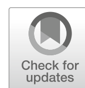
Article 50 of the Treaty on European Union: How to Understand the 'Right' of the Member State to Withdraw the European Union?



Andrea Circolo, Ondrej Hamuľák, and Ondrej Blažo

Abstract This chapter focuses on legal aspects, respectively the constitutional assumptions of the departure of the Member State from the European Union. It offers an analysis of past debates and theoretical models that preceded the official introduction of the exit clause in today's Article 50 TEU. It also addresses the question of the nature of the withdrawal and casts doubt on the nature of the "right to withdraw." Article 50 is working with two alternatives on how to leave the Union—a consensual exit and unilateral withdrawal. Although the authors accept the theoretical extreme possibility of unilateral exit without agreement, they also point to the factual necessity of the agreement (that is necessary from the point of view of legal certainty, economic stability, political accountability, and international status of the outgoing state), which in fact makes the consensual exit the only possible way of terminating membership and therefore casts doubts on the existence of right to withdraw.

1 Introduction: The Problem of the Withdrawal from the EU Nowadays

'*Le retrait est un acte par lequel l'État membre d'une organization Internationale met fin à son appartenance à celle-ci*.'[1] It's the simple and straightforward message. States as sovereigns are free to choose their destiny and decide whether participate or

[1]Mehdi (2007), p. 113.

A. Circolo (✉)
Department of Economic and Legal Studies, Parthenope University of Naples, Naples, Italy
e-mail: andrea.circolo@uniparthenope.it

O. Hamuľák
Faculty of Law, Palacký University Olomouc, Olomouc, Czech Republic
e-mail: ondrej.hamulak@upol.cz

O. Blažo
Institute of European Law, Faculty of Law, Comenius University in Bratislava, Bratislava, Slovakia
e-mail: ondrej.blazo@flaw.uniba.sk

© Springer International Publishing AG 2018

D. Ramiro Troitiño et al. (eds.), *Brexit*,
https://doi.org/10.1007/978-3-319-73414-9_12

tanel.kerikmae@ttu.ee

not on the functioning of particular international organisation. However, when meeting the political reality of European integration today and considering the complexity of European project, the issue becomes challenging and rather open. Several years ago, it would have seemed untimely and rather scholastic to make an analysis of real case of withdrawal[2] in relation to the European Union, given that it has never been applied (and for a long time even forecasted) and that, rather, the process of European integration, as developed in last 60 years, has been marked by successive and repeated enlargements (not exempt from criticism) that led the Member States from the original 6 to 28[3] of today. The European Union's external borders, with periodic behaviour and seemingly inevitable, have been, in fact, gradually moved in the direction of all four cardinal points.[4] The continuing exception of Switzerland and Norway does not diminish the impression of an unstoppable march that concerned, and that progressively involves the entire European continent.[5] Geographical widening and material deepening of European integration[6] over the last six decades has given rise to assumption of unstoppable and unlimited existence of the European bond. The lack of attention of the doctrine on the issue of termination of membership could be justified by this reason. The scholars predominantly focused on the theme of the accession of the applicant countries and the existing membership in the EC/EU (position of the states, relation between EU and national law etc.), rather than on the withdrawal of the Member States.

As is known, no cases of withdrawal have so far yet checked, both before and after the Lisbon Treaty and to the Community or the Union. However, the question has been the focus of some discussions for many years before the upcoming Brexit. In 1965 France, disagreeing with the Commission on how to finance the CAP, after the breakdown of negotiations, which took place during the Board of Ministers of the EEC (June 30/July 1), re-called his organisation's delegates and refrained from participating in the Meeting of the Council of Ministers of 26 July 1965. "The French behaviour" of that time is known as the policy of *the empty chair* or *chaise vide* to the Council, which blocked *de facto* the institution. The United Kingdom too is not new to such situations. The *Royame Uni* entered the European Economic Community in January 1973, under the government of the Conservative Party (Tory). In 1974 the (most of the) Labour Party, just from the beginning opposite to the entrance of Britain in the EEC, printed several posters for the upcoming

[2]For terminological clarity, withdrawal, retreat, and exit will be used as synonyms. We do not believe we can consider in this way the noun secession, which is used to describe a country that acquires independence separating itself from a unitary state.

[3]The writers refer to a "Europe at 28" because, as established by Art. 50 TEU, neither any withdrawal agreement has yet been signed, nor have 2 years after the notification of intent by the United Kingdom passed away.

[4]For an historical perspective of the enlargement see Nelli Feroci (2005), pp. 597; for a legal perspective see Puglia (2014), pp. 333–338.

[5]Vellano (2007*)*, p. 503.

[6]Wessels (2001), pp. 5–11.

tanel.kerikmae@ttu.ee

elections, in which he promised to ask for a renegotiation of the terms of accession of the UK and hold a consultative *referendum* (but strongly binding) with which the British people would have decided the country's future in the Community. *Historical courses and resorts*. The negotiation was signed in Dublin in March 1975 by representatives of the EEC and the British Cabinet, who voted 16-7 in favour of the United Kingdom stay in the EEC. The referendum also took place on June 5 1975, the result of which, perhaps influenced by the government's vote, was a landslide victory for the YES - 67.2%—(the question put to voters was "Do you think the UK should stay in the European Community (Common Market)?". The presence of representatives of the Community in the negotiations, and the absence of questions raised on the legality of the *referendum* demonstrated the will on the part of the EU not to create an unwelcome precedent, as suggests the idea that the Member States did not find illegal the British behaviour from the point of view of EU and international law (it should however be noted that the only request to renegotiate the treaties, under the threat of the withdrawal, could not possibly devote the existence of the right of withdrawal either in Community law or in the international one). It remained only a purpose, instead, the new electoral will of the Labour party to leave the EEC (1981): *the party of the rose* promised that, if victorious, would have withdrawn the country from the Community, this time even without going through a popular *referendum*, convinced that the confidence gained at the polls constituted sufficient mandate to complete the exit. Even then the reasons were, mostly, economic: the high contribution due to the coffers of the EEC, the revaluation of oil in the North Sea reserves, the decline of British industry. Another "accident" like the British occurred in Greece. During the election campaign for the 1981 national elections, PASOK (*Panhellenic Socialist Movement*) promised to hold, in case of victory, a national *referendum* to determine the permanence or the output of the Greek State by the EEC. Despite the victory of the Socialist Party, the *referendum* was never realised: this could have been requested only by the President of the Hellenic Republic, which was then Constantine Caramanlis, totally favourable to membership of his country to the European Community. At the end deserves special attention also the precedent of Greenland. However, even in this case, we are far from being able to talk about a case of withdrawal: in fact, although it is also spoken of withdrawal for this hypothesis, actually a change of the legal system was made to which the territory of the Greenland is subjected (with a strong autonomy from the Danish state as early as 1979 with the obtaining of the *Home Rule*), without which no evidence of its membership has come out with respect to the then European Economic Community. Belonging that was, and continues to, headed to Denmark. Since 1985, after a special *referendum* held on February 23, 1982, art. 182–187 of the Fourth Part of the EC Treaty "Association of Overseas Countries and Territories", are applied to Greenland, except the specific provisions as contained in Protocol annexed to the EC Treaty. It was, in fact, the Brussels Treaty (13 March 1984) to amend the Treaties establishing the European Community with regard to Greenland, declaring naught, from that date, the application of the Treaties themselves, and by conferring the status of "associated territory". The procedure for the change is that in art. 236 EEC: it was not, in fact, Greenland to require a direct way

tanel.kerikmae@ttu.ee

for the withdrawal, but Denmark for it, through a proposal for a redefinition of the application of the Treaties submitted to the Council, then transmitted to the Commission and Parliament for consultation. The case must therefore be classified in the same way for a revision of the Treaty, which established the quality of "Overseas Territory" for Greenland: there was no unilateral termination, as all Member States, also making several changes to the initial proposals, agreed with the result achieved (Greenland gained a new *status*, designed to regulate fishing rights and to recognise the same right to the "free trade").

The renewed (it would be more sufficient to treat it as 'firstborn') interest on the topic of withdrawal is unquestionably connected with the process of 'formal' constitutionalisation of the EU. Primary, it was opened in connection to the negotiation and creation of the Treaty Establishing Constitution for Europe, which in its art. I-60 introduced for the very first time the explicit right of (voluntarily) withdrawal of Member State from the EU.[7] Later, more deep evaluation of exit clause continued after adoption of Lisbon Treaty, which confirmed the right for withdrawal in art. 50 TEU, and discussion accelerated during the multi-crisis which EU have been facing during last periods. The ongoing economic and political crisis, the *Brexit* (with attached *Grexit* and *Frexit* hypothesis), and so long, have placed such a constitutional issue at the centre of political and scientific debate in Europe and beyond. Finally, the issue left the 'black letter' space of scholarly research and becomes the great topic of our time since June 2016 and March 2017 respectively, when UK people in *referendum* and the UK government by official notification started the most vivid and most important question of the history of European integration—the withdrawal of the United Kingdom from the European Union.

This text intends to give the overview of the 'withdrawal question' within the evolution of European integration and to analyse the nature of prescribed path of terminating the membership as it stands in EU law today. We must admit that analysis of such a proceeding and advancing topic brings the risk of being '*passé*'. On the other side, it´s the challenging and interesting adventure to be the part of this big story. From the legal point of view, art. 50 of the TEU, even rightly criticised for the multitude of shortcomings and declared as being the vehicle, that was not intended to be driven,[8] could be understood as archetypal constitutional provision. The general and short in its wording, giving the space for flexible interpretation and establishment of the constitutional practice. But politically this is not the case. Abstractness of the provision dealing with such a dramatic question complicates the process of withdrawal and gives rise to serious level of uncertainty. It is quite a risky business to enter the uncharted territory in the crucial question like this.[9] The questions arise and solutions appear on the day to day basis. Art. 50 shall for sure obtain new legal quality once being used in the process of *Brexit*. But the end of story is not here now. People of Europe, politicians and institutions are facing the

[7]Herbst (2006), pp. 383–389; Friel (2004), pp. 407–428; or de Waele (2005) pp. 169–189.

[8]Amato (2016).

[9]Craig (2016), pp. 447–468.

tanel.kerikmae@ttu.ee

unprecedented (regrettable) situations. But the lawyers are looking for establishment of constitutional practice, so needed relative to the vague and abstract Treaty proviso.

2 Setting the Scene: The Situation Before Lisbon

Nobody wants to speak about divorce on the wedding day

The popular motto, often attributed to Abraham Lincoln, portrays perfectly the situation about the right to withdraw pre-Lisbon. Before the entry into force of this Treaty in 2009, in fact, neither the EC Treaty nor the EU Treaty did regulate explicitly the possibility of a Member State to leave the EU. The most probable reason for this silence about withdrawal seems to be the intent of the founders to dissuade Member States from withdrawal.[10] However, the withdrawal itself was never denied by the Treaties and therefore open to be discussed at least on the theoretical base. Another line of interpretation of 'no withdrawal provision' in the Treaties, was connected with the understanding of the integration entity as indissoluble community, that could not be abandoned by its Member States using the international law tools.[11] Unless the Treaty establishing the ECSC (whose duration was limited to 50 years), the Treaties establishing the EEC, Euratom and EU have been concluded for an unlimited period.[12] The undefined commitment of membership was interpreted ambivalently about the theme of the withdrawal.

On the first interpretation, the unlimited duration of the founding Treaties would involve the implied possibility for Member States not having to wait for a "budgeted" expiry and to be able to withdraw at any time.[13] Some subordinated the activation of the withdrawal to the fulfilment of the conditions of application of the principle of *rebus sic stantibus*[14] (art. 62 VCLT); others justified this possibility as available through the withdrawal expressed in the Vienna Convention on the Law of Treaties (1969), *white elephant* of the rules encoded on the theme: under art. 56 of that "a treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal", unless it is satisfied that it was "established that the parties intended to

[10]Wyrozumska (2013), pp. 1385–1418.

[11]Ćapeta (2016), p. 7.

[12]Respectively, Art. 312 EC (which replaces the EEC), Art. 208 EAEC, Art. 51 TUE.

[13]In this regard, the words of Von Mises (1983, p. 34): 'No people and no part of a people shall be held against its will in a political association that it does not want'.

[14]It is better to remind that this clause does not exempt the withdrawing State from showing the actual change in those conditions, although it is a case of denunciation that is independent of the length of the Treaty and that lives its own ontological and conceptual autonomy. The exceptionality hypothesis, therefore, does not justify in any way the assessment of this option in terms of withdrawal *ad libitum*, but rather as a case of withdrawal *ad nutum*, using a dear distinction with regards to the contractual legal tradition.

tanel.kerikmae@ttu.ee

admit the possibility of denunciation or withdrawal"; or that "a right of denunciation or withdrawal may be implied by the nature of the treaty."[15] Both exceptions lend themselves, obviously, to be admitted, or excluding, according to opposite subjective interpretations, but not for this unfounded. However, the argument was used mainly by the doctrine that believes that, even before the entry into force of the Lisbon Treaty, Member States had the right to withdraw from the Union under the codification of 1969 and according, therefore, to the customary international law expressed in the Convention,[16] confirming fully the affiliation of the European Union Law with the International Treaties.

In this line of thinking also adhered, even in filigree, several national constitutional courts, which were firmly opposed to the idea that the Member States, joining the Community, agreed to give up their sovereignty: along these lines, in fact, the participation in the Union entails *a mere transfer of shares of sovereignty*[17] and not a definitive failure of the same. Although, mind you, as *ultima ratio*, the German and Spanish Constitutional Courts have left, then, foreseeing the possibility of withdrawal, in the presence of an irreconcilable conflict between the provisions of the respective Constitutions and the primary and secondary law of the Union.[18] More prudent has been, however, the Italian Constitutional Court, but still deployed in defence of the values essential content, in particular, in Part I of the Constitution. In this regard, it is worth quoting the considerations of a consolidated approach that would consider necessary the prior amendment of the national Constitution, as far as it provides for the participation in the European integration process, before activating any procedure of withdrawal. Even in the case of Italy it would need to proceed with the amendment of Title V[19] insofar as the Constitutional Law n. 3/2001 has introduced compliance with the constraints deriving from EU.[20] That reference, although not explicit as in the constitutions of other Member States, seems, in fact, to constitute a constraint of belonging to the European Union: a more explicit anchor was foreseen in the draft constitutional reform to art. 116, but it has not been successful.[21] Therefore, according to this approach, joining the European Union would not affect the right of withdrawal by a Member State, as a natural consequence of the principle of sovereignty.[22]

---

[15]To these assumptions are added the provisions of Art. 54 of the Convention, according to which "the termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; (b) at any time by consent of all the parties after consultation with the other contracting States". Albeit difficult configurability, given the unanimity of the 28 Member States, it is still a hypothesis possibly workable.

[16]In this sense see Tesauro (2012), p. 93.

[17]Puglia (2014), p. 339.

[18]Vellano (2007), p. 508.

[19]The procedure for constitutional amendment is required by the Italian Constitution in the Art. 138.

[20]Vellano (2007), p. 509.

[21]About this, just see Strozzi (2005), p. 388.

[22]Nicotra (2003), p. 453.

tanel.kerikmae@ttu.ee

However, according to an interpretation in the opposite direction, just the unlimited duration of the commitment assumed leans in favour of the indissolubility of the bond contract by Member State: the absence of a specific procedure of withdrawal would therefore be the logical consequence of this choice, to be honest a little pragmatic and crystallised in legal abstraction (the question has always been shown to have a "material" side, difficult to contain by regulations). This seems to be the approach adopted by the Court of Justice, obtainable indirectly from some historical judgments (above all, Case C 6/64, Costa v. ENEL[23]): a clearly restrictive view on the possibility to withdraw from the Community which it recalls the sovereignty freely chosen by the Member States with their accession to the treaties, establishing the basis of 'an ever closer union among the European peoples' (Preamble of the EC Treaty - art. 1 TEU). In this historical decision, the European judges had to say that "the transfer, by the States in favour of the Community, of the rights and of the obligations corresponding to the provisions of the Treaty, implies [. . .] a definitive limitation of their sovereign rights". Furthermore, although It does not omit to consider, even in subsequent judgments, the fact that the treaty has been concluded in the form of international agreement, the Court arises from the very beginning from the perspective of understanding the treaty as a genuine 'federal' constitution,[24] where the covenant of "the marriage" is characterised by the permanence and the unlimited time.[25] The attempt to formalise this interpretation would have been only postponed.

Nevertheless, the existence of a jurisprudential and doctrinal trend favourable to the possibility of withdrawing let open a debate on the "output" mode: the withdrawing State and remaining States would have contest for real diplomatic negotiations prior to formalise withdrawal. Negotiation necessary to verify whether the conditions for withdrawal (e.g., the change of the initial conditions), to determine the full legitimacy of the relevant proceedings (the absence of which may lead to the assumption of sanctions against the withdrawing State), to define economic issues, in and out, with respect to the Member State in question.[26] According to another theory, it could bring about a scenario completely new and different: the question could be brought to the attention of the Court of Justice by the Commission or by another Member State,[27] with the possibility that the withdrawing State implicated does not recognise anymore, specifically because of the withdrawal, the jurisdiction of the Court of Justice.[28]

[23]Costa vs. ENEL, 6/64, ECLI:EU:C:1964:66.

[24]To express clearly this idea, the Advocate General Lagrange spoke about "a single market based on the creation of a separate judicial system of the Member States, but intimately and even organically tied to it."

[25]Nicotra (2003), p. 452.

[26]Vellano (2007), p. 509.

[27]Infringement procedure, respectively, in Art. 226 and 227 TEC.

[28]Vellano (2007), p. 510.

tanel.kerikmae@ttu.ee

3 An Express "Exit Clause": A Birth That Lasted Twenty-Five Years

The path, which has found the end with the express provision in the Lisbon Treaty, has been, without any doubt, so long and tortuous. Before art. I-60 TCE (forerunner of the art. 50 TEU), that would have regulated the withdrawal if the Union's constitutional process (2004) had had a good end, there are various "unofficial" proposals that provide an insertion of a provision of that way that should be carefully evaluated. The *Spinelli's Draft* (1984) and the *Oreja-Herman's Draft* (1994), both pre-ordered to create a possible Constitution of the European Union, not yet reflected in an express provision on the possibility to withdraw. But this conclusion would be simply synonymous and symptom of superficiality. Both art. 82 of the *Spinell's draft* and art. 33 of the *Guidelines in the negotiations of Maastricht* (1990) ventilate the hypothesis of a "constitutional breakdown"[29], resulting in withdrawal from the Community, for the States that do not ratify the Constitution, only if most of the Member States, consisting of the 2/3 of the population of the Community,[30] agrees with it. Like them, it is the provision of art. 47 of the *Oreja-Herman Bozza*, published in February 1994 at the request of the Institutional Affairs Committee of the European Parliament: in this case, however, the *ratio* was 4/5. We are faced with a provision requiring the withdrawal still occasional, linked to occasions merely contingent and away from the hypothesis of unilateral withdrawal by the will of the Union Member State. The first proposal in this regard comes from the academic environment: a group of students (*European Constitutional Group*) published a draft of the European Constitution, whose art. I-60 contained an express provision on the withdrawal: this is guaranteed to each Member State, provided that the complaint is notified a year before.[31] At the beginning of the new millennium appears in the same wake the draft published by the magazine *The Economist*, whose Art. 20 reads simply: "a member State may leave the Union at any time"; a more complex and detailed proposal also comes from a group of researchers at the European University Institute in Florence.[32] The assessed drafts differ for solutions to the issue, but they all have in common a limited impact and the general indifference of the political "environment" of the time: nevertheless, it is undoubted the utility that the same have as a starting point in the scientific debate on the right of withdrawal.

The situation changed radically in the first years of this decade, when the greatest actors on the European stage decided to introduce in the Treaties a clause dedicated to the withdrawal from the Union by a Member State. The proposal was advanced for the first time during the works of the European Convention at the *Laeken*

[29]De Witte (2005), p. 21.

[30]Zbiral (2008), p. 306.

[31]Ibid p. 307.

[32]Ibid p. 308.

tanel.kerikmae@ttu.ee

European Council (14–15 December 2001) to outline the *Treaty establishing a Constitution for Europe*.

During the works they were presented numerous doctrinal contributions, all of which suggested to give different trims to the exit clause.[33] The most important theoretical models for the elaboration of a withdrawal clause were three: *State Primacy*, *Union Primacy* and *Union Control*,[34] the concepts flowing between federal and international mode of understanding of membership of state in some greater bond. The federal systems usually do not permit the unilateral withdrawal without necessary change of constitution. Federations are based on the notion of indissoluble unity. On the contrary the international law perspective when dealing with the membership of the states in the international organisations or when dealing with the international treaty regimes is more open and more tolerant to the autonomy of state's will (and the state´s sovereignty[35]) hence rules of international law, as stated above, allow a state to end up its commitments arising from the international treaties and analogically to end up the membership in the international organisations founded by the international treaty.

The first model, which not coincidentally was supported by a doctrinal contribution presented by the British government, attributed to the Member States complete freedom to withdraw, without the possibility of intervention or *veto* by the Union institutions.

The second model, by contrast, embodied a fatal membership concept: once inside the Union, it would no longer be possible to get out.

The third and final model, that of the Union Control, offered this possibility through a mutual decision, shared by all the parties, following the model of the Canadian Federation, thus revealing itself a real example of negotiation.

The later converged solution in art. I-59 of the draft Constitution, and finally adopted in art. I-60 of the Treaty establishing a Constitution for Europe, however, "escaped" from each of these three models. Despite the failure of the Treaty establishing a Constitution for Europe, foundered after the failed ratification by France and the Netherlands, the former withdrawal clause of art. I-60 was one of multitude of provisions which, far from being shelved, merged in an almost unchanged form in the Lisbon Treaty.

The latter, which entered into force on 1 December 2009, defines the current Union's institutional framework, regulating the withdrawal of a Member State with the art. 50[36] of the new Treaty on European Union. Explicit regulation of the right for unilateral voluntary withdrawal from the Union apparently finished the debates

[33]Snavely (2004), pp. 213–230.

[34]Friel (2004), p. 422.

[35]Voluntary membership in international organisations was always seen as a basis of state sovereignty. It was the case even with the historically first global integration organisation—League of Nations. Voluntary membership was also in its case the (positive) answer to the question whether states which joined an international organisation and so accepted certain limitations on their sovereignty can still be seen as sovereign subjects (Le Fur 1935).

[36]This is the current text of the Art. 50 TEU:

tanel.kerikmae@ttu.ee

whether withdrawal from the Union should be perceived from constitutional (federal) of international point of view. Explicit regulation of the right to withdraw from the Union shifted the discussions towards later option and underlined the concept of the EU as the bound of sovereign states. Inclusion of such proviso into the treaties was perceived as positive notwithstanding the fact that it deals with the negative question (the termination of the membership). It was observed as the constitutional rule having the positive and promoting impact on the integration process.[37] The hypothesis was that Members States having the explicit right to determine their destiny in/out of the integration processes would be better prepared to cooperate and accept the outcomes of the functioning of the EC/EU on the quotidian basis. The withdrawal option could therefore lessen the federalisation tendencies and make EU more operable.[38] There are of course also opposite views understanding the inclusion of the explicit exit clause as too risky. They speak about the 'rule of possible' pointing on the abusive potential of declaration of right to withdrawal.[39]

---

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, 2 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 rejoin, its request shall be subject to the procedure referred to in Article 49.

[37]Herbst (2006), pp. 388; Weiler (1985), pp. 282–298.

[38]For example, Czech Constitutional Court noticed this conceptual change and used the right to withdraw from the Union as an argument in favour of preserving the sovereignty of the Czech Republic when participating on the European integration. It reminded that: '[...] the Treaty of Lisbon newly introduces, in Art. 50 of the Treaty on EU, the possibility of withdrawing from the organization. This can take place by agreement between the withdrawing state and the Council as a representative of the member states (i.e., not with the Commission, as a representative of the interests of the Union itself), and if an agreement is not reached, the Treaty itself gives the withdrawing state a notice period. Thus, the manner of termination membership is also typical for an international organization, not a contemporary federative state, and this possibility, on the contrary, strengthens the sovereignty of member states. [...]' Decision in case Treaty of Lisbon I, Pl. ÚS 19/08, ECLI:CZ:US:2008:Pl.US.19.08.1, point 146.

[39]Klabbers (2016), p. 555; Wessel (2016), p. 2.

tanel.kerikmae@ttu.ee

Thus from 2009, within the complex legal framework offered by the European Union's primary law, there is an express possibility of withdrawal available to the Member States of the organisation. Nevertheless, the discipline offered by art. 50 TEU, as articulated, also opens the way to interpretation difficulties, doubts, and criticism because of its several dark traits in some steps and its lack of clarity about the means of implementation of such withdrawal. The doctrine has criticised the wording of art. 50 TEU in relation to four particular aspects: the absence of conditions for the start of the withdrawal procedure, making in this way possible abuses of the instrument; his lack of analyticity in defining the individual phases of the procedure leading to the withdrawal; the darkness of the status that the country would enjoy withdrawing during the negotiations; the minimum content that the withdrawal agreement should assume for the purpose of managing, as much as possible, an unproblematic withdrawal. The current structure of art. 50 TEU, and in particular the choice not to include any express condition (apart from being subject to compliance with constitutional requirements) to operate the withdrawal could make it easier the blackmailing by States wishing to obtain special concessions, under the threat of disintegration of the Union.[40] However, in front of the new art. 50 TEU, the doctrine has set from the beginning a preliminary application: this standard gives the States a right of unilateral termination or rather the exit from the Union must necessarily follow an agreed procedure?

4 Two Alternatives of Withdrawal? Really?

4.1 The Unilateral Withdrawal

As often happens, different doctrinal currents are deployed in favour of only one of these reconstructions.

Some authors, for example, have focused on individual parts of the rule to affirm that States have the right to leave the European Union unilaterally, without any obligation to conclude a withdrawal agreement.[41] According to a less radical thesis, indeed (however, it is still part of the same current of thought), the letter of the second paragraph of the rule would place an obligation to negotiate and conclude an agreement not so much on the State, which would still have the possibility to withdraw unilaterally at the expiry of the two-year deadline for the negotiations, but rather on the Union's shoulders.[42] Paragraph 3 of art. 50 TEU, in fact, expressly leaves open the possibility of implementing the withdrawal by the State concerned even without withdrawal agreement if the parties are unable to agree within two years after its notification to the European Council. Although the deadline for

[40]Hofmeister (2010), p. 599.

[41]Tatham (2012), p. 152.

[42]Łazowski (2012), p. 526.

tanel.kerikmae@ttu.ee

conducting the negotiations may be subject to extension, the complexity of the issues at stake and the need for a unanimous vote of the European Council to obtain it make the failure of negotiations, and therefore the absence of withdrawal agreement, a realistic assumption.

As we said, the unilateral withdrawal, in the absence of an agreement, would seem possible from the wording of paragraph 3 of art. 50 TEU. However, in the absence of a proper legal framework governing the withdrawal, the issues raised by this would risk transforming the farewell of the Union in a catastrophic event. In the absence of a minimum reference standard, inevitably we would witness the birth of frictions and disputes (political, economic, and legal) between the Union and the former Member State, whose solution would lead to unpredictable results, especially for the leaving State. Unable to conduct fruitful negotiations with their former European partners, the withdrawing State would be obliged to take note of the loss of the access to the single market, to introduce—if it were a Member of the Eurozone—an independent currency (with adjoining issue of renaming the debt), to recalibrate its geopolitical position in a rapidly changing world, to manage the numerous loss of job by its citizens once used in the administration of the Union, to legislate anew in the many subjects once governed by European law having direct effect, and so long. All this, managing alone and in strong bargaining asymmetry with the European Union and its members.

Despite these possible drawbacks, based on these considerations and other elements, the cited doctrinal current deduces, inside art. 50 TEU, the existence in the hands of the Member States of a unilateral withdrawal from the Union.

4.2 The Withdrawal Agreement

Another part of the doctrine invites to undertake a systematic reading of the Art. 50 TEU, globally understood, which ponders the legal, economic, and political context in which it should operate. Considerations of this type may only highlight that the withdrawal by agreement is not only the hypothesis far preferable, but also the only viable *de facto*. An abrupt unilateral withdrawal, as we saw, would end making so difficult resolving the issues concerned.[43]

Going through the process outlined by art. 50 TEU, a Member State which take—in accordance with its own constitutional provisions—the decision to leave the Union shall notify their intentions to the European Council. The Union, according to the provisions of art. 218, par. 3 TFEU[44] (with the appointment of a team of negotiators who would follow the guidelines dictated by the EU Council), will negotiate and conclude with the State concerned an agreement, governing the

[43]Di Paolo (2016).

[44]We have just said that the Art. 50 TEU does not consider, itself the concrete procedure of the withdrawal negotiation.

tanel.kerikmae@ttu.ee

withdrawal and the frame of future relations between the Union and the State. The agreement will be concluded, from the Union, by the European Union Council, who will vote by qualified majority after the approval of the European Parliament. The European Treaties will cease to be applied to the withdrawing State upon the date of the entry into force of the Agreement Withdrawal, or, in case of failure of the attainment of the agreement, two years after the notification indicated in the first paragraph of the article. However, it remains a possibility that, given the paucity of the period granted to the negotiations, in relation to the complexity of the issues to be addressed, the withdrawing State and the Council agree an extension of the same.

Art. 50, par. 2, TEU provides rather general indications about the content that the withdrawal agreement will have: the norm is limited to attribute the task of regulating the withdrawal at issue and to dictate the overall framework for future relations between the withdrawing State and the Union. The main purpose of the withdrawal agreement is to adjust in the best way an operation in itself traumatic, also because of the absence of rules able to respond to major legal, economic, and political issues, inevitably present and to be solved. These, that the parties will have to discuss and resolve during negotiations, are so numerous and complex that make potentially insufficient the two-years term. This period, in fact, will be necessary to provide for the reorganisation of all EU bodies (e.g. The Council) in which sit representatives of the withdrawing State, as well as fixing a date from which the latter ceases to participate in meetings of the first, including also the multitude of agencies, organisations and institutions that give each day life at the Union.[45] The parties should allow citizens of the withdrawing State to continue its work within bodies of the Union until the date of entry into force of the withdrawal. This solution, albeit shared, however, ends up raising a paradox: the risk that the Union's policies and priorities are decided or influenced by significant periods of time by officers now less sensitive to the common European interest. Art. 50 par. 4, TEU merely provides the only abstention of the members of the Council and the European Council representing the Member State wishing to withdraw from the deliberations and decisions that concern them, leaving no express provision for the condition of the other leaders or officers. The withdrawal agreement could not fail to regulate also the termination of the work of the members of the European Court of Justice (e.g., judges of the Court of First Instance, or the Advocate General - one of them is always from UK) having nationality of the withdrawing State, providing a suitable framework to coordinate it with any cases, concerning the withdrawing State, which are still pending until the entry into force of the withdrawal.

Sensitive issues mentioned in the previous pages are only a small part of the numerous issues that the withdrawal of a Member State from the Union would let emerging: just think about how the integration between European countries has become deep in the last few year (for example, the EU's law-making has become so impressive as to make unthinkable abandoning it abruptly).

[45] Łazowski (2012), p. 530.

tanel.kerikmae@ttu.ee

For these reasons, the doctrine recommends almost unanimously that the possible withdrawal of a Member State must be brought to fruition through the signing of a withdrawal agreement.

5 Conclusion

The procedure under art. 50 TEU, therefore, provides the opportunity to leave the European Union along two different roads: while leading to the same terminal, each of them still presents a path and its consequences. However, based on these and other considerations, the majority of the commentators has concluded that, although art. 50 TEU makes it possible in theory both, in a realistic scenario the complications, which would inevitably encounter the first (*pathological path*), make it workable, in practice, only the second one (*natural path*).[46] Anyway, the procedure should be carried out by the parties following the principle of loyal cooperation, assisting each other and solving the tasks which flow from the Treaties.[47] A joint reading of art. 50 and art. 4, par. 3 TEU, should, therefore, further reduce the viability of the "pathological" hypothesis of unilateral termination, resulting this theoretically possible but unrealistic,[48] as the spirit of the treaties is aimed at promoting cooperation between the parties, even in the management of a withdrawal between them.

In conclusion, for the first time in the European history, after the entry into force of the Lisbon Treaty, the EU Member States have a clause that explicitly allows and regulates the possibility of withdrawal from the Union by one of them. However, the European Union's exit does not prevent the state to back off because of a future afterthought: if the former Member States expresses a will to resume its EU membership, it will still have to run from the beginning the whole process described in art. 49 TEU, in a manner similar to any other candidate for accession (art. 50, par. 5, TEU).

A state's withdrawal from the EU must be first a consensual process. A Member State wishing to withdraw notifies its intention to the European Council, which provides guidelines for the conclusion of an agreement setting out the arrangements for its withdrawal. These negotiations are on behalf of the EU conducted by a negotiator (Commission) and when the negotiations are completed, the agreement is concluded on behalf of the European Union by the Council, after obtaining the consent of the European Parliament. The EU institutions can thus affect the process of a state's withdrawal, but not the withdrawal itself. The participation of institutions on the withdrawal was labelled as a display of Europeanisation of residual national

[46] Some authors (Nicolaides, Athanassiou, Lazowski, Hofmeister) have serious doubts about the practical viability of the withdrawal totally unilateral because of the weight of the legal, political, and economic challenges that such a move concerns.

[47] Art. 4, paragraph 3 TEU. This rule introduces the so called "principle of cooperation".

[48] Łazowski (2016), pp. 1297, 300.

tanel.kerikmae@ttu.ee

sovereignty.[49] The withdrawal agreement is not an absolute condition of membership termination. If the agreement is not agreed on or is not accepted, membership comes to an end two years after the Member State declared its intention to the European Council.

The Member States are the original holders of competences and act as a *Master of the Treaties* but moreover they remain as independent units capable to make the own decision about their future. Their right to withdraw from the Union, which was introduced by the Lisbon underlines this fact.[50] Member States must be understood as the "holders of their own destiny", the masters in the Schmitt's extreme situation. Carl Schmitt commences his Political Theology by famous sentence that 'sovereign is who decides on the exception', where exception means the stepping outside the ordinary state of things, to stand outside the legal rules. Within the supranational legal system, the Schmitt's exception means to stand outside the EU, not to be the one of the Member States. This crucial (and extreme) position is absolutely in the hands of every Member State, which should act as a sovereign when using the exit clause of art. 50 TEU. Accession and withdrawal are autonomous rights of the states and the membership is their privilege, which cannot be taken away by a decision of an institution or a decision of other Member States.[51]

References

Amato G (2016) Father of EU divorce clause demands tough stance on British exit. World News (21.07.2016). http://www.reuters.com/article/us-britain-eu-amato-idUSKCN1012Q8

Craig P (2016) Brexit: a drama in six acts. Eur Law Rev 41:447–468

Ćapeta T (2016) Brexit and the EU constitutional order: a three act tragedy. Croat Yearb Eur Law Policy 12:1–23

De Waele H (2005) The European Union on the road to a new legal order - the changing legality of member state withdrawal. Tilburg Foreign Law Rev 12:169–189

De Witte B (2005) The process of ratification and the crisis options: a legal perspective. In: Curtin D (ed) The EU constitution: the best way forward? Springer, The Hague, p 21

Di Paolo E (2016) L'uscita dall'euro e dall'Unione Europea: teoria e pratica del Brexit e del Grexit. Department of European Union Law of University of Pisa, Italy

Friel M (2004) Providing a constitutional framework for withdrawal from the EU: Article 59 of the draft European constitution. Int Comp Law Q 53:407–428

Hamuľák O (2016) National sovereignty in the European Union. View from the Czech perspective. Springer, Cham

Herbst J (2006) Observations on the right to withdraw from the European Union: who are the "Masters of the Treaties"? In: Dann P, Rynkowski M (eds) The Unity of the European constitution, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol 186. Springer, Berlin, pp 383–389

[49] Kumm (2005).

[50] Hamuľák (2016), p. 85.

[51] The extreme decision on withdrawal is the part of Member State autonomy even in constitutional structure like EU and therefore state cannot be prevented to do so. See Nicolaides (2013), p. 212.

tanel.kerikmae@ttu.ee

Hofmeister H (2010) Should I Stay or Should I Go? A critical analysis of the right to withdraw from the EU. Eur Law J 16:589–603
Klabbers J (2016) Editorial: continent in crisis. Eur J Int Law 27:553–556
Kumm M (2005). To be a European citizen: constitutional patriotism and the treaty establishing a constitution for Europe. In: Eriksen EO et al (eds) The European constitution: the Rubicon crossed? Arena, Oslo, pp 7–63
Łazowski A (2012) Withdrawal from the European Union and alternatives to membership. Eur Law Rev 37:526–530
Łazowski A (2016) Unilateral withdrawal from the EU: realistic scenario or a folly? J Eur Public Policy 23:1294–1301
Mehdi R (2007) Brèves observations sur la consecration constitutionelle d'un droit de retrait volontaire. In: Demaret P, Govaere I, Hanf D (eds) Dynamiques Juridiques Européennes. Peter Lang, Bruxelles, p. 113. Quote in Salmon J (ed) Dictionnaire de droit international public. Bruylant AUF, Brussels, 2001
Nelli Feroci F (2005) L'Unione europea: tra la crisi del Trattato Costituzionale e i dilemmi dell'allargamento. In: Ferrari Bravo L (ed) La Comunità internazionale (LX), trimestrale, organo della Società Italiana per l'Organizzazione Internazionale. Editoriale Scientifica, Naples, p 597
Nicolaides P (2013) Withdrawal from the European Union: a typology of effects. Maastrich J Eur Comp Law 20:209–2019
Nicotra I (2003) Il diritto di recesso e il Trattato che istituisce la Costituzione europea. In: Lucarelli A. (ed) Studi sulla Costituzione europea, percorsi e ipotesi. A. Patroni Griffi. Edizioni Scientifiche Italiane, Naples, pp 452–453
Puglia M (2014) Commento agli artt 49–50 TUE. In: Tizzano A (ed) Trattati dell'Unione europea. A. Giuffrè, Milan, pp 333–339
Snavely AC (2004) Should we leave the backdoor open? Does an agreement Uniting States need a withdrawal provision: the European Union Draft Constitution. UMKC Law Rev 73:213–230
Strozzi G (2005) Diritto dell'Unione Europea. Parte Istituzionale G. Giappichelli, Turin, p 388
Tatham AF (2012) Do not mention divorce at wedding, Darling! EU accession and withdrawal after lisbon. In: Biondi A, Eeckhout P, Ripley S (eds) EU law after lisbon. Oxford University Press, Oxford, p 152
Tesauro G (2012) Diritto dell'Unione europea, Settima Edizione. CEDAM, Padua, p 93
Vellano M (2007) Espulsione e recesso dall'Unione europea: profili attuali e prospettive future. In: Ferrari Bravo L (ed) La Comunità internazionale (LXII), trimestrale, organo della Società Italiana per l'Organizzazione Internazionale. Editoriale Scientifica, Naples, pp 503–510
Von Mises L (1983) Nation, State and Economy: contributions to the politics and history of our time. New York University Press, New York, p 3
Weiler J (1985) Alternatives to withdrawal from an international organization: the case of the European Economic Community. Israel Law Rev 20:282–298
Wessels W (2001) Widening and deepening. Transatlantic Internationale Politik 2:5–11
Wessel RA (2016) You can check out any time you like, but can you really leave? On 'Brexit' and leaving international organizations. Int Organ Law Rev 13:197–209
Wyrozumska A (2013) Commentary on Art. 50 TEU. In: Blanke H-J, Mamgiameli S (eds) The treaty on European Union. A commentary. Springer, Heidelberg, pp 1385–1418
Zbiral R (2008) Searching for an optimal withdrawal clause for the European Union. In: Niedobitek M, Zemanek J (eds) Continuing the European constitutional debate, German and Czech contributions from a legal perspective. Chemnitzer Europastudien. Duncker & Humblot, Berlin, pp 306–308

tanel.kerikmae@ttu.ee
View publication stats