STUDY

Requested by the AFCO committee

European Parliament

Interpretation and implementation of Article 50 TEU

Legal and institutional assessment

Policy Department for Citizens' Rights and Constitutional Affairs
Directorate-General for Internal Policies
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Interpretation and implementation of Article 50 TEU

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Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, looks into the constitutional and institutional challenges that the European Union faced during the Brexit negotiations, and analyses whether the current wording of Article 50 of the Treaty on European Union was applied in an adequate manner and allowed for an efficient and properly organised withdrawal procedure.

This document was requested by the European Parliament's Committee on Citizens' Rights and Constitutional Affairs.

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LIST OF ABBREVIATIONS

AFCO	Constitutional Affairs Committee
ALDE	Group of the Alliance of Liberals and Democrats for Europe
BSG	Brexit Steering Group of the European Parliament
CJEU	Court of Justice of the European Union
EEC	European Economic Community
EPP	Group of the European People's Party
EU	European Union
Greens/EFA	Greens/European Free Alliance
IGC	Intergovernmental Conference
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom of Great Britain and Northern Ireland
UKIP	United Kingdom Independence Party
VCLT	Vienna Convention on the Law of Treaties

EXECUTIVE SUMMARY

Background

The effective departure of the United Kingdom from the European Union on 31 January 2020 settled, for some time at least, the troubled relationship between Britain and Europe, 48 years after the country joined the then European Economic Community and three and a half years after the Brexit referendum of 23 June 2016.

This long process marked, also, **the first application of the procedure stipulated in Article 50 of the Treaty on European Union** which affords a legal way for Member States to withdraw the Union. The provision was introduced by the Lisbon Treaty as a means to ensure Member States that they could leave the Union, if they so desired. However, as one thought that it would never be applied, the Article defines a complete process but is, at the same time, succinct: the provision leaves a number of institutional issues unanswered.

Now that the EU and the UK have, in the words of Commission President Ursula von der Leyen after the conclusion of the EU-UK Trade and Cooperation Agreement on 24 December 2020, "*left Brexit behind*" it is time to look at the withdrawal process from a distance in order to determine how the provisions of Article 50 TEU have been interpreted and applied during this process.

This study examines the constitutional and institutional challenges that arose during Brexit in relation to the application of Article 50 TEU and **analyses whether its current wording was sufficient and facilitated an efficient and properly organised withdrawal procedure**. The study does not aim to anticipate other "exits" nor to facilitate or render them more difficult. Rather, it scrutinises the entire process of Brexit and looks into the procedures used during the negotiations in order to determine whether Article 50 TEU allowed for a suitable use of these procedures both internally, among the various EU institutions, and when dealing with the withdrawing Member State.

The period before the triggering of Article 50 TEU raised two main questions related indirectly to Article 50 TEU. Firstly, **the lack of a clear time limit** within which a Member State that wishes to withdraw should formally submit the relevant notification. The UK case showed that the EU has little influence over what is a Member State's right. The second question concerns **the involvement of the legislative branch** in the formal notification process: the UK case demonstrated the need to clarify the relevant provision of Article 50 TEU on the "*respect of a Member State's own constitutional requirements*".

A significant lesson, both institutionally and politically, for the EU was its early decision over the format of the negotiations; the EU stressed its **unity** during the negotiations, avoiding any bilateral talks with the UK, chose **not to open negotiations** before the UK notified its decision to leave the EU and channelled **all discussions** with the UK **through the EU Chief negotiator**.

The start of the negotiations brought into the forefront the issue of **the sequence of the withdrawal negotiations** which should be conducted "*taking account of the framework for [the withdrawing state's] future relationship with the Union*". The EU opted for a "phased approach" and insisted on negotiating first on the withdrawal and at a later stage on future trade relations. It remains open to discussion whether this approach is in line with the Article's intention and whether, in the specific context, another approach would be feasible.

The negotiations also allowed to **clarify** as well as to **shape the role of the various EU institutions** in the withdrawal process. The negotiations confirmed the significant **political role of the European Council** as well as the incontestable **trust in the European Commission** to lead them. The negotiations also allowed **expanding the involvement of the European Parliament** in the relevant debate; Parliament used a novel institutional setup, stressed both its political weight and showed full institutional respect to the unity of the EU. It managed, thus, both to forge for itself a meaningful place in the withdrawal context and to successfully defend its priorities.

The final text of the withdrawal agreement demonstrates the extremely intricate relations that have been established within the EU. Separation has been complex and required meticulous, legal provisions which cannot be thoroughly covered in a Treaty Article; but the text can be seen as a model for any future such agreement and provides for a **comprehensive protection of rights for citizens** affected by the withdrawal and a **complete and clear financial settlement**. It also demonstrates that the governance of the agreement must be tailor-made, in any case, leaving sufficient space for the Union's autonomy and CJEU involvement.

The process of Brexit demonstrated that Article 50 TEU has broadly achieved its objectives for an orderly withdrawal from the EU, respectful of the institutional balance and the objectives of the Union. It remains up to the EU to consider whether it is expedient or not to look further into the lacunae and omissions that the Article's use during Brexit showed and review accordingly the Article. To this end, the study concludes with **a number of relevant recommendations** also in view of **the upcoming Conference on the Future of Europe**. These include:

- The desirability of revisiting the **need to maintain in the Treaties a provision to regulate the withdrawal of a Member State**.
- Following the CJEU judgment on the *Wightman* case, the need to **clarify or set conditions** on the **right to revoke** a withdrawal notification.
- The suitability of a **longer,** or **conditional** to agreement**, negotiation period** in order to allow for a clearer perspective on the future relations.
- Whether it would be appropriate for the EU institutions to consider adopting some form of **'roadmap to separation'**, setting, for citizens and Member States, a set of EU principles and priorities for future uses of Article 50 TEU.

1. INTRODUCTION

The agreement reached on 24 December 2020 on the future relationship between the United Kingdom (UK) and the European Union (EU) settled – for some time at least - the vexed relationship between Britain and Europe, 48 years after the country joined the then European Economic Community (EEC) and four and a half years after the Brexit referendum of 23 June 2016. During that period, the two sides conducted marathon negotiations, firstly in order to resolve the issues related to the withdrawal of the UK from the EU and then to agree on the trade relations of the two sides for the future.

Brexit was the first application of the procedure stipulated in Article 50 of the Treaty on European Union (TEU) which regulates the withdrawal of a Member State from the EU. The provision, in force since the 2009 Lisbon Treaty, aims to afford a legal solution to the hitherto unclear and untested right of Member States to withdraw from the EU. It was first conceived, during the Convention on the Future of Europe set up in order to produce the unsuccessful 2004 Constitutional Treaty. Back then, rather than being an operational provision, this Article was viewed more of a theoretical institutional safeguard aiming to convince apprehensive citizens and Member States that Europe was not 'a prison for peoples' and that nations had a right and a way to leave the Union, if they so desired. At a time when several European states endeavoured to join the EU, it was generally considered that the provision was there just to alleviate fears and that it would never be applied. As such, the provision is complete but, at the same time, succinct. The drafters of the Constitutional Treaty did not delve into the details of the process but more on the general principles governing it. It was, perhaps accurately, regarded that in the hypothetical event of a Member State withdrawal, a lot would have to be decided *ad hoc*, based on political negotiations and that there was no need for detailed provisions in the Treaty.

The Brexit referendum and the decision of the UK citizens to leave the EU brought Article 50 TEU to the forefront. Suddenly, the Article became one of the most studied and analysed provisions of the Treaty. Although there was, already before the Lisbon Treaty and the introduction of Article 50 TEU, an extensive literature on the right to exit the EU, academic research and political analysis of its contents bourgeoned over Brexit but were, consequently, determined, and sometimes dictated, by its specific context.

Now that the EU and the UK have, in the words of Commission President Ursula von der Leyen after the conclusion of the EU-UK Trade and Cooperation Agreement on 24 December 2020, "*left Brexit behind*"[1], it is possible to examine Article 50 TEU from a distance to determine how its provisions have been interpreted and applied during the withdrawal procedure in order to draw conclusions. **The objective of this study is to look into the constitutional and institutional challenges that the EU faced during Brexit and analyse whether the current wording of Article 50 TEU was sufficient and facilitated an efficient and properly organised withdrawal procedure**.

The study has a difficult balance to strike: The objective is not to anticipate other "exits" and should not be seen as intending either to facilitate the withdrawal of other Member States or make it more difficult. Rather, it attempts to scrutinise the handling of the entire process during the Brexit negotiations, to look into the procedures used and to determine whether Article 50 TEU allowed for a suitable use of

[1] "Remarks by President Ursula von der Leyen at the press conference on the outcome of the EU-UK negotiations" 24 December 2020 in https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_2534

these procedures both internally, that is among the various institutions of the EU and its Member States, and when dealing with the withdrawing Member State.

The study is divided in five main chapters, after the introduction and the historical overview. Chapter 3 consists of an institutional and constitutional analysis of Article 50 TEU. It examines both the origins and the underlying reasons for inserting the Article in the Treaty and analyses its content and the institutional steps it contains. Chapter 4 looks, in particular, into the withdrawal negotiations during Brexit; it examines the institutional issues that arose and the way they were dealt in the context of the Article. This chapter also focuses on the sequencing of the negotiations and the decision to proceed first with the withdrawal negotiations and only subsequently with the future relations agreement and examines whether this structure has been the most appropriate one.

Chapter 5 assesses the role of the various EU institutions, paying particular attention to the involvement of the European Parliament (Parliament). This part explores how the Brexit negotiations implicated the institutions and their interaction, from a political and institutional angle. Chapter 6 assesses the outcome of the Withdrawal Agreement from the point of view of the application of Article 50 TEU. Chapter 7 looks at specific issues raised by the application of Article 50 TEU, among others the legal controversy over the revocation of a withdrawal notification and the possibilities of expelling a Member State. The study concludes with specific recommendations on the possible clarification and rewording of the provisions of Article 50 TEU as well as other institutional changes, if necessary.

2. THE HISTORY OF ARTICLE 50 TEU

2.1. The debate over the right to withdraw from the EEC

The European integration treaties did not provide any explicit reference to the right to withdraw. Neither the European Coal and Steel Community (ECSC) nor the European Economic Community (EEC) included provisions to the right of Member States to leave. This absence was as much due to the improbability of a withdrawal as to a deliberate emphasis on the irreversible character of European integration: the preamble to the Rome Treaty proclaimed its objective to found "*an ever-closer union*" among the peoples of the Community while Article 240 stipulated that the Treaty is concluded for an unlimited period.[2]

Until the introduction of Article 50 TEU in the Treaty of Lisbon, the right of a Member State to withdraw from the EEC raised mostly academic interest. Over the years, scholars disagreed over the existence of such a right on doctrinal and political grounds, going into the very essence of European integration.

A 'federalist' reading of the matter, which emphasised the 'autonomous' character of the Union asserted that, by submitting to the Treaties, **Member States surrendered irreversibly part of their sovereignty**.[3] Thus, the right to withdraw was deliberately omitted in the Treaties because states, once they had joined the Communities, could no longer leave. On the other hand, **a more 'intergovernmental' or 'international law'** analysis claimed that the Treaties, as any other international law instrument, cannot bind Member States perpetually and sustained that Member States could withdraw following the rules of customary international law or, later, the withdrawal provisions set in the 1969 Vienna Convention on the Law of Treaties (VCLT).[4]

The first analysis drew support from the European Court of Justice (ECJ, now Court of Justice of the European Union, CJEU) case law. ECJ had inferred on several occasions that membership of the EEC was not reversible. The 1964 *Costa v. Enel* case specified that:

> *As opposed to other international treaties, the Treaty instituting the E.E.C. has created its own order […]. In fact, by creating a Community of unlimited duration, having its own institutions, its own personality and its own capacity in law, apart from having international standing and more particularly, real powers resulting from a limitation of competence or a transfer of powers from the States to the Community, the member-States, albeit within limited spheres,* ***have restricted their sovereign rights*** *and created a body of law applicable both to their nationals and to themselves.*[5]

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[2] It should be recalled that the 1953 Draft Treaty on the European Political Community stipulated, in article 1, that the Community was '*indissoluble*'. This wording was replaced by the less final one of '*unlimited duration*' in the Rome Treaty.

[3] See, among others, Blumann, C. - Dubouis, L. (2007)) *Droit institutionnel de l'Union européenne*, 3e éd., Paris, NexisLexis/Litec, 2007, p. 70. Louis, J.-V. (2006) « Le droit de retrait de l'Union européenne », *Cahiers du Droit Européen,* no 3-4/2006, p. 299.

[4] See, among others, Tsiliotis, Ch. (2020), *The withdrawal of the United Kingdom from the European Union (Brexit) under the light of the Union and British constitutional Law* (in Greek), Sakkoulas editions, Athens 2020, pp. 23-29.

[5] Judgment of the Court of 15 July 1964, Flaminio Costa v E.N.E.L. Reference for a preliminary ruling. Case 6-64. ECLI:EU:C:1964: 66. Paragraph 3.

Even more clearly, the ECJ's first opinion (1991) on the European Economic Area (EEA) agreement pointed out that:

> *The EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals.*[6]

Such 'autonomous' reading was challenged by other scholars and especially supreme courts of Member States, which professed that these had the right to withdraw (following negotiations or even unilaterally).[7] This position was notably pointed by the German Constitutional Court, in its famous Maastricht ruling, where it declared that:

> *The Federal Republic of Germany remains a member of a compound of States [Staatenverbund], the authority of which is derived from the Member States and has binding effect in German sovereign territory only by virtue of the German command to apply the law [Rechtsanwendungsbefehl]. Germany is one of the "High contracting parties" [Herren des Vertrages] which have given as the reason for their commitment to the Maastricht Treaty, […] their desire to be members of the European Union for a lengthy period; such membership may, however, be terminated by means of an appropriate act being passed.*[8]

While further down it claimed again that:

> *The Maastricht Treaty sets long-term standards which […] finally do not stand in the way of withdrawal from the Community as a last resort if it proves impossible to achieve the stability sought.*[9]

The UK legal order also defied the irreversible character of the Treaties. In his dissent over the case *Macarthys Ltd v Wendy Smith*[10] which later was referred to the ECJ, Lord Denning, Master of the Rolls, while supporting the supremacy of EU law over domestic one, considered granted that the UK Parliament is free and able to leave the Community, as follows:

> *"If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the*

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6. Opinion of the Court of 14 December 1991 - Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area. Opinion 1/91. ECLI:EU:C:1991:490, paragraph 21.

7 On the relation between the right to leave the EU and national constitutional courts see Cirlig C-C. (2020) *Article 50 TEU in practice. How the EU has applied the 'exit' clause*, EPRS (European Parliamentary Research Service). In-depth analysis. European Parliament. PE 659.349 – November 2020 p. 4.

8 Bundesverfassungsgericht (Federal Constitutional Court) [hereinafter BVerfG], Judgment of Oct. 12, 1993 (Maastricht), 89 155.BGBl. 1973 II S. 430). Paragraph 112. BGBl. 1973 II p. 430.

9 Ibid. Paragraph 147.

10 Macarthys Ltd v Smith [1979] 3 All ER 325.

> *statute ... Unless there is such an intentional and express repudiation of the Treaty, it is our duty to give priority to the Treaty.*[11]

Such **doctrinal debates collided with the political reality and the practical difficulty of forcibly keeping a state within the EEC**. If a Member State were to decide to leave the Community, it is unlikely that other Member States would use legal means to prevent it. It was equally unlikely that the withdrawing Member State would prefer to leave in a disorderly manner rather than pursue some form of *ad hoc* negotiations with a view to a mutually satisfactory exit procedure.[12]

It was assumed that, in such a case, legal objections to withdrawal would yield to politics. This was confirmed in the cases of the independence of Algeria[13] in 1962 and the withdrawal of Greenland[14] in 1985. In both cases,[15] it was not a Member State, but rather a part of it, which decided to leave the EEC because it either became independent or self-governed and they are not directly comparable to the withdrawal of a Member State. Both France and Denmark continued to be bound by the Treaties in the totality of their (new) territory. Such decisions, however, set political precedents in favour of a right to leave the EEC following a relevant political decision.

The first British referendum on EEC membership of 1975 is more useful in this respect. The UK joined the EEC through a parliamentary vote that revealed solid fissures within both major parties over EEC membership: The House of Commons voted the 1972 European Communities Act by a tight vote of 301 to 284. The opposition Labour Party, in particular, was split over the matter and pledged to renegotiate the country's membership terms and then put the outcome to a national referendum. After

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[11] In https://learninglink.oup.com/static/5c0e79ef50eddf00160f35ad/casebook_107.htm. For a legal analysis of the assumption see Allan, T. R. S. "Parliamentary Sovereignty: Lord Denning's Dexterous Revolution." *Oxford Journal of Legal Studies* 3, no. 1 (1983): 22-33.

[12] Joseph H. H. Weiler, "Alternatives to Withdrawal from an International Organization: The Case of the European Economic Community," *Israel Law Review* 20, issue 2-3 (Spring-Summer 1985), p. 288.

[13] Algeria joined the EEC as an integral part (rather than a colony) of France. The independence of Algeria in 1962, after the Evian Accords, had the ancillary effect of the *de facto* withdrawal (in fact, secession) of the new state from the EEC. The independence negotiations were conducted exclusively on a bilateral level between the French government and the Algerian FLN without any involvement of the European institutions which, however, never questioned the withdrawal. In fact, Algeria received a special treatment after independence in order to reduce the impact of its separation from the EEC on its economy. See Ben Hamouda, Houda. « Le rôle de la France envers le Maghreb au sein de la Communauté européenne (1963-1969) », *Matériaux pour l'histoire de notre temps*, vol. 99, no. 3, 2010, pp. 90-97.

[14] Greenland joined the EEC in 1973, as part of Denmark, despite the fact that the majority of its inhabitants opposed membership. After Denmark granted home rule to Greenland, the government of the island requested a referendum to be held on the withdrawal of the island from the EEC, on various grounds. The referendum, held in 1982, produced a majority in favour of leaving the EEC. Denmark consented to this withdrawal which did not provoke any objections from among the other Member States. See Frederik Harhoff, (1983) "Greenland's Withdrawal from the European Communities", *Common Market Law Review*, 20 (1), pp. 13-33, in https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/20.1/COLA1983002. The withdrawal was legally completed by means of a Treaty modification, in accordance with its revision provisions. The Treaties ceased to apply to Greenland and as concerns the EEC Treaty, Greenland was added to the list of the overseas territories in accordance with Part IV of the Treaty of Rome (currently Article 204 TFEU). As a matter of fact, it was the Commission that suggested the legal path (a treaty revision with transitional arrangements and a new agreement on fishing zones) to the disengagement of the island from the EEC. See Status of Greenland. Commission opinion. Commission communication presented to the Council on 2 February 1983. COM (83) 66 final, 22 February 1983. Bulletin of the European Communities, Supplement 1/83. [EU Commission - Working Document]

[15] To these two cases, the French island of Saint Barthélemy should be added. Saint Barthélemy was part of the French department of Guadeloupe and an outermost region of the EU. Following the desire expressed by the elected representatives of the island and the initiative of the French Republic, it was taken out from the list of the outermost regions of the EU and became an overseas territory, covered by Part Four of the TFEU. See *European Council Decision 2010/718/EU of 29 October 2010 amending the status with regard to the European Union of the island of Saint-Barthélemy*. OJ L 325, 9.12.2010, p. 4–5.

it won the 1974 elections, the new Labour government negotiated better terms (in particular over the UK's contribution to the EEC budget) with the other Member States and, subsequently, held a referendum on 5 June 1975 on the following question:

> *"The Government has announced the results of the renegotiation of the United Kingdom's terms of membership of the European Community. Do you think the United Kingdom should stay in the European Community (the Common Market)?".*

Throughout the negotiations and during the referendum campaign, there was no challenge to the right of the UK to hold such a referendum and, subsequently, leave the EEC. The positive outcome of the vote (by 67,2% of the electorate) avoided having to deal with a withdrawal at that time, but it made clear that Member States could envisage and even organise such a withdrawal.[16]

2.2. The origins of Article 50 in the Convention on the Future of Europe

A formal process for the withdrawal from the EU was **first introduced in the 2002-2003 Convention on the Future of the European Union**, established with the purpose to draft a constitution for the EU. The outline of provision, in general terms, appeared in the "framework" draft constitutional treaty proposed by the Convention's Presidium on 28 October 2002.[17] It was also included in the European Commission (Commission) contribution to a preliminary draft Constitution of the European Union (so-called Penelope Paper) which allowed a Member State to withdraw from the EU only in case it did not accept a revision of the European Constitution, in accordance with the constitutional rules of the Member State concerned.[18]

The Convention conducted rather passionate debates on the matter[19] and several amendments were tabled.[20] Initially focused on whether this provision should be retained or deleted, the debate in the Convention moved later, as a majority came out in favour of such an article, towards its precise wording and the unilateral or negotiated character of it. Some members of the Convention accepted the principle of withdrawal but intended to restrict its scope and/or make its consequences more severe. The Commission's proposal and other relevant amendments which made withdrawal conditional to a constitutional revision were not accepted, in particular by the candidate member states. The final wording of what, at that stage, was Article 46 on '*Voluntary withdrawal from the Union*' was presented

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16 Wall, S. (2012) *The official history of Britain and the European Community, vol. II: From rejection to referendum, 1963-1975*, in particular p. 577 where Wilson openly discusses at the Dublin European Council with the other heads of state and government the issues on the renegotiation table "*if, after the referendum, we remain as a member*".

17 "*Article 46. This article would mention the possibility of establishing a procedure for voluntary withdrawal from the Union by decision of a Member State, and the institutional consequences of such withdrawal*." Preliminary draft Constitutional Treaty. CONV 369/02. Brussels, 28 October 2002.

18 European Commission. *Contribution to a preliminary draft Constitution of the European Union*, Working Document. 04/12/2002 in https://www.europarl.europa.eu/meetdocs/committees/afco/20021217/const051202_en.pdf. Article 103. See European Convention Secretariat *Summary Report of the Plenary Session* - Brussels, 24 and 25 April 2003, Document CONV 696/03 dated 30 April 2003 in https://web.archive.org/web/20070731083430/http:/register.consilium.eu.int/pdf/en/03/cv00/cv00696en03.pdf

20 See European Convention Secretariat, *Summary sheet of proposals for amendments concerning Union membership: Draft Articles relating to Title X of Part One (Articles 43 to 46)*, Document CONV 672/03 dated 14 April 2003 in http://european-convention.europa.eu/pdf/reg/en/03/cv00/cv00672.en03.pdf.

by the Presidium in its draft on 4 April 2003.[21] **The principle of an unconditional withdrawal prevailed, tempered with a temporary delay of the effect of withdrawal**.

Following the failure of the Constitutional Treaty, the Intergovernmental Conference (IGC) that drafted the Reform Treaty (later the Lisbon Treaty) maintained the provision (as Article 50 of the Treaty on European Union), with an almost identical wording.

[21] Following the modifications in the order of the articles, withdrawal was eventually introduced as Article I-60 of the Constitutional Treaty.

3. A CONSTITUTIONAL ANALYSIS OF ARTICLE 50

Article 50 TEU states:

> *1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.*
>
> *2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.*
>
> *3. 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 referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.*
>
> *4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.*
>
> *A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.*
>
> *5. If a State which has withdrawn from the Union asks to re-join, its request shall be subject to the procedure referred to in Article 49.*

The text of the Article in the Lisbon Treaty is identical to that of the Constitutional Treaty, save some technical amendments on the references to other Articles and the clarification in paragraph 2 that the withdrawal agreement shall be concluded "on behalf of the Union".

The provision, as already stated, describes a complete process. It is however succinct and inevitably limited. This chapter examines Article 50 TEU from a legal and an institutional perspective.

3.1. An unconditional and unilateral, though time-delayed, right to withdraw…

The various requirements of the Article cannot conceal that it introduces a **voluntary, unilateral and unconditional right of a Member State to leave the Union**. As the majority of the members of the Convention wanted, the decision to withdraw is the sovereign decision of the Member State. It is not dependent on the acquiescence of other Member States or EU institutions and cannot be subject to

conditions set by them. The provision consecrates that Member States remain the '*Masters of the Treaties*' and, as such, maintain an inherent right to leave the Union. This unilateral and unconditional character has been confirmed by academics and politicians alike. It also corroborates the pre-existing jurisprudence of national constitutional courts. As the German Constitutional Court put it, in its Lisbon Treaty judgement, "**the free right of withdrawal is alleged to confirm the continued existence of state sovereignty**".[22] For the Court:

> *"withdrawal from the European union of integration (Integrationsverband) may, regardless of a commitment for an unlimited period under an agreement, not be prevented by other Member States or by the autonomous authority of the Union. This is not a secession from a state union (Staatsverband) […], but merely the withdrawal from an association of sovereign states (Staatenverbund) which is founded on the principle of the reversible self-commitment".* [23]

The judgment states that the Lisbon Treaty makes "explicit for the first time in primary law the **existing right of each Member State to withdraw** from the European Union" [our emphasis] and confirms that German membership to the EU "depends [...] on its lasting and continuing will to be a member of the European Union".[24]

The Article stresses that withdrawal should, preferably, be achieved through negotiations, but this does not alter the undisputed right to leave. It is up to the withdrawing state to opt or not for a negotiated path. Still, this unequivocal right does not, in itself, make withdrawal easier: the political and economic realities of the "*high enmeshment*" among Member States and the "*potential, real or perceived, for political and economic losses*"[25] constitute a much stronger incentive towards a negotiated exit that a mere provision of the Treaty.

3.2. …But a compulsory Union procedure

Although the right to withdraw is unilateral and unconditional, it still differs both in essence and procedurally from withdrawal from other international treaties. **Withdrawal is integrated into the EU legal order** and so it excludes the alternative use of relevant provisions in international law, in particular either customary international law or the VCLT exit provisions. **Article 50 TEU is the only legal path to leave the EU.** Its particular Union character is underlined by the fact that withdrawing state is a 'Member State', rather than a 'High Contracting Party';[26] negotiations are not conducted with the other Member States but in a Union context with the EU institutions (the European Council, the Council of the European Union (Council) and the European Commission). The agreement to withdraw is constructed under EU law: it is concluded '*on behalf of the Union*' by the Council after it has received

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[22] German Constitutional Court (BVerfG), Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 (Lisbon Treaty judgment), paragraph 150. In http://www.bverfg.de/e/es20090630_2bve000208en.html

[23] Ibid. Paragraph 233.

[24] Ibid. Paragraph 329.

[25] Weiler, J.H.H. (1999), *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration*, Cambridge University Press. p.18

[26] Hillion, C. (2017) "This Way, Please! A Legal Appraisal of the EU Withdrawal Clause," In Closa, C. (ed.), *Secession from a Member State and Withdrawal from the European Union: Troubled Membership*, Cambridge, Cambridge University Press, p. 217.

the consent of the European Parliament. Given the sequence in the wording of Article 50(2) TEU, **without the Parliament's consent, there can be no move to a qualified majority vote in the Council;** therefore, the withdrawal agreement is not concluded. As an EU legal act, the agreement is subject to control by the CJEU.[27]

The character of the withdrawal agreement as a Union legal text is not in doubt, but there is a debate as to its so-called 'dual nature'[28] vis-à-vis the withdrawing state. The dual nature is not referring to its effect within the (remaining) EU, but rather as regards the withdrawing Member State after withdrawal and any subsequent transitory arrangements. Within the EU, it remains the same legal act. It constitutes a secondary source of EU law and courts in EU Member States may submit to the CJEU preliminary references on its interpretation. After withdrawal, however, its legal position changes *vis-a-vis* what is henceforth a third country. The CJEU's judgments will no longer be binding for the state that has withdrawn and its courts will not be able to make references to the former. Presumably, the agreement may include a settlement mechanism for disputes between the two parties (though not for issues relating to the effects of the agreement within the EU, where jurisdiction remains with the CJEU).[29] Also, direct effect of the withdrawal agreement in the EU remains unaltered, but direct effect over the state that left will depend on relevant, bespoke, provisions in the withdrawal agreement and, in the absence thereof, on international law.

The agreement is part of EU law but "*in the hierarchy of EU law norms, it ranks below the EU Treaties and the foundational principles of EU law*".[30] This means that it cannot modify the Treaties (indeed even the technical and geographical modifications cannot be achieved in the withdrawal agreement) and, more important, its provisions must respect these principles as well as the Charter of Fundamental Rights. The reference to Article 218 of the Treaty on the Functioning of the European Union (TFEU) which is the legal basis for international agreements with third states is revealing: the EU cannot commit to international agreements that violate the fundamental principles of the EU legal order (fundamental rights, rule of law); by analogy, it cannot conclude a withdrawal agreement that violates these principles. The withdrawal agreement, thus, cannot, *inter alia,* discriminate between EU citizens or prevent the CJEU from interpreting its provisions.

3.3. In accordance with the [withdrawing state's] own constitutional requirements

The Article stipulates that the decision to withdraw should be taken in accordance with the Member State's own constitutional requirements. This sentence poses a number of problems, already raised during the Convention. In fact, **the deletion of the sentence was proposed twice**, firstly during the

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27 Weerts, J. « L'évolution du droit de retrait de l'Union européenne et sa résonance sur l'intégration européenne » in *Cahiers de droit européen*, Vol. 48, Nº 2, 2012, pp. 393.

28 Fernandez Tomas, A.F. *The Settlement of disputes arising from the United Kingdom's withdrawal from the European Union,* European Parliament Policy Department for Citizens Rights and Constitutional Affairs, PE 596.819. November 2017, pp. 48-49.

29 Tridimas T. (2016) "Article 50: An Endgame without an End?", *King's Law Journal*, 27:3, p. 310.

30 Ibid. p. 311.

Convention itself[31] and later on at the Constitutional Treaty IGC;[32] both times it was retained. The objection, both times, was that **it might imply that the EU should be able to assess the constitutionality of a withdrawal decision** and immerse the EU into domestic political and constitutional quarrels, furthering the crisis between that Member State and the EU.

The rationale of the sentence is powerful: the EU and its Member States form a community ruled by law. **This provision should prevent a government from usurping such a major decision from the legislative branch, or from its people**. A Member State should not commit to such a serious and binding process, depriving its citizens – who are also European citizens - of rights acquired by belonging to the EU, without following the due constitutional process.[33] It was also thought that it would, indirectly, avoid frequent changes of positions due to short-term whims by national leaders or after governmental changes and would impart a more solemn or binding character on a decision to leave the EU.

At first glance, the provision states the obvious: **a decision to withdraw should respect the domestic requirements for taking it.** This could involve, among others, a clear and well-framed discussion within the society and among political actors on the proposal to withdraw, a vote in the country's legislature, or perhaps a referendum over it (especially in the case that accession was confirmed through popular vote) and the respect, throughout this process, of relevant legal and constitutional requirements, such as franchise, balanced access to media and objective representation of the positions.

However, are **two difficulties** arise from this, rather sensible, intention: its **substantiation** and the **implications of its violation**. How and who can assess that a decision to withdraw has been taken in accordance with the country's constitutional requirements and, especially, what should the implications be if it is considered that these requirements have not been fulfilled?

The reply to the first question seems evident – at domestic level: any act deemed unconstitutional or unlawful, in a country where rule of law prevails, can be **assessed and quashed under national law by the independent judiciary**. This seems quite straightforward: a government in a Member State wishing to withdraw from the EU without respecting its own constitutional requirements (for instance by governmental decree or by a parliamentary vote achieved in violation of democratic or parliamentary principles) should find itself confronted with its own courts. If a government is increasingly illiberal, "*at odds with the requirements of EU membership*", one might argue that the EU would show no interest in trying to keep within its ranks such a Member State.[34] The problem would

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[31] Amendment 8 to 46 § 1, Titre X, by MEPs Olivier Duhamel and Elena Paciotti proposed the deletion of the phrase "*in accordance with its own constitutional requirements*", on the grounds that "*on the one hand, it is superfluous and on the other, damaging: it cannot be a Union's problem to assess whether the government of a Member State that wishes to abandon the Union respects its own constitution*". In http://european-convention.europa.eu/docs/Treaty/pdf/46/Art46-1Duhamel(ITFR).pdf

[32] The IGC's legal experts had suggested to delete this phrase because "*Stating that the Member State may decide "in accordance with its own constitutional requirements" could give the impression that it is a matter for the Union to check whether a Member State's internal rules have been observed or not*". Conference of the Representatives of the Governments of the Member States, IGC Secretariat IGC 2003 – Editorial and legal comments on the draft Treaty establishing a Constitution for Europe – Basic document CIG 4/03, Brussels 6.10.2003. in https://data.consilium.europa.eu/doc/document/CG%204%202003%20INIT/EN/pdf

[33] Louis, J-V (2006) « Le droit de retrait de l'Union européenne », *op. cit.*, pp. 305-306.

[34] Hillion, C. (2016), *Leaving the European Union, the Union way - A legal analysis of Article 50 TEU*, SIEPS (Swedish Institute for European Policy Studies) European Policy Analysis, August 2016. p. 3.

arise, for the EU institutions and the purpose of Article 50 TEU, if such a constitutional conflict were brought to the European level, before the CJEU through a request for a preliminary ruling or to the European Council as a potentially unconstitutional notification to withdraw. Similar issues were mooted during Brexit, without reaching, in the end, the CJEU because the UK government abided to its court's rulings and the controversy did not persist.

Much more problematic would be the follow-up: **how should the EU react if the executive in question persists in a path deemed unconstitutional?** Should it refuse to acknowledge a Member State's decision to withdraw because it is unclear or disputed whether such decision is taken in accordance with that Member State's own constitutional requirements? And what implications would such a situation have? It would lead to a crisis within the EU – and within the Member State – and might force the CJEU to act as a super-constitutional court with all the political and legal consequences that this entails.[35]

Weerts sees into this provision an additional 'break' (a *garde-fou* as he puts it) to a whimsical or light-hearted attempt to leave the EU, which adds a further obligation for governments wishing to withdraw to modify relevant constitutional provisions "*to avoid any incompatibility between the withdrawal enterprise and the open provisions for European integration*".[36]

Such obligation may be valid if EU membership is stipulated in a Member State's constitution, such as the case of Ireland. In the event of Ireland's withdrawal, its own constitutional provisions order to hold a withdrawal referendum and to modify the relevant articles of its constitution. Denmark provides in its constitution (Article 20.1) that "*powers vested in the authorities of the Realm under this Constitutional Act may […] be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and cooperation*" and requires, for the enactment of a Bill dealing with the above, either a majority of five sixths of the Members of the Folketing or the majority required for the passing of ordinary Bills **and** a referendum. It does not cover the case where powers vested to an international authority are taken back because the state wishes to withdraw from that authority: again, it is logical to expect a similar process to take place. In other cases, it might be less clear whether a constitutional provision should or not be altered: a withdrawal from the EU could be justified as an *ad hoc* decision that does not necessarily contravene a constitutional provision framed in general terms, in favour of closer international cooperation.

Weerts also suggests that the European Council "*may assess the conformity of the intention to withdraw which has been notified to it with the national constitution*".[37]**The argument is politically sensible but legally rather weak**, in particular as the relevant sentence in paragraph 2 of the text of the Constitutional Treaty was deleted by the Lisbon Treaty IGC.[38] Hillion, too, argues that "*the domestic decision to withdraw is not entirely exempt from also having to conform, albeit implicitly, to EU*

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[35] The Central American Court of Justice, in article 22 (f) of its Statute, is entrusted with the unique and rather problematic competence of adjudicating between constituent organs of a member state of the Central American Integration System (SICA). This provision was used is 2004 in a conflict arising between then Nicaraguan president Enrique Bolanos and the country's Legislative Assembly. See Nyman-Metcalf K - Papageorgiou I. (2005) *Regional Integration and Courts of Justice,* Intersentia. Brussels pp, 60-61.

[36] Weerts, J. "L'évolution du droit de retrait …" op.cit. pp. 389-90.

[37] Weerts, ibid. p. 390.

[38] The beginning of paragraph 2 of article I-59 provided that "*A Member State which decides to withdraw shall notify the European Council of its intention;* ***the European Council shall examine that notification***". The latter part of the sentence was eliminated by the IGC.

requirements […] notably the common values of Article 2 TEU" and attributes a controlling role to the European Council.[39] Again, it is evident that the European Council shall examine in detail the withdrawal notice and will also probably look into its legal standing, but **it is difficult to assess what it could do,** from a legal point of view, if it found that the decision is unconstitutional.

An alternative reading of this sentence could lead to a totally different conclusion. According to this, Article 50 (1) TEU is "*descriptive rather than normative*". The lawfulness of a decision to withdraw and even whether such a formal decision has been made or not "*is a question for domestic law*".[40] A challenge to the formal character, the legality or the constitutionality of such a decision, or even the very existence of it, **is up to the domestic law of the Member State concerned**; **it is not up to the EU to judge this**. The sentence of Article 50 (1) TEU is an admonition to the Member States, not a prerequisite for the triggering of the withdrawal procedure. This reading is not supported by the relevant discussions in the Convention, nor has it been defended during the Brexit process, but it might be considered an easier way out to a supranational constitutional crisis.

3.4. The reasoning of the withdrawal

Article 50 TEU does not require that a Member State which intends to withdraw should reason its withdrawal. During the Convention it was proposed that the Article should contain "*an exhausted list of the conditions upon which certain country could withdraw from the Union*" [41] but the relevant amendment was not retained. Obviously, at national level, a withdrawal decision will be reasoned politically, but this reasoning can neither be assessed nor contradicted by the EU or other Member States, save also in a political context, without any legal implications.

The letter that the UK Prime Minister Theresa May sent on 29 March 2017 to the President of the European Council, Donald Tusk, and that formally notified the UK's intention to withdraw and opened the legal process for Britain's withdrawal from the EU, did not include a reasoning but rather reassurances that Britain would continue to cooperate closely with the EU and the UK's proposals for the negotiation process.[42] The letter's content was not challenged nor was there any question as to why the country had decided to withdraw.

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39 Hillion, C. (2017) "This Way, Please! A Legal Appraisal of the EU Withdrawal Clause," op. cit. p. 218.

40 Armstrong K. *Has Article 50 Really Been Triggered?*, Constitutional Law Association, 14 June 2017 in https://ukconstitutionallaw.org/2017/06/14/kenneth-armstrong-has-article-50-really-been-triggered/.

41 Amendment 30 to Article 46 (Hübner) proposed that "*since the right of secession from the Union has a wide range of direct consequences […] it shall be described in detail {…and…] should contain an exhausted list of the conditions upon which certain country could withdraw from the Union*". In http://european-convention.europa.eu/docs/Treaty/pdf/46/ART46hubnerEN.pdf.

42 Theresa May's letter invoking Article 50. The Prime Minister's Office. 29 March 2017. In https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf.

3.5. The notification

Paragraph 2 of the Article provides for the withdrawing state to notify its intention to the European Council. This notification is an important constituent of the general structure of the Article not only because if formalises the domestic decision to withdraw, but also because it is the moment of the **formal onset of the withdrawal procedure** as of which the two-year period is calculated. The Article does not specify the form of the notification, but it is understood that it should have a formal character (such as an official letter by the government or the head of the executive or a relevant diplomatic note) and, in particular, be **unequivocal** in expressing the intention "*to leave the Union, following an internal decision to that effect*".[43] In other words, **it cannot be conditional or qualified** (stating for instance that withdrawal shall take place if a specific event occurs or unless a specific condition is met) nor **timeless** (withdrawal shall take place at some moment in the future).[44] Indeed, some members of the Convention who were against the principle of a withdrawal provision justified their opposition to possible situations where a Member State could blackmail the EU, putting forward withdrawal threats, in order to achieve a desired outcome.[45] If a notification does not include these specific elements, the European Council might be well in its right to consider it as lacking in essence.

The Member State **notifies the intention to withdraw**; **it does not leave the EU**. The notification triggers the process but does not alter its status as a Member State, save in the discussions "*of the European Council or Council or in decisions concerning [the said withdrawal]*" as stipulated in paragraph 4 of the Article. This means that the withdrawing state is bound by all EU decisions and is obliged to respect the Treaties, in particular the values of the Union as well as the **principle of sincere cooperation** enshrined in Article 4 (3) TEU and should behave accordingly.

The principle of sincere cooperation is particularly important also in respect to the timing of the notification. **The provision does not specify a time limit between the 'decision to withdraw' and the notification thereof**. In theory and taking into account that the Member State is bound by the above principle, such notification should be handed as soon as the decision at domestic level is taken and the national constitutional requirements fulfilled. In practice, this allows the withdrawing state a certain margin of discretion when giving the notification, as was the case with the UK at the start of the Brexit process.

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[43] Hillion, C. (2017) "This Way, Please! A Legal Appraisal of the EU Withdrawal Clause…" op. cit. p. 219.

[44] Given that notification is a formal, specific act, neither the withdrawing Member State, not the EU can defer its effect to other moments (such as the start of official negotiations). The date of the notification triggers the two-year countdown to withdrawal. If the two sides want the two-year period to start at a later stage, they can only use the extension provision of the Article.

[45] See, for instance, the amendment from the EPP group in the Convention to Article I-59. The explanation stated that "*such an explicit exit clause could allow Member States to blackmail the Union*", in http://european-convention.europa.eu/docs/Treaty/pdf/46/46_Art%20I%2059%20Brok%20EN.pdf .

3.6. The negotiations

Paragraphs 2 and 3 are closely linked and describe the various stages of the withdrawal negotiations.[46] They indicate that the European Council plays a key role, for the commencement as well as for the political direction of the negotiations. The European Council sets the "guidelines" of the negotiations and may, therefore, review their progress and, if necessary, modify guidelines. The Article does not refer to the role of individual members of the European Council in informal talks but, again, it should be assumed that bilateral relations and national interests would play into the shaping of the guidelines.

The **'shall'** form of the sentence ***"the Union shall negotiate and conclude an agreement with that State"*** implies **an obligation to negotiate.** Although the requirement is addressed to the Union only, it is appropriate to assume that it refers to the withdrawing Member State, as well. Neither side can simply let time pass without discussing the terms of the withdrawal, but the obligation is more direct for the EU. Manifestly, a negotiated outcome is in the interest of both sides: their common itinerary for decades before withdrawal, have created a high degree of interconnections between all Member States. Still, even if a Member State stalls and frustrates the start of negotiations, the EU might bring the matter to the CJEU for violation of the principle of sincere cooperation. In that sense, too, Article 50 TEU departs from the international law perspective, where a withdrawal notice is often all it takes for a state to leave an international organization.

Although the relevant sentence in the Article was deleted by the Lisbon IGC, it is evident that the European Council shall firstly examine the notification, in particular to confirm that it constitutes, effectively, a withdrawal notification. It may conclude that it does not, as explained above in point 3.3. In such a case, it is at the political level to solve the difference, especially if the withdrawing Member State persists that it does constitute one. It is to be assumed that such hypothetical divergences may be anticipated and resolved, before the notification, through indirect contacts.

If the European Council concludes that the notification is valid, it must begin the negotiation process after it provides *'the guidelines'* for it. Again here, the Article does not specify how soon the European Council should start negotiations; in theory, the EU might deliberately delay the start of effective negotiations in order to increase pressure on the withdrawing Member State.[47] Again the principle of sincere cooperation with what still is a Member State imposes to avoid excessive delays or deliberate procrastination – on both sides.

The negotiations should be carried in accordance with Article 218 (3) of the TFEU which covers international agreements with third states. The paragraph reads as follows:

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[46] Given that withdrawal negotiations start after notification, the Article does not oblige either side to start (formal) negotiations before the formal handing of the notification, without such refusal to enter talks being considered as a violation of the principle of sincere cooperation.

[47] The opposite can also occur: A Member State, especially a bigger one, may choose to delay the start of negotiations to increase leverage on them. This case is, however, less probable as a withdrawing state has more interest in concluding negotiations, given that it has already made its decision, while it can delay, if it wants, negotiations by not submitting the formal withdrawal notification.

> *The Commission […] shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.*

In negotiations for international agreements with other third states, only the Commission services seems to have the capacity to deal with the manyfold issues linked to such a detailed negotiation but, in theory, the Council may nominate as Union negotiator another institution.

A question that has not been settled even after Brexit refers to whether the reference to Article 218 (3) TFEU is only limited to the conduct of the negotiations (or rather it implicitly covers also the rest of the Article, mutatis mutandis, and therefore allows for an *ex ante* advisory opinion on the withdrawal agreement by the CJEU, as is the case with other agreements covered by that Article. Article 218 (11) provides that:

> *"A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended, or the Treaties are revised".*

Although the possible involvement of the CJEU was raised on various occasions during Brexit, and it did intervene on the revocation of the withdrawal notification, the CJEU was not asked to provide an opinion on the compatibility of the content of the withdrawal agreement. The silence of the Treaties can thus be interpreted either way and the case has not been settled – nor has the ancillary question over whether the exiting Member State can also ask the CJEU to examine the agreement. However, the prevailing opinion is that a withdrawal agreement should, in the general economy of the Treaties, receive the same treatment as any other agreement under Article 218 TFEU.[48]

3.7. 'Taking account of the framework for its future relationship with the Union'

The Article accurately assumes that, even after withdrawal, the two sides will want to maintain some form of close relations, in particular trade and political ones, which cannot be covered only by merely referring to World Trade Organisation (WTO) rules. An, even general, understanding over the context and content of these relations might facilitate the conclusion of the withdrawal agreement and allow for a smoother divorce. For instance, if the two sides wish to maintain very close links by, say, maintaining a single market or through the participation (and contribution) of the exiting State to many EU programmes, the drafting of the relevant provisions of the withdrawal agreement might be eased.

The Article does not prescribe a parallel negotiation of the withdrawal agreement and of an agreement on the future relations – indeed, formal trade negotiations with what is going to be a third state need to follow specific rules under the Treaty while many trade agreements with third states require

[48] See, among others. Hillion, C. (2016), *Leaving the European Union, the Union way*… op. cit. p. 6; Carmona J., Cîrlig C.C. and Sgueo G. (2017) *UK withdrawal from the European Union - Legal and procedural issues,* European Parliament Research Service (EPRS), PE 599.352, March 2017, p. 13; Tridimas, T. (2016), *Article 50: An Endgame without an End?* pp. cit. p. 307.

ratification by the Member States' legislatures. Experience has shown that trade agreements require a longer time than the two-year period of Article 50 TEU. Additionally, any such agreement can formally be concluded after the withdrawing Member State becomes a third state. Thus, the sentence can be interpreted to only suggest to 'take into account' how the two sides want to shape such relations.[49]

This is not easy, though. A decision to withdraw involves, almost certainly, a total rejection, at least by a majority in the Member State concerned, of the EU and its policies and implies the need for a clean break. As Brexit showed, politics and identity issues, not economic imperatives, were at the centre of the referendum debate but also post-referendum political priorities. A cool-headed discussion on trade links in the middle of a political turmoil is no easy job for the exiting state. The EU too, faced with the existential threat of secession, would hardly be willing to offer the withdrawing state an attractive alternative to membership. 'Red lines' both over the withdrawal terms and the future relations would make difficult reaching an understanding on how these latter should be shaped and might obstruct rather than help the withdrawal negotiations. Indeed, the decision of the EU not to discuss the future relations before withdrawal was agreed, which prevailed eventually, seems to have again set a precedent. In that context, the provision does not seem to hold sway, unless it is indeed a 'velvet divorce'.

3.8. The content of the withdrawal agreement

The Article does not provide guidelines as to what the withdrawal agreement should contain; it only sketches that it should deal with "*the arrangements for withdrawal*". The content of these arrangements is not clear. It was assumed that they would at least cover "*strict divorce matters*", such as the future of rights acquired by individuals and legal entities, pending or upcoming financial issues relating to payments to and receipts from the budget of the EU and the situation of pending cases before the CJEU or other institutions. The agreement can, nonetheless, expand from this limited content to other areas, including "*a generous sunset clause*" until the two sides conclude a future relationship agreement.[50] This expansive view was rejected by the EU in the Brexit negotiations and, in fact, it might constitute a precedent, henceforth.

An additional element that should be taken into account is that the departure of any Member State will automatically create the need to revise the Treaties, at least Articles 52 TEU and 355 TFEU on the territorial scope of the EU and those protocols concerning or referring to the exiting state. This consequence is not considered in Article 50 TEU and the withdrawal agreement is not able to change

[49] It should also be recalled, as Peers accurately points out, that the Article does not establish a legal obligation for the EU to conclude a free trade agreement with the exiting state. The term 'future relationship' assumes that there would be some form of agreement between the two sides, but does not specify what its content should be, among other reasons because a deep and comprehensive 'mixed' agreement would often require unanimity in the Council and the ratification by all national and some regional legislatures. Peers, S. *Article 50 TEU: The uses and abuses of the process of withdrawing from the EU*, EU law Analysis, 8 December 2014 in http://eulawanalysis.blogspot.com/2014/12/article-50-teu-uses-and-abuses-of.html.

[50] Tridimas, T. (2016) "Article 50: An Endgame without an End?" Op. cit. p. 309.

the Treaties. The remaining Member-States must resort, after withdrawal, to the revision procedures laid out in Article 48 TEU.[51]

3.9. The outcome of the negotiations

The provision describes **two ways to end the withdrawal negotiations**: the conclusion of an **agreement between the two sides** or the lapse of **two years after the notification**, whichever comes first. Precedence is given to the unconditional right of a Member State to leave the Union: the EU cannot prevent a Member State from leaving once the two-year period expires, if it so desires, even without the conclusion of an agreement. Preference, though, goes for a negotiated withdrawal agreement: the parties should aim to reach an agreement within the two years.

The Article recognises the difficult task confronting the negotiators and provides for a fallback option – to extend the negotiation period – if the negotiations fail to provide a result and all sides agree to it. The provision takes into account that the two sides should, in any case, provide solutions regarding "*the rights and obligations for any natural persons and legal entities affected by the withdrawal*" which should not "*remain open to doubt*" and implicitly recognizes that "*the two-year notice period, as a general rule, is far too short for negotiating and concluding a withdrawal implementation agreement in an "average" Member State withdrawal case*".[52] This again is a 'community' approach which differs from what is customary with the withdrawal from other international organisations.

The provision does not specify which side takes the initiative to propose a prolongation, and it does not seem to be of significance. What is essential is that there is a unanimous agreement on the need to prolong. This might seem more difficult for the EU, as the European Council should agree unanimously to the prolongation and any of the remaining Member State might make its agreement to the prolongation dependent on the satisfaction of specific demands.

Although not explicitly mentioned, the extension shall be for a determined period of time, also agreed in common by all parties concerned.[53] **The sentence does not limit the number of extensions**: there can be more than one extension and, in fact, during the Brexit process three extensions were granted before reaching an agreement. It has been argued though that indefinite extensions stand against "*the logic and context of Article 50 [which] suggests that extensions of the time limit are temporary*" [54] and might render void the withdrawal process. Such a situation which could be considered as an implicit form of revocation should be dealt by all EU institutions rather than only by the European Council, as its implications go beyond Article 50 and impact on the day-to-day work of other institutions (for instance the number of MEPs in the Parliament) and the EU as a whole.

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51. Barata, M. (2020) "Brexit and the limits of Article 50 TEU" *Open Political Science* 3 pp.171-172.

52 Herbst, J. (2005) "Observations on the Right to Withdraw from the European Union: Who are the 'Masters of the Treaties'?," *German Law Journal*, Cambridge University Press, 6(11), pp. 1757–8.

53 It has, though, to be pointed out that the first extension to Brexit by the European Council had two different dates set, depending on whether the UK would organize the European Parliament elections or not. See paragraph 3 of the Conclusions of the special meeting of the European Council (Art. 50). Brussels, 10 April 2019, EUCO XT 20015/19 in https://www.consilium.europa.eu/media/39042/10-euco-art50-conclusions-en.pdf.

54 Peers, S. "*Article 50 TEU: The uses and abuses of the process of withdrawing from the EU*", op. cit.

Once the agreement is reached, it has to obtain the "*consent of the European Parliament*". [55]It in concluded "*on behalf of the Union*" by the Council, which must agree to it with the so-called super-qualified majority stipulated in Article 238 3 (b) TFEU.[56] The text does not mention, but it is obvious that for the agreement to be valid, it must also become binding for the withdrawing Member State, as prescribed in its own constitutional system (usually through a relevant vote by its legislature).

The Article provides that the agreement shall "*cease to apply to the State in question from the date of entry into force of the withdrawal agreement*". **It does not specify when it shall enter into force**. Logically, this could happen already some few days or weeks after the agreement is ratified by both sides. However, the effective day of entry into force of the agreement may be delayed, depending on whether the two sides have already set up all necessary legal and regulatory measures for a smooth separation and secured the continuity of rights of persons, other obligations set in the agreement as well as provisions regarding trade between them. In fact, the cessation of the application of EU rules on the country that has withdrawn requires that both sides adopt new legal bases for all commercial and other relations.

The Article does not specify whether the two-year period would need to be extended, in case the entry into force of the agreement goes beyond two years from notification, even if the withdrawal agreement is concluded before it. Textually, this does not seem to be the case, since the two-year period becomes operative only "*failing*" the conclusion of an agreement. It would, in any case, be preferable, for both sides to agree on a formal extension. This question is linked to that of a withdrawal agreement with a very distant date of entry into force. It may be that the two sides need much longer a period for the conclusion of all necessary steps for withdrawal: the Greenland Treaty was signed in March 1984 and became effective on 1 February 1985.[57]

A prolonged delay to the entry into force of the agreement may be assumed to offer the Member State a second chance to change its mind, in particular after the CJEU ruled on the *Wightman and others* case that a Member State can unilaterally revoke its withdrawal notification **even after the signature** but before the entry into force of the withdrawal agreement. In any case, if there are second thoughts, among the European Council and with the exiting State, on the desirability of withdrawal, such discussions should definitely be open and extend to other EU institutions, too.

T**he Article does not treat the implications of an institutional conflict**, whether within the European Council or from the part of other institutions. If there is no qualified majority between the members of the Council (or within the European Council) on the proposed withdrawal agreement, it is logical that the negotiations might continue – and its period extended, if necessary, provided the withdrawing State and all Member States agree on such an extension. If the withdrawal agreement is rejected by Parliament (or found to be in violation of the Treaties by the CJEU following the procedure of Article 218 (11) TFEU), the agreement already reached is null and void and a new one should be negotiated. Again, the timing is of essence: it might imply an extension – this time presumably more easily reached at the European Council as the opposition comes from another EU institution.

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[55] By a majority of the votes cast according to Rule 88 of the European Parliament's rules of procedure.

[56] Namely, "*the qualified majority shall be defined as at least 72 % of the members of the Council [excluding the withdrawing Member State] representing the participating Member States, comprising at least 65 % of the population of these States*".

[57] However, the withdrawal of Greenland required the amendment of the Treaties and, therefore, ratification by all Member States.

3.10. New accession

Article 50 (5) TEU clarifies that withdrawal is a one-way street: once completed, there is no reversal. After a State has withdrawn from the EU, it may join again following the usual accession procedure. In practice re-accession might be a relatively speedy procedure, given that the former Member State had (and might still keep) the *acquis* and accession negotiations could proceed fast. On the other hand, re-accession is in fact a new accession procedure: this implies that the candidate State must secure the acceptance of all Member States and must negotiate the conditions of its accession as a new candidate. Some Member States, or even only one, might not accept an accession under the conditions previously afforded to the candidate State or even completely reject the application.

In any case, it would be quite rare that a State which has withdrawn, changes its mind so fast as to have kept the erstwhile *acquis* as it was. Usually, re-accession might be considered many years later, perhaps even after a generation. In this lapse many legislative texts will have evolved (in both sides) and the approximation of legislation will have weakened as a result. So, accession might require a lengthier period.

4. INSTITUTIONAL ISSUES DURING THE BREXIT PROCESS

4.1. The background of the UK withdrawal

4.1.1. UK as an 'awkward partner'

The UK had from the start a troubled relation with European integration: initially it shunned the supranational approach during the 1950s and, when it changed its mind over EEC membership in the 1960s, its application was blocked by France. When it finally joined the Communities, in 1973, it was more as a pragmatic economic choice rather than as a pursuit of an 'ever closer union'. Accession was acrimonious and divided political parties and citizens. After it joined, the country was quickly labelled an '*awkward partner*',[58] seeking a special treatment in its budgetary contribution (the 'British rebate') and often objecting to further integration. To a large extent, in particular after the Maastricht Treaty, it managed to impose what effectively was a selective participation in several new integration areas[59] and its agreement to further integration was achieved through securing opt-outs and special arrangements.[60]

Despite this, **resentment against the European project** was increasing among the popular press and sectors of the society, often **feeding on incorrect postulations over European competences or even plain factual errors**.[61] In parallel, the Conservative party, once the more pro-European of the two major UK parties, split gradually into Eurosceptic and Europhile camps. During its long period in opposition under the Blair-Brown Labour governments, the party (both its membership and, increasingly, its leadership) turned more anti-European. The rise of the **United Kingdom Independence Party (UKIP)** after the European elections of 1999 further widened the rift within the Conservative Party, fearful that Eurosceptic Conservative voters would desert it for UKIP. In the early 2000s, UKIP increased its representation in the UK's European Parliament elections, became a robust political party with significant media presence and a vocal supporter of a referendum to leave the EU. At the same time, the Conservative Party veered towards isolationism in its EU policies.[62] Between 2010 and 2015 the coalition with the pro-European Liberal Democrats obliged UK Prime Minister David Cameron to refrain

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58 George, S. *An Awkward Partner: Britain in the European Community*, OUP, 3rd edition, 1998.

59 The UK was allowed, in particular, not to adopt the euro as its currency (Protocol No 15), not to participate in the Schengen acquis (Protocol No 19), to exercise border controls on persons as regards internal and external borders (Protocol No 20), to choose whether to participate in measures in the area of freedom, security and justice or not (Protocol No 21), to decide unilaterally whether to apply or not, as from 1 December 2014, a large majority of Union acts and provisions in the field of police cooperation and judicial cooperation in criminal matters (Protocol No 36) and to avoid the extension of the ability of the CJEU or any UK court to rule on the consistency of its laws and practices with the Charter of Fundamental Rights of the EU (Protocol No 30).

60 Martill, B. and Staiger, U. (eds.) *Brexit and Beyond: Rethinking the Futures of Europe*, UCL Press. 2018. Open access pdf. In https://www.uclpress.co.uk/products/108355.

61 A typical misconception among public, media and politicians alike, is the widespread confusion between the European Court of Human Rights and the Court of Justice of the European Union. UK opposition to any role of the CJEU in its post-Brexit relations with the EU, stems largely from it being assimilated to the ECtHR and its alleged intromission on cases such as the detention or expulsion of Islamist and international terrorists.

62 More notably, the decision of UK Prime Minister David Cameron to withdraw the Conservative Party from the EPP-ED group in the European Parliament after the 2009 EP elections and his efforts to prevent the nomination of Jean-Claude Juncker to the presidency of the European Commission in 2014.

from any major policy change *vis-à-vis* the EU as a government, but still Conservatives became more anti-European, in particular as UKIP was rising and eroding the Conservative base.

4.1.2. The referendum and its outcome

The starting point for the Brexit process can be traced back to David Cameron's speech on Europe on 23 January 2013[63] where, the Prime Minister, under pressure from many of his own MPs, promised to hold **an in-out referendum** "*within the first half of the next parliament*" after the government negotiates a new settlement with the EU to address the changes the UK felt it needed in its relationship with the EU.

The 2015 Conservative Manifesto included a promise to reform the EU which it termed "*too bureaucratic and too undemocratic*"; it committed to "*negotiate a new settlement for Britain in Europe*", and then ask the British people whether they want to stay in the EU on this reformed basis or leave "*before the end of 2017*" and promised to respect its outcome.[64]

In the **2015 elections**, the Conservatives secured an overall majority in the House of Commons. David Cameron formed a single-party government and vowed to deliver his manifesto pledge of an EU referendum. **One of the first acts of the new Parliament was the European Union Referendum bill**.[65] In parallel, the UK government undertook negotiations with the EU in order to secure a new settlement, demanding, among others, "*legally binding principles that safeguard the operation of the Union for all 28 Member States*" concerning measures taken for the Eurozone, the end of "*Britain's obligation to work towards an "ever closer union*" and national measures to allow "*greater control on arrivals from inside the EU" and "to crack down on the abuse of free movement*".[66]

Some of the UK requests were directly in violation of EU rules, but nonetheless negotiations were successful. At the European Council of 18-19 February 2016[67] Member States reached an agreement on a set of arrangements, annexed to a decision of the Heads of State or Government, meeting within the European Council – thus an international agreement rather than a European Council agreement. The agreement recognised formally that the UK need not pursue deeper integration and included the commitment, from the Commission, to present proposals to amend EU legislation so as to allow Member States to index the export of child benefits to another Member State, to authorise a Member State to restrict access to non-contributory in-work benefits to Union workers newly entering its labour market and to exclude from the scope of free-movement rights third- country nationals who had no

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63 The speech was often termed as '*Bloomberg speech*'. See "David Cameron speech: UK and the EU" in https://www.bbc.com/news/uk-politics-21160684

64 *Strong leadership – a clear economic plan, a brighter, more secure future*, Conservative party manifesto 2015, p. 72. In http://ucrel.lancs.ac.uk/wmatrix/ukmanifestos2015/localpdf/Conservatives.pdf

65 The Bill was introduced in the House of Commons on 28 May 2015 and required the holding of a referendum on "*whether the UK should remain a member of the European Union" or not "no later than the end of 2017*". See https://www.legislation.gov.uk/ukpga/2015/36/introduction/enacted. It was adopted in Parliament with the support of Labour and Liberal Democrats, with only SNP opposing it.

66 *A new settlement for the UK in a reformed EU*, Letter of the UK Prime Minister to the President of the European Council,10 November 2015 in https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf

67 European Council meeting (18 and 19 February 2016). Conclusions. EUCO 1/16. 19 February 2016. In https://www.consilium.europa.eu/media/21787/0216-euco-conclusions.pdf

prior lawful residence in a Member State before marrying a Union citizen. The implementation of these measures was made dependent on the outcome of the UK referendum.[68]

The legal implications of the settlement were controversial,[69] and the agreement was criticised, but it satisfied partly the UK demands. David Cameron claimed that the settlement allowed Britain to get "*the best of both worlds [being] in the parts of Europe that work for us – influencing the decisions that affect us[… but also] out of the parts of Europe that do not work for us*"[70] and called a referendum in which the government's position would be to recommend that Britain remains in a reformed European Union, though individual Cabinet ministers could campaign in a personal capacity as they wished.[71]

The referendum was called for 23 June 2016 on the following question (after a reformulation by the Electoral Commission):

> *"Should the United Kingdom remain a member of the European Union or leave the European Union?"*.

From a strictly legal point of view, the referendum was only advisory. **The Referendum Bill did not contain any requirement for the UK government to directly implement the results of the referendum,** but political parties had committed to respect its outcome.

The campaign was long and tense, fought between the two cross-party campaign groups (Britain stronger in Europe and Vote Leave) leading it. The EU, in particular the Commission, remained outside the campaign, following a relevant request by the UK government. [72]

The negative outcome came as a surprise to many; almost all polls predicted a small but constant majority in favour of 'Remain'. On a turnout of 72.2%, 16,141,241 (48,1%) voters supported to 'Remain' in the EU and 17,410,742 (51,9%) to 'Leave'.[73]

It is not the objective of this study to analyse the reasons of the result. Perhaps they could best be summarised by one of the conclusions of the House of Lords' European Union Committee report, before the referendum:

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[68] Point 4 of the European Council Conclusions stated that "*it 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 referred to in paragraph 2 above will cease to exist*". Ibid.

[69] Poptcheva E.-M. and Eatock, D. *The UK's 'new settlement' in the European Union - Renegotiation and referendum*, European Parliamentary Research Service (EPRS), PE 577.983. February 2016.

[70] UK government, *The best of both worlds: the United Kingdom's special status in a reformed European Union*, Presented to Parliament pursuant to section 6 of the European Union Referendum Act 2015. February 2016. In https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/502291/54284_EU_Series_No1_Web_Accessible.pdf

[71] UK government, *PM statement following Cabinet meeting on EU settlement: 20 February 2016*, in https://www.gov.uk/government/speeches/pms-statement-following-cabinet-meeting-on-eu-settlement-20-february-2016.

[72] Later on, Commission President Juncker characterised the Commission's absence from the referendum campaign as one of the most important mistakes in his term "*because the then prime minister asked [him] not to interfere, not to intervene in the referendum campaign*", in "*Juncker regrets EU silence on Brexit campaign "lies*"", 7 May 2019, in https://www.reuters.com/article/us-britain-eu-juncker-mistake-idUSKCN1SD1BI

[73] The UK Electoral Commission, *Results and turnout at the EU referendum*, in https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/eu-referendum/results-and-turnout-eu-referendum

"Formally it is for the 'remain' campaign to set out a vision of the UK's place in the EU, and to persuade the electorate to support that vision. Yet the 'remain' campaign has been held back from developing a clear message by months of uncertainty over the outcome of the renegotiation and the Government's 'offer' to the people".[74]

4.2. The onset of the Brexit negotiations

The outcome of the referendum, in political terms, led, in a matter of days, to the resignation of David Cameron and the challenge to the leadership of Labour leader Jeremy Corbyn. The new Prime Minister, Theresa May, promised to work for reuniting the Conservative party and the country and delivering the outcome of the referendum ('Brexit means Brexit').

4.2.1. Preparing for the negotiations – the EU

The result was also a shock for the EU. In the immediate post-referendum period, the EU tried to secure its solidity and to prepare its response in view of the coming negotiations. **During that early period, the EU took three significant policy decisions that were fundamental for the future negotiation.** Firstly, it decided to remain united during the negotiations and avoid any bilateral talks with the UK. Secondly it chose not to open negotiations before the UK notified its decision to leave EU. And thirdly, at a later stage, it announced that all discussions would take place through the EU Chief negotiator.

Unity: preparations to build a united EU front had apparently began even before the referendum and European Council President Donald Tusk seems to have been a "*key player brokering unity among the EU27*".[75] Unity was stressed again with the first EU declarations after the referendum. As shall be analysed later, a united position was essential for maintaining a single voice through what promised to be a hard negotiation and for achieving the EU goals: the EU institutions, and Donald Tusk repeatedly emphasised that bilateral discussions between the EU and the UK should be avoided. Unity reinforced the bargaining position of the EU and allowed it to impose its timetable, agenda and sequence of the upcoming talks.

No negotiation before notification: the European Council also took early the decision not to undertake any, even unofficial, negotiation with the UK before it formally notifies the EU of its intention to withdraw. The decision has its pros and cons. On the one hand, it allowed the EU to clearly plan its negotiation lines and to formulate relevant proposals. The superior technical capacity of the EU, in particular of the Commission, on the separation issues gave the EU side a competitive edge, in particular as the UK struggled to formulate its relevant positions. On the other hand, it let precious time pass idle without allowing even preliminary discussions.

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[74] House of Lords' European Union Committee (2016), *The EU referendum and EU reform*, Report. 9th Report of Session 2015-16 - published 30 March 2016 - HL Paper 122. Point 252. In https://publications.parliament.uk/pa/ld201516/ldselect/ldeucom/122/12202.htm

[75] Kassim H., (2019), *Donald Tusk, the European Council and Brexit*, Commentary, UK in a Changing Europe. 29 November 2019 in https://ukandeu.ac.uk/donald-tusk-the-european-council-and-brexit/

Discussions only through the Chief negotiator: once the European Council decided that the Commission would negotiate on behalf of the EU and the Council nominated Michel Barnier as Chief negotiator, direct talks between the UK and individual Member States were strongly discouraged. UK efforts to bypass Barnier largely failed, and EU leaders referred individual approaches to M. Barnier.[76] The obligation of the UK to only deal with the Commission negotiators on each particular issue gave a stronger bargaining power to the "bureaucratic", issue-focused approach of the Commission, while the UK was approaching the separation issues having in mind to reach political as opposed to technical agreement.

4.2.2. Preparing for the negotiations – the UK

Contrary to the more centralised format chosen by the EU institutions, **the UK government did not place the Brexit negotiations under the new Prime Minister**, choosing instead to establish a special ministerial department, the Department for Exiting the European Union (DExEU).[77] Drawing resources from the Cabinet and Foreign Offices, DExEU was responsible for overseeing the withdrawal negotiations. It was also assigned the coordination of relevant legislation and engagement with Parliament, EU Member States and interested parties in view of the preparation and affirmation of the UK position. **This institutional setup has been criticised as confusing and impractical**.[78] Besides the DExEU, the Foreign Office and the Department for International Trade were also dealing with withdrawal issues, as did the Prime Minister's Office. Personal rivalries and political disagreements hampered the UK government's positions both domestically and in the withdrawal negotiations.[79]

In addition to these institutional shortcomings, the UK was facing a policy dilemma that reverberated throughout the negotiations and stemmed from the Leave campaign promises and their impact within the governing Conservative Party. Despite Theresa May's claim that 'Brexit means Brexit" the UK government was faced with several, often mutually excluding, interpretations of Brexit. As the UK position was gradually shaping towards a weak form of future relations with the EU, the contradictions it bore (in particular regarding Northern Ireland) became visible and blocked the withdrawal negotiations.

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[76] In the words of Donald Tusk *"The EU27 have maintained extraordinary self-discipline and loyalty among themselves, despite London's attempts to "bilateralise" these negotiations*". ibid.

[77] 'New ministerial appointment July 2016: Secretary of State for Exiting the European Union'. 13 July 2016 in https://www.gov.uk/government/news/new-ministerial-appointment-july-2016-secretary-of-state-for-exiting-the-european-union

[78] Owen, J. (2019), *A new Conservative government should abolish DExEU on 1 February*, Institute of Government, 12 December 2019, in https://www.instituteforgovernment.org.uk/blog/new-conservative-government-should-abolish-dexeu-1-february

[79] Two out of the three DExEU Secretaries, David Davis and Dominic Raab, resigned over policy disagreements while the negotiations were led in the latter period by Oliver Robbins, Theresa May's personal Brexit advisor and later by David Frost, Boris Johnson's Europe adviser.

4.3. Institutional issues before the notification

The first, though perhaps redundant, point made clear already on the day after the referendum was that **the only way to leave the EU is by virtue of Article 50 TEU**. The statement by the EU leaders and the Netherlands Presidency on the outcome of the UK referendum underlined that "*Article 50 of the Treaty on European Union sets out the procedure to be followed if a Member State decides to leave the European Union*".[80] This statement put an end, if ever necessary, to some claims within the UK during and after the referendum campaign, that the UK could leave the EU without reference to Article 50, for example by repealing the 1972 European Communities Act 1972, which gave domestic effect to EU law.

Two other issues, both relating indirectly to Article 50 TEU dominated the period before the notification of the UK's intention to withdraw: **the timing of the notification** and **the role of the UK parliament in the decision to notify the withdrawal intention**.

4.3.1. The period between referendum and notification

As already stated, the referendum, an advisory one, had no legally binding force.[81] Thus, its result was not a legal act tantamount to a withdrawal notification under Article 50 (2) TEU. It was up to the UK authorities to submit such a notification and launch the withdrawal procedure.[82] Already on the day after the referendum, the EU insisted that the UK government should give effect to the withdrawal decision as soon as possible, since *"any delay would unnecessarily prolong uncertainty*".[83] The 27 members of the European Council (without the UK) who met in the margin of the European Council insisted again that notification "*should be done as quickly as possible*" although Donald Tusk recognised that some time might be needed to "*allow the dust to settle in the UK*". The leaders also confirmed that "*there can be no negotiations of any kind before this notification has taken place*". Tusk repeated his call for a formal notification as soon as possible when he met Theresa May on 8 September 2016.

Article 50 TEU does not prescribe a time limit between the decision to withdraw, in paragraph (1) and the notification of the state's intention to withdraw as per paragraph (2) of the Article. Of course, once a domestic decision to leave the EU has been taken there is an obligation to notify the EU. Any time lapse between the two should be reasonable but not overly long, sufficient to '*let the dust settle*', to set domestic negotiation priorities and to establish the relevant institutional setup. Intentionally delaying notification might be considered as a violation of the principles of good faith and sincere cooperation that binds all Member States, including the UK. On the other hand, the UK was aware that, after notification, it would lose control of the timetable. In addition, there was no consensus within the UK government and the UK Parliament over what withdrawal would imply, and on the general features of

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[80] Statement by the EU leaders and the Netherlands Presidency on the outcome of the UK referendum. 24 June 2016, in https://www.consilium.europa.eu/en/press/press-releases/2016/06/24/joint-statement-uk-referendum/

[81] The European Union Referendum Act of 2015 which allowed to hold the referendum did not invest the outcome of the referendum with any sort of legal effect.

[82] Elliot, M. (2016), *Can the EU force the UK to trigger the two-year Brexit process?*, Public Law for Everyone, 26 June 2016, in https://publiclawforeveryone.com/2016/06/26/brexit-can-the-eu-force-the-uk-to-trigger-the-two-year-brexit-process/

[83] *Statement by the EU leaders and the Netherlands Presidency on the outcome of the UK referendum,* 24 June 2016 in https://www.consilium.europa.eu/en/press/press-releases/2016/06/24/joint-statement-uk-referendum/

the EU-UK future relations.[84] Thus the UK government opted to delay the notification, also in view of the rising domestic conflict over the role of the Parliament in the notification.

It is debatable whether the gap between the Brexit referendum and its notification (nine months) can be deemed reasonable, but **the EU did not find a way to oblige the UK to serve the notification earlier**. It is true that during that period, the two sides might have started preparations and could even have conducted informal soundings over the withdrawal process. It is possible that the UK side would indeed have liked to use this period to discuss with its partners its preferred way out; but the decision of the EU that there will be '*no negotiation without notification*' halted any such move till March 2017, also awaiting the outcome of the judicial decision on the Parliament's involvement.

On the other hand, the fear of uncertainty may have been overrated by the EU. Brexit did have an impact on the currency exchange markets, but it was mostly the value of the pound sterling that was affected while the euro remained relatively stable. Even the pound, despite losing to the euro, did not collapse, and indeed after the 2019 UK general election, the value of the pound rose to its highest against the euro since Brexit.[85] The UK economy did not witness a breakdown. So, such a delay might not have an impact in the long run.

Theresa May announced, at the Conservative Party Conference of October 2016, that the official notification would come by the end of March[86] and, in January 2017, she set, in her speech at Lancaster House, the twelve priorities of the UK government in negotiating Brexit[87] which were expanded in the relevant White Paper.[88] Both the Prime Minister and the White Paper made explicit what the UK did not want (CJEU jurisdiction, free movement of persons and participation in the customs' union) rather than what they did want. Nevertheless, the White Paper shaped the UK position and allowed for the formal process of withdrawal to begin.

The European Union (Notification of Withdrawal) Act 2017, voted in Parliament [89] following the ruling on the *Miller* case (see below) allowed the government to formally submit the notification of withdrawal on 29 March 2017.[90] The six-page letter handed to President Tusk, besides a historical account of the referendum and its follow-up and polite references to the continued presence of Britain

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84 Rutter J. and White H. (2016) "Planning Brexit: Silence is not a strategy". UK Institute for Government, September 2016 in https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Organising_Brexit_briefing_final.pdf

85 Williams B. (2020) *Brexit Effect on Euro Exchange Rate*, The London Economic, 2 September 2020, in https://www.thelondoneconomic.com/lifestyle/money/brexit-effect-on-euro-exchange-rate-200178/

86 *'Theresa May's keynote speech at Tory conference in full'*, 5 October 2016. In https://www.independent.co.uk/news/uk/politics/theresa-may-speech-tory-conference-2016-full-transcript-a7346171.html

87 *'The government's negotiating objectives for exiting the EU: PM speech'*, 17 January 2017 in https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech

88 Department for Exiting the European Union (2017), *The United Kingdom's exit from and new partnership with the European Union White Paper*, in https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union--2

89 The Act was voted in third reading at the House of Commons on 8 February 2017 and at the House of Lords on 7 March 2017. It received royal assent on 16 March 2017.

90 '*Prime Minister's letter to Donald Tusk triggering Article 50*', 29 March 2017 in https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50

in Europe, set out of the UK's approach to the negotiations and the future relationship between the two sides.[91]

4.3.2. The UK Parliament involvement in the decision to withdraw

The second issue, bearing indirectly on Article 50 TEU, which dictated the UK post-referendum political agenda, was the domestic constitutional dispute over **the legal authority which should formally notify the EU that the UK intends to withdraw**.

The new government maintained that its executive powers, inherited through what was the **royal prerogative** and its customary practice of signing international treaties, entitled it to submit such notification. For the government, **the involvement of the Parliament would only come later** when it would be called to ratify the withdrawal agreement and vote the necessary legislative texts. On the other hand, may scholars claimed that parliamentary sovereignty as well as the fact that many citizens' rights would be abolished by Brexit required that **only Parliament could authorise notification and thus take away rights created by the 1972 European Communities Act**.

The matter was not envisaged in the 2015 Referendum Act and the UK constitutional provisions were unclear. It was also a politically sensitive matter. **Parliament had a significant cross-party majority who had campaigned for Remain**[92] and it had already asked twice to be able to **properly scrutinise the government's plan for leaving the EU before Article 50 is invoked;**[93] government wanted to avoid splitting its majority again.

The dispute was eventually brought to the courts by two citizens, Rita Miller and Deir Dos Santos, in separate cases, later joined, against the Secretary of State for Exiting the EU. It was heard in the High Court which ruled on 3 November 2016 that, given the loss of rights for individuals that would result from the process, **Parliament rather than the executive should decide whether to trigger Article 50**. Following an appeal by the government, the Supreme Court also concluded,[94] in January 2017, that **Parliament did need to give its consent before notification is submitted**. The government accepted the ruling and brought forward the legislation (the European Union (Notification of Withdrawal) Act 2017) to provide the Prime Minister with the power to notify.

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[91] The letter made explicit that the UK was also leaving the European Atomic Energy Community (Euratom) thus ending the discussions in the UK as to whether Brexit should also mean leaving Euratom. See Peers S. (2017), *The UK Brexits Euratom: Legal Framework and Future Developments*, EU Law Analysis, blog, 30 January 2017 in http://eulawanalysis.blogspot.com/2017/01/the-uk-brexits-euratom-legal-framework.html

[92] It was calculated that up to 73% of MPs supported Remain. See, *This is the size of the majority in the House of Commons against Brexit*, Business Insider, 3 November 2016 in https://www.businessinsider.com/majority-house-of-commons-against-brexit-2016-11

[93] Firstly in a House of Commons resolution on *'Parliamentary Scrutiny of Leaving the EU'* of 12 October 2016 in https://hansard.parliament.uk/Commons/2016-10-12/debates/F327EC64-3777-4D40-A98D-BEC2E11763A2/ParliamentaryScrutinyOfLeavingTheEU and again in a second resolution on "the Government's Plan for Brexit" of 12 December 2016 in https://hansard.parliament.uk/commons/2016-12-07/debates/CA09D9B2-9634-41C8-8979-8B9CD82DBB8F/TheGovernmentSPlanForBrexit.

[94] Judgment R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) REFERENCE by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review, reference by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review. In https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf

The case has fundamental implications on the UK constitutional order as it deals with the relative powers of Parliament and the government, relations between the centre and the devolved administrations and the concept of parliamentary sovereignty in a modern political system. It also demonstrated the degree that the UK's EU membership had changed the UK constitution. As such, it gave rise to an extensive literature in the UK and abroad.[95] This study will only regard the issues raised in the Miller case from the angle of Article 50 TEU, in particular in relation to the vexed issue of its first paragraph "*in accordance with its own constitutional requirements*."

The referendum was a political rather than legal instrument: The Supreme Court confirmed that the Brexit referendum belonged to the sphere of the political: point 124 of the judgment stated that the referendum "*did not change the law in a way which would allow ministers to withdraw the United Kingdom from the European Union without legislation. But that in no way means that it is devoid of effect. It means that, unless and until acted on by Parliament, its force is political rather than legal. It has already shown itself to be of great political significance*". As such, it does not constitute a notification under Article 50 (2) TEU because it is not a a legal but a political event and does not, therefore, bear the force of a constitutional requirement.

The decision to withdraw is a political decision but requires a parliamentary confirmation: for the Supreme Court withdrawal from the EU is a matter "*for ministers and Parliament to resolve*", inappropriate "*for resolution by judges*" (point 3 of the ruling) and thus, it did not discuss the suitability of the referendum or the implications for UK constitutional law of the practice of holding referendums before embarking on major constitutional changes.

However it underlined (point 95) that although "*when ministers are participating in EU law-making processes and are therefore involved in making EU law, and hence domestic law, they are thereby exercising prerogative powers*" [what in continental European constitutional law would be called executive powers] the giving of Notice to withdraw is not an equally legitimate exercise of those powers because in doing so ministers "*unilaterally dismantle the very system which they set up in a co-ordinated way with Parliament*" which goes against the provision in Article 50 TEU that "withdrawal must be effected by a member state "in accordance with [its] constitutional requirements". By doing this, if clarifies that it is highly unlikely, in any EU constitutional order, that a decision to withdraw will not involve the representatives of the people.

The missed opportunity for a preliminary reference ruling under Article 267 TFEU: An important consequence (by omission) is that the Supreme Court chose not to refer the issue of revocability or the meaning of the sentence 'own constitutional requirements' to the CJEU.

As to the first point, the ruling (point 26) concluded that "*it is common ground that notice under article 50(2) […] once given, cannot be withdrawn*" and proceeded under this assumption, adding that "*even if this common ground is mistaken, it would make no difference to the outcome of these proceedings*". The

[95] See among many others Elliott, M., Williams, J. and Young, A., (eds.) (2018) *The UK Constitution after Miller: Brexit and Beyond*. Hart Publishing, Oxford; James S. 'The Case of the Century': The Supreme Court and Brexit' (2017) in *Britain and the World*, 10 (2), Page 217-237, available Online Aug 2017 (https://doi.org/10.3366/brw.2017.0276).

reasons of this common ground can only be assumed – it would weaken the argument of the claimants and was not politically advantageous for the government.[96]

This was criticised by some commentators who held that the Supreme Court, as a court of last resort, should in accordance with Article 267(3) TFEU refer this point to the CJEU. Given that for the Supreme Court revocability was not a crucial issue, necessary to enable it to give judgment, it chose to avoid the question, irrespective of its potential significance for the wider economy of Article 50 TEU. The issue was resolved through another preliminary ruling, but it would be interesting to have a question from the UK Supreme Court on the matter – also regarding the CJEU's opinion on the 'crucial nature' of the question in the case under review.

The choice of the Supreme Court not to seek clarification of the meaning of the sentence 'own constitutional requirements' to the CJEU is more easily understood. No Supreme Court would easily surrender the right to decide what is constitutional within the UK to a 'foreign' court, be it the CJEU. In any case, besides the major political implications of such a referral, it is doubtful whether the CJEU would willingly venture into the plane of British constitutional law. This absence strengthens the view that the sentence is an incitement to the withdrawing state to scrupulously follow its constitutional rules in the process, rather than an enforceable provision that can be controlled at EU level.

4.4. Institutional issues after the notification

4.4.1. The sequencing of the negotiations

Even before negotiations started, the sequence of the negotiations on withdrawal and on future relations demonstrated the divergences between the two sides as well as the lack of clarity in Article 50 TEU.

As already pointed,[97] Article 50 TEU starts from the assumption that, even after withdrawal, the two sides, having been part of the same community for decades and united by an intricate web of trade and other links, will maintain close economic relations, beyond the general WTO trade rules. Thus, it stipulates[98] that the negotiation and conclusion of the withdrawal agreement shall be made *"taking account of the framework for [the withdrawing state's] future relationship with the Union"* since, if the two sides have *"a clear projection of the future relationship when negotiating the withdrawal agreement"*, they would more easily reach an agreement over the withdrawal.

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[96] Feldman, D. (2016), *Brexit, the Royal Prerogative, and Parliamentary Sovereignty*", Constitutional Law Association, 8 November 2016, in https://ukconstitutionallaw.org/2016/11/08/david-feldman-brexit-the-royal-prerogative-and-parliamentary-sovereignty/

[97] *Supra*, chapter 3.7.

[98] Tell Cremades, M. and Novak, P. (2017), *Brexit and the European Union: General Institutional and Legal Considerations*, European Parliament Policy Department for Citizens Rights and Constitutional Affairs, PE 571.404, January 2017, p. 20.

However, the Article does not prescribe a parallel negotiation of the withdrawal agreement and an agreement on the future relations,[99] the more so since a trade agreement can only be concluded formally only after withdrawal and may require a different conclusion and ratification process (unanimity in the Council and, perhaps, a ratification by the Member States' parliaments). In addition, experience has shown that negotiating trade agreements with third countries often requires a much longer time than two years.

A parallel negotiation is what the UK had initially in mind.[100] Although recognising that the agreement on future relations could only take effect after withdrawal, the UK government wanted to have two parallel – and interconnected - negotiations which would allow to quickly adopt a future relations agreement almost immediately after leaving. Theresa May's letter to Donald Tusk which notified the country's intention to withdraw underlined that "*the United Kingdom wants to agree with the European Union a deep and special partnership that takes in both economic and security cooperation. To achieve this, we believe it is necessary to agree the terms of our future partnership alongside those of our withdrawal from the EU*".[101] The UK White Paper repeated that it wanted "*to have reached an agreement about our future partnership by the time the two-year Article 50 process has concluded*".[102]

From its side, the EU, since the very start, opted to first deal with the separation issues before looking into the outline of the future relations between the two sides.[103] The EU was wary of the UK's "cherry-picking" common policies for the future relations and afraid of the, initially, confrontational UK positions relating to its financial obligations to the EU. Several Brexiteers claimed that the UK could just walk out of the EU, while the financial settlement estimates were, initially, wide apart. The informal meeting of the European Council (at the format of 27) after the Brexit referendum warned that "*any agreement, which will be concluded with the UK as a third country, will have to be based on a balance of rights and obligations. Access to the Single Market requires acceptance of all four freedoms*".[104]

Thus, the EU opted for a "**phased approach**". Immediately after the UK notification, the European Council draft guidelines for the negotiations stressed again that the UK should first agree principles for a withdrawal before talks on trade and a future relationship start. The primary aim of the negotiations should be "*to ensure the United Kingdom's orderly withdrawal so as to reduce uncertainty*", created by Brexit in particular to EU citizens and businesses. Negotiations should aim to "*settle the disentanglement of the United Kingdom from the Union and from all the rights and obligations the United Kingdom derives from commitments undertaken as Member State*". Discussions on the future trade relationship would be

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[99] Tell Cremades and Novak had also suggested to establish a direct link between the two agreements whereby the time set for the entry into force of the withdrawal agreement "*far in the future*" could "*be concomitant with the entry into force of the future relationship treaty*", ibid. p. 20.
In fact, before the referendum, the Vote Leave Campaign claimed that the UK "*will negotiate the terms of a new deal before we start any legal process to leave*", in https://d3n8a8pro7vhmx.cloudfront.net/themes/55fd82d8ebad646cec000001/attachments/original/1463496002/Why_Vote_Leave.pdf?1463496002

[101] 'Prime Minister's letter to Donald Tusk triggering Article 50', 29 March 2017, in https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50

[102] H. M. Government "*The United Kingdom's exit from and new partnership with the European Union*". February 2017, in https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf . Point 12.2.

[103] See, for instance, the European Parliament resolution of 28 June 2016 on the decision to leave the EU resulting from the UK referendum which, in point 7 recalled "*that any new relationship between the UK and the EU may not be agreed before the conclusion of the withdrawal agreement*".

[104] *Informal meeting at 27 Brussels, 29 June 2016 Statement*, point 4. In https://www.consilium.europa.eu/media/20462/sn00060-en16.pdf

allowed only after the European Council determined that "*sufficient progress in the separation issues has been achieved*".[105] This position, shared by the Parliament,[106] in the end prevailed. The European Council (Article 50) adopted negotiation guidelines in March 2018[107] and effective negotiations for the future relations started in 2020, in part hampered by the domestic political troubles of the UK.

The term '*sufficient progress*' used by the European Council had no definition in its guidelines, creating more uncertainty and putting further pressure on the UK. Unanimity in the European Council meant that all Member States should be content on the progress of talks on withdrawal to agree that '*sufficient progress*' had been achieved.

The sequence of the negotiations was imposed to the UK by the EU side, but **the political environment, in any case, would not have been propitious for a parallel negotiation**. The predominance of the political and ideological goals over the economic and trade realities was too strong in the UK while, on the other hand, the EU was eager to protect its interests from the UK's tendency for 'cherry-picking' and to avoid being seen as giving an easy alternative to membership to the UK.

Trade negotiations usually require a less politically loaded environment; a conclusion of the more pressing separation issues seems a prerequisite. In addition, the sequence altered radically the power relations in the negotiations, as it tipped the balance in favour of the EU. Cecilia Maelstrom's' quote "*first you exit, then you negotiate*"[108] may have been an exaggeration, but the setting of the sequence gave the EU a significant edge on the withdrawal negotiations. **It is highly unlikely that the EU would change this policy, unless it has an interest in the Member State leaving the EU** and thus is eager to make generous offers to hasten departure.

4.4.2. The prolongations of the two-year time limit

The need to prolong negotiations became clear, as the UK government was unable to secure a majority in Parliament for the withdrawal agreement it had approved. Despite its claim that a no-deal might be better for a bad deal, the government was well aware of the risks of leaving the EU without agreement. The prolonged parliamentary impasse and the approach of the date of the 29th of March 2019 obliged the UK – also forced by relevant parliamentary votes in some cases – to request a first and, later, a second and third extension.

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[105] *European Council (Art. 50) guidelines following the United Kingdom's notification under Article 50 TEU,* 29 April 2017 in https://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/

[106] The European Parliament resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union noted that "*the negotiations are to concern the arrangements for the United Kingdom's withdrawal*" (point 13) and that "*should substantial progress be made towards a withdrawal agreement then talks could start on possible transitional arrangements on the basis of the intended framework for the United Kingdom's future relationship with the European Union*" (point 14).

[107] *European Council (Art. 50) (23 March 2018) – Guidelines*, Brussels, 23 March 2018. EUCO XT 20001/18 in https://www.consilium.europa.eu/media/33458/23-euco-art50-guidelines.pdf

[108] Urban, M, "EU Trade Commissioner: No trade talks until full Brexit", BBC news, 30 June 2016 in https://www.bbc.com/news/uk-politics-eu-referendum-36678222

- On 22 March 2019, the European Council took a decision with the effect of extending the deadline until 12 April 2019.[109]
- On 11 April 2019[110], a second European Council decision extended the deadline until 31 October 2019.
- On 28 October 2019[111], a third extension was granted by the European Council (through written procedure) until 31 January 2020.

Extension was not always easy, as the EU leaders were divided over how to deal with what they saw as UK's intractability, and divergences emerged regarding whether prolongation should be accorded as well as on its duration.[112] All three extensions include interesting institutional points.

The first extension included **conditional alternative durations**. The relevant decision of the European Council held that "*in the event that the Withdrawal Agreement is approved by the House of Commons by 29 March 2019 at the latest*" extensions was granted until 22 May 2019. "*In the event that the Withdrawal Agreement is not approved by the House of Commons by 29 March 2019 at the latest*" such extension would go until 12 April 2019, and it was up to the UK to "*indicate a way forward before 12 April 2019, for consideration by the European Council*". This is not, strictly speaking, foreseen in Article 50 TEU and implies that **extensions may be granted conditionally.**

The second extension, on the other hand, included a different form of conditionality. It required from the UK to organise the May 2019 European Parliament elections and stated that the extension decision would "*cease to apply on 31 May 2019 in the event that the United Kingdom has not held elections to the European Parliament in accordance with applicable Union law and has not ratified the Withdrawal Agreement by 22 May 2019*". This condition is justified by the fact that the UK remains a Member State with all the rights and obligations deriving from it.

Unlike the first extension, the second and third extensions were imposed on the government by the UK Parliament[113] showing, in particular, the implication of the parliamentary institution in the negotiations of the government in these matters. The third extension especially was forced upon the new Prime Minister, Boris Johnson, despite his having publicly opposed any further extension beyond 31 October 2019.

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[109] *European Council decision taken in agreement with the United Kingdom, extending the period under Article 50(3) TEU*, Brussels, 22 March 2019, EUCO XT 20006/19. BXT 26, in https://data.consilium.europa.eu/doc/document/XT-20006-2019-INIT/en/pdf

[110] *European Council decision taken in agreement with the United Kingdom extending the period under Article 50(3)TEU*, Brussels, 11 April 2019, EUCO XT 20013/19, BXT 38 in https://data.consilium.europa.eu/doc/document/XT-20013-2019-INIT/en/pdf

[111] *Declaration of the European Council (Article 50),* Brussels, 29 October 2019, EUCO XT 20025/1/19 REV 1, CO EUR 30 BXT 92 in https://data.consilium.europa.eu/doc/document/XT-20025-2019-REV-1/en/pdf

[112] In particular from France which was, during the negotiations, supporting a hard stance *vis-à-vis* the UK. See « *Brexit: Macron oblige les Européens à limiter le report au 31 octobre* »Les Echos, 11 April 2019, in https://www.lesechos.fr/monde/europe/macron-oblige-les-europeens-a-limiter-la-prolongation-du-brexit-1008411

[113] The European Union (Withdrawal) Act 2019 (also known as the Cooper-Letwin Act or the Cooper Act) required the Prime Minister to seek an extension of Article 50 for the second extension. The EU (Withdrawal) (No. 2) Act 2019 obliged the Prime Minister to seek a 3-month extension to 31 January 2020. Cowie, G. (2019) *Parliament and the three extensions of Article 50*, House of Commons Library briefing paper Number 8725, 31 October 2019.

The third extension decision recalled to the UK the obligation "*to suggest a candidate for appointment as a member of the Commission*" which the UK disregarded, though. The Commission pursued the UK for violation of its obligations but, ultimately, closed the infringement procedure.

4.4.3. The transitional arrangements

Article 50 TEU does not provide for transitional arrangements, but, bound as they are by the principle of sincere cooperation, the two sides should "*ensure that the withdrawal process is as cooperative, smooth and orderly as possible*" and thus work towards appropriate "*transitional arrangements [to allow for an] adequate agreement*" with the exiting state.[114] Even before talks started, though, the need for a transitional period became evident: it was clear that withdrawal negotiations would last long and discussions over the future relations, also dependent on the outcome of the former, could not be concluded in time. Avoiding a "cliff edge" was important for both sides, despite the claim that "*no deal for Britain is better than a bad deal*".

As for the sequencing of the negotiations, the possible transition arrangements were imposed by the EU. Point 6 of the European Council (Art. 50) guidelines for Brexit negotiations of April 2017 clarified the only option for transitional arrangements acceptable for the EU:

> *"To the extent necessary and legally possible, the negotiations may also seek to determine transitional arrangements which are in the interest of the Union and, as appropriate, to provide for bridges towards the foreseeable framework for the future relationship in the light of the progress made. Any such transitional arrangements must be clearly defined, limited in time, and subject to effective enforcement mechanisms. Should a time-limited prolongation of Union acquis be considered, this would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply".*[115]

The Union's institutional goals in reference to possible transitional arrangements were clear already there:

- Such arrangements may be sought "*to the extent that they are necessary and legally possible*"
- They should be in the interests of the Union
- They should represent bridges to foreseeable framework for the future relationship
- They must be clearly defined, limited in time, and subject to effective enforcement mechanisms
- If agreed, they should fall under the EU regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures.

The EU did not alter its position, if not to make it more stringent in the supplementary guidelines for the transitional arrangements adopted by the Council on 29 January 2018[116] adding that:

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[114] Eeckhout, P. and Patel, O. (2017), *Brexit Transitional Arrangements: Legal and Political Considerations*, (November 17, 2017), p. 4, http://dx.doi.org/10.2139/ssrn.3073310.

[115] *European Council (Art. 50) guidelines for Brexit negotiations*, 29 April 2017, in https://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/

[116] Council of the European Union, *Annex to the Council Decision supplementing the Council Decision of 22 May 2017 authorising the opening of the negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the*

- any transitional arrangements should cover the whole of the Union acquis
- any changes to the Union acquis should automatically apply to and in the United Kingdom during the transition period.

As will be seen in Chapter 6, the withdrawal agreement included almost all EU requirements, in particular its demands for the full application, during that period, of the EU acquis and the use of Union enforcement mechanisms. There is no reason to consider that a different pattern would be used in future situations.

4.5. Lessons learnt – the procedure and the sequence

The Brexit process filled in some gaps in Article 50 TEU that could be in use for future similar situations, while remaining unclear regarding others.

The timing of the notification: Article 50 TEU does not set a time distance between the (domestic) decision to leave the EU and the formal notification**.** A delay can be challenging as it maintains uncertainty and may further destabilise relations between the EU and the withdrawing state, as well as within this latter. The EU might apply great political pressure upon the withdrawing state to get on with formal notification, but **there is nothing it can legally do so as to force the pace.** The case of Brexit demonstrated that the UK remained sovereign as to the notification timetable, despite the EU remonstrations. The country notified formally its decision to withdraw only when it felt it were ready to do so.

The gap between the decision to withdrawal and its formal notification might, arguably, be used to try and negotiate a better deal (within or without the EU). In Brexit, however, the decision of the EU not to proceed to any form of negotiations before the notification made any such attempt futile. This pattern would seemingly be the case in the future, too: **it is unlikely that the EU would want to lay its negotiating cards to the withdrawing state before notification**. It would therefore be in the interest of this state to proceed with a speedy notification. On the other hand, the EU must acknowledge that control over the timetable before notification remains in the hands of the withdrawing state, **unless Article 50 TEU is modified accordingly**.

The national constitutional requirements: The EU is not any wiser as to the content of the term. The UK Supreme Court, in the *Miller* case, did not consider necessary to refer the question to the CJEU, but proceeded to assess that a notification by the government without parliamentary consent does not respect the country's "own constitutional requirements." As already stated, the content and the contours of the provision are not clear. The Supreme Court's ruling reinforces the argument that **the sentence is a declaratory one,** a guidance from the EU to the withdrawing state rather than a constitutive part of the withdrawal process. Even if the Supreme Court had requested an interpretation of the provision by the CJEU, **it is doubtful whether the CJEU would be willing to interpret the**

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arrangements for its withdrawal from the European Union- Supplementary directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, Brussels, 29 January 2018, XT 21004/18 ADD 1 REV 2

provision for the specific UK constitutional context, because it indeed was not a main point in the dispute. The Brexit experience has rendered more difficult to see how, in practice, respect of national constitutional requirements can be taken into account or controlled by the EU institutions, including the CJEU. Still, the problem would arise if the UK government refused to abide with the Supreme Court ruling and proceeded in notifying without the consent of Parliament, bringing the EU and the CJEU in the midst of a domestic constitutional battle.

The Supreme Court also gave other interesting hints as to how to interpret Article 50 TEU in the future. A referendum or other form of popular consultation does not necessarily denote a legal obligation to leave the EU, and even less does it constitute a notification under Article 50 (2) unless the relevant domestic constitutional provisions state this unambiguously. Notification cannot be inferred by domestic political developments – they require a specific act by the established institutions of the Member State.

Leaving the EU implies leaving the EAEC. Incidentally, the brief debate during the UK process confirmed, if need be, that withdrawal from the EU brings automatically withdrawal from the European Atomic Energy Community (EAEC). The Council directives for the negotiation of the withdrawal agreement with the UK stipulated in point 3 that the orderly withdrawal of the UK from the EU also covers the European Atomic Energy Community.

The sequence of the negotiations: The EU chose not to follow, to the letter, of the relevant sentence of Article 50 TEU and imposed a 'phased' stage in the negotiations with the UK. This option was facilitated by the lack of clarity of the relevant sentence in the Article and served the interests of the EU. In any case, as pointed above, the political setting was not favourable for parallel negotiations which require a more settled atmosphere between the two sides. The conclusion of pressing separation issues, in such circumstances, takes precedence. It is likely that the same pattern will be followed in other similar circumstances, unless the EU is, itself, eager to get rid of an intractable Member State and wishes to facilitate and accelerate its departure.

The prolongation of the two-year period set in Article 50 (3) TEU: Brexit has allowed considerable experience on the prolongation. Firstly, it made evident that there can be more than one prolongation, of different and even conditional durations. Agreement was not always easy, and it was one of the few times that disagreements among EU Member States over the handling of Brexit came to the forefront but in the end succeeded. It was also one of the rare moments of almost direct intervention of the domestic constitutional conflict in the Brexit negotiations.

5. THE ROLE OF THE EU INSTITUTIONS

5.1. The institutional setup for withdrawal negotiations

The institutional choreography of the withdrawal process is described in Article 50 TEU in conjunction with Article 218 TFEU and involves the European Council, the Council, the Commission and Parliament with a possible role for the Court of Justice of the EU.

The key political role pertains to the **European Council**. It **receives the withdrawal notification** and agrees, unanimously, on the **guidelines for the negotiations**. These guidelines may be more or less broad and general, outlining core principles, but would not go into the technical points, leaving subsequently to the Council the possibility to further detail.

Next, the **Commission** drafts a **recommendation** for a **negotiating mandate**, on the basis of the European Council's guidelines. This part of the process is regulated by Article 218 (3) TFEU. The mandate, which is often more detailed and more technical, is discussed by the **Council** and must be agreed by qualified majority (excluding the UK). The mandate includes the **nomination of the EU negotiator**. Traditionally, international agreements with third states under Articles 207 TFEU and 218 TFEU have been negotiated by Commission. However, such agreements have been trade-related or association agreements with third states and commercial policy pertains to the remit of the Commission. In the case of Brexit, the Article 50 TEU negotiations were to be conducted with what still is a Member State. There was no precedent for such a negotiation and the case, theoretically, was unclear. In theory, the Council could take over the position of the lead negotiator who would then undertake the bulk of the negotiation process.

Although the CJEU is not mentioned in the Article, its potential role is important: given that the withdrawal agreement is an EU legal act, the Court is able to rule on actions brought against the content of the agreement, either directly through the annulment procedure or indirectly through the preliminary ruling request. It is possible too, as explained above, that it can provide an advisory opinion as per Article 218(11) TEU. Its ruling on the issue of the revocability of the withdrawal notification demonstrates the potential power of a CJEU ruling in the process. [117]

5.2. The role of the institutions during the Brexit negotiations

5.2.1. The Council and the European Council

One of the first important decisions regarded the institution that would lead the negotiations: although traditionally negotiations under Article 218 TFEU were conducted by the Commission, the particular nature of Brexit raised questions as to whether the Council rather than the Commission should become the negotiator in this case. Two days after the referendum, the Council appointed Didier Seeuws as head of its Brexit Special Task Force. This was initially viewed as an effort of the Council to take control

[117] Tell Cremades, M. and Novak, P. (2017), *Brexit and the European Union*… op. cit. p. 11.

of the negotiations[118] but institutional rivalries, if they existed, were quickly resolved with the Commission taking over the role of the EU negotiator mainly due the higher technical expertise and resources it possessed, and the European Council being permanently seized of the process. Parliament was also quick to invite the Council to nominate the Commission as Chief negotiator.[119]

Throughout the process, the European Council remained a key player, though it chose to avoid dealing with the details and kept the role of the "higher authority" and "a guarantee for general unity". Member States were also kept informed at the level of the Council and in Coreper, but key policy decisions (such as the start of negotiations, their sequence, the main issues and the Union's 'red lines') were reached at the level of the European Council (in the format of the 27). Possible disagreements among Member States were never brought officially in the light and were dealt, successfully, by the Council's Brexit team. There were frequent and detailed updates from the EU negotiator to the General Affairs Council and to the European Council, as well as to Coreper.

In addition, the European Council's President, Donald Tusk, acted in a distinct role; speaking on behalf of the European Council, he often voiced the leaders' point of view or their frustrations with the UK position and confirmed the Union's determination to maintain a single voice. Even though the UK government seemingly preferred a negotiation with the European Council, in the belief that national leaders would take a more favourable stance *vis-à-vis* the UK,[120] Tusk prevented this, keeping a hold on bilateral negotiations and referring the UK to the Union negotiator.[121]

5.2.2. The European Commission

Article 50 TEU does not confer a specific role to the Commission in the process. Article 50 (2) stipulates only that the withdrawal agreement shall be negotiated in accordance with Article 218(3) TFEU which provides that the Commission:

> *"shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team".*

Following the appointment of Didier Seeuws, the Commission appointed, on 27 July 2016, Michel Barnier as its Chief negotiator in charge of the Commission Task force for the Preparation and Conduct of the Negotiations with the UK under Article 50 TEU which was set up in September 2016. The Commission, as did also Parliament, opted for a **centralised management** of the negotiations. Mr.

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[118] Maurice E. *Brexit, lessons in negotiations for the European Union*, Fondation Robert Schuman, European Issue No 494, 26.11.2018 in https://www.robert-schuman.eu/en/european-issues/0494-brexit-negotiation-lessons-for-the-europe an-union.

[119] European Parliament resolution of 28 June 2016 on the decision to leave the EU resulting from the UK referendum, point 9.

[120] "*Brexit: Theresa May to bypass European Commission and appeal directly to EU leaders in bid to secure better deal*". The Independent, 29 July 2016 in https://www.independent.co.uk/news/uk/politics/brexit-theresa-may-bypass-europe an-commission-and-appeal-directly-eu-leaders-attempt-secure-better-deal-a7160766.html

[121] See, for instance, the rebuff of Theresa May's efforts to involve Member States at the Salzburg European Summit on 21-22 September. Donald Tusk qualified the UK proposals as "*surprisingly tough and in fact uncompromising*" and reiterated the EU27 leaders' trust in Chief negotiator Michel Barnier. See '*Statement by President Donald Tusk on the Brexit negotiations*', 21 September 2018 in https://www.consilium.europa.eu/en/press/press-releases/2018/09/21/statement-by-president-donald-tusk-on-the-brexit-negotiations/

Barnier would report directly to the President of the Commission with thematic input and advise from relevant Directors-General to the negotiator's team but without their direct involvement in the negotiations. [122]

In their informal meeting in the margin of the European Council of 15 December 2016, the 27 leaders invited the Council to nominate the Commission as the Union negotiator and welcomed the Commission's nomination of Michel Barnier as Chief negotiator. However, the European Council would keep a leading role throughout the process. The 27 made clear that they would "*remain permanently seized of the matter, and [would] update these guidelines in the course of the negotiations as necessary*". They also invited the Chief negotiator to "*integrate a representative of the rotating Presidency of the Council*" in the negotiations while "*representatives of the President of the European Council [would] be present and participate in all negotiation sessions, alongside the European Commission representatives*". In addition, the EU negotiator should systematically report to the European Council, the Council and its preparatory bodies.

The General Affairs Council, meeting in an EU27 format (known as *Article 50 format*), adopted, on 22 May 2017, a decision authorising the opening of Brexit negotiations with the UK and formally nominating the Commission as EU negotiator. [123] The Council also adopted negotiating directives for the talks. Both texts were based on a recommendation presented by the Commission on 3 May 2017 [124] and built on the guidelines adopted by the European Council (Art.50) on 29 April 2017. Although major policy decisions were taken at European Council, the General Affairs Council was where Member States took stock of the progress in the negotiations. Barnier was updating the Council in almost all its meetings.

5.2.3. The role of Michel Barnier

The appointment of Barnier was, among other reasons, due to his "*extensive network of contacts in the capitals of all EU Member States and in the European Parliament*", a valuable asset for this function, as Commission President had pointed out. [125] Barnier used extensively his network and kept stakeholders informed by briefing representatives of the 27 and the major EU institutions, on different aspects of the planned agreement, by frequent visits to capitals, meetings with leaders and parliamentarians and a good press coverage.

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[122] *President Juncker appoints Michel Barnier as Chief Negotiator in charge of the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 of the TEU*, Press release, 27 July 2016, in https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2652

[123] Council Decision *authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union*, in https://www.consilium.europa.eu/media/21766/directives-for-the-negotiation-xt21016-ad01re02en17.pdf

[124] European Commission, *Recommendation for a Council Decision authorising the Commission to open negotiations on an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union*, Brussels, 3.5.2017. COM/2017/0218 final.

[125] *President Juncker appoints Michel Barnier as Chief Negotiator* … op. cit.

5.2.4. The significance of transparency in the negotiations

The institutions chose to be open in their dealings with the UK. The decision was justified both in terms of the issues at stake and the interest Brexit raised for citizens and businesses – and because it was clear that confidentiality in the negotiations would fail in case of contradictory leaks and might ultimately create more uncertainty. The April 2017 guidelines of the European Council emphasised that **transparency would be among the 'core principles'** in the negotiations; Michel Barnier was also very clear from the start that the level of transparency would be ***"exemplary"***.[126] On 22 May 2017, the Union published an official note setting out its **guiding principles for transparency in negotiations under Article 50 TEU.**[127] Indeed, the Commission provided all negotiation documents online and the Brexit Task Force published dozens of position papers on specific general policy or sectoral areas, such as citizens' rights. It even published the draft withdrawal agreement in February 2018. The EU's policy on transparency obliged the UK, too, to follow a similar path and the UK Department for Exiting the EU uploaded on its site all policy papers and documents on the negotiations.

5.3. The role of the European Parliament in the Brexit negotiations

Article 50 TEU does not, formally, confer a role to Parliament during the early stages and the negotiations of a withdrawal process. Parliament appears in the wording only at the end of the negotiations stage, when it is asked to **give its consent to the withdrawal agreement**. If no such agreement is reached and withdrawal takes place at the expiry of the two-year period, technically Parliament is not involved at all. Parliament may also, as an institution of the EU and in accordance with Article 218 (11) TFEU, **request the opinion of the Court of Justice** as to whether the withdrawal agreement envisaged is compatible with the Treaties, on the assumption that this provision is applicable in the context of Article 50 TEU. If Article 218 TFEU applies as a whole, *mutatis mutandis*, in this case, paragraph 10 which states that the "*European Parliament shall be immediately and fully informed at all stages of the procedure*" may also be invoked by Parliament.

However, from the start of the Brexit process, **Parliament requested a more prominent role** in the entire process arguing that the implications of a withdrawal of a Member State require a closer look both on the negotiations and its outcome by the representatives of the citizens. Already in its resolution of 28 June 2016, it asked to "*be fully involved at all stages of the various procedures concerning the withdrawal agreement and any future relationship*". It was the first institution to insist on the need for unity within the EU in the negotiations and also the first to request that the Commission be entrusted with conducting the negotiations.

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[126] « *Les négociations qui s'ouvrent seront sans précédent. Elles appellent une transparence exemplaire. Nous allons jouer cartes sur table, en négociant avec l'esprit d'ouverture qui est nécessaire pour créer une atmosphère constructive* ». Discours par Michel Barnier à la 57ème COSAC (Conférence des Organes Parlementaires Spécialisés dans les Affaires de l'Union des Parlements de l'Union Européenne) – Malte, 29 May 2017, in https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_1469

[127] Council of the Union, *Guiding principles for transparency in negotiations under Article 50 TEU*, Brussels, 22 May 2017, Document XT 21023/17, in https://data.consilium.europa.eu/doc/document/XT-21023-2017-INIT/en/pdf

An enhanced role for Parliament was not a given fact, at least at the early stages of Brexit, when the European Council seemed to wish to exercise full control over the process. Gradually, by the end of 2016, it became apparent that Parliament could not and should not be sidestepped in the interinstitutional process regarding the Brexit negotiations. Such change came both **as a result of Parliament's own pressure** and from the understanding, among other institutions and Member States, that the EU should act in a manner as united as possible.

The informal meeting of the Heads of State or Government of 27 Member States, (later termed European Council - Article 50), on 15 December 2016 agreed that representatives of the Parliament would be invited at '*sherpa*' preparatory meetings, that the "*Union negotiator will be invited to* ***keep the European Parliament closely and regularly informed*** *throughout the negotiation*" and that "*the Presidency of the Council will be prepared to* ***inform and exchange views with the European Parliament*** *before and after each meeting of the General Affairs Council*".[128] This came after Parliament President Schultz, in a letter to European Council President Donald Tusk, made public, expressed his disappointment over the fact that the European Council's draft conclusions relegated Parliament "*to a secondary position in the Brexit negotiation process*" and threatened that there would "*grave consequences if Parliament [were] all but excluded from EU Brexit talks*".[129] Indeed, **the use of veto** was perhaps the most efficient and "crucial bargaining instrument for increasing the EP's power" in the process and it became more credible to the other institutions, especially the European Council "because the EP built a solid majority to support its position" with five groups (EPP, S&D, ALDE, Greens and GUE) commanding a significant majority, defending this position.[130]

5.3.1. The institutional setup of the Parliament for the Brexit negotiations

Parliament's rules of procedure confer the competence to deal with "*the institutional consequences of enlargement negotiations of or withdrawal from the Union*" to the Constitutional Affairs Committee (AFCO).[131] The text, however, does not elaborate whether monitoring of and involvement in the withdrawal negotiations pertain also to the AFCO remit. The leadership of Parliament, in any case, opted for **a more centralized approach** to dealing with Brexit.

On 8 September 2016, the Conference of Presidents appointed **Guy Verhofstadt as the EP coordinator for Brexit negotiations**, as counterpart of Michel Barnier, negotiator for the Commission. His mandate was to keep the Conference of Presidents fully informed of developments and to help prepare Parliament's position in the negotiations, in close consultation with the Conference of Presidents.[132] In the decision, it was made clear that, after the triggering of Article 50 TEU, Guy

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[128] *Statement after the informal meeting of the Heads of State or Government of 27 Member States, as well as the Presidents of the European Council and the European Commission*, Brussels, 15 December 2016, points 6 and 7. In https://www.consilium.europa.eu/media/24173/15-euco-statement.pdf.

[129] *Grave consequences if Parliament is all but excluded from EU Brexit talks*, Press release, 14 December 2016, n https://www.europarl.europa.eu/news/en/press-room/20161214IPR56183/grave-consequences-if-parliament-is-all-but-excluded-from-eu-brexit-talks.

[130] Closa C. (2020) "Inter-institutional cooperation and intergroup unity in the shadow of veto: the construction of the EP's institutional role in the Brexit negotiations", *Journal of European Public Policy*, 27:4, p. 639.

[131] Rules of Procedure of the European Parliament, 9th parliamentary term - January 2021, Annex VI, Chapter 18, point 3. Available at: https://www.europarl.europa.eu/doceo/document/lastrules/TOC_EN.html?redirect

[132] *Parliament appoints Guy Verhofstadt as representative on Brexit matters,* Press release. 08-09-2016. In

Verhofstadt would also work closely with the AFCO committee and its then Chair, Danuta Hübner, as well as with other committees wherever necessary to shape Parliament's negotiating position.

After the UK submitted its notification to withdraw, the Conference of Presidents established, on 6 April 2017, the **Brexit Steering Group (BSG).** The group was chaired by Guy Verhofstadt and included the Chair of the AFCO Committee, Danuta Hübner, and four members representing the European People's Party, the Socialists and Democrats, the Greens and the United Left.[133] It operated under the aegis of the Conference of Presidents and was tasked to coordinate and prepare Parliament's deliberations, considerations and resolutions on the UK's withdrawal from the EU.

The establishment of a special group was unusual for Parliament but testified of its leadership's intention to maintain a close scrutiny over Parliament's activities on Brexit. The need for coordination superseded the traditional committee-centered decision-making process of Parliament. Still, the BSG held several meetings with committees or with committee chairs regarding specific matters of the withdrawal agreement pertaining to their remit.[134] To a large extent, during the entire negotiating period, it was the BSG and its chair (or more rarely the Conference of Presidents) which gave the temperature of Parliament's positions or feelings about the negotiations. In addition, Parliament made its official views known through seven resolutions adopted in plenary.[135]

Central monitoring did not stymy in any way information within Parliament: Brexit was discussed frequently at various EP meetings (both statutory and special hearings), while the BSG gave frequent updates of the situation to leadership bodies, AFCO and other committees and to the Conference of Committee Chairs.[136] In addition, the European Parliament Research Service (EPRS) and Parliament's Policy Departments produced a large number of Brexit-related research.[137]

Under this format, Parliament's objective was to **stay informed, be involved and have an impact**. Parliament requested from the start to be fully informed on the process already before the official notification of the withdrawal. To a large extent, this requirement was met, not only on the basis of the European Council decision to "*closely and regularly*" inform Parliament throughout the negotiation, but

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https://www.europarl.europa.eu/news/en/press-room/20160908IPR41661/parliament-appoints-guy-verhofstadt-as-representative-on-brexit-matters

133 The Group's last composition included Guy Verhofstadt, Brexit coordinator and Chair, Danuta Hübner, Pedro Silva Pereira, Philippe Lamberts, Martin Schirdewan and Antonio Tajani. Previous members (before the 2019 elections) were Elmar Brok, Roberto Gualtieri and Gabriele Zimmer. It was supported by the Deputy Secretary-General of the Parliament and the Presidency services. The Brexit Steering Group concluded its work on 31 January 2020.

134 A particular process was also adopted regarding Brexit-related resolutions which would follow an informal round of consultations rather than discussions in committees, while the Conference of Presidents prevented, before the triggering of Article 50 TEU, delegation visits to the UK. See Bressanelli, E., Chelotti, N. & Lehmann, W. (2019), "Negotiating Brexit: the European Parliament between participation and influence", *Journal of European Integration*, 41:3, p. 354.

135 In addition to its resolution of 28 June 2016, Parliament adopted the resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union, the resolution of 3 October 2017 on the state of play of negotiations with the United Kingdom, the resolution of 13 December 2017 on the state of play of negotiations with the United Kingdom, the resolution of 14 March 2018 on the framework of the future EU-UK relationship, the resolution of 18 September 2019 on the state of play of the UK's withdrawal from the European Union and the resolution of 15 January 2020 on implementing and monitoring the provisions on citizens' rights in the Withdrawal Agreement.

136 For instance, BSG held special thematic meetings, such as the one organized with the LIBE, AFCO, JURI and Employment Committees of the Parliament with the UK Home Office, in order to evaluate and assess the 'registration' procedure system for EU27 nationals proposed by the UK. See *Statement by the European Parliament's Brexit Steering Group, Monday 19 March 2018,* in https://www.europarl.europa.eu/brexit-steering-group/en/documents/statements.html.

137 Bressanelli, Chelotti & Lehmann (2019) "Negotiating Brexit…" op.cit. p. 355.

also because the Commission had chosen to keep it as an ally – and possibly as an echo voice of its frustrations during the negotiations. The early choice of the Commission to use an open and transparent approach during the negotiations – making documents and policy papers public as soon as they were drafted – and the close contacts between the Commission Task Force and Parliament's BSG also allowed for adequate information flow to Parliament which was often underlined in BSG statements.

Parliament's efforts to be involved in the preparation of the EU's negotiating positions is more difficult to assess, as it is not clear what the Commission's attitude would have been without the input from Parliament. Such involvement was facilitated by the absence of significant divergence of positions among the various EU institutions: all institutions were aware of the danger of divided positions and aimed for maximum coordination. The Commission's negotiating positions were broadly acceptable for Parliament.[138] We can assume, however, that the uncompromising position of Parliament regarding citizens' rights strengthened the Commission's hand and allowed focus on more citizen-friendly provisions in the final agreement, in particular as it often accompanied such positions with a reminder that its consent should not be taken for granted.

On the other hand, Parliament too, as the end of the negotiations was approaching, recognised the dreadful prospective of a no-deal Brexit, showed pragmatism and toned down its positions: the latest statements of the BSG were more conciliatory and, without giving in on the fundamentals, warned that "*a no-deal exit would be economically very damaging, even if such damage would not be inflicted equally on both parties*". [139]

5.3.2. The political priorities of Parliament

Although Parliament was interested in all aspects of the negotiations, it chose to emphasise specific areas, also given its limited staff and research resources. **The rights of citizens** were its most important priority area from the start: Parliament was the first institution to take position, with its resolution of 28 June 2016, regarding the need to safeguard the rights of EU citizens. As the institution that directly represents European, including UK, citizens, at the earlier phase of the negotiations, it set its focus on this chapter. In its April 2017 resolution, it underlined that it "***represents all citizens of the EU and will act to protect their interests throughout the whole process***". Throughout the first period of negotiations, the BSG closely monitored this chapter: following a meeting with Michel Barnier in July 2017, after the second round of negotiations between the EU and the UK, the BSG repeated – and gave a theoretical reasoning to it – that "*the European Parliament will remain vigilant regarding citizens' rights and will continue to push for full rights for EU citizens in the UK as well as UK citizens in the EU. It is a core mission of the European project to protect, not to diminish, the fundamental rights of all citizens.*"[140]

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[138] See for instance BSG's statement on 28 February 2018 which welcomes "*the overall approach taken by Michel Barnier*"

[139] "*Brexit: An orderly exit is in the interests of both parties*". 24 July 2019. In http://www.epgencms.europarl.europa.eu/cmsdata/upload/c1495c2f-856d-4f3c-a00c-ab432080457b/Statement_by_the_Brexit_Steering_Group_of_24_July_2019.pdf

[140] *Brexit: Statement by Guy Verhofstadt and the EP Brexit Steering Group after meeting with EU negotiator on Brexit, Michel Barnier, on 25 July 2017*, in http://www.epgencms.europarl.europa.eu/cmsdata/upload/c72515ec-ee23-49b9-b44f-c8a3728975bc/Statement_by_Guy_Verhofstadt_and_the_Brexit_Steering_Group.pdf

In this context, Parliament fought to expand acquired rights for citizens and the procedures for guaranteeing them. Parliament's positions on this chapter were often detailed and well documented. BSG made observations on the outcome of the negotiation rounds and provided detailed comments on the various proposals.[141]

Often these priorities reflected the priorities of the EU negotiator as well and further strengthened the EU negotiating hand, hence the claim that Parliament might have played the role of the 'bad cop' in the negotiations.[142] Though such assessment cannot be corroborated, it is certain that the public statements by the EP Brexit coordinator often made news in the UK and emphasised the limitations in the margin of manoeuvre for the EU negotiator.

The impact of Parliament in the negotiations is even more difficult to assess. As already stated, Parliament, as the entire EU, had to take into account the enormous consequences of a possible no-deal: almost any deal, even one where Parliament's red lines might be crossed seemed a better solution.

Northern Ireland became a main issue of concern for Parliament during the second stage of the negotiations, when the citizens' issues were agreed upon. Both the BSG statements and Parliament resolutions emphasized the importance of maintaining the open border and, again, the BSG raised the veto threat over an unsatisfactory solution.[143]

5.4. Lessons learnt - an assessment of the role of the various institutions

As stated, Article 50 TEU is quite vague as to the division of competences among EU institutions. The Brexit negotiations adopted an *ad hoc* methodology that allowed a smooth running of the negotiations and in particularly maintaining the unity of the 27. Such division functioned adequately.

The format chosen for the negotiating team was similar in all three institutions, **centralized** and **vertical**, rather than sectoral. All three Brexit coordinators reported directly to the leadership of their respective institutions and bypassed sectoral committees – although closely liaising with them for feedback. Centralization maintained control at the top and thus a single message, perhaps necessary

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[141] See for instance the BSG comments on "EU/UK positions on citizens' rights" after the third round of negotiations (4 September 2017). The group provided detailed positions on e.g., family reunion, or the application for 'settled status'. In http://www.epgencms.europarl.europa.eu/cmsdata/upload/8962f313-cb71-4fb3-997d-6dcec0bb5414/Table_on_citizens'_rights_BSG_Comments_05092017.pdf. Some of the comments bore the indication BSG political priority.

[142] Chelloti N. – Lehmann W.,(2020), *Is the European Parliament the EU's bad cop when it comes to trade talks?*, UK in a Changing World, 27 February 2020, in https://ukandeu.ac.uk/is-the-european-parliament-the-eus-bad-cop-when-it-comes-to-trade-talks/

[143] See for instance the statement of Guy Verhofstadt on 15 October 2018 that without "*a workable, legally operational and all-weather backstop for the Ireland/Northern Ireland border […} the European Parliament would not be in a position to give its consent to the Withdrawal Agreement*" in http://www.epgencms.europarl.europa.eu/cmsdata/upload/c389b899-3546-49d8-b01b-5b192f501c29/Statement_Brexit_Steering_Group_15_10_2018.pdf as well as the BSG statement of 23 January 2019 where it insisted that, "*without such an "all-weather" backstop-insurance, the European Parliament will not give its consent to the Withdrawal Agreement*". 'EP Brexit Steering Group calls on the UK to overcome the deadlock' in http://www.epgencms.europarl.europa.eu/cmsdata/upload/73a7aec0-3d38-46f0-b836-a3e089a90dc1/Brexit_Steering_Group_calls_on_the_UK_to_overcome_the_deadlock.pdf

given the issue at stake. It was not a solitary enterprise though as committees, Member States and General Directorates provided feedback and advice.

5.4.1. The distribution of tasks and the 'driver's seat'

Despite the vagueness of Article 50 TEU regarding the distribution of competences, institutions found a way to cooperate relatively harmoniously. The alleged power struggle between the Commission and the Council immediately after the referendum on the conduct of the negotiations never came officially to the open. What is clear, though, is that **the two institutions quickly reached a working arrangement** which did not falter almost throughout the negotiations. The Chief negotiator's positions were regularly endorsed by the European Council and divergences were tactical nuances rather than genuine strategic differences of opinion. Member States, but also Parliament, were permanently briefed and internal differences within each institution solved, to a large extent, by respective coordinators through a process of inclusion. In fact, inclusion was a decisive factor in maintaining unity and a single voice in the negotiations.

5.4.2. The significance of the united response

The unparalleled risk that Brexit could lead to the dissolution of the European enterprise forced the institutions to build and keep a solid united front in the negotiations. Contrary to what has happened with other trade or political agreements, such as with the US[144] or with Mercosur, all institutions and Member States maintained a single voice. The UK efforts to approach individual Member States in order to circumvent the Commission in search of a better political arrangement were rebuffed by the European Council and Member States. Such unity allowed for the EU to impose its own priorities and reinforce its negotiating positions. It has been widely acknowledged that "*maintaining a united front has been the EU's core strategy, and it has served it well*".[145]

5.4.3. The personalities

The co-existence of three persons (and teams) assigned the Brexit dossier in the three institutions could have been a source of conflict. However, in the end, it enhanced the cooperation among institutions as well as a division of tasks and, in particular, conveyed a single and united message. For instance, the Council Brexit coordinator played an effective role in the coordination of the Committee of Permanent Representatives as well as the General Affairs Council and "*led, in the long term, to the fluidification of relations*" between the Council and the Commission.[146]

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[144] Puccio, L. (2015), *EU-US negotiations on TTIP - A survey of current issues*, European Parliamentary Research Service (EPRS) PE 559.502, June 2015, in particular pp. 6-7.

[145] Patel, O. (2018), *The EU and the Brexit Negotiations: Institutions, Strategies and Objectives*, UCL European Institute. Brexit Insights, October 2018, available at SSRN: https://ssrn.com/abstract=3269554

[146] Maurice, E. (2018) *Brexit, lessons in negotiations for the European Union*, op. cit.

Close coordination between institutions was partly a result of the Commission's resolute decision to maintain an open line of communication with the other institutions and, to a large extent, linked to the personal relationship built between the three Brexit coordinators. In the words of a business expert in negotiations, Michel Barnier remembered the stakeholders who were not at the table and was "*diligent about providing updates on the status of the negotiations to member countries, European ambassadors, and the European Parliament*".[147]

5.4.4. The role of the European Parliament

Where differences really existed and came to light were regarding the role of Parliament in the process. There was indeed an effort, initially, to relegate Parliament to a secondary role. The convincing threat of vetoing the withdrawal agreement and the desire of other institutions to show a united front to what constituted an existential threat to the EU allowed for an increased involvement of Parliament in the process.

In dealing with Brexit, Parliament chose a centralized institutional approach (a special coordinator and a steering group directly reporting to the Conference of Presidents) and a general content approach (dealing with the general principles and underlying specific problems in detail). This approach sidestepped to some extent the traditional sectoral approach – through committees – that Parliament often uses, and some committees might have felt that they were being left behind. The participation in the deliberations of the Conference of Committee Chairs allowed not to lose sight of the committees' views but did not alter the centralized approach the Parliament followed in this context.

In brief, Parliament chose to concentrate its priorities around the citizens, providing bigger visibility to its positions and pre-empting the position of negotiators. As Closa rightfully assesses, the role of Parliament in the Brexit negotiations testified once again Parliament's objectives to gain influence and attain its preferred outcomes "*from inter-institutional bargaining but also [from] efforts to model and shape EU norms and procedures in a manner which suits its own power-enhancing objectives*".[148]

[147] Fisher P. (2020), *Lessons From Brexit on How (Not) to Negotiate*, Harvard Business Review, 8 December 2020 in https://hbr.org/2020/12/lessons-from-brexit-on-how-not-to-negotiate

[148] Closa C. (2020) "Inter-institutional cooperation … "op. cit. p. 632.

6. THE OUTCOME OF THE NEGOTIATIONS

6.1. The negotiations

Effective negotiations between the two sides started on 19 June 2017. They were conducted in accordance with the EU's transparency guidelines with published 'position papers' on the main topics for discussions. As stated, the sequence of the negotiations imposed by the EU was in the end accepted by the UK. The main topics at stake were quickly identified by both parties though their priorities differed.[149] The objective of this chapter rather than providing a history of the negotiations or an analysis of the withdrawal agreement is to look into the elements that impinge on the operation of Article 50 TEU.

6.1.1. The main issues of the negotiations

Two of the main issues discussed in priority (rights of citizens post-Brexit and the settlement of the financial liabilities of the UK stemming from its contribution to the EU budget) are elements that will play a major role in other separation cases. The third – and perhaps the most fraught one - keeping an open border with Northern Ireland was particular to the UK case and, mainly provoked by the UK resolve to leave the customs' union.

- **Citizens' rights** were an EU priority as a matter of principle (to protect EU citizens who had exercised their rights stemming from EU law) but also because a significant large number of EU27 citizens lived in the UK. It was also a difficult point for the UK government to oppose, although it was "lukewarm" to make generous offers on residence, aware of the significant role of immigration in the referendum outcome.[150]
- The **financial disentanglement** was equally important for the EU, mindful to reduce the loss in the EU budget from the UK withdrawal and fearful of UK assertions that the UK could leave without paying anything.[151]
- **The provisions of the Good Friday Agreement** to maintain an open border on the island of Ireland seemed at first sight irreconcilable in the face of the UK insistence to leave the Customs Union and avoid erecting an internal border between Northern Ireland and the rest of the UK.

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[149] As Donald Tusk had put it, the UK should settle *'people, money and Ireland'* warning that before discussing on the future, they should first sort out the past. *Brexit: Donald Tusk says UK must settle 'people, money and Ireland' first during EU talks*, The Independent, 28 April 2017 in https://www.independent.co.uk/news/world/europe/brexit-donald-tusk-uk-united-ireland-eu-free-movement-single-market-divorce-payment-a7706846.html

[150] Bradley, K. (2020), "Agreeing to Disagree: The European Union and the United Kingdom after Brexit", *European Constitutional Law Review*, Volume 16 (3), September 2020 p. 380.

[151] This argument, a dear one to Brexit supporters, was reinforced by an assessment of a House of Lords report that concluded that "*Article 50 TEU allows the UK to leave the EU without being liable for outstanding financial obligations under the EU budget and related financial instruments, unless a withdrawal agreement is concluded which resolves this issue*". House of Lords European Union Committee, (2017), *Brexit and the EU budget*, 4 March 2017, point 135. In https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/125/12502.htm

EU made the agreement on these matters a prerequisite to continue negotiations on the future relationship at the second stage.

6.1.2. The gradual rapprochement of positions

Agreement on citizens came first. The outcome was very near the original EU demands. The withdrawal agreement protects EU27 citizens residing in the UK, and UK nationals residing in one of the 27 EU Member States, at the end of the transition period, as well their family members that are granted rights under EU law.

Agreement on the financial settlement (that is on the obligations stemming from the UK's participation in the EU budget and other aspects of its EU membership) was more delicate, as the cost of EU membership was a major argument of the Leave campaign and numbers in billions were circulating in the media (the EU side always refused to discuss figures). In the end, the solution was to include a financial settlement which rather than giving a definitive cost, established which financial commitments would be covered, the methodology for calculating the UK's share and a payment schedule.

Northern Ireland. Discussions on Northern Ireland were further complicated after the early UK parliamentary elections of 8 June 2017 which produced a hung parliament. Theresa May lost her majority and had to depend for 'supply and support' from the Democratic Unionist Party (DUP) of Northern Ireland which was adamant against any settlement that might give the impression of separating in any way Northern Ireland from the rest of the UK. The solution proposed by the EU ("*a solid, operational and legally binding Irish backstop*") was largely the reason of the defeat of the withdrawal agreement in the House of Commons and, indirectly, of Theresa May's resignation. The final text of the Protocol on Northern Ireland, renegotiated in autumn 2019 by the new UK government, was the only major accomplishment of Boris Johnson and, perhaps, the only point where the EU had to give way on its principles.

On 8 December 2017 the two sides submitted to the European Council a joint report with the progress achieved on the issues of citizens and the financial settlement but still lacking agreement on the question over the border between the two sides in Ireland. Following this, the European Council concluded that sufficient progress had been achieved to move towards the second stage of the future relations.

On 28 February 2018, the Commission published the first draft withdrawal agreement which transposed into legal text the joint report of December 2017. In June 2018, the UK parliament voted the *European Union Withdrawal Act (2018)* which repealed the *European Communities Act of 1972*, to take effect once the withdrawal agreement would come into force. The two sides reached agreement on the text of a full withdrawal agreement on 14 November 2018. It was accompanied by an outline of a political declaration on the future relations. On 11 January 2019 the Council voted the text and authorised its president to sign it, with a view to the UK leaving within the time limit of 29 March 2019. The agreement included a transitional arrangement for a period up to the end of 2020.

The rejection of the agreement by the House of Commons on three occasions and the change in government in the UK delayed the UK departure. Boris Johnson who became Prime Minister in July 2019 tried to renegotiate the Withdrawal Agreement with a no-deal Brexit as a real possibility. In the

event the two sides, agreed on a revised Protocol on Ireland and a revised political declaration in October 2019, leading to withdrawal of the UK on 31 January 2020.

6.2. The Withdrawal Agreement

The initial timetable plan was that negotiations would be concluded by autumn 2018, allowing some time for proofing and ratification of the withdrawal agreement and for taking other necessary measures to prepare the departure. However, divisions within the UK government and with the Parliament, primarily on the Northern Ireland protocol, considerably delayed agreement. Although a general agreement was reached as early as April 2018, the impossibility to secure a majority on the agreement[152] or on any alternative option[153] within the UK parliament, in particular after the government lost her majority at the June 2017 elections, substantially delayed progress, making also necessary to extend three times the withdrawal deadline. Political and institutional divisions of this kind are to be expected in similar situations. Brexit divided parties, broke party discipline and created institutional conflict in the older democracy of the world. One must bear in mind that comparable crises, and thus delays, may be caused by vacillating or contradictory positions among institutions in the case of other withdrawing states, too.

The content of the Withdrawal Agreement is to a large extent a pattern for future such agreements. It contains more elements than some minimalist readings had thought in the very beginning and provides an interesting basis for the analysis of possible future solutions. While formally a single instrument, it regulates matters which have different legal character, and follow differentiated time scales. It is a complete text, in the sense that it covers all aspects of the separation between the two sides as well as some projections on the future relations, in particular concerning Northern Ireland.

6.2.1. The legal status of the agreement in the UK

As already stated, the withdrawal agreement is part of EU law. **As such it enjoys primacy and direct effect in the EU**. In addition, however - and this is a novel characteristic of this agreement – it establishes directly effective rights to individuals (in particular EU citizens in the UK and UK nationals in the EU. It also has primacy and direct effect over UK law and, **for eight years from the end of the transition** UK courts may send preliminary references to the CJEU on matters relating to EU citizens' rights. Article 4 of the WA provides that:

> *'The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States. Accordingly, legal or natural persons*

[152] Three 'meaningful votes' (on 15 January 2019, on 12 March 2019 and on 29 March 2019) were held in the House of Commons, all three failing to secure a majority in favour of the Withdrawal Agreement.

[153] In March and April 2019, the House of Commons held, despite the opposition of the government, a number of 'indicative votes" on various 'models' of the relations with the EU (from no-deal to a new referendum) which all failed. In addition, the House of Commons twice (on 13 March and on 4 September 2019) voted to avoid a no-deal Brexit.

shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law'.

The Withdrawal Agreement was given effect in the UK by virtue of the European Union (Withdrawal Agreement) Act 2020[154] which amended the European Union (Withdrawal) Act 2018;[155] this latter remains the main act on the status of EU law after withdrawal.

The form of enforcement of the withdrawal agreement achieved with the UK is a pattern for other cases. It has been pointed out that the force and clarity with which the Withdrawal Agreement underlines the direct effect and the primacy over national legislation is surpassing even the Treaty itself.[156] It will be interesting, though, to watch the extent that the two sides will abide to it, or at least abide to the relevant dispute resolution process and whether the UK courts will make use of the right to refer to the CJEU – and to what extent. Recent frictions over the application of the Northern Ireland protocol might demonstrate that even elaborate dispute resolution mechanisms require a consensual environment to operate.

6.2.2. Governance and the role of the CJEU in the UK and the EU

It is worth looking more in detail in these two areas in the withdrawing agreement as governance and the role of CJEU are interesting and may be repeated in future agreements.

Governance of the Agreement pertains to a Joint Committee responsible for the implementation and the application of the Withdrawal Agreement. Decisions and recommendations will be made by mutual consent and will be binding on both sides. They will have the same legal effect as the Agreement.

The UK government had made putting an end to the jurisdiction of the CJEU a central objective in the negotiations. The EU on the other hand insisted on maintaining as much as possible a role for the CJEU. The final outcome is quite balanced. Under the Withdrawal Agreement, the CJEU retains its jurisdiction "as provided for in the Treaties" during the transition period. In relation to citizens' rights, UK courts will continue to be able to refer cases to the CJEU for eight years following the end of the transition period. The Court will also be able to hear new cases against the UK based on facts that took place before the end of the transition period, brought by the Commission.

It also plays an important role in respect of the Protocol on Northern Ireland. Disputes which cannot be solved in the Joint Committee can be submitted to an arbitration mechanism. However, where a dispute raises a question of interpretation of EU law, including of a provision of EU law referred to in the Withdrawal Agreement, the arbitration panel should request the CJEU to give a ruling on the question; the ruling will be binding on the arbitration panel.

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[154] European Union (Withdrawal Agreement) Act 2020 of 23 January 2020 in https://www.legislation.gov.uk/ukpga/2020/1/contents/enacted

[155] European Union (Withdrawal) Act 2018 (c. 16) of 26 June 2018 in https://www.legislation.gov.uk/ukpga/2018/16/contents/enacted

[156] Bradley, K. (2020) "Agreeing to Disagree…" op. cit. pp. 398-9.

Both the governance scheme and the jurisdiction of the CJEU are acceptable in terms of a hybrid agreement with what is presently going to be a third state. In particular the role of the CJEU is sufficiently wide to be considered a model for future withdrawals.

6.3. The agreement on the future relations

The study is not intending to look into the Trade and Cooperation Agreement but rather examine the institutional aspects of the Political Declaration (both the first and the revised one) from the angle of Article 50 TEU.

The future relations were not dealt in the early stages of the withdrawal negotiations, as the EU set agreement on the main separation issues before going into the future relations. In December 2017, the European Council concluded that there was sufficient progress in the withdrawal negotiations, to continue with the second stage. Relevant negotiating guidelines followed in spring 2018 without effective negotiations starting due to the prolonged political stalemate in the UK.

In the meantime, the two sides agreed on a Political Declaration [157] proposed on 22 November 2018 by the EU.[158] The Declaration was submitted to the UK Parliament together with the Withdrawal Agreement without success. Following the renegotiation undertaken after the change of Government in July 2019, a revised Political Declaration was published on 17 October 2019.

The model of the political declaration is not anticipated in Article 50 TEU. It was not a legally binding text. As a matter of fact, it was not even necessary and in practice it proved of little use as the Trade and Cooperation Agreement was signed less than a year later. Adopting a political declaration was in part aiming to assist the UK leadership in its efforts to pass the withdrawal agreement but is not clear whether it did help there nor whether it helped achieve faster the trade agreement. In fact, it seems to have created more questions it solved, and it is doubtful that a similar approach will be followed in future withdrawals. However, a similar political declaration adopted much earlier – or even at the start of the negotiations - might provide a different outcome and facilitated the withdrawal negotiations.

[157] "Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom" In https://www.consilium.europa.eu/en/press/press-releases/2018/11/22/draft-political-declaration-setting-out-the-framework-for-the-future-relationship-between-the-eu-and-the-uk-and-article-132-of-the-draft-withdrawal-agreement/

[158] "Outline of the political declaration setting out the framework for the future relationship between the European Union and the United Kingdom of Great Britain and Northern Ireland, as agreed at negotiators' level on 14 November 2018" in https://ec.europa.eu/info/files/outline-political-declaration-setting-framework-future-relationship-between-european-union-and-united-kingdom-great-britain-and-northern-ireland-agreed-negotiators-level-14-november-2018_en

6.4. Lessons learnt – the outcome of the negotiations

The dominance of an agreed withdrawal: A first important lesson from Brexit is the all-powerful incentive of reaching an agreement before withdrawal. This is true for the EU, but even more so for the withdrawing state, even if this is a major Member State. Even for a convinced no-deal advocate, as Prime Minister Boris Johnson, economic realities overpowered his political preferences to leave without a deal. It is very difficult to imagine the withdrawal of a Member State without an agreement. The economic imperative also played a role on the transitional arrangements. Despite opposing in principle to an all-encompassing transitional period, in particular against a relatively limited future trade agreement, the UK government acceded to this demand by the EU in order to secure continuity, avoid a disorderly interruption of relations and prepare the post-Brexit situation.

"People and money": Any future withdrawal agreement can be expected to cover two of the three aspects what President Tusk had mentioned at the start of the Brexit negotiations. "People and money", though not Ireland, should be the two basic components in any withdrawal agreement and a quick solution to these a prerequisite to the conclusion of an agreement and, even more, of close or even orderly future relations. On the citizens, the general rule agreed was (near) perpetuity of rights acquired for citizens (and their, even future, families). On the financial settlement, instead of discussing sums, the EU suggested a methodology for the calculation of obligations. The agreement on both areas is satisfactory and can be used in future situations.

The implications of the "asymmetric hostility": Bradley accurately points out a problem that was not sufficiently taken into account by the drafters of Article 50 TEU. Brexit negotiations "*were conducted in an atmosphere of asymmetric political hostility, that is, hostility on the part of the UK government and its allies […] not apparently, reciprocated by the EU, which acted throughout more in sorrow than in anger*". [159] Though this was particularly visible in the Brexit negotiations due to domestic reasons, it can well be sustained that a similar hostile attitude might appear in other exit negotiations: countries and people will presumably nurture strong feelings against the EU to decide to leave it. Negotiations will consequently suffer due to this emotional aspect and the propensity of a lose-lose situation will increase.

A political declaration for the future relations? The idea of a political declaration did not work and in fact did not satisfy any of the parties in the negotiations. However, had such a political declaration being agreed upon earlier on in the negotiations, one can consider that it might have more positive an impact on the negotiations.

[159] Bradley, K. (2020), "Agreeing to Disagree…" op. cit. p. 387

7. SPECIFIC ISSUES RELATED TO THE APPLICATION OF ARTICLE 50 TEU

7.1. The status of the withdrawing Member State between notification and withdrawal

Article 50 TEU provides that the withdrawing State remains a Member State until the conclusion of the withdrawal process. This is indicated clearly in paragraph 2 which stipulates 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 referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."*

The EU was quick to point out to the UK that until the withdrawal process is over it remains a member of the EU "*with all the rights and obligations that derive from this*" and that "*EU law continues to apply to the full to and in the United Kingdom until it is no longer a Member*".[160] The conclusions of the European Council (Article 50) of February 2017 which laid down the guidelines of the negotiations reiterated this, specifying that "*the principle of sincere cooperation' is part of UK's continuing obligations*".[161] The same text made clear that, as UK was still a member, "*all ongoing EU business must continue to proceed as smoothly as possible at 28*". This was not challenged by the UK government which continued to participate in Council meetings and apply fully the Treaty.

The UK's status did not change in the institutions, with the exception of those meetings prescribed in Article 50 (4) TEU, namely discussions of the European Council or Council regarding the withdrawal of the UK or decisions concerning it. However, the UK decided to relinquish the Council presidency in the second half of 2017, following which the Council changed the order of Council rotating presidencies, excluding the UK.[162]

It has been argued that such institutional 'neutrality' is problematic and may "*give rise to tensions*" or "*conflict of interests*". Indeed, as EU policies are heavily intertwined, it is difficult to establish whether the withdrawing Member State, when it participates in decisions on specific policies. pursues "*the interests of the EU [or] its own interests*" after exit and that "*at least in some circumstances, the duty of loyal cooperation may require [from that Member State] to abstain from decision-making and even participation in policy meetings*".[163]

The situation was a bit more complicated regarding individual nominations. During the immediate aftermath of the referendum, Jonathan Hill, UK Commissioner in charge of the portfolios of financial

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[160] *Statement by the EU leaders and the Netherlands Presidency on the outcome of the UK referendum.* 24 June 2016, in https://www.consilium.europa.eu/en/press/press-releases/2016/06/24/joint-statement-uk-referendum/

[161] *European Council (Art. 50) guidelines following the United Kingdom's notification under Article 50 TEU,* point 25. In https://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/

[162] Council of the European Union, *Council rotating presidencies: decision on revised order,* Press release 475/16 of 26 July 2016 in https://www.consilium.europa.eu/en/press/press-releases/2016/07/26/council-rotating-presidencies-revised-order/pdf

[163] Tridimas T. (2016), "Article 50: An Endgame without an End?", op. cit. p. 308.

stability, financial services and capital markets union, resigned. He was replaced by Julian King, who was given the security portfolio, till the end of the Juncker Commission's mandate on 30 November 2019. Both Hill's and King's assignments were allegedly questioned by MEPs on the grounds of their nationality, but this does not seem to have influenced Juncker's decision and the definitive allocation of portfolio.[164]

The UK did not appoint a commissioner to the Von der Leyen Commission for the brief time that it was still a Member State (between 1 December 2019 and 31 January 2020), despite repeated calls from Ursula von der Leyen to do so; the absence of a commissioner from a Member State raised questions over the legality of the actions of an incomplete Commission.

The UK government had initially committed to leave the EU on 31 October 2019 and considered therefore that it was not bound to nominate a new Commission member. However, even after the European Council extended the withdrawal period till 31 January 2020, the UK refused to nominate a member of the Commission despite the European Council's express request.[165] The UK argument was that the government was unable to make international nominations ahead of the country's general election of 12 December 2019.

The Commission considered this failure as a breach of the treaties and launched an infringement procedure against the UK.[166] However, the procedure was closed after the UK's departure.[167]

Taking stock of UK's refusal, the Council adopted on 25 November 2019 the list of the Commissioners, excluding the UK representative, noting that the UK's failure "*cannot undermine the regular functioning of the Union and its institutions and thus cannot constitute an obstacle to the appointment of the next Commission in order for it to start exercising the full range of its power under the Treaties as soon as possible*". [168] The college of commissioners voted by the Parliament consisted of 27 members.

The UK decision, besides the obvious disrespect of the Treaties by the UK, raises a number of issues for the future: decisions by an incomplete Commission might be challenged legally. More widely, it could be considered as a precedent for the EU or for the way Member States appoint Commissioners in the future.

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[164] *British EU Commission nominee to oversee response to terrorism*, Reuters agency, 2 August 2016, n https://www.reuters.com/article/uk-britain-eu-commissioner-idUKKCN10D0KG

[165] The *European Council Decision (EU) 2019/1810 taken in agreement with the United Kingdom of 29 October 2019 extending the period under Article 50(3) TEU* required, in point 11, that "*this further extension cannot be allowed to undermine the regular functioning of the Union and its institutions. Furthermore, it will have the consequence that the United Kingdom will remain a Member State until the new withdrawal date, with full rights and obligations in accordance with Article 50 TEU, including the obligation to suggest a candidate for appointment as a member of the Commission*". In https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019D1810&from=EN.

[166] *European Commission launches infringement proceedings against the UK following its failure to name a candidate for EU Commissioner*, Press release, European Commission, 14 November 2019 in https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6286

[167] Inf (2019) 2305 closed on 23 July 2020. In https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=false&active_only=0&noncom=0&r_dossier=&decision_date_from=&decision_date_to=&EM=UK&title=&submit=Search

[168] Council Decision (EU) 2019/1949 taken by common accord with the President-elect of the Commission of 25 November 2019 adopting the list of the other persons whom the Council proposes for appointment as Members of the Commission and repealing and replacing Decision (EU) 2019/1393.

A discussion, early during the withdrawal period, on the status of staff members of the European institutions of UK nationality after withdrawal[169] was ended when the Commission, on 28 March 2018, decided to provide "*Commission staff with British nationality with some certainty and security*" and not to use "*its discretionary power [to terminate staff employment] except when duly justified in specific cases, such as conflicts of interest or due to international obligations*".[170]

Early in the process of Brexit, it was reported that some MEPs were raising questions around whether UK-elected MEPs should continue with their pre-referendum functions and roles, in particular as committee chairs or rapporteurs on various files.[171] Martin Schultz, then President of the European Parliament, quickly excluded any change thereupon. In fact, UK MEPs had no change in their status until the exit agreement. Given that MEPs under Article 14 TEU are "representatives of the Union's citizens" and "are elected for a term of five years", it has been suggested that UK MEPs should be allowed to keep their seats till the end of their term.[172]

The first extension of UK's withdrawal process meant that the UK should participate and organise elections to the European Parliament. The EU side required this,[173] and the UK reluctantly accepted this obligation and organised the European Parliament elections.

The UK judges in the CJEU and the General Court, as well as the UK Advocate-General continued their duties normally: the UK judge, C. Vajda, participated even in the judgment of the *Wightman* case.

The withdrawal agreement provided that, on the date of its entry into force, the mandates of all members of institutions, bodies and agencies of the Union nominated, appointed or elected in relation to the United Kingdom's membership of the EU should end. There was no provision in the withdrawal

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[169] EU citizenship is a prerequisite for employment as an EU staff member. Hence, UK nationals who were civil servants of the EU institutions could, legally, face the possibility of their employment being terminated under the rules of the Staff Regulations in the event of Brexit, as they would lose EU citizenship (unless they had another EU nationality). See Hofmann, H. C.H (2017), *The impact of Brexit on the legal status of European Union officials and other servants of British nationality*". European Parliament Policy Department for Citizens' Rights and Constitutional Affairs. European Parliament, Brussels, PE 596.837, November 2017.

[170] European Commission, Minutes of the 2249th meeting of the Commission held in Brussels (Berlaymont) on Wednesday 28 March 2018 (morning) in https://ec.europa.eu/transparency/regdoc/rep/10061/2018/EN/PV-2018-2249-F1-EN-MAIN-PART-1.PDF

[171] See, for instance, '*British MEPs allowed to keep their European Parliament posts - for now*' 1 July 2016 in https://www.theparliamentmagazine.eu/news/article/british-meps-allowed-to-keep-their-european-parliament-posts-for-now and '*British MEPs 'in limbo' as Parliament considers their fate*', 7 July 2016 in https://www.politico.eu/article/european-parliament-considers-fate-of-its-british-european-parliament/

[172] Fabbrini F. (2018), *The Institutional Consequences of a hard Brexit*, In-depth analysis, European Parliament Policy Department for Citizens Rights and Constitutional Affairs, PE 604.961, May 2018, p.10.

[173] See relevant letter to President Tusk by Jean-Claude Juncker, stating that if the UK were still part of the EU at the end of May 2019 "*it will be legally required to hold these elections, in line with the rights and obligations of all Member States as set out in the Treaties*". Letter dated 11 March 2019 in https://www.consilium.europa.eu/media/41013/20190311-letter-president-juncker-tusk.pdf. The European Council on 10 April 2019 which agreed on the first extension of the withdrawal process was more menacing. It pointed out, in paragraph 3 of the Conclusions, that "*the extension cannot be allowed to undermine the regular functioning of the Union and its institutions. If the UK is still a Member of the EU on 23-26 May 2019 and if it has not ratified the Withdrawal Agreement by 22 May 2019, it must hold the elections to the European Parliament in accordance with Union law. If the United Kingdom fails to live up to this obligation, the withdrawal will take place on 1 June 2019*". Special meeting of the European Council (Art. 50) (10 April 2019) – Conclusions. Brussels, 10 April 2019, EUCO XT 20015/19 in https://www.consilium.europa.eu/media/39042/10-euco-art50-conclusions-en.pdf.

agreement for maintaining a UK judge in the CJEU for the transition period, although CJEU judgments will continue to affect the UK even beyond the transition period. [174]

7.2. The revocation of the withdrawal agreement and the consequences of the CJEU Wightman *and others* judgment

The right of a Member State to revoke its withdrawal notification was very little discussed during the Convention, [175] and not at all during the brief negotiations at the IGC that prepared the Lisbon Treaty. After 2009, while there has been an extensive literature on the implications of Article 50 TEU, the right of a Member State to change its mind and revoke a withdrawal notification received scarce academic interest: it was assumed that a State's decision to withdraw from the EU would be final. The question was moot because there were no institutional and judicial precedents to guide the interpretation of the Article and "*the main interpretative task in this respect is to resolve a question on which that provision is silent*" [176].

Academic research usually studied the revocation in the context of a more general analysis of Artide 50 TEU and opinions contrasted as to whether it allowed revocation or not. Friel concluded that revoking a withdrawal notification was inherent in the withdrawal model provided by Article 50 TEU. He considered that "*as a matter of common sense, it should be open to a Member State to change its mind within the two-year period*", adding that it would be "*perverse*" not to allow this. A State could "*withdraw the withdrawal*" at any stage of the process "*provided it does so before two years have elapsed*". [177] Łazowski also accepted that e revocation is possible: A Member State may trigger the Article 50 TEU procedure "*but changes its mind in the course of negotiations (for instance as a result of change of government) and decides to stay in the European Union*". [178]

J-V. Louis, on the other hand, argued that the notification of withdrawal cannot be revoked. His reason was that in order to avoid rushed initiatives to withdraw, and attempts at blackmail and intimidation, especially on the part of larger states, withdrawing the intention to withdraw should be denied. [179] In

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[174] Fabbrini justly supports that the UK judge and advocate general should be allowed to remain in the Court even after withdrawal the Court is "*a unique institution*" where "*nationality does not play any role in [its] internal organisation*". Fabbrini F. (2018), *The Institutional Consequences of a hard Brexit*", op. cit. pp. 12-13.

[175] An amendment proposed by German MEP Sylvia-Yvonne Kaufmann added to the then Article 46 on voluntary withdrawal the following sentence: "*The revocation of the withdrawal intention can be made at any time by a declaration addressed to the President of the European Council*". The amendment intended, as several other related amendments, to limit the right of withdrawal and to establish a negotiated rather than a unilateral right of withdrawal from the EU. It was not accepted by the Presidium of the Convention and eventually failed. See Papageorgiou, I, (2018), *The (ir-)revocability of the withdrawal notification under Article 50 TEU.*, study, European Parliament Policy Department for Citizens Rights and Constitutional Affairs, PE 596.820, March 2018, p. 16.

[176] Sari A. (2017) "Reversing a Withdrawal Notification under Article 50 TEU: Can a Member State Change its Mind?" *European law Review*, n. 4, 2017, pp. 454.

[177] Friel, R. J. (2004), "Secession from the European Union: Checking out of the Proverbial Cockroach Motel", *Fordham International Law Journal*, Vol. 27, Issue 2, January 2004, p. 638.

[178] Łazowski A. (2013), "Withdrawal from the European Union and alternatives to membership", *European Law Review*, Vol. 37(5), 2012, pp. 523-540 in footnote 30.

[179] Louis, J.-V. « Le droit de retrait de l'Union européenne », op. cit. p.308.

an analysis, before the Brexit developments but in view a possible referendum, Steve Peers recognised that "*in the absence of explicit wording, the point is arguable either way*".[180]

As the Brexit negotiations stalled and the divisions within the UK political system increased, some 'Remainers' floated the possibility for the UK to revoke its withdrawal notification, in conjunction with the proposal for a second referendum. Given its political significance, revocation became a hotly debated legal and political matter. In a short lapse of time, a large number of academic articles appeared, while EU institutions[181] and UK[182] and EU leaders[183] suggested a revocation as a natural and even desirable outcome.

Most scholars, in particular British, defended that the UK (as any Member State) had a unilateral[184] (or, for others, a negotiated)[185] right to revoke its withdrawal notice: the most powerful argument being that a change of mind of the withdrawing state should not be prohibited as "*Article 50 is a mechanism dealing with voluntary withdrawal from the Union. It is not a mechanism for expulsion of a Member State*".[186] Among EU institutions, a cautious preference went for some form of negotiated right to withdraw. Parliament, in its resolution on the Brexit negotiations of 5 April 2017, acknowledged that revocation of the UK notification is possible - although it should be "*subject to conditions set by all EU-27"* so as to avoid using it "*as a procedural device or abused in an attempt to improve on the current terms of the United Kingdom's membership*".[187]

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[180] Peers S. (2014), *Article 50 TEU: The uses and abuses of the process of withdrawing from the EU*. op. cit. He later changed his mind, supporting unilateral revocation

[181] In fact, the first indirect such statement came before even notification by the European Council president Donald Tusk who in a speech at a European Policy Centre conference in October 2016 stated that "*the only real alternative to a "hard Brexit" is "no Brexit*". In https://www.consilium.europa.eu/en/press/press-releases/2016/10/13/tusk-speech-epc/

[182] Among them, former Labour Prime Minister Tony Blair "Tony calls "people to 'rise up' against Brexit", BBC, 17 February 2017 in http://www.bbc.com/news/uk-politics-38996179, former Tory Deputy Prime Minister Michael Heseltine "Brexit: Britain could reverse EU exit decision if public opinion swings back towards remain", The Independent, 6 September 2016 in http://www.independent.co.uk/news/uk/politics/brexit-latest-eu-exit-decision-reversal-u-turn-public-opinion-remain-economy-austerity-michael-a7931606.html; and former Liberal Democrat leader, Tim Farron who says that "Article 50 can be revoked", BBC news, 7 December 2016 in http://www.bbc.com/news/uk-politics-38240121

[183] In particular, French President Emmanuel Macron declared, during a meeting with UK PM Theresa May on 13 June 2017, that "*the door is evidently open for the UK*" in the event it changed its mind (http://www.elysee.fr/videos/declaration-conjointe-d-emmanuel-macron-et-de-theresa-may-premier-ministre-du-royaume-uni/); European Council's president Donald Tusk also expressed a similar opinion on 29 March 2017 http://www.independent.co.uk/news/uk/politics/brexit-article-50-donald-tusk-eu-president-we-miss-you-already-happy-day-brussels-a7655966.html and German Finance Minister Wolfgang Schäuble claimed, on 13 June 2017, that "*should the British change their decision [to leave the EU], then they would naturally find an open door*" in http://www.handelsblatt.com/politik/deutschland/schaeuble-zu-grossbritannien-exit-vom-brexit-die-briten-wuerden-auf-offene-tueren-stossen/19928246.html

[184] See in particular, *In the Matter of Article 50 of the Treaty on European Union*, (known as "Three Knights' Opinion") (2017), an opinion published by eminent lawyers (five rather than three: Sir David Edward KCMG PC QC, Sir Francis Jacobs KCMG PC QC, Sir Jeremy Lever KCMG QC, Helen Mountfield QC and Gerry Facenna QC), 10 February 2017 in https://www.bindmans.com/uploads/files/documents/Final_Article_50_Opinion_10.2.17.pdf; Sari, A. (2016), *Biting the Bullet: Why the UK Is Free to Revoke Its Withdrawal Notification under Article 50 TEU*', UK Constitutional Law Blog (17 Oct 2016); Sir John Kerr, Secretary General of the Convention on the Future of Europe, also supports this position in "I wrote Article 50 – and I know this government can reverse Brexit if it wants to", the New Statesman, 10 November 2017.

[185] A similar approach is taken in the Carmona, J., Cirlig C-C. and Sgueo G. (2017) *UK withdrawal from the European Union - Legal and procedural issues*, op. cit. pp. 9-10, who conclude that "*there is wide agreement that the withdrawal process could be suspended if all the other Member States agree to this, as the Member States are the 'masters of the Treaties'*" but considers "*much more problematic*" a unilateral revocation.

[186] *In the Matter of Article 50 of the Treaty on European Union*, op. cit.

[187] European Parliament resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union, Point L.

Before the withdrawal notification was submitted, a UK MEP, Raymond Finch (EFDD) raised the issue in Parliament through identical written questions addressed to the Council and to the Commission.[188] In its reply, the Commission merely stated that the Treaty does not provide for a revocation mechanism but added that "*once the article 50 TEU is triggered, it is no longer a unilateral process*".[189] The Council declined to take position and simply replied that "*it is not for the Council to provide legal analysis*".[190] In a July 2017 fact sheet on the State of play of the Brexit negotiations, the Commission seemed to persist that, although a decision to revoke is feasible, it should not be taken unilaterally.[191]

7.2.1. The CJEU *Wightman and Others* judgment

It was long expected that, in the absence of a clear provision in the Treaty, the CJEU would be called upon to interpret Article 50 TEU, despite its aversion to replying to hypothetical questions. On 19 December 2017, a petition in a Scottish court was lodged: the petitioners, among them members of the Scottish, United Kingdom and European Parliaments, sought from the court a declarator (a legal action, in Scottish law, which seeks to obtain from a court a judicial declaration of a fact) specifying "*whether, when and how the notification [under Article 50] can unilaterally be revoked*". The petition was initially rejected[192] but eventually the Court of Sessions acceded to the petitioners' request. A relevant request for preliminary ruling under the expedited procedure was submitted on 21 September 2018[193] with the following wording:

> *Where in accordance with Article 50 of the TEU, a Member State has notified the European Council of its intention to withdraw from the European Union, does EU law permit that notice to be revoked unilaterally by the notifying Member State; and, if so, subject to what conditions and with what effect relative to the Member State remaining within the EU.*

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[188] Both questions asked the same: "*Can notice under Article 50 of the Treaty on European Union be revoked? If so, what is the process or procedure by which such revocation can be effected?*" Question for written answer to the Council under Rule 130 (reference E-008604/2016) and question for written answer to the Commission under Rule 130 (ReferenceP-008603/2016), both dated 16-11-2016.

[189] Commission reply, 18 January 2016 in http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2016-008603&language=EN

[190] Council reply, 25 January 2017 in http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2016-008604&language=EN

[191] "*It was the decision of the United Kingdom to trigger Article 50. But once triggered, it cannot be unilaterally reversed. Article 50 does not provide for the unilateral withdrawal of the notification*". European Commission fact sheet on 'the State of play of Article 50 negotiations with the United Kingdom', Brussels, 12 July 2017 in http://europa.eu/rapid/press-release_MEMO-17-2001_en.htm

[192] The Court found that "*the issue was hypothetical in light of the UK Government's position … the matter encroached upon parliamentary sovereignty and was outwith the court's jurisdiction [and] the conditions for a reference had not been met, as the facts were not ascertainable and the issue was hypothetical*." Interlocutor and relative opinion dated 8 June 2018 (2018 SLT 657) by the Lord Ordinary. In https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2018csih62.pdf?sfvrsn=0.

[193] *Andy Wighman, MSP, and others*, First division, Inner House, Court of Session [2018] CSIH 62. P1293/17 in https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2018csih62.pdf?sfvrsn=0.

The CJEU received the request on 3 October 2018, granted expedited procedure on 19 October 2018 and delivered extremely fast, on 10 December 2018, its judgment in the case C-621-18 *Andy Wightman and Others* v *Secretary of State* for Exiting the European Union (*Wightman* case).[194]

In the proceedings the UK intervened in favour of the inadmissibility of the request as hypothetical and because it was a request for an advisory opinion contrary to Article 218(11) TFEU. So did the Commission. In addition, in their interventions, the Commission and the Council agreed that "*a Member State is entitled to revoke the notification of its intention to withdraw before the Treaties have ceased to apply*", but challenged the unilateral character of this right, suggesting instead that the Article "*should be interpreted as allowing revocation, but only with the unanimous consent of the European Council*" (para. 42). They both warned that such a right might incite the Member State concerned to unilaterally make a revocation shortly before the end of the period laid down in Article 50(3) TEU and notify a new intention to withdraw immediately after that period expired, thereby triggering a new two-year negotiation period, thus rendering the time limit ineffective. In addition, they feared that a Member State could at any time use its right of revocation as leverage in negotiations (paras 39-42).

The CJEU ruled the application admissible because:

- the question was one of EU law which enjoys "a presumption of relevance" (para. 27),
- it was the point in dispute in the main proceedings (paras. 32–33) and
- was not hypothetical (para. 34).

Interestingly, it also ruled that the request was not for an advisory opinion, but "*to interpret a provision of EU law in order to enable it to give judgment in the main proceedings*" (para. 35).

The CJEU found that Article 50 TEU allows the Member State that has notified its intention to withdraw to revoke that notification,

> *"for as long as a withdrawal agreement concluded between that Member State and the European Union has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in Article 50(3) TEU, possibly extended in accordance with that paragraph, has not expired"*.

Revocation can be made "*unilaterally, in an unequivocal and unconditional manner, by a notice addressed to the European Council in writing, after the Member State concerned has taken the revocation decision in accordance with its constitutional requirements*". The revocation's purpose "*is to confirm the EU membership of the Member State concerned under terms that are unchanged as regards its status as a Member State, and that revocation brings the withdrawal procedure to an end*" (para. 75).

In order to reach this conclusion, the Court applied the following reasoning:

- The founding Treaties, which constitute "*the basic constitutional charter*" of the EU, have established an autonomous legal order "*with respect both to the law of the Member States and to*

[194] Judgment of the Court (Full Court) of 10 December 2018. *Andy Wightman and Others v Secretary of State for Exiting the European Union*. Request for a preliminary ruling from the Court of Session, Inner House, First Division (Scotland). Case C-621/18. ECLI:EU:C:2018:999.

international law"; the question therefore should be examined "*in the light of the Treaties taken as a whole*" (paras 44-46).

- Article 50 indeed "*does not explicitly address the subject of revocation. It neither expressly prohibits nor expressly authorises revocation*" (para. 48).
- However, the intention to withdraw from the EU under Article 50 (1) depends solely on the Member State's sovereign choice and, by its nature, is neither definitive nor irrevocable (paras 49-50).
- The Article enshrines "*the sovereign right of a Member State to withdraw from the European Union and [establishes] a procedure to enable such a withdrawal to take place in an orderly fashion*" (para. 56).
- Just as each Member State has the sovereign right to withdraw, similarly, it "*has a right to revoke the notification of its intention to withdraw*" before the withdrawal takes effect (para. 57).
- The revocation of the notification of its intention to withdraw, before withdrawal takes effect "*reflects a sovereign decision by that State to retain its status as a Member State of the EU, a status which is not suspended or altered by that notification*" (para. 59).
- In addition, to force the withdrawal of a Member State which, having notified its intention to withdraw from the EU, decides to revoke the notification of that intention through a democratic process would be inconsistent with the Treaties' purpose of creating an ever-closer union among the peoples of Europe, the elimination of the barriers which divide Europe and the values of liberty and democracy which make part of the common values enshrined in Article 2 TEU (paras. 66-67).

The Court also looked into the context, including the 'historical context', of the Article and recalled that during the drafting of the clause by the Convention on the Future of Europe, all amendments proposed to allow the expulsion of a Member State or to make the withdrawal decision more difficult, were rejected "*on the ground, expressly set out in the comments on the draft, that the voluntary and unilateral nature of the withdrawal decision should be ensured*" (para. 68)

The CJEU found that its conclusion is "*corroborated*" by the relevant provisions of the Vienna Convention on the Law of Treaties (VCLT)[195] which provide "*in clear and unconditional terms, that a notification of withdrawal … may be revoked at any time before it takes effect*" (paras. 70-71).

The Court set very few requirements for the unilateral and sovereign right to revoke the withdrawal notification:

- The revocation by a Member State of the notification of its intention to withdraw from the EU, should be made "*after the Member State concerned has taken the revocation decision in accordance with its constitutional requirements*" (para. 75).
- It should be submitted in writing to the European Council (para. 74).
- It should be "*unequivocal and unconditional*". Its purpose, that is, should be "*to confirm the EU membership of the Member State concerned under terms that are unchanged as regards its status as a Member State*" (para. 74).

Such a revocation would bring the withdrawal procedure to an end.

[195] Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331. Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

7.2.2. Limitations to the right to revoke

The ruling did not accept many restraints to the right to revoke. Besides the technical elements (to be in writing and addressed to the European Council), there are only two main conditions which are not particularly enlightening and can barely be termed effectively as limitations: that revocation should be "*unequivocal and unconditional*" and that it should be made "*in accordance with the Member State's constitutional requirements*".

An unequivocal and unconditional revocation: A revocation must be clear and unequivocal and state that the Member State changed its mind and wishes to remain in the EU (rather than changed its mind about a specific withdrawal agreement or a particular aspect of EU membership). A revocation cannot be conditional (revocation will be effective if an event takes place or unless the EU accedes to specific demands of the Member State) and should be immediate, since its notification brings the withdrawal process to an end. Besides these aspects, it is difficult to see "*how or on what basis the intentions of the revoking State could be questioned, even if it appeared at the time of notification or subsequently that the purpose of the revocation was to frustrate the two-year time period specified in Article 50(3)*".[196] In fact, almost any revocation will have to be accepted in its face value and end the withdrawal procedure. It has been argued that the two adjectives imply "*an element of good faith*"[197], and that "*the burden is upon the other Member States to trust the declaration of the State to reverse its withdrawal intentions unequivocally and unconditionally*"[198]. Nonetheless, "*the conclusion of the CJEU assumes the good faith of the decision of the Member State to genuinely reverse its previous withdrawal intention, while binding the other Member States to that decision*".[199]

The second condition seems more significant. Paragraph 37 states that revocation "*may only be exercised in accordance with the constitutional requirements of the Member State concerned, by analogy with the right of withdrawal itself, laid down in Article 50(1) TEU*". The Court, by extending respect of the constitutional requirement to revocation, as well as to the decision to withdraw, seems to have chosen, indirectly, to extend it throughout the withdrawal process. Paragraph 75 also clarifies that the decision to revoke, on the basis of which revocation will be notified to the European Council should have been taken in accordance with its constitutional requirements: the decision, rather than its notification should respect constitutional requirements. The constitutional requirements would imply a revocation decision achieved through similar means as the original decision to withdraw (a popular vote and/or a vote in Parliament). A revocation notification submitted by the executive alone – or a conflict between the branches of government cannot be deemed to abide with the constitutional requirements, not even represent an unequivocal decision. Because the domestic constitutional requirements must have been fulfilled before the notification of the revocation decision, it is, in theory, possible that the European Council may examine whether the revoking Member State has met the revocation requirements and could consider it as invalid.[200]

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[196] Cotter, J. (2019), *Ten Months Later: A Retrospective of Wightman*, 21 October 2019 in http://dcubrexitinstitute.eu/2019/10/ten-months-later-a-retrospective-of-wightman/

[197] Cirlig C-C. (2020), *Article 50 TEU in practice. How the EU has applied the 'exit' clause*, op. cit., p. 20.

[198] Martinico G, Simoncini M (2020), "Wightman and the Perils of Britain's Withdrawal", *German Law Journal*, 21 (5), p. 812.

[199] Ibid. p. 812.

[200] Azaria, D. (2019) "Wightman et al. v. Secretary of State for Exiting the European Union," *American Journal of International Law*, Cambridge University Press, 113(4), p. 803. Azaria submits that, in such case, the affected Member State may challenge that decision before the CJEU.

Besides these limitations, no other obstacles seem to be required for a revocation.

Timing and 'tactical' revocations: Revocation can be made at any moment before the entry into force of the withdrawal agreement or, if no such agreement has been concluded, before the two-year period laid down in Article 50(3) (and its possible extensions). Therefore, it can even be made after the agreement has been concluded but before it enters into force (but not during the transitional period as the state has already left the EU).

In doing so, the Court goes beyond, and in fact rejects, the logic of the Advocate General Campos Sánchez-Bordona who (in para. 147 of his Opinion) considered that the temporal limit on the revocation, inferred from Article 50(3) TEU, should be "*the two-year negotiation period*" and that "*once the withdrawal agreement has been formally concluded, which implies the agreement of both parties, it is no longer possible to revoke the notification, since that notification has by that time already taken full effect*".[201] This is a particularly problematic point, which was not sufficiently considered by the Court. Such a wide time temporal limit allows a Member State to evaluate the withdrawal agreement and, if it concludes it is insufficient, rescind it whether in earnest, judging that in the end it is not worth it, or not, in order to negotiate a better deal. This faculty involves a serious risk of strategic abuse. Though the Court did not delve into the risk of abuse, the Advocate General did so, and provided a reply in para. 152 of his opinion: "*the possibility that a right may be abused or misused is […] not a reason to deny the existence of that right*". The abuse should be prevented through appropriate legal instruments. He also suggested that the general principle, established by the Court, that abusive practices are prohibited, could be applied in the context of Article 50 TEU, too (para. 153). But the ruling does not provide any guidance or appropriate legal instruments to avoid abuse.

Repetitive notifications: Connected to the above is the issue of multiple notifications and revocations. Again, the Court remains silent on the matter and again it was the Advocate-General to look into it. He seems to consider that there can be no abuse when "*unilaterally revoking the first*" notification and that "*abuse could occur only when a second notification of the intention to withdraw is submitted*" (para 155) which is far from given, as explained above. He is right in his second argument that "*in practice, it would be extremely difficult for tactical revocations to proliferate*" given the heavy requirements both in deciding to withdraw and in revoking the withdrawal notification: as he states, "*the obligation that a revocation must be carried out in accordance with the Member State's constitutional requirements is thus a filter which acts as a deterrent in order to prevent the abuse of the withdrawal procedure*" (para 156). The ruling does not delve at all in these murky waters; thus, in principle there is nothing in the text of the Article or in the ruling that would prevent a second withdrawal notification, either because the Member State concerned is in fact vacillating in its intention (consequent diverging governing majorities, contradictory referenda) or in order to secure specific objectives within or without the EU. Such abuse can be countered by appealing to the general principles of the sincere cooperation and good faith: "*repeatedly initiating the withdrawal process would disrupt the functioning of the EU and thus constitute a measure which could jeopardise the attainment of the Union's objectives within the meaning of Article 4(3) TEU*".[202] In such a case, the only remedy against a refractory Member State would be a recourse to the CJEU for breaching the principle of mutual trust which still applies to the relations between all Member States as long as they all commit to the same values. It is doubtful whether such a behaviour could

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[201] Opinion of Advocate General Campos Sánchez-Bordona delivered on 4 December 2018. *Andy Wightman and Others v Secretary of State for Exiting the European Union*, Request for a preliminary ruling from the Court of Session, Inner House, First Division (Scotland). Case C-621/18. ECLI:EU:C:2018:978.

[202] Sari A. (2017) "Reversing a Withdrawal Notification under Article 50 TEU...", op. cit. p. 30.

easily qualify as a ground to "*determine the existence of a serious and persistent breach by [that] Member State of the values referred to in Article 2*" and lead to the suspension of the membership of that state, by virtue of Article 7 TEU. A Member State's spurious behaviour regarding withdrawal may not be accompanied by a (blatant) violation of the values enshrined in Article 2.

Providing a reason for the change of mind: The parallelism between the notification of withdrawal and that of its revocation accepted by the CJEU means that the Court does not require a reasoning to be included in the revocation. This is not considered "*indispensable*" in the Advocate-General's Opinion (para. 146) although "*it would be reasonable for the Member State to explain to the other EU Member States the reasons for its change of position, which, since it runs counter to its previous actions, calls for an explanation*".

7.2.3. Institutional implications of the unilateral right to revoke

The *Wightman and others* case was the first occasion for the CJEU to offer an interpretation of Article 50, and thus it can be qualified as 'historical'. The conclusions of the Court are authoritative and unlikely to change, as the Court did not only look into the particular situation of the UK but built its reasoning on the wider premise that a Member State cannot be forced to withdraw from the EU against its will. In addition, its assessment is also founded on fundamental EU principles, such as the objective of an ever-closer union the importance of the values of liberty and democracy, which are among the common values referred to in Article 2 TEU and the value of EU citizenship. This means that the right to unilateral revocation is henceforth enshrined in Article 50 TUE.

The judgment has a number of consequences for the EU, some of which go beyond the extent and the interpretation of the specific Article that, hopefully, will not be used again.

Sovereignty: Perhaps the most important feature of the judgement is the, unusual for the Court, emphasis shown to an unfettered respect for national sovereignty.[203] Although the Court bases its reasoning on the autonomous, almost constitutional, legal order of the EU, it treats revocation as a unilateral – sovereign in its words - right of Member States (which rather seem to have become again 'High Contracting Parties'). It is true that Article 50 TEU belongs to the 'sovereign' constitutional provisions of the Treaty, such as Article 49 TEU on accession, which underpin the international law elements of the Union and that the Court simply provides more details regarding the already unilateral character of withdrawal. However, a comparison to Article 49 TEU demonstrates that Article 50 TEU is much more "EU-led" and includes a strong multilateral component. The Court seemed to sidestep the multilateral components of revocation in favour of a strong unilateral reading of the clause.

It is clear that it would be legally and politically very difficult for the Court to interpret Article 50 TEU as non-revocable, in particular without any allusion to this end in the Treaties. Political expediency had already pushed Member States and EU institutions to acknowledge a right to revoke, and even welcome that the UK could change its mind. The crucial issue at stake was less the right to revoke *per se* and rather whether revocation would be a unilateral act of the withdrawing Member State or it would require some form of agreement by the EU. In its judgement, the Court dismissed any

[203] It has been noted that "*the adjective "sovereign" was repeated six times in the English version of the judgment and the concept of sovereignty was undoubtedly one of the keywords of the decision*". Martinico G, Simoncini M (2020). "Wightman and the Perils of Britain's Withdrawal", op. cit. p. 813.

involvement of other institutions and went further to protect the sovereign right of a Member State to retract from a withdrawal notification – even a withdrawal agreement.

Vidmar builds his criticism to the *Wightman* case on the apparent contradiction between the constitutional instruments of a polity that are at the same time international treaties. Article 50 TEU is the point where contractual and constitutional principles collide. "*The Court of Justice has sprung into action here as the EU's Constitutional Court to fix the faulty Article 50 mechanism, which was textually drafted as a treaty withdrawal clause but is inoperative as a mechanism for severance from a constitutionalised legal system*".[204]

Unrestrained sovereignty: The Advocate-General suggested to introduce restraints by submitting its exercise to the principles of good faith and sincere cooperation. The Court, did not, however, adhere to it and did not include any safeguard to temperate the right to revoke. The "*unequivocal and unconditional*" manner of the revocation is not tantamount to good faith and sincere cooperation. The Advocate-General also suggested that "*it would be reasonable for the Member State to explain to the other EU Member States the reasons for its change of position, which, since it runs counter to its previous actions, calls for an explanation*" (para. 146); this too was ignored by the ruling. He also suggested as logical that it would no longer be possible to revoke the notification after "*the withdrawal agreement has been formally concluded*" because the conclusion "*implies the agreement of both parties [..] notification has by that time already taken full effect*" (para. 147). All these common sense requirements[205] that should protect the EU against "tactical revocations" were discounted in the ruling.

A constitutional approach but a treaty outcome: Although the conclusion is the same in practice, one notes the different approaches taken by the Advocate General and the Court in the reasoning of the unilateral right to revoke. Though both sided with unilateral revocability, the former followed an international law reasoning, on the basis of the VCLT and international customary law. He considered "*necessary to interpret Article 50 TEU*", as well as revision, accession and ratification of the Treaties, in connection "*with the origin of those treaties*" namely that they represent "*a typical international law issue*" (para. 84). He assessed that the wording of the Article was inspired by Articles 65 to 68 of the VCLT. Although he considers Article 50 as a *lex specialis* "*in respect of the general rules of international law on withdrawal from treaties*", the clause is "*not a self-contained provision which exhaustively governs each and every detail of that withdrawal process*" and, thus, "*in order to fill the lacunae in Article 50 TEU, there is nothing to preclude recourse being had to Article 68 of the VCLT, even though it does not reflect, stricto sensu, a rule of customary international law*". (para. 85). On the other hand, the Court diverged and followed the legal route of the autonomy of the Union legal order to justify its conclusion: only in the end and in an accessory manner did it refer to the relevant provisions of the VCLT in order to "*corroborate*" its position (paras 70-71).

In summary, the CJEU was called upon to make an unenviable choice, in the middle of a domestic and European political turmoil. The ruling tries to balance the conflicting natures of Article 50 TEU (and of the EU itself), **a constitutional construction or an international treaty**. Such balance does not seem to have held: the CJEU gave precedence to the sovereign choice of a State (as well as to the stability of treaty relations within the EU legal order) and to the preservation of European unity to the detriment

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[204] Vidmar, J. (2019), "Unilateral Revocability in Wightman: Fixing Article 50 with Constitutional Tools: ECJ 10 December 2018, Case C-621/18, Andy Wightman and Others v Secretary of State for Exiting the European Union," *European Constitutional Law Review*, Cambridge University Press, 15(2), p. 374.

[205] Martinico G, Simoncini M (2020), "Wightman and the Perils of Britain's Withdrawal" op. cit. p. 811.

of the multilateral rationale of the Article. It is now much easier to retract a notification than to extend the deadline. The former can be done unilaterally; the latter requires unanimity.[206] Though its conclusion in the Wightman case could be seen as a reasonable choice, "***it risks exposing Article 50 TEU to dangerous unilateral readings***".[207]

The Court dismissed the probability of tactical revocations, but their threat remains. The EU lacks now a legal mechanism to protect the community construction from abuse: the removal of the ability of the European Council to take into account and protect wider interests in the specific context of a revocation of an Article 50 TEU notification is only one of the potential risks of the ruling. The possible erosion of the real meaning of the EU as a "new legal order" of international law[208] might be a not-so-distant outcome.

7.3. Article 50 TEU and an 'implied' right to expel a Member State

Expulsion (or forced withdrawal) of a member state from an international organization represents the ultimate sanction and the most severe rebuke, in fact a total rejection, of that state. At the same time, it also indicates a failure of the organization itself: it proved unable to influence the expelled state so as to respect the organisation's fundamental objectives. **Expulsion clauses are not always included in founding treaties and, when they are, they are very rarely used**, for several reasons, which include the force of such a sanction, respect for state sovereignty, the principle of *pacta sunt servanda* and the reluctance of its members states to introduce mechanisms that would reduce the appeal of the organisation and might turn against them. Express expulsion provisions existed in the Covenant of the League of Nations[209] and the Charter of the United Nations.[210] In Europe, the Statute of the Council of Europe includes a provision to expel a member state that has seriously violated Article 3 of its Statute, namely the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.[211]

The European integration treaties do not include, and never did, an exclusion provision.[212] When voluntary withdrawal from the Union was proposed during the Convention for the Future of Europe,

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[206] Vidmar, J. (2019) "Unilateral Revocability in Wightman…" op. cit. p. 374

[207] Martinico G, Simoncini M. (2020), op. cit. p. 813.

[208] Cotter, J. (2019), *Ten Months Later: A Retrospective of Wightman*, op. cit.

[209] Article I6, paragraph 4 of the Covenant provided that any member of the League "*which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon*".

[210] Article 6 of the Charter states that: "*A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council*".

[211] Article 8 of the Council of Europe's Statute stipulates that "*Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine*".

[212] The Constitutional Committee of the 1952 *ad hoc* Assembly that was instructed to prepare the draft treaty on the European Political Community discussed, in the subcommittee on powers and competence the "*right of future withdrawal and possibility of exclusion*" but did not include either at the final text. See working program of the Constitutional Committee adopted on 25 October 1952 in http://aei.pitt.edu/991/1/political_union_draft_treaty_1.pdf.

the EPP group in the Convention, whose members opposed the introduction of a right to exit the EU, suggested to also introduce a possibility to expel a Member State in order to "*create a political balance*" to withdrawal. [213] Their argument was that "*a Union in which every Member is free to leave must also be free to get rid of Members which violate persistently its values or which paralyse its functioning*".[214] The proposal was rejected by the Presidium. It was not proposed for a second time in the IGC that drew up the Lisbon Treaty.

Against this legal backdrop, there have been a number of scholarly analyses which try to **infer an indirect right to expel a recalcitrant Member State**, usually through a combination of Articles 50 and 7 TEU.[215] Expulsion, from the Economic and Monetary Union, rather than the EU, was also discussed during Greece's financial crisis.[216]

Article 7

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

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[213] The amendment stated that "*a Member State which continues a serious and persistent breach of the values mentioned in Article 2 for a period of 1 year following a European Council decision in accordance with Article I-58 paragraph 2, or which has abused the right of withdrawal under the present Article, may be expelled from the Union by a decision of the European Council. Such expulsion shall require a qualified majority in the European Council and the consent of the European Parliament*".

[214] http://european-convention.europa.eu/docs/Treaty/pdf/46/46_Art%20I%2059%20Brok%20EN.pdf

[215] See Weerts, J. (2012) "L'évolution du droit de retrait …" op. cit. p. 395 who considers, with reference to Perek, that a withdrawal clause might possibly play the role of a substitute to exclusion, as Member States, faced with a serious blockage of the EU functioning would put pressure on a Member State to withdraw.

[216] See, inter alia, Blocher, J. - Gulati, G.M. and Helfer, L. R., (2016) "Can Greece Be Expelled from the Eurozone? Toward a Default Rule on Expulsion from International Organizations" (August 4, 2016), in *Filling the Gaps in Governance: The Case of Europe*, pp. 127-150, European University Institute, available at SSRN: https://ssrn.com/abstract=2780743 or http://dx.doi.org/10.2139/ssrn.2780743; Athanassiou, P. (2009), *Withdrawal and expulsion from the EU and EMU: some reflections*, Legal Working Paper Series No 10, European Central Bank.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed. (-- --)

Despite such voluntarist legal approaches, the **conventional wisdom** is that, in the absence of an explicit reference in the treaties and past indications that relevant suggestions were dismissed, the **EU rules do not allow for the expulsion of a Member State**. The *Wightman* case seems to have strengthened the sovereign right of Member States and thus stymied the possibilities for the other Member States to "punish" a recalcitrant member. It is certain that the expelled Member State would challenge such decision before the CJEU, and individuals affected might do the same before national courts. It is unlikely that the Court could bless legally so serious an act, when it is conspicuously absent from the treaties. The Court suggestion in the *Wightman* ruling that "*a State cannot be forced to withdraw from the European Union against its will*" would fully apply here while, in addition, an expulsion goes against the objective of the ever-closer union. The problems that arose during the Brexit negotiations, in particular regarding the rights of individuals and the financial implications of withdrawal, also advocate against a legally doubtful forced exit of a Member State: the practical complications of an expulsion in the intricately linked system of the EU would be enormous.

This does not mean that there are no other means, short of a formal expulsion, that the EU could use against a Member State that could lead to an equivalent outcome. Looking at other international organisations, it appears that only on a few occasions were similar measures taken actually authorised by explicit treaty provisions.[217] The prevailing tendency is to improvise and to invent new methods for dealing with a recalcitrant member that are effective rather than punitive. The nature of intra-EU relations is different from other international organisations, but a comparable approach might be considered, if the political will exists. Such measures may include:

An enhanced use of the procedure of Article 7 (2) TEU on the suspension of a Member State's rights: The principal requirement in order to apply this provision is that a refractory Member State violates the values of Article 2 TEU. This may not always be the case. A Member State may, theoretically, hamper the good functioning of the EU, be an intractable partner or even violate the principle of sincere cooperation without, at the same time, violating the values of the Union – or at least without doing so in a clear manner. Still, it is difficult to imagine that the EU would seriously debate the exclusion of a Member State unless gross violations of the rule of law or democratic values take place in a sufficiently general manner to allow for a *de facto* freezing of the State's participation in the EU. The more explicit form of sanction referred in the provision, namely the "s*uspension of the voting rights of the representative of the government of that Member State in the Council*' may not produce results. However, the provision also allows for other sanctions such as the suspension of "*other rights deriving from the application of the Treaty*". This more general reference allows "*for sanctions that can be economic and non-economic in nature, including access to EU funds*".[218] An extended use of the sanctions

[217] Sohn, L. B. (1964) Expulsion or Forced Withdrawal from an International Organization. *Harvard Law Review*, June 1964, Vol. 77, No. 8, p. 1421. In https://www.jstor.org/stable/1339157

[218] Kochenov D (2017) *Busting the myths nuclear: A commentary on Article 7 TEU*, EUI Working Paper, Law, 2017/10. p. 11.

in Article 7 TEU might result in the *de facto* freezing of a Member State (in particular of its government, which is usually the culprit in such situations) and also more easily achieve the pursued objective: to oblige the Member State to restore respect for the values of Article 2 TEU. The obstacles are mostly political, namely an established view among all other Member States to proceed towards such a path: sanctions under Article 7 TEU require unanimity.

More recently, in conjunction with the alleged violation of EU rules and values by some Member States' governments, the idea of **an implicit right to expel a Member State from the EU** was floated: Hillion, in the wake of the *Wightman* case in the CJEU, assessed that the Hungarian and Polish governments are "*increasingly at odds with the principles underpinning the EU legal order*". He argues that a notification under Article 50(2) TEU can take different forms, including an implicit one: the two governments' "*continued and deliberate defiance of the core principles of membership is expressing their respective intention no longer to apply EU Treaties*". Such behaviour should be deemed to be tantamount to a "*notification for the purpose of Article 50(2) TEU*" and the (other) Member States should "*acknowledge the intention of a state no longer to apply the EU Treaties, before the legal order they establish is itself damaged*".[219] Again, such an approach requires consensus, according to Hillion, a difficult stake. It is not at all certain that the other Member States would like to embark on such a process, the more so as, currently, there are more than one Member States which might fall under this condition.

A more remote, and legally more doubtful, possibility is to **use Article 60 of the VCLT**. Under this Article, a "*material breach*" of a multilateral treaty by one party—defined as "*a repudiation of the treaty not sanctioned by the present Convention*", or as "*the violation of a provision essential to the accomplishment of the object or purpose of the treaty*" entitles "*the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it*" either in the relations between themselves and the defaulting State, or between all the parties. It is very dubious, as explained elsewhere, whether from a legal point of view VCLT and even more this specific article can find application in the case of the Lisbon Treaty, but it is a legal path that could be taken into consideration, with the caveat of the CJEU's approval, obviously. Such measures require emphatically a bold and unanimous resolve by the other Member States; such a stance has not been witnessed until now on other similar occasions.

As stated, there have been cases where a Member State has been expelled – or forced to withdrawal – from an international organization albeit there was no express provision for expulsion in that organisation's constitution. Most have been politically motivated. The most well-known example is the expulsion of Cuba from the Organisation of American States (OAS).[220] A similar approach seems inconceivable in the case of the EU as it would violate directly the principles of Article 2 TEU, by the EU this time.

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[219] Hillion, C. (2020): Poland and Hungary are withdrawing from the EU, VerfBlog, 2020/4/27, https://verfassungsblog.de/poland-and-hungary-are-withdrawing-from-the-eu/ DOI: 10.17176/20200428-044543-0.

[220] Although the OAS did not provide for the exclusion (or even the suspension) of a Member State, the organization, under pressure from the United States, voted in 1962 a resolution to exclude "*the present Government of Cuba from participation in the Interamerican system*" because its Marxist-Leninist system was incompatible with the principles and values of the Interamerican system. Technically, it was not Cuba as a state, but rather its government that was excluded – and, in fact, the State remained of concern to the Interamerican Commission on Human Rights. Following the rapprochement between Cuba and the US, the OAS in 2009 decided that the 1962 resolution "*ceased to have effect*"; the conciliation process between the two sides continues.

The usefulness of an expulsion clause – and of the expulsion of a Member State – for the EU treaties **is debatable**. It has been claimed that "*expulsion seems to be more a weapon of the politician than the statesman*".[221] One of the advantages of European integration is its capacity to strengthen, by prodding, coercing and restraining, democracy and rule of law among its Member States. Accession to the EU was considered for citizens and Member States alike as a means to consolidate democracy. Expelling a Member State would imply that the ambition of the Union to act as a temple of democratic values failed and that the organization despaired that it could keep such a state within the EU value system. Maintaining the Member State within the EU but applying other forms of pressure might be more successful a path to achieve the desired result. This is the dilemma facing currently the Council of Europe regarding Russia, Turkey or Azerbaijan.[222] In addition, an expulsion clause could be, no matter how improbably, used against any Member State. In general, states are afraid to open such a Pandora's box in case they might fall themselves in the trap.

7.4. Re-accession

The Treaty does not provide for a different procedure for the accession of a state which, having left the EU by virtue of Article 50 TEU, changes its mind and decides to apply again for membership, so the term re-accession is not totally accurate. Accession of a former Member State will follow the same process as any other candidate State, in accordance with Article 49 TEU. This means that it will require a unanimous agreement in the Council and the consent of Parliament.

Any Member State may oppose the new candidate for whichever reason or negotiate its agreement. In particular it should be noted that "*the conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State*". Thus, the EU and the candidate start off with a clean slate as far as the candidate's terms of membership are concerned; the new State will not be accorded automatically its former exceptions or special treatment. It will also have to transpose the EU *acquis*. Some of it might still be valid in the former Member State but both the EU and domestic legislation may has changed post-exit.

It is logical to believe that a re-accession application will be considered as a major success of the European construction and the objectives pursued by the EU and the EU will want to speed up procedures and perhaps give that state precedence in the negotiations over other candidates. Article 49 TEU does not provide any 'fast-track' procedures and accession negotiations will be conducted following a pattern (Commission opinion, examination of the *acquis* by chapters etc.). Also, it is far from certain that all Member States would accept a fast-track application: bilateral difficulties, or even domestic matters, would perhaps lead to tensions and delay the process.

Withdrawal is always a breakup, often a bitter one, both between the EU and the withdrawing state and, even more, within this latter. **A new attempt for accession will have to wait for passions to**

[221] Sohn, L. B. (1964), "Expulsion or Forced Withdrawal from an International Organization", op. cit. p. 1424.

[222] Dzehtsiarou, K. and Coffey, D. K. (2019) "Suspension and expulsion of members of the Council of Europe: Difficult decisions in troubled times", *International and Comparative Law Quarterly*, Cambridge University Press, 68(2), pp. 443–476 p. 449.

subside. The second Norwegian application to join the EEC came twenty years after the first one[223] and even the UK waited for six years after its application was opposed by France to apply again. By that time, re-accession will look more and more like a regular accession process with similar technical and political problems as any other.

7.5. Should the EU make a less 'exit-hostile Article 50 TEU?

Some commentators, during the Brexit negotiations, have suggested that **Article 50 TEU was constructed or being used to favour the EU and make exit difficult for the withdrawing state**.[224] This assertion is true and false at the same time, because it has less to do with the content of Article 50 TEU and more with the act of the withdrawal itself. The Convention for the Future of Europe had rejected proposals to impose a longer waiting period for the withdrawing state or to make exit dependent on reaching an agreement, in order to avoid imposing too heavy a burden on the withdrawing Member State. On the other hand, withdrawal entails that a Member State separate itself from a bigger, highly integrated bloc with which it is intertwined, politically and economically. Separation hurts both sides and has a cost, irrespective of the reasons that led to it. In addition, as any divorce, it unescapably provokes tensions between the two parties: either side wants to reduce the direct or indirect separation costs for itself and pass as much of the perceived loss to the other side.

In this context, **the nature of the withdrawing negotiations stands often against the withdrawing Member State as the weaker of the two**. But this is not always the case. Bargaining powers depend on many variables: the size and clout of the Member State within the EU, its (perceived) capacity and decisiveness to stand alone and the loss of benefits for the remaining Member States. The withdrawal of a smaller Member State which is a net beneficiary from the EU will be much more damaging to that state than to the EU.[225] The withdrawal (or the threat thereof) of a big and relevant Member State that could lead to heavy losses in integration benefits for the other Member States increases their willingness to accommodate the former.[226] Withdrawal, as in the past the right of veto, is a weapon of the powerful not the weak ones, who might prefer other means to achieve their goals. Also, the deeper the integration, the more difficult and costly separation would be. Brexit was extremely problematic although the UK was not a member of the Eurozone and out of many EU policies.

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[223] The first referendum in Norway to join EEC was held on 25 September 1972, with a 53.5%-46.5% negative result. The second referendum to join the EU was held on on 27 and 28 November 1994. It also rejected membership by a 52.2%-47.8% margin. See Pettersen P.A., Todd Jenssen A. & Listhaug O. (1996), "The 1994 EU Referendum in Norway: Continuity and Change", *Scandinavian Political Studies*, Vol. 19 - No. 3, 1996, in particular pp. 261-63.

[224] Barber, N. Hickman T. and King, J. (2016), *Pulling the Article 50 'Trigger': Parliament's Indispensable Role*, in Constitutional Law Association, 27 June 2016; Dixon, D. "Article 50 and Member State Sovereignty", *German Law Journal* Volume 19, Issue 4, 01 July 2018, p. 903.

[225] It could also make the EU more generous if it wanted to get rid of an annoying member. During the Greek financial crisis, the proposed (forced) withdrawal of Greece from the eurozone was accompanied by a substantial financial assistance.

[226] Hofmeister considers that Article 50 TEU privileges larger states, a fact that he considers paradoxical as the provision was defended mostly by smaller Member States. This affirmation holds if we remember that, in order to keep Britain in the EU, Member States accepted, in February 2016, to modify fundamental principles of the Union. Hofmeister, H. (2010), "Should I Stay or Should I Go ?'—A Critical Analysis of the Right to Withdraw from the EU", *European Law Journal,* Vol. 16, No. 5, September 2010, p. 598.

Obviously, as seen during Brexit, withdrawal is by definition perceived as an existential risk for the EU. **The Union will not want to make exit easy for the withdrawing state fearing the contagion effect.** During the Brexit negotiations, the EU institutions repeatedly stated that a third state cannot receive the same benefits as a Member State. It would be suicidal to accept the opposite. But this position which is natural for any international organization does not mean that the EU would deliberately penalise the withdrawing state. The EU position vis-à-vis the UK was shaped more by the initial British 'red lines' on economic ties. It would make more economic sense for both sides to have shaped a closer form of relationship. It was the UK's preference for selective integration that upset the EU. On the other hand, Brexit has shown that withdrawal is not impossible, even against economic logic, as other factors influence such a major decision.

Against these allegations of bias in favour of the EU, **a counterargument is proposed by Huysmans and Crombez, who blame the provision as making exit too easy**. Given that "*Article 50 does not specify an exit penalty*" which would imply the imposition of an explicit exit penalty, such as "*the payment of membership fees for a number of years after the exit without any benefits*" as well possibly as an "*obligation to pay back the administrative costs of exit on the EU side*" runs counter to the assumption that a decision to leave the EU should be based on grounds of efficiency rather than emotions.[227] Again this argument does not take into account the capacity of disruption a refractory Member State can have in the EU and Europe's limited ability to enforce decisions on a Member State that refuses to abide.

In conclusion, it is not a vice in the form of withdrawal but rather in **the special characteristics of each individual case that establish the balance between the two sides** and makes withdrawal more or less hostile to the withdrawing state. As Closa puts it, there is an "*anti-equality bias*" in the provision which "*has a different meaning depending on which state implements it and how this is done: even if withdrawal becomes legally feasible, political and economic considerations will nevertheless condition it as a realistic option*".[228] Such bias, though, is founded on the lack of details of Article 50 TEU, which makes it particularly vulnerable to the concrete balance of forces in each withdrawal case, rather than a deliberate plan of the EU. A more detailed and regulated exit (for instance making exit dependent on reaching an agreement or setting rules on the financial aspects of the separation)[229] might be considered as going against the freedom to leave the Union but, paradoxically, give weaker Member States more certainty over the negotiation rules. On this basis, Article 50 TEU seems to be reflecting the reality of the institutional and political relations within the EU.

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[227] Huysmans M. and Crombez C. (2019), *Lessons from Article 50: Why exit clauses should include penalties for the seceding state*, LSE blog, 5 December 2019, in https://blogs.lse.ac.uk/europpblog/2019/12/05/lessons-from-article-50-why-exit-clauses-should-include-penalties-for-the-seceding-state/.

[228] Closa C. (2017), "Interpreting Article 50: exit and voice and... what about loyalty?" in Closa C. (ed.) *Secession from a member state and withdrawal from the EU: Troubled membership*, Cambridge University Press, 2017, p. 203.

[229] Hofmeister (2010), "Should I Stay or Should I Go…", op. cit. p. 598.

7.6. Lessons learnt – strengths and weaknesses of the application of Article 50 TEU

Revocation of the withdrawal notification is perhaps the most problematic issue that came out of Brexit. Although, or perhaps because, it is not provided for in the treaties, it played the role of a trump card in the Brexit negotiations, more within the UK than in the EU. Both the major loss that a UK withdrawal represents and political expediency led all EU institutions to support the right of the UK to change its mind. Were this to happen, it is almost certain that the EU would have accepted the UK's volte-face without further ado. **The CJEU ruling went beyond what Member States and EU institutions wanted.** The wide margin of manoeuvre to revoke offered to Member States by the *Wightman and others* case transforms revocation into a central element of future withdrawals, not only as a negotiating chip but also as a producer of institutional and legal instability within the withdrawing State. The possibility to revoke, even at the last minute, even after the withdrawal agreement is concluded, means that domestic opponents of withdrawal will challenge the majority position constantly, making the conduct of negotiations problematic and disturbing the entire process.

The fact that the UK's government did not change its mind and did not make use of this faculty is due to political preference. It does not mean that it would be same with other Member States: divisions among parties and among citizens when a State decides to leave the EU are immense, as seen with Brexit, and the possibility of reversing a decision will create heavy tensions between supporters and opponents of exit.

The CJEU ruling was made because the Treaty did not provide a clear line as to revocation. It seems reasonable to make provision in the next revision of the treaties, by adding a reference to revocation in Article 50 TEU. Its precise content depends, of course, on the preference of those involved in the revision process, in particular the Member States who are the High Contracting Parties of the Treaty. Brexit showed a wide support welcoming revocation though Member States did not comment on the CJEU ruling, it was evident that they gave preference to some form of agreed revocation rather than a unilateral one. The period within which the right to revoke can be exercised is also important and should, preferably, be regulated. A binding regulation of revocation can only be achieved through the ordinary revision of the Treaty according to Article 48 TEU and may require the organisation of a Convention as per Article 48 (3) TEU.

8. CONCLUSIONS AND RECOMMENDATIONS

Before Brexit, Tatham had adeptly described Article 50 TEU as **a bare skeleton**, where academic research was trying to add substance to the body. He presciently had submitted that it would take the actual use, or threat thereof, to **stimulate the EU institutions to outline their understanding of its operation**.[230]

The main objective of this study was to look into the constitutional and institutional challenges that the EU faced during Brexit and analyse whether the current wording of Article 50 TEU was sufficient and facilitated an efficient and properly organised withdrawal procedure. Looking back at the application of the Article during the UK withdrawal, it can be concluded that **the Article has, in general, served its purpose.**

Article 50 TEU has been accepted by all parties as **the sole legal means to leave the Union**, it has produced the **orderly withdrawal of the UK** and **settled the separation issues.** In addition, the procedure followed during Brexit has **permitted the EU to speak and negotiate with a single voice** while **safeguarding the fundamental concerns** for the Union: the **protection of rights** for EU citizens established in the UK and UK citizens established elsewhere in the EU, the **integrity of the single market** and a **graduality in the future relations** with the UK, with more rights in future cooperation the closer such cooperation is.

On the other hand, the Brexit process has also shown that **it is not possible to tailor all the practical requirements of withdrawal in a Treaty provision**. A lot of unforeseen issues appeared in the negotiations which were not specified in Article 50 TEU and have had to be dealt *ad hoc*.

These conclusions look into the *ratio*, content, process and outcome of Article 50 TEU as it functioned during Brexit in an attempt to provide recommendations on future application.

However, **each withdrawal is unique,** and **its negotiation differs** from the previous one. It would be erroneous for the conclusions to focus only on the contentious issues raised during Brexit –problems in another withdrawal might be different. True, **some questions will probably remain the same**. The **financial arrangements**, for instance, will certainly constitute a permanent point of contention, whether the withdrawing state is a net beneficiary or a net contributor to the budget. The same with the wider question of the **governance of the agreement**. On the other hand, some of the thorniest issues in Brexit, in the first place Northern Ireland, were particular to the UK situation. Other issues, not raised during the Brexit negotiations, might appear on other exits, for instance if a member of the Eurozone were to leave the EU.

For these reasons the below conclusions and recommendations do not respond only to the Brexit-related problems but **try to reflect more generally on issues that did arise** during these negotiations and **questions that might appear** on other occasions or which stem from lacunae in the application of Article 50 TEU.

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[230] Tatham, A. F. (2012), "Don't Mention Divorce at the Wedding, Darling!': EU Accession and Withdrawal after Lisbon" in Biondi A., Eeckhout P., Ripley S. (eds.) *EU Law After Lisbon,* OUP. Oxford, p. 154.

They fall into two main groups: **those that require Treaty revision** and **these that can be attended to by means of an agreement or even an understanding between institutions**.

Obviously, the first group requires a much longer and more complicated process and, as a minimum, the acquiescence of all Member States. **The timing of the study is auspicious: the agreement among the institutions on the convocation of the Conference on the Future of Europe** will allow, once the Conference starts, a wider reflection among institutions and citizens over the desired future course of European integration and may include, if it so agreed, proposals to reform the Treaties.[231]

8.1. On the ratio of Article 50

8.1.1. Do we need Article 50 TEU?

Though the right to withdraw from the EU has entered firmly into the EU constitutional order, **it seems valid to reflect again on its pertinence**. The Article was introduced in part to ease fears of, mainly smaller, Member States that they could, if they so decided, leave EU in an orderly manner. At the time, many scholars concluded that **an explicit right to leave the EU would change radically its nature**. After Brexit, it is legitimate to reflect if it still is appropriate for a Union which, following the Eurozone crisis and the Covid-19 pandemic, has taken giant steps towards further integration, also looking at the practical aspects of exercising such a right. In 2003, the provision was introduced for the sake of, particularly, smaller Member States. Brexit demonstrated how difficult it is for a larger Member State to leave the EU; such a process will seemingly be ever more testing for smaller ones. These reflections should focus on the following alternatives:

a. **The deletion of the Article:** simply eliminating Article 50 TEU would not bring us back the situation before 2003. Then, the right to withdraw was legally arguable, as the treaties did not provide an answer. The elimination of this right now would imply its formal repudiation. An even stronger alternative to elimination would be an **explicit reference in the Treaties to the indissoluble character of the EU**. Realistically, it is quite difficult to imagine that all Member States would acquiesce to this.
b. **A limitation of the right to withdraw:** In 2003, the Convention, in particular the Presidium, opted for a sovereign, unilateral right to leave the EU with only a temporal constraint. The EU could reflect on adding **further limitations to this right**. Such limitations could include, for instance:
    a. The obligation for the withdrawing member state to only leave after concluding a withdrawal agreement or with the consent of all or most Member States;
    b. The obligation to conclude an arrangement for the future relations before leaving;
    c. An obligation for both sides, in particular the withdrawing state, to provide for the continuance of acquired rights for citizens – or even an **exceptional maintenance of EU citizenship for citizens of the withdrawing state**;

[231] It should also be recalled that, technically, the Treaties need to be amended in order to clean them from references to the UK (Articles 52 TEU and 355 TFEU on the territorial scope of the EU and those protocols concerning or referring to the exiting state). This obligation has been hitherto ignored by the EU which considers such references as obsolete, to be cleaned in the next revision of the Treaties. This represents another "opportunity" for Treaty reform. Fabbrini F. (2016), *How Brexit Opens a Window of Opportunity for Treaty Reform in the EU*, Spotlight Europe, 2016/01, Bertelsmann Stiftung, Berlin.

d. Specific **rules on how the decision to leave should be taken** (for instance a parliamentary or popular vote, two votes in advance and after the withdrawal agreement is concluded etc.). This requirement raises serious constitutional questions within the EU, as it establishes, albeit in a limited area, a supra-constitutional competence of the EU.

8.1.2. Framing the right to revoke

It has been pointed out in this study that **the CJEU ruling on *Wightman and others* allows too wide a margin for a Member State to revoke its withdrawal notification**. The CJEU is unlikely to reverse this ruling; thus, as Article 50 TEU stands now, Member States are allowed a very wide margin to change their mind over withdrawal. **If the EU institutions and Member States wish to rescind or limit revocation, the only legal path is a revision of Article 50 TEU** to introduce an explicit reference to restrict or fully prohibit revocation. As a *lex specialis*, it would override the relevant provisions of the Vienna Convention on the Law of Treaties. The intervention on revocation can take the following forms:

- **A total ban** once a notification is submitted.
- **A right to revoke with the agreement of (all or most) Member States.**
- **A unilateral right to revoke with a temporal limitation** (a short period after notification, before signing the withdrawal agreement etc.)

Any limitation of the right to revoke a withdrawal notification is legally audacious in the light of the CJEU argumentation that **revocation strengthens the objective of an ever-closer union**. Again, it is debatable whether Member States would agree to limit a potentially useful, and now vested, right which they might need at a moment of crisis. A total prohibition of the right to revoke a withdrawal notification would be tantamount to a forced exit, as pointed out in the CJEU's ruling and could be discussed in conjunction with a possible introduction of a formal expulsion clause.

8.1.3. An exclusion clause?

Despite relevant academic arguments, the EU cannot currently expel a Member State. **If the EU and its Member States want to introduce a form of forced withdrawal, a Treaty revision to this end is necessary**. An expulsion clause, as an opposite to the right to withdraw, was proposed and rejected in the 2002-3 Convention. It remains unpopular today, not to mention how improbably difficult it would be to achieve it. The EU institutions should, nevertheless, reflect on the relevance of such a provision, in particular in view of the increasing challenges to the fundamental principles of the EU. An alternative to formal expulsion could be **an enhanced – or easier – use of the provision of Article 7 TEU** to suspend the rights of a Member State.

8.2. On the content of and the procedures foreseen in Article 50 TEU

8.2.1. Better defining the sentence "in accordance with its own constitutional requirements"

The sentence *"in accordance with its own constitutional requirements"* in Article 50 (1) TEU is **ambiguous**, raises **serious issues of interpretation** and might **complicate the domestic political situation** in the Member State that wishes to withdraw as well as the relations between the EU, its institutions and the withdrawing state. When looking again at the Article, it might be positive to examine ways to improve the meaning or totally delete the sentence.

- **Deletion**: there have already been suggestions to delete the sentence during the drafting of Article 50 TEU. A deletion now (requiring a revision of the Treaty) would clarify that a decision to leave the EU is a matter for the domestic rather than the EU law to decide.
- **Interpretation**: interpretation is more complicated. It would need a ruling from the CJEU, probably under the Article 267 TFEU preliminary reference procedure, thus another -exit and it would assume that the CJEU would acquiesce to provide an answer.

8.2.2. Setting a time limit to notify the decision to withdraw

It has been pointed in this study that **Article 50 TEU does not set a time limit to the period between the domestic decision to leave the EU and the formal notification of this intention**. Although the nine-month distance of the two events did not particular hamper the Brexit negotiations, it remains an issue. The EU institutions could reflect on the better framing this provision in one of the following forms:

- **Merging the moment of notification to the domestic event that decides the withdrawal**: this is legally and politically difficult as it would mean that the EU is intervening in the domestic political debate and takes a position on which event constitutes a notification to withdrawal.
- **Setting a maximum period** (say 3 or 6 months) between the time the decision to withdraw is taken "*in accordance with the State's own constitutional requirements*" and the formal notification.

8.2.3. A longer negotiation period

The two-year period for the conduct of exit negotiations was considered insufficient already before Brexit started. Brexit confirmed that **the two years are not sufficient to disentangle, in an orderly manner, a Member State from the EU**. This statement bears some qualification: strictly speaking, the period for the preparation of the withdrawal agreement in the case of Brexit was less than a year. The delay came mostly from the political impasse that arose around the withdrawal itself. Admittedly, some of the main stumbling blocks were of a domestic nature (divisions within the governing party) or particular to the UK (notably the Irish border issue). But there is no reason to exclude that other, similarly complicated, issues will arise in other exits, let alone the implications of a withdrawal of a Member State which is also a member of the Eurozone. Increasing the two-year period might be deemed an attempt to make withdrawal even more 'hostile' to a Member State and defies the unilateral nature of withdrawal. A formal modification of the two-year period requires a revision of the Treaties.

An easier alternative is to keep the Article as it is now and deal with the lack of sufficient time for the negotiations by the current procedure of extending the two-year period by unanimous decision of the European Council.

8.2.4. How to take into account the framework for future relations

The sequence of the negotiations was imposed by the EU side to the UK**.** Discussing first the divorce issues makes sense as it protects the interests of the EU and its Member States, while putting pressure on the withdrawing state: a profitable future relationship should depend on a smooth divorce. It is a strategy that benefitted the EU during the Brexit talks and it is to be expected that future withdrawals would follow the same cadence.

This study pointed out the **obstacles of this sequencing during the negotiations**, namely the delay in resolving withdrawal issues because of the absence of a common view on the content of the future relationship. This responsibility lies mainly with the UK government's tendency for 'cherry-picking' and the inherent contradiction between its pledge to follow an independent trade policy and the obligations of the Good Friday agreement. The underlying problem, however, has again to do with the prevalence of political goals over economic and trade realities. Similar tensions should be expected in other potential exiting states. The EU institutions could reflect on whether **a more stringent parallelism** between the withdrawal agreement and the negotiation of the future trade links should be required or if the sequence adopted for Brexit serves the purpose.

8.2.5. Modifying the way to extend the two-year period

Brexit required three extensions of the time set for withdrawal. The decision was taken by the European Council unanimously, in agreement with the Member State concerned. Although during the Brexit talks, such extensions were considered necessary by all institutions, the relevant provision in Article 50 TEU involves a bias in favour of the European Council and gives each Member State a right to block such extension. The EU institutions should consider whether this provision should be reformed or not, looking at one (or a combination) of the following ways:

- **Reduce the number of extensions** or introduce a specific duration thereof (for instance, six months).
- **Involve other institutions** in the extension decision (e.g. a consent of Parliament).
- **Reduce the requirement of unanimity** in the European Council for extension.

8.2.6. Transitional arrangements

Brexit made clear that **the two-year period of Article 50 TEU is insufficient to conclude an agreement on the future relations** between the two sides and to avoid a trade cliff edge. Transitional arrangements were necessary for about one year after Brexit, in order to reach a relatively modest agreement with limited scope focusing more on trade in goods. The EU requirements for such a transitional period were stringent and there is no reason to assume that they would change in a similar situation in the future. Thus, for a relatively long period of time the State that left EU will be bound by

EU rules though outside its institutional frame. This state of affairs is quite **inequal for the exiting state**. In order to provide for a more level playing field the following solutions can be considered:

a. **Continuation of the current system** combining extension(s) and a transitional period until an agreement is reached.
b. **Use the European Council's right to prolong the two-year period** of Article 50 TEU until the two sides reach an agreement on trade relations that will not result in a cliff edge (at least unintentionally).
c. Modification of Article 50 TEU to make **withdrawal dependent on the conclusion of a future relationship agreement** even beyond the current two-year limit. An agreement could simply state that the two sides do not want to have any special trade links but will continue their relations under WTO rules only. Thus, the two sides will be clear as to what form the trade and other relations will have immediately after divorce and remain free in their efforts later on if they change their mind.

8.2.7. Clarify the involvement of the CJEU

An issue that still remains unclear after Brexit, is **whether Article 218 (11) TFEU is applicable in an Article 50 TEU withdrawal agreement**, allowing for the CJEU to give an opinion as to whether an agreement envisaged is compatible with the Treaties.

There is wide agreement in academia that this is already the case, but the EU institutions could reflect whether it would be preferable to **include a clear Treaty reference** that it is indeed so, in particular given that the agreement may in any case and at any moment be assessed, ex post, by the CJEU. Such clarification could take the form of an amendment to Article 50 TEU explicitly referring to Article 218 (11) TFEU or through a modification of the reference to Article 218 (3) TFEU in Article 50 (2) TEU. It is debatable whether this intention could be achieved through an interinstitutional agreement under Article 295 TFEU which does not involve the CJEU, as the latter might reject the process.

In the same vein, the EU institutions might consider the possibility of **retaining, for some time, the judges of withdrawing state in the CJEU**, in particular if the withdrawal agreement gives a role to the CJEU even after withdrawal and it continues to adjudicate on matters affecting the withdrawn state.

8.2.8. On the format and conduct of the negotiations

The format of the negotiations and the division of tasks among institutions, as well as inclusive approaches by the Chief negotiator were paramount in maintaining the unity of the EU and promoting its priorities in the Brexit negotiations. **Central and vertical control of the Brexit responsibilities** within each institution did not suppress upstream involvement of other stakeholders.

Parliament, in particular by using a mix of **institutional responsibility**, **credible warnings** and **honest cooperation**, succeeded in playing much higher a role in the process compared to the provisions of the Treaty.

The role of individuals also mattered: the good cooperation between the three Brexit coordinators and their efforts to build alliances within their respective institutions and involve those who were not on the table paid, as EU positions were broadly accepted and defended.

In the event of another withdrawal, the Brexit model of **verticality**, **centrality**, **transparency** and **inclusiveness** should well be repeated. The distribution of competences among institutions does not need to be clarified in the Treaty, as they showed to understand the stakes involved and found a way to cooperate. It would be useful, however, perhaps in the context of an interinstitutional agreement, to formalise the model of cooperation adopted during Brexit.

8.2.9. On individuals and nominations

The UK refusal to nominate a Commissioner to the Von der Leyen was a serious violation of the Treaties and should have been pursued by the Commission before the CJEU. Member States should be required to **maintain the persons nominated to EU functions until the last day of their participation in the Union** and such obligation should be part of the withdrawal agreement.

The EU institutions should reflect on adopting **a settled position on the staff from the withdrawing state** (perhaps also through a modification of the Staff Regulations).

The question of MEPs from the withdrawn state is more fraught. The case that MEPs represent the totality of EU citizens rather than the citizens of the state they are elected is powerful and would give strength to the argument of a European "*demos*". On the other hand, maintaining MEPs from a state that has left the EU and no longer contributes to the EU budget is contrary to the principles of representative democracy. Secession or other forms of withdrawal from a state always entail the departure of elected representatives of the seceding territory. Parliament could reflect on the possibility to **offer MEPs from the Member State that already left, some form of temporary observer status**, similar to the one that was introduced for MEPs from acceding states.

8.3. Conclusions: adopting a set of "guidelines to withdrawal"?

The Brexit referendum campaign has shown the **widespread lack of knowledge as to what withdrawal entails**. It is true that citizens all over the EU, not only in the UK, are generally not familiar with many aspects of how the EU works; ignorance of the consequences of leaving the EU is even more generalised.

This is understandable: Article 50 TEU was supposed never to be used and it was futile to establish how the withdrawal process should be conducted and what it would entail. The experience of Brexit, and even more of the referendum campaign, shows that **the EU should consider adopting standard rules regarding the content and the process of withdrawal**. One aspect of Brexit, little discussed, is the **massive loss of EU citizens** after the UK left. The EU is not only a Union of Member States but also **a community of citizens**; it bears a responsibility to provide **its** citizens with information on the withdrawal process and its implications. Advance knowledge would be useful to citizens of a Member State which considers leaving the EU.

Accession negotiations have their own, comparable, set of rules providing a more objective treatment of new applications for membership. Since 1993, the EU gradually developed accession criteria (the so-

called **Copenhagen criteria**), a set of the essential conditions all candidate countries must satisfy to join the EU. Despite the differences in the two processes, **a similar pattern would help clarify the matter, especially for citizens**. The content and form of these "**guidelines to withdrawal**" is open to discussion. They could take the form of an annex to European Council conclusions, as was originally the case with the 'Copenhagen criteria" or, perhaps, of an interinstitutional agreement under Artide 295 TFEU. Their content is also depending on political will:

- They might cover only **general principles and priorities** (vested rights of citizens, non-discrimination, governance, graduality); or
- They could be **more detailed and formal** covering for instance procedural and political matters (coordination on possible extensions or transitory arrangements and proposals for the future relations). In such case, an **interinstitutional agreement** might be better placed to serve the objective and could include a lot of the recommendations above mentioned.

Whether these rules were to be binding and incontrovertible or not, the most important thing is to provide the required information on the implications of leaving the Union and the EU's priorities in the relevant negotiations.

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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, looks into the constitutional and institutional challenges that the European Union faced during the Brexit negotiations, and analyses whether the current wording of Article 50 of the Treaty on European Union was applied in an adequate manner and allowed for an efficient and properly organised withdrawal procedure.

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