**Article 50: an endgame without an end?**

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**Introduction**

In the EU referendum of 23 June 2016, the majority of the British electorate voted in favour of the United Kingdom leaving the European Union.[[1]](#footnote-1) The vote is expected to trigger a process towards the withdrawal of the UK and has profound political, economic and legal implications. ‘Brexit’ marks a turning point in the modern history of Europe and, for the UK, is probably the greatest constitutional reversal since the restoration of the monarchy in 1660.[[2]](#footnote-2)

The legal issues arising from Brexit could be classified into four categories: the management of the withdrawal process; the future relationship between Britain and the EU; the implications of the withdrawal for the EU integration paradigm; and its implications for the UK legal system. The present contribution focuses on selective issues within the first category. It first provides some wider reflections on the implications of the referendum outcome and then deals with the EU aspects of the withdrawal process centring on Article 50.

**Some reflections: picking up the pieces**

Whilst the full implications of the referendum cannot properly be assessed before the dust settles, it is not too early to offer some reflections on its immediate aftermath and repercussions.

First, the departure of the UK is a great loss to the EU. Brexit shatters the irreversibility outlook implicit in the integration paradigm of ‘ever closer Union’. The rejection of the integration project by one of the most economically and politically powerful Member States cannot but be seen as a great setback. The UK has been very influential in shaping EU policy, leading the way in many areas of decision-making and, with its *laissez faire* orientation, often seen as providing a counterbalance to continental managerial inclinations. It has also been, in terms of its compliance with EU law, one of the Union’s best citizens. Losing a key player is a disappointment and a political failure. This is not to say that the referendum outcome is to be blamed on the Union’s intransigence. The proposed settlement for the UK, reached in the European Council in March 2016,[[3]](#footnote-3) went a long way towards accommodating Britain’s requests. It made substantial amendments to the free movement of workers, stretching the Treaties to their maximum, and was a concession that few Member States could achieve. It is also highly doubtful that, had more extensive concessions been granted, the referendum outcome would have been different.

Secondly, the call for exit has given rise to an enormous amount of uncertainty and inefficiencies of a daunting scale. Managing Brexit has become, and will continue to be for a number of years, the main preoccupation of political leadership and the civil service in Britain, increasing exponentially the costs of public administration.[[4]](#footnote-4) Those costs are exacerbated by the lack of preparation at both policy and logistical levels. There appears to be no concrete alternative blueprint as to the trade policy of the UK and, prior to the referendum, the civil service had made no preparation in anticipation of a possible Brexit outcome. The EU will also be preoccupied with mastering a meaningful response whilst the cost of uncertainty, both economic and non-material, to individuals and businesses will be momentous.

Thirdly, the referendum outcome places the UK and the EU in a trajectory of conflict. Although Member States negotiate hard and pursue their own individual interests within the EU, they do so under the aegis of shared objectives and commitment to common institutions and processes. The decision to leave views the EU legal framework as an expression of EU hegemony and brings the UK and the Union in a competitive relationship both vis-à-vis each other and vis-à-vis third countries.

Fourthly, irrespective of the motives or objectives of individual voters, it is difficult to avoid the conclusion that the no vote has empowered illiberal causes. The rejection of EU membership favours anti-immigration policies and fosters an ‘us’ and ‘them’ political culture. It has promoted nationalism and xenophobia, building capital for political parties at home and abroad that favour a nationalist agenda.[[5]](#footnote-5) One may take the view that, on a cost benefit analysis, the empowerment of illiberal causes is a fair price to pay for deriving the sovereignty gain that results from Brexit. But denying its existence would appear to run counter to the evidence.

Finally, the referendum outcome has brought to the fore tensions between direct and indirect democracy. The outcome is widely perceived to be at odds with the views of the majority of the members of the Westminster Parliament. It thus leads to the paradox that a fundamental constitutional decision is taken despite the disagreement of the people’s elected representatives in a polity where parliamentary sovereignty is the defining constitutional principle. Yet, the triumph of direct democracy may well be temporary. The referendum question presented a multi-dimensional decision as a binary choice. Exit from the EU is only half of the story. The other half is the articulation of an alternative economic and social blueprint on which the referendum question was silent. The vote can be interpreted as an empowerment to articulate such a blueprint although it is uncertain to whom the empowerment is given and under what processes any ensuing decisions are to be taken. The referendum, in other words, has prompted delegation of power to political agents in a way that might enhance the powers of the executive vis-à-vis those of parliament.

**The right to withdraw**

Withdrawal from the EU gives rise to issues of EU and national law and, secondarily, issues of international law. This contribution focuses only on EU law issues. The withdrawal of a Member State is governed by Article 50 TEU, a provision which originated in the aborted Constitutional Treaty[[6]](#footnote-6) and added by the Treaty of Lisbon. Its inclusion was a positive step. It provides a degree of certainty as to the right and process of withdrawal and serves as a guarantee of sovereignty. Before the inclusion of Article 50, there was uncertainty as to whether a Member State had a right to withdraw and, if it did, under what conditions.[[7]](#footnote-7) Under international law, a contracting party to an international convention does not, by default, have a unilateral right to withdraw, the terms of withdrawal or denunciation being governed by the Vienna Convention.[[8]](#footnote-8) Greenland withdrew from the EU in 1985 but it was a constituent part of Denmark and not a Member State. Its departure therefore entailed a change in the territorial scope of EU law.[[9]](#footnote-9) Also, withdrawal occurred consensually.[[10]](#footnote-10) Article 50 now provides an exclusive procedure. A Member State may not claim a right to withdraw from the EU under terms other than those provided in Article 50 except in the hypothetical case where the conditions of the Vienna Convention are satisfied,[[11]](#footnote-11) which is clearly not the case in the circumstances of EU – UK relations. Failure to abide by the process of Article 50 would, therefore, be a breach of both EU and international law.[[12]](#footnote-12)

Friel distinguishes three kinds of withdrawal models in federal or quasi-federal systems.[[13]](#footnote-13) Under the state primacy or sovereignty model, each constituent part of a composite entity has an unqualified right to withdraw. The federal primacy model prohibits secession altogether, whilst the federal control model makes withdrawal subject to conditions. He correctly identifies Article 50 as being close to the state primacy model. Article 50 provides for a process[[14]](#footnote-14) but does not impose any substantive conditions of withdrawal. A Member State does not need to give reasons nor is its decision subject to any system of approval by the other Member States. A system allowing withdrawal only subject to certain conditions is by no means unknown to international law.[[15]](#footnote-15)

Article 50 provides, essentially, a unilateral right to withdraw. It is thus in line with the conception of the Union as a constitutional union of sovereign Member States (Staatenverbund) and not a federal State as articulated by the Bundesverfassungsgericht.[[16]](#footnote-16) It is also in accord with the functional model of the EU endorsed by Article 1(1) TEU which affirms that the conferment of powers to the EU emanates from the Member States and *a contrario* not directly the peoples of Europe. Although the withdrawal clause underwent various drafts during the drafting of the Constitutional Treaty, its substance did not change. It was always envisaged as a provision of voluntary disengagement which favours but does not require the agreement of the Union. It is precisely so as not to affect the right to exit that withdrawal is not subject to reaching a prior agreement and occurs automatically at the end of a two year period following the notification to withdraw.[[17]](#footnote-17) In drafting the clause, the Praesidium of the Constitutional Convention sought to send a powerful political message to those who considered that the EU is a rigid organization from which there is no right of secession.[[18]](#footnote-18)

All in all, Article 50 counterbalances the federal aspirations of the EU. The integration project is a voluntary mission and Member States which find that they no longer share its objectives or do not agree with the integration paradigm as it evolves are free to go. In some respects, the constitutional model of the Treaties is uneven. There is a unilateral right to withdraw but no right to expel. This is however perfectly in line with the Treaty objectives and framework. The EU is a voluntary form of cooperative federalism which creates reciprocal rights and obligations supported by powerful sanctioning mechanisms which apply insofar as there is an underlying fundamental commitment to belong.

In both legal and political terms, withdrawal is different from breach of a treaty.[[19]](#footnote-19) Unlike a breach, withdrawal is in conformity with positive law and thus does not carry any sanctions or the opprobrium associated with illegality. Nevertheless, withdrawal has two distinct elements which may mark it out as a more aggressive form of international conduct. First, it is a deliberate act which reflects the overall political posture of the State towards its international partners. Unlike a breach, it cannot be inadvertent. Secondly, it signals a comprehensive rejection of international commitments, rather than ad hoc non compliance with specific treaty provisions.[[20]](#footnote-20)

Under Article 50, the procedure of withdrawal has essentially three stages: first, giving notice of withdrawal; secondly, the negotiation of a withdrawal agreement; and finally its conclusion or the automatic exit of the withdrawing Member State. A Member State that decides to withdraw must notify the European Council of its intention. Notification triggers the commencement of a two year period within which the terms of withdrawal must be agreed. Failure to reach an agreement leads to automatic exit. Under Article 50(3), that period can only be extended unanimously by the European Council in agreement with the Member State concerned.

**The requirement of compliance with national constitutional requirements**

Under Article 50(1), a Member State may decide to withdraw from the Union in accordance with its own constitutional requirements. It is clearly for the withdrawing Member State to decide what these requirements are. This is a question of national law over the interpretation of which the ECJ has no jurisdiction. The Court however does have jurisdiction to interpret Article 50 and, at least theoretically, the possibility exists that the issue whether a decision has been taken according to the national constitutional requirements of the withdrawing Member State may reach it.

Uncertainty may arise, for example, because national political actors or different branches of government may express conflicting views as to the requirements that must be satisfied. In *extremis*, there could be a situation where the government gives notification to withdraw disregarding a procedure that the supreme court has held must be followed under domestic constitutional law. In this context, one could take different views. A sovereignty view would suggest that the ECJ has no role to play. Once the incumbent government has notified its intention to withdraw, the EU and its institutions have to take it at face value and cannot look behind the notification. According to that view, the reference to own constitutional requirements in Article 50(1) is not intended to make compliance with them a condition for the legality of the withdrawal notification but stress that the decision to withdraw is to be taken solely by the withdrawing Member State and not conditional on any approval by the EU.[[21]](#footnote-21) Under an alternative view, the proviso ‘in accordance with its own constitutional requirements’ is a condition imposed by EU law and the ECJ has jurisdiction to examine its fulfillment. In cases therefore where there is objective uncertainty as to whether those requirements are fulfilled the Court may consider that the notification lacks the requisite degree of clarity although the implications of such a finding would be more difficult to determine. [[22]](#footnote-22)

**The notification to withdraw**

Under Article 50(2), a Member State that wishes to withdraw must notify the European Council of its intention. The notification is a unilateral act which triggers the process of withdrawal. It is an exercise of a sovereign power, its timing and form being at the discretion of the Member State. A government need give no reasons to justify separation. Nonetheless, given the enormity of its consequences, notification is a formal act which must be given in a clear and unambiguous manner. It is, in other words, difficult to envisage circumstances of constructive notification except perhaps in highly exceptional cases of egregious, persistent and comprehensive violation,[[23]](#footnote-23) although unreasonable prevarication on the part of the withdrawing Member State may amount to a breach of the duty of good faith and the duty of cooperation under both EU and international law. In such a case, there would be little that the EU could do.

Given that notification is the exercise of the sovereign will of a Member State, it should be considered to be revocable.[[24]](#footnote-24) No legitimate expectation of withdrawal arises on the part of the other governments. This view is in line with the Vienna Convention[[25]](#footnote-25) and also in accord with the integrationist spirit of the Treaties. A Member State which, for whatever reason, changes its mind and no longer wishes to withdraw should be permitted to revoke its notification. Until and unless the withdrawal process is completed, it remains part of the EU.

It could be argued that revocation is excluded by Article 50(3) which requires a unanimous agreement for the extension of the two year period within which the withdrawal agreement must be agreed. If the withdrawing Member State had the right to revoke, it could extend the period for negotiations by doing so and then notifying withdrawal *de novo* when it felt ready to proceed. This argument however fails since the effects of revocation are different from those of extending the two-year time limit. The latter extends the time within which the withdrawal terms may be agreed. The parties may wish to avail themselves of it, for example, so as to have the opportunity to complete at the same time both negotiations for the terms of withdrawal and a new trade agreement. The revocation of withdrawal notification, by contrast, does not extend the two-year negotiation period. The State concerned expresses its wish to terminate the withdrawal process and continue as a full status member.[[26]](#footnote-26)

If notification was said to be irrevocable that would also have other odd consequences. It would foreclose, for example, the possibility of all Member States agreeing to amend the Treaties in a way that would make it acceptable for the Member State that wished to withdraw to remain. More generally, it would foreclose the possibility of the Member State, for whatever reason, changing its mind, for example, because a new pro-EU government takes office or a referendum is held which is favourable to membership. Even though notification is revocable, the House of Lords Constitutional Committee is correct to work on the assumption that, once given, notification of withdrawal would be final.[[27]](#footnote-27) It would be odd and contrary to Article 50 to make notification on an experimental or contingent basis. The British Prime Minister has indicated that notification will be given by the end of March 2017 suggesting that the United Kingdom will end its membership some 46 years after acceding to the Communities.[[28]](#footnote-28)

**The bargaining position of the parties: a loaded dice?**

Does Article 50 tilt the balance of power in favour of the EU placing the withdrawing Member State in a difficult negotiating position? This question can only be answered by reference to a set of objective standards. In the negotiations leading to the adoption of the withdrawal clause, no alternative method of withdrawal was put forward by the UK or any other Member State. There is thus no such standard of comparison. In the absence of a specific clause, the matter would be governed by the Vienna Convention. It is however incorrect to suggest that that would necessarily be preferable for the exiting Member State. First, as already stated, the Vienna Convention does not provide for a general right of withdrawal from an international agreement. There would therefore be some legal uncertainty as to the right to withdraw, although politically it is difficult to see how a Member State could be stopped from leaving or what purpose such resistance might serve. Under the Vienna Convention, the exiting Member State would need to give at least twelve months notice and notify its withdrawal to all other Member States.[[29]](#footnote-29) Thus, extrication could be more brusque but there is no guarantee that the deal would be more favourable to the exiting State. The two year period provided in Article 50 recognises the difficulties of disentanglement and gives both parties the opportunity to reflect on the transitional arrangements given that EU law and the law of the withdrawing Member State are closely intertwined and that individual rights are at stake. It is thus more in line with the EU rights-based paradigm than the default position of the Vienna Convention.

Essentially, Article 50 is politically neutral. It favours neither the withdrawing Member State nor the EU but heeds to the respective power of the juxtaposing sides. The greater the economic and political power of the withdrawing Member State, the more the Article 50 procedure works to its favour. Article 50, thus, simply formalizes the balance that emerges from the underlying position of the parties.

It is correct that Article 50 separates withdrawal from the negotiation of a possible agreement governing future relationship. Such decoupling reduces the options of the withdrawing State in that it cannot maintain membership until it negotiates a deal that it considers better for its interests. Once it gives notification, the two year count down begins. Decoupling however reduces the options and poses a risk also for the Union. It essentially works to the disadvantage of the weaker party whichever that party might be. Secondly, it is counterbalanced by the unilateral right to withdraw. Thirdly, it is more in line with the fundamental terms of the EU bargain. The withdrawing Member State may decide to leave the Union but could not expect the right to determine unilaterally the terms of its future relationship with the EU nor the right to remain a Member until it can negotiate an alternative deal which it considers more advantageous.[[30]](#footnote-30) That would lead to a perpetually provisional membership.

**The conduct of negotiations and the conclusion of the withdrawal agreement**

Once notification is given, the formal process of withdrawal begins. The EU is to negotiate a withdrawal agreement with the Member State in question.[[31]](#footnote-31) Both parties have an obligation to conduct negotiations in good faith and in a spirit of cooperation. This duty derives from international law and also the duty of loyal cooperation provided by Article 4(3) TEU, which continues to bind the withdrawing Member State until it leaves the EU.[[32]](#footnote-32) By contrast, the EU does not have an obligation to enter into negotiations with the withdrawing State before notification is given. Such informal negotiations may occur in practice and may be politically advantageous for both sides but there is no legal duty to enter into them. This is the result of providing an unqualified right to withdraw. A Member State has the freedom to trigger Article 50 at any time it wishes but clearly cannot require its partners to enter into any negotiations before doing so.

Negotiations are conducted in the light of guidelines provided by the European Council and the agreement is to be concluded in accordance with Article 218(3) TFEU.[[33]](#footnote-33) This selective reference raises the issue whether the rest of the provisions of Article 218 would apply to the conclusion of the withdrawal agreement. There is no doubt that the European Council may address directives to the negotiator during the process of negotiations or delegate that task to the Council or designate consultation committees.[[34]](#footnote-34) A more interesting question is whether the institutions or the Member States may activate the *ex ante* jurisdiction of the ECJ to rule on the compatibility of envisaged international agreements with the Treaties.[[35]](#footnote-35) Whilst, the silence of Article 50 can be interpreted either way, a purposive interpretation would favour an affirmative reply. The purpose of Article 218(11) is to foreclose difficulties which would ensue if, after an international agreement came into force, it was found to be incompatible with EU law. The same rationale applies here. The withdrawal agreement is part of EU law and, whilst it entails perforce, amendments to the founding Treaties, it must nonetheless comply with the foundational principles of EU law. It is also clear that the withdrawal agreement has wide ramifications for the rights of individuals. Legal certainty therefore would require that the process of ex ante review of compatibility is also open in relation to that agreement although granting such jurisdiction is without prejudice to the two year catalytic period after notification has been given.

The withdrawal agreement is concluded by the Council after obtaining the consent of the European Parliament.[[36]](#footnote-36) The Council is to act by the super-majority provided in Article 238(3)(b), namely, at least 72 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States.[[37]](#footnote-37) The 72% condition requires a majority of 20 Member States instead of 15 that would be required if the Council was acting by a qualified majority of the remaining 27.[[38]](#footnote-38) Notably, in an early draft of the exit clause the Praesidium had floated the idea that, instead of providing for qualified majority, the voting procedure in the Council would depend on the subject-matter of the respective substantive provisions of the withdrawal agreement. That would essentially lead the Council being required to act by unanimity.[[39]](#footnote-39)

The withdrawing State does not take part in the discussions nor does it vote in the European Council or the Council when they decide on matters of withdrawal.[[40]](#footnote-40) By contrast, the MEPs of the withdrawing State are entitled to vote when the EP is called upon to give its consent. This has been criticized[[41]](#footnote-41) but is based on the ideas that MEPs are elected not only to represent their constituents but the EU as a whole[[42]](#footnote-42) and the institutional unity of the Parliament which acts as an indivisible body. The Parliament gives (or withholds) its consent by majority of the votes cast.[[43]](#footnote-43) This contrasts with the process for accession of a new Member State which requires consent to be given by a majority of the component members of the EP.[[44]](#footnote-44)

The withdrawing Member State continues to take part in EU decision-making and vote in the Council on all matters other than those relating to withdrawal. This may give rise to tensions and, indeed, conflict of interests as, by notification, the Member State signals its intention to quit and pursue its own interests individually.[[45]](#footnote-45) Given that all areas of policy making are intertwined, it is difficult to see how the withdrawing Member State can be expected to pursue the interests of the EU in preference to its own interests and, at least in some circumstances, the duty of loyal cooperation may require it to abstain from decision-making and even participation in policy meetings.

## **The extrication and re-engagement conundrum**

## Article 50(2) states that, the Union is to negotiate and conclude the withdrawal agreement with the withdrawing State ‘taking account of the framework for its future relationship with the Union.’ This provision does not make the conclusion of a withdrawal agreement conditional on having reached an agreement on the future relationship nor does it even require the parties to reach an understanding on a broad outline. Failure therefore to reach such an agreement or understanding does not affect automatic exit at the end of the two year period in the event negotiations prove fruitless.

The separation between a retrospective withdrawal agreement and a prospective new trading agreement is important as the two are governed by different EU processes. Article 50 does not provide a legal basis for the EU to conclude an agreement governing its future relations with the withdrawing State which, upon withdrawal, is treated for all purposes as a third State.[[46]](#footnote-46) For such an agreement to be concluded, the general provisions of the TFEU on external relations apply. There is nothing to prevent withdrawal and re-engagement negotiations from proceeding in tandem but here lies a conundrum: whilst the two year period may be enough to secure a relatively orderly withdrawal, it is highly unlikely to be sufficient to conclude a new trading agreement and next to impossible to complete all the requirements for that agreement to come into force. Any trading treaty with the EU is likely to be concluded as a ‘mixed agreement’. This would require ratification not only by the EU but also by the Member States according to their national constitutional requirements. This in many cases entails approval not only by the national but also by regional parliaments making the total number of assemblies that need to ratify an agreement to 38. There is therefore a strong possibility that, unless much preparatory work is done by consent before notification is given or the two year period is extended, there will be a legal hiatus where relations between the EU and the departing Member State are governed by the default position of WTO.

Since the conclusion of the withdrawal agreement is legally separate from the conclusion of a new trading agreement both in terms of authority and in terms of processes, it becomes important to identify what can and cannot be included in the withdrawal agreement. Essentially, that agreement may provide for the treatment of existing rights and obligations but cannot create any new rights. The withdrawal agreement may include transitional provisions governing existing EU rights and arrangements for phasing out the participation of the withdrawing State to EU affairs.[[47]](#footnote-47) It may provide for different transitional periods for different rights. It may provide, through a generous sunset clause, for the continued application of certain aspects of EU law thus giving the parties the opportunity to reach agreement on a future trading relationship. But it cannot provide for access to the internal market for the withdrawing Member State for an indefinite or indeterminate period of time, for example, until such time as a new agreement is concluded, as withdrawal cannot be conditional.

**Effects of withdrawal and Status of the withdrawal agreement**

Under Article 50(3), the Treaties cease to apply to the withdrawing State from the date of entry into force of the withdrawal agreement or, failing that, two years after the withdrawal notification. The two-year period may only be extended by the European Council acting unanimously in agreement with the Member State in question. In the absence of an agreement, withdrawal will occur automatically. In the event that that were to happen, it would create major challenges and give rise to some intractable legal problems. Upon withdrawal, the Treaties cease to apply to the Member State in question. This means that that State is not bound by future legislation adopted by the EU and EU law does not apply to future legal relations. EU law will also, in principle, cease to apply with immediate effect i.e. to legal relations subsisting at the time of withdrawal although there are here a number of caveats. EU law which is transposed into the domestic law of the Member State that has departed will continue to apply until the domestic legislation is repealed or amended. International law also imposes certain limitations on the retroactive effect of legislation. Also, as discussed below, EU law may also impose some limitations.

The Member State that has withdrawn does not enjoy any privileged status. It may rejoin the EU under the normal accession procedure.[[48]](#footnote-48) In drafting the withdrawal clause, the Praesidium considered that it was not necessary to provide for any special associated status on the ground that the provisions of the Treaty on the union and its immediate environment (Article 8 TEU) provided an alternative basis for framing an appropriate relationship.[[49]](#footnote-49) However, the European neighbourhood policy provides only possibilities and no concrete commitments and so far has been built on different premises from those that are likely to be suitable for EU-UK relations. The bottom line is that Article 50 allows for no ‘halfway house’[[50]](#footnote-50) and any future relationship will need to be negotiated de novo.

In contrast to an accession treaty, a withdrawal agreement is concluded by the EU and not by the individual EU Member States, this being the reason why its entry into force is not conditional on ratification by them.[[51]](#footnote-51) The withdrawal agreement is part of EU primary law. National courts of EU States may refer to the ECJ questions on the interpretation but the Court’s judgments will not bind the exiting State unless there is a jurisdictional clause to that effect in the withdrawal agreement. In the case of Brexit, this is unlikely to occur since avoiding the jurisdiction of the Court of Justice appears to have been one of the key points of the Eurosceptic campaign. Similarly, courts of the withdrawing State will not be able to make references to the ECJ. It might be possible for the parties to agree in the withdrawal agreement on an alternative dispute resolution system. That would govern relations between the parties but could not impinge on the powers of the ECJ which has exclusive jurisdiction between Member States on disputes pertaining to the subject-matter of the founding Treaties,[[52]](#footnote-52) and therefore on the interpretation and effect of the withdrawal agreement for intra-EU relations.

Will the withdrawal agreement have direct effect? Under the case law, international treaties concluded by the EU may produce direct effect subject to the following conditions. First, it must be ascertained that the wording, purpose, and nature of the agreement justify, in general, direct effect. If that is so, then, secondly, a provision can be regarded as directly effective if it contains a clear, precise, and unconditional obligation.[[53]](#footnote-53) Given that the purpose of a withdrawal agreement would be to provide some certainty on the transitional protection of rights acquired under EU law, it is likely that such provisions would have direct effect. Since the doctrine, however, will no longer be part of the law of the withdrawing State, it would be necessary to provide expressly in the agreement an obligation on the withdrawing State to make rights guaranteed therein enforceable before its domestic courts.

**Does EU law impose any limitations on the withdrawal agreement?**

Does EU law impose any substantive limitations on what can be agreed in the withdrawal agreement? Is there, perhaps, a residue of core EU rights that individuals may not be deprived of? The detailed discussion of this question falls beyond the scope of this paper. Suffice it to make the following points.

Individuals whose acquired rights are affected may derive some protection from international law although such protection is in fact limited.[[54]](#footnote-54) Furthermore, the national law of the withdrawing State may guarantee to EU citizens residing in its territory certain rights after withdrawal.[[55]](#footnote-55) From the point of view of EU law, two sets of limitations arise. First, in concluding the withdrawal agreement the EU, albeit not the withdrawing State, is bound to respect the EU Treaties and higher ranking constitutional norms of EU law. Secondly, and, more controversially, an argument can be made that at least some EU citizenship rights may subsist after withdrawal.

The withdrawal agreement is part of EU law but, in the hierarchy of EU law norms, it ranks below the EU Treaties and the foundational principles of EU law. Those subsist until and unless the Treaties are amended through the procedure envisaged therein. This is confirmed by the case law which establishes a hierarchy within the primary sources of law. The ECJ has held that the EU may not conclude an international agreement which breaches the general principle of non discrimination and, where such a treaty has been concluded, the offending clauses cannot be applied by the EU.[[56]](#footnote-56) By the same rationale, it should be accepted that international treaties concluded by the EU must also respect the Charter. The case law also posits that international agreements rank above secondary EU measures but below the Treaties and, furthermore, recognises some principles as being of foundational character so that Member States may not depart from them.[[57]](#footnote-57) The EU therefore cannot breach those principles by concluding the withdrawal agreement. To give an incontrovertible example, the EU could not agree on provisions of the withdrawal treaty which discriminate on racial or ethnic grounds or which introduce gender discrimination. By the same token, it would not be open to the EU to agree on provisions which introduce discrimination on grounds of nationality among EU citizens unless those could somehow be objectively justified. It would thus not be permissible to include a clause in the withdrawal agreement which would provide, in general, for better or lower protection in the UK for citizens of specific Member States. It should be borne in mind, however, that not every difference in treatment would necessarily amount to prohibited discrimination on grounds of nationality. Preferential arrangements in favour of certain nationalities that might currently exist under national law would continue to apply.

The withdrawing Member State however will no longer be bound by EU law and there is nothing to prevent it from introducing differential treatment among EU citizens. It is a separate issue whether the withdrawal agreement could prevent the withdrawing State from introducing such differential treatment. Such pre-emptive effect would depend on the way the agreement was drafted.[[58]](#footnote-58)

The withdrawal agreement should be interpreted in light of the *communautaire* character of the rights that it seeks to regulate. EU rights have been intended to be broad, intense, and conferred on individuals *qua* EU citizens. In case of ambiguity, guarantees to individual rights should be interpreted widely. It is reasonable to suggest that this obligation should burden also the courts of the withdrawing Member State. Given the nature of the EU, courts of the withdrawing State may be under an obligation to interpret transitional provisions included in the withdrawal treaty favourably to the preservation of EU rights. This presumption seems compatible with the preservation of individual rights and should subsist in the absence of clear language to the contrary. This will be, perhaps, the last vestige of membership for the withdrawing State.

Finally, an argument can be made, which is only tentatively put here, that certain EU acquired fundamental rights will subsist after withdrawal and continue to bind the EU Member States.[[59]](#footnote-59) This argument is based on the following premises: (a) since its establishment, the European Economic Community, and now the EU, has been intended to be for an unlimited duration[[60]](#footnote-60); (b) EU law is an autonomous legal order separate from international law involving the transfer of sovereign rights from the Member States to the EU;[[61]](#footnote-61) (c) EU law bestows individuals with rights which are part their legal heritage;[[62]](#footnote-62) (d) Union citizenship is intended to be the fundamental status of nationals of the Member States.[[63]](#footnote-63)

Those fundamental underpinnings suggest that, in the event of withdrawal, some core EU rights may rest with the citizen and not devolve with territory. Article 20 TFEU states that EU citizenship is attached to every person holding the nationality of a Member State and that it is additional to, and does not replace, national citizenship. This suggests that EU citizenship is derivative and cannot stand alone. Article 20, however, is less definitive than it might appear. It makes it clear that citizenship of a Member State opens the door to EU citizenship but does not pre-determine if, once acquired, Union citizenship rights can be involuntarily extinguished by withdrawal. A Member State has an unfettered sovereign right to withdraw but the EU, as a constitutional order, does not have the power unilaterally to deprive citizens en bloc of the genuine enjoyment of the substance of the rights conferred by virtue of their status as Union citizens.[[64]](#footnote-64) This may not necessarily lead to the wholesale maintenance of EU rights post withdrawal. But it suggests that EU citizens may have a residue of core EU rights which follow the person and do not eclipse upon withdrawal. Those rights can be asserted against States bound by EU law, albeit not the withdrawing State, although their precise content and extent will need to be determined on a case by case basis.

**Conclusion**

The impending withdrawal of the UK is nothing short of a legal revolution. Article 50, which sets out the rules of the game, is consistent with the constitutional underpinnings of the EU. By granting an unqualified right of withdrawal, it confirms that the EU is a union of sovereign States. In contrast to what is often suggested, it does not place the withdrawing state at a disadvantage but merely formalizes the underlying asymmetries in the bargaining power of the parties. In conformity with the integration paradigm of the Treaties, it decouples the conclusion of the withdrawal agreement from that of a possible agreement governing the future relationship thus precluding half way arrangements. The withdrawal treaty is part of EU law and must comply with the Charter and the general principles of law. It is also an open question whether some core EU rights may subsist and bind the EU and its Member States after withdrawal.

1. The turnout was 72.2% of eligible voters. 51.9% per cent voted to leave and 48.1% voted to remain in the EU, See Electoral Commission, ‘EU referendum results’: http://www.electoralcommission.org.uk/findinformation-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information. [↑](#footnote-ref-1)
2. See speech delivered by Rhodri Thompson QC “The EU Referendum”, 14 June 2016, Holborn Bars, London. [↑](#footnote-ref-2)
3. See Council Conclusions of 18-19 February 2016 providing a new settlement for the UK, Brussels, 19 February 2016 (OR. en) EUCO 1/16 CO EUR 1 CONCL 1. [↑](#footnote-ref-3)
4. The Institute for Government estimates that the annual cost of Whitehall restructuring to manage Brexit will be 65 million for each year that the Department for Exiting the EU and the Department for International Trade will operate: See J.Rutter and H.White, Planning Brexit: Silence is not a Strategy, Briefing Paper, September 2016. [↑](#footnote-ref-4)
5. Police statistics suggest a substantial increase in hate crime in the aftermath of the referendum. See, among others, <https://www.theguardian.com/society/2016/sep/28/hate-crime-horrible-spike-brexit-vote-metropolitan-police> (accessed on 28 September 2016), and see, more recently, Race and religious hate crimes rose 41% after EU vote, BBC online 13 October 2016, <http://www.bbc.co.uk/news/uk-politics-37640982> (accessed on 13 October 2016), accessed on 10 November 2016; see also the Report of the UN Committee on the Elimination of Racial Discrimination on the United Kingdom adopted on 29 June 2016, http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/United\_Kingdom/GBR-CbC-V-2016-038-ENG.pdf, accessed on 10 November 2016. [↑](#footnote-ref-5)
6. The Treaty establishing a Constitution for Europe was drafted by the Convention on the Future of Europe and adopted by the European Council in 2004 but never came into force as it was rejected by popular referenda in France and the Netherlands. For its final text, see OJ 2004 C 310/1. It was replaced by the

Treaty of Lisbon. [↑](#footnote-ref-6)
7. For the view that, before Article 50, there was no right to withdraw, see e.g. C.M. Rieder, The Withdrawal Clause of the Lisbon Treaty in the Light of EU Citizenship (Between Disintegration and Integration), (2013) 37 Fordham I.L.J.; P. Athanassiou, Withdrawal and expulsion from the EU and EMU some reflections, ECB Legal Working Paper Series Legal Working Paper Series, No 10, December 2009; and J.H.H. Weiler, Alternatives to Withdrawal from an International Organisation: The Case of the European Economic Community (1985) 20 Isr.L.Rev. 282. This view receives some support from the case law of the ECJ: Case 7/71 *Commission v France* [1971] ECR 1003, paras 19-20. Cf. the view of the German Federal Constitutional Court in the *Lisbon Treaty* judgment, BVerfG, 2 BvE 2/08, 30 June 2009, available at <http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html>, para 233.

The initial position of the British Government in the negotiations for the adoption of the Constitutional Treaty was that the inclusion of a specific withdrawal clause was not necessary although, as the negotiations developed, it seemed to favour it. For a discussion of the views of the Government, see Vaughne Miller, House of Commons Research Paper 04/66, 4 September 2004, the Treaty Establishing a Constitution for Europe: Part I, p. 78-79 available at researchbriefings.files.parliament.uk/documents/RP04-66/RP04-66.pdf. [↑](#footnote-ref-7)
8. See Vienna Convention on International Treaties, Articles 54 and 56. For a thorough discussion, see L.R. Helfer, Exiting Treaties, 91 (2005) Virginia L.Rev. 1579, and a more provocative approach, see C.A.Bradley and M. Gulati, Withdrawing from International Custom, (2010) 120 Yale L.J. 202. See also N. Feinberg, "Unilateral Withdrawal from an International Organization", 1963 Brit. Yrbk. Int'l L. [↑](#footnote-ref-8)
9. Such territorial changes have occurred also in other cases. Algeria had joined the European Communities as part of France but left upon independence in 1962. The reverse occurred with German reunification when the territorial scope of EU law was extended: see *See J-P. Jacqué,* German Unification and the European Community, 2(1991) EJIL 1. [↑](#footnote-ref-9)
10. See Harhoff, ‘Greenland’s Withdrawal from the European Communities’, *CML Rev.* (1983) 13 and Wiess, *EL Rev* (1985) 173. [↑](#footnote-ref-10)
11. See e.g. Vienna Convention, Article 62 (the *rebus sic stantibus* clause) and, more generally, the provisions of the Convention on the validity and termination of treaties, Articles 42 *et seq*. [↑](#footnote-ref-11)
12. For international law, see for example *Gabcikovo-Nagymaros project (Hungary/Slovakia)* 1997 ICJ 7. [↑](#footnote-ref-12)
13. R.J. Friel, Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution. (2004) 53 ICLQ 407. For further contributions on Article 50, see, among others: Rieder, op.cit.; Athanassiou, op.cit., Weiler, op.cit; C. Hillion, Leaving the European Union, the Union way: A legal analysis of Article 50 TEU, SIEPS, August 2016; E-M. Poptcheva, Article 50 TEU: Withdrawal of a Member State from the EU, EP Briefing, ΡΕ 577.971, February 2016, EPRS\_BRI(2016)577971\_EN.pdf; A.F.Tatham, ‘Don't’ mention Divorce at the Wedding, Darling!’; EU Accession and Withdrawal after Lisbon’ in A. Biondi, P. Eeckhout, S. Ripley (Eds), EU law After Lisbon, Oxford, 2012, 128-154; A. Lazowski, ‘ Withdrawal from the European Union and Alternatives to Membership’ (2012) 37 ELRev, 523; H. Hofmeister, ‘Should I Stay or Should I Go?’—A Critical Analysis of the Right to Withdraw from the EU, (2010) 16 ELJ 589; J. Herbst, Observations on the Right to Withdraw from the European Union: Who Are the “Masters of the Treaties”?, (2005) 6 German L.J. 1755. [↑](#footnote-ref-13)
14. Specific procedures for withdrawal are also provided, for example, in the GATT (Articles XXVIII and XXXI); the IMF Treaty (Articles XXIV and XXVI) and the EEA Agreement (Article 127). [↑](#footnote-ref-14)
15. See e.g. the Nuclear Non-Proliferation Treaty (NPT) which makes withdrawal conditional on extraordinary events that have jeopardized the supreme interest of the withdrawing country, see Article X, para 1. For a discussion, see Asada, Arms Control Law in Crisis ? A Study of the North Korean Nuclear Issue, 9 J. Conflict & Security 331 (2004). [↑](#footnote-ref-15)
16. See e.g. the *Lisbon Treaty* judgment, op.cit, and, more recently, the *OMT I* judgment, BVerfG, 2 BvR 2728/13, 14.1.2014, <http://www.bverfg.de/en/decisions/rs20140114_2bvr272813en.html> [↑](#footnote-ref-16)
17. See Praesidium de la Convention européenne, Note du Praesidium à la Convention : Titre X – L’appartenance à l’Union, CONV 648/03, Bruxelles, 02.04.03, <http://european> convention.eu.int/pdf/reg/fr/03/cv00/cv00648.fr03.pdf, at p. 10. [↑](#footnote-ref-17)
18. See Draft Constitutional Treaty Part I, transmitted by the Praesidium to the members of the Convention on 26 May 2003, commentary under Article I-59, Praesidium de la Convention européenne, Note de transmission du Praesidium à la Convention : Projet de Constitution, Volume I - Texte révisé de la Partie I, CONV 724/03, Bruxelles, 26.05.03, <http://europeanconvention.eu.int/pdf/reg/fr/03/cv00/cv00724.fr03.pdf>., at p. 135. [↑](#footnote-ref-18)
19. See Helfer, op.cit. at 1598-9 [↑](#footnote-ref-19)
20. Ibid. [↑](#footnote-ref-20)
21. See H. Hestermeyer, How Brexit Will Happen: A Brief Primer on European Union Law and

Constitutional Law Questions Raised by Brexit’, Journal of International Arbitration 33, Special Issue

(2016): 429–450. [↑](#footnote-ref-21)
22. For example, a British citizen living in another EU State who no longer enjoys EU rights of free movement might conceivably dispute the legality of the withdrawal process in proceedings before the courts of the State of its residence which may then make a preliminary reference to the ECJ. Nevertheless, even if in such a case the ECJ decided that the national constitutional requirements had not been followed it would not follow that the withdrawal agreement was invalid. [↑](#footnote-ref-22)
23. A question could arise as to whether systematic and comprehensive disobedience of EU law could be seen as constructive notification. Could, for example, the repeal of the domestic law providing the basis of EU membership by itself or coupled with a systematic failure to comply with EU obligations and a policy of non cooperation within the EU institutions be characterized as constructive notification triggering the two year period? This is a highly theoretical possibility which would lead to a political crisis. In the first place, it should be treated as a failure to comply with EU law triggering the enforcement mechanisms available to the Commission and the Council. Notably, the scheme of the Treaties is somewhat uneven in that it provides for a right to withdrawal but no power of expulsion. Persistent and egregious violation of EU law could result in the application of Article 7 TEU and the withdrawal of voting rights in the Council, as well as pecuniary sanctions under Article 260 TFEU and, ultimately, the operation of the EU under some doctrine of necessity. [↑](#footnote-ref-23)
24. For the opposite view, see Jake Rylatt, ‘The Irrevocability of an Article 50 Notification: Lex Specialis and the Irrelevance of the Purported Customary Right to Unilaterally Revoke’ UK Constitutional

Law Association Blog, 27 July 2016: https://ukconstitutionallaw.org/2016/07/27/jake-rylatt-theirrevocability-of-an-article-50-notification-lex-specialis-and-the-irrelevance-of-the-purportedcustomary-

right-to-unilaterally-revoke/. [↑](#footnote-ref-24)
25. Under Article 68 of the Vienna Convention, a Contracting Party who gives notice of withdrawal or denounces an international agreement under its terms may withdraw the notice at any time before it takes effect. The International Law Commission which authored the draft articles on the law of treaties which provided the basis for the Convention considered that, although there were good arguments against allowing revocation, the counterarguments were so strong that there should be a general freedom to revoke subject to a specific provision providing otherwise in an international agreement. See Draft Articles on the Law of Treaties with commentaries [1966] II YBILC 187 at 264. [↑](#footnote-ref-25)
26. Ultimately, whether notification is revocable is a matter of interpretation of Article 50 which is for the ECJ to decide. The Court could rule on the issue in any type of proceedings in which it has jurisdiction, including by way of preliminary reference, provided the resolution of the issue was material to the outcome of the proceedings. [↑](#footnote-ref-26)
27. See HL Select Committee on the Constitution, The invoking of Article 50, 4th Report of Session 2016–17, 13 September 2016, paras 11 et seq. [↑](#footnote-ref-27)
28. See BBC news online, 2 October 2106, http://www.bbc.co.uk/news/uk-politics-37532364. [↑](#footnote-ref-28)
29. See Vienna Convention, Articles 56(2) and 67(2). [↑](#footnote-ref-29)
30. Note also that the withdrawal agreement is concluded by the Council acting by a super majority of the remaining Member States: see Article 50(4) discussed below. This means that no State has the right to veto the terms of exit and the withdrawing Member State could seek to form alliances in its favour. Along with the juxtaposition between the EU and the withdrawing Member State there lies an intra-EU juxtaposition. States who have less close economic ties with the withdrawing State will be less concerned with accommodating its demands unless they can extract a worthy price either from it or from the EU States that are amenable to its demands in view of their own trade advantages. However, the alignment of those interests acquires much more importance in relation to the negotiation of a new agreement governing future relations with the exiting State where the EU decision making process is different. [↑](#footnote-ref-30)
31. Article 50(2) TFEU. [↑](#footnote-ref-31)
32. The duty of cooperation binds the withdrawing Member State to conduct the negotiations in good faith and in a spirit of cooperation. The extent to which Article 4(3) TEU binds more generally the withdrawing Member State after notification is a different issue. It is submitted that duties under Article 4(3) still persist given that the withdrawing Member State continues to take part in EU decision-making and vote in the Council except on matters relating to withdrawal: see Article 50(4). It is however difficult to see how the Member State could take part in long term planning of EU policy. See below. [↑](#footnote-ref-32)
33. Article 50(2) TFEU. Article 218 lays down the general procedure for the conclusion of international agreements. [↑](#footnote-ref-33)
34. Cf Article 218(4). [↑](#footnote-ref-34)
35. Article 218(11) TFEU. [↑](#footnote-ref-35)
36. Article 50(2). [↑](#footnote-ref-36)
37. Article 50(4). [↑](#footnote-ref-37)
38. See Article 238(3)(b) TFEU in combination with Article 16(4) TEU. 72% of 27 Member States provides a figure of 19.44 but this should be considered to require 20 and not just 19 votes in Council since Article 238((3)(b) refers to ‘at least’ 72% and, numerically, that percentage is more than 19 votes. [↑](#footnote-ref-38)
39. Praesidium de la Convention européenne, Note du Praesidium à la Convention : Titre X – L’appartenance à l’Union, CONV 648/03, Bruxelles, 02.04.03, <http://european> convention.eu.int/pdf/reg/fr/03/cv00/cv00648.fr03.pdf, at p. 10. [↑](#footnote-ref-39)
40. Article 50(4). [↑](#footnote-ref-40)
41. See M. Dougan, (2008) 45 CMLRev 617, at 688. [↑](#footnote-ref-41)
42. See Poptcheva, op.cit. n. 12. [↑](#footnote-ref-42)
43. See Article 99(1) of the EP Rules of Procedure. [↑](#footnote-ref-43)
44. See Articles 49 TEU. [↑](#footnote-ref-44)
45. See Hillion, op.cit. [↑](#footnote-ref-45)
46. See Article 50(5). [↑](#footnote-ref-46)
47. Thus, it may cover, among others, the following: (a) The rights of EU citizens and corporations in the withdrawing State and vice versa, after withdrawal; (b) The possible continued application of mutual recognition and free movement rights; (c) Transitional provisions for the application of some EU measures to the withdrawing State; (d) Reciprocal financial obligations, namely, the contributions of the withdrawing State to the EU budget and entitlements of the latter to EU structural funds and other EU monies; (e) The possible continued participation of the withdrawing State in international agreements concluded by the EU; (f) The timetable for the termination of the representation of the withdrawing State in the EU institutions, e.g. the Court of Justice and the Commission; (g) The timetable for the relocation of EU agencies located in the withdrawing State. [↑](#footnote-ref-47)
48. See Article 50(5). [↑](#footnote-ref-48)
49. See Draft Constitutional Treaty Part I, transmitted by the Praesidium to the members of the Convention on 26 May 2003, commentary under Article I-59, CONV 724/03, Bruxelles, 26.05.03, <http://europeanconvention.eu.int/pdf/reg/fr/03/cv00/cv00724.fr03.pdf>., at p. 135. [↑](#footnote-ref-49)
50. See J Shaw, Legal and political sources of the draft European Constitutional Treaty, at

<http://les.man.ac.uk/law/staff/documents/legalandpoliticalsourcesofthedrafteuropeanconstitution.pdf> quoted by HC, op.cit. p. 78. [↑](#footnote-ref-50)
51. Cf Article 49 TEU. It is correct that the withdrawal of a Member State will entail consequential adjustments in the Treaties, for example Article 52 TEU and 355 TFEU which provide for their respective territorial scope, but withdrawal is not conditional on their ratification. See House of Commons Research Paper 04/66, 4 September 2004, the Treaty Establishing a Constitution for Europe: Part I, p. 77 available at researchbriefings.files.parliament.uk/documents/RP04-66/RP04-66.pdf. [↑](#footnote-ref-51)
52. See Article 344 TFEU. [↑](#footnote-ref-52)
53. See e.g. Case 104/81 *Hauptzollamt Mainz v Kupferberg* [1982] ECR 3641; *Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719, para 14. [↑](#footnote-ref-53)
54. See S. Douglas-Scott: What Happens to ‘Acquired Rights’ in the Event of a Brexit? UK Constitutional Law Association, <https://ukconstitutionallaw.org/2016/05/16/sionaidh-douglas-scott-what-happens-to-acquired-rights-in-the-event-of-a-brexit/> [↑](#footnote-ref-54)
55. Similarly, citizens of the withdrawing State resident in an EU Member State post-withdrawal may be able to derive some constitutional protection from the domestic law of their residence. [↑](#footnote-ref-55)
56. Case C-122/95 *Germany v Council* [1998] ECR I-973. [↑](#footnote-ref-56)
57. In its seminal judgment in *Kadi*, the ECJ held that the obligations imposed on the EU by an international agreement cannot have the effect of prejudicing the constitutional principles of EU law which require that all EU acts must respect fundamental rights: see Joined Cases C-402/05 P & C-415/05 P *Kadi v Council and Commission,* judgment of 3 September 2008, para 285. See further: Opinion 1/91 on the *Draft Agreement relating to the creation of the European Economic Area* [1991] ECR I-6079; Opinion 2/13 *on Accession to the ECHR* EU:C:2014:2454. [↑](#footnote-ref-57)
58. It should be borne in mind here that the possible remedies appear incomplete. Even if the withdrawal agreement prevented the withdrawing State from introducing such rules, it is not clear what remedies would exist for the affected parties in the absence of direct effect of the agreement in the law of the exiting Member State. [↑](#footnote-ref-58)
59. See, in agreement: Rieder, op.cit. at 160 et seq. [↑](#footnote-ref-59)
60. See Article 53 TEU. [↑](#footnote-ref-60)
61. Case 26/62 *Van Gend en Loos* [1963] ECR 1, at 12. [↑](#footnote-ref-61)
62. Id. [↑](#footnote-ref-62)
63. See, e.g. Case C‑184/99 *Grzelczyk* [2001] ECR I‑6193, para 31. [↑](#footnote-ref-63)
64. Cf C- 34/09 *Zambrano* [2011] ECR I-1177. [↑](#footnote-ref-64)