Draft European Constitution' (2004) 53 *ICLQ*, 407 at 425.

<sup>3</sup> Adam Lazowski, 'Withdrawal from the European Union and Alternatives to Membership' (2012) 37 *ELRev*, 523 at 527. For another view, see the so-called 'Vote Leave Roadmap': [http://www.voteleavetakecontrol.org/a\\_framework\\_for\\_taking\\_back\\_control\\_and\\_establishing\\_a\\_new\\_uk\\_eu\\_deal\\_after\\_23\\_june](http://www.voteleavetakecontrol.org/a_framework_for_taking_back_control_and_establishing_a_new_uk_eu_deal_after_23_june)

<sup>4</sup> Friel (n. 2), 422; Allan Tatham, "'Don't Mention Divorce at the Wedding, Darling!'" EU Accession and Withdrawal after Lisbon', in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds.), *EU Law after Lisbon* (Oxford: OUP, 2012), 128 referring (at footnote 17) to the proposal put forward by the 'Cambridge group': A. Dashwood, M. Dougan, C. Hillion, A. Johnson and E. Spaventa, 'Draft Constitutional Treaty of the European Union and related documents' (2003) 28 *ELRev*, 3.

<sup>5</sup> On the idea of Member States, see e.g. Christopher Bickerton, *European Integration: From Nation-States to Member States* (Oxford: OUP, 2012).

<sup>6</sup> Referring to the literature on secession, and although EU law does not itself specifically requires this, it has been suggested that the decision to withdraw from the EU ought to be subject to a stringent internal procedure in terms notably of requirements for democratic accountability, for instance in the form of a super qualified majority in the national parliament, or a referendum: e.g. Tatham (n. 4), 149.

<sup>7</sup> One could also examine what is meant by a State *deciding* to leave in Article 50(1) TEU; on the UK case see e.g. Mark Elliott, 'Can the EU force the UK to trigger the two-year Brexit process?' on <https://publiclawforeveryone.com/>

<sup>8</sup> On these questions, see e.g. Adam Tucker, 'Triggering Brexit: A Decision for the Government, but under Parliamentary Scrutiny', U.K. Const. L. Blog (29th Jun 2016) (available at <https://ukconstitutionallaw.org/>); N. Barber, T. Hickman and J. King, 'Pulling the Article 50 "Trigger": Parliament's Indispensable Role', U.K. Const. L. Blog (27th Jun 2016) (available at <https://ukconstitutionallaw.org/>) and the various reactions, also on the UK Constitutional Law Association Blog.

<sup>9</sup> Recall that, according to Art. 49 TEU, membership is based on the respect and promotion of the values of Art. 2 TEU.

<sup>10</sup> On EU oversight of the values enshrined in Article 2 TEU, particularly the Rule of Law, see e.g. the Commission's Communication, 'A new EU Framework to strengthen the Rule of Law' COM(2014)158 final. Also, Carlos Closa and Dimitry Kochenov, 'Reinforcing Rule of Law Oversight in the European Union' (2014) *EUI Working Paper No 2014/25*; Anthony Arnull, 'The Rule of Law in the European Union', in Anthony Arnull and Daniel Wincott (eds.) *Legitimacy and Accountability in the European Union* (Oxford: OUP, 2002), p. 239; Christophe Hillion, 'Overseeing the Rule of Law in the European Union: Legal Mandate and Means (2016) SIEPS European Policy Analysis 1/2016.

for example curtailing the powers of the parliament and/or the judiciary, and reserving the power to make such a constitutional decision to the executive branch.

Arguably therefore, the domestic *decision to withdraw* is not entirely exempt from also having to conform, albeit implicitly, to EU requirements, and notably to the common values of Article 2 TEU.<sup>11</sup> Of course, the EU would have no interest in preventing a Member State's departure if the latter's constitutional evolution was increasingly at odds with the requirements of EU membership, quite the contrary. However, based on Article 7 TEU, a state that seriously and persistently breached the values of Article 2 TEU could ultimately have its membership right to withdraw withheld in order to protect the rights and interests of other Member States, and those European citizens potentially affected by the putative withdrawal.<sup>12</sup> If the state intending to withdraw were to bypass the European Council's negative stance on the notification, or indeed ignore the EU rules of withdrawal more generally, it would not only risk damaging its international reputation at a time it would need it most, but it could also open the possibility for natural or legal persons to claim compensation in the courts if they had suffered damages as a result.<sup>13</sup>

Article 50 TEU merely stipulates that the *notification* has to come from the withdrawing state and must be submitted to the European Council. Nothing in the clause specifies its *form*, or the *timing*, thus seemingly allowing the departing state some discretion in this regard. Given that this is the formal step that triggers the whole exit procedure, such notification should be unequivocal: there should be a clear message from the state concerned that it intends to leave the Union, following an internal decision to that effect. Therefore, until such a message has been conveyed to the EU, and so long as the Member State continues to fulfil all its membership obligations, the withdrawal process cannot be deemed triggered.

These points should nevertheless be qualified. In particular, a state that has internally decided to leave should not be allowed to instrumentalise the exit threat to increase its bargaining leverage in the EU decision-making process,<sup>14</sup> and/or delay the notification to strengthen its future negotiating position, at the expense of the overall functioning of the Union. The discretion as to the timing for activating Article 50 TEU should therefore not be limitless, notably in view of the principle of sincere cooperation under Article 4(3) TEU. Although in more general terms, the Heads of State or Government of 27 EU Member States made these points clear following the UK 2016 referendum: while '[i]t is up to the British government to notify the European Council of the UK's intention to withdraw from the Union', [t]his *should be done as quickly as possible* [and] [t]here *can be no negotiations of any kind before this notification has taken place*' (emphasis added).<sup>15</sup> Indeed, if the domestic decision to leave was taken lawfully and deemed binding on the state's authorities, the latter's failure to take steps to implement that decision within a reasonable time could fall foul of the terms of Article 50(2) TEU if the word 'shall' is to be understood as an obligation, and more generally of the requirements of Article 2 TEU which could then prompt a reaction under Article 7 TEU.

The question may be raised as to whether a notification could eventually be deduced on the basis of that withdrawing state's actions and/or inactions. For example reduced participation in the meetings of EU institutions', particularly the Council and European Council, and/or activities, let alone deficient compliance with EU obligations, might not only form the basis of infringement proceedings against that state before the Court of Justice, these could also amount to tangible evidence that the state no longer intends to participate in membership of the EU, and thus could be taken as notification for the purpose of Article 50 TEU.

<sup>11</sup> Tatham (n. 4) is also of the view that the withdrawing state is 'still bound by Union values in the manner of its withdrawal. In particular, it could be argued that the values of democracy, the rule of law, freedom, solidarity and equality – Articles 2 and 49 TEU – are equally applicable to withdrawal'.

<sup>12</sup> The 'all-affected' dimension of withdrawal has been underlined by Tatham (n. 4); compare Herst (n. 1) and Lazowski (n. 3); see also Carlos Closa's and Jan-Werner Müller's chapters in Carlos Closa and Dimitry Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: CUP, 2016).

<sup>13</sup> It has even been pointed out that since Article 50 TEU 'would be justiciable by the ECJ], this insertion [i.e. constitutional requirements] has catapulted that court into the role of final arbiter of a significant issue of national constitutional law'; Friel (n. 2) 425.

<sup>14</sup> See e.g. A. Buchanan, 'Secession', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Stanford, MA: The Metaphysics Research Lab, 2013); Andrew Shorten, 'Constitutional Secession Rights, Exit Threats and Multinational Democracy' (2014) 62 *Political Studies*, 99; Florentinas Harbo, 'Secession Right – An Anti-Federal Principle? Comparative Study of Federal States and the EU' (2008) 1 *Journal of Politics and Law*, 132.

<sup>15</sup> Statement, Informal meeting at 27, Brussels, 29 June 2016.

In light of this, various elements of the particular case of the UK could be considered. Recall for instance, that at the European Council meeting of June 2016 the 'UK Prime Minister informed the European Council about the outcome of the referendum in the UK'.<sup>16</sup> Although this 'information' in itself could not be regarded as notification, its meaning should nevertheless be read in the light of the previous European Council Conclusions of February 2016.<sup>17</sup> In particular, a simple a contrario reading of these conclusions suggests that, for the purpose of activating the February 2016 'Decision of the Heads of State or Government meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union', the UK Prime Minister did *not* 'inform (...) the Secretary-General of the Council *that the United Kingdom has decided to remain a member of the European Union*' (emphasis added), and thus by implication the UK had decided to leave. Indeed, the same February conclusions added that '[i]t is understood that, *should the result of the referendum in the United Kingdom be for it to leave the European Union*, the set of arrangements [listed in the European Council Conclusions of February 2016] cease to exist' (emphasis added). Although the outcome of the referendum may not legally amount to a formal UK decision to leave,<sup>18</sup> it has already had some legal implications at EU level in terms of the relationship between the UK and the EU. Other evidence corroborates that the UK is moving towards leaving the EU, such as its decision to relinquish the Council presidency in the second half of 2017, a decision that has since been officialised in EU law by the ensuing Council Decision to change the order of the presidencies,<sup>19</sup> and by the establishment of the UK cabinet post of State Secretary for Exiting the European Union. Although, taken alone, these elements could not amount to notification, taken together they increasingly substantiate

the UK 'intention' referred to in Article 50 (2) TEU,<sup>20</sup> and at some point this should be acknowledged as such by the Union.

To be sure the notification has implications on the participation of the withdrawing state in the EU decision-making process, which might explain delaying tactics. Notification does not of itself have a terminating effect;<sup>21</sup> as made clear in Article 50(3) TEU, the Treaties 'cease to apply' only when the withdrawal agreement enters into force, or 'failing that, two years after the notification [...] unless the European Council, in agreement with the Member State concerned, unanimously decides to extend the period'. However, the notification is not devoid of immediate legal implications: paragraph 4 stipulates that for the purpose of Article 50(2) and (3) TEU, the member of the European Council or of the Council representing the withdrawing state will not participate in the discussions of these institutions, or in decisions concerning it.

This suspension is logical in view of the significant involvement of the European Council and of the Council in the withdrawal process: the former determines the guidelines for negotiating the withdrawal agreement with the state concerned, whereas the latter concludes it. Conversely, the envisaged arrangement indicates that the citizens of the withdrawing state who work for these institutions, even at administrative levels, or who are members of other EU institutions, such as the Commission (including the High Representative for Foreign Affairs and Security Policy, and the Vice-President of the European Commission), the European Parliament and the Court, not to mention the agencies, bodies and other working groups, would, in principle, not be immediately affected by this exclusion.<sup>22</sup> Although this may be justified since they

<sup>16</sup> Conclusions, European Council, 28 June 2016, pt. 23.

<sup>17</sup> Section I of the European Council Conclusions concerning the 'United Kingdom and the European Union' foresaw the following: 'iv) Th[e Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union] *will take effect on the date 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*' (emphasis added). Conclusions, European Council, 18-19 February 2016, pts 1-4.

<sup>18</sup> See e.g. M. Elliott (n. 7).

<sup>19</sup> See in this context the Council Decision establishing a revised order in which the member states will hold the presidency of the Council of the EU until 2030 'Following the UK decision to relinquish the Council presidency in the second half of 2017', Council of the EU, press release 475/16, 26/07/2016.

<sup>20</sup> To be sure, a state that clearly intends to leave would have to consider the degree to which lengthening the period prior to activating Article 50 TEU would be in its best interest, particularly in view of the subsequent negotiations of the withdrawal arrangement, and of the future agreement with the EU and its Member States. See further below.

<sup>21</sup> Jochen Herbst, 'Observations on the Right to Withdraw from the European Union: Who are the "Masters of the Treaties"?' (2005) 6 *German Law Journal*, 1756.

<sup>22</sup> Henry G Schermers and Niels Blokker, *International Institutional Law* (2003), at 93, footnote 193; Friel (n. 2), 426; Herbst (n. 21), 1747; Lazowski (n. 3), 530.

do not formally represent their state, some of these citizens might nevertheless be more prone to defending their state's interests, if not their own, in the extraordinary context of withdrawal, and the job relocation that it would entail. They could therefore use their influence, for example within the Commission, if and when taking a legislative initiative that might be of significance to the withdrawing state.<sup>23</sup>

Indeed, if interpreted in reverse, Article 50(4) TEU indicates that the withdrawing state is allowed, somewhat paradoxically, to take part in all other Council and European Council discussions and decisions. Although such participation may be defensible given that the state formally remains a 'Member State' until its effective withdrawal under the terms of paragraph 3, it is questionable whether, from the perspective of democratic legitimacy, it should nevertheless be entitled to influence EU decisions which might never apply to it, or indeed use its position to obtain concessions in the context of the withdrawal negotiations. Although Article 50 TEU does not provide a legal foundation for the outright suspension of the decision-making rights of the withdrawing state as soon as the exit process is formally initiated, paragraph 4 could nevertheless be construed broadly enough so as to limit its weight in the Council and European Council, and thus could circumscribe its influence on the production of EU norms that, potentially, would not affect it. After all, the interests of that state's *people* would still be taken care of, notably in the European Parliament, where its MEPs would, in principle, continue to sit until formal withdrawal.<sup>24</sup> Should there be an interval between the end of the negotiations of the withdrawal agreement and its eventual entry into force, for example if a referendum was organised by the withdrawing state on the draft agreement, or if there was a provision in the agreement postponing its application to a later date, that pre-withdrawal phase could, indeed, be akin to the period following the signature of a treaty of accession, allowing the state concerned a more limited 'observer' status – notably in the Council and European Council – rather than a fully-fledged voting right until the agreement enters

into force.<sup>25</sup> Otherwise, the withdrawing state would have more influence than a state about to become member.

That being said, it could be argued that the suspensory effect of the notification should not be construed too broadly so as not to make it too difficult for the state concerned to change its mind before the completion of the process (e.g. following a new general election, or after another referendum) at least if it is accepted that, legally, the notification may be withdrawn, thereby halting the exiting process. Article 50 TEU is ambiguous on this point. On the one hand, paragraph 3 foresees that 'the Treaties 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 notification (...), unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period'. One reading of this provision is that once notification is given, there is no turning back: the treaties will cease to apply to the state concerned either upon the entry into force of the withdrawal agreement or at the end of the two year period triggered by the notification; the only possible change in the process being that the European Council and the state concerned alter the time upon which the treaties cease to apply, but not withdrawal as such. This would indeed prevent a Member State from abusing the procedure to gauge what exit terms it could achieve, whilst retaining the assurance of full membership if dissatisfied with those terms. On the other hand, the remaining Member States might still be open to holding up the withdrawal process following a genuine change of position of the state concerned. The European Council and the Member State could indeed extend the period long enough to establish a sufficient track record of tangible re-engagement with the integration process.

The notification, once acknowledged by the European Council, triggers an obligation to negotiate an agreement with the departing state to set out the arrangements for its withdrawal. This obligation is only addressed to the Union. In contrast, paragraph 4 allows the candidate for

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<sup>23</sup> Tatham (n. 4), 151.

<sup>24</sup> Arguably, withdrawal would concern not only MEPs of the nationality of and elected in the withdrawing state, as well as MEPs of a nationality of a different Member State elected in the withdrawing state, but also MEPs of the latter's nationality elected in another Member State. On the situation of MEPs linked to the departing state: <http://www.politico.eu/article/european-parliament-considers-fate-of-its-british-european-parliament/>

<sup>25</sup> Case C-413/04 *European Parliament v. Council* [2006] ECR I-11221; and Case C-414/04 *European Parliament v. Council* [2006] ECR I-11279; Case C-273/04 *Poland v. Council* [2007] ECR I-8925.

withdrawal to wait until the end of the two-year period for its departure to become effective, even in the absence of an agreement. In other words, Article 50 TEU does not require a *negotiated* departure,<sup>26</sup> but only appears to establish a *best endeavours* obligation.<sup>27</sup> The negotiations only depend on the withdrawing state's willingness to discuss, although in principle, until effective departure, as a Member State it remains bound by the obligation of sincere cooperation, and therefore by the duty to help the Union carry out its tasks, including that of negotiating an agreement.

Whether such an obligation may have any actual bearing on the situation is moot. Indeed, in suggesting that the arrangements be set out with the withdrawing state 'taking account of the framework for its future relation with the EU' (paragraph 2), the procedure recognises that the terms and implications of withdrawal would heavily depend on the specific circumstances and the atmosphere in which a possible negotiation would take place. Ideally, the degree of interdependence created by membership could push both parties cooperatively to address the complex implications of their separation, particularly those for EU citizens.<sup>28</sup> Indeed the absence of an agreed settlement might otherwise open the floodgates for legal claims, notably against the leaving state, and might also undermine the prospect of a comprehensive mutually beneficial post-exit agreement.

That a settlement should not be made exceedingly difficult is reflected by the procedural arrangements for the conclusion of the withdrawal agreement. First, in referring to Article 218(3) TFEU, Article 50 TEU indicates that exit ought to be arranged by the EU institutions through a *EU agreement* with the departing state, rather than through an inter-state process and treaty, as in the accession context. Second, the Council has to conclude the ensuing agreement by a qualified majority vote (72% of the remaining 27 Member States, representing 65% of the population). Thus, in

principle, no Member State is able to veto the conclusion of the agreement, in contrast with an accession treaty. Given this particular arrangement, one could justifiably wonder whether the conclusion by the Council, and the absence of any reference to Member State ratification of the agreement, also entails that, in principle, mixity is excluded.<sup>29</sup> Since EU treaties are rather explicit about where Member States must ratify specific agreements (e.g. accession treaties under Article 49 TEU, or an accession agreement to the ECHR, under Article 218(8) TFEU), the silence of Article 50 TEU could indeed be taken as precluding their participation, however surprising that may be in view of the possible broad scope of the agreement, and considering the law and case law on EU treaty-making competence.<sup>30</sup> That the Member States do not have to conclude the agreement would however be consistent with the apparent intention to facilitate its entry into force and, given the destabilising effects it would have on the functioning of the Union, to prevent its ratification dragging on.<sup>31</sup> In short, once agreed, 'exit' would be procedurally easier than 'entry'.<sup>32</sup>

The procedure envisaged by Article 50(2) TEU could also mean that the agreement is not deemed to contain far-reaching EU commitments in terms of future cooperation with the withdrawing state, and might be limited to setting out the technical 'arrangements for [the] withdrawal' (e.g. treatment of officials from the departing state working in EU institutions and bodies, transitional periods permitting some aspects of EU law to continue applying for a period, financial contributions and benefits, etc.), 'taking account of the framework for its future relationship with the Union'. Further articulation of this 'framework of its future relation', referred to in paragraph 2, would thus be left for a separate agreement, to be concluded at a later date in a different legal framework, and perhaps when the withdrawing state would not be sitting on both sides of the negotiating table. That said, the arrangements for withdrawal, however

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<sup>26</sup> It is thus considered by some as an '*unfettered* right to *unilateral* withdrawal': Hannes Hofmeister, "Should I Stay or Should I Go?" – A Critical Analysis of the Right to Withdraw From the EU" (2010) 16 *ELJ*, 589 at 592; also: Tatham (n. 4); Herbst (n. 21).

<sup>27</sup> Rostane Medhi, 'Brèves observations sur la consécration constitutionnelle d'un droit de retrait volontaire', in Paul Demaret, Inge Govaere and Dominik Hanf (eds.), *30 Years of European Legal Studies at the College of Europe/30 ans d'études juridiques européennes au Collège d'Europe: Liber Professorum 1973/74–2003/04* (Brussels: P.I.E.-Peter Lang, 2005).

<sup>28</sup> As pointed out by David Edward, 'EU law and the Separation of Member States' (2013) 36 *Fordham Inter'l LJ* 1151, also Lazowski (n. 3); Medhi (n. 27).

<sup>29</sup> Compare Lazowski (n. 3).

<sup>30</sup> See e.g. Allan Rosas 'Exclusive, Shared and National Competence in the Context of EU External Relations: Do such Distinctions Matter?', in Govaere et al. (n. 1), p. 17.

<sup>31</sup> On the increasing difficulties to achieve ratification, see Carlos Closa, *The Politics of Ratification of EU Treaties* (London: Routledge, 2013).

<sup>32</sup> Phedon Nicolaidis, 'Withdrawal from the European Union: A Typology of Effects' (2013) 20 *Maastricht Journal of European and Comparative Law*, 209.

technical, might still entail policy choices. A case in point would be the movement and treatment of citizens from the withdrawing state, and that of citizens from other Member States resident in that state.<sup>33</sup> It is hardly imaginable that the borders would be shut completely as a result of separation.<sup>34</sup>

That a Member State's exit would entail further agreements also results from the fact that the withdrawal agreement, as an EU agreement, could not in itself modify EU primary law, though such modification would be necessary. For example, the list of contracting parties included in the preambles to the treaties, Article 52 and possibly Article 55 TEU, the geographical references, for example in Article 355 TFEU and the protocols to the treaties, where applicable, may all have to be amended and/or repealed. The amendments imposed by withdrawal would thus have to be introduced through, or in the context of another treaty based on Article 48 TEU, or possibly on Article 49 TEU,<sup>35</sup> as in a treaty of accession concluded with another state.

It remains the case that Article 50 TEU permits altering, in the sense of reducing, the legal borders and territory of the EU, as well as its state composition, without the formal approval of all its Member States. Indeed, if negotiated, the terms of withdrawal would in principle reflect the interests of the Union<sup>36</sup> rather than those of the Member States only. The reference to Article 218(3) TFEU indicates that, in addition to the European Council, the Commission could be involved in drafting the negotiating mandate,<sup>37</sup> and might possibly be entrusted by the Council with the task of negotiating the withdrawal agreement, or at the very least be part of the negotiating team. For its part, the European Parliament, representing the interests of other EU peoples, would have to consent before the conclusion of the agreement and, thus, could also influence its content. Incidentally, how any potential institutional divergence regarding the content and nature of the agreement would be addressed can be questioned. The legal nature and basis of the agreement

might also raise disputes. The *renvoi* in Article 50 TEU to Article 218(3) TFEU opens the possibility for the European Court of Justice to intervene – either by controlling the lawfulness of the decision to conclude it, through the annulment procedure (Article 263 TFEU), or the plea of illegality (Article 277 TFEU), or indirectly through the preliminary ruling mechanism (Article 267 TFEU), or by way of an advisory opinion based on Article 218(11) TEU – to establish the agreement's compatibility with the Treaty.<sup>38</sup> Indeed, unlike an accession treaty based on Article 49 TEU, the jurisdiction of the Court over the withdrawal agreement does not seem to be restricted in any way.

The above discussion indicates that the TEU only sets out the basic elements of the withdrawal process. Much remains to be clarified once such process is activated. That the procedure lacks greater detail may seem paradoxical. After all, its very insertion in EU law was meant to establish in advance the specific steps to be taken in the event of a separation, a context in which ad hoc procedural arrangements are perhaps less easy to agree upon.<sup>39</sup> That said, the imperfection of the procedure reflects the uncertainty of the implications of exit, and the need to leave room to cater for the particular needs of the situation. Perhaps the lack of clarity is also a way to avoid making the clause too user-friendly.

### 3 A new right for EU Member States?

According to one view, leaving the Union had always been possible, both legally and practically, despite the silence of the pre-Lisbon treaties on the matter. Like any other international treaty, any of its contracting parties can leave the EU<sup>40</sup> on the basis of the application of public international law, such as the Vienna Convention on the Law of Treaties (VCLT), or of customary international norms for those states that have not ratified the Convention. Certainly, the absence of such a withdrawal clause in the statute of an international organisation does not in itself

<sup>33</sup> On the possible substance and shape of this agreement, see e.g. Lazowski (n. 3), 528.

<sup>34</sup> Further: Edward (n. 28), 1164.

<sup>35</sup> Bruno De Witte, 'Treaty Revision Procedures after Lisbon', in Biondi, Eeckhout and Ripley (n. 4), p. 107 at p. 125.

<sup>36</sup> Compare Nicolaides (n. 32).

<sup>37</sup> Although the participation of the High Representative should not be excluded at that stage, it is unlikely that she or he would negotiate the agreement as a whole, as it is unlikely to be considered as relating principally or exclusively to the CFSP.

<sup>38</sup> Although there is an ambiguity as to whether other paragraphs of Article 218 TFEU have relevance in the context of Article 50 TEU.

<sup>39</sup> Medhi (n. 27).

<sup>40</sup> While the Court of Justice had interpreted the EC treaty as constituting the Constitutional charter of the Community, it also consistently admitted that it remained an international agreement (notably in Case 6/64 *Costa v. ENEL* [1964] ECR 1251; and Opinion 1/91 *EEA I* [1991] ECR I-6079).

prevent withdrawal by its participating states,<sup>41</sup> and it is precisely because the EC/EU treaties lack specific provisions to that effect that the above *lex generalis* would apply. From this perspective, a Member State could always invoke, for example, a ‘fundamental change of circumstances’, that is, the *rebus sic stantibus* clause (Art. 62 VCLT) to terminate its participation in the treaties, under the strict conditions of Articles 54 and 56 VCLT.<sup>42</sup>

Indeed, even if understood as the constitutional charter for the Union, muteness on withdrawal of the pre-Lisbon EU primary law would also not necessarily preclude it. After all, the absence in the Canadian constitution of the right of provincial secession did not prevent the Canadian Supreme Court from considering such secession conceivable, albeit under certain conditions and provided that it was negotiated with the rest of Canada.<sup>43</sup> Even the ‘unlimited’, ‘indissoluble’<sup>44</sup> or ‘perpetual’<sup>45</sup> characterisation of a Union may not in itself guarantee its everlasting existence. Hence, despite Article 1 stipulating that ‘the Two Kingdoms of Scotland and England shall upon the 1st May next ensuing the date hereof, *and forever after*, be United into One Kingdom by the name of Great Britain’ (emphasis added), the 1706 Treaty of the Union between England and Scotland has been deemed reversible.

The notion that withdrawal from the Community/Union has always been plausible was epitomised by the nationwide referendum held in the UK in June 1975, when British voters were asked whether ‘the UK should stay in the

European Community (Common Market)’, implying that there was no doubt, at least in the UK, that a Member State could always leave.<sup>46</sup> It has also been suggested that withdrawal partly occurred in the case of Greenland, although this was in the specific context of devolution within Denmark’s constitutional system,<sup>47</sup> and when Algeria became independent from France, thereby leaving the Community’s territory.<sup>48</sup>

In sum, the absence of an exit clause in the EU founding treaties, whether approached as international treaties or as the constitutional charter of the Union, did not make withdrawal impossible. It was even contended during the Convention drafting the Constitutional Treaty that this addition might simply be superfluous.<sup>49</sup>

According to the contrary view, given the specific features of the EU legal order, leaving the Union was inconceivable prior to the inclusion of Article 50 TEU. The idea that the EC Treaty was concluded for ‘unlimited duration’,<sup>50</sup> ‘creating a Community of [equally] unlimited duration’,<sup>51</sup> aimed at ‘an ever closer union’, thus precluded Member States’ unilateral withdrawal, which also included withdrawal by means of international law. Notably, it has been wondered whether the strict conditions for termination based on a change of circumstances could ever be met by a Member State in view of the original ‘ever closer union’ purpose of the treaties to which all had to subscribe, and considering that any significant modifications, for example, to the treaties, requires unanimous approval.<sup>52</sup> The supremacy of Union

<sup>41</sup> As Lazowski aptly recalls, the absence of such a clause in the UN Charter did not prevent Indonesia from withdrawing (n. 3), 526; also Schermers and Blokker (n. 22).

<sup>42</sup> This proposition is supported in the literature; e.g. Mehdi (n. 27) who recalls (at 6) that the Praesidium of the Convention made a link between the EU provision and the VCLT; Lazowski (n. 3), 525; it was also the views of some of the *conventionnels* (e.g. proposal for amendment of Art I-59 by Mr Lopes and Mr Lobo Antunes), though criticised by e.g. Hofmeister (n. 26) footnotes 12–14 (and literature mentioned).

<sup>43</sup> Reference *re Secession of Quebec* [1998] 2 S.C. 217; which led to the adoption of Bill C-20, ‘An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference’, 2nd session, 36th Parliament, 1999 (first reading, 13 December, 1999).

<sup>44</sup> The term featured in the defunct Treaty establishing a European Political Community (<[http://aei.pitt.edu/991/1/political\\_union\\_draft\\_treaty\\_1.pdf](http://aei.pitt.edu/991/1/political_union_draft_treaty_1.pdf)>).

<sup>45</sup> The notion featured in the *Articles of Confederation and Perpetual Union*, but not explicitly in the US constitution that replaced them. However see the US Supreme Court judgment in *Texas v. White*, 74 (1869) US 700. On the Articles, see e.g. Armin Cuyvers, *The EU as a Confederal Union of Sovereign Member Peoples – Exploring the Potential of American (Con)Federalism and Popular Sovereignty for a Constitutional Theory of the EU* (Leiden: Leiden University, 2013).

<sup>46</sup> Recall also the ambition of the Labour Party to have Britain leave the EC without referendum in 1981 on the basis of international law; the PASOK party had similar intentions for Greece in 1981.

<sup>47</sup> Interestingly, this was achieved by relying on Art. 48 TEU (OJ 1985 L29). Further: Friel (n. 2), 409ff.

<sup>48</sup> Tatham (n. 4), 142ff.

<sup>49</sup> Suggestion for amendment of Article I-59 DCT by Mr Ernani Lopes and Manuel Lobo Antunes; <[http://european-convention.europa.eu/docs/Treaty/pdf/46/46\\_ArtI%2059%20Lopes%20EN.pdf](http://european-convention.europa.eu/docs/Treaty/pdf/46/46_ArtI%2059%20Lopes%20EN.pdf)>

<sup>50</sup> Art. 53 TEU and Art. 356 TFEU.

<sup>51</sup> Case 6/64 *Costa v. ENEL* [1964] ECR 1251, 1269–1271.

<sup>52</sup> For more see Herbst (n. 21) 1755, Jean Paul Jacqué, *Droit institutionnel de l’Union européenne* (Paris: Dalloz, 2015), p. 141.

law, the enforceable rights it confers directly on Member States and individuals, endowing its institutions with sovereign rights and entitlement to deal with economic, social and political issues, and its compulsory system for the judicial resolutions of disputes, have also been invoked to argue that, at the very least, ‘Member States were not entitled *unqualifiedly* to revoke their membership’<sup>53</sup> (emphasis added). The inclusion of an exit clause in the Treaty establishing a Constitution for Europe was thus regarded as contravening the commitment to an ever closer union that States take on when they become members,<sup>54</sup> and the underlying general principles of loyalty and solidarity to which they are thereby committed.<sup>55</sup>

#### 4 Withdrawal and the ‘ever closer union’ aims of the EU

Although there is little doubt that Member States have always had the possibility to leave the Union, the express inclusion of a withdrawal clause in the TEU does raise the question of its compatibility with the canons of the Union’s legal order. In particular, how can this fit in with the system of the treaties, designed as it is to fulfil the EU’s ‘ever closer union’ objective? This question is all the more acute because the withdrawal procedure involves EU institutions. In view of Article 13(1) TEU, according to which ‘The Union shall have an institutional framework which shall aim to promote its values, *advance its objectives, serve its interests*, those of its citizens and those of the Member States, and *ensure the consistency, effectiveness and of its policies and actions*’ (emphasis added), how could EU institutions be empowered by the treaties to act against the Union’s integration aim? Certainly, such an exit right has a centrifugal force; it impedes the very functioning of the EU in that it becomes a bargaining chip with distorting effects on EU decision-

making,<sup>56</sup> particularly in the hands of larger states.<sup>57</sup> Once used, it could also encourage other Member States to leave.

The broader (legal and political) context in which the clause was introduced is of key significance and should be carefully considered to comprehend its meaning and possible function. The clause derives from the defunct Treaty establishing a Constitution for Europe (TCE). As such, it was an integral part of the EU constitution and constitutionalising package, rather than an element of the de-constitutionalisation course instigated by the 2007 Intergovernmental Conference, following the rejection of the Constitutional Treaty.<sup>58</sup> From this constitutional perspective, the inclusion of the clause in the TCE first reflects the intention to submit it to EU constitutional canons rather than leaving it to the vicissitudes of international law, if withdrawal should ever occur.<sup>59</sup> As Article 50 TEU is the *lex specialis*, any withdrawal of a Member State would thenceforth have to take place within the framework of EU law, rather than outside of it.<sup>60</sup>

Second, the *constituants’* intention to consolidate the dynamic of the ‘ever closer union’ may explain, at least in part, the acknowledgement of the right to withdraw. The latter was thus understood as a safety valve to reassure Member States<sup>61</sup> that they would always be allowed to leave, should they be uncomfortable with the integration path envisaged by the Constitutional Treaty – which the Treaty of Lisbon did not fundamentally alter.<sup>62</sup> In the initial context of the constitutionalisation of the EU Treaties, and of the strengthened commitment to integration that it arguably entailed, the inclusion of the exit would therefore be a *quid pro quo*.<sup>63</sup> For Member States’ the choice *not* to leave arguably entails a firm pledge to pursue the ‘ever closer union’ goal, in

<sup>53</sup> Koen Lenaerts and Piet van Nuffel, *Constitutional Law of the European Union* (London: Sweet and Maxwell, 2005), p. 363.

<sup>54</sup> Friel (n. 2); Harbo (n. 14).

<sup>55</sup> Compare Medhi (n. 27), 3; Herbst (n. 21), 1756.

<sup>56</sup> Friel then speaks of a ‘system of delayed withdrawal [that] threatens both the withdrawing state and the stability of the Union’; (n. 2), 427.

<sup>57</sup> As typified by the UK ‘renegotiations’ of the terms of its membership, prior the ‘remain or leave’ referendum. Further: Tatham (n. 4), 151; Medhi (n. 27), and literature on secession referred to above (n. 14).

<sup>58</sup> Part 3 IGC, 2007 Mandate (11218/07, 26 June 2007).

<sup>59</sup> Medhi (n. 27).

<sup>60</sup> The argument that Article 54 of the Vienna Convention on the Law of Treaties would make it possible for a state to withdraw from the EU outside the framework Article 50 TEU if Member States unanimously so decide, is questionable. The provision confers on the EU a competence to organise the withdrawal process that it exercises through its institutions. The Member States would infringe that competence if they decided to allow withdrawal outside the EU framework. Either they would have to modify the EU treaties to withdraw that competence first, or arguably the EU too should have to approve withdrawal outside the EU exit clause.

<sup>61</sup> For Shorten: ‘a pressure valve that deflates full blown secessionist politics?’ (n. 14).

<sup>62</sup> Jacqué (n. 52); Medhi (n. 27).

<sup>63</sup> See e.g. Harbo (n. 14), 42. Indeed, the then president of the European Convention considered that withdrawal should be open to those states that would not ratify the constitution, so as not to prevent the latter’s ultimate entry into force.

line with the principle of sincere cooperation now enshrined in Article 4(3) TEU. Conversely, the latter principle could be construed as inviting, though not obliging, a recalcitrant Member State to consider withdrawal to allow the Union to fulfil its tasks and pursue its integration objectives – rather than allowing that state to achieve the dilution, or deletion of the aim of ever closer union.<sup>64</sup>

The right to withdraw may thereby be interpreted as the ultimate elaboration of constitutional devices (e.g. the subsidiarity principle, enhanced cooperation, opt-outs, Article 4(2) TEU) conceived to cater for the needs of less integrationist states. By the same token, it confirms that participation in the European integration process is essentially voluntary and that the continental vocation of ‘ever closer union’ cannot trump its democratic foundations encapsulated in the idea expressed in the Preamble to the TFEU that only European peoples who ‘share [this] ideal [...] join in [the Member States’] efforts’.<sup>65</sup> Indeed, the expressions of ‘shar[ing] their ideal’ and ‘join[ing] in their efforts’, may take several forms, of which membership is but only one, particularly in view of the changing conception of the accession-integration nexus.<sup>66</sup> Hence non-membership

does not technically result in non-participation in, let alone rejection of, the European integration process. The network of EU association agreements with third European states *not* seeking membership, such as the EEA, or the EU bilateral arrangements with Switzerland, is a useful reminder of this point.<sup>67</sup>

The introduction of Article 8 TEU by the Treaty of Lisbon should also be considered in this context. Building upon the ad hoc European Neighbourhood Policy,<sup>68</sup> the provision establishes a specific mandate for the EU to develop a ‘special relationship’ with neighbouring states, aimed at establishing an area of prosperity and stability based on EU values and involving ‘the possibility of undertaking activities jointly’.<sup>69</sup> Read in the light of Article 21(1) TEU, Article 8 suggests that the post-Lisbon integration goal transcends the legal boundaries of the Union and those of its constituent states.<sup>70</sup>

By definition, the withdrawing state would become a European neighbour of the Union, which would fall within the ambit of Article 8 TEU and with which the EU would be bound to engage as a result.<sup>71</sup> Thus, this provision not only bolsters the normative basis for a *negotiated* withdrawal, it

<sup>64</sup> UK keen to delete “ever closer union” from EU treaty’, <<http://euobserver.com/political/121607>>. See also the letter of 10 November 2015 of then UK Prime Minister Cameron to European Council President Tusk, entitled ‘A new settlement for the United Kingdom in a reformed European Union’; cp. Section C, pt. 1, of the Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union; Annex I of the Conclusions of the European Council of 18-19 February 2016.

<sup>65</sup> See, in this respect, para. 27 of the Conclusions of the European Council of 27 June 2014, <[www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/ec/143478.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/143478.pdf)>

<sup>66</sup> For more on this point, see C. Hillion: ‘Accession and Withdrawal in the Law of the European Union’, in Anthony Arnulf and Damian Chalmers (eds.) *Oxford Handbook of European Union Law* (Oxford: OUP, 2015)

<sup>67</sup> Consider Norway’s current position in relation to the EU, as thoroughly explored in Fredrik Sejersted et al., *Utenfor og innenfor – Norges avtaler med EU* (Oslo: NOU, 2012); see also the contributions in Isabelle Bosse-Platière et Cécile Rapoport (eds.) *L’Etat tiers en droit de l’Union européenne* (Paris: Bruylant, 2014); as well as the status of ‘associate membership’ envisaged by The Spinelli Group, *A Fundamental Law of the European Union* (2013), <[www.spinelligroup.eu/article/fundamental-law-european-union](http://www.spinelligroup.eu/article/fundamental-law-european-union)> pp. 20 and 93; Adam Lazowski, ‘Enhanced multilateralism and enhanced bilateralism: integration without membership’ (2008) 45 CMLRev, 1433.

<sup>68</sup> Steven Blockmans, ‘Friend or Foe? Reviewing EU Relations with its Neighbours Post Lisbon’, in Panos Koutrakos (ed.), *The European Union’s External Relations A Year After Lisbon*, CLEER Working Papers 2011/3, 113; Marise Cremona and Christophe Hillion, ‘L’Union fait la force? Potential and limits of the European Neighbourhood Policy as an integrated EU foreign and security policy’ (2006) *European University Institute Law Working Paper No 39/2006*.

<sup>69</sup> For more on Art. 8 TEU: Peter van Elsuwege and Roman Petrov, ‘Article 8 TEU: Towards a New Generation of Agreements with the Countries of the European Union?’ (2011) ELRev, 688; Dominik Hanf, ‘The ENP in the light of the new “neighbourhood clause” (Article 8 TEU)’ (2011) *College of Europe Research Paper in Law – Cahiers juridiques* No 2/2011; Christophe Hillion, ‘The EU neighbourhood competence under Article 8 TEU’, in Elvire Fabry (ed.), *Thinking Strategically about the EU’s external action* (Paris: Jacques Delors Institute, 2013), p. 204.

<sup>70</sup> See e.g. Sandra Lavenex and Frank Schimmelfennig (eds.), *EU External Governance. Projecting EU Rules Beyond Membership* (London: Routledge, 2010); Anne Myrjord, ‘Governance Beyond the Union: EU Boundaries in the Barents Euro-Arctic Region’ (2003) 8 *European Foreign Affairs Review*, 239.

<sup>71</sup> Whether this provision was ever envisaged as a post-membership device is a moot point. Suffice to recall that in its initial formulation in the draft Treaty establishing a Constitution for Europe, the withdrawal clause was inserted in Title IX along with the accession and suspension clauses respectively, which followed Title VIII on the EU’s relations with its neighbourhood.

also points towards a strong post-exit engagement between the Union and the former Member State. The legal system of the withdrawing state' might not be entirely shielded from the influence of EU law as a result. Indeed, although enlargement is a EU foreign policy aimed at transforming a third state into an operational member, withdrawal is also part of EU foreign policy.<sup>72</sup> It is a process whereby a member becomes a third state with which the Union is expected to entertain a special relationship.

Withdrawal thus entails the production of new post-membership external devices<sup>73</sup> that are all the more pressing given the degree of interaction and interdependence built into the context of membership.<sup>74</sup> Certainly, the concerns of citizens living and working in the withdrawing state ought

to be addressed,<sup>75</sup> notably in view of the first EU mission that, according to Article 3(1) TEU, is to ensure the 'well-being of its peoples'.

## 5 Concluding remarks

The Treaty on European Union explicitly foresees that a Member State may leave the EU. This power is not entirely new, but its acknowledgement and partial articulation in EU primary law entail that the classic canons of public international law no longer exclusively govern its exercise. Moreover, and as paradoxical as it may seem, such a codification may ultimately serve the purpose of 'ever closer union' of the European integration process. In effect, the EU makes it possible for a member to leave rather than obstructing its development.

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<sup>72</sup> The two processes also have consequences for the rest of the world. Accession thus entails that the acceding states denounce agreements in areas where the EU is exclusively competent; conversely, once outside the Union the withdrawing state has to establish and re-establish agreements both with third states and the EU in those very areas.

<sup>73</sup> For more see Jean Claude Piris, 'Which Options Would Be Available to the United Kingdom in Case of a Withdrawal from the EU?' (2015) *CSF-SSSUP Working Paper No 1/2015*.

<sup>74</sup> Edward (n. 28), 1164; Adam Lazowski, 'How to withdraw from the European Union? Confronting hard reality' (2013) *CEPS Commentary*, <[www.ceps.eu/publications/how-withdraw-european-union-confronting-hard-reality](http://www.ceps.eu/publications/how-withdraw-european-union-confronting-hard-reality)>

<sup>75</sup> Herbst (n. 21), 1755.

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