Exiting the European Union

Exiting the European Union:

Legal Procedure, Dimensions and Implications

By

Manolis Perakis

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All omissions and errors are, of course, my own.

INTRODUCTION

I. Purpose of the book

From its inception, the European integration project sought to achieve an "ever closer union among the peoples of Europe", namely a mission without an end date, but with an intense degree of teleology; always and above all, a mission steeped in its legal rules. For that very reason, the Founding Treaties were signed as "open-ended" documents, with no fixed term, and without any provisions for their denunciation by any contracting State or on any right to withdraw. Besides, the common objectives of integration, peace and common development in all sectors of the economy, society and politics on the one hand, and the continuous evolution of EU rules and competences on the other, not only made it unlikely, but also undesirable, that any Member State would decide to "jump ship". Indeed, even though the relationship between the EU and its Member States has always been a complex and sensitive one, the common pursuit of all parties' goals was always at the center of the unification path.

Nevertheless, the last decade has been marked by a series of severe, interrelated crises that have deeply impacted on European societies and created the picture of an unprepared and weak Union, incapable of addressing such problems. The economic crisis and the conflicts within the Eurozone, the refugee crisis and the discord amongst Member States, the rise in extremist political forces and the inability to put forward persuasive alternative solutions, as well as the secessionist tendencies within Member States themselves and their direct repercussions for European cohesion have all raised questions which seemed inconceivable fifteen years ago; the most important of those questions being whether the Member States actually benefit from their status as such. Indeed, these crises brought back to the surface fundamental legal, political and economic dilemmas concerning the bonds between the Member States and the EU and amongst themselves, as well as the importance of their different views, history and interests for the European integration project. Unity in advanced areas like common defense and economic policy is set against the disunity demonstrated in matters such as the refugee crisis.

As a result, political and legal theory has focused, for the first time in the Union's history, on the Article 50 TEU process and/or other interpretatively-derived routes by which a Member State could withdraw from the EU or some part of it (such as the Eurozone), and has also begun studying the actual power of mechanisms to control compliance with EU rules, asking whether it is possible to expel a Member State from the Union. Besides, it was not long before the main case-study into these matters appeared, i.e. the United Kingdom's triggering of the process of withdrawing from the EU.

This book is a contribution to the study of the conditions, process and specific issues that arise from a Member State's withdrawal from the Union, and from related forms of withdrawal or changes in its status as a full member. The author's unwavering belief is that all these critical issues at a political, economic and social level are regulated within the Union by rules of law, and should thus be approached in academic terms from a legal perspective.

II. Research methodology and diagram

Needs demand that the research in this book covers the entire body of EU law, both primary and secondary, and above all the case law of the Union's courts, be it the former European Court of Justice (ECJ), now the Court of Justice of the European Union (CJEU), or the former Court of First Instance (CFI), now the General Court (GCEU). In addition to the relevant legislation and case law, an important tool in dealing with the topic is the–currently sparse yet of high quality–literature, in the form of monographs, articles and commentaries, that have provided the necessary starting point and which this book has used as a springboard, in the hope that the study of this matter and the concerns raised can be moved one step forward. One other important source of information about the process of a Member State's withdrawal from the Union and the issues this raises is the current–and so far historically unique–case of Article 50 TEU being triggered. We are, of course, referring to the United Kingdom's (Br)exit from the European Union.

Since a topic like the one this book seeks to grapple with cannot be examined by looking only at the European Union's own "internal" legal order, due to the sheer complexity of the matter and the various interesting aspects it raises, the viewpoint of national or international law has also been examined in certain sections of the book. This particular aspect of the

study is not intended to set aside the fundamental principle and practical reality that the European Union is an autonomous legal order, but to make the study and its results useful for the jurist researching the impacts and effects of EU law on national legal orders and in applying international rules on the withdrawal of States from international organisations or agreements. Besides, in the initial stages of its development, EU law relied on the common constitutional traditions of the Member States and their international agreements; today, it has developed to such a degree that it constitutes a set of rules which tend to prevail over, to homogenise, or even replace national rules in many sectors.

It is also useful to clarify that this book's purpose is neither to examine the political dimension of the topic, nor to explore whether and to what extent government policies or the decisions of intergovernmental institutions play a major role in the process of a Member State's exit from the Union. On the contrary, its purpose is strictly confined to the legal sphere, and seeks to highlight the fundamental legal issues that arise from the examination of the relevant rules. This is so because, firstly, focusing on complex legal aspects of the specific topic is a challenge for the legal scholar, given that it is very easy yet pointless to "deviate" towards merely setting out facts or announcements. Secondly, because any successful focus on these matters is exceptionally "fruitful" in research terms, as the legal issues raised in the important and complex field of the Union's legal relations with the withdrawing Member State, will bring to the fore a wealth of concerns and provide fertile ground for further academic study. Thirdly, because the Union remains a "Union of law" and its integration project continues to be law-bound, a feature which still applies even when a Member State is withdrawing from the EU. For that very reason, the "maturity" of and progress towards European integration as a process, which by default entails creating a set of rules and a system for controlling the withdrawal of a Member State from the Union, are issues which can only be approached and resolved effectively via the law.

To provide a presentation of the diverse, complex legal issues raised by a Member State's withdrawal from the Union as comprehensively and as well-rounded as possible, it was decided to divide the material into two Parts. The main research method involves examining, interpreting and commenting on the relevant legislation and case law, which is occasionally quoted directly, since there is nothing more authentic and no "truer" narrator of a court ruling than the judge who made it. The main distinction between the two parts is the relationship between voluntary withdrawal from the Union in the general sense (Part A) and hypothetical

cases of a *de facto* or *de jure* withdrawal from it under specific circumstances (Part B).

More specifically, Chapter I of Part A examines the historical development of the right of a Member State to withdraw from the EU. This section reviews the theoretical legal regime prior to the Treaty of Lisbon (hereinafter referred to as the "ToL"), the views that have been formulated about such a right, and the provision of Article 50 TEU freshly introduced by the said Treaty, along with all political positions and legal views which led to the provision's current form.

Chapter II of Part A attempts to analyse the concept of voluntary withdrawal of a Member State from the Union, as specified in Article 50 TEU. Based on the wording and spirit of the provision, the withdrawal process is outlined and the stipulated steps are examined one by one, with particular reference to and analysis of the most important legal questions raised in this regard, either due to issues which have not been regulated or because of the complexity of the Article's literal wording. As one might expect, monitoring of the current process known as "Brexit" dominates this Chapter.

In the following first Chapter of Part B, the book takes the opposite tack to the previous Part, namely it explores the possibility of there being a legal basis and process for the *de jure* expulsion of a Member State from the Union, whether directly, or indirectly by imposing strict sanctions. The key focus of this Chapter is the control and sanctions mechanism of Article 7 TEU, which is exceptionally current as a topic given the recent developments in Poland and Hungary. These events are also examined in depth.

In the final Chapter, which is the second of Part B, two possible cases of *de facto* forced withdrawal of a Member State from the European integration project are examined. Questions about these cases have recently arisen, provoking political and legal debate and spawning multiple, diverse points of view. These are the exit of a Member State from the Eurozone, whether voluntary or forced, and the legal landscape created by the secession from an EU Member State.

Finally, the book's Epilogue sets out the concluding remarks and the author's own personal thoughts about the general phenomenon of withdrawal of a Member State from the process of European integration–

always from a legal viewpoint–, while taking into consideration its interplay with political and economic factors.

The Epilogue is followed by the book's Appendices, which include the most important source texts relating to the current process of the United Kingdom's withdrawal from the European Union. In particular, the documents referred to include the UK Prime Minister's letter of 29.03.2017 to Donald Tusk triggering Article 50 (Appendix I), the European Council's statement of 29.03.2017 on the UK notification (Appendix II), the European Council's guidelines of 29.04.2017 for Brexit negotiations (Appendix III), the Commission's Recommendation to the Council of 03.05.2017 (Appendix IVa) and its Annex (Appendix IVb), the Council's Directives of 22.05.2017 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 (Appendix V), and the Joint report of 08.12.2017 from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union (Appendix VI).

Insofar as how information is presented in this work, it is worth noting, by way of final observation, that the entry into force of the ToL on the 01.12.2009 brought about major changes not only in how the Union functions, but also to the names of its judicial bodies. The ECJ was renamed the CJEU and the former CFI is now called the GCEU. In the course of writing the present book, it was considered only proper to refer to each court by the name it bore at the time each judgment was issued.

LIST OF ABBREVIATIONS

CFI = Court of First Instance

CJEU = Court of Justice of the European Union

Charter = Charter of Fundamental Rights of the European Union

EAEC = European Atomic Energy Community

ECB = European Central Bank

ECHR = European Convention on Human Rights

ECtHR = European Court of Human Rights

EC = European Community

ECJ = European Court of Justice

EEA = European Economic Area

EFTA = European Free Trade Area

EMU = Economic and Monetary Union

EU = European Union

Euratom = European Atomic Energy Community

GCEU = General Court of the European Union

RLF = Rule of Law Framework

TEC = Treaty establishing the European Community

TEU = Treaty of the European Union

TFEU = Treaty of the Functioning of the European Union

ToL = Treaty of Lisbon

UN = United Nations

VCLT = Vienna Convention on the Law of the Treaties

VCSS = Vienna Convention on Succession of States

WTO = World Trade Organisation

PART I:

THE VOLUNTARY WITHDRAWAL FROM THE EU

I

HISTORY

1. Previous theories concerning the right to withdraw

Before the Treaty of Lisbon entered into force, and unlike other international agreements[1], there were no provisions in the Treaties acknowledging an EU Member State's right to withdraw from the Union, or setting out the relative process for doing so. Although part of the literature has expressed the view that this legal lacuna constituted an unintentional omission on the part of the Treaties drafters–and, therefore, Member States did have a right to withdraw deriving from state sovereignty[2]–, according to the prevailing view[3], the absence of such a provision was a conscious choice made primarily for three reasons. Firstly, so as not to call into doubt Member States' dedication to achieving the goal of integration; secondly, to discourage the possibility of a withdrawal; and thirdly, because providing for such a procedure would entail a great detail of complexity which ought to be avoided so early on in the functioning of the Communities.

In any event, and although no such issue arose in the history of the Communities and Union[4] until the United Kingdom decided to withdraw in 2016, the theoretical possibility of such a development was something

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[1] For example, the NATO and WTO Treaties include special provisions on a State's voluntary withdrawal.

[2] See, *inter alia*, J. Zeh J., "Recht auf Austritt," *Zeitschrift für Europarechtliche Studien*, no. 2 (2004): 209.

[3] See, *inter alia*, P. Athanassiou, "Withdrawal and Expulsion from the EU and EMU: Some Reflections," *ECB Legal Working Paper Series*, no. 10 (2009): 10.

[4] The case of Greenland is different given that it was never a Member State but only part of a Member State that was included amongst the "Overseas Countries and Territories", with a major part of EU law ceasing to apply to it. See F. Harhoff, "Greenland's Withdrawal from the European Communities," *Common Market Law Review* 20, no. 1 (1983): 13; and F. Weiss, "Greenland's Withdrawal from the European Communities," *European Law Review* 10, no. 3 (1985): 173 et seq.

jurisprudence has often times grappled with[5]. Therefore, both points of view–for and against the existence of a right to withdraw–were fervently argued by legal scholars, who primarily relied on the relevant rules of international law.

Indeed, such widely accepted rules of international law have been codified in the 1969 Vienna Convention on the Law of Treaties (VCLT). First of all, Article 54 of the Convention stipulates that, in order for the withdrawal to be lawful, it has in principle to be provided for explicitly and should take place in line with the relevant rules. However, as aforementioned, there was no such provision in the Treaties prior to the ToL. Furthermore, Article 56(1) of the VCLT regulates the case of a member's unilateral withdrawal from a multilateral international treaty, when that treaty contains no relevant provision. Pursuant to this Article, such a withdrawal is not in accord with international law, unless it is established that the contracting parties intended to admit the possibility of denouncing the treaty or withdrawing from it, or a right of denunciation or withdrawal may be implied by the nature of the treaty, and provided that at least 12 months of notice is given.

However, just like the Treaties currently into force, both the Treaty establishing the European Community (TEC) and the Treaty on European Union (TEU) have been concluded for an unlimited period[6]. Moreover, the intention of the Member States to continuously strive to deepen and extend European integration–a trend which prevailed in all subsequent revisions of the Treaties–, was stressed in various parts of the original text. Consequently, the open-ended term of the Treaties on the one hand, and the goal of creating "an ever closer union among the peoples of Europe"[7]

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[5] See, *inter alia*, S. Berglund, "Prison or Voluntary Cooperation? The Possibility of Withdrawal from the European Union," *Scandinavian Political Studies*, 2006: 147 seq.; J.-V. Louis, "Le droit de retrait de l'Union européenne," *Cahiers de droit européen 20, no. 3 (2006): 293 seq.;* J. H. H. Weiler, "Alternatives to Withdrawal from an International Organization: the Case of the European Economic Community," *Israel Law Review* 20, no. 2-3 (1985): 282 seq.; J. Hill, "The European Economic Community: The Right of Member State Withdrawal," *Georgia Journal of International and Comparative Law* 12, no. 3 (1982): 335 seq.

[6] Current Articles 53 TEU and 356 TFEU. However, it is worth pointing out that, according to the Court's view, the open-ended term of the Community does not preclude the competences transferred by Member States being returned under some explicit provision of the Treaties (ECJ 7/71, judgment of 12.12.1971, *Commission / France*, ECLI:EU:C:1971:121, paras 19-20).

[7] TEU and TFEU Preambles.

on the other, made the possibility of one of the said two conditions of Article 56(1) VCLT for the lawful withdrawal of a Member State applying very unlikely[8], meaning that such an action would entail international liability for the withdrawing State.

Besides, a unilateral denunciation of the Treaties by an EU Member State would not be possible even on the basis of the principle of fundamental and unforeseen change of circumstances, which constitutes an essential basis of the consent of the parties to be bound by a treaty (*rebus sic stantibus*), as provided for and specified in Article 62 VCLT, given the adaptability of EU law and the definitive role Member States play in decision-making, including allowing them to exercise a *veto* over all decisions which have major consequences on their fundamental interests. In fact, the Luxembourg compromise and the generalisation of unanimity, along with the growing involvement of the Council in decision-making, guaranteed Member States a strong voice in the Communities and the EU, especially before the Single European Act (1986) and the Maastricht Treaty (1992). Beyond that, the Treaties always contained special provisions on how to amend the Treaties (current Article 48 TEU) and on derogations from agreed terms due to exceptional occurrences[9], which take precedence over Article 62 of the VCLT as *lex specialis*. Moreover, acceptance of the *acquis communautaire* and application of the fundamental principle of sincere cooperation (Article 4(3) TEU) always ensured that any fundamental and unforeseen change of circumstances would be addressed to promote cooperation amongst Member States and to safeguard the prevalence of law.

Likewise, the principle of reciprocity, which governs international agreements to a major degree and would provide a Member State with lawful grounds to denounce the Treaties because they are being breached by other contracting parties, is also not applicable to the EU legal order. Indeed, the establishment of an autonomous, comprehensive and binding judicial system within the Union, which all Member States committed themselves to comply with[10], eliminates the need to seek recourse to extreme solutions such as denunciation in the case of violation of the terms

[8] See H. Hofmeister, "Should I Stay or Should I Go?-A Critical Analysis of the Right to Withdraw from the EU," *European Law Journal* 16, no. 5 (2010): 590.
[9] See, by way of example, current Articles 347-348 TFEU.
[10] Article 344 TFEU.

agreed by the contracting parties, thus rendering the latter a prohibited means of self-redress[11].

Following from all the above, international law–as codified in the VCLT– did not confer on EU Member States a right to withdraw or to unilaterally denounce the Treaties, since the conditions laid down in Articles 56 and 62 VCLT were not met. That aside, it is extremely doubtful whether it would be correct in legal terms to invoke rules of international law for such a fundamental issue which lies at the very core of how the EU legal order functions.

It is especially worth noting that the EU Court has early on–in the *Poulsen* case–expressed the judgment that "*the European Community must respect international law in the exercise of its powers*"[12], whilst in the subsequent case of *Racke*, the Court ruled that "*... the rules of customary international law ... are binding upon the Community institutions and form part of the Community legal order*"[13]. Finally, adopting the same stance as the one taken by the CJEU, the General Court of the European Union (hereinafter referred to as the "GCEU") has remarked, in the *Opel Austria* case, that: "*the principle of good faith is a rule of customary international law ... and is therefore binding on the Community*"[14]. At first reading, the aforementioned case law could lead to the conclusion that, eventually, customary international law finds application even within the EU legal order.

However, as being the EU's "Constitutional Charter"[15], the EU Treaties are interpreted and filled in based exclusively on the wording, purposes, development and system of primary EU law, and without the fundamental principle of autonomy of the EU legal order allowing rules of international law to play any such role. Besides, it should be pointed out that in the *Kadi* case, the EU Court was clear that even the United Nations Charter, a primary example of an instrument codifying most important principles of

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[11] ECJ C-5/94, judgment of 23.05.1996, *The Queen / Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland)*, ECLI:EU:C:1996:205.
[12] ECJ C-286/90, judgment of 24.11.1992, *Anklagemindigheden / Poulsen and Diva Navigation*, ECLI:EU:C:1992:453, para. 9.
[13] ECJ C-162/96, judgment of 16.06.1998, *Racke / Hauptzollamt Mainz*, ECLI:EU:C:1998:293, para. 46.
[14] GCEU T-115/94, judgment of 22.01.1997, *Opel Austria / Council*, ECLI:EU:T:1997:3, para. 90.
[15] ECJ 294/83, judgment of 24.04.1986, *Les Verts / European Parliament*, ECLI:EU:C:1986:166, para. 23.

customary international law, "*would have primacy over acts of secondary Community law, ... that primacy at the level of Community law would not, however, extend to primary law*"[16]. Consequently, the failure to regulate the case of a Member State's withdrawal from the Union, as it existed in the pre-ToL legal framework, could not have been filled in by invoking rules of international law, even those of major scope such as the rules contained in the VCLT.

Therefore, the answer to this theoretical question should not be sought in international law, but in the law of the Treaties themselves, as the latter were applied prior to the ToL. Indeed, legal theory and case law have always consisted of differing views over whether the Treaties ought to be interpreted as permitting unilateral withdrawal of a Member State from the Union or not, or even whether a "consensual divorce" was possible. Thus, the UK's 1975 referendum on withdrawal from the Communities, pragmatically speaking, brought to the fore the question of the legal possibility to withdraw, especially given that no Member State or Community institution had contested the United Kingdom's right prior to it being exercised[17]. Furthermore, the German Constitutional Court, in its ruling on the Maastricht Treaty, constructed the right of withdrawal as a guarantee of state sovereignty and, hence, inherent to membership[18], a view also shared by the Czech Constitutional Court in relation to Article 50 TEU[19]. However, unlike the aforementioned national courts, the ECJ never had the opportunity to interpret the Treaties in order to reply to this specific question.

Guided by the letter and spirit of the Treaties, as the latter have been interpreted by the CJEU in light of landmark cases in the history of case law, the most correct answer to the question posed should be that the only case of a Member State's withdrawal from the Union that would be lawful on the basis of the pre-ToL legal regime, would be a non-unilateral

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[16] ECJ C-402,415/05 P, judgment of 03.09.2008, *Kadi and Al Barakaat International Foundation / Council and Commission*, ECLI:EU:C:2008:461, paras 307-308.

[17] In any case, the referendum, which took place in 1975, ended with a landslide victory for the pro-European camp. See also A. F. Tatham, "Don't Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon," in *EU Law after Lisbon*, eds. Andrea Biondi, Piet Eeckhout and Stefanie Ripley (Oxford University Press, 2012), 144.

[18] German Federal Constitutional Court, 12.10.1993, Cases 2 BvR 2134/92, 2 BvR 2159/92, *Re Maastricht Treaty* [BVerfG 89, 155].

[19] Czech Republic Constitutional Court, 26.11.2008, ÚS 19/08: *Treaty of Lisbon I.*

withdrawal, accompanied by the consent of all the other Member States, and would only occur by a procedure of amendments made to the Treaties.

Given the autonomy of the EU legal order ascertained by the Court, the open-ended term of the Treaties' application, and the irreversible transfer of increasingly more competences by Member States to the EU[20], it becomes clear that the EU legal order is one exhibiting greater affinity with the national ones. In fact, the Member State's transferred sovereignty has not been lost but rather subjected to a process of division, which has raised the bond between the EU and Member States to a level beyond State sovereignty[21].

As is clear from the foregoing discussion, a right to unilaterally denounce the Treaties and to withdraw from the Union could not be inferred from the silence of the Treaties and *contra legem*. Only the existence of an explicit provision in the Treaties themselves, conferring such a right, and specifying the terms for its exercise and subsequent protection of the other Member States and private individuals (as also being subjects of the legal order in question), could constitute the legal basis for such an action. Consequently, although the absence of such a provision in the pre-ToL legal regime could not lead to the conclusion that the withdrawal of a Member State was prohibited by EU law[22], the inclusion of such a provision–even if only to allow a specific Member State to withdraw–would require compliance with the Treaties' amendment procedure.

2. The Constitution for Europe

As previously mentioned, before the ToL entered into force, there was no provision in the Treaties regulating the right of a Member State to withdraw from the Union and the process for doing so. The first attempt to include such a special provision in the Treaties took place during discussions on the "Treaty establishing a Constitution for Europe", and on Article I-60 specifically[23].

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[20] ECJ 6/64, judgment of 15.07.1964, *Costa / E.N.E.L.*, ECLI:EU:C:1964:34.
[21] See P. Athanassiou, "Withdrawal and Expulsion from the EU and EMU", 17.
[22] For example, Article 1 of the European Political Community employed the term "indissoluble" for its Treaty, which is a stronger term than "unlimited", and implied, indeed, that not only duration, but also membership was to be permanent.
[23] Article I-60:
"Voluntary Withdrawal from the Union"

One of the main proponents of introducing a provision like this into the Treaties was the United Kingdom, which always robustly resisted policies leading to an increasingly closer political Union, and which were adopted as the direction of travel in the Constitutional Treaty. Moreover, the UK battled against such policies, either nipping them in the bud within EU institutions, or exempting itself from the relevant commitments. On the contrary, Member States which supported the constitutional plan at that time, such as Germany and France, were actively opposed to the wording of that provision. Their negative stance was also adopted by the majority of other–primarily "older"–Member States[24], and by EU institutions. More specifically, a group of Members of European Parliament proposed that, even if that provision were added in the end, further assurances should be included to prevent favouring the withdrawing State[25].

Besides, one of the most interesting proposals was to insert a provision into the Treaties that would create an alternative form of link to the Union for those Member States, like the United Kingdom, that, in fact, wished to remain closely associated to the EU, but did not support the ambition of

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"*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 III-325(3). It shall be concluded by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. The Constitution 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 European decisions concerning it.
A qualified majority shall be defined as at least 72 % of the members of the Council, representing the participating Member States, comprising at least 65 % of the population of these States.
5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article I-58."

[24] Such as the Netherlands, Portugal, Luxembourg, Greece and Austria.

[25] See P. Eeckhout and E, Frantziou, "Brexit and Article 50 TEU: A Constitutionalist Reading," *Common Market Law Review* 54, no. 3 (2017): 704.

promoting political integration[26]. Furthermore, a series of other amendments, which sought to make withdrawal more complicated, and thereby to discourage it, were put forward by France[27]. More specifically, the idea was floated of making the right to withdraw dependent on the existence of "irreconcilable differences" between the Union and the withdrawing Member State, which would emerge following amendments to the Treaties that were unacceptable to the latter. It was also proposed that a clause be included making a Council's prior attempt to find a compromise solution for both sides a prerequisite to withdrawal.

Due to the prolonged negotiations over many years and the numerous, diverse proposals on the existence and wording of the provision on a Member State's withdrawal, its form and content changed many times between the preliminary[28] and final draft of the Constitution[29]. By way of example, it should be noted that, although the preliminary draft did not place any restrictions on a country that had withdrawn from the Union to rejoin it, two important reservations were added in the final draft, namely that (i) the two-year period of negotiations between the Union and withdrawing Member State could only be extended by a unanimous decision of the European Council, and (ii) a State which withdraws but wishes to rejoin the Union shall submit a new application, under the selfsame conditions of admission as any third State.

The developments described above and the setting out of the final wording of the provision in the Constitutional Treaty–which was transposed without any changes to its content into the ToL and applies today–, along with the proposed amendments and additions that were rejected, all offer vital insights into the *ratio* of the provisions of Article 50 TEU. The outcome of the "tug-of-war" is not a compromise between the differing positions expressed, but an attempt to find the golden section between the two extreme versions of it, namely non-recognition of the right to withdraw from the Union on the one hand, and withdrawal without conditions, restrictions or prerequisites, with the option to readmit to rejoin the Union without any terms, on the other hand. As is always the case in

[26] Proposal made by A. Duff, L. Dini, P. Helminger and Lord Maclennan.
[27] See "List of proposed amendments to the text of the Articles of the Treaty Establishing a Constitution for Europe", "Part I of the Constitution: Article 59".
[28] European Convention, "*Document from the Praesidium: Preliminary draft Constitutional Treaty*," 28.10.2002, CONV 369/02.
[29] European Convention, "*Draft Treaty establishing a Constitution for Europe,*" 18.07.2003, CONV 850/03.

such critical processes that are specified in the Treaties, that attempt is also expressed through an allocation or sharing of competences between Member States and EU institutions, and amongst the latter. It is worth pointing out, for instance, that the Commission's role is minimal[30] compared to that of the European Council where the Member States are represented; the Council dominates both negotiations and conclusion of the withdrawal agreement, whereas the Parliament plays a key role only in the final phase. Finally, the conflicting viewpoints and the urge to balance them, so as to make the provision functional, reveal that, unlike the time when the founding Treaties were drafted sixty years ago, the possibility of a Member State withdrawing from the Union was considered to be a realistic expectation in the age of the Constitutional Treaty.

In any case, the conflict, pressures and concessions on both sides, which lie behind the final version of the provision of Article I-60 which led to Article 50 TEU, constitute a legacy that will weigh heavily on how the withdrawal mechanism will operate; a legacy reflected in its wording. Indeed, although the very wording of the provision does not contain major ambiguities, certain concepts critical for applying the Article ask for interpretation, whilst significant questions about certain aspects of the withdrawal process have been left unanswered.

[30] See P. Nicolaides, "Is Withdrawal from the European Union a Manageable Option? A Review of Economic and Legal Complexities," *Bruges European Economic Policy Briefings*, no. 28 (2013): 11, https://www.coleurope.eu/system/files_force/research-paper/beep28_0.pdf?download=1.

II

ARTICLE 50 TEU

1. The decision to withdraw

1.i. The right to decide

The first paragraph of Article 50 TEU provides that: "*Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements*". Clearly, this provision acts as an introduction to this Article without constituting the starting point or the first step of the otherwise complex and prolonged exit process of a Member State from the Union, which is provided and regulated by the rest of the provision. More specifically, this particular sentence captures the essence of the basic principle underlying the withdrawal of a Member State, namely the absolute, unconditional and unrestricted freedom of each State to choose whether, when and by means of which national procedures the said process shall be initiated. In other words, Article 50(1) TEU recognises a unilateral and unconditional right to withdrawal, which is not immediate or absolute[1], since it concerns the taking of the decision and the initiation of the exit process, and not the unconditional and immediate completion of the latter.

Thus, any Member State may decide to withdraw at any time, without having to present any serious reason, without any prior consultations with other Member States or the EU institutions and without any process or

[1] See C. Closa, "Interpreting Article 50: Exit, Voice and... What About Loyalty?" in *Secession from a Member State and Withdrawal from the EU*, ed. C. Closa (Cambridge University Press, 2017), 193, and J. Friel, "Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution," *International and Comparative Law Quarterly* 53, no. 2 (2004): 407.

early warning being required[2]. The aforementioned decision or the process of its taking shall not be subject to the review of any institution, and no condition is set to that end. Despite the fact that such absolute freedom regarding the decision to exit can be in full agreement with the international principle of state sovereignty, it was one but not the only possible course of action by the European Union's Constitutional Legislature[3]. It should be noted that, if the latter had decided to adopt unaltered the corresponding rules of the VCLT on this matter, by ignoring the autonomy and special nature of the EU legal order, they would have instituted strict terms and conditions[4] in place of the absolute discretionary power they eventually chose to establish.

The last phrase of the quoted text regarding the taking of the decision "*in accordance with the constitutional requirements*"–which is not to be found in any other international agreement–seems to constitute a departure from the general spirit of the provision. Indeed, the term "*constitutional requirements*" shall not cause any confusion in itself, since it clearly implies the corresponding, hierarchically superior national rules of the withdrawing Member State, and not necessarily its constitutional provisions, given that the constitutional order's paradigm does not uniformly apply in all Member States. However, the lack of a provision regarding the competence or power of the Union to exercise any kind of review[5] over the compliance with the said condition, raises questions as to the practical usefulness of the provision, which should be answered by means of its literal and purposive interpretation.

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[2] See H. P. Hestermeyer, "How Brexit will Happen: A Brief Primer on EU Law and Constitutional Law Questions Raised by Brexit," *Journal of International Arbitration* 33, no. 7 (2016): 434.

[3] During the proceedings of the Constitutional Assembly, which drafted the "Treaty establishing a Constitution for Europe", the French representative, Dominique de Villepin, proposed that the essential conditions for a Member State withdrawing from the EU should be a) the existence of "irreconcilable differences" between the State and the EU following amendments to the Treaties, and b) an attempt in Council to reach compromise prior to withdrawal. See "List of proposed amendments to the text of the Articles of the Treaty Establishing a Constitution for Europe", "Part I of the Constitution: Article 59".

4 Articles 54 et seq and 62 VCLT. See also C. Hillion, "Accession and Withdrawal in the Law of the European Union," in *The Oxford Handbook of European Union Law*, eds. A. Arnull and D. Chalmers (Oxford University Press, 2015), 126.

[5] The CJEU has no competence under the Lisbon Treaty to adjudicate upon validity of the internal law procedures in similar situations, and the Court was consequently rejecting its competence in similar cases.

In particular, the addition of the phrase "*in accordance with the constitutional requirements*" serves two equally important roles within the framework of Article 50 TEU.

The first is to put emphasis on the absolute freedom of choice and decision of each State to withdraw from the EU without requiring the latter's consent. The importance of the provided condition, regarding the compliance with the corresponding rules of national law by each State, does not lie by it being extant, but in the fact that it is the only one explicitly stated and remaining mainly unreviewed by the Union[6], apart from very extreme cases, such as taking the decision to withdraw following the imposition of a dictatorship. In fact, such a severe violation of EU fundamental principles, as provided for in Article 2 TEU, could perhaps be regarded as the only instance where non-compliance with "*constitutional requirements*" would be indeed reviewed by the Union, possibly resulting in the rejection of the decision to exit. In this regard, an argument could also be drawn on Article 7 TEU, according to which such a violation of EU fundamental values and principles may also lead to the suspension of the Member State's rights deriving from the application of the Treaties, one of which being that of the decision to withdraw from the EU, arising from Article 50 TEU.

The second role the aforementioned phrase fulfills concerns determining the time of taking the decision to withdraw and its subsequent review in accordance with the constitutional rules of the withdrawing State. In particular, in case the decision is taken in line with the applicable national rules and the Union is being notified upon the initiation of the exit process, any possible change in the State's political will (e.g. due to elections) or in the legislative framework regulating the taking of the decision, should not constitute a lawful ground to revoke it and, thus, overturn the exit process. Besides, the very provision of Article 50(1) TEU provides in its wording that the critical time for the withdrawal decision to fulfill the condition of being "constitutional" is the time point of its taking, without requiring that this condition be met throughout the course of the exit process, since the Article provides that "*a Member State may decide to withdraw from the Union in accordance with its own constitutional requirements*" rather than "*a Member State withdraws in accordance with its own constitutional requirements*". Furthermore, as already stated, this is a right to initiate the exit process and not a right to its immediate completion. Therefore,

[6] See T. Tridimas, "Brexit means Brexit-Article 50: An Endgame without an End?," *King's Law Journal* 27, no. 3 (2016): 303.

contrary to what has been argued by part of the literature[7], the withdrawing Member State's argument that its respective national rules have undergone change or its will shifted during the course of the exit process, and, as a consequence, the decision that was previously taken and notified no longer complies with the "*constitutional requirements*" of the State in question, may not constitute a correct legal basis neither for lawful revocation of the notification of the withdrawal notification, nor for a request to reverse the exit process.

1.ii. The decision's procedure

As stated, the absolute freedom recognised to Member States by Article 50 TEU does not only refer to whether and when a State would initiate the exit process from the EU, but also to which national procedures shall be followed. In other words, whether the State chooses the parliamentary, governmental or referendum course of deciding to withdraw, and, that being the case, whether its constitutional provisions shall be complied with, is–apart from extreme cases–indifferent to the Union, which has no reviewing capacity-through its Court-in this respect[8]. However, the phrase "*in accordance with the constitutional requirements*" is not void of meaning with regard to the decision-making process, since the decision to withdraw from the EU, notified by a Member State, would not be accepted by the Union when made, for example, by a government that has taken power by force, or following a makeshift referendum held by a large number of citizens, without the consent of the democratically elected government and by infringing the constitutionally established procedures.

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[7] See P. Eeckhout and E. Frantziou, "Brexit and Article 50 TEU: A Constitutionalist Reading", 712.

[8] See also GCJEU T-458/17, judgment of 26.11.2018, *Schindler and others / Council,* ECLI:EU:T:2018:838, paras. 56-59. Moreover, the German Constitutional Court, in its judgment on the Lisbon Treaty, clearly stated that "*whether these [national constitutional] requirements [referred to Article 50 TEU] have been complied with in the individual case can, however, be verified by the Member State itself, not by the European Union or the other Member States*" (judgment No 2 BvE 2/08, 30.06.2009). See also J.-C. Piris, "Brexit or Britin: is it really colder outside," Fondation Robert Schuman, *European Issues*, no. 355 (2015), 2, https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-355-bis-en.pdf. For the opposite view see, *inter alia*, F. Harbo, "Secession Right-An Anti-Federal Principle? Comparative Study of Federal States and the EU," *Journal of Politics and Law* 1, no. 3 (2008): 143.