

# RETHINKING THE EUROPEAN UNION WITHDRAWAL CLAUSE

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*Abstract: The Lisbon Treaty introduced an EU withdrawal procedure in Article 50 of the Treaty on European Union (TEU). However, the withdrawal procedure outlined in Article 50 TEU revealed a lack of clarity in withdrawal rules, highlighting the need for future amendments. This is particularly evident in aspects such as the setting of the two-year withdrawal period, the regulation of possible extensions of the withdrawal period, the role of the Court of Justice of the European Union (CJEU) in the withdrawal procedure, and the required majority for the conclusion of a withdrawal agreement.*

*Keywords: withdrawal clause, Article 50 TEU, withdrawal agreement, Court of Justice of the EU.*

## 1 Introduction

Before the Treaty establishing the Constitution for Europe, European legislation did not specify a right regarding withdrawal from the European Union. The existence of this right was based on the classification of the nature of the European Union. However, the *sui generis* nature of the European Union did not seem to fit into the traditional dichotomy between federal states and international organisations, resulting in an unclear answer to this question. During the preparation phase of the Treaty establishing the Constitution for Europe, the presidency assessed that including a withdrawal clause in the constitutional text was necessary to dispel doubts about such a right and to define the procedure for its implementation.<sup>1</sup> By creating the withdrawal clause, the Treaty establishing a Constitution for Europe subordinated the provisions regarding withdrawal from the EU to EU law and prevented the use of international law on the withdrawal of Member States.<sup>2</sup>

Article 50 TEU followed the solutions laid down in the Treaty establishing a Constitution for Europe and legally regulated the right of withdrawal from the EU. The compatibility of Article 50 TEU with national constitutional orders has been reviewed by several national courts. The

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<sup>1</sup> The European Convention, Cover Note of 28/5/2003 from the Praesidium to the Convention, CONV 724/1/03 REV 1.

<sup>2</sup> C Hillion, 'Accession and Withdrawal in the Law of the European Union' in Anthony Arnall and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015).

Czech Constitutional Court emphasised that determining the procedure for withdrawal from the EU based on Article 50 TEU is consistent with the principle that the Member States are 'masters of the treaties'.<sup>3</sup> It also clarified that the withdrawal procedure is more akin to a withdrawal from an international organisation than that of a federal unit from a federation, thereby reinforcing the aforementioned right of Member States and their sovereignty.<sup>4</sup> In considering the compatibility of the two-year withdrawal period, the Latvian Constitutional Court stressed that this period is not only beneficial for both the withdrawing Member State and the EU but is also necessary to guarantee the rights of the citizens of the outgoing Member State and ensure an orderly withdrawal.<sup>5</sup>

The article aims to critically analyse the challenges that the withdrawal clause raises. Through an examination of the Brexit experience and scholarly contributions, the author seeks to identify necessary amendments to Article 50 TEU that would better address possible future withdrawals of Member States from the EU.

## **2 Deciding to withdraw from the EU by the State's constitutional requirements**

Article 50 of the TEU stipulates that Member States shall decide to withdraw from the EU by their constitutional requirements, thereby referring to the use of national law in the initial stage of the withdrawal process. Since almost no Member State has established a specific procedure for withdrawal from the EU in national legislation, most would face a lacuna when deciding on withdrawal. From the perspective of national law, the author believes it is necessary to determine whether national law requires a constitutional revision procedure before withdrawal, whether it provides for a referendum on the matter, and what the relationship is between the legislative and executive branches during the withdrawal process. A constitutional revision procedure seems to be necessary, at least in cases where EU membership is explicitly stipulated in the constitution, and a referendum decision regarding withdrawal from the EU is likely to be used, especially when a referendum was used to accede to the EU. The author agrees with Garner<sup>6</sup> on the need for clarifying the constitutional requirements for withdrawal from the EU, as it would provide

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<sup>3</sup> US 19/08 (Czech Constitutional Court) para 106.

<sup>4</sup> *ibid.*, para 146.

<sup>5</sup> No 2008-35-01 (Latvian Constitutional Court).

<sup>6</sup> O Garner, 'Why All Member States Should Clarify Their Constitutional Requirements for Withdrawing from the EU' (*Verfassungsblog*, 2 November 2016) <<https://verfassungsblog.de/why-all-member-states-should-clarify-their-constitutional-requirements-for-withdrawing-from-the-eu/>> accessed 11 April 2024.

much-needed procedural clarity and avoid constitutional uncertainty. However, in contrast to Garner,<sup>7</sup> the author does not suggest the Quebec experience but points to the Polish withdrawal legislation as a model to constitutionally clarify the withdrawal requirements. While the case of Quebec represents secession from a federal state, and the application of the Vienna Convention on the Law of Treaties (VCLT) represents the withdrawal from an international organisation, it seems that the Polish withdrawal legislation represents a withdrawal solution based on the theory of the EU as a union.<sup>8</sup>

Several authors oppose the current wording of Article 50 TEU, as it lacks any conditions for withdrawal, except the requirement of respecting the State's constitutional requirements. Some argue that the withdrawal clause itself undermines the *telos* of the supranational constitutional order<sup>9</sup> and suggest that it would only be triggered after the prior use of sanctioning measures under Article 7 TEU. Based on the *travaux préparatoires*, Article 50 TEU represents an unconditional withdrawal clause and does not provide a sanctioning mechanism or an expulsion clause. The Brexit experience refuted suggestions about the linkage of the withdrawal proceedings and the sanctioning procedure as stipulated in Article 7 TEU, showing that Article 50 TEU could be triggered without any prior proceedings. Garner, however, believed that a Member State could withdraw only in the event of a fundamental constitutional conflict, which could be proven if the Member State demonstrated an incompatibility posed by its EU membership to its national identity inherent in its fundamental structures, political, and constitutional, as stated in Article 4(2) TEU.<sup>10</sup> Although this solution seems to address the undermining of the 'ever closer union' and respects the self-determination of individuals as EU citizens, it does not fully consider the derivative nature of EU citizenship and significantly interferes with the sovereignty of Member States by implying additional conditions for withdrawal.

In the context of the decision to withdraw from the EU by Member States' constitutional requirements, Garner advocates for a new double decision structure.<sup>11</sup> This structure would involve a decision on the intention to withdraw and a second confirmatory decision once the

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<sup>7</sup> *ibid.*

<sup>8</sup> M Avbelj, 'Evropska Unija Kot Nedržavna Federacija' in Matej Avbelj and Tine Hribar (eds), *Prenova Evrope: Posvetovanje: Prispevki za slovenski nacionalni program II* (Slovenska akademija znanosti in umetnosti 2017).

<sup>9</sup> O Garner, 'Reforming Withdrawal and Opt-Outs from the European Union: A Dual-Constituent Perspective' (SSRN, 4 January 2019) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3303938](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3303938)> accessed 11 April 2024.

<sup>10</sup> *ibid.*

<sup>11</sup> O Garner, 'Seven Reforms to Article 50 TEU' (2021) 46(6) *European Law Review* 784.

outcome of the negotiation is clear. Garner believes that this double decision structure would provide a more coherent basis for the continued application of EU law to a withdrawing Member State during negotiations and ensure greater symmetry with the accession process.<sup>12</sup> The author disagrees with Garner on the need for a double decision structure in Article 50 TEU, asserting that the decision to withdraw from the EU represents a sovereign state right, which should be determined in domestic constitutional orders and not integrated into the supranational withdrawal process solely due to Member States' lack of clarity regarding their constitutional requirements for withdrawal. Additionally, Garner's solution appears not to address the main issue – the absence of withdrawal rules in national legislation – and overlooks the existing possibility for all Member States to introduce a double decision structure in their own constitutional orders as a prerequisite before the conclusion of the withdrawal agreement. Considering the reversibility of the decision to withdraw, it seems that the current wording of Article 50 TEU already provides a legal basis for such a procedure.

### **2.1 Review of the decision to withdraw from the EU**

It is crucial to highlight that the question of the constitutionality of the decision to withdraw primarily falls within the review of national courts. National courts play a vital role in the initial stages of this process by assessing whether the withdrawal decision has been made in compliance with constitutional standards. During Brexit, the UK Higher Court emphasised that intervening in a democratically adopted decision requires proving and establishing a violation of the electoral procedure. Additionally, the complainant must reasonably demonstrate that the referendum outcome would likely have been different had the mentioned violation not occurred.<sup>13</sup> With the decision in *Wilson v Prime Minister*, the UK Higher Court set a constitutional standard regarding possible interferences in the adoption of the withdrawal decision in the UK, recognising that such standards could vary in other Member States.

## **3 Withdrawal notification**

The second paragraph of Article 50 TEU provides scant regulation for the withdrawal notification, as it does not establish any specific procedural prerequisites. After a Member State decides to exit the EU, the timing of the official notification to the European Council becomes crucial, as all deadlines are calculated from that date, and the formal act

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<sup>12</sup> *ibid.*

<sup>13</sup> *Wilson v Prime Minister* [2019] EWCA Civ 304.

of notification serves as the foundation for all consequences outlined in Article 50 TEU. While Article 50 TEU does not specify any deadline for submitting the official withdrawal notification, the author agrees with Kreilinger, Becker, and Wolfstadter that compliance with the principle of loyal cooperation from Article 4(3) TEU requires Member States to provide the notification within a reasonable period, avoiding an increase in legal uncertainty in the EU and other Member States.<sup>14</sup> To prevent threats from Member States regarding exit from the EU, the notification of the exit is handled in an extremely formalistic manner. However, this does not imply that the notification has no legal effects on the participation of the exiting Member State in the decision-making process of the EU. These effects are primarily regulated by the fourth paragraph of Article 50 TEU.<sup>15</sup>

### **3.1 Revocability of the withdrawal notification**

The question regarding the revocability of the withdrawal notification was one of the most contested issues following Brexit, as Article 50 TEU does not address this matter. The third paragraph of Article 50 TEU stipulates that EU treaties shall cease to apply to the exiting Member State after the entry into force of the withdrawal agreement or, in the absence of such an agreement, two years after the notification of the Member State's intention to withdraw unless the European Council and the exiting Member State unanimously agree to extend the withdrawal period. Through linguistic interpretation, we can infer that, in any case, the consent of the exiting Member State to leave the EU is required. This is because after a change in the decision of the exiting Member State regarding withdrawal from the EU, the fulfilment of the conditions from the first paragraph of Article 50 TEU – deciding to withdraw by the constitutional rules of the exiting Member State – becomes questionable. Furthermore, the Member State that changes its decision would be forced to withdraw against its will or even be expelled.

In the *Wightman* case,<sup>16</sup> the CJEU ruled that Article 50 TEU should be interpreted to allow Member States to unilaterally revoke the withdrawal notification unequivocally and unconditionally until the withdrawal agreement between the Member State and the EU is ratified. In

<sup>14</sup> V Kreilinger, S Becker and M Wolfstadter, 'Brexit: Negotiation Phases and Scenarios of a Drama in Three Acts', Jacques Delors Institute <<https://institutdelors.eu/en/publications/brexit-negotiation-phases-and-scenarios-of-a-drama-in-three-acts/>> accessed 7 March 2020.

<sup>15</sup> Consolidated version of the Treaty on European Union [2012] OJ C326/13.

<sup>16</sup> Case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union* ECLI:EU:C:2018:999.

the case of no agreement being reached, Member States can revoke until the two-year negotiation period specified in Article 50(3) of the TEU expires or any extended period by that provision. This can be done through a written communication addressed to the European Council after the Member State has made the revocation decision according to its constitutional requirements.<sup>17</sup> By revoking the withdrawal notification, the Member State confirms its membership in the EU under the unchanged conditions of its previous membership, thus concluding the withdrawal process.<sup>18</sup> The Advocate General pointed out that the rules of the Vienna Convention on the Law of Treaties (VCLT) provided interpretative guidelines to assist in dispelling doubts about the issue of the revocability of the withdrawal decision, which was not expressly dealt with in Article 50 TEU.<sup>19</sup> On the other hand, the CJEU pointed out that the EU is a new legal order, autonomous from the Member States and international law. It has its institutions and independent sources of law, which have primacy over the laws of the Member States and may confer rights with direct effect.<sup>20</sup> The CJEU insisted on the autonomy of EU laws from international law, as previously confirmed in the *Kadi* judgment.<sup>21</sup> The Court reaffirmed that EU law was no longer part of international law, even though it may have been considered as such at its origin. Martinico and Simoncini also highlight that while the Advocate General aimed to strike a balance between national sovereignty and the European project, the CJEU focused on the goals of the EU legal order and the persistent willingness of the State to be part of that project.<sup>22</sup>

Barata disagreed with the CJEU findings regarding the revocability of the withdrawal notification during the extension period, as he argued that a State cannot claim absolute sovereignty in this extended period.<sup>23</sup> He contended that to guarantee the smooth functioning of the EU, the CJEU overlooked the sovereignty of Member States in their EU membership, which he considers a cornerstone of the EU integration process. Despite the potential for abuses in revoking the withdrawal statement,

<sup>17</sup> Case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union* ECLI:EU:C:2018:978, Opinion of AG Campos Sánchez-Bordona, paras 94–95.

<sup>18</sup> *Wightman* (n 16) para 75.

<sup>19</sup> Opinion of AG Campos Sánchez-Bordona (n 17) para 82.

<sup>20</sup> *Wightman* (n 16) paras 44–45.

<sup>21</sup> Case C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* ECLI:EU:C:2008:461, paras 282, 316.

<sup>22</sup> G Martinico and M Simoncini M, 'Wightman and the Perils of Britain's Withdrawal' (2020) 21(5) *German Law Journal* 799.

<sup>23</sup> M Barata, 'Brexit and the Limits of Article 50 Treaty of the European Union' (2020) 3 *Open Political Science* 165.

it must be emphasised that this initial phase of the withdrawal procedure falls within the sovereignty of Member States. This sovereignty must be respected, even when considering revocation in the extended period; otherwise, a Member State could be *de facto* expelled from the EU. Papageorgiou also warns that the revocation of the withdrawal notification can lead to various incidental effects, especially in the functioning of the EU institutions. Therefore, the CJEU can review the lawfulness of the given revocation.<sup>24</sup> However, the author believes that the CJEU's review of the lawfulness of the revocation is limited, as it is with the notification of withdrawal.

### 3.2 Review of the withdrawal statement

Despite the national court's decision regarding the constitutionality of the withdrawal decision, the European Council, which receives the official notification of withdrawal, must verify whether the decision has been made in line with the legal standards of the EU, thereby influencing the validity of the notification.<sup>25</sup> In light of the sovereignty of Member States, the verification should be made merely regarding possible breaches of the values referred to in Article 2 TEU. As the CJEU stipulated in *Hungary v Parliament and Council*,<sup>26</sup> the values in Article 2 TEU are an integral part of the very identity of the EU as a common legal order. Although acceding States need to comply with these values in the accession phase, the author believes that the expression of these principles in legally binding obligations for Member States could result in breaches after accession. Although the debate regarding the stand-alone (direct) use of Article 2 TEU before the CJEU is severely criticised as changing Article 2 TEU into a 'federal homogeneity clause',<sup>27</sup> the author believes that a serious breach of EU values that would result in the withdrawal decision should be contested before the CJEU.

## 4 Negotiation of a withdrawal agreement

The second paragraph of Article 50 TEU provides the legal basis for negotiations on the withdrawal from the EU, stating that the EU and the withdrawing Member State shall negotiate by the third paragraph of Article 218 TFEU, which governs the procedure for negotiations on

<sup>24</sup> I Papageorgiou, 'The (Ir-)Revocability of the Withdrawal Notification under Article 50 TEU' (European Parliament 2018) <[https://www.europarl.europa.eu/RegData/etudes/IDAN/2018/596820/IPOL\\_IDA\(2018\)596820\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2018/596820/IPOL_IDA(2018)596820_EN.pdf)> accessed 5 June 2020.

<sup>25</sup> Hillion (n 2).

<sup>26</sup> Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97, para 232.

<sup>27</sup> M Nettesheim 'Die "Werte Der Union": Legitimitätsstiftung, Einheitsbildung, Föderalisierung' (2022) 57 *Europarecht* 525

international agreements. Lukić Radović points out that Article 50 TEU bestows upon the Union a best-efforts obligation to achieve an agreement with the withdrawing country, and not a duty to achieve the agreement at any cost.<sup>28</sup> It is worth noting that even in the case of withdrawal negotiations, we do not speak of negotiations *stricto sensu*, as the positions of the parties, despite their common desire to reach an agreement, are significantly different. The negotiating guidelines of the EU are formulated based on the guidelines set by the European Council<sup>29</sup> and consider the diverse interests of the remaining Member States and the EU, as they are adopted by consensus. This also means that the European negotiator is constrained in negotiations by the adopted guidelines, which must be broad enough to provide a reasonable ground for negotiations. The goal of the negotiations between the withdrawing Member State and the EU differs significantly. The primary goal of the EU is to preserve the rights and obligations derived from EU law in various areas, while the main goal of the withdrawing Member State is often to replace the EU legal framework with its national legal framework. On the other hand, the negotiating positions and capabilities of individual Member States that decide to withdraw are limited by their own constitutional rules, especially the competencies of their respective authorities in negotiations for the conclusion of international agreements.

The Council adopts negotiating directives and nominates the EU negotiator by a qualified majority vote, which means that Member States no longer have a veto. The European Parliament is actively involved in the exit negotiations through resolutions, primarily because of its right to veto the withdrawal agreement.<sup>30</sup>

## 5 Two-year withdrawal period

Article 50 TEU establishes that the fundamental treaties will cease to apply to the relevant Member State on the date when the withdrawal agreement comes into effect, or if no agreement is reached, two years after the official notification under Article 50(2) TEU. This is unless the European Council, in agreement with the concerned Member State, unanimously decides to extend this period. The drafters of Article 50 TEU set a relatively short period for a Member State's withdrawal from the EU, which is understandable from the perspective of resolving open issues between the exiting Member State and the EU more swiftly. However, considering the case of Greenland (which was not a case of withdrawal

<sup>28</sup> Maja Radović, 'Withdrawal from the European Union: Consequences under EU Law and International Law' (2020) 59(89) *Zbornik radova Pravnog fakulteta Nis* 227.

<sup>29</sup> Consolidated version of the Treaty on European Union [2012] OJ C326/13.

<sup>30</sup> *ibid.*

of an EU Member State based on international law as Greenland is an autonomous territory within the Kingdom of Denmark but still lasted two years),<sup>31</sup> and considering the deepening of the EU, the two-year withdrawal period could be considered too short. The author suggests that a longer withdrawal period should be set – such as three years or a flexible period (between three or four years), depending on the level of integration of the Member State in the EU (Schengen, Eurozone, number of opt-outs, etc).

The author disagrees with Garner's proposal for the removal of the two-year limit, as she believes that eliminating the time limit for negotiating a withdrawal agreement could stall negotiations and potentially delay the withdrawal indefinitely. Consequently, this might hinder the smooth functioning of the EU, as EU institutions would have to deal with prolonged negotiations. On the other hand, a longer time limit could benefit both negotiating parties, providing some predictability in the functioning of the EU institutions and Member States. The establishment of a longer withdrawal period, particularly if it considers the integration level of the withdrawing State in the EU, combined with restrictions on the extension of the withdrawal period, could contribute to an orderly withdrawal from the EU and enhance predictability.

### **5.1 Extension of the two-year withdrawal period**

Article 50 TEU explicitly provides the legal basis for the extension of the withdrawal period, but it does not stipulate how many times the withdrawal period could be extended or for how much time. Bernard and Weatherill believe that due to the silence of the legislator and the lack of an explicit prohibition, the two-year exit period could be extended multiple times, and the European Council could condition the extension on the fulfilment of certain commitments by the exiting Member State.<sup>32</sup> With the adoption of European Council Decision (EU) 2019/584 on 11 April 2019, in agreement with the UK regarding the extension of the period provided for in Article 50(3) of the Treaty on European Union, all doubts regarding the possibility of multiple extensions of the two-year withdrawal period were removed.

Craig emphasises that the act of triggering the withdrawal clause, or its revocation, significantly differs from requesting an extension of the two-year withdrawal period. A shorter extension of the withdrawal period does not result in any direct legal consequences, allowing a government

<sup>31</sup> Derrick Wyatt QC, 'Supplementary Written Evidence (PLE0001)' <<https://committees.parliament.uk/writtenevidence/66826/html/>> accessed 16 May 2024.

<sup>32</sup> Catherine Bernard and Steve Weatherill, 'Extension and Elections: We Need to Talk about Article 50' (*EU Law Analysis*, 14 March 2019) <<https://eulawanalysis.blogspot.com/2019/03/extension-and-elections-we-need-to-talk.html>> accessed 22 June 2024.

to request such an extension within its competence.<sup>33</sup> However, Garner points out that the executive-driven extension mechanism lacks input legitimacy and, as such, should be avoided.<sup>34</sup>

Based on the author's proposal for setting a longer withdrawal period, the reasoning for restricting the extension of the withdrawal period also emerges. Although Brexit showed that the European Council conditioned the extension of the withdrawal period, the author believes that, from the aspect of legal security, the conditions for the extension of the withdrawal period should be set in advance. The withdrawal negotiations should, therefore, reach a final phase so that the extension would represent just a 'technical extension', for which the question of legitimacy would not arise.

## 6 Ratification of the withdrawal agreement

Article 50(2) TEU stipulates that the Council, with the consent of the European Parliament, concludes the withdrawal agreement on behalf of the EU. This provision governs the ratification process concerning the withdrawal agreement on behalf of the EU. However, the ratification process of the Member States is left to their national constitutional systems, and any potential withdrawing State will likely apply analogies with the accession procedure to the EU due to the lack of specific provisions in national legislation regarding this matter.

It should be noted that Article 50 TEU does not address the issue of the European Parliament's rejection of the withdrawal agreement or the political declaration.<sup>35</sup> Given the wording of this article, which requires prior consent from the European Parliament before the conclusion of the withdrawal agreement, one could infer that such rejection could lead to withdrawal from the EU without an agreement (if the withdrawal period expires) or to the reopening of negotiations with the withdrawing State.

It is important to highlight that in its history, the European Parliament has already exercised its right of veto within the framework of the ratification process of international treaties. Furthermore, during the negotiation process regarding the withdrawal agreement, the European Parliament has sought to transcend its formal role within the ratification process by utilising informal powers to influence the shaping of the

<sup>33</sup> Robert Craig, 'Can the Government Use the Royal Prerogative to Extend Article 50?' (*UK Constitutional Law Association Blog*, 9 January 2019) <<https://ukconstitutionallaw.org/2019/01/09/robert-craig-can-the-government-use-the-royal-prerogative-to-extend-article-50/>> accessed 22 July 2024.

<sup>34</sup> Garner (n 11).

<sup>35</sup> For example, in the case of the Anti-Counterfeiting Trade Agreement (ACTA).

withdrawal agreement ex-ante. Brusenbauch Meislova emphasises that after the adoption of the Lisbon Treaty, the European Parliament significantly strengthened its role in concluding international agreements, which is particularly evident in the case of the UK's withdrawal from the EU. By innovatively using the existing procedural provisions, the European Parliament expanded its powers beyond constitutionally provided ones and indirectly contributed to increasing the legitimacy of the decisions taken.<sup>36</sup>

## 7 The conclusion of the withdrawal agreement

Undoubtedly, one of the most important elements of a Member State's withdrawal from the EU is the conclusion of a withdrawal agreement, which, when ratified, serves as the basis for terminating the founding treaties of the EU for the withdrawing Member State.<sup>37</sup> According to the second paragraph of Article 50 TEU, the agreement on behalf of the EU is concluded by the European Council with a qualified majority vote.

This provision differs significantly from the entry of a Member State into the EU, as in the case of accession the European Council decides unanimously,<sup>38</sup> and the agreement is also subject to ratification in all Member States.<sup>39</sup> Although the legislative distinction in regulating the process of accession and withdrawal of a Member State to or from the EU may seem reasonable, it is important to note that some of the legal consequences of a Member State's withdrawal from the EU are far-reaching, requiring at least consideration of the inclusion of unanimous decision-making by the European Council in Article 50 TEU. The withdrawal of a Member State from the EU results in significant not only legal but also economic and political consequences that cannot be ignored; hence, decision-making by the European Council with a qualified majority vote seems inappropriate.

Although the author supports the EU institutions' campaign for qualified majority voting, which is seen by federalists as a major step in the EU integration process, she argues that the conclusion of the withdrawal agreement should be made by unanimity, similarly to the extension of the withdrawal period or the conclusion of the accession treaty. Although withdrawal will be effective with or without a negotiated

<sup>36</sup> Monika Brusenbauch Meislova, 'The European Parliament in the Brexit Process: Leading Role, Supporting Role or Just a Small Cameo?' in T Christiansen and D Fromage (eds), *Brexit and Democracy* (Palgrave Macmillan 2019).

<sup>37</sup> Consolidated version of the Treaty on European Union [2012] OJ C326/13.

<sup>38</sup> *ibid.*

<sup>39</sup> *ibid.*

agreement, the terms of such an agreement seem to be crucial for the EU and its Member States, resulting in the need for unanimous decision-making in this matter. The author believes that the question of withdrawal, along with EU membership, represents one of the most sensitive matters, where unanimity voting should be used to enable each Member State to veto the withdrawal agreement. In the case of EU enlargement, even the Committee on Constitutional Affairs recognised that the consensus requirement is a useful one since it offers reassurance to current members that they will not be obliged to accept new members without their explicit consent, and it offers recognition to the successful candidate country because all existing members will have accepted it into the 'club'.<sup>40</sup> Similarly, the conclusion of the withdrawal agreement by unanimity could guarantee that the remaining Member States could specify the terms under which an orderly withdrawal could take place and safeguard their most important rights about the withdrawal State. Brexit was illustrative on this question as it highlighted the question of Ireland and Northern Ireland, where Ireland could not formally stall the conclusion of the withdrawal agreement even if the issue of Northern Ireland was not addressed properly. Even if this case showed great unanimity amongst Member States, it is questionable if this would be the case in possible future withdrawals.

## 8 Conclusion

The regulation of the withdrawal of a Member State from the EU in Article 50 TEU has certainly eliminated doubts about the existence of the right to withdraw and enabled some clarity regarding the procedural requirements for the withdrawal of a Member State from the EU. It also passed the test of its first implementation, but at the same time, due to its legal ambiguity, it brought new challenges in understanding the individual stages of the withdrawal process. The questions that arose from Brexit showed that the traditional dichotomy between the EU as a federal State and international organisation persists and strongly influences the withdrawal procedure. The author believes that the question of a Member State's withdrawal from the EU under Article 50 is still under-regulated, and therefore proposes changes to Article 50 TEU to appropriately address the mentioned under-regulation.

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<sup>40</sup> Sandro Gozi, 'Working Document on Overcoming the Deadlock of Unanimity Voting' (2021) Committee on Constitutional Affairs, European Parliament 2019-2024, DT\1229579EN.docx, PE691.407v01-00, <<https://www.europarl.europa.eu/cmsdata/233740/AFCO%20Working%20Document%20on%20Overcoming%20the%20Deadlock%20of%20Unanimity%20Voting.pdf>> accessed 16 May 2024.

Firstly, the author proposes to amend Article 50 TEU to ensure judicial review of the compatibility of the official notification of a Member State's withdrawal from the EU (which implies the decision to withdraw) with the fundamental values of the EU, as contained in Article 2 TEU. Since the decision to withdraw from the EU is made based on the constitutional rules of the Member State, the jurisdiction of the CJEU should be limited to assessing the conformity of the withdrawal notification with Article 2 TEU, thus preventing any disproportionate interference of the CJEU in the national legal systems of the Member States. In this regard, it is essential to emphasise that the decision to leave the EU is primarily a political issue, which, due to its sensitivity and legal effects, requires careful balancing by the CJEU between respecting the fundamental values of the EU and the specificities of individual national legal systems. Considering the CJEU case law, the decision regarding the direct applicability of Article 2 TEU could represent a major development towards more judicial federalism in the EU.

The author suggests explicitly allowing the revocation of the withdrawal decision. The purpose of the proposed change is to include the decision of the CJEU in the *Wightman* case regarding the revocability of the exit declaration in the text of Article 50 TEU. Despite the mentioned decision, in the interest of respecting the principle of separation of powers, the legislator should specifically regulate this issue and dispel all doubts regarding possible revocation.

The author further recommends a longer withdrawal period while at the same time restricting the possibility of extending the withdrawal period. Brexit has provided an answer to the question regarding the possibility of multiple extensions of the withdrawal agreement, simultaneously outlining numerous challenges that such extension may cause not only in the withdrawing Member State but also in the institutions of the EU. Although from the perspective of ensuring an orderly exit of a Member State from the EU (withdrawal with the conclusion of a withdrawal agreement), there is an understandable desire of the Member States to allow for the extension of the withdrawal period, the author must emphasise that the specific case of Brexit has indicated at least partial impairment of the regular functioning of the EU due to multiple extensions of the withdrawal agreement. Additionally, it should be noted that the determination of new commitments by the exiting Member States in the European Council's decisions on extending the withdrawal period is extremely problematic from the perspective of respecting the principle of equality of Member States. A solution to this issue could be provided by defining a longer withdrawal period.

Finally, the author proposes changing the required majority for the conclusion of a withdrawal agreement to an absolute majority. This

change is suggested based on a comparison of the accession and withdrawal processes, highlighting that the smaller required majority for the conclusion of a withdrawal agreement does not reflect the real weight of all legal, economic, and political consequences of a Member State's withdrawal from the EU. Similarly, drawing an analogy with the right to extend the exit period, which requires the consent of the European Council, decision-making by a qualified majority vote in the European Council regarding the conclusion of a withdrawal agreement is considered unjustifiable. The author argues that decision-making on the withdrawal agreement with unanimity would increase the democratic legitimacy of the agreement reached.



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