Unilateral Withdrawal of a Member State? Some Thoughts on the Legal Dimensions of Brexit[1]

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Brexit opened the door of legal interpretation in relation to the right of a member state to unilaterally withdraw from the European Union. Article 50 TEU regulates the process providing a framework, however it lets open many practically important questions which has to be answered. This paper attempts to analyse Article 50, highlight its arguable points, and summarize the withdrawal process and the main legal aspects of Brexit. There are some procedural question marks as well in the application of Article 50 that should be elaborated via negotiations and on the base of the interpretation of the Court of Justice – which is still waited.

Keywords: Brexit, Article 50 TEU, interpretation of withdrawal clause, procedural and practical implications of Brexit

1. Introduction

The Treaty of Rome (hereinafter referred to as: EEC Treaty) establishing the European Economic Community in 1957 determined the main objective of the European integration project as intending to establish "*an ever closer union among the peoples of Europe.*"[2] The EEC Treaty was an attempt to foster European economic integration in that fragmented period after the World Wars. Article 240 of the EEC Treaty declares that the Treaty is "*concluded for an unlimited period*"[3] which means that the Treaty creates a permanent organization which aims to achieve stability. In parallel to that, the EEC Treaty places permanent limitations on the sovereign rights of the Member States whose limitations were interpreted in the C-6/64., *Costa v. ENEL* case.[4] In the *Costa v. ENEL* case the Court states, that *"the EEC Treaty has created its own legal system which became an integral part of the legal systems of the member states and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the member states have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves.*"[5] Therefore, the founding Treaties did not include any provisions on the withdrawal

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[2] Treaty establishing the European Economic Community (EEC Treaty) (1957), available: http://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:11957E/TXT&from=HU (5. September 2017).

[3] EEC Treaty, Article 240.

[4] C-6/64., *Costa v. ENEL* case [1964], Court Report 1141, ECLI:EU:C:1964:66.

[5] C-6/64., *Costa v. ENEL* case [1964], Court Report 1141, point 3

from this supranational organization. The European Constitutional Treaty included the unilateral right to withdraw from the European Union (hereinafter referred to as EU), however, due to the *referenda* in France and the Netherlands, it never came into force. Thus, European Community (and later EU) Law did not regulate the issue of a member states' withdrawal until the Lisbon Treaty came into force in 2009. Although the question of a Member State's unilateral withdrawal was raised up several times[6] during the history of the European Union, no member state has withdrawn from the EU yet.[7]

The referendum of 23 June 2016 on EU membership in the United Kingdom (hereinafter referred to as: UK) resulted in an unprecedented and surprising situation resulting in the first application of Article 50 of the Treaty of the European Union. In point 2, I analyse the Article itself, and in point 3, I summarize the legal aspects of the withdrawal and draw some conclusions.

2. Unilateral Withdrawal of a Member State under the TEU

Article 50 TEU introduces the unilateral right for a member state to withdraw from the EU. Accordingly, EU law regulates the issue of the exit from the Union, therefore the process cannot rely only on international law anymore. EU Law is more or less a *self-contained regime*[8], which is interweaved with international law in many aspects, but where the relationship of the European Union and its member states are in question, EU Law functions as *lex specialis*, which necessarily *derogat legi generali*.[9]

In practice, the negotiated withdrawal seems more likely to happen than the unilateral one. Unilateralism in this sense means the voluntary decision on exiting made solely by the exiting state, and not the unilateralism of the whole process. As accession needs active behaviour from both the EU and the acceding member state, withdrawal also requires action from the EU as well – at least the silent acknowledgment of the decision of the member state made on the ground of its constitutional requirements. After the member state has made its decision and notified the EU about this, the process becomes bilateral (*i.e.* bilateral between the member state and the EU). Thus, only the decision of leaving the integration is made unilaterally, the following process is necessarily two-sided in practice.

Article 50 TEU regulates as follow:

[6] For example: in February and October 1974, the United Kingdom Labour Party issued Election Manifestos that mandated renegotiation of the terms of Britain's accession treaty with the EEC (1973) and a national referendum to determine Britain's continued membership. The EEC heads of state met in Dublin in March 1975, to conclude the negotiations, after which the British cabinet voted by a majority that the United Kingdom should remain in the EEC. By national referendum of June 5, 1975, a 67.2% British majority voted for the United Kingdom to remain in the EEC.

[7] More precisely, Greenland consensually withdrew from the European Communities in 1985, but it was part of Denmark and not a member state by its own right, so it was just a reduction of the territorial scope of the founding Treaties as it meant a partial withdrawal and not a full one. This process was made on the base of an international law instrument, namely the *Vienna Convention on the law of treaties* (1969, 1155 UNTS). The Convention provided a general position under public international law when it came to the termination or withdrawal from international Treaties.

[8] See further information about self-containedness: Liana Andreea Ionita(2015): *Is European Union Law a Fully Self-Contained Regime? A Theoretical Inquiry of the Functional Legal Regimes in the Context of Fragmentation of International Law*, Studia Politica; Romanian Political Science Review, available at: https://www.questia.com/library/journal/1P3-3695684861/is-european-union-law-a-fully-self-contained-regime (7. March 2018).

[9] Although, there are many dilemmas in the legal literature in this regard. For example, the UN Charter always prevails over the founding treaties of the EU. But in this case, there is no need to analyse the relationship of international treaties and EU law instruments, as the withdrawal of the UK is an inner issue of European Union law, and the TEU is not contradictory to international law.

"1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

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

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

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

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

2.1. Constitutional Requirements

Article 50 paragraph 1 declares that "*Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements."* This means 28 different ways of withdrawal in theory, as every member state has its own constitutional requirements. This undermines the process in a sense. From the perspective of European Union law, it does not matter what the constitutional requirements of the exiting member state are. This presumes that the EU is going to accept the decision, without examining the base and conditions under which the national decision was taken. Hypothetically, this means that the European Union trusts that the decision about EU membership is made on the basis of democratically accepted constitutional requirements, and therefore there is no reason to question them.

In the case of the United Kingdom, paragraph 1 raised the first legally problematic question. How should constitutional requirements be interpreted in a country which does not have a written constitution? Could the referendum be accepted as one component of constitutional requirements? Could the result of the Brexit-referendum could be recognized as a constitutional requirement?

The result of a referendum – in contrary to the case in Hungary – is not legally binding for the British Parliament. Therefore, Westminster had the opportunity to ignore it in a legal sense, however – from a political point of view – that was not plausible. If we count the result of the *vox populi* as a constitutional requirement, the question arises who was entitled to vote? Was constitutionally correct the eligibility to vote under European Law requirements? Obviously, the result of an election is depends on the

`*composition of voters*`. The *European Union Referendum Act of 2015*[10] Section 2 determines the entitlement to vote in the referendum. According to that:

> *"(1) Those entitled to vote in the referendum are—*
>
> *(a) the persons who, on the date of the referendum, would be entitled to vote as electors at a parliamentary election in any constituency,*
>
> *(b) the persons who, on that date, are disqualified by reason of being peers from voting as electors at parliamentary elections but—*
>
> *(i) would be entitled to vote as electors at a local government election in any electoral area in Great Britain,*
>
> *(ii) would be entitled to vote as electors at a local election in any district electoral area in Northern Ireland, or*
>
> *(iii) would be entitled to vote as electors at a European Parliamentary election in any electoral region by virtue of section 3 of the Representation of the People Act 1985 (peers resident outside the United Kingdom), and*
>
> *(c) the persons who, on the date of the referendum—*
>
> *(i) would be entitled to vote in Gibraltar as electors at a European Parliamentary election in the combined electoral region in which Gibraltar is comprised, and*
>
> *(ii) fall within subsection (2).*
>
> *(2) A person falls within this subsection if the person is either—*
>
> *(a) a Commonwealth citizen, or*
>
> *(b) a citizen of the Republic of Ireland.*
>
> *(3) In subsection (1)(b)(i) "local government election" includes a municipal election in the City of London (that is, an election to the office of mayor, alderman, common councilman or sheriff and also the election of any officer elected by the mayor, aldermen and liverymen in common hall)."*

This means that the approximately 3,4 million[11] EU citizens living[12] in the UK at the time of the election were not eligible to vote, which is, in my view, controversial to some rights in relation to EU citizenship. According to the Article 20 paragraph 2 point b) of TFEU, European citizens "*have the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State*". Although this does not entitle EU citizens to vote in general national elections in their member state of residence, it highlights the intention of the concerning EU law. The intention is to entitle EU nationals to get involved

[10] European Union Referendum Act of 2015, available at: http://www.legislation.gov.uk/ukpga/2015/36/contents/enacted (7. March 2018).

[11] According to the Office for national Statistics (https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/datasets/populationoftheunitedkingdombycountryofbirthandnationality,7. March 2018) approximately 3,4 million EU citizens were living in the UK at the time of the Brexit-referendum. Now this data is around 3,7 million.

[12] According to the Eurostat, the 4,9% of the UK`s population were born in other member state. See: http://ec.europa.eu/eurostat/statistics-explained/index.php/People_in_the_EU_%E2%80%93_statistics_on_origin_of_residents#Foreign-born_residents_from_another_EU_Member_State (7. March 2018).

in a decision-making processes where their future might depend on. There is a huge difference between a national election, a municipal election, a European Parliamentary election and a referendum. A national referendum on EU membership – taking into account its nature and possible consequence – is quite different. The discrepancy is in the consequence of the decision. It is understandable that EU citizens[13] cannot vote in national elections, as the result of it generally does not change their status in that member state. Normally – in democratic countries – the result of a national election does not change radically the quality of living, the statehood, thus when an EU citizen decides to move to another member state, this decision generally will not depend on a national election within that state. However, a decision which is taken on the membership of that state is much different, as it might change not just the status of the state in the EU, but the status of its citizens as well. Still we must acknowledge that no legal obligation flows from EU law which would legally require member states to enable EU citizens to vote in national referenda.

A second interesting provision of the EU Referendum Act is that it excludes UK citizens from voting on the EU membership referendum, who were last registered to vote over 15 years ago. This – not to mention how this might affect the right to the free movement of people within the EU[14] – takes the general elections and the referendum in this case as if they were essentially similar, as this provision is also applied in general elections, but they are really not. Moreover, *argumentum a contrario* this 15-year rule should be applied also in the case of those EU citizens who reside in the UK for more than 15 years. It is understandable in my view that the UK nationals living somewhere else for 15 years are excluded, as they live their everyday live somewhere else, their contribution to British life is not 'relevant' (supposedly they pay their taxes where they live and work, etc.), their life cannot change radically due to the referendum, therefore their opinion is 'less important' in this sense. But – in contrast – those nationals of EU member states who are continuously living and working in the UK, contributing in the system (working and paying taxes, but not citizens of the UK yet) were also excluded, which is hardly understandable. In addition to this, another contrast: the *Commonwealth* citizens[15] not living in the UK were eligible. There is an inequity in this mechanism which should have been supervised – in my opinion.

Accepting that the *common law* traditions are widely divergent from civilian ones and therefore assuming that the so-called constitutional requirements in the case of the United Kingdom might fully only be understood by the British, a critical statement is addressed to the EU legislator at this stage concerning the first imperfection of Article 50. The critique concerns the fact that the European Union provides the right to a member state to unilateral decision-making on the one hand, but does not supervise or control neither the "know-how" of that decision-making, nor the availability of the constitutional requirements. As the member state is sovereign, it has the right to decide on the basis of its constitutional requirements about its membership. However, respecting the fact that the member state is sovereign and the EU is not a federal state, a common frame of constitutional requirements should be in place in order to avoid 28 different ways of decision-making. This would not affect the sovereign right of a member state, but would mean a guarantee for the citizens and for other member states. In my view, the missing element is not supervision or control, but should be a common framework to be applied as laid down by the European Union. Are there common constitutional

[13] It is important to add that EU citizenship is not an alternative of regular citizenship, it is an additional supplementary bouquet of rights which are arising from the membership status of a state in the EU. The main legal question is, whether and how the legal nature and position of these acquired rights could change due to the Brexit.

[14] See the argument made in *R (Preston) v Wandsworth London Borough Council* [2013] QB 687.

[15] *E.g.* British Overseas Territories citizen, British Overseas citizen, Britishsubject, British National (Overseas) or a national of a country listed in Schedule 3 of the British Nationality Act 1981.

requirements in our EU − which gained values via respecting the so-called common constitutional traditions of the member states?

Of course – as it was declared in the *Schindler* case[16] by the High Court – the "*UK undoubtedly has a sovereign right to determine the constitutional procedures which shall be followed in determining the question*". However, the problematic issue here is not the determination of the constitutional requirement which is obviously the competence of a sovereign state, but the inequity in the eligibility of voters. Taking into account that the difference[17] between the numbers of the votes of the '*Remainers*' and the '*Brexiters'* was not significant, ensuring the right to vote of EU citizens living in the UK – eg. for more than 15 years − might even have led to a different result of the referendum.

2.2. Procedural Issues Defined by Article 50

Article 50 paragraph 2 clearly contains procedural provisions. This Section starts with the following: *"A Member State which decides to withdraw shall notify the European Council of its intention."*

The member state – in this case the United Kingdom – shall notify the EU institutions, namely, the European Council of its intention. More precisely, it is not the intention anymore that is notified, but the decision on the withdrawal. The notification – after internal debates in the UK about who is entitled to submit, the Prime Minister or the Parliament, alone or after the approval of the Westminster[18] – was submitted on 29 March 2017.

Firstly, there is no explicit time limit for taking the action of notification. The referendum resulting in Brexit was held on 23 June 2016, and the notification was submitted 9 months later. The British could wait even longer, as EU law does not regulate this issue in detail. Leaving the door open between when the withdrawal decision is made in a member state on the basis of constitutional requirements and the notification of the decision is submitted to the EU raises practical problems, such as uncertainty. What if the member state decides to withdraw, but does not take the notification at all?

According to *Steve Peers* and *Darren Harvey*, "*the member states are under the duty to respect the values of the Union as enshrined in Article 2 TEU as well as to abide by the principle of sincere cooperation in Article 4 (3)TEU."*[19] This necessarily implies that the "*discretion of the UK vis-á-vis the timing for providing Article 50 TEU notification should not be limitless.*"[20] Thus – according to the spirit of EU law – wasting time and holding the other member states in uncertainty is not compatible with the Union law. That is why the deadline should be counted from the date when the decision is made under the national law. The content that is missing from Article 50 is on the one hand understandable as it only provides a framework, which was probably not intended to be applied. Thus,

[16] *H. Schindler MBE & J. MacLennan v Chancellor of the Duthcy of Lancaster, Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 957 (Admin.) per Lloyd Jones Lj, available at: https://www.judiciary.gov.uk/wp-content/uploads/2016/04/shindler-final.pdf (7. March 2018).

[17] The proportion of the votes of the Brexiters and the Remainers were: 51.9% and 48,1%, respectively.

[18] This debate was finally decide upon the *Miller* case (*R Miller v Secretary of State for Exiting the EU* [2017]), where the Supreme Court stated that under the British law, the approval of the Parliament is needed before the Prime Minister submits the notification. For further information about this topic, see: Paul Craig (2016): Brexit: *A Drama in Six Acts*, European Law Review, Vol. 41., issue 4, pp. 447-468; and Sir David Edward & Sir Francis Jacobs & Sir Jeremy Lever & Helen Mountfield & Gerry Facenna (2017): *In matter of Article 50 of the Treaty of European Union* – Opinion, available at: https://www.bindmans.com/uploads/files/documents/Final_Article_50_Opinion_10.2.17.pdf (7. March 2018) pp. 44-55. etc.

[19] Steve Peers & Darren Harvey (2017): *Brexit: The Legal Dimensions*, in: Catherine Barnard and Steve Peers (ed.): European Union Law, p. 824.

[20] Christoph Hillion (2015): *Accession and Withdrawal in the Law of the European Union*, in: D. Chalmers – Anthony Arnull (eds.): The Oxford Handbook of European Union Law (Oxford, Oxford University Press), pp. 126-151.

Article 50 is much more like a European constitutional guarantee for member states to keep their sovereignty tangible than a real, nuanced procedure under EU Law.

Secondly, using the word '*intention*' suggests, that even if the decision is made on the basis of internal law, it is still just an *intention* (and not a fully declared decision) until it is going to be successfully delivered to the European Council. Using the word "*intention*" is controversial to paragraph 1, as that gives the right to the member state to decide on the withdrawal based on its constitutional requirements, thus paragraph 2 should use the word "*decision*" instead. This decision should just be sent simply to the EU, if that would be considered as a decision of a sovereign state without any reaction needed by the other party. This may increase uncertainty regarding the sovereign member state, suggesting that even if it is entitled to unilaterally decide about its future membership in the EU under TEU, that decision is just a declaration of intention until the European Council declares that the notification was delivered, or *silently approves* it by issuing the guidelines as an answer.

Article 50, paragraph 2 continues: *"In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union."*

This defines the first obligation of the European Union, as the European Council has to provide guidelines for the withdrawal negotiations. This sentence also lacks a deadline because there is no obligation to issue the guidelines in time. The timing of the issue of the guidelines should be counted from the submission date of the notification by the member state. The timeline is also an uncertain factor in the process. The guidelines – in the current case – were issued in April 2017, a month after the UK sent the notification to the Council.

The second part of the sentence obliges the Union to negotiate the withdrawal of the member state. It is not clear whether the provision obliges the EU only to negotiate or that the duty extends to concluding an agreement as well. Subsequent parts of Article 50 however establish the opportunity of a withdrawal without having an agreement, consequently only the negotiation is compulsory which is – taking into account the principle of the loyal cooperation – obvious.

The negotiations and the possible agreement should involve the arrangements for the withdrawal taking into account the future relationship of the member state and the EU. The guidelines of the Council declared that a parallel negotiation process of the withdrawal and future relationship is not possible, only after the first chapter of withdrawal had been finished could the new stage of the future cooperation start. Therefore, it is hardly understandable what the *"taking account of the framework for its future relationship with the Union"* means. On the one hand, it is logical to close a process and then start a new one. However, when Brexit happens, the UK becomes a third country from EU law perspective and this time it can start to negotiate its new relationship with the EU as a whole or with different states via bilateral agreements, the result cannot be seen at this moment. The negotiations necessarily take years, which – without having a transitional period maintaining the current system – is simply uncertain. Moreover, it is unclear what it means to conclude an agreement setting out the arrangements for the withdrawal. Who is entitled to draw the conditions of the withdrawal agreement? Is it an obligation? What if the UK and the EU cannot agree or only in minimum questions due to the time pressure and economic interests?

As the minimum content of the withdrawal agreement – the so-called arrangements – are not listed in Article 50, nor in other parts of EU law, and as paragraph 3 lets the withdrawal happen without having an agreement, this section is also very controversial.

The end of paragraph 2 provides clear procedural regulations declaring that *"agreement shall be negotiated in accordance with Article 218(3) TFEU"* and that the agreement *"shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament."* Thus, this admits the liable body to proceed the withdrawal on the side of the EU, entitling the Council, but requiring a qualified majority on the one hand, and the consent of the Parliament on the other. A complex question arises also from paragraph 2 of Article 50, namely the revocability of the notification. More precisely: can a member state change its mind? Whether the notification under the EU Law is revocable or not? Who is entitled to decide on this? I address the question from another perspective: assuming that the notification is not an intention, but a decision which was declared by the decision maker in the direction of the addressee, the question is not the revocability of that procedural action of sending this message to the addressee, but the decision itself. And the question is more likely whether the decision could be revoked unilaterally and unconditionally, or not? If the decision is changeable, then it is just a technical issue whether the notification is replaceable and under what circumstances. The Brexit-literature is quite divided on this topic. Before I summarize the concurring opinions, the first point is that this question – as it is related to EU law – should be interpreted by the European Court of Justice via preliminary ruling procedure, as that is the only body who is entitled to give the missing authentic interpretation.

Firstly, there is a political and a legal side to this question. Politically, obviously, deciding to leave integration and then withdraw the withdrawal process seems irrational and not permissible. This would easily lead to political games of double mill. This was agreed by the applicants and the British government in the abovementioned *Miller* case. Nevertheless, other member states may follow the British example, which is – from the integrationist perspective –not reasonable. Logically, the previous argument is false from a practical point of view. Every member state has advantages of the membership, hypothetically saying, it is not plausible that a member state is going to follow the British example just because they seemingly gained a 'plus' via Brexit. Practically, nobody will divorce from his wife just because the neighbour did and they feel good now. It is not viable.

Legally, there is no prohibition in Article 50 related to the reversibility of the process. Thus, as it is not forbidden, it is legally – theoretically – possible, until the European Court of Justice interprets differently. The question – as I mentioned above – is whether it is revocable unilaterally, unconditionally and at any time? As *Hillion* argued related to the timing of the notification itself, it cannot be limitless in time. The same has to be true in this case as well. Therefore, firstly, EU law does not prohibit it, so it is theoretically possible. Secondly, revocability arises from the ancient legal values formed in principles of law – such as the '*clausula rebus sic stantibus*'. If we consider the two-year time that Article 50 provides for the process and if there is no mutually agreed extension, within this time-frame, the notification should be revocable. Thirdly, the last paragraph of Article 50 declares that a member state who has withdrawn, may apply to be a member of the EU later − treating it as a third country – using Article 49 as a basis. Therefore, if the TEU keeps the door open for the future, strengthening the integrationist perspective of "*establishing an ever-closer Union*", why would the EU close the road '*halfway*', if a member state could change its mind before leaving integration? The rest of the commentators[21] agree on that the notification is revocable, but nor unconditionally and neither

[21] See to this topic *e.g.*: P. Craig (2016): *Brexit: A Drama in Six Acts*, ibid.; Takis Tridimas (2016): *Article 50: An Endgame without an End?*, *King's Law Journal*, Vol. 27., issue 297, pp. 303–305; A. Thiele (2016): *Der Austritt aus der EU:*

limitless. In addition to that, *Craig* highlights "*the nature of electoral politics in democratic societies dictates that there may well be a change of government from time to time. It would therefore seem absurd to hold as a matter of law that the notification to leave the EU rendered by a previous government was binding upon the incumbent government despite them assuming office on an electoral pledge to reverse the withdrawal process.*"[22]

All in all, from a legal point of view, there is no reasonable obstacle in the way of revoking the notification made on the base of Article 50. However, politics could undermine the legal interpretation and until the only authentic interpreter of the EU law – namely the European Court of Justice – is not addressed with this question via preliminary ruling procedure, the commentators can only argue.

Article 50 defines the parties of the negotiations which on the EU side is the European Council. Paragraph 2 refers to the Article 218 (3) of the Treaty on the Functioning of the European Union (TFEU). Article 218 (3) declares that

> "*The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.*"

This focuses on the roles of different EU institutions in the withdrawal progress. These are purely procedural issues. The first duty of the Council under Article 50 is to provide guidelines to provide a framework for the negotiations. Then, it has to cooperate with the European Commission according to TFEU Article 218 (3). Article 50 does not expect consent from the member states related to the withdrawal agreement. An agreement may be concluded after a qualified majority vote in the Council, then after getting the consent of the European Parliament. Thus, the member states hold no formal veto over the process of negotiation and conclusion of a withdrawal agreement.[23]

Paragraph (4) declares that the representatives of the exiting member state cannot participate and vote in the EU decisions concerning the withdrawal of that state.

On the other hand, the Article does not define the obligations of the exiting member state. It neither obliges it to time limits concerning the submission of the notification, not defines the constitutional standards the decision has to meet, etc. Why the TEU lacks these obligations, while it declares the duties of EU institutions related to the withdrawal process? What are the obligations of the exiting member state, besides those defined in the principles – such as loyal cooperation?

Hintergründe und rechtliche Rahmenbedingungen eines 'Brexit', Europarecht, Vol. 51., issue 281, p.295*;* P. Eeckhout and E. Frantziou (2016): *Brexit and Article 50 TEU: A Constitutionalist Reading*, UCL European Institute Working Paper, pp. 37–40.
http://www.ucl.ac.uk/european-institute/eipublications/brexit-article-50.pdf (10. March 2018).

[22] Steve Peers & Darren Harvey (2017): *Brexit: The Legal Dimensions*, in: Catherine Barnard and Steve Peers (ed.): European Union Law, p. 825.

[23] Ibid p. 827.

2.3. The Cease of EU Membership

Article 50 (3) provides that:

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

Thus, the membership of the exiting member state ceases after the two-year period counted from the submission of the notification – in case this period is not extended by the EU and the UK, or unless the withdrawal treaty defines otherwise. This means – in my view – that if there is no extension or other action, on 29 March 2019 at midnight, the Treaties shall cease to apply to the UK, thus the UK *de iure* loses its membership.

This point clarifies that the withdrawal agreement is just one option, without an agreement the UK's membership can be lost just because of the time. The same happens if only one party intends to extend the period.

Firstly, regarding the 'time', it is more or less obvious that two years are not enough for this process. In the case of Greenland in 1985, the quasi-exit took more than three years – where the cooperation was not even at the same level as it is now.

Secondly, the exit cannot happen without a transitional period. When a member state accedes to the EU, there is a time frame for '*Europeanisation*', this means among others: harmonization, closing up economically, implementing certain institutions, etc. Therefore, when a state withdraws, the transition is necessary for the '*de-Europeanisation*' as well. This period is very important, not just from the perspective of the withdrawing state – as it has to deal with financial, economic, administrative, labour and clearly legal issues – but from the aspect of the citizens as well, especially those EU citizens who are currently living in the UK. Their situation and future is also a very important question that could be the subject of another research paper.

2.4. Leaving the Door Open

Article 50 (5) declares that "*if a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49".* This means that after the UK withdraws, there is no condition which could impede their future application to the EU. The door is open, which could mean that the most important guiding principle is the ethos of '*the ever-closer Union*'. Nobody can foresee the future, especially until we do not see the end of negotiations and the withdrawal agreement itself vis-á-vis the UK. The negotiations about the future relationship of the EU and the UK may start only after the withdrawal is done, which assumes a transitional period for negotiations and leading out the United Kingdom from the EU legal system. In any case, this paragraph handles the withdrawing state as a third country with no benefit or advantage in case for a re-accession. It is important that the Article does not link any extra obligation or "punishment" as a consequence if a state which had previously left the EU changes its mind in the future.

3. Summary

Brexit might be useful from the point of view of legal clarification, because it highlights the problems with Article 50 TEU and the uncertainties which arise from the whole procedure, as it is barely regulated and unprecedented. Therefore, the withdrawal of the United Kingdom – besides being regrettable as European integration may lose such a great generator of innovation as the United Kingdom – could fill legal gaps on the one hand.

There are purely legal questions that are not regulated in detail and this causes practical problems when it comes to the application of the Article.

Firstly, the '*constitutional requirements*' need a common frame or standards, which has to be fulfilled while the decision about the withdrawal is made at the national level. There must be a level of control, at least before the decision is made, related to how that decision is taken. This is what is important in my opinion in order to prevent other member states from considering a decision on withdrawal. In addition, I would add into the accession treaties in the future a clause which defines (pre-accession) their conditions to withdraw. In this case, a member state would make its decision on the accession taking into account its possible withdrawal and its consequences.

Secondly, the obligations of the withdrawing state are not clear, apart from the submission of the notification. There are missing frameworks both in time and in duties. Moreover, the relevant Article is silent about the revocability and the possible conditions of the notification.

Thirdly, Article 50 misses the opportunity to lay down a framework for the transitional period starting from the end of the two-year period and lasting until the member states loses its membership. Currently, there is an option for losing the membership with no agreement about the withdrawal and no agreement about the future, which results in a very uncertain situation.

Brexit might in a sense be useful also for the European Union, as it may indicate the limits of the integration process. Since 1957, European integration has been growing, spreading, developing and becoming more and more harmonized. Sometimes the member states used their "brakes" and reflected that an issue on agenda could be solved in a better way nationally and used their '*subsidiarity*' warning when it came to the decision. This happened with many private law instruments which aimed harmonization or unification such as the Common European Sales Law. Integration can be ever closer, always developing, improving and even more borderless, but we can see that even this cooperation has its limits. Brexit shows us that the limits have been reached by now, many challenges are on the agenda (*e.g.* related to migration into Europe), and there are important foreign policy issues that have to be solved before the integration moves toward the next level.

In my view, the European Court of Justice should be asked about the interpretative questions of Article 50, as many uncertainties could be turned into certainty. Brexit will have a significant effect on the internal legal situation in the United Kingdom, as a common law country may return to its own traditions – by leaving continental influences outside. However, those influences which are already implemented into national law will still continue to have effects, as decades of cooperation necessarily leave a lasting impression not just on the legal system of the UK, but on the European Union as well.