What light has Brexit shed on the meaning and the effect of Article 50 TEU?

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After almost three years, the United Kingdom (UK) has left the European Union (EU). To call it with a catchphrase, 'Brexit is finally done'. The withdrawal process was anything but smooth, took far longer than expected and revealed lots of shortcomings. As ways part, it is time to take a step back and evaluate the single legal basis that withdrawal is based on in the EU Treaties. Article 50 of the Treaty on European Union (TEU), long conceived as dead letter, has become one of the most prominent Treaty provisions. But has it fulfilled its purpose in the biggest disentanglement of EU history?

(I) Article 50 TEU: A British inspired norm?

The UK has shaped the 'rulebook' for exiting the EU under Article 50 TEU from the moment it decided to leave.[2] But the decisive British influence did not just start there. The idea for a withdrawal clause was born almost 20 years ago at the European Convention, the body which drafted the failed Constitutional Treaty of 2004. The draft put forward by one of the British members of the Convention built on the so-called 'Cambridge Text'[3], edited by Allan Dashwood at the very University I am writing this essay. It envisaged a unilateral and immediate right of a Member State to exit the EU after a notification of intention, no further questions asked. Unsurprisingly, this heavily 'state-centred' approach clashed with the views of more 'integrationist' members of the Convention.

After the Commission had proposed practically the opposite, the Convention adopted a compromise between the 'union-centred', and the 'state-centred' approach. It should, with minor changes, become what is Article 50 TEU today: A *lex specialis* to the rules of public international law[4] that provides a possibility to leave the Union under its own rules. Article 50 TEU foresees a unilateral and substantially unconditional right to exit the EU; but it is not an immediate and might not be an automatic one.[5] While some inspiration for the provision did indeed come from the UK,[6] it did not provide the British with an easy way out.

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[2] Christophe Hillion, 'Withdrawal under Article 50 TEU: An integration-friendly process' (2018), 55.2/3 CML Rev 29, 49.

[3] Robert Schütze, *European Union Law* (2nd edn., Cambridge University Press, 2018), 855; Martijn Huysmans, 'Enlargement and Exit: The Origins of Article 50' (2019) 20.2 European Union Politics, 155, 158.

[4] Especially the Vienna Convention on the Law of Treaties; Steve Peers, Darren Harvey, 'Brexit: the Legal Dimension' in Catherine Barnard, Steve Peers (eds), *European Union Law* (2nd edn, Oxford University Press, 2017), 815, 819; Grabitz/Hilf/Nettesheim/Dörr, 'EUV Art. 50' 69. EL Februar 2020, Rn. 12 (in German).

[5] The provision imposes an obligation to negotiate the terms and conditions of withdrawal. In that sense, it can be argued that withdrawal is not automatic, safe the two-year sunset clause. However, it is contentious whether it is just the EU that comes under this obligation or whether it extends to the departing Member State via the duty of sincere cooperation (Article 4(3) TEU), see Schütze [fn3] 857 with further references.

[6] The origins of Article 50 are disputed. Both the then Italian Vice-President of the Convention, Giuliano Amato, and the British diplomat Lord Kerr 'auto-proclaim' themselves as fathers, see Schütze [fn3] 855.

(II) National Sovereignty v Judicial Scrutiny – Article 50(1) TEU

According to Article 50(1) TEU '[a]ny Member State may decide to withdraw (…) *in accordance with its own constitutional requirements*.'[7] In the wake of the Brexit referendum, the question arose whether UK constitutional law, as applied in the withdrawal process, was subject to EU law and could be reviewed by the European Court of Justice (ECJ). While a slight majority of UK citizens who participated in the referendum decided to leave, not everybody had been able to take the ballot. Citizens who lived in another Member State and had not been registered in the UK within the last 15 years were precluded from voting. In *Shindler*, the UK Courts had to decide whether the '15-year rule', a national constitutional requirement, impeded expatriates' free movement right and therefore violated EU law. According to the UK Court of Appeals, the legality of the '15-year rule' fell outside the scope of EU law, as Article 50 TEU expressly provides room for the 'exercise of national sovereignty' (paras 16 and 60). The German Constitutional Court (para 330) had come to the same conclusion in its famous decision on the Treaty of Lisbon.

However, the ECJ, the judicial authority that has the 'final word' on the interpretation of EU law, has not ruled on the issue yet. The general response to this question would be that EU law ranks above national constitutional law hierarchically. The latter can therefore be set aside when it is contradicting the former in its ambit. However, evidence has surfaced during Brexit that national constitutional law as applied in the withdrawal context *cannot* in fact be overruled by the Luxembourg courts. In *Wightman* (paras 50 and 56), the ECJ went above and beyond to stress that withdrawal was a 'sovereign right' of a Member State that 'depends solely on its sovereign choice'. While the General Court rejected an action for annulment of the Council decision opening the Brexit negotiations in *Shindler* (para 58), it also stated in an *obiter dictum* that the UK withdrawal decision did not give rise to any form of acceptance from the EU institutions. Such an act of approval 'is *not needed* and is *not provided for* by Article 50 TEU'. Much now suggests that the EU courts would not intervene in this fundamental decision.

(III) The 'orderly' withdrawal procedure after Brexit – Article 50(2) and (3) TEU

While Article 50(1) TEU enshrines the sovereign right to withdraw from the EU unilaterally, paragraphs 2 and 3 have the purpose to ensure that the exit procedure happens 'orderly'. These sections of Article 50 TEU have been discussed the most during Brexit,[8] particularly concerning the notification process, the division of powers between the institutions and the substantive meaning and scope of Article 50 TEU.

(i) To take back or not to take back the notification

The beans on this first point have been spilt. Brexit – or rather the ECJ – has taught us that the notification of the intention to leave the EU can be unilaterally revoked. While Article 50 TEU deals with notice in some detail, it is silent on its revocability. In *Wightman*, the ECJ held that a Member State may revoke

[7] Emphasis added.
[8] Hillion [fn2]; Peers/Harvey [fn4].

its notification until the Withdrawal Agreement has entered into force or, failing that, a period of two years has expired, unless it is prolonged by the European Council, acting unanimously, in accordance with the Member State concerned. Anything else would equate to forcing that state out of the Union and impede the Treaties' objective of 'an ever closer Union' (paras 61-67). Furthermore, the terms of membership would remain unchanged in such a scenario.

Before the ECJ's judgment, this question was utterly unclear. In *Miller* (paras 9-17), the UK government argued for irrevocability,[9] while the Council and the Commission in *Wightman* (para 42) saw a unanimity requirement in the European Council. *After* the ECJ's judgment, its reasoning has rightly been criticised for its lack of stringency and comprehensiveness.[10] The possibility that the notification might be irrevocable was not even considered in *Wightman*. Even though it is just an *intention* to withdraw which, by definition, is 'not definite and may change' according to the AG in *Wightman* (para 100), the Treaties '*shall* cease to apply' on the other hand, either when the Withdrawal Agreement comes into force (option one) or, failing that, at the end of the negotiating period after a maximum of two years unless prolonged (option two). Para 3 of Article 50 TEU uses binding language and seems final which makes it is at least questionable whether there is room for an option to stay.

As the Council and the Commission rightly pointed out in *Wightman* (paras 40-41), such a right of revocation might also potentially open the doors to misuse. A departing state could extend the negotiating period eternally, by simply withdrawing its notification shortly before the end of the period and triggering it again immediately after. It could also use the right of revocation as leverage in negotiations and threaten to revoke the notification whenever it is not happy with the prospective terms of a withdrawal deal. This point of view does, of course, not take into account that a departing state remains a member of the EU for the time being, despite its notification. It is still bound by the duty of sincere cooperation (Article 4(3) TEU) as well as the values of the Union. Moreover, the UK has not provided any empirical evidence that would indicate a misuse of its right of revocation, so the Commission and the Council might be overly cautious. But not all Member States are as law abiding as the UK; the worsening rule of law-situations in the EU's rising 'illiberal democracies'[11] gives reason to doubt whether they would behave as honourably as the UK in case of their exit.

Critique of the ECJ aside, it needs to be acknowledged that it had to 'fix [the] faulty withdrawal clause'[12] in a record-breaking three months just in time before the first scheduled 'meaningful vote' on the Withdrawal Agreement in the UK Parliament. In comparison, the average duration of proceedings at the ECJ in 2018 was 15,7 months. The Court enabled the UK Parliament to take a decision aware of

[9] Actually, both parties in *Miller* argued for irrevocability. For the UK government, stating in open court that the notification of a plebiscite decision by 'the British people' could be taken back at any time would have amounted to political suicide.
[10] E.g. Jure Videmar, 'Unilateral Revocability in Wightman: Fixing Article 50 with Constitutional Tools: ECJ 10 December 2018, Case C-621/18, Andy Wightman and Others v Secretary of State for Exiting the European Union' (2019) 15/2 ECL Rev, 359.
[11] Farid Zakaria first used this term in a 1997 Foreign Affairs article, it is not an invention by Hungarian prime minister Viktor Orbán.
[12] Videmar [fn10] 374.

all its options. This is more than the UK government has done for its citizens, as *Craig* has pointed out in this year's McKenzie Stuart Lecture.[13] However, the introduction of the option to stay by the ECJ in addition to what has become known as 'Hard-Brexit' and 'Soft-Brexit' did not make the UK's life easier. Quite the contrary, it divided Parliament even further and led to more complications and delays.

(a) The role of the EU 27 and the European Council

Evidently, Brexit has filled the technical withdrawal procedure stipulated in Article 50(2) TEU with life. It has shown how it works in practice. As opposed to the inter-state process of accession, regulated in Article 49 TEU, withdrawal is governed by the institutions, rather than the Member States. Therefore, it can be classified as a Union-led process. However, Article 50 TEU does not make use of a 'classical' internal mechanism, such as the ordinary legislative procedure. Although it only refers expressly to Article 218(3) of the Treaty on the Functioning of the European Union (TFEU), it borrows more than just a paragraph from the Union's international treaty-making provision and 'transplants' it into the withdrawal process. The roles of the Commission, the Council and the Parliament are similar to those prescribed in Article 218 TFEU but adapted for exit.[14] Thus, Article 50(2) TEU, combining different internal and external procedures, reflects the status 'in between' of a Member State on its way to becoming a third party.

What balances this Union-led, supranational character of withdrawal is the strong role of the European Council, comprised of the heads of state or government of the remaining Member States.[15] Paragraph 2 introduces an intergovernmental element through the back door. The provision gives the European Council the power to set out the guidelines for the negotiations by consensus and to unanimously decide whether the two years negotiating period shall be extended, which it generously did three times during the Brexit-process.[16] While the provision suggests that these guidelines are set out once at the beginning of the negotiations, the European Council decided to *"*remain permanently seized of the matter*"* and updated the guidelines whenever necessary, thereby extending its influence. The role the European Council took upon itself stretched the wording of paragraph 2 quite extensively. It introduced a certain degree of flexibility in an otherwise strict procedure. Moreover, it strengthened the indirect role of the Member States in the Brexit process.

This adaption and application of existing mechanisms by the EU institutions has shown that the Unions legal framework is apt to compensate for the technical shortfalls of Article 50 TEU.

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[13] He invoked the failure of the UK government to comply with Art 4(3) TEU and with the UK Constitutional Law obligation to put before the citizens objective evidence-based information to guide their actions during the Brexit process. As an example, he referred to detailed studies undertaken by the UK government departments and scrutinized by experts (among them himself) to show the benefits/disadvantages of EU membership in their respective fields. Almost all of them concluded that EU membership was beneficial. The public, however, was not informed.

[14] Hillion [fn3] 33.

[15] Hillion [fn3] 30.

[16] Ironically, one of the British members of the Convention found a negotiating period of two years too long as 'a shorter time limit concentrates the mind, and discourages attempts to stall for time.' He proposed one year instead, see European Convention, Suggestion for amendment of Article 46 (part 3) by David Heathcoat-Amory and Mr Bonde, [document undated], available at http://european-convention.europa.eu/docs/Treaty/pdf/46/Art46Heathcoat-AmoryEN.pdf.

(b) The EU's secret super-power – an Article 50 competence

What is perhaps most striking is that Article 50 TEU was used as more than just a procedural provision during withdrawal. To further the objective of an 'orderly' departure, the Council defined the withdrawal clause as conferring an 'exceptional horizontal competence' of a 'one-off nature […] strictly for the purposes of arranging the withdrawal', authorizing the Union to negotiate and conclude a Withdrawal Agreement on 'all matters necessary to arrange the withdrawal', while not affecting the future division of competence between the EU and the Member States. Thus, the exit clause sets out an 'EU-superpower'; an exceptional, all-encompassing competence that allows the Union to speak with one voice, even on questions where only the Member States are usually authorised to act. It gave the institutions the opportunity to 'enrich' the substantive framework for the Brexit negotiations which led to a unique category that *Hillion* denominated *EU withdrawal law.*[17]

This extensive interpretation of Article 50 TEU has been highly criticised[18] and might arguably be at odds with other EU constitutional principles, such as subsidiarity or conferral. The ECJ has not been asked to rule on the legality of the Withdrawal Agreement, so we might never know.[19] In my opinion, the existence of such a far-reaching competence seems necessary, if not *essential*, to compensate for the silence of Article 50 TEU regarding the most fundamental, substantive questions arising in *any* withdrawal situation. Two of the three most sensitive issues identified during the Brexit process, namely the financial settlement and the effect of withdrawal on citizens' rights are not UK specific[20] and the realization that they must be dealt with is nothing new. Far less integrated organisations such as the Food and Agricultural Organisation (Article XIX) of the United Nations and the International Labour Organisation (Article 1(5)) have 'pay your bills before you leave'-provisions in their constitutions. The Commission's Draft of the Constitutional Treaty included an albeit cryptic provision in Article 103(3)(2) that a withdrawing Member State would remain responsible *to 'bear the cost of payments due to natural or legal persons residing on in [sic] its territory by virtue of rights and obligations arising before the date on which it left the Union'* in case an agreement on the future relationship between the parties failed to be concluded within six months of the opening of negotiations. While the provision definitely needs re-drafting, it indicates that citizens' rights and protection were a topic at the Convention. Yet none of these issues were included in the Treaty of Lisbon, the consequence of which cannot be that a lower standard of protection applies. Thus, I would argue that a situation like the withdrawal of a Member State, which threatens to shake the constitutional foundations of the Union,

[17] Hillion [fn3] 50.
[18] My academic adviser at Cambridge, Markus Gehring, highly doubts whether the Withdrawal Agreement is legal and is sceptical of the view I present here.
[19] If the reading of Article 50 TEU that I suggest is applied, it is questionable under which procedure the Court could do a review. It could not give an opinion under Article 218(11) TFEU, because the provision only concerns international agreements with third states which I have argued the Withdrawal agreement is not; the Council Decisions authorising the negotiations and the conclusion could of course be reviewed under an action for annulment pursuant to Article 263 TFEU.
[20] The third question which turned out to be the actual deal breaker, the border between the Republic of Ireland and Northern Ireland, is unique to UK context.

justifies the special competence that has been interpreted into Article 50 TEU in the course of Brexit. It seems to be an alternative means of effectively protecting EU citizens residing in the departing state, which, in the case of the UK, are almost three million people.

(IV) Conclusion – what is left

So what to make of this? Brexit has definitely shed light on the meaning of Article 50 TEU. First and foremost, it has shown its faults; the provision was not exactly well drafted, potentially owing to the fact that some members of the Convention on the Future of Europe *actually* believed that it was never to be used. It attempts to regulate the withdrawal procedure, but fails to do so comprehensively, which the ECJ illustrated in *Wightman.* It is silent on substantive issues like budgetary questions and citizens' rights, possibly leaving EU citizens residing in the exiting state in limbo.

Nevertheless, it has also turned out that the doomsday advocates from back in the day, who argued that Article 50 TEU would be conceived as an invitation to leave the Union,[21] were wrong when we look at what is perhaps the most striking effect of Brexit. Paradoxically, triggering the withdrawal clause for the first time has led to more solidarity among the EU 27 *internally, not less*.[22] *Externally*, Brexit was a show of force. The UK had to learn the hard way that it would not receive a favourable treatment. During the withdrawal negotiations, it conceded to comply with its financial obligations arising from the EU budget, it will not kick out EU citizens already resident in the UK and according to a protocol, there will be a *de facto* border for goods in the Irish sea.[23] Lastly, it now faces the very real risk of falling back to WTO-rules in its trade relationship with the EU after 31 December 2020, 11pm UTC, if it does not manage to conclude a free trade agreement in a record-breaking 11 months, of which only six are left now.[24]

If Brexit has one legacy, it surely made a 'Grexit', 'Frexit' and however you want to call a possible withdrawal of other Member States more unlikely.[25]

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[21] Thomas Bruha, Karsten Nowak, 'Recht auf Austritt aus der Europäischen Union?' (2005) 42/1 Archiv des Völkerrechts (AVR) 1, 24.
[22] Andreas Kumin, 'Vertragsveränderungsverfahren und Austrittsklausel' in Waldemar Hummer, Walter Obwexer (eds), *Der Vertrag von Lissabon* (Nomos, 2009) 301ff.
[23] Of course, I am aware of the fact that the UK administration has contradicted many of these things in the negotiations on the future relationship which are taking place at the moment.
[24] *European Union (Withdrawal Agreement) Act 2020*, s 39(2).
[25] Markus Gastinger, 'Brexit! Grexit? Frexit? Considerations on how to explain and measure the propensities of member states to leave the European Union.' (2009) EUI Working Papers, RSCAS 2019/85 <https://cadmus.eui.eu/bitstream/handle/1814/64565/RSCAS_2019_85.pdf>.