

# The Article 50 Procedure for Withdrawal from the EU: A Well-Designed Secession Clause

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## Introduction

Withdrawal from the EU has long been a matter of legal debate, and has drawn particular attention after the Brexit referendum. The ‘exit’ of an EU Member State raises numerous legal questions concerning issues such as the options available to the departing state after withdrawal,<sup>1</sup> the challenges for its constitutional law,<sup>2</sup> or the procedure for withdrawal, set in Article 50 TEU. The latter is an especially crucial problem, which remains under researched.

Article 50 TEU attracted significant criticism, because it explicitly recognises the right of EU Member States to unilaterally withdraw from the Union. Pursuant to this provision, ‘any Member State may decide to withdraw from the Union’, by notifying its intention to do so and either negotiating ‘arrangements for its withdrawal’ or simply waiting for two years. The possibility of unilateral withdrawal is theoretically problematic because it allegedly contradicts the integrationist rationale of the Treaties<sup>3</sup> and questions its (quasi-)federal nature.<sup>4</sup> While unilateral withdrawal is perfectly conceivable in the context of international organisations,<sup>5</sup> unilateral secession from federations is generally excluded.<sup>6</sup> The right to unilateral withdrawal might purportedly have also negative practical consequences. By giving EU Members ‘an unfettered right to unilateral withdrawal’,<sup>7</sup> Article 50 seems to ensure ‘state primacy’ throughout the withdrawal process, especially in the case of large withdrawing Member States, which might ‘control the process of withdrawal to their own benefit’.<sup>8</sup> Article 50 may therefore result in some sort of ‘regressive, gradual disintegration of the EU.’<sup>9</sup>

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<sup>1</sup> See e.g. J-C. Piris, ‘Which Options Would Be Available for the United Kingdom in the Case of a Withdrawal from the EU?’, in P. J. Birkinshaw and A. Biondi (eds.), *Britain Alone! The Implications and Consequences of United Kingdom Exit from the EU* (Kluwer Law 2016) p. 118.

<sup>2</sup> See e.g. M. Gordon, ‘Brexit: a Challenge for the UK Constitution, of the UK Constitution?’, 12 *European Constitutional Law Review* (2016) p. 1.

<sup>3</sup> P. Athanassiou, ‘Withdrawal and Expulsion from the EU and EMU: Some Reflections’, European Central Bank, Legal Working Paper Series (2009), <http://www.ecb.europa.eu/pub/pdf/scplps/ecblwp10.pdf>, p. 25.

<sup>4</sup> The ideas of ‘federalism’ and ‘federation’ are of course polysemic, see e.g. M. Claes and M. De Visser, ‘The Court of Justice as a Federal Constitutional Court: A Comparative Perspective’, in Cloots et al. (eds.), *Federalism in the European Union* (Hart 2012) p. 83 at pp. 83-85. Suffice to say that this contribution elucidates some similarities and differences between EU law and the law of some federal countries in respect of secession/withdrawal.

<sup>5</sup> See further *infra*, section 1.

<sup>6</sup> States are characterised by ‘close ties of interdependence’ based on shared values, which would be put into question by unilateral secession, see Supreme Court of Canada, Reference re Secession of Quebec [1998] 2 S.C.R. 217, para. 149. Cf. H. De Waele, ‘The Secession Conundrum – Through the Looking Glass’, 11 *European Constitutional Law Review* (2015) p. 609 at p. 614; W. Norman, *Negotiating Nationalism: Nation-Building, Federalism and Secession in the Multinational State* (Oxford University Press 2006) p. 175. See further *infra*, section 1.

<sup>7</sup> Hofmeister, *cit.*, p. 592. See also J. Friel, ‘Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution’, 53 *International and Comparative Law Quarterly* (2004) p. 407, pp. 424-427; J. Herbst, ‘Observations on the Right to Withdraw from the European Union: Who are the “Masters of the Treaties”?’, 6 *German Law Journal* (2006) p. 1755, pp. 1758-1760; A. F. Tatham, “‘Don’t Mention Divorce at the Wedding, Darling!’: EU Accession and Withdrawal after Lisbon”, in A. Biondi et al. (eds.) *EU Law after Lisbon* (Oxford University Press 2012), p. 152; H. Hofmeister, “‘Should I Stay or Should I Go?’ — A Critical Analysis of the Right to Withdraw from the EU”, 16 *European Law Journal* (2010) p. 589, pp. 23-25.

<sup>8</sup> Friel, *cit.*, p. 426. See also Tatham, *cit.*, 151-152.

<sup>9</sup> Hofmeister, *cit.*, p. 599.

Arguably, these critiques are not entirely well founded. To understand the real meaning and effects of Article 50 TEU, one should look, not only at the letter of this provision, but also at its interaction with other EU Treaty norms, and to their consequences in practice. When these factors are taken into account, it becomes apparent that the secession from the EU is less ‘unilateral’ than it may seem at first sight. The Member States do not have an ‘unfettered’ right to unilateral withdrawal and can hardly ‘control’ the withdrawal process. EU Treaties, on the contrary, impose taxing procedural restrictions, which buttress the negotiating position of the Union and deter its disintegration. Instead of contradicting the integrationist rationale of the Treaties, Article 50 arguably has beneficial effects on European integration, since it contributes to remedy the democratic deficit and enables the Union to control the departure of recalcitrant States.

By providing for a systemic analysis of Article 50 TEU and other withdrawal-related provisions, this paper contributes to the theoretical debate on the identity of the Union as a *sui generis* subject, and provides insight into the impact that Article 50 TEU may have in practice. It is worth noting that this paper focuses on a specific aspect relating to the withdrawal from the EU – the right to unilateral withdrawal – and does not seek to exhaustively chart the developments concerning the UK’s withdrawal from the EU.

The paper is divided in six sections. Section 1 introduces the concepts of unilateral secession (from States) and withdrawal (from international organisations), showing that unilateral secession is generally forbidden, while unilateral withdrawal is generally legal. Section 2 shows that, while Article 50 allows for unilateral withdrawal, it does not necessarily question the rationale of European integration: more important than the abstract possibility to ‘secede’ are the procedural restrictions to secession at the constitutional level. The paper then demonstrates that Article 50 introduces a procedure that discourages secession from the EU, in three ways. Firstly, Article 50 ensures the unity of the EU during withdrawal negotiations (section 3). Secondly, Article 50 restrains the discretion of departing States regarding the activation and termination of the withdrawal procedure (section 4). Thirdly, it is contended that the very concept of unilateral withdrawal under Article 50 is better understood as a risk for the withdrawing country, rather than as a right that the withdrawing State may exploit (section 5). The theoretical and practical impact of Article 50 TEU on the process of European integration are discussed in the conclusion (section 6).

## 1. Unilateral Secession and Federalism

The debate on the constitutional identity of the EU often addresses the analogy between the Union, on the one hand, and international organisations and States, on the other hand. The rules on the withdrawal from the EU may provide for an important argument in this debate, as international organisations and States address this issue in a different manner.

*Consensual* withdrawal (from international organisation) and secession (from States) are not exceedingly problematic. Article 54 of the 1969 Vienna Convention expressly enables States to withdraw from a treaty (such as the statute of an international organisation) whenever they obtain the ‘consent of all the parties’. Similarly, a province may secede from a State by reaching an agreement with the latter. The principle of self-determination means that, in international law terms, provinces have a right ‘to resolve their future status through free negotiation’ with their State.<sup>10</sup> The constitutional law of certain States seems to hinder consensual secession, since it postulates the ‘indivisibility’ of the country.<sup>11</sup> Nonetheless, it is clear that at least certain States – notably federations and devolved States – expressly recognise the right to consensual secession of all or some of their territories. For instance, the Constitution of Ethiopia recognises that ‘Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession’, coming into effect ‘when the Federal Government will have transferred its powers to the council of the Nation, Nationality or People

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<sup>10</sup> UK Minister of State, Foreign and Commonwealth Office, written answer to Lord Hylton, HL Deb 23 January 1991 vol 525 c9WA, available at [http://hansard.millbanksystems.com/written\\_answers/1991/jan/23/the-baltic-states](http://hansard.millbanksystems.com/written_answers/1991/jan/23/the-baltic-states). See also J. Crawford, *The Creation of States in International Law* (Oxford University Press 2007), pp. 394-395.

<sup>11</sup> E.g. Croatia, France, Macedonia, Romania, Slovakia, Spain, see Norman, cit., pp. 124-126.

who has voted to secede'.<sup>12</sup> Similarly, the Anglo-Irish Agreement of 1985 stipulates that, if a majority of the people of Northern Ireland clearly wish for the establishment of a united Ireland, the parties will introduce legislation to give effect to that wish.<sup>13</sup> The right to secession may not be spelled out in the Constitution, but still be recognised in the case-law. The Supreme Court of Canada, in particular, acknowledged the right of provinces to 'seek' independence, provided that they democratically decide to secede and negotiate secession with the federation and the other provinces.<sup>14</sup>

*Unilateral* withdrawal and secession, i.e. withdrawal or secession that are not the product of a negotiation,<sup>15</sup> are problematic. Unilateral withdrawal from international organisations is possible when it is expressly allowed by the statute of an international organisation (that is, in most cases).<sup>16</sup> For example, Article XV of the WTO agreement enables a Member State to unilaterally withdraw upon the expiration of six months from the date on which the State has given notice of withdrawal to the Organisation. Similarly, Art. 1 of the League of Nations' Covenant stipulated that any Member State could, after two years' notice of its intention so to do, withdraw from the League. Under Art. 56(1) of the 1969 Vienna Convention, withdrawal from an international organisation is possible even if it is not explicitly foreseen in its statute, provided that: it is established that the parties intended to admit the possibility of withdrawal (Art. 56(1)(a)), or a right of unilateral withdrawal is 'implied by the nature of the treaty' founding the organisation (Art. 56(1)(b)). According to a widespread view, it may be generally presumed that the nature of the treaties establishing international organisations implies the right to unilateral withdrawal. In principle, 'anything which is not conceded in favour of the organisation is retained by the member-State'; in the absence of an express stipulation, it may be presumed that the international organisation 'does not put any limitation on the right of the member-States to withdraw'.<sup>17</sup> It should be noted, at any rate, that the practice in this respect is not entirely straightforward.<sup>18</sup>

While unilateral withdrawal from international organisations seems often (if not always) possible, unilateral secession from States encounters several obstacles. International law may seem to be neutral with respect to unilateral secession. There generally is neither a right to unilateral secession by parts of independent States<sup>19</sup> nor a prohibition of such secession.<sup>20</sup> The principle of territorial integrity of States may potentially be questioned by unilateral secessions, but, as noted by the International Court of Justice, the 'scope of the principle of territorial integrity is confined to the sphere of relations between states',<sup>21</sup> and does not address non-State entities such as separatist groups. One should note, in any event, that a State constituted through unilateral secession is unlikely to receive wide recognition in the international community;<sup>22</sup> hence, the 'ultimate success' of such secession would be at risk.<sup>23</sup> Domestic laws are even

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<sup>12</sup> Article 39(1).

<sup>13</sup> Agreement Between the Government of Ireland and the Government of the United Kingdom, 15 November 1985, Article 1. This provision implies, of course, that the secession of Northern Ireland from the United Kingdom can hardly take place without the assent of the latter.

<sup>14</sup> *Reference re Secession of Quebec*, cit., para. 82.

<sup>15</sup> On the definition of 'unilateral secession', see *Id.*, para. 86.

<sup>16</sup> See Article 54 of the 1969 Vienna Convention.

<sup>17</sup> N. Singh, *Termination of Membership of International Organisations* (Stevens & Sons 1958), p. 86.

<sup>18</sup> See T. Christakis, 'Article 56, 1969 Vienna Convention', in O. Corten and P. Klein (eds.) *The Vienna Conventions on the Law of the Treaties: A Commentary, Volume 1* (Oxford University Press 2011) p. 1251, at p. 1275.

<sup>19</sup> J. Crawford, *The Creation of States*, cit., p. 415. The colonial context makes exception to this general rule. Furthermore, according to some, a right to secession may be the last resort for ending oppression (so-called 'remedial secession'), but it is doubtful whether such a right actually exists, see Jure Vidmar, 'Remedial Secession in International Law: Theory and (Lack of) Practice', 6 *St Antony's International Review* (2010), p. 37.

<sup>20</sup> T. Christakis, 'The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?', 24 *Leiden Journal of International Law* (2011): 73-86. It is worth noting that some States hold that unilateral secession is forbidden by international law, as it impinges on territorial integrity, see the opinions expressed by Serbia, Russia, Spain, and China in the hearings for the Advisory Opinion on Kosovo's declaration of independence of the International Court of Justice; for Serbia see CR 2009/24 hearing of 1 December 2009, paragraphs 4-6 pp. 63-65; Russia: CR 2009/30 hearing of 8 December 2009, paragraphs 5-7, p. 41 and paragraph 34; Spain, CR 2009/30 hearing of 8 December 2009, paragraph 31 p. 16; China, CR 2009/29 30 hearing of 7 December 2009 paragraph 15, p. 33.

<sup>21</sup> International Court of Justice, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Request for Advisory Opinion), 22 July 2010, par. 81.

<sup>22</sup> Cf. Crawford, cit., p. 414.

<sup>23</sup> Supreme Court of Canada, *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.

more hostile to unilateral secession from States.<sup>24</sup> Even the States that acknowledge the possibility of secession usually subordinate it to some action of the original State, such as a transferral of power (e.g. Ethiopia), the adoption of a law (e.g. United Kingdom), or the conclusion of an arrangement with the breakaway province (e.g. Canada).<sup>25</sup> The original State must be involved in the secession procedure because, as noted by the Canadian Supreme Court, States are characterised by ‘close ties of interdependence’ based on shared values, which would be put into question by unilateral secession.<sup>26</sup> Some form of negotiation between the State and the separatist entity is therefore required, to address the interests of the entire country and of its citizens.<sup>27</sup>

Unilateral secession therefore sets international organisations apart from States: while unilateral withdrawal is generally possible in the case of international organisations, it is generally not possible in the case of States, including federations. Consequently, the possibility to dissolve an entity ‘only by mutual agreement’ is often taken as an indicator of its statehood.<sup>28</sup>

## 2. Article 50 TEU: A Unilateral Secession Clause?

Given the different regulation of unilateral secession in international organisations and States, one may be tempted to identify the constitutional identity of the European Union by verifying whether its Member States actually have a right to unilaterally withdraw.

Before the Lisbon reform, the issue was unclear, because EEC/EU Treaties were silent on this topic, and no Member State ever sought withdrawal. In principle, one may argue that unilateral withdrawal from the EEC/EU was possible under Article 56(1)(b) of the Vienna Convention, given the EEC/EU’s character as an international organisation (see above, section 1). However, it seems more reasonable to consider unilateral withdrawal from the EEC/EU unwarranted, as it contradicted the nature of the EU as an organisation placing permanent limitations on the sovereign rights of the Member States.<sup>29</sup>

It is not longer necessary to address this issue in detail, since the European Constitution and, then, the Lisbon Treaty, introduced a ‘secession clause’, in what is now Article 50 TEU. This provision was first proposed by the European Convention Praesidium, reportedly to fight anti-EU media propaganda in the UK. As noted by a British member of the Praesidium, ‘We wanted to defuse the canard that you are tied to the EU, with no way out, proceeding to an unknown destination’.<sup>30</sup> Article 50 TEU provides for the right to unilateral withdrawal from the EU, since it expressly stipulates that a Member State may autonomously leave the Union simply by notifying its intention to do so and either concluding an agreement with the Union or waiting for two years after the notification.

The existence of an explicit right to withdraw from the European Union might potentially be regarded as evidence for the thesis that the European Union is not a State.<sup>31</sup> In fact, Article 50 was immediately perceived as a step back in European integration. Certain pro-EU members of the European Convention complained that it confirmed the EU’s character as a ‘traditional’ international organisation.<sup>32</sup>

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<sup>24</sup> An exception is provided by the Constitution of St Kitts and Nevis, whose Article 113 gives Nevis the right to unilateral secession.

<sup>25</sup> See above.

<sup>26</sup> *Reference re Secession of Quebec*, cit., para. 149. Cf. H. De Waele, ‘The Secession Conundrum – Through the Looking Glass’, 11 *European Constitutional Law Review* (2015) p. 609 at p. 614; W. Norman, *Negotiating Nationalism: Nation-Building, Federalism and Secession in the Multinational State* (Oxford University Press 2006), p. 175.

<sup>27</sup> *Reference re Secession of Quebec*, cit., para. 151.

<sup>28</sup> R. L. Watts, ‘Comparing Forms of Federal Partnerships’, in D. Karmis, W. Norma, *Theories of Federalism: A Reader* (Palgrave 2005), p. 233, at p. 235.

<sup>29</sup> See e.g. J. Hill, ‘The European Economic Community: The Right of Member State Withdrawal’, 12 *Georgia Journal of International and Comparative Law* (1982), p. 335.

<sup>30</sup> Brian Kerr, quoted in A. MacDonald and P. Taylor, ‘Federalists tried to kill EU exit clause; now Britain wants to dodge it’, *Reuters*, 28 June 2016, <http://uk.reuters.com/article/uk-britain-eu-article-idUKKCN0ZE18Y>.

<sup>31</sup> T. Lock, ‘Why the European Union is not a State’, *European Constitutional Law Review* (2009), p. 407, at p. 414.

<sup>32</sup> Cf. the ‘Explication’ annexed to the proposal of amendment of Art. 46 of the European Constitution, now Art. 50 TEU, by L. Michel et al., available at <http://european-convention.europa.eu/docs/Treaty/pdf/46/Art46MichelFR.pdf/>.

Even the representatives of some Member States criticised this provision at first.<sup>33</sup> Conversely, less Europhile commentators praised Article 50 TEU. The German Constitutional Court, in its judgement on the Lisbon Treaty, approved it, noting that it made explicit for the first time in primary law the existing right of each Member State to withdraw from the European Union. Therefore, according to that Court, Article 50 TEU ‘underlines the Member States’ sovereignty’ and shows that the current state of development of the European Union ‘does not transgress the boundary towards a state’.<sup>34</sup>

Both the praise and the criticism for Article 50 TEU are arguably too formalistic, and, consequently, misleading. While it is true that national constitutions generally prohibit unilateral secession, the absence of a right to unilateral secession ‘does not necessarily prevent strong subunits from achieving a strong bargaining position, because everyone is aware that secession can occur regardless of its legal legitimacy’.<sup>35</sup> Democratic constitutions may even stimulate secession, albeit indirectly. To respect and protect the rights to freedom of expression and freedom of association, democratic States must tolerate the advocacy of secession, the formation of parties with secessionist platforms, and the participation of said parties in provincial governments. Secessionists may therefore be in strong bargaining positions, which they might reinforce by calling for referenda on independence. States can hardly prevent a provincial authority to hold a ‘consultative’ referendum, and may find it difficult not to negotiate with the secessionists after their ‘victory’ in that consultation.<sup>36</sup>

As unilateral secession is always possible *de facto*, it is not very useful to concentrate on the abstract possibility of unilateral secession. It is arguably more reasonable to verify whether constitutional norms make it easier or more difficult for separatists to secede. As argued by Norman, the insertion of a ‘well-designed secession clause’ in national constitutions might have beneficial effects, as it may render secession less likely or more costly for the secessionists. Such a well-designed secession clause should define clear procedural rules which ensure that the secession process is democratic and orderly, and that it takes into due account the interests of both the secessionist province and of the State at large. For instance, the secession clause might alert secessionists that they would be sitting across from ‘quite-possibly-hostile negotiators elected specially to represent the interests of the rump state’.<sup>37</sup> By providing for clear rules, the secession clause may thus discourage rather than encourage secession.

This paper analyses Article 50 TEU from this perspective, and argues that it constitutes ‘a well-designed secession clause’. Rather than focusing on its formalistic nature – as a unilateral secession clause – the analysis elucidates the crucial elements of the procedure introduced by Article 50. This procedure does not foster unilateralism and, consequently, it does not underline the Member States’ sovereignty, quite the contrary. Article 50 TEU reinforces the negotiating position of the Union, since it ensures its unity during the negotiations with the withdrawing State (below, section 3). Moreover, it introduces considerable restraints to the discretion of the ‘secessionist’ State, regarding the activation of the withdrawal procedure and its termination (section 4). The very possibility of unilateral withdrawal appears as a constraint for the withdrawing State, rather than an advantage (section 5).

### 3. The EU’s Unity in Withdrawal Negotiations

To ensure an orderly secession, and to discourage casual invocations of it, ‘a well-designed secession clause’ should ensure that the State – or, in our case, the EU – may negotiate with the departing entity from a position of force. To achieve this result, the secession clause should ensure, first and foremost, the unity of the State (or EU) vis-à-vis the ‘secessionists’.

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<sup>33</sup> The then German Foreign Minister Joschka Fischer, for instance, declared that ‘This clause should be struck out. [...] So far there has been no need for an exit provision for the Union.’, quoted in MacDonald and Taylor, cit.

<sup>34</sup> BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08, para. 329.

<sup>35</sup> S. Mancini, ‘Secession and Self-Determination’, in M. Rosenfeld, A. Sajò, *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), p. 481, at p. 495.

<sup>36</sup> Norman, cit., p. 194.

<sup>37</sup> Id., p. 180.

The unity of the EU's representation is a notoriously complex problem. The Treaties confer the power to represent the EU externally on a plethora of bodies.<sup>38</sup> Moreover, the EU must often negotiate alongside its Member States: the conferral of limited competences to the Union implies that the external policy of the EU is limited *ratione materiae*. This problem might be exacerbated in the negotiation of the arrangements for withdrawal. In the absence of a 'secession' clause in the Treaties, withdrawal should be regulated by international law rules. Assuming that EU Treaties would not implicitly confer a right to unilateral withdrawal (see above, section 2), withdrawal from the Union would be possible only if approved by all the parties.<sup>39</sup> In other words, the withdrawing State would have to negotiate its 'secession' with all the other Member States.

A multilateral negotiation of withdrawal would offer the 'secessionist' State the opportunity to conduct separate talks with the other Member States. The withdrawing State – and especially a *big* withdrawing State – might offer benefits to selected countries, to play one State against the other and divide the Union. The absence of a withdrawal clause in EU Treaties may thus play against the EU's interests.

Article 50 TEU solves this problem. This provision clearly affirms that the withdrawing State must negotiate with the 'Union'. Article 50 seems thus to exclude the Member States from the negotiations, and it thereby prevents the withdrawing country from playing a 'divide and rule' strategy. Furthermore, Article 50 ensures that the EU is represented in an efficient manner, that is, by a single institution. It indeed stipulates that the Union should conduct negotiations 'in accordance with Article 218(3) TFEU', i.e. the negotiating procedure generally applicable to the agreements with third countries.

Article 218(3) TEU does not expressly identify the EU's representative in the negotiations with the withdrawing State. Nonetheless, a systematic assessment of different primary law provisions suggests that the Union should speak with 'one voice' in negotiations. Article 17(1) TEU provides for the general rule in this ambit, by stipulating that the EU's external representation is ensured by the European Commission, 'with the exception of: (a) the Common Foreign and Security Policy (CFSP), and (b) 'other cases provided for in the Treaties'. In the CFSP field, the EU is normally represented by the High Representative, pursuant to Article 27(2) TEU.<sup>40</sup> The Treaties also identify 'other cases' in which the EU's representation is not ensured by the Commission. For instance, according to Article 34(1) TEU, the Member States should 'uphold the Union's position' in international fora, which means that EU Members speak on behalf of the Union in several organisations of which the EU is not a member.

The general rules on external representation may seem to be applied in a special manner in respect of the conclusion of international agreements, since Article 218(3) TFEU stipulates that the Council may 'depending on the subject of the agreement envisaged' nominate 'the Union negotiator' or 'the head of the Union's negotiating team.' According to some authors, the Council's power to nominate the negotiator entails a margin of discretion: while the Commission normally negotiates agreements with third countries, Article 218(3) allegedly 'leaves it open for the Council to nominate a different Union negotiator.'<sup>41</sup> In my view, this interpretation of Article 218 is not satisfactory. Article 17(1) TEU provides for a rule (according to which the EU is represented by the Commission), which may be subject to exceptions 'provided for in the Treaties'. It stands to reason that such exceptions should be *explicitly* spelled out in primary law. Article 218(3) TFEU, far from introducing an exception to Article 17(1) TEU, confirms it, by affirming that the Council must nominate the EU's negotiator 'depending on the subject of the agreement envisaged'. The post-Lisbon practice supports this interpretation, since the Commission routinely negotiates non-CFSP agreements (*ex* Article 17(1) TEU), while the High Representative negotiates CFSP instruments (*ex* Article 27(2) TEU). The Court of Justice upheld this reading of Article

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<sup>38</sup> For instance, the European Commission represents the EU in the negotiation of agreements relating to trade, while the High Representative represents it for the negotiation of security-related agreements, see M. Gatti and P. Manzini, 'External Representation of the European Union in the Conclusion of International Agreements', 49 *Common Market Law Review* (2012), p. 1703.

<sup>39</sup> See above, section 1.

<sup>40</sup> It worth noting that the President of the European Council ensures the EU's representation in the CFSP field 'at his level', i.e. in summits at head of State level, see Article 15(5) TEU.

<sup>41</sup> E. Poptcheva, *Article 50 TEU: Withdrawal of a Member State from the EU* (European Parliamentary Research Service 2016), p. 4.

218(3) TFEU, since it affirmed that agreements between the European Union and one or more third States ‘are to be negotiated by the Commission’.<sup>42</sup>

According to some authors, the rules generally applicable to the EU’s external representation should not be used in the case of Article 50 TEU, since the ‘political’ character of withdrawal negotiations calls for a more intergovernmental procedure, to the extent that withdrawal should be ‘negotiated only with the Council’<sup>43</sup> and that ‘the role of the Commission is minimal’.<sup>44</sup> This argument is perhaps understandable from a political perspective, but does not seem to be sound from a legal viewpoint. The Commission is conferred a power of representation by Article 17(1) TEU and, as is well known, limitations to such a power can only come from the wording of the Treaties, and not from general principles or from political considerations.<sup>45</sup>

The Declaration of the (remaining) Member States of 15 December 2016 confirms the above interpretation of Article 50: EU States ‘invited’ the Council to nominate the Commission as the EU negotiator.<sup>46</sup> The States also welcomed the nomination of Michel Barnier as the Commission’s chief negotiator. The declaration arguably contains a legal imprecision, as it stipulates that the negotiating team of Mr. Barnier will have to include a representative of the Council presidency. In light of the Commission’s power of external representation and of its institutional autonomy, this institution should have the absolute power to determine who takes part in the negotiations. The Council presidency, in particular, should have no role in international negotiations, since EU Treaties confer it no power in this field. However, this problem should not be overemphasised. The Member States routinely interpret external relations procedures in a ‘creative’ manner,<sup>47</sup> and it is not surprising that they did so in this case, given the political importance of Brexit. What truly matters, in any event, is that the Member States recognised Barnier’s role as the head of the negotiating team. He will therefore be able to ensure that the Union speaks with one voice during the negotiations.

#### 4. The Not-So-Unilateral Character of Article 50 TEU

Article 50 TEU arguably constitutes a ‘well-designed secession clause’, not only because it allows the EU to speak with one voice, but also because it constrains the discretion of the departing State in the course of the procedure. In other words, the Article 50 procedure is less unilateral than it may appear at first sight. Section 4.1 explores the restrictions to the departing State’s discretion relating to the activation of the withdrawal procedure. Section 4.2 analyses the restraints to unilateralism regarding the termination of the procedure.

##### 4.1 *Obligation to Promptly Activate the Withdrawal Procedure*

Pursuant to Article 50 TEU, each EU Member may decide to withdraw from the Union ‘in accordance with its own constitutional requirements’. Subsequently, the departing State should simply ‘notify’ the European Council of its ‘intention’ to open negotiations with the Union, and eventually cease to be a EU Member, either after the conclusion of an agreement with the EU or after two years.<sup>48</sup>

At first sight, the departing State seems to enjoy unfettered discretion regarding the activation of the withdrawal procedure. This discretion might potentially be used to exert control on the withdrawal

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<sup>42</sup> *Commission v Council*, C-425/13, EU:C:2015:483, para 62.

<sup>43</sup> Tatham, cit., 154.

<sup>44</sup> P. Nicolaidis, ‘Withdrawal from the European Union: A Typology of Effects’, 20 *Maastricht Journal of European and Comparative Law* (2013), p. 209, 222. See also C. Curti Gialdino, ‘Oltre la Brexit: brevi note sulle implicazioni giuridiche e politiche per il futuro prossimo dell’Unione europea’, *Federalismi.it* (2016), p. 20: “given the eminently political character of the procedure [...] the Commission may hardly have a meaningful role in the *iter* that leads to the conclusion of the withdrawal agreement”, at 18 (translation by the author).

<sup>45</sup> Cf. *France et al. v Commission*, Cases 188-190/80, EU:C:1982:257, p. 2573.

<sup>46</sup> Statement after the informal meeting of the 27 heads of state or government, 15 December 2016, SN 96/16, <http://www.consilium.europa.eu/en/press/press-releases/2016/12/15-statement-informal-meeting-27>, para 3.

<sup>47</sup> For instance, the Council routinely presidency signs agreements on behalf of the EU, even if this practice is arguably contrary to the Treaty, see Gatti and Manzini, cit.

<sup>48</sup> On the possibility to revoke the notification see *infra*, section 4.2.

process. It may be expected, in particular, that the departing State might seek to delay the notification of its intentions to conduct informal negotiations before the formal withdrawal procedure begins. Such a strategy would allow the departing State to extend *de facto* the short negotiation period imposed by Article 50 (which plays against the withdrawing state's interests, as section 5 will show). The conduct of informal negotiations before the notification would also enable the departing State to conduct talks with individual Member States, thereby 'undercutting' the EU's position in the subsequent formal negotiations.<sup>49</sup>

A closer inspection reveals that the Treaties do not give unfettered discretion to the departing State regarding the activation of the withdrawal procedure. According to Article 50 TEU, the withdrawing State must ('shall') notify its intentions to the EU. This notification should arguably be performed in a rapid manner. Pursuant to Article 4(3) TEU, the Member States must 'facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'. Arguably, a delay in the notification may bring about insecurity, which might, in turn, prevent the Union from effectively pursuing its objectives, such as maintaining a 'stable currency', ensuring the 'efficient functioning' of its institutions, or promoting the 'well-being of its peoples'.<sup>50</sup> Therefore, if the departing State arbitrarily delayed the notification of its decision to withdraw, it would arguably violate Article 4(3) and 50 TEU.<sup>51</sup>

Such a violation of Article 4(3) TEU is susceptible of being sanctioned. The Commission may initiate an infringement procedure directly against the departing State, though such a procedure would only lead to a penalty payment, which might not necessarily force the withdrawing State into compliance.<sup>52</sup> Recourse to indirect means of enforcement may be more effective. The Commission might refuse to negotiate the withdrawal agreement before the departing State notifies its intentions, and may impose similar restraints on the Member States, by threatening them with an infringement procedure should they hold talks with the departing country. The case law of the Court of Justice suggests indeed that the duty of loyalty, codified in Article 4(3) TEU, prevents the Member States from conducting negotiations in areas covered by EU competences and from disrupting the EU's external strategy.<sup>53</sup> Since Article 50 confers the EU the competence to negotiate withdrawal agreements, EU Member States cannot conduct their own negotiations with the withdrawing State. Since negotiations between EU countries and the departing State are unlikely to take place, because of the threat of infringement procedures, the withdrawing State has limited interest in delaying the notification *ex* Article 50(2). Therefore, by enforcing the duty of loyalty of the remaining Member States, the Commission may indirectly ensure compliance with the duty of loyalty of the departing country.

The practice seems to confirm that the departing State is unlikely to gain a negotiating advantage by strategically delaying the notification under Article 50. After the Brexit referendum (June 2016), the British government delayed the notification of its intentions for an indefinite period, and apparently sought to open informal negotiations with EU Members on issues such as the status of EU citizens in the UK.<sup>54</sup> The EU and its Member States, on the other hand, called for an immediate activation of Article

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<sup>49</sup> European Council, Draft guidelines following the United Kingdom's notification under Article 50 TEU, doc. XT 21001/17, available at <http://g8fip1kplyr33r3krz5b97d1.wpengine.netdna-cdn.com/wp-content/uploads/2017/03/FullText.pdf>, para 2.

<sup>50</sup> See preamble and Art. 3 of the TEU.

<sup>51</sup> Cf. C. Hillion, 'Leaving the European Union, the Union Way: A Legal Analysis of Article 50 TEU', Swedish Institute for European Policy Studies (2016), p. 3; Curti Gialdino, *cit.*, p. 21.

<sup>52</sup> On infringement procedures and Article 50 TEU, see also Lazowski, 'Withdrawal from the European Union and Alternatives to Membership', 37 *European Law Review* (2012) p. 523 at pp. 531-532. More generally, EU Treaties do not seem to allow the Member States to 'expel' another Member State, not even when it violates a primary law provision (such as Article 4(3) TEU). As repeatedly noted by the Court of Justice, 'a Member State cannot, in any circumstances, plead the principle of reciprocity and rely on a possible infringement of the Treaty by another Member State in order to justify its own default.' See ECJ 14 February 1984, Case 325/82, *Commission v Germany*, para. 11; cf. Athanassiou, *cit.*, pp. 31-38.

<sup>53</sup> See ECJ 20 April 2010, Case C-246/07, *Commission v Sweden*, paras 87-104. See also ECJ 14 July 2005, Case C-433/03, *Commission v Germany*, para. 66; ECJ 2 June 2005, Case C-266/03, *Commission v Luxembourg*, para. 60.

<sup>54</sup> UK Government, *The United Kingdom's exit from and new partnership with the European Union*, 2017, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/589191/The\\_United\\_Kingdoms\\_exit\\_from\\_and\\_partnership\\_with\\_the\\_EU\\_Web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf), p. 30.



50, and refused to conduct ‘any negotiation, formal or informal, before we receive a notification’.<sup>55</sup> They subsequently lived up to the Commission’s slogan ‘no negotiation before notification’, to the extent that the UK, in the hope of convincing the ‘remaining Members of the EU [...] to have some preparatory work’, committed to activate Article 50 before March 2017.<sup>56</sup> Even this attempt at stimulating pre-notification negotiations failed. The UK invoked Article 50 in March 2017, nine months after the Brexit referendum, seemingly without having conducted any substantial negotiation with its partners.

#### 4.2 Prohibition of Unilateral Termination of the Withdrawal Procedure

Another restriction to the allegedly unilateral character of Article 50 concerns the termination of the withdrawal procedure: once the departing State has invoked Article 50 it cannot unilaterally stop the withdrawal process.

The development of the negotiations might possibly convince the withdrawing State that any plausible ‘exit’ option is in reality worse than continuing to remain in the EU.<sup>57</sup> In this situation, the termination of the withdrawal procedure may seem the better option. A *consensual* termination of the withdrawal procedure seems indeed possible: since the Union and the withdrawing State may agree to extend the negotiation period, they might also agree upon a *sine die* extension, that is, a *de facto* termination of the procedure.<sup>58</sup> It is to be noted, at any rate, that, under Article 50 TEU, such a consensual termination would require approval by unanimity in the European Council, which may not be easily obtained.

It has been argued that the withdrawing state has also the right to *unilaterally* revoke the notification of the national decision to withdraw.<sup>59</sup> Since the Article 50 procedure is premised on the unilateral notification of the national decision to withdraw, the unilateral revocation of such a notification may possibly lead to the termination of the withdrawal procedure. The letter of Article 50 TEU does not expressly provide for the possibility of such a revocation, but it allegedly does so in an implicit manner. Article 50 stipulates that the conclusion of a withdrawal agreement requires the consent of the departing state, which, during the course of negotiations, may ‘change its mind and withdraw from the exit negotiation’. In such a case, there would no longer be a decision to withdraw within the meaning of Article 50(1), since ‘the original decision had been changed in accordance with national constitutional requirements’.<sup>60</sup>

The existence of a right to unilaterally stop the withdrawal process would severely affect the dynamics of the negotiations: should the withdrawing State be unsatisfied with the ‘deal’ it is offered, it may simply block the process, and return to its original status as an EU Member. It might even consider re-activating the Article 50 procedure after a few months, or a few years, in the hope of obtaining better conditions. Such a scenario would evidently favour the withdrawing State, and would considerably

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<sup>55</sup> Jean-Claude Juncker, Letter to the Members of the College, 28 June 2016, reported by ‘EU & Democracy’, 12 October 2016, <http://euanddemocracy.ideason europe.eu/2016/10/12/exclusive-presidential-order-ec-president-junker-brexit-negotiation-teu-art-50-notification>. See also See e.g. A. McSmith, ‘German leaders furious at UK’s reluctance to invoke Article 50’, *The Independent*, 27 June 2016. <http://www.independent.co.uk/news/uk/home-news/article-50-brexit-eu-referendum-result-german-eu-latest-news-leave-european-union-a7105946.html>.

<sup>56</sup> R. Merrick, ‘Article 50: EU president rejects Theresa May’s call for early start to preliminary Brexit negotiations’, *The Independent*, 2 October 2016, <http://www.independent.co.uk/news/uk/politics/article-50-brexit-theresa-may-donald-tusk-eu-european-council-president-reject-preliminary-a7341686.html>

<sup>57</sup> P. Craig, ‘Brexit: A Drama in Six Acts’, 41 *European Law Review* (2016) p. 447 at p. 465.

<sup>58</sup> In principle, it may be possible to argue that ‘the logic and context of Article 50 suggests that extensions of the time limit are temporary’, see S. Peers, ‘Article 50 TEU: The uses and abuses of the process of withdrawing from the EU’, *EU Law Analysis*, <http://eulawanalysis.blogspot.it/2014/12/article-50-teu-uses-and-abuses-of.html>, visited 24 October 2016. Yet, one may doubt whether the Court of Justice would be likely to endorse such an interpretation in practice, considering that it might lead to *de facto* expulsion of the departing State against the will of all EU Members.

<sup>59</sup> See, *inter alia*, A. Young, ‘Brexit, Article 50 and the “Joys” of a Flexible, Evolving, Un-codified Constitution’, in P. Eleftheriadis (ed.), ‘Legal Aspects of Withdrawal from the EU: A Briefing Note’, University of Oxford Legal Research Paper Series (2016), p. 20 at p. 21; D. Wyatt, Supplementary written evidence, UK Parliament, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-union-committee/the-process-of-leaving-the-eu/written/32079.html>, para. 2.

<sup>60</sup> Craig, *cit.*, p. 464.

weaken the Union's position. The right to unilaterally terminate the withdrawal procedure might thus stimulate the recourse to Article 50, and the disintegration of the EU.

However, it would not seem that Article 50 actually provides for a right to unilaterally stop the withdrawal procedure. Article 50 affirms that the withdrawal process may terminate only in two manners: the parties may conclude a withdrawal agreement, or, 'failing that', withdrawal is automatic after two years. In both cases, the procedure ends with the withdrawal of the departing Member State. Therefore, Article 50 seems to imply that withdrawal is the natural outcome of the procedure that starts with the notification of the intention to withdraw. Such an interpretation of Article 50 is arguably corroborated by the duty to cooperate in good faith, enshrined in Article 4(3) TEU.<sup>61</sup> Arguably, a Member State would not negotiate in good faith if it could threaten to terminate negotiations whenever they lead in a direction it does not approve.

The change in the domestic 'decision' of the withdrawing country, in the terms of Article 50(1), would not be relevant under EU law. It is not the decision to withdraw that starts the withdrawal process, but the *notification* of such a decision. Once the decision has been notified, the procedure starts. A subsequent change in the national decision does not affect the previous notification and, consequently, cannot stop the withdrawal procedure.

A unilateral termination of the Article 50 procedure would remain impossible, in my view, even if the 'change of heart' of the withdrawing State were determined by a referendum. It has been argued that, in such a scenario, 'the EU would not wish to be forced to push out of the door a state that had bona fide changed its mind.'<sup>62</sup> Yet, one should stress that a *consensual* termination of withdrawal procedures would always remain possible: the departing State and the other EU Members may simply agree to stop the withdrawal process—by unanimity. The necessity to reach an agreement with all EU Members would of course constitute a difficulty for the (formerly) departing state. Yet there seems to be nothing shocking in the idea that a Member State, which is not forced to activate the withdrawal procedure, may have difficulty blocking it.<sup>63</sup>

In fact, the democracy principle cannot be invoked to trump the principle of equality, the rights of individuals, or the operation of democracy in the other Member States or in the EU as a whole.<sup>64</sup> The withdrawal process represents the reconciliation of various rights and obligations by negotiation between two legitimate majorities:<sup>65</sup> the majority of the population of the withdrawing State and that of the EU as a whole. The concern for democracy may require the departing State to respect the will of the majority of its population, even when it is inconstant. However, it cannot force other States, or the European Union, to do the same, since they have to protect the interests of their own populations, which are not less important. The mere invocation of Article 50 TEU is likely to bring about instability, which is noxious for the interests of the population of the entire Union. It seems reasonable that the departing state, after having had a change of heart, should negotiate some form of compensation for the disruption it caused.

## 5. Unilateral Withdrawal: Right or Risk?

The last reason why Article 50 TEU constitutes a 'well-designed secession clause' is probably the most important and – paradoxically – it coincides with the reason why this provision has been so fiercely criticised: the possibility of unilateral withdrawal. In fact, the procedural limitations to unilateralism in withdrawal negotiations (see above, section 4) do not question the possibility that a State may ultimately decide to abandon the Union without negotiating a withdrawal agreement.

Pursuant to Article 50(2) and (3) TEU, after the notification the Union 'shall negotiate and conclude an agreement' with the departing State. EU Treaties cease to apply to the departing State 'from the date of entry into force of the withdrawal agreement' or, failing that, 'two years after the notification'.

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<sup>61</sup> See, in particular, ECJ 20 April 2010, Case C-246/07, *Commission v Sweden*, para. 77; ECJ 27 February 2007, Case C-355/04, *Segi and Others v Council*, para. 52.

<sup>62</sup> Craig, cit., p. 465.

<sup>63</sup> Cf. T. Christakis, 'Article 56, cit., p. 1264: 'there is nothing shocking in the idea that States, which are not forced to enter into a treaty regime, may have difficulty leaving it.'

<sup>64</sup> Cf. *Reference Re Secession of Quebec*, cit., para. 91.

<sup>65</sup> Cf. id., para. 93.

This means that the departing State might allegedly invoke Article 50 and hold ‘the threat of withdrawal over the EU’, knowing that after two years ‘withdrawal will take effect in any event’.<sup>66</sup> Seen from this perspective, Article 50 TEU may look like Article 1 of the League of Nations’ Covenant, which enabled any Member State to withdraw after two years’ notice of its intention so to do. Interestingly, even the time framework (two years) is the same in both Article 1 of the Covenant and Article 50 TEU. This reading of Article 50, which is essentially the one espoused by the German Constitutional Court in the judgement on the Lisbon Treaty, truly ‘underlines the Member States’ sovereignty’ (see above, section 2).

At first sight, the practice may seem to confirm that Article 50 underlines the States’ sovereignty; in fact, the British government has repeatedly threatened the Union with a ‘hard Brexit’. Should the EU fail to comply with the British demands, the UK government seems ready to pursue unilateral withdrawal, without any agreement with the Union. However, the credibility of this threat is questionable. As noted by the British government before the referendum, ‘a considerably larger proportion of the UK economy is dependent on the EU than vice versa. [...] Taken as a share of the economy, only 3.1 per cent of GDP among the other 27 Member States is linked to exports to the UK, while 12.6 per cent of UK GDP is linked to exports to the EU’.<sup>67</sup> An inordinate Brexit is therefore more likely to hurt the UK than the EU.

If the negotiations between the EU and the departing State could last indefinitely, the problem of a ‘hard’ withdrawal would probably never materialise. The withdrawing State might simply continue the negotiations until it reaches a favourable result; unilateral ‘secession’ would remain a threat to be used only in extreme cases. However, Article 50 TEU imposes a deadline to withdrawal negotiations: two years. This time limit is very short, considering that the negotiations concern sensitive issues, such as the status of EU citizens in the departing country. Moreover, one should note that the negotiators are likely to need a long time to reach a compromise that satisfies the departing State, a large number of EU governments (which must approve the agreement in the Council),<sup>68</sup> as well as a majority of European Parliament members.<sup>69</sup> To be sure, Article 50 TEU allows for an extension of the negotiating time, but subordinates such an extension to an onerous condition: a unanimous decision of the European Council, approved by the departing State.

Article 50 TEU thus places the departing State in an uncomfortable position: either it swiftly reaches a compromise with the EU, or it risks a ‘hard’ withdrawal, which would be particularly negative for its economy and society. The vulnerability of the departing State may therefore have ‘an impact on the dynamic of the negotiations’:<sup>70</sup> having greater interest in a swift conclusion of the withdrawal agreement, the departing State is likely to make significant concessions to the EU.

The practice confirms this reading of Article 50 TEU. The UK delayed the activation of Article 50 for nine months, ostensibly because of a concern for timing issues. Theresa May made this clear in September 2016, by affirming that ‘we shouldn’t invoke Article 50 immediately [...] because when we hit Article 50, when we invoke that, the process at the EU level starts. They say that that could take up to two years’.<sup>71</sup> The behaviour of EU institutions and Member States further confirms that the time limit of Article 50 plays against the interests of the departing State: they demanded a swift activation of Article 50, and resolutely refused to conduct any negotiation before Article 50 was invoked (see above, section 4.1). The practice thus lends credit to the journalistic reports according to which the two-years restriction of Article 50 was added by Martin Selmayr, now chief-of-staff to European Commission President – someone who presumably had an interest in making unilateral ‘secession’ more complicated.<sup>72</sup>

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<sup>66</sup> Friel, cit., p. 426.

<sup>67</sup> UK Government, ‘The Process for Withdrawing from the European Union’, February 2016, [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/504216/The\\_process\\_for\\_withdrawing\\_from\\_the\\_EU\\_print\\_ready.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504216/The_process_for_withdrawing_from_the_EU_print_ready.pdf), visited 23 October 2016.

<sup>68</sup> Obviously, the withdrawing state would not participate in the vote, see Article 50(4)TEU.

<sup>69</sup> It is not clear whether the Members of the European Parliament who have the nationality of the departing State may vote on the withdrawal agreement, see e.g. Hofmeister, cit., p. 594. However, it is not indispensable to address this issue here.

<sup>70</sup> UK Government, cit.

<sup>71</sup> See P. Dominiczak, ‘Theresa May to Decide over Brexit Talks, No 10 Says, after Boris Johnson began Setting Brexit Strategy’, The Telegraph, 23 September 2016, [www.telegraph.co.uk/news/2016/09/22/theresa-may-to-decide-over-brexit-talks-no-10-says-after-boris-b/](http://www.telegraph.co.uk/news/2016/09/22/theresa-may-to-decide-over-brexit-talks-no-10-says-after-boris-b/), visited 23 October 2016.

<sup>72</sup> See MacDonald and Taylor, cit.

These considerations put the ‘unilateral’ character of the Article 50 procedure into perspective.<sup>73</sup> From a purely formalistic viewpoint, this provision enables unilateral secession, thereby ‘underlining the Member States’ sovereignty’ and potentially stimulating the EU’s disintegration. A more realistic assessment permits to see Article 50 in a different light. Unilateral withdrawal, rather than a right, appears as a *risk* for the departing State. By threatening a ‘hard’ withdrawal, Article 50 *de facto* compels the departing State to negotiate and compromise, thereby ensuring that the withdrawal process addresses the interests of the entire Union – and not only those of the departing State. The *risk* of unilateral withdrawal may thus paradoxically discourage the recourse to the *right* to unilateral withdrawal in the future.

## 6. Conclusion: A Well-Designed Secession Clause

Article 50 TEU has often been criticised because it allegedly grants EU Member States an unfettered right to unilateral ‘secession’, which questions the EU’s quasi-federal character and fosters its disintegration.<sup>74</sup> This paper demonstrates that Article 50 TEU actually plays the opposite function, since it introduces a rigorous procedure that discourages casual recourse to withdrawal.

The analysis suggests that the widespread pessimistic reading of Article 50, exemplified by the Lisbon Treaty judgement of the German Constitutional Court, is based on a purely formalistic approach, which focuses on the abstract possibility for unilateral withdrawal. Seen from this perspective, Article 50 TEU might truly appear as a challenge for the EU’s federal aspirations and for its very survival. However, this formalistic approach divorces law from reality. Secession (from States) and withdrawal (from international organisations) is always possible *de facto*: the relevant question is whether constitutional provisions, such as Article 50, permit (or not) a good management of secession processes, and whether they discourage (or not) casual recourse to secession.

The paper suggests that Article 50 promotes an orderly ‘secession’ from the Union, since it ensures the EU’s unity in withdrawal negotiations, limits the discretion of the departing State regarding the activation and termination of the withdrawal procedure, and stimulates it to reach a compromise with the Union. Unilateral withdrawal from the EU is possible, thanks to Article 50, but is also discouraged. Article 50 may thus contribute to preserve European integration by functioning as a ‘safety valve’:<sup>75</sup> when the pressure (of Euroscepticism) rises too high, the withdrawal of a Member State enables the Union to release some ‘steam’ in a controlled manner, thereby reducing the risk of ‘explosions’.

Furthermore, Article 50 ensures a balance between the concern for the EU’s integrity and the principles that inspire the Union. It seems indeed reasonable that a Union with democratic and federal aspirations should negotiate constitutional changes whenever the population of a Member State clearly expresses its desire to pursue ‘secession’.<sup>76</sup> The very possibility of ‘secession’ from the Union may potentially contribute to reduce the democratic deficit of the EU, and reinforce its legitimacy: Article 50 makes clear that the membership of the Union is now a choice, not a necessity.

It may therefore be argued that Article 50 TEU constitutes a ‘well-designed secession clause’, which allows the possibility of withdrawal ‘in accordance with norms of democracy, justice and the rule of law’.<sup>77</sup> It is not entirely inconceivable that this reviled provision may, in the future, inspire the drafting of secession clauses at the national level. As democratic States find it increasingly difficult to deny demands for independence backed by public opinion, they may decide to ‘import’ a provision such as Article 50 TEU, to prevent populous or rich seceding regions from exploiting their greater bargaining power in the context of secession negotiations.<sup>78</sup>

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<sup>73</sup> Cf. Lazowski, cit., pp. 527-528.

<sup>74</sup> See above, section 2.

<sup>75</sup> Cf. C. Balmer, ‘Father of EU Divorce Clause Demands Tough Stance on British Exit’, *Reuters*, 21 July 2016, <http://www.reuters.com/article/us-britain-eu-amato-idUSKCN1012Q8>, visited 21 October 2016.

<sup>76</sup> Cf. *Reference Re Secession of Quebec*, cit., para. 88.

<sup>77</sup> The expression ‘well-designed secession clause’ and its definition are taken from Norman, cit., p. 175.

<sup>78</sup> Cf. S. Mancini, cit., pp. 495 and 499.