Research Article

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Brexit and the limits of Article 50 Treaty of the European Union

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Abstract: This article aims to analyse the limits of Article 50 of the Treaty of the European Union (TEU) which expressly consecrates a Member State's unilateral right to leave the Union. However, the provision seems to raise more questions than it answers due to the lack of concrete legal guidelines, and Brexit has underlined this reality. For example, the exit procedure contemplates the possibility of signing a withdrawal agreement with the European Union (EU), but it does not discipline its content. In our opinion, any agreement must regulate three questions: fundamental rights, financial settlement, and borders. A second limitation refers to the possibility of a Member State withdrawing its withdrawal notice. This question has recently been decided by the Court of Justice of the European Union (CJEU) in a manner that leaves the EU without any say in the process. Finally, the provision does not deal with the constitutional implications of withdrawal: treaty revision, institutional deadlock, and institutional representation. In sum, these critical omissions are analysed considering the relevant legal doctrine, jurisprudence, as well as the Brexit process. It also proposed that Article 50 of the TEU be amended in the future.

Keywords: withdrawal agreement; revocation of a withdrawal notice; constitutional and institutional implications.

1 Introduction

One of the novelties of the Treaty of Lisbon, as emphasized by the German Federal Constitutional Court, in its Lisbon judgement, is the introduction of an explicit withdrawal clause in European Union (EU) primary law. The codification of such a right in Article 50 of the Treaty of the European Union (TEU) has received mixed reviews. In this sense, Marianne Dony (2010, 67) writes that supporters of a withdrawal clause underline the fact that belonging to the European Union (EU) is not an imposition but a choice, while those who are more critical argue that it is contrary to the interests of the Union and its citizens. This ambivalence is also present in Koen Lenaerts and Piet Van Nuffel's assessment (2011, 98) of the right to withdraw when they defend that it "may endanger the internal cohesion of the Union" but sustain that it "also underscores the deliberate choice made by each Member State belonging to the Union".

However, the controversial nature of recognizing withdrawal in the Treaty is but one piece of the legal and political puzzle. More important is the fact that the consecration of the right to leave the EU raises more questions than it resolves due to the lack of clarity and the absence of concrete legal guidelines connected to the provision. In our opinion, these limits or deficiencies are a source of political uncertainty and legal insecurity that render the norm incapable of answering the numerous thorny questions that will stem from the withdrawal of the United Kingdom or any other Member State due to the lack of domestic political support or other reason (for example: the euro and sovereign debt crisis). The perception of this dubious situation is brilliantly captured by Neil Walker (2016, 125) in these words: "but my inability to express the meaning of Brexit also has to do with the sheer uncertainty of what will follow. The skies are ominously dark, the short and long-term forecasts are deeply unpredictable". Consequently, one of the most important outcomes deriving from Brexit refers to the awareness of the limits and need to reform Article 50⁹ of the TEU.

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This article seeks to critically analyze the challenges that the exit clause raises for the future of European integration, particularly in relation to the withdrawal agreement, the possibility of revoking a withdrawal notice, and the constitutional impact associated with leaving “Lisbon”. In order to achieve this aim, I will resort to the legal and political doctrine that discusses the right to leave as well as the Court of Justice of the European Union’s decision regarding the revocability of that right.

2 The right to withdraw

Article 50, n° 1, of the TEU, states that any Member State has the right to withdraw from or leave the EU according to the rules prescribed in its constitution. The wording of the first part of this disposition firmly establishes a right to withdraw and the exercise of this right is not dependent upon the verification of any “substantive conditions” according to authors such as Hannes Hofmeister (2010, 592) or Eliza Malathouni (2008, 115). In other words, a Member State who chooses to exercise its right to exit the Union does not have to justify or explain its action, not even invoke the classical reasons for withdrawal or secession of a political subunit as underlined by Cass Sunstein (1991, 654): limitation of civil and political rights; economic self-interest; economic exploitation; history and territory (i.e., questions connected to the original acquisition); as well as cultural integrity and self-determination.

The second part of the norm under analysis ties the right to withdraw from the EU to the observance of the rules prescribed in the constitution of the Member State who has exercised its “option” – in the words of Ingolf Pernice (2009, 405) – to leave. The compliance with the rules and procedures established in the fundamental law of the Member State who wishes to exit the Union is of paramount importance in the opinion of Jean-Victor Louis (2006, 306) who considers that this legal criterion decouples this right from everyday politics. In this sense, he offers the example of the Government of Malta which manifested its intention to join the Union; then suspended the decision; and later expressed a renewed desire to accede to the EU. However, Brexit offers the best example of the need to follow domestic constitutional requirements. One cannot forget the legal and constitutional controversy regarding the participation of Parliament in the withdrawal process. Although the United Kingdom (UK) Government did not want to involve Parliament in the triggering of Article 50 of the TEU, the Courts decided otherwise. In the Case *R – on the application of Miller and another (Respondents) v. Secretary of State for Exiting the European Union (Appellant)* – the Supreme Court ruled on January 24, 2017 that the Government could not trigger Article 50 without obtaining parliamentary authorisation. Following that decision, the UK Parliament adopted the “European Union (Notification of Withdrawal) Act 2017” on March 13, 2017.¹

In sum, Article 50, n° 1, of the TEU, recognizes a unilateral right to withdraw from the EU that resembles the right to secede from a confederation or withdraw from an international organization, and it also constitutes a significant argument for those who argue that the Union is a voluntary association of States as opposed to a *mixtum compositum* (Schütze, 2015, 75), i.e., a hybrid combining international and federal elements (Wyrozumska, 2013, 1415); a federal polity (Harbo, 2008, 144); a federal association or union of States and citizens (Everling, 2010, 701; Barata, 2014); a constitutional composite (Pernice, 2009, 349). It also stands in stark contrast to what occurs in a federation. According to Ronald Watts, the constitution of the federation does not recognize a unilateral right of the constituent units (i.e., federated states) to withdraw or secede (2008, 169). These different and opposing understandings lead the Federal German Constitutional Court to reject the federal idea and explain the legal nature of the European Union as a “Staatenverbund” or an “Association of Sovereign States”, a position which is partly based on the recognition of a right to unilaterally withdraw from the Union.²

¹ The Act came into effect when royal assent was signified on the morning of 16 March 2017.

² German Federal Constitutional Court decision on the Lisbon Treaty, June 30, 2009, paragraphs 256, 329 and 330.

3 Withdrawal agreement

In the words of Jean Claude Piris (2010, 10) Article 50, n° 2, of the TEU, consecrates a “divorce procedure”. However, the procedure laid down in the provision is described as “embryonic” by the legal doctrine, (Malathouni, 2008, 115). Firstly, the Member State who has decided to withdraw from the EU must notify the European Council of its intention to do so. The reception of the notification triggers the next step in the procedure. This step concerns the negotiation and signing of an agreement between the withdrawing State and the EU governing the exit and bearing in mind the future relationship between the two parties, according to the guidelines prescribed by the European Council.

The agreement shall be negotiated in accordance with the rules provided in Article 218°, n° 3, of the Treaty on the Functioning of the European Union (TFEU) which disciplines the conclusion of international agreements by the Union. According to this provision, the Commission must submit recommendations to the Council which then authorizes the opening of the negotiations. The Council also adopts the negotiation directives and appoints the negotiating team. Once an agreement is reached, the Council authorizes its signing according to Article 218, n° 5, of the TFEU. Council deliberations are based on a qualified majority and the procedural rules relative to international agreements require that it obtain the consent of the European Parliament.

The agreement foreseen in Article 50, n° 2, of the TEU, is widely discussed in the legal doctrine because of the important questions connected to it. One of the first observations made relative to the agreement is that it is not mandatory. Therefore, there can be a withdrawal from the EU with an agreement or without an agreement. In other words, there are two types of withdrawal according to Fausto de Quadros (2013, 447). A second issue raised by wording of the norm is tied to the regulation of the withdrawal arrangements and the framework for the future relationship with the Union. This might entail the need for “one or more treaties between the EU and recessed state” according to Jacques Ziller (2020, 12). A final question refers to the specific content of the withdrawal agreement. The provision does not specify what type of matters should be covered by the agreement. This omission is criticized by several authors which leads them to consider concrete areas that an agreement should govern (Craig, 2017, 59). Considering the Brexit experience, a withdrawal agreement must cover at least three matters: fundamental rights; financial responsibilities; borders.

3.1 Fundamental rights

A specific matter that should be regulated in the withdrawal agreement refers to fundamental rights and this question is raised by several authors. For example, Ingolf Pernice (2017, 235) considers the impact of withdrawal on fundamental rights of European Union citizens and sustains that “the notice under Article 50 TEU, instead, withdraws citizen’s rights: non-discrimination and free movement, the active and passive right to vote in the country of residence at the local level and at European elections, judicial protection against any violations of fundamental rights and liberties”. This question is also analyzed by Koen Lenaerts and Piet van Nuffel (2011, 99) who write the following: “in this connection, it will have to be determined to what extent rights and obligations stemming from Union law may continue to apply to citizens of the withdrawing Member State”. In this sense, Paul Craig considers the Brexit process and sustains that “people matter too, pre-eminently so, and the withdrawal agreement will address the rights of citizens living in the UK, and UK citizens residing in the EU” ((2017, 58). However, the question of fundamental rights is not circumscribed to citizens or natural persons. Withdrawal also affects the rights and obligations of other legal persons. In this sense, German author Jochen Herbst (2005, 1757) defends that “most importantly, though not expressly mentioned in the provision, any legal consequences of the withdrawal regarding the rights and obligations for any natural persons and legal entities affected by the withdrawal need to be dealt with. In the absence of a well-drafted withdrawal implementation agreement, the specific legal consequences will remain open to doubt”.

3.2 Financial responsibilities

A second aspect that a withdrawal agreement must cover relates to the financial settlement between the withdrawing Member State and the EU. The need for a settlement derives from the fact that the EU could claim that a departing State settle its previous budget commitments in relation to the Union. However, Article 50 of the TEU is silent on the matter.

In the absence of any legal criterion relative to the question of a withdrawing Member State's financial responsibilities, the withdrawal agreement must consider this question. It is a matter of legal certainty between the parties involved on both sides of the Channel.

In the case of Brexit, the EU expects the UK to honor its share of the financing of all the obligations undertaken while it was a member of the Union. Therefore, it demands a single financial settlement to be paid in euros by the United Kingdom to cover, according to Maria-Luisa Sánchez-Barrueco (2018, 459), “budgetary contributions, termination of membership of EU institutions and bodies, and participation in EU spending policies and programmes”. In addition, the financial settlement must contemplate the withdrawing Member State's liabilities. In the case of the UK these would encompass, according to Sánchez-Barrueno (2018, 464) pension liabilities; certain non-EU and mixed financing schemes and programs; membership of the European Investment Bank (EIB); participation in the assets and liabilities involving EU buildings. Consequently, financial or economic withdrawal might take years to achieve and will certainly not occur at the same time as political withdrawal.

3.3 Borders

A third and final question that a withdrawal agreement must regulate pertains to borders. This is an important aspect of withdrawal since borders with or without infrastructure will have to be reintroduced between the departing State and the European Union. However, Brexit has shown that this question is harder than one might think due to the situation of Northern Ireland and previous peace agreements that provided for no hard border between Northern Ireland and Ireland.

4 Withdrawing a withdrawal notice

According to Article 50, n^o 3, of the TEU, the Treaties governing the EU cease to apply in the Member State who has exercised its right to withdraw from the Union when the withdrawal agreement enters effect. However, this is the first of two possible deadlines. A second deadline may be found in the subsequent part of the norm in question and regulates the possibility of a withdrawal without an agreement. In such a case, the treaties cease to apply two years after the formal notification of a Member-State's decision to exit the Union. However, the last part of the norm under analysis permits an extension of this two-year period. The European Council can extend this period after having obtained the agreement of the Member State.

One of the most contentious issues surrounding Article 50 of the TEU relates to the question regarding the possibility of withdrawing a Member State's withdrawal notice during the transitional period. In other words, can a Member State change its mind during this initial two-year period or is withdrawal a “one-way street to exit once invoked” (Craig, 2016, 464)? Legally speaking, is revocation possible? This problem derives from the fact that the legal precept which regulates the right to leave the European Union does not offer the interpreter any clear guidance to resolve this matter. On the contrary, the legal and political debate regarding this poorly drafted provision suggests various and conflicting interpretations.

4.1 Political arguments

The question regarding a State's right to withdraw its withdrawal notice has received different answers from academics belonging to the political science and legal backgrounds who have reflected upon this matter. Their answer to this

question is tied to the analysis of the right to withdraw and the possibility of a Member State using this right to threaten other States, as a negotiating strategy, to obtain a better deal when negotiating at the European level. Therefore, the possibility of withdrawal being misused influences the answer to the initial question. On the one hand, the potential abuse of the withdrawal clause leads authors like Raymond Friel (2004a, 426) to reflect upon the possibility of a Member State withdrawing the withdrawal notification. Although he advocates that a Member State should be allowed to withdraw its withdrawal notice, he is uneasy about this course of action because of its possible use as a negotiating strategy between States and sustains that the threat of withdrawal favors the larger States of the Union. This understanding of the threat of withdrawal favoring the larger Member States is also shared by Alan Tatham (2012, 151) who sees it as a “potent weapon” and a “trump card”. On the other hand, Jean-Victor Louis (2006, 308) defends that a Member State should not be allowed to withdraw its withdrawal notice and justifies his position on the grounds of the possible abuse of the right in question. Finally, other authors base their positive answer to this question on the ultimate will of the Member-State. Therefore, state sovereignty serves as a basis for arguing that revocation is possible so long as it is compatible with the constitutional requirements of the Member-State.

4.2 Legal perspectives

Moving away from the political, other authors are clearly more legal in their approach to the possibility of withdrawing a withdrawal notice. On the one hand, there are several authors that deny this course of action. They argue that unilateral revocation is impossible since Article 50, n^o 2, of the TEU is silent on the matter and that one should not read any right into the text unless that can be inferred by the context. In addition to this argument, authors such as Lazowski (2012, 523), defend that Article 50 of the TEU should be read as a complete provision that describes the entire withdrawal process. Consequently, if the withdrawing Member States wishes to maintain its ties to the EU it can request for an extension of the withdrawal deadline which is foreseen in Article 50 (3) of the TEU or reapply for membership according to the rules laid down by the Treaties.³ Others contend that a Member State has no right to revoke its withdrawal notice because that would depend on the willingness of the other Member-States and seek to limit potential abuse of the exit clause.

On the other hand, there are several authors who sustain that a Member State can revoke its withdrawal notice. However, they differ in their reasons. A first group resorts to public international law and invokes Article 68 of the VCLT to sustain that under international law a Member States has a right to revoke a withdrawal notification (Sari, 2017). A second group deduces an implicit right of revocation from the absence of an explicit contrary provision that denies this possibility in the Treaty. This is a formal argument since Article 50 of the TEU is silent on the matter. Lastly, a third group reads the relevant provision from a teleological perspective and interprets Article 50 of the TEU within the context of the objectives of the Treaty. Since one of those objectives is to establish an “ever closer Union” a solution to this question must help States remain within the European Union. Consequently, revocation is possible.

4.3 Preliminary Reference

The question regarding the possibility of a Member State revoking its withdrawal notice unilaterally came up in a petition for judicial review that was filed during the month of December 2017 in the Court of Sessions, Inner House, First Division (Scotland, United Kingdom) by members of the UK Parliament, the Scottish Parliament, and the European Parliament. On October 3rd, 2018 the Scottish Court referred the question to the Court of Justice of the European Union (CJEU) through the preliminary reference procedure foreseen in Article 267 of the TFEU and requested that the Court in Luxembourg apply the expedited procedure. This procedure allows the CJEU to reduce procedural time-limits and give a case absolute priority.

³ See Article 50 (5) and Article 49 of the TEU.

4.4 The Advocate-General's Opinion

The Advocate-General at the Court of Justice - Campos Sánchez-Bordona – defended that a Member State has the unilateral right under Article 50 of the TEU to revoke its notification of the intention to withdraw from the European Union. The Advocate General states that a Member State may revoke its withdrawal notice if this “has been decided upon in accordance with the Member States constitutional requirements, is formally notified to the European Council and does not involve an abusive practice”.⁴

This conclusion is based upon two observations. Firstly, Article 50 of the TEU does not expressly foresee this hypothesis. Secondly, the Advocate General turns to public international law and the Vienna Convention on the Law of Treaties (VCLT). According to Article 68 of the VCLT notifications of withdrawal from an international treaty may be revoked at any time before they take effect. However, the possibility of unilateral revocation is subject to certain limits namely: the European Council must be notified; revocation must respect national constitutional requirements. Lastly, there is a temporal limit. In the eyes of the Advocate General, revocation can only occur in the initial two-year period and the principles of good faith and sincere cooperation must be observed to prevent any abuse.⁵

4.5 The Court of Justice's ruling

The Court of Justice Union had never ruled directly on the question of withdrawal since this legal possibility was not foreseen in the Treaties until Lisbon. Therefore, Article 50 TEU “marks a significant departure “from the former Treaties” (Wyrozumska, 2012, 362-362). Before the Lisbon Treaty, the possibility of withdrawal was a hypothetical question that entertained politicians and puzzled academics. According to Piet Eeckhout and Eleni Frantziou the “majority opinion held that withdrawal from the EU was possible, but only through a consensual process under Article 54 of the Vienna Convention on the Law of Treaties (VCLT)” (2017, 706). However, unilateral withdrawal was and is more controversial. On the one hand, some authors resorted to International Law in order to defend that a Member-State possessed a unilateral right to withdraw from the European Union and invoked the exceptions laid down in Article 56 of the VCLT relating to the intentions of the parties involved and the nature of the treaty. On the other hand, several authors have pointed towards the federal character of the Union and the fact that the European Treaties created an autonomous legal order for an unlimited duration⁶ in order to sustain the contrary position, stressing certain paragraphs that underline these ideas in the jurisprudence of the CJEU (*Van Gend en Loos*, *Costa v ENEL*, *Simmenthal*, *Internationale Handelsgesellschaft*, etc.).

During the month of December 2018, the CJEU got its first chance to rule on Article 50^o of the TEU and decided the preliminary reference made by the Scottish Court of Session relative to the possibility of withdrawing the withdrawal notification. In the case *Wightman and Others v. Secretary of State for Exiting the European Union*, the Court of Justice ruled that the United Kingdom is free to unilaterally revoke the notification of its intention to withdraw from the EU.

In its decision, the Court notes that there is no provision in Article 50 TEU that explicitly addresses the question of revocation. However, the Court resorts to the objectives of Article 50 to sustain that a Member State has the sovereign right to leave the EU in accordance with its constitutional requirements and the provision in question enables such a withdrawal in an orderly fashion. The central argument made by the Court revolves around the sovereign nature of the right to leave. It is that nature that supports the conclusion that a Member State has a right to revoke its notification of its intention to withdraw from the European Union. In the words of Armin Cuyvers (2019, 1310) “the ECJ found that the sovereign nature of the choice to *leave* the EU extends to the choice to revoke and hence *remain* in the EU. If leaving is a sovereign choice, then so is remaining”. Cuyvers argues that the CJEU applied the legal norm relating to the unilateral right to withdrawal analogously to the right to revoke the exit notification. Thus, the Court considers that a Member State can unilaterally revoke its withdrawal notification if this decision is taken in accordance with its constitutional requirements and the withdrawal agreement has not entered into force, nor the two-year transitional period or any

⁴ Court of Justice of the European Union Press Release N° 187/18, Luxembourg, 4 December 2018 relative to the Judgement in Case C-621/18 *Wightman and Others v Secretary of State for Exiting the European Union*.

⁵ See paragraph 9 of the Press Release.

⁶ Article 53 of the Treaty of the European Union.

extension has not expired. However, the Court does place two conditions upon the exercise of this unilateral right. Firstly, the European Council must receive the revocation in writing. Secondly, it must be unequivocal and unconditional. In sum, the CJEU begins its interpretative journey with European Union law – Article 50 of the TEU – and ends it when it arrives at the Member State’s Constitutional Law, in order to justify that it has a unilateral right to revoke a withdrawal notification which, in the final analysis, “reflects a sovereign decision to retain its status as a Member State of the European Union”.⁷

4.6 Comments

Although the Advocate General and the Court of Justice of the European Union take different routes (i.e., public international law *versus* European Union law) their conclusions are similar in the sense that they both support the existence of a Member State’s unilateral right to withdraw its withdrawal notification.

However, we do not entirely agree with the Court’s findings. Our disagreement with the Court is due to the possibility of revoking the withdrawal notice during the extension period. According to the Court, the Member State has a sovereign right to revoke its intention to withdraw unconditionally during the initial two-year period or any extension of that transitional period. In other words, the Member State has a unilateral right to revoke its revocation notice at any time. Consequently, it has deprived the EU of any say regarding revocation, particularly in the extension period.

The problem with this position is that it treats these two periods in the same way. In our opinion, the extension period should be treated differently. A Member State is only a Member State of the Union in this period because it has asked for an extension of the initial two-year transitional period and the European Council – a European Union institution - has agreed to it in accordance to Article 50 (4) of the TEU. Therefore, we are in a specific period where a State cannot claim absolute sovereignty. On the contrary, its sovereignty is limited. In other words, its continued membership within the Union is not only derived from its sovereign will but also from the will of the European Union. Therefore, we defend that any change in its future and potential status within the Union should also be decided by that Union. In other words, a Member State’s right to withdraw its withdrawal notification should not be considered as unilateral if it occurs within the extension. On the contrary, the right to revoke its withdrawal notification should be interpreted as conditional upon the obtaining of the consent of the European Council.

5 Constitutional questions

The procedural rules on withdrawal are highly deficient because they do not contemplate the question of the effects or consequences of withdrawal on the “constitution” of the European Union. In this sense, Ingolf Pernice (2017, 233) considers the effects of Brexit in the light of European constitutionalism and defends that to “withdraw from the Union is not an easy operation. It is a serious constitutional rupture, with important implications for the constitution both, of the EU and of the UK”. Therefore, it is imperative that the constitutional implications or impacts deriving from any exit or Brexit be considered, since they are not addressed in Article 50 of the TEU. These include treaty revision, institutional deadlock, and institutional representation.

5.1 Treaty revision

The departure of any Member-State from the European Union will automatically create a necessity “to delete all provisions and protocols annexed to the Founding Treaties touching upon a departing country”. This consequence which is noted by Adam Lazowski (2012, 529) is not considered in the wording of Article 50 of the TEU. Therefore, the remaining Member-States would have to resort the revision procedures laid out in Article 48 of the TEU to deal with

⁷ See the Court of Justice of the European Union Press Release n° 191/18, Luxembourg, 10 December 2018 relative to the Judgement in *Case C-621/18 Wightman and Other v Secretary of State for Exiting the European Union*.

the formal “constitutional” implications of any withdrawal. However, this is not an ideal solution because the general revision procedure is cumbersome. The Treaties could have contemplated a simplified revision procedure to deal with the specific consequences of withdrawal.

5.2 Institutional deadlock

A second question of a more constitutional nature that Article 50 of the TEU does not consider is the possibility of negotiation failure within the European Union because the withdrawal agreement might not obtain the necessary consent of the European Parliament or the approval of the Council. This situation relative to “institutional divergence” - an expression used by Christophe Hillon (2015, 136) - within the Union is considered by Maria Luísa Duarte (2005, 433) who defends that a Member State retains its “fundamental right to leave, which is solely dependent upon the unilateral act of notification”.

5.3 Institutional representation

A final set of questions pertain to the operation of specific institutions in the European Union. In this sense, Hofmeister (2010, 594) and Friel (2004a, 426) remind us that the withdrawal of any Member State would have significant changes on the composition and operation of the Union’s institutions. Consequently, one must analyze how Article 50 of the TEU treats the questions pertaining to the functioning of Union institutions.

Firstly, Article 50, n^o 4, of the TEU, curtails the rights of the representatives from the withdrawing Member State in two European institutions: the European Council and the Council. In this sense, representative from the withdrawing Member State in these two European institutions cannot participate in the deliberations and decisions regarding withdrawal.

The provision is criticized by the legal doctrine because it leaves out other institutions of the EU. For example, several authors criticize the fact that Members of the European Parliament (MEP) from the Member-State that has exercised its right to withdraw from the Union maintain their rights. In other words, a MEP can participate and vote in the deliberations connected to the approval or rejection of the withdrawal agreement. This possibility is especially considered by Michael Dougan who offers a possible explanation for not extending any type of limitation to institutions such as the European Parliament, the European Commission or the Court of Justice of the European Union. In his opinion, the limitations in article 50, n^o 4, of the TEU, were probably not extended to these institutions because of their supranational character. However, Dougan (2008, 688) does not agree with this option and defends that “there is no good reason to offer the MEP the right to exercise any influence (let alone a potentially decisive one) over the agreement which will determine future relations between that country and the Union”.

Secondly, the legal literature points to the fact that the provision does not cover judicial matters. In this sense, the precept in questions does not offer any legal guidelines relative to the operation of the Court of Justice of the European Union. According to Ladowski (2012, 531) a decision would have to be made regarding the Judges and Advocate Generals from the departing country. That decision would have to refer to the possibility of hearing new cases and the temporal limit of their functions. There is no reason to bar Judges from the State who has formally notified the European Council of its decision to withdraw from continuing to hear and decide cases. However, their terms should formally end on the date of withdrawal from the EU.

Within this judicial operational context, Friel (2004a, 425) raises a very interesting point connected with the possibility of a withdrawing Member State appointee to the Court of Justice of the European Union participating in a case surrounding withdrawal. According to Article 218, n^o 11, of the TFEU, any Member State, the European Parliament, the Council and the Commission may obtain an opinion from the Court of Justice on a draft international agreement in accordance to the Treaties. This includes a draft withdrawal agreement. However, the provision referring to withdrawal does not contemplate this possibility.

6 Conclusion

The Treaty of Lisbon formally recognizes a right to withdraw from the EU and the introduction of this possibility in the Treaties underlines the voluntary character of the Union. In other words, membership in the Union is not an imposition – it is an option. The right to leave the European Union is not tied to the verification of any condition. Therefore, Member-States have a unilateral right to withdraw from the Union which is typical of a confederation.

However, Article 50^o, of the TEU, is very sketchy and leaves many questions unanswered that should be addressed in the future. One of most important queries regarding this provision refers to the absence of legal guidelines relative to what matters should be regulated in the withdrawal agreement concerning the exit and future relations between the two parties, particularly in relation to fundamental rights, financial implications associated with the exit process, and borders. In our opinion, future alterations to the provision should render the withdrawal agreement mandatory and cover these issues. Secondly, the possibility of revoking the notification of withdrawal should be codified in a future Treaty amendment. However, a limit should be placed on revocation if it occurs in the temporal period beyond the initial two years in the sense of involving the Union's institutions. Lastly, the provision should address the constitutional issues that would derive from any exit, be it the United Kingdom or any other Member State. These include a specific treaty revision procedure related to any exit, institutional deadlock, and the rights of institutional representatives in the case of withdrawal.

In sum, the deficiencies associated with Article 50 of the TEU should be considered as an opportunity to propose practical solutions (i.e., amendments) that address the questions raised (i.e., limits) in a future revision of the Lisbon Treaty, in view of the fact that, presently, it constitutes but a general outline to secede from the Union (Tatham, 2012, 154). However, controlling withdrawal and making it less unilateral and thus approximating it to the “hybrid character” of the European Union, to borrow a term used by Anna Wyrozumska (2012, 363), will probably generate further political complications, since this step (i.e., answering the questions that were outlined in the preceding sections) is likely to divide those that support State sovereignty and those who defend a more perfect and an ever-closer Union.

References

- Barata, Mário S., 2014. “A Natureza Jurídica da União Europeia Após o Tratado de Lisboa”, *Boletim da Faculdade de Direito de Coimbra*, 90, pp. 263-313.
- Craig, Paul, 2017. “The Process: Brexit and the Anatomy of Article 50”, *The Law & Politics of Brexit*, Oxford University Press.
- Craig, Paul, 2016. “Brexit: A Drama in Six Acts”, *European Union Law Review*, 41, pp. 447-468.
- Cuyvers, Arnin, 2019. “Wightman, Brexit, and the Sovereign Right to Remain”, *Common Market Law Review*, 56, pp. 1303-1331.
- Dashwood, Alan, Michael Dougan, Barry Rodger, Eleanor Spaventa and Derrick Wyatt, 2011. *European Union Law*, 6th edition, Hart Publishing.
- Dony, Marianne, 2010. *Droit de l'Union Européenne*, Editions de L'Université de Bruxelles.
- Dougan, Michael, 2008. “The Treaty of Lisbon 2007: Winning Minds, not Hearts”, *Common Market Law Review*, 45, pp. 617-703.
- Duarte, Maria Luísa, 2005. *Estudos de Direito da União e das Comunidades Europeias II*, Coimbra Editora.
- Eeckout, Piet and Eleni Frantziou, 2017. “Brexit and Article 50 TEU: A Constitutionalist Reading”, *Common Market Law Review*, 54, pp. 695-734.
- European Parliament Policy Department for Citizen's Rights and Constitutional Affairs, 2018. *The (ir-)revocability of the withdrawal notification under Article 50 TEU (by Papageorgiou, Ioannis)*, European Union.
- Everling, Ulrich, 2010. “The European Union as a Federal Association of States and Citizens”, *Principles of European Constitutional Law: Revised Second Edition*, Hart Publishing.
- Friel, Raymond J., 2004a. “Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution”, *International and Comparative Law Quarterly*, 53, pp. 407-428.
- Friel, Raymond J., 2004b. “Secession from the European Union: Checking out of the Proverbial “Cockroach Motel””, *Fordham International Law Journal*, 27, pp. 590 – 640.
- Harbo, Florentina, 2008. “Secession Right – an Anti-Federal Principle? Comparative Study of Federal States and the EU”, *Journal of Politics and Law*, 1, pp. 132-148.
- Herbst, Jochen, 2005. “Observations on the Right to Withdraw from the European Union: Who are the “Masters of the Treaties”?”, *German Law Journal*, 6, pp. 1755-1760.
- Hillion, Christophe, 2015. “Accession and Withdrawal in the Law of the European Union”, *The Oxford Handbook of European Union Law*, Oxford University Press.

- Hofmeister, Hannes, 2010. "Should I Stay or Should I Go? – A Critical Analysis of the Right to Withdraw from the EU", *European Law Journal*, 16, pp. 589-603.
- Lazowski, Adam, 2012. "Withdrawal from the European Union and alternatives to membership", *European Law Review*, pp. 523-540.
- Lenaerts, Koen and Piet Van Nuffel, 2011. *European Union Law*, Sweet & Maxwell.
- Louis, Jean-Victor, 2006. "Le Droit de Retrait de L'Union Européenne", *Cahiers de Droit Européenne*, 42, pp. 293-314.
- Malathouni, Eliza, 2008. "Should I Stay or Should I go: The Sunset Clause as Self-Confidence or Suicide", *Maastricht Journal of European and Comparative Law*, 15, pp. 115-124.
- Mancinni, Susanna, 2012. "Secession and Self-Determination", *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press.
- Pernice, Ingolf, 2017. "European Constitutionalism and the National Constitutions of the Member States: Implications for Brexit", *Boletim da Faculdade de Direito da Universidade de Coimbra*, 93, pp. 211-244.
- Pernice, Ingolf, 2009. "The Treaty of Lisbon: Multilevel Constitutionalism in Action", *Columbia Law Journal*, 15, pp. 349-407.
- Piris, Jean-Claude, 2010. *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge University Press.
- Quadros, Fausto de, 2013. *Direito da União Europeia: 3ª edição*, Almedina.
- Sánchez-Barruenco, Maria-Luisa, 2018. "Leaving the EU Budget: Brexit and mutual financial claims", *ERA Forum*, 18, pp. 453-468.
- Sari, Aurel, 2017. "Reversing a Withdrawal Notification under Article 50 TEU: Can a Member State Change its Mind?", *European Law Review*, 42, pp. 451-473.
- Schütze, Robert, 2015. *European Union Law*, Cambridge University Press.
- Sunstein, Cass R., 1991. "Constitutionalism and Secession", *The University of Chicago Law Review*, 58, pp. 633-670.
- Tatham, Alan, 2012. "Don't mention Divorce at the Wedding: Darling! EU Accession and Withdrawal after Lisbon", *EU Law After Lisbon*, Oxford University Press.
- Walker, Neil, 2016. "The European Fallout", *German Law Journal*, 17, pp. 125-129.
- Watts, Ronald L., 2008. *Comparing Federal Systems*, 3rd edition, McGill Queen's University Press.
- Wyrozumska, Anna, 2013. "Article 50 Voluntary Withdrawal from the Union", *The Treaty on European Union (TEU): A Commentary*, Springer.
- Wyrozumska, Anna, 2012. "Withdrawal from the European Union", *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action*, Springer.
- Ziller, Jacques, 2020. *Advanced Introduction to European Union Law*, Edward Elgar Publishing Limited.