

BREXIT AND THE EU CONSTITUTIONAL ORDER: A THREE ACT TRAGEDY

Tamara Čapeta*

Summary: This paper reflects upon the consequences of Brexit for the EU constitutional order. It joins many analyses that followed the referendum by which the UK citizens decided that their country should leave the EU. However, whereas the majority of analyses concentrate on the impact of Brexit on the UK legal order, this paper looks into the possible repercussions for the EU legal order. It divides the consequences into three periods: first, the one that immediately followed the referendum; second, the period that will open with the UK notification of its decision to withdraw; and the third, looking into the long-term effects of Brexit for the EU. Within such a framework, the paper offers the author's view on the possible and desirable interpretations of article 50 TFEU.

1 Introduction

Ever since UK voters politically bound their government to find a way for the UK to leave membership of the EU, blogs, newspapers, conferences, roundtables and academic journals have daily been analysing the ensuing process, known as Brexit. Most of the law-oriented studies undertaken after the referendum have focused on the effects Brexit has had and will have for the UK. This article joins the Brexit analyses. However, in it, I will assess the effects Brexit might have on the EU and its legal order.

Writing about the story that is currently happening necessarily means that certain facts will be missing for the future reader. However, the paper has to be submitted and published at a certain point. Thus, I would like to state at the beginning that this paper was finalised on 25 November 2016. Namely, after the original submission, I still made the necessary changes to take into account the recent decision of the London High Court¹ and as-

* Jean Monnet Professor of EU Law at the Faculty of Law, University of Zagreb. I am grateful to my colleagues at the Department for EU Law in Zagreb for their comments, as well as to audiences at the public lectures I have delivered on the topic of this paper during September 2016 at the University of Michigan, University of Pittsburgh and Cornell University. The research for this paper was conducted under the research project 'Novi hrvatski pravni sustav' of the Faculty of Law in Zagreb and the research project DER2015-63927-P (MINECO/FEDER) Spain.

¹ Case No CO/3809/2016 and CO/3281/2016 in the High Court of Justice, Queen's Bench Division, Divisional Court, London, between Gina Miller and Deir Tozetti Dos Santos, claimants and The Secretary of State for Exiting the European Union, defendant. Decision of 2 November 2016 [2016] EWHC 2768 (Admin). The High Court's decision was appealed to the UK Supreme Court whose decision is expected in January 2017.

sess how it influences my conclusions. With this disclaimer, let me begin my story.

Writing recently for the *European Law Journal* on Brexit, Professor Paul Craig decided also to honour the 400 years since the death of William Shakespeare. He therefore entitled his article: 'Brexit – a Drama in Six Acts'.² I propose to honour another British writer, Agatha Christie. This year the UK (and the world) celebrates 100 years since she wrote her first crime novel and 40 years since her death.³ My article is, thus, subtitled 'A Three Act Tragedy'.⁴

I will look into the effects of Brexit on the EU by delimiting three different periods (three acts):

Act One: the immediate period following the referendum and preceding the initiation of the withdrawal procedure;

Act Two: the transitional period, which will open with the UK notification of withdrawal and last until the UK ceases to be an EU member;

Act Three: the long-term consequences for the legal and political system of the EU and, with it, the European continent.

In each act of her drama, Agatha Christie had a murder. In our story, there are also victims, the 'legal' victims as I will call them. The legal victim in the first act is the fiction of the EU as a new autonomous constitutional order. In the second act, in the transitional period, the victim is the policies and decision-making processes in the European Union. The potential third victim, in the third act, is the European Union itself, together with its entire legal order. However, it is not necessary for this drama to end with the same number of victims as those in Agatha Christie's play. If Poirot is wise enough, he can perhaps prevent the murder of the third victim.

Let us set the scene. On 23 June 2016, a majority of UK voters (51.9%) expressed at a referendum their wish for the UK to leave mem-

² Paul Craig, 'Brexit – A Drama in Six Acts' (2016) 41(4) *EL Rev* 447.

³ On this occasion the British post office issued special stamps. Cf Royal Mail, 'Agatha Christie Stamp Set' <<http://shop.royalmail.com/agatha-christie/agatha-christie-stamp-set/inv/20160204>> and 'New Agatha Christie Stamps Deliver Hidden Clues' *The Guardian* (London, 15 September 2016) <<https://www.theguardian.com/books/2016/sep/15/new-agatha-christie-stamps-deliver-hidden-clues>> both accessed 13 September 2016.

⁴ The book was first published in the USA in 1934 under the title 'Murder in Three Acts', and a year later in the UK under the name 'Three Act Tragedy'. The novel was also adapted for television.

bership of the EU.⁵ Since this is the first time ever that a country is leaving⁶ rather than joining the Union, many questions have arisen, including those that could be qualified as legal. Such questions are likely to end up in the courts. In the EU, the Court having final jurisdiction to interpret EU law is the European Court of Justice (ECJ).

My drama unfolds in the EU, or what will be left of it after the UK exits. Its intention is to look into the effects and legal questions that Brexit has raised or will raise within the EU legal order. However, as the cause (the murderer) is an important part of the play, I will first very briefly sketch the dominant internal legal issues that have appeared in the UK. Much more has been written on UK-specific problems than on EU-specific ones.

2 The UK debate

One of the first issues to arise was the question of the constitutionally proper procedure for leaving the EU. As of 2009, the EU founding Treaties contain a clause regulating the withdrawal of a country from the EU: article 50 of the Treaty on the European Union (TEU). Notwithstanding this, some other options were also discussed in the UK, such as leaving under the conditions of international law, or just revoking the European Communities Act unilaterally.⁷

The majority view, however, sees article 50 as a rule that should be applied to the withdrawal process.⁸ In terms of constitutional law, article 50 raises new questions, both within the UK and in the EU.

⁵ The result of the referendum was 51.9% to leave and 48.1% to stay. The turnout at the referendum was 72.2%, or around 30 million voters. Official results are available at Electoral Commission, 'Electoral Results' <<http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information>> accessed 13 September 2016.

⁶ The situation of both Algeria and Greenland were different. Algeria left the EU (then the EEC) in 1962 after gaining its independence from France. Greenland left in 1985, after obtaining a high level of autonomy from Denmark. More about these two cases in Allan Tatham, 'Don't Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon' in A Biondi, P Eeckhout and S Ripley (eds), *EU Law after Lisbon* (OUP 2012) 143ff.

⁷ See House of Lords, European Union Committee, 'The Process of Withdrawing from the European Union' (HL 2015–16, 11th Report of Session, point 9) <<http://www.publications.parliament.uk/pa/ld201516/ldselect/lducom/138/138.pdf>> accessed 13 September 2016. See also House of Commons Library, 'Brexit: How Does the Article 50 Process Work?' (2016) Briefing Paper No 7551, 30 June 2016 <<http://researchbriefings.parliament.uk/Research-Briefing/Summary/CBP-7551>> accessed 13 September 2016.

⁸ See, for instance, the UK Government paper presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty under the title: 'The Process for Withdrawing from the European Union'. This analysis of art 50 TEU as a proper legal basis for an exit from the EU was published in February 2016, thus before the referendum took place <<https://www.gov.uk/government/publications/the-process-for-withdrawing-from-the-european-union>> accessed 13 September 2016.

According to article 50, withdrawal begins with the UK's notification to the European Council of its intention to leave. The most pertinent question in the UK related to the notification is who in the country is empowered to trigger article 50 – the Government or the Parliament.⁹ This question has already reached the UK courts.¹⁰ At the moment of the final submission of this text, the question was answered by the London High Court, which was of the opinion that the decision to withdraw is not a royal prerogative, but requires a decision of the UK Parliament.¹¹ This story, however, is not yet over, as the Government appealed to the Supreme Court.

Some additional questions were raised immediately after the referendum. For example, how binding is the referendum result, especially given the number of 'untruths' (to use a euphemism) spread during the referendum campaign?¹² Can a referendum be repeated and should it be repeated? Can the UK revoke its withdrawal notification once given? The latter is relevant as a matter of EU law as well, so I will address it later.

There are other issues domestic to the UK. Most importantly, fear exists that Brexit may lead to the break-up of the UK, given the possibility of a new Scottish referendum for independence, and Northern Ireland's potential referendum for unification with Ireland. Namely, both Scotland and Northern Ireland, together with London, voted to stay.¹³ Thus, the murderer may not survive until the end of the story.

⁹ House of Lords, Select Committee on the Constitution, 'The Invoking of Article 50' (HL 2016-17, 4th Report of Session) <<http://www.publications.parliament.uk/pa/ld201617/ldselect/ldconst/44/44.pdf>> accessed 13 September 2016; Nick Barber, Tom Hickman and Jeff King: 'Pulling the Article 50 "Trigger": Parliament's Indispensable Role' (*UK Constitutional Law Association*) <<https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/>> accessed 13 September 2016.

¹⁰ One case was initiated in the High Court in London by different applicants: Gina Miller, who runs an investment firm in London, a London-based Spanish hairdresser, the People's Challenge group and Fair Deal for Expats, an organisation of UK citizens living outside the UK. Another case has started in the Belfast High Court on the application for judicial review by a number of Northern Ireland politicians. The claim in both cases is that the Government cannot act on its own in triggering art 50. The applicants claim that an act of Parliament is required by the UK constitution, and, in the Northern Ireland case, by the Good Friday agreement. A good overview was given by Kristina Cooper writing for BBC News: 'Brexit: Court Battle Looms over Rights of Parliament' <<http://www.bbc.co.uk/news/uk-politics-37576654>> accessed 14 October 2016. In the meantime, the claim was rejected by the Belfast High Court, but upheld in the London High Court.

¹¹ See n 1.

¹² See, for instance, Professor Michael Dougan on the UK referendum, at <<https://www.youtube.com/watch?v=USTypBKEd8Y>> accessed 13 September 2016.

¹³ See, for instance, Electoral Commission, 'EU Referendum Results' <<http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information>> accessed 8 September 2016.

Even though the withdrawal process has not yet been initiated, some questions related to post-Brexit UK law have already arisen.¹⁴ How will numerous EU regulations having direct application in the situation of membership be replaced?¹⁵ Further, with the break from the EU, the UK will cease to be a party to numerous international agreements which it has signed through the EU or together with it.¹⁶ They have to be renegotiated, even if only to agree to carry on existing arrangements. On the other hand, their renegotiation will depend on the UK's future relations with the EU, which brings us to the question of how the divorce is to be implemented.

3 The effects of Brexit on the EU

On the EU side, there does not seem to be any doubt that article 50 is the only possible procedure for the UK to leave the EU.¹⁷ The existence of this provision in the treaties would indeed lose its purpose if it were not applied in a situation such as Brexit.

Given the constitutional significance of article 50, it is not surprising that legal discourse gravitates towards that provision. Here, therefore, is its text:

Article 50 TEU

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

¹⁴ For an inventory of the effects of withdrawal on the withdrawing country, see Phedon Nicolaides, 'Withdrawal from the European Union: A Typology of Effects' (2013) 20 MJ 209.

¹⁵ See an inquiry initiated by the Foreign Affairs Committee of the UK Parliament <<http://www.parliament.uk/documents/commons-committees/foreign-affairs/Correspondence/2015-20-Parliament/Letter-to-AG-legal-issues-brexit.pdf>> accessed 13 September 2016.

¹⁶ Guillaume Van der Loo and Steven Blockmans, 'The Impact of Brexit on the EU's International Agreements', CEPS commentary, 15 July 2016 <<https://www.ceps.eu/publications/impact-brexit-eu-s-international-agreements>> accessed 13 September 2016.

¹⁷ See point 2 of the Statement of the Heads of States and Governments of 27 Member States who met in Brussels on 29 June 2016 <<http://www.consilium.europa.eu/en/press/press-releases/2016/06/29-27ms-informal-meeting-statement/>> accessed 13 September 2016.

qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

3.1 Act One - immediate effects

3.1.1 The victim: the narrative about the EU as an autonomous constitutional legal order

By its participation in the EU, the UK was not just a party to an international agreement. Rather, it was (and still is) a member of an autonomous legal order. This was at least the dominant legal narrative about the EU used by EU lawyers and the European Court of Justice (ECJ). The Court offered such a vision as long ago as 1963, some ten years before UK accession, in the celebrated *Van Gend en Loos* case,¹⁸ and repeated it a year after in *Costa v ENEL*.¹⁹ Ever since, the autonomy of the EU legal order either in relation to international law or in relation to the domestic laws of its Member States has been strongly defended by the Court. The recent evidence that the Court has not changed its vision is Opinion 2/13²⁰ finding that the proposed agreement for the EU's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was contrary to the autonomy of the EU legal order.²¹

This constitutional vision of the EU was more than just a legal narrative. It was also politically accepted. One demonstration of this broader

¹⁸ Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* EU:C:1963:1.

¹⁹ Case 6/64 *Flaminio Costa v ENEL* EU:C:1964:66.

²⁰ Opinion 2/13 EU:C:2014:2454.

²¹ Daniel Halberstam, 'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 6 *German Law Journal* 105.

acceptance is that the countries that became EU members in the last three waves of enlargement acceded using their constitutional procedures that were envisaged for more than just accession to an international treaty. The example I can most easily talk about is the last accession, that of Croatia in 2013. The constitutional procedure for accession to international treaties that imply a transfer of powers required parliamentary approval by a two-thirds majority. The legal basis chosen for EU accession was, however, a different constitutional provision, prescribing the procedure for ‘association with other states’ and demanding, apart from the two-thirds majority in Parliament, also a referendum.²² Thus, the EU was perceived not as just another international treaty, but rather as something much more complex.

The difference of the EU legal order from other international legal orders lies in its ability to create rights independently of the Member States’ endorsement of such rights. Thus, individuals in the EU, including the citizens of its Member States, are given certain rights that flow directly from EU law and do not depend on Member States and their legal orders. Even if they are enforced within the Member States by their existing institutions, this happens on the basis of the rules imposed by the EU legal order itself.

Once the EU is accepted as a constitutional legal order, divorce is no longer a matter of international law. EU law, not international law, both enables withdrawal and sets the procedure. From the EU legal perspective, therefore, it is not necessary that international law, specifically the Vienna Convention on the Law of Treaties 1969 (VCLT), enables withdrawal. The Treaties are not an ‘international treaty’ from the point of view of the EU legal order – they are a constitutional charter.²³ Therefore, the proper legal basis for leaving the EU cannot be found by viewing the Treaties as any other international treaty. By ceasing to be a party to the EU founding treaties, the country is not only leaving the Treaties but leaving an entire legal order. Indeed, the legal analyses of article 50, published after its insertion in the Treaty, but preceding the UK referendum, saw it as part of the EU constitutional order. Thus, for instance, Hillion writes:

The EU procedure is therefore not premised on a ‘state primacy’ conception of the right. Indeed, in speaking of ‘any Member State’ rather than using the notion of the ‘High Contracting Parties’ contained Article 1 TEU, paragraph 1 embeds the withdrawal

²² Tamara Čapeta, ‘The Croatian Constitution in EU Integration’ in *Member States’ Constitutions and EU Integration* (Hart Publishing) (forthcoming).

²³ The ECJ characterised the Treaties as the EU’s constitutional charter as long ago as 1986 in Case 294/83 *Parti écologiste ‘Les Verts’ v European Parliament* [1986] ECR 1339, para 23.

process in the EU legal order, rather than outside it. The success of a withdrawal initiative therefore depends not only on the Member State's intention, but also on the fulfilment of the procedural and substantive requirements of Article 50 TEU, and more generally on its compliance, qua Member State, with rules and principles underpinning the EU legal order, under the control of the European Court of Justice.²⁴

After the referendum, the rhetoric seems to have changed. Scholars, including EU legal scholars, have been discussing the legality of the UK withdrawal from the point of view of international law and find the entitlement to withdraw in international law, rather than in the EU constitutional order.²⁵ The argument goes that article 50 is the proper legal basis for the divorce, because the VCLT not only allows it, but even requires that the withdrawal happen on the basis of the provisions contained in an international treaty, if there is one.²⁶ This obviously proves the point that from the perspective of international law, using article 50 is the only acceptable choice and that a unilateral UK decision to withdraw by revoking the European Communities Act would not be seen as a legally available avenue by international law. Such discourses use an entirely different narrative – they describe the EU as an international treaty regime.

Therefore, contrary to the entrenched legal narrative, the EU is not, or is ceasing to be perceived as, an autonomous constitutional legal order, which on its own represents added value for citizens of the Member States.²⁷ Thus, this legal fiction becomes the first and immediate 'legal' victim of the post-referendum era.

The recent decision of the London High Court, however, might have restored to a certain degree the 'old' fiction of the EU as an autonomous order. It has recognised that divorce from the EU is more than a country leaving it. It is also its citizens that leave, and these citizens enjoy certain rights directly because of the country's membership in the EU. Thus, the rights of individuals that will be affected in the process, and not only State interests, have to be taken into account in the process of leaving the EU.²⁸

²⁴ Christophe Hillion, 'Accession and Withdrawal in the Law of the European Union' in Damian Chalmers and Anthony Arnall (eds), *The Oxford Handbook of European Union Law* (OUP 2015) (footnotes omitted).

²⁵ Craig (n 2) 463.

²⁶ Cf art 54 VCLT.

²⁷ In such a context, it is less surprising that the EU-appointed negotiator, Michel Barnier, can give a statement that the EU is 'not a federation but a cooperative of nations. We work together but we do not merge'. This was reported by Euobserver on 14 September 2016 <<https://euobserver.com/uk-referendum/135074>> accessed 14 September 2016.

²⁸ High Court judgment (n 1) paras 34 and 57-66.

3.1.2 *Divorcing but still a couple*

Given the text of article 50, and as the EU leaders confirmed at the end of June 2016 at the informal Brussels meeting,²⁹ from the EU point of view the withdrawal process cannot start before the UK officially notifies the EU that it is leaving. Until the UK resolves its domestic constitutional doubts in that regard and announces its intention, legally the EU is pretending that nothing has happened. Is that really possible?

One does not have to think twice to answer that question. The first sign that we cannot pretend nothing has happened is the very meeting of the heads of states and governments on 29 June, a few days after the referendum. It was organised as an informal meeting of the heads of states and governments, not as a European Council meeting. This is not envisaged by the Treaties. The second such meeting of 27 leaders, again termed an informal meeting,³⁰ was held on 16 September in Bratislava. The agenda of that meeting was not Brexit, even if it was its cause. Rather, the focus was the future of the European Union. The topic thus concerned the entire EU of which the UK is still a member, and, legally, we do not know that it intends to cease to be one. However, Theresa May, Britain's Prime Minister, was not invited.

Likewise, even if the EU declines to discuss Brexit conditions before formal notification, it has already made the first moves to organise the negotiations on its part. Thus, Michele Barnier was appointed the Commission's chief negotiator, and the European Parliament appointed Guy Verhofstadt to oversee the Parliament's role in the negotiations.

3.2 Act Two - transitional dilemmas and effects

3.2.1 *The victim: EU decision-making processes*

Political leaders can meet as they wish. However, the EU institutions must follow Treaty-prescribed procedures, especially when they enact legal rules. The question arises, therefore, about how decision-making at the EU level will be organised. This primarily concerns the vote of the UK Council representative. As long as the UK is an EU member, it has a vote in the Council. It also has a commissioner and representatives in the European Parliament. UK participation in the Commission is not a problem, since the commissioner is supposed to be neutral and detached

²⁹ European Council, 'Informal meeting at 27, Brussels, 29 June 2016, Statement' (Press Releases and Statements) point 2 <<http://www.consilium.europa.eu/en/press/press-releases/2016/06/29-27ms-informal-meeting-statement/>> accessed 13 September 2016.

³⁰ Even if informal, the meeting was announced and its conclusions were published on the official website of the Council <<http://www.consilium.europa.eu/en/meetings/european-council/2016/09/16-informal-meeting/>> accessed 4 October 2016.

from the nominating government.³¹ By contrast, the vote of the UK representatives in two legislative bodies, especially in the Council, might prove problematic.

The Treaty contains provisions which regulate decision-making on policies in which some Member States have opt-outs.³² However, there is no provision in the Treaty that answers how decision-making proceeds in a situation where a country is negotiating its withdrawal from the EU. The interests of the UK in the outcome of EU decision-making will change in the expectation of withdrawal and there might be good political reasons to exclude British ministers from the Council meetings and voting. However, as long as it is still a member, the UK has a right to participate and vote. Much will therefore depend on the political position to be taken by the UK. Its commissioner, Lord Hill, resigned from this position immediately after the referendum, and his proposed successor, Sir Julian King, was given a much less important portfolio than the one his predecessor had.³³ Likewise, the UK renounced its role of presiding over the EU Council in the second half of 2017. Judging by such decisions, one may expect that the UK Council members will decide not to participate in decision-making, especially in those areas in which EU and UK interests might diverge in the future. However, in addition to the problem that this depends on a voluntary decision by the UK, the possible abstention of the UK from voting might in itself cause problems in EU decision-making. If unanimity is required in the Council, abstention is seen as a vote for the measure. However, when a qualified majority is required (and this is currently a default position in the Treaties), abstentions are counted as votes against. Thus, the UK principled decision to abstain from voting may in fact increase the chances of reaching a blocking minority, even if this were not the political intention of the UK in relation to a certain measure. In any case, a UK abstention from voting will change the balance between the States and influence the usual negotiation patterns in the Council.³⁴

EU decision-making has already been affected and this will last into the transitional period, in which the UK will announce its withdrawal but will still technically (and legally) be an EU Member State. Thus, the legal victim of Act Two is the efficiency of EU decision-making, due to which all its policies will suffer. As the transitional period might last for several years, this may cause serious damage to the EU.

³¹ Art 17/3 TEU.

³² Art 238/3 TFEU.

³³ Sir Julian King was endorsed by the European Parliament on 15 September 2016 as Commissioner for the Security Union. His predecessor, Lord Hill, handled a far more important portfolio – on financial services.

³⁴ See the analysis by Oliver Patel and Christine Reh, 'Brexit: The Consequences for the EU's Political System' UCL Constitution Unit Briefing Paper <<https://www.ucl.ac.uk/constitution-unit/research/europe/briefing-papers/Briefing-paper-2>> accessed 22 November 2016.

3.2.2 *Legal issues relating to the withdrawal process*

Once the UK declares its intention to leave, it will not be excluded from membership automatically. This will only happen on the basis of the agreement it negotiates with what remains as the European Union, or, lacking agreement, two years after the notification of its intention to leave.

3.2.2.1 Procedural issues relating to the withdrawal agreement

Several legal issues have appeared in relation to the procedure for concluding the withdrawal agreement. Whereas it is clear from article 50 that for the purpose of the negotiation of this agreement the UK members of the European Council and the Council will not be present in discussions nor will vote, it is not at all clear what happens with the UK representatives in other EU bodies, primarily the European Parliament. Article 50 is silent on this, yet it is clear that the consent of Parliament is necessary.³⁵ In the vote to give consent for the withdrawal agreement, should the European Parliament vote without the UK MEPs? This is only one of the questions which may end up in the EU Court of Justice (ECJ).

Article 50 provides that the withdrawal agreement is concluded by the Council, deciding by a qualified majority and after obtaining the consent of the European Parliament. It envisages, therefore, that the Member States, acting in the Council, do not have to achieve a unanimous decision on the withdrawal agreement.³⁶ However, what is not in itself clear is whether this provision means that the power to adopt such an agreement is an exclusive EU power or, quite the reverse, that the agreement might be signed with the parallel participation of Member States, as a mixed agreement. The latter means that its entry into force would be dependent on ratification by 27 States. In such a scenario, even if the unanimity of Member States is not required in the Council, it would in fact be required, as each Member State would have to ratify the agreement. Whether the power to adopt the withdrawal agreement is an exclusive or shared power is a matter of interpretation. Arguments can be found for both outcomes. As usual, arguments that rely on the text may be used to prove both sides. On the one hand, it may be argued that article 3 TFEU, which exhaustively enumerates the exclusive competences of the EU, does not

³⁵ On the procedure to be followed in the Parliament in order to give or withhold consent, see Darren Harvey, 'What Role for the European Parliament under Article 50 TEU?' (*EU Law Analysis*, 14 July 2016) <<http://eulawanalysis.blogspot.hr/2016/07/what-role-for-european-parliament-under.html>> accessed 13 September 2016.

³⁶ Even if art 50 provides for a higher than regular qualified majority (ie at least 72% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States), still not all Member States have to agree with the proposed text of the agreement.

mention the withdrawal agreement. On the other hand, one may invoke the part of the text in article 3(2) TFEU according to which the EU has exclusive power for the conclusion of an international agreement ‘in so far as its conclusion may affect common rules or alter their scope’. As the withdrawal agreement is to be concluded in accordance with the procedure for the adoption of international agreements and it will necessarily alter the scope of common rules, this may be used to underpin the position that this is an exclusive EU power.

However, more important than textual arguments are contextual and policy ones. Thus, whether Member States could legitimately claim to be parties of the withdrawal agreement would largely depend on its content.

3.2.2.2 Issues relating to the content of the withdrawal agreement

Article 50 states that the agreement should set out ‘the arrangements for the withdrawal’ of the UK, and that such arrangements should ‘take into account the framework for its future relationship with the Union’. What do ‘arrangements for the withdrawal’ imply? Is there any necessary content that has to be resolved by the withdrawal agreement?

Even if article 50 prefers a negotiated divorce, it still allows for unilateral withdrawal. The UK can leave without the agreement, as article 50 provides that divorce happens automatically if no agreement is concluded within two years from notification, and this deadline is not prolonged.³⁷ Therefore, it is difficult to claim legally that there is any necessary content for the withdrawal agreement.

However, the purpose of having article 50 in the Treaties might suggest a different reading. On the one hand, one may read from the fact that a non-negotiated exit is possible that the purpose of article 50 is to guarantee a Member State the right to withdraw, which is why it protects the withdrawing state from the possibility of being prevented from leaving by other participants in EU integration. If this is so, the possibility to leave without agreement leads to the conclusion that the Treaty does not impose any necessary content of the agreement.

On the other hand, recognition that unilateral withdrawal may happen may be no more than precisely that – the simple recognition of political reality: that if a state wishes to leave the union of states, it will leave. Historically, this has proven to be possible. Federal units have left federal states even without constitutional recognition of such a possibility. This

³⁷ Art 50 was read as granting a right to unilateral withdrawal by Hannes Hofmeister, ‘Should I Stay or Should I Go?’—A Critical Analysis of the Right to Withdraw from the EU’ (2010) 16 ELJ 589. For a discussion of this, but also a different interpretation, see Adam Lazowski, ‘Withdrawal from the European Union and Alternatives to Membership (2012) EL Rev 523, 525-528.

has either happened peacefully, as in the case of the split of Czechoslovakia, or after the war, as has happened in former Yugoslavia. If this has proven to be politically possible in the case of federal States, it must be even more so in an organisation which is not a federal State.

However, even if not a federal State, the EU is a federal legal order (or if one prefers to avoid the ‘f’ word, we may call it a transnational legal order). Being based on the powers conferred on it by the participating States for longer than half a century, this new legal order has created rights for its subjects, rights that are independent of the legal orders of the participating Member States in their existence, even if they are dependent on the States for execution. Thus, the Treaties have created certain rights for UK citizens (and companies) in other Member States, and reversely, they have created rights for citizens (and companies) from other Member States in the UK (such as the right to stay and work). By leaving the EU constitutional framework, the UK cannot influence the former rights, whereas the existence of the latter will depend on the unilateral decision on the part of the UK. However, the interested parties – citizens of other Member States enjoying certain rights in the UK on the basis of EU law – do not have a voice in the decision of the UK to deprive them of their EU-based rights. Their interests can only be taken into consideration in negotiations leading to the withdrawal agreement. The same is true for UK citizens who enjoy rights in the rest of the EU.³⁸

Thus, the most important reason for having article 50 in the Treaties might be the necessity of agreed divorce, precisely because the EU is not just an arrangement between Member States, but an independent legal order which has made direct promises to its citizens. Arguably, the agreement, therefore, has to deal with at least those rights that are based directly in the EU legal order, and whose holders’ interests are not represented in the unilateral process of withdrawal. In such a reading, article 50 would serve the same purpose as the decision of the Canadian Supreme Court on the secession of Quebec.³⁹ This Court considered that the withdrawal of Quebec is constitutionally possible, albeit not unilaterally, but rather as a negotiated deal with the rest of the country. In the words of the Canadian Supreme Court:

... the continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in

³⁸ See in this respect also the comment by Francesca Strumia, ‘In-Between the Lines of the High Court Brexit Judgment: EU Transnational Rights and their Safeguards’ (EU Law Analysis, 6 November 2016) <<http://eulawanalysis.blogspot.hr/2016/11/in-between-lines-of-high-court-brexit.html>> accessed 22 November 2016.

³⁹ Case No 25506 Reference re Secession of Quebec, judgment of the Canadian Supreme Court of 20 August 1998 [1998] 2 SCR 217.

Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government and Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities.⁴⁰

In the same way, the UK's democratic decision to leave the EU has to be accepted by other EU Member States and the EU itself. However, withdrawal has to be negotiated in order to respect the rights and promises that were created for citizens by the EU legal order. Such a reading of article 50 would be consistent with seeing the EU as an autonomous constitutional legal order, creating promises for its citizens, rather than just an international treaty, creating promises only among the States.

The 'arrangements' to be negotiated thus have to address the fact that the UK has been part of the EU legal order for more than 40 years. Under such a reading, both the UK and the rest of the EU are bound to take into consideration the interests created for individuals by the UK's participation in the EU legal order and address them in a bilateral agreement, as they may not be resolved unilaterally. Unilateral withdrawal, thus, becomes illegitimate, even if it is legally recognised as possible. Therefore, article 50 might be seen as imposing an obligation on both sides to take into consideration the interests of those subjects that exist on the basis of the EU legal order. In this, the EU cannot disregard the UK's democratic decision adopted at the referendum, nor can the UK disregard the interests of the citizens of other Member States that were created as a result of the UK's participation in the EU.

The agreement therefore has to address the constitutional promises of the EU legal order until the moment when the separation is concluded. It is unrealistic to expect that the agreement will cover anyone other than those people (and companies) already in the UK at the moment of the conclusion of the agreement, and UK citizens (and companies) outside the UK. For them, certain guarantees of their rights in the host country, ideally of the same kind as current rights, for at least a certain reasonable period of time, if not permanently, must be arranged. Such an outcome would increase the credibility of the EU legal order as a constitutional legal order.

⁴⁰ *ibid.*

3.2.3 One or more agreements?

Apart from demanding that arrangements for withdrawal are negotiated, article 50 also mentions the future relationships between the UK and the EU that have to be taken into account. Does this mean that the future relationships should be negotiated within, or at least in parallel with, the withdrawal agreement, or may such negotiations be left for after the withdrawal agreement is concluded?⁴¹ If future relations have to be agreed on in function of settling the arrangements of withdrawal, it might almost be impossible for the withdrawal agreement to be reached within the deadline of two years envisaged by article 50.

The interests of the UK and the EU in relation to the length of the transitional phase differ. The situation where the UK is at the same time 'in' (legally), but also 'out' (politically) is damaging for the EU, especially for the efficiency of its decision-making. The EU, therefore, has an interest to interpret article 50 as requiring a quick divorce. There are good reasons to argue that article 50 was indeed meant for a quick divorce, in order to avoid, as far as possible, the internal destabilisation of the Union. The ECJ might embrace such a view, if asked.

By contrast, the UK has divided interests. On the one hand, it does not want to lose its EU member status until it agrees on its future relations with the EU, and possibly with other countries. If it exits the EU and its market without any other arrangement, UK – EU trade relations will be governed within the WTO regime. Therefore, the most favoured treatment that the EU has offered will also apply to imports from the UK.⁴² This means not only that custom tariffs will start applying to many products exported from the UK to the EU, but also that the UK will lose the single market benefit of dismantling the non-tariff barriers. Additionally, once the EU legal order ceases to apply to the UK, international agreements to which that country is a party through its membership will also cease to apply.⁴³ Third countries might prefer to wait until EU – UK relations are settled before entering into bilateral negotiations with the UK. It is, therefore, also in the UK's interest for the divorce to end quickly, but only provided that future relations with the EU are settled at the same time. The UK could prefer prolonging the transitional period if this is necessary to settle future relations with the EU before leaving it.

⁴¹ Hugo Flavier and Sebastien Platon, 'Brexit: A Tale of Two Agreements?' (*European Law Blog*, 30 August 2016) <<http://europeanlawblog.eu/?p=3324>> accessed 13 September 2016.

⁴² For a thorough account of the consequences of Brexit for the WTO status of the UK, including the unresolved question this will raise, see Alberto Mucci, Simon Marks and Christian Oliver, 'Forget Brussels, Brexit's Toughest Battleground Is the WTO' (*Politico*, 10 June 2016) <<http://www.politico.eu/article/forget-brussels-brexit-toughest-battleground-is-the-wto-uk-theresa-may/>> accessed 13 September 2016.

⁴³ Van der Loo and Blockmans (n 16).

In trade relations, the EU has exclusive competence to conclude international agreements. Therefore, trade arrangements, at least transitional ones, could be agreed quickly between the UK and the EU, as the participation of the Member States is excluded. Settling, if only for transitional purposes, trade relations with the UK is also in the EU's interest. Not only is the EU the most important trade partner of the UK,⁴⁴ but conversely, also, the UK is an important export market for EU countries.⁴⁵ It is in both sides' interest for their mutual relationships to stabilise as soon as possible. Transitional trading arrangements might indeed be negotiated quickly. They could, if relating exclusively to trade which is under EU exclusive competence, even be part of the withdrawal agreement, even if the latter is interpreted as being under the EU's exclusive competence.

The largest obstacle on this path currently seems to be the UK's wish to participate in the internal market without participating in the free movement of people. On the other hand, the EU has firmly responded that this is not possible.⁴⁶ This claim is often presented as a legal truth. However, it does not seem that the Treaties really contain a prohibition for the EU to establish with a third country a relation which would grant it access to the market in goods, services and capital, but not to the labour market. This, true, is not in the political interest of the EU, but it is not legally impossible. The most important political concern is that there are other EU members dissatisfied with the freedom of movement of people. There are fears that giving the UK too good a deal may encourage other States to ask for the same. Thus, there is an important political concern, but there is no legal obstacle to grant the UK's wishes.

However, if the future relations are understood as going beyond trade, their negotiation will most likely require the participation of Mem-

⁴⁴ According to the 2015 data, the EU accounted for 44% of UK exports of goods and services, and 53% of UK imports of goods and services. See 'What Does Leaving the EU Mean for Trade?' (*Full Fact*, 28 June 2016) <<https://fullfact.org/europe/uk-leaving-eu-trade/>> accessed 13 September 2016.

⁴⁵ 2015 data on trade of the UK with each EU Member State are provided in Simon Lambert, 'How Much Does the EU Need Britain's Trade? Brexit Means We'll Find Out' (*This Is Money*, 30 June 2016) <<http://www.thisismoney.co.uk/money/comment/article-3666465/How-does-EU-need-Britain-s-trade-Brexit-means-ll-out.html>> accessed 13 September 2016.

⁴⁶ "Brexit Vote Irreversible", say EU leaders' (*Euobserver* 29 June 2016) <<https://euobserver.com/uk-referendum/134099>> accessed 13 September 2016; "Brexit: No Single Market Access Without Free Movement of People", Francois Hollande tells Theresa May' (*International Business Times*, 21 July 2016) <<http://www.ibtimes.co.uk/no-single-market-access-without-free-movement-people-francois-hollande-tells-theresa-may-1571894>> accessed 13 September 2016; 'UK Cannot Have Access to Free Market After Brexit Without Free Movement - Angela Merkel' (*Newstalk*, 6 October 2016) <<http://www.newstalk.com/UK-cannot-have-access-to-free-market-after-Brexit-without-free-movement--Angela-Merkel>> accessed 11 October 2016.

ber States. Usually, long-lasting relations agreements settle many issues. These more comprehensive agreements are usually concluded as mixed agreements.⁴⁷ This means that, apart from the ratification of such an agreement by the EU, they are usually ratified also by each Member State. Such future relations cannot be agreed on by the withdrawal agreement if article 50, which envisages that it is concluded by the Council acting with a qualified majority and after obtaining the consent of the European Parliament, is read as not allowing the Member States to join. However, this issue has not been settled, and there is room to interpret article 50 differently – as not prohibiting the conclusion of a withdrawal agreement as a mixed agreement. The Treaty does not require it, but it also does not prevent it. However, such an interpretation would be contrary to interests in a quick divorce. It is therefore highly unlikely that either the EU political actors or the ECJ would accept such an interpretation.

To conclude, the withdrawal agreement, understood as an EU exclusive competence, could address transitional trade relations between the EU and the UK. However, any more comprehensive trade arrangements, as well as any other questions of future relations, will have to be negotiated separately from the withdrawal agreement. It is therefore likely that two agreements will be negotiated – the withdrawal agreement and a future relations agreement.

There are other, more formalistic legal reasons why the withdrawal agreement should be seen as a separate agreement from the future relations agreement. First, future relations are relations between the EU and a third country. For as long as the UK divorce treaty is not concluded (or the two-year period has not elapsed), the UK is not a third country. So, it may not enter into international relations with the EU. This view would require the consecutive and not parallel conclusion of the two agreements.

The withdrawal of the UK will necessarily call for the amendment of some Treaty provisions, primarily those contained in different protocols attached to the Treaties. All references to the UK will have to be deleted from the text. In the reverse situation of the accession of a new country to the EU, such amendments to the treaties were effectuated by the accession treaties. However, accession treaties were signed as mixed agreements, and were therefore ratified by each existing Member State. Thus, a formal procedural criterion for the amendment of the treaties was satisfied, as it demands ratification by each State. Accession treaties became in this way part of EU primary law. This could not be achieved through

⁴⁷ The example is the recently ratified EU–Canada Comprehensive Economic and Trade Agreement (CETA), which was adopted as a mixed agreement. The question of the reach of the EU's exclusive competences will be clarified after the ECJ comes to a decision in Opinion 2/15 relating to the free trade agreement between the EU and Singapore, which is pending before the plenary Court.

the withdrawal agreement if it is to be signed only by the EU. Therefore, an additional procedure, requiring an intergovernmental conference and the ratification of Member States, will have to be used in order to adjust the treaties to the new situation.

3.2.4 Irreversibility of the withdrawal process?

Another legal question that is not clear on its own is whether the process, once started, can be reversed. Can the UK revoke its notification, and, if so, until when?

There are voices claiming that the process is unidirectional,⁴⁸ or at least that article 50 leaves the door open for such an interpretation. To use the eloquent explanation by Professor Peers:

In the absence of explicit wording, the point is arguable either way. It could be argued that since a notification to withdraw is subject to a Member State's constitutional requirements, the Treaty therefore leaves to each Member State the possibility of rescinding that notification in accordance with those requirements. On the other hand, it could also be argued that Article 50 only provides for two possibilities to delay the withdrawal of a Member State from the EU once notification has been given (an extension of the time limit, or a different date in the withdrawal agreement). There's no suggestion that this is a non-exhaustive list. Therefore the notification of withdrawal can't be rescinded.⁴⁹

It is thus possible that once article 50 is triggered, there is no going back. In this interpretation, if the UK changes its mind, it has to renegotiate its membership. It is highly unlikely that in accession negotiations the UK could strike the deal it has now, with all the opt-outs from certain common policy areas, including the euro.

There are also different views.⁵⁰ They invoke principles, text and teleology to prove their position that the notification may be revoked.⁵¹ Since text can be construed in both ways, the more important question is, therefore, one of the teleology of the provision or, even more importantly,

⁴⁸ Michael Holden, 'Britain Cannot Revoke EU Divorce Once Begun, Government's Top Lawyer Says' (*Reuters*, 17 October 2016) <<http://www.reuters.com/article/us-britain-eu-article-idUSKBN12H140>> accessed 17 October 2016.

⁴⁹ Steve Peers, 'Article 50 TEU: The Uses and Abuses of the Process of Withdrawing from the EU' (*EU Law Analysis*, 8 December 2014) <<http://eulawanalysis.blogspot.hr/2014/12/article-50-teu-uses-and-abuses-of.html>> accessed 13 September 2016.

⁵⁰ House of Lords European Union Committee, *The Process of Withdrawing from the European Union* (HL11th Report of Session 2015–16) point 10 <<http://www.publications.parliament.uk/pa/ld201516/ldselect/ldEUcom/138/138.pdf>> accessed 13 September 2016.

⁵¹ Craig (n 2) 463.

of political interests. If, as I have suggested, the purpose of article 50 is to make the process of withdrawal as painless as possible, then certainly allowing the State to change its mind before a final deal is struck is a more acceptable reading, or, as stated by Derrick Wyatt, a 'better view'.⁵² However, given the irrational emotions which are involved in any divorce, this might not be the reading preferred by all the actors.

3.2.5 *The European Court of Justice and the withdrawal process*

The ECJ may be asked to interpret any point of article 50. This may happen in different scenarios and therefore in different types of procedure.⁵³

The first imaginable scenario is the situation just described. A national court of a Member State before which a dispute that is dependent on the meaning of article 50 is pending may (or even must) refer a question of interpretation to the ECJ under a preliminary ruling procedure. In the case before the London High Court, the UK government accepted that the withdrawal decision, once notified, is not revocable, even if the opposite position would possibly help its case. The reasons behind it were probably political, as the current government does not want to lose the credibility of its promise that 'Brexit means Brexit'. As both parties agreed on that point, the High Court did not question it, but decided the case as if this was the correct interpretation. However, it is possible that the issue will reappear before the Supreme Court. This Court might find that this question is relevant for the UK constitutional question of whether giving such notice is or is not a royal prerogative.⁵⁴ Thus, the proper interpretation of article 50, which is ultimately under the jurisdiction of the ECJ, will become part of the UK constitutional issue and create an obligation for the Supreme Court under article 267 TFEU to refer it to the ECJ for a preliminary ruling.

Other scenarios are also possible. For example, a Member State (including theoretically the UK) or any EU institution may introduce an

⁵² In his discussion at the Brick Court organised panel discussion on the 'Brexit and the EU Constitution', Derrick Wyatt explained that seeing the withdrawal notice as revocable is a 'better view' at: <<http://www.brickcourt.co.uk/past-events/detail/brexit-and-the-uk-constitution>> accessed 13 September 2016, video at minute 48.37.

⁵³ Steve Peers, 'Brexit: Can the ECJ Get Involved?' (*EU Law Analysis*, 3 November 2016) <<http://eulawanalysis.blogspot.hr/2016/11/brexit-can-ecj-get-involved.html>> accessed 22 November 2016.

⁵⁴ It is likely that the Supreme Court will not see the issue of revocability of the notification as settled. Namely, contrary to the London High Court, the Belfast High Court has seen notification as only the first step in the process and has therefore rejected the claims that the Government cannot give such notification. Cf 'A Ruling in Belfast Makes the High Court's Brexit Decision Even More Complicated Than You Think' *Independent* (London, 6 November 2016) <<http://www.independent.co.uk/news/uk/politics/brexit-ruling-legal-challenge-article-50-northern-ireland-a7400611.html>> accessed 6 November 2016.

action asking for the annulment of the consent given by the Parliament on the withdrawal agreement, claiming that it was supposed to vote with (or without) the UK MEPs. The ECJ would then have to decide about the 'correct' interpretation of this aspect of article 50. This would cause an important complication as the two-year period after which the Treaties will cease to apply to the UK will be running. If the Court annuls the consent given by the Parliament on procedural grounds, the withdrawal agreement could no longer be renegotiated in accordance with a proper procedure. Namely, in that case, the UK would no longer be a withdrawing Member State, but a third State, and article 50 would no longer apply to it. The Member States might, of course, unanimously agree to prolong the period of two years, but what if they do not? This might raise additional legal issues. Can, for example, the ECJ order the stay of the two-year period by an interim measure?

It is also possible to imagine the following situation. The UK revokes its notification of withdrawal. The Council adopts a decision that the negotiations will continue, holding the process irreversible. The UK might then ask for an annulment of the Council decision by the ECJ, which would then have to judge whether the Treaties allow the withdrawing state to change its mind.

Finally, as the withdrawal agreement is to be concluded in accordance with the procedure of article 218 TFEU, which is the regular procedure for the conclusion of international agreements even if with a higher qualified majority threshold, the Court most likely also has jurisdiction to give an opinion on the compatibility of the proposed withdrawal agreement with the EU legal system.⁵⁵ If asked (by any Member State or EU institution), the judicial procedure would postpone the entry into force of the agreement and make it dependent on a positive ECJ opinion, again reopening the question of what happens with the two-year period. If the agreement is negotiated but submitted to the Court for an opinion, will this automatically prolong UK membership until the Court's final decision or will the unanimous decision of the Council still be necessary? If the extension is automatic, the UK might use the Court to stretch its EU Member Status and buy some time.

Courts, including eventually the European Court of Justice, already have or will have a role to play in the Brexit process. This will necessarily reopen discussion about the legitimacy of the courts to interfere with

⁵⁵ There are also opposite views. These claim that art 50 only refers to art 218(3) TFEU, which excludes the application of its other paragraphs (the Court's jurisdiction is regulated by art 218(11) TFEU). For this, see European Parliament Research Service 'Article 50 TEU: Withdrawal of a Member State from the EU' (European Parliament, Briefing, February 2016) 8 and fn 7 <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI\(2016\)577971_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf)> accessed 16 September 2016.

political decisions, and raise questions about the limits of the courts' powers.

3.3 Act 3 - long-term EU constitutional future

3.3.1 Potential victim: the EU and its legal order

Act Three is, for now, pure speculation. One thing is certain: the Brexit experience will inevitably change the EU. It may even lead to its end.⁵⁶ If this happens, we will have a third murder.

For at least the last two decades (ever since the adoption of the Maastricht Treaty), EU politics has neglected to address the obvious, that there is something wrong with the EU in the eyes of its citizens. Not only UK voters, but citizens of other EU countries have voted negatively on EU-related referenda. This was true of the Danes voting on the Maastricht Treaty, the French and the Dutch voting on the Treaty on the Constitution for Europe, and the Irish voting on the Lisbon Treaty. Many explanations have tried to show that the negative results did not have to do with the EU, but rather with domestic politics. And this may largely be true. But still, if real popular support for the EU project existed, then the success rate of EU referenda would have been much higher, even when faced with domestic political or economic problems, or precisely because of them.

Additionally, the no votes suggest another worrisome fact: not only did EU citizens not want to move further with EU integration, but they were unhappy with what already constituted EU law. We only need to remember that one of the main 'no campaign' arguments in France against the Constitutional Treaty was the story of the 'Polish plumber'. This represented the unwillingness of French citizens to allow other States' workers onto their labour market. The Polish case was important also in the Brexit referendum. If the Polish plumber is the real reason for French citizens to reject the Constitutional Treaty, then what really happened was a rejection of the already existing Union and its single market, and not the future proposed one. This is worrying. And this is at the same time the issue that European politicians have been trying to avoid for decades.

Brexit has changed this. It has made the Europeans' fears of their fellow Europeans more visible. These issues can no longer be swept under the carpet. If the EU is to survive, it has to stop pretending that the problem with the free movement of people does not exist. The deal struck

⁵⁶ Adam Lazowski, 'Brexit Referendum: Beginning of the End or Just a Turning Point?' (2016) 1(2) European Papers (editorial) <http://www.europeanpapers.eu/en/system/files/pdf_version/EP_eJ_2016_2_2_Editorial.pdf> accessed 13 September 2016.

by former Prime Minister David Cameron⁵⁷ with the aim of securing a stay vote in the UK referendum revealed that other Member States very readily accepted limitations on the free movement of people, notwithstanding the public rhetoric about the fundamental nature of this market freedom.⁵⁸ As much as many of us may regret it, this is the reality.

This might be the result of the failure of European integration to create a European identity. For a long time, the main tool for building such an identity was law. However, citizens have not felt involved in the creation of European law. Thus, the idea of European integration has remained for many an alien idea, threatening, together with their jobs, also their inherited national identities. This is how ‘the ever closer Union’ process became enemy No1 in the Brexit process. However, in order to keep building an ever closer Union, it is not necessary or even desirable to replace national identities with a new European one. The idea is precisely to maintain national identity and to upgrade it with an additional, European one. Understood in this way, European identity cannot endanger national identities, as feared by some of the Brexiters. The EU legal order defines itself in this way. It provides for respect of national identities as a matter of its own constitutional identity (article 4/1 TEU).⁵⁹

Such a vision of the EU has not, however, reached EU citizens. Or has it? The UK referendum results can also be read not only as denying, but at the same time showing the existence of a nucleus of new European identity. Demonstrations after the UK referendum showed that not an insignificant number of people understand Europe as an equally important part of their identity as the British one.⁶⁰

For all of us who think that the idea of European integration is worth continuing despite its existing flaws, the Poirot in this story will need to find a workable solution to keep it alive. The idea of Europe, based on the dual identity of its citizens, should become a story desired by or at least acceptable to the majority of Europeans. Such a Europe, however, can be built only as an open and tolerant society. This might prevent the third murder and lead to a happy ending for the tragedy. This ideal, alas,

⁵⁷ European Council meeting (18 and 19 February 2016) – Conclusions <<http://www.consilium.europa.eu/en/press/press-releases/2016/02/19-euco-conclusions/>> accessed 13 September 2016. For an analysis, see Jo Shaw, ‘Where does the UK belong?’ University of Edinburgh School of Law Research Paper Series No 2016/04 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2742525> accessed 13 September 2016.

⁵⁸ As duly noted in the ‘True Is It That We Have Seen Better Days’, editorial comments to the (2016) 53 CML Rev 857, 880.

⁵⁹ See the editorial by Steve Weatherill in this volume.

⁶⁰ For example, Suchandrika Chakrabartig and Emma Mullin, “‘March for Europe’ Brexit Demo: Recap After 50,000 People Waving Colourful Banners Protest over EU referendum’ *Daily Mirror* (London, 2 July 2016) <<http://www.mirror.co.uk/news/uk-news/march-europe-brexit-protest-live-8332198>> accessed 13 September 2016.

seems to have disappeared from the agendas of many politicians across Europe.

Post scriptum

A clever person has asked me who Poirot is in this story.⁶¹ For now, I do not have the answer. I am, however, persuaded that academia has an important role in contributing to finding a solution for the EU's survival.

---- to be continued ----

⁶¹ Thank you, Toby Goldbach.