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Interpreting Article 50:  
exit and voice and...what about loyalty?

Carlos Closa



European University Institute  
**Robert Schuman Centre for Advanced Studies**  
Global Governance Programme

## **Interpreting Article 50: exit and voice and...what about loyalty?\***

Carlos Closa

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## **Abstract**

Article 50 has explicitly formalized the exit option that previously existed in an implicit form. The provision entitles to an unilateral, unconditional but not immediate withdrawal from the European Union which renders relatively easy in procedural terms to trigger the process. Several utilitarian reasons explain why a member state may wish to leave an organization such as the EU although in the case of the UK 2016 referendum none of them seem to have played a major role. Building on this background and Joseph Weiler's 1999 seminal contribution on the transformation of Europe, this paper argues that the formalization of the withdrawal provision undermines loyalty (understood as the proclivity to resolve losses of organizational efficiency within the organization) which is at the very basis of the EU project.

## **Keywords**

Article 50, withdrawal from the EU, Brexit; exit voice and loyalty.





## I. Introduction\*

The explicit right to withdrawal enshrined in Article 50, far from being redundant for stating the obvious, may have subtly transformed the structure of the Member States' commitment to the EU. J. H. H. Weiler<sup>1</sup> depicted these commitments by applying the notions of exit and voice borrowed from Albert O. Hirschman's seminal analysis.<sup>2</sup> In a nutshell, Weiler argued that the implicit exit option led to an increase of voice (i.e. the control of governments on decision making). This picture probably remained valid until the early 2000s. The Treaty of Lisbon formalised an explicit right to withdrawal and this has affected the traditional equilibrium between these two mechanisms: the explicit regulation of withdrawal provides a resource for the erosion of *loyalty* and changes the demands from *increasing voice* to *ex post selective exit* (i.e. partial exemptions from the EU *acquis*). In order to substantiate this thesis, this chapter first presents the notions of exit, voice and loyalty as constructed by Hirschman and applied to the EU by Weiler. It then examines the model of exit contained in the Treaty of Lisbon, arguing that formalisation produces significant legal and above all political effects. Section 4 lists and describes a typology of these effects. The paper then revises the rationale for exit from organisations such as the EU, turning towards the current demands raised against the threat of exit and concludes by discussing how this erodes 'loyalty'. Section 7 describes how the formalisation of exit changes the voice mechanism and section 8 concludes.

## II. Interpretation of withdrawal: exit and voice

In 1970 Hirschman constructed the notions of exit and voice as instruments which individuals and groups use to respond to the decline in the performance of products, firms, organisations and public corporations.<sup>3</sup> 'Exit' is an economic mechanism and consists of simply abandoning the product, organisation, firm etc. Whilst Hirschman did not precisely define what an 'economic mechanism' is, most likely he meant that utility calculus informs exit decisions. 'Voice', on the other hand, is a more diffuse mechanism and one which belongs to the sphere of politics. The use of voice results less evident: basically, individuals, groups etc. increase their demands for improvement and/or take a more active role to control the product/organization. Voice and exit relate closely to each other: in the face of declining performance, voice serves to air dissatisfaction and increase involvement through various mechanisms, thus improving the product, organisation etc. But this happens on the condition that exit is virtually ruled out. Hirschman<sup>4</sup> argues that the presence of the exit option can sharply reduce the probability that the voice option will be taken up widely and effectively. Later, he expanded his previous thesis and in his *Exit, voice and the state*,<sup>5</sup> Hirschman focussed on the significance of exit in relation to the state but he did not construct a systematic analysis nor did he elaborate on the relationship between exit and voice *within* the state, let alone the connection between these two mechanisms and loyalty. The connection between these mechanisms precisely in the case of organizations remains underexplored.

In the *Transformation of Europe*, Weiler applied these categories to show how the EU had successfully closed selective exit (i.e. the selective application of EU law) in the foundational period

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\* I wish to thank Giuseppe Martinico, Maraijke Kleine, Oliver Garner and the participants in the EUI workshop on troubled membership in the EU in January 2014 for their valuable comments.

<sup>1</sup> J. H. H. Weiler, 'The Transformation of Europe' (1992) 100 (8) *The Yale Law Journal*, 2403–2483.

<sup>2</sup> Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard MA: Harvard University Press, 1970).

<sup>3</sup> Hirschman (n. 2)

<sup>4</sup> Hirschman (n. 2), p. 76.

<sup>5</sup> A. O. Hirschman, 'Exit, Voice, and the State' (October 1978) 31(01) *World Politics*, 90–107.

while keeping full exit (leaving the Union) an implicit option. To compensate for the selective closure of exit, Member States increased their voice, i.e. the political mechanism. This meant an increased role for the Council and the intergovernmental procedures for decision making within the Community method itself. Full exit did not play any specific role in Weiler's construction of the relationship between voice and selective exit in the EU, even though he conceded that in the face of many lawyers' scepticism, withdrawal remained possible in principle.<sup>6</sup> He further convincingly argued that insisting on the possibility of withdrawal might be counterproductive, especially in an organisation like the EU.

The original treaties' silence on the issue created a certain interpretative vacuum on the exit option which the application of the posterior Vienna Convention on the Law of Treaties (1969) could help clarify. Although appeal to the Convention has formed the backbone of much legal argument, Article 4 conclusively establishes that *the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention*. The Convention would thus apply, in purity, after the first 'new' treaty amending the original ones (i.e. the Single European Act) which entered into force in 1987 (the Convention entered into force on 27 January 1980).<sup>7</sup>

In parallel, the Luxembourg compromise and the generalisation of unanimity along with the growing involvement of the Council in decision making (together with the ongoing efforts of governments to enlist their nationals in Community institutions such as the EP and the Commission to serve their cause) guaranteed states a voice in the EU. Doctrinally, exit options remained contentions but the 1974 UK referendum on withdrawal from the Communities proved pragmatically the existence of the right to withdraw. No one contested the British government's assumed right to withdraw if it had wished after holding the referendum,<sup>8</sup> although a significant number of authors argued that the EU's *sui generis* nature precluded withdrawal.<sup>9</sup> After this episode, no other state claimed this right again until the German Constitutional Court, in its ruling on the Maastricht Treaty, constructed the right of withdrawal as a guarantee of its sovereignty and, hence, inherent to membership.<sup>10</sup> The Czech

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<sup>6</sup> See his 'Alternatives to Withdrawal from an International Organization: The Case of the European Economic Community' (1985) 20 *Israel Law Review*, 282–98. However, authors such as Schermers argued that unilateral withdrawal was not compatible with international organisations. H. G. Schermers, *International Institutional Law* (The Hague: Sijthoff & Noordhoff International Publishers, 1980), p. 29.

<sup>7</sup> Alternatively, if the Greece Accession Treaty is construed as a reform of the original treaties, then the Convention would apply to the EU from the entry into force of the later treaty (i.e. 1 January 1981).

<sup>8</sup> See A. F. Tatham, 'Don't Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon', in A. Biondi, P. Eeckhout and S. Ripley (eds.), *EU Law after Lisbon* (Oxford: OUP, 2012), p. 128, at 144. He follows T. C. Hartley, 'International Law and the Law of the European Union: A Reassessment' (2001) 72 *British Yearbook of International Law*, 1, 22.

<sup>9</sup> In the 1980s Greenland withdrawal triggered a debate on whether a state could withdraw from the then EEC. Harhoff argued that the unlimited duration established in Article 240 of the Treaty of Rome meant an irrevocable commitment of the signatories and deduced from this that unilateral denunciation was illegal and contrary to the aim of the treaties. F. Harhoff, 'Greenland's withdrawal from the European Communities' (1983) 20 *CMLRev*. Other authors subscribing to this thesis were Jean Victor Louis, *The Community Legal Order* (2nd edition, Luxembourg: Office for Official Publications of the European Communities 1990), p. 74; and Michael Akehurst, 'Withdrawal from international organizations' (1979) 32 *Current Legal Problems*, 152. Louis however specified that the Community was dissoluble only by virtue of being a step in a gradual process towards union. However, a significant number of other actors argued that withdrawal was possible: J. H. H. Weiler, 'Supranationalism revisited – a retrospective: the European Communities after 30 years', in W. Mainhoffer (ed.), *Noi si mura* (Florence: EUI, 1983); Roy Pryce, *The politics of the European Community* (London: Butterworths, 1975), p. 55; and Paul Taylor, 'The European Community and the State: Assumptions, Theories and Propositions' (1991) 17 (2) *Review of International Studies*, 109–125. P. D. Dagoglou opined that 'whether withdrawal was excluded or not depended not on the aim to integrate "in abstracto", but only on the stage of integration actually reached "in concreto"': P. D. Dagoglou (ed.), *Basic problems of the European Community* (Oxford: Basil Blackwell, 1975). The EP legal affairs committee concluded that it was not possible to conclude on whether a state could withdraw from the EC, PE Doc 1-264/83, p. 9

<sup>10</sup> Decision of the German Federal Constitutional Court of October 12, 1993 in Cases 2 BvR 2134/92, 2 BvR 2159/92 *Re Maastricht Treaty* [BVerfG 89,155]

Constitutional Court also asserted the same view in its ruling on the Treaty of Lisbon precisely in reference to Article 50.<sup>11</sup>

While full exit implicitly formed part of the nature of the EU, the Single European Act (SEA) opened a path to a different modality of *selective exit* that the Treaty of Maastricht consolidated and later treaties enlarged: the progressive inclusion of opt-out provisions which allow the selective derogation of specific policies measures for specific states. In relation to the situation described by Weiler, EU law applies equally to all *participating* Member States but not all states participate equally. As I will argue below, the withdrawal threat creates the conditions for new modalities of selective derogation of the *acquis*: ex pots partial derogation. Before developing this argument further, the next section reviews the characteristics of the formalised exit provision.

### **III. The formalisation of full exit**

Article 50 of the Treaty of Lisbon explicitly regulates withdrawal. Allegedly, formalisation of withdrawal explodes two basic assumptions about the EU: that European integration is irreversible and that Member States have waived their right to dissolve the Union.<sup>12</sup> It also confirms the interpretations of the German and Czech constitutional courts mentioned above.

While recourse to the general rules of international law was possible in the absence of explicit provisions,<sup>13</sup> formalisation of the right of withdrawal in Article 50 immediately renders general rules of international law inapplicable because of the principle '*lex specialis derogate legi generali*'. Releasing the EU from the strictures of international law means on the one hand, enhancing EU autonomy *vis-à-vis* that order, but on the other hand, it also means releasing Member States from the stricter conditions for withdrawal in international law.<sup>14</sup> Explicit regulation hardly represents a novelty in international public law since a significant number of international organisations regulate the same option along similar lines.<sup>15</sup> But an important caveat applies to this trend: while denunciation and withdrawal are a regularised component of modern *treaty* practice, they are not that common for *international organisations*.<sup>16</sup> Accordingly, if withdrawal regulation is not exceptional but not widespread either, the question which stands is why or for what purpose the EU Member States decided to introduce an explicit provision on withdrawal given the significant agreement among legal scholars about its facticity. If withdrawal was possible in any case, why bother mentioning it explicitly? A trend towards institutional isomorphism with other international organisations would not appear to explain the provision (at least not in the sense that this convergence is interpreted as a mechanism for reasserting the EU's international law nature).

The provision originated in the works of the Convention on the Future of Europe (2002-2003) and some responses may be found in this setting. One specifically legal response would be that Article 50

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<sup>11</sup> Czech Republic Constitutional Court Judgment Pl. ÚS 19/08: *Treaty of Lisbon* I 2008/11/26.

<sup>12</sup> Jochen Herbst, 'Observations on the Right to Withdraw from the European Union: Who are the "Masters of the Treaties"?' (2005) 6 *German Law Journal*, 1755, at 1759. He appealed to both assumptions in order to argue that the legality of the right of withdrawal could be challenged.

<sup>13</sup> H. Hofmeister, 'Should I stay or Should I Go? – A Critical Analysis of the Right to Withdraw from the EU' (2010) 16 *ELJ*, 589 at 591.

<sup>14</sup> C. Hillion, 'Accession and Withdrawal in the Law of the European Union', in A. Arnulf and D. Chalmers (eds.), *The Oxford Handbook of European Union Law* (Oxford: OUP, 2015), p. 126; and in this volume.

<sup>15</sup> In comparative international regulation, withdrawal is also in almost all cases an unconditional option and withdrawing states do not need to provide any kind of justification for this decision. Only the Organization for the Prohibition of Chemical Weapons (OPCW) and the Organization for Eastern Caribbean States (OECS) construe the right to withdraw as deriving from a state deciding that extraordinary events, related to the subject matter of the Conventions, jeopardised their superordinate national interest (Arts. 16 and 24 respectively).

<sup>16</sup> Helfer(n. 22), 1602.

serves to dispel any legal doubts about withdrawal. The Praesidium of the Convention thus argued that even though withdrawal was possible even in the absence of an explicit specific provision to that effect, its insertion clarifies the situation and allows the introduction of a procedure for negotiating and concluding an agreement between the Union and the withdrawing state.<sup>17</sup> Agreeing on the procedure before a specific instance of its application emerges is easier than achieving the same agreement against the background of an actual case of separation.<sup>18</sup> Notably, the provision does not clarify all of the necessary elements completely and some actors have rightly criticised it for this incompleteness.<sup>19</sup>

Introduction of procedural clarification still begs the question why it is necessary to dispel doubts about something generally agreed, on the one hand, but which results politically costly to implement, on the other? Furthermore, the introduction of procedural requirements also skews our conception of exit as being more likely (or even desirable). Why?

Withdrawal was agreed in the context of a significant uplift in the EU's ambitions with the 2005 EU Constitution. The Praesidium argued that the provision was *a political signal to anyone inclined to opine that the Union is a rigid entity which is impossible to leave*. Thus, in line with theoretical interpretations of the right to exit, explicit formalisation of withdrawal functions as an 'insurance policy' against future uncertainty permitting a state to renounce to its commitments if the anticipated benefits of cooperation turn out to be overblown.<sup>20</sup> The existence of this 'insurance policy' enables states to negotiate more expansive or deepen substantive treaty commitments *ex ante*, although it raises troubling opportunities for strategic action *ex post*.<sup>21</sup> This was precisely the context of the EU Constitution: the right to withdraw was thus understood as a safety valve to reassure Member States that they would always be allowed to leave, should they be or become unwilling to pursue the emboldened integration path embodied by the Constitutional Treaty.<sup>22</sup> This begs the question why a state would wish to leave the EU? Section V below discusses the logics for seeking exit but next paragraphs provided a fuller characterization of article 50.

The peculiarities of withdrawal in the EU result from the interaction of its characteristics with the specific nature of the Union. Article 50 recognises an *unilateral, unconditional and non-immediate* right to withdrawal.

- Unilateralism means that the right is totally independent of the will of the EU (EU institutions may not even opine on the departing Member State's communication) and the remaining Member

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<sup>17</sup> Draft Constitution, 'Volume I Revised text of Part One' (2003) Conv 724/1/03 Rev 1 Annex 2, <<http://register.consilium.europa.eu/doc/srv?l=EN&f=CV%20724%202003%20REV%201>>, accessed 5 July 2015, p. 131. Similarly, the House of Lords (n. 19) argued that the significance of Article 50 lay, therefore, not in establishing a right to withdraw, but rather in defining the procedure for doing so. In contrast, the representative of the Austrian government at the Convention, Hannes Farnleitner, argued that the provisions of the Vienna Convention on the Law of the Treaties provide a sufficient basis for termination of membership. Hannes Farnleitner, 'Suggestion for amendment of Article I-59' <[http://european-convention.europa.eu/docs/Treaty/pdf/46/46\\_Art%20I%2059%20Farnleitner%20EN.pdf](http://european-convention.europa.eu/docs/Treaty/pdf/46/46_Art%20I%2059%20Farnleitner%20EN.pdf)>, accessed 5 July 2015. The representatives of the Dutch government argued that facilitating the possibility of withdrawal from the Union is contrary to the idea of European integration set out in the Preamble to the Treaty and captured in the expression of 'an ever closer union'. G. M. de Vries and T. J. A. M. de Bruijn, 'Suggestion for amendment of Article: 46 Suggestion for Part III' (2003), <<http://european-convention.europa.eu/docs/Treaty/pdf/46/art46vriesEN.pdf>>, accessed 5 July 2015.

<sup>18</sup> Rostane Medhi, 'Brèves observations sur la consecration constitutionnelle d'un droit de retrait volontaire', in Paul Demaret, Inge Govaere and Dominik Hanf (eds.), *30 Years of European Legal Studies at the College of Europe/30 ans d'études juridiques européennes au Collège d'Europe: Liber Professorum 1973/74–2003/04* (Brussels: P.I.E.-Peter Lang, 2005).

<sup>19</sup> Hofmeister (n. 12), 595.

<sup>20</sup> Helfer (n. 22), 1591.

<sup>21</sup> Helfer (n. 22), 1591.

<sup>22</sup> Hillion (n. 14) and 'This way, please! A legal appraisal of the EU withdrawal clause' in this volume; Medhi (n. 40).

States.<sup>23</sup> In relation to this, the Convention moved between two alternatives. On the one hand, some British representatives defended a strictly unilateral provision which would merely require a notification to the Council for withdrawal to become effective.<sup>24</sup> On the opposite side, most of the proposals and amendments submitted to the Convention on the issue sought either to eliminate explicit unilateralism or to introduce mechanisms to correct or limit it. For instance, the Badinter proposal subordinated the right to a compulsory agreement with the Union.<sup>25</sup> The final design reflects a compromise between these two and, because of this, the ultimate shape of the withdrawal right contains only a specific limitation to unilateralism: the obligation to follow the procedure established by Article 50, which renders alternative mechanisms (such as simply repealing the domestic legislation which gives EU law effect in a given Member State) illegal.<sup>26</sup> Beyond the notification and the requirement to seek an agreement, no other factors modify unilateral withdrawal. Some authors have tried to engineer a reasoning which brings the ECJ in as the final arbiter of this decision: since treaty provisions are justiciable, Article 50 places the ECJ in such a position and it could rule on disputes regarding the validity or not of withdrawing.<sup>27</sup> However, it seems unthinkable that a withdrawing state proceeding according to its own domestic constitution would entrust the ECJ with the verification of this act. Unilateralism has been supported by arguing that the prevalence of the opposite principle (i.e. ‘mutual agreement’ between Member States and the EU) on this point would reduce the counter-centralisation force underlying the right of secession.<sup>28</sup>

- Unconditionality means that the exercise of the right to withdrawal is not subjected to any preliminary verification of conditions<sup>29</sup> nor is it even conditional on the conclusion of the agreement foreseen in the provision<sup>30</sup> (see below). Article 50 does not even mention the generic circumstances in which this right may be activated, and the proposals aired during the Convention, such as the existence of ‘extraordinary circumstances’ (such as revision of the Treaties) or conditioned on obtaining unanimous assent of Member States (which would be equivalent to

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<sup>23</sup> Hofmeister (n. 13), 592; Tatham (n. 8), 152. Helfer, Laurence (2005) *Exiting treaties* 91 *Virginia Law Review* 1579–1648. He argues that withdrawal is fundamentally a unilateral act’.

<sup>24</sup> Allan Dashwood Article 27 CONV 345/02. In reality, it was Peter Hain who submitted the Project entitled, *Traité constitutionnel de l’Union européenne* (Dashwood Project), CONV 345/02 Brussels, 15 October 2002.

<sup>25</sup> For instance, the Badinter proposal (*Une constitution européenne (Artículo 80)* CONV 317/02, 30 September 2002) modified strict unilateralism by granting states the final right to withdrawal but it could only be exercised with the EU’s agreement (Art. 80).

<sup>26</sup> HM Government, ‘The process of withdrawing from the European Union’ (2016) <[www.publications.parliament.uk/pa/ld201516/ldselect/ldeucom/138/138.pdf](http://www.publications.parliament.uk/pa/ld201516/ldselect/ldeucom/138/138.pdf)>, accessed 5 June 2016, p. 13. Although the UK government declared itself bound to follow the Article 50 procedure, surprisingly, it lays the main emphasis against illegal withdrawal on the practical effects of such behaviour on trade negotiations rather than on the illegality per se. (*Such a breach would create a hostile environment in which to negotiate either a new relationship with the remaining member states, or new trade agreements with non EU countries*). Equally, the House of Lords concluded that the process described in Article 50 is the only way of doing so consistent with EU and international law. House of Lords (2016) *The process of withdrawing from the European Union* European Union Committee 11th Report of Session 2015–16 HL Paper 138, <[www.publications.parliament.uk/pa/ld201516/ldselect/ldeucom/138/138.pdf](http://www.publications.parliament.uk/pa/ld201516/ldselect/ldeucom/138/138.pdf)> accessed 5 July 2016.

<sup>27</sup> R. J. Friel, ‘Providing a constitutional framework for withdrawal from the EU: Article 59 of the draft European constitution’ (2004) 53 *ICLQ*, 407–428, at 42; C. Hillion ‘This way, please’ in this volume.

<sup>28</sup> Wolf Schäfer, ‘Withdrawal legitimised? On the proposal by the Constitutional convention on the right of secession from the EU’ (July/August 2003) *Intereconomics*, 182–185, at 185.

<sup>29</sup> Cf. Hillion in this volume who argues that some conditions do apply; Herbst (n. 11). According to Helfer, the overwhelming majority of the denunciation and withdrawal clauses do not require a state to provide any justification to quit a Treaty. Helfer (n.19).

<sup>30</sup> Hofmeister (n. 12), 593.

requesting authorisation) were ruled out.<sup>31</sup> The Convention also ruled out the option of making withdrawal conditional upon completion of the withdrawal agreement: its *Praesidium* argued that if the right of withdrawal existed without explicit regulation, it could not then be made conditional upon the conclusion of such an agreement.<sup>32</sup> Nor could withdrawing in accordance to a country's *own constitutional requirements*, as explicitly required in the Article, be considered a condition.<sup>33</sup> The German Constitutional Court, in its judgment on the Lisbon Treaty, clearly stated that '*whether these [national constitutional] requirements [referred to in Article 50 TEU] have been complied with in the individual case can, however, only be verified by the Member State itself, not by the European Union or the other Member States*'.<sup>34</sup> The UK Court of Appeal, when deciding on the citizens entitled to vote in the 2016 withdrawal referendum, approvingly quoted the German decision which argued that Article 50 protected the conditions for the exercise of the right of withdrawal from EU level review: invoking provisions on EU citizenship to intervene to determine the constitutional requirements to be adopted by a Member State deciding whether to leave the EU would be contrary to Article 50.<sup>35</sup>

As mentioned, Article 50 releases the Union from the strictures of public international law and marks a stark contrast with the pre-Lisbon situation<sup>36</sup> when the absence of an explicit withdrawal clause meant the application of the Vienna Convention on the Law of the Treaties. Its Article 62 requires a 'fundamental change of circumstances' for legitimate unilateral withdrawal.<sup>37</sup> The International Law Commission indicated two conditions for interpreting what a 'fundamental change of circumstances' is: they should be central to the reasons for the state's acceptance to be bound by the treaty and/or the effects of the changes must radically change the extent of the obligations under the treaty. Article 50 does not contain any reference to changes of circumstances and/or obligations to ground a state's withdrawal, which releases the EU procedure from the (allegedly, very light) conditionality under international law. Even more worrisome from the perspective of the integrity of EU law, the principle of loyalty/sincere cooperation do not impose any condition on withdrawing states,<sup>38</sup> although it may need to be taken into account.<sup>39</sup> In summary, although the neutralisation of the conditionality implicit in international law may be considered an autonomy enhancing tool for EU law, it may also affect some of its core principles.

- Non-immediate effect.<sup>40</sup> A unilateral right does not mean an immediate right and this is the sole limitation in the whole provision to the full exercise of sovereignty by the withdrawing state.

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<sup>31</sup> See for instance, Contribution by Mr Lamassoure, Member of the Convention 'The European Union: four possible models' (3 September 2002) CONV 235/02 Contribution 83 (05.09) <[www.alainlamassoure.eu/liens/366.pdf](http://www.alainlamassoure.eu/liens/366.pdf)>, <<http://register.consilium.europa.eu/doc/srv?l=EN&f=CV%20235%202002%20INIT>>, accessed 5 June 2015.

<sup>32</sup> Draft Constitution, 'Volume I Revised text of Part One' (2003) CONV 724/1/03 Rev 1 Annex 2, <<http://register.consilium.europa.eu/doc/srv?l=EN&f=CV%20724%202003%20REV%201>>, accessed 5 June 2015, p. 132. Also, Tatham (n. 8). Surprisingly, the House of Lords (n. 19) argues that withdrawal from the EU becomes final *only* once the withdrawal agreement enters into force.

<sup>33</sup> Cf. Clemens M. Rieder, 'The withdrawal clause of the Lisbon Treaty in the light of EU citizenship: between disintegration and integration' (2013) 37 *Fordham Intern'l LJ*, 147–174.

<sup>34</sup> Judgment No 2 BvE 2/08, 30 June 2009, <[www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html)>, accessed 5 July 2016.

<sup>35</sup> UK Court of Appeal: *Shindler & anr v. Chancellor of the Duchy of Lancaster & anr* [2016] EWCA Civ 469.

<sup>36</sup> For instance, Herbst (n. 11), 1755: 'there exists no unlimited right of an EU member state to withdraw from the EU; i.e. without any further prerequisite and simply at the free discretion of the respective member state, within the confines of its internal (constitutional) law provisions'.

<sup>37</sup> Scholars still dispute the concepts behind Article 62 Vienna Convention. See Helfer (n. 22), 1579.

<sup>38</sup> Herbst (n. 11), 1758.

<sup>39</sup> Hofmeister (n. 12), 598. When interpreting Article 50, the principle of sincere cooperation enshrined in article 4(3) TEU needs to be taken into account.

<sup>40</sup> Hofmeister (n. 12), 593.

Withdrawal enters into force two years after the formal official communication of a state willing to assert this right and the European Council, acting by unanimity, can prolong the two-year period with the agreement of the withdrawing state. The EU has not innovated institutionally with this provision: most international organisations require a ‘preparation’ or ‘cooling off’ period between the announcement of withdrawal and effective withdrawal and this period varies between ninety days (for instance, in the Korean Peninsula Energy Development Organization KENDO) and two years (for instance, in the Organization of American States OAS), with one year being the most common period.

Two possible interpretations may explain the function of this delay period. The first derives directly from Article 50: it permits the adaptation of the EU and the withdrawing state to the new circumstances and the changes required and specifically, the negotiation of the withdrawal agreement between the Union and the withdrawing state. The assumption is that some kind of legal relationship will still remain between the two and that the legal consequences of the withdrawal regarding the rights and obligations of natural persons and legal entities affected by the withdrawal need to be dealt with. In the absence of such an agreement, the specific legal consequences will remain in doubt.<sup>41</sup> The drafters adopted the longest period commonly provided in international organisations, but in practical terms, it remains still too short for negotiating any comprehensive agreement.<sup>42</sup> Perhaps because they conceived of withdrawal as an unrealistic possibility, the drafters did not properly think through how complex and lengthy the negotiations would need to be.

The second interpretation brings EU law in line with international law: in other international organisations, the delay between announcement and effective withdrawal serves as a ‘cooling off’ period allowing the withdrawing State to change its position. For instance, Spain decided not to withdraw from the League of Nations in 1928 shortly before its notice to do so would have taken effect. The question here is whether this general interpretation in international law can prevail when the aim of Article 50 has been precisely to create an autonomous withdrawal procedure. Crucially, Article 50 does not state anything about whether the decision is reversible and whether a state can backtrack once it has communicated its decision to withdraw. Because of this, the House of Lords (2016)<sup>43</sup> argued that *nothing in Article 50 formally (prevents) a Member State from reversing its decision to withdraw in the course of the withdrawal negotiations*. Although this literal interpretation may fit the letter of the provision, *prima facie*, it seems contrary to the spirit of the provision (let alone with the political will asserted by the withdrawing state). To argue that a new government may change the decision of a previous one during this period to justify this interpretation places the interpretation of EU rules at the disposal of domestic political disputes. What is clear is that in case of ambiguity, the authoritative interpreter of the provision is the ECJ.

In any case, the uncertainty on whether backtracking is possible combined with the long and protracted negotiations on alternative agreements during the delay period create a kind of *limbo membership*. Supposedly, the withdrawing state will be still bound by EU legislation and the principle of loyal cooperation (Article 4(3)). However, as the date of termination of legal obligations under the treaty approaches, domestic authorities may legitimately consider that they can exercise a policy of ‘legal detachment’<sup>44</sup> (i.e. repealing EU law selectively, as well as the

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<sup>41</sup> Herbst (n. 11), 1757.

<sup>42</sup> Herbst (n. 11), 1758. The UK Government and the House of Lords coincide in their estimation of not less than 10/9 years would be needed to negotiate a settlement. HM Government *The process of withdrawing from the European Union*.

<sup>43</sup> House of Lords (n. 19); Philip Syrpis ‘What next? An analysis of the EU law questions surrounding Article 50 TEU: Part One’ (2016) *eutopialaw*, <<https://eutopialaw.com/2016/07/08/what-next-an-analysis-of-the-eu-law-questions-surrounding-article-50-teu-part-one/>>, accessed 25 July 2016.

<sup>44</sup> Adam Lazowski ‘Inside but out? United Kingdom and EU’, in Andras Jakab and Dimitry Kochenov (eds.) *The enforcement of EU law. Methods against Member States’ defiance* (Oxford: OUP, 2016). The House of Lords (n. 19) also indicated this as a probable position for the withdrawing state.

principles of direct effect, primacy and direct applicability). Furthermore, the withdrawing state will be in the awkward situation of being a full member of the Union but a third party to the effects of concluding the agreement.<sup>45</sup>

As mentioned above, section V below discusses the logics for seeking exit but first the section below list and discusses the possible effects of having a formal explicit provision regulating exit.

#### **IV. The effects of the exit provision**

An explicitly formalised withdrawal provision creates a wide panoply of possible effects since it stimulates both cooperation-diminishing and cooperation enhancing dynamics.<sup>46</sup> While by no means an exhaustive list, the following effects can be listed:

##### ***a. Enlargement of the possible number of members of an organisation or signatories of a Treaty***

Withdrawal provisions are perceived as guarantees for the broad membership of an organisation: they may encourage the ratification of a treaty by a larger number of states than those which would be prepared to ratify it in the absence of such a clause.<sup>47</sup> However, the positive value of this effect depends on the type of organisation: the number of participating member states may in itself be of value for global organisations, which by definition aim to comprising all world states. However, this is not necessarily true for regional organisations which can have a maximum number of hypothetical participants (defined by geography).

Alternatively, withdrawal provisions (can) also enable states to negotiate deeper or broader commitments than would be attainable for treaties without unilateral exit clauses.<sup>48</sup> According to Helfer, governments often refrain from compelling their partners to accept the entire package of treaty commitments in order to facilitate the widespread adoption of multilateral agreements. Instead, they permit states to append reservations before expressing their consent to be bound to an agreement.<sup>49</sup> The EU treaties do not permit reservations but they possess the functional equivalent: opt-outs which are often formulated in protocols. These opt-outs and the additional derogations and exceptional provisions for determined Member States are equivalent to a form of selective exist which permit Member States to tailor their membership in the Union. As will be discussed below, under such condition of selective exit, Member States may find is difficult to identify a clear rationale for full exit. In fact, selective exit serves to diminish the margin for full exit in theory, even though the UK case (a member state with a significant number of selective exit mechanisms) has demonstrated that it did not function in this way.

##### ***b. Guarantee against centralisation and redistribution***

Exit provisions in trade and economic oriented organizations may fulfil specific functions: they may be thought as guarantees against centralization processes and redistributive policies. In this line, Schäffer interprets exit provisions. He considers that exit and partial exit create a more efficient organisation: specifically, if the member states are granted the right to withdraw partially or completely from central areas of policy in order to take on responsibility for these areas themselves, this encourages an accompanying process of finding the best solution to the problem of the

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<sup>45</sup> House of Lords (n. 19): the UK would be treated as a non-EU State for the purpose of Article 50.

<sup>46</sup> Helfer (n. 22), 1587.

<sup>47</sup> Helfer (n. 22), 1599.

<sup>48</sup> Helfer (n. 22), 1599.

<sup>49</sup> Helfer (n. 22), 1640–1641.



institutional assignment of public tasks within the Community.<sup>50</sup> The right of secession therefore supports vertical institutional competition within the EU.<sup>51</sup> Economists have argued in response that trade agreements are generally less effective where formal escape clauses are easily invoked.<sup>52</sup>

As for the effects on redistribution, Schäffer's opinion expresses an ideological preference for certain policies: an institutional right of secession in the EU corresponds completely with free trade trends caused by globalisation and the intentions of the institutions committed to free trade, such as the WTO.<sup>53</sup> Some economists have echoed a similar preference: thus, Alesina et al.<sup>54</sup> argue that for countries which primarily lose out in strategic redistribution games, the exit option – and even only threatening to use it – can work to reduce redistribution and therefore increase efficiency.<sup>55</sup>

### ***c. Reputational effects on the withdrawing state***

Formalisation, however, also has important benefits for the withdrawing state: making the exit procedures formal, lawful and public, positively affects (in relation to not formalising them) the withdrawing state's reputation for compliance with international law.<sup>56</sup> Following an established procedure means complying with the norms even when breaking from an organization and this sends positive signals as to the state's adherence to legal procedures, even in extreme situations such as withdrawal. Other states may take note and believe that the withdrawing state remains a reliable partner despite its abandoning the organisation.

### ***d. Strategic behaviour***

A significant number of scholars<sup>57</sup> agree that explicit withdrawal provisions provide a powerful tool for strategic bargaining: the authorities of a member state can threaten withdrawal to obtain compensation in circumstances where a country's cost-benefit of membership calculation changes. In this situation, an affected state can try to persuade the EU to compensate it for such changes. Therefore, a member state will make certain demands and threaten to withdraw if these demands are not met; i.e. the threat of withdrawal can be used to obtain compensation for accepting decisions which are necessary to the integration process. And this can occur even if the EU perceives the threat as 'empty words': even in this case, the EU may choose to compensate in order to eliminate uncertainty.<sup>58</sup> Alternatively, a member state may use the right to withdrawal as a potential right to veto or as a potential threat in order to prevent disadvantageous decisions.

The creation of a formal provision which permits the strategic negotiation of compensation explains the opposition of the Commission to the inclusion of a withdrawal clause in the 2004 Draft Constitution. The Commission argued that such provision would allow Member States to blackmail others by threatening to leave. These effects also explain why theorists have been concerned to find

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<sup>50</sup> Schäfer (n. 21), 183.

<sup>51</sup> Ibid.

<sup>52</sup> Suzanne Lechner and Renate Ohr, 'The Right Of Withdrawal In The Treaty Of Lisbon: A Game Theoretic Reflection On Different Decision Processes In The EU' (2011) 32 *European Journal of Law and Economics*, 357–75.

<sup>53</sup> Schäffer (n. 21), 184.

<sup>54</sup> A. Alesina and R. Perotti, 'Economic risk and political risk in fiscal unions' (1998) 108 *Economic Journal*, 989–1008; A. Alesina and R. Wacziarg, 'Openness country side and the government' (1997) 69 *Journal of Public Economics*, 305–321.

<sup>55</sup> Schäfer (n. 21), 184

<sup>56</sup> Helfer (n. 22), 1590.

<sup>57</sup> See *inter alia*, Lechner and Ohr (n. 51); Tatham (n. 8); Helfer (n. 22); Sara Berglund, 'Prison or Voluntary Cooperation? The Possibility of Withdrawal from the European Union' (2006) 29 *Scandinavian Political Studies*, 147–167.

<sup>58</sup> Lechner and Ohr (n. 51), 361 and 371

mechanisms to restrain the temptation of strategic gamesmanship. In fact, Helfer argues that the principal challenge facing treaty negotiators is to set optimal conditions for exit *ex ante* so as to deter opportunistic exploitation of exist clauses *ex post* after the treaty has entered into force.<sup>59</sup> As a result, scholars have suggested various mechanisms which could deter strategic behaviour: extra-treaty sanctions or incentives;<sup>60</sup> including a referendum that requires the majority of citizens in the respective state to vote for withdrawal (sic);<sup>61</sup> or demand an exit fee to compensate the EU for losses caused by the departure of a Member State.<sup>62</sup>

Withdrawal provisions undeniably facilitate strategic bargaining behaviour. But is this option available equally to all members of an organisation? In fact, two factors condition the bargaining: the size and range of the costs in question, and the determination of the threatening government. For the first, the ability of a withdrawing actor to externalise the costs of its unilateral decision to the other members (and the limitation or non-existence of benefits for the remaining member states) determines the size and range of such costs. Every type of cost becomes relevant in the equation: trading and economic costs in relation to the market, the feared impact on the dominant ideology within the Union, fears of triggering a domino effect etc. Accordingly, to Lechner and Ohr,<sup>63</sup> the effectiveness of the threat of withdrawal depends on three aspects: the benefit/loss the withdrawing state would experience following its decision, the relevance of the withdrawing member to the other members' integration benefits, the benefit loss the other members would suffer in case of withdrawal, and the extent of the EU's benefit gains following the decision. Taking all the factors together, this provision reinforces the conclusion that larger states are by definition best placed to gain the most from exit (i.e. large Member States have better chances of survival on their own and they can externalise more costs than smaller states). Also, larger Member States can cope better with the costs of withdrawal: the loss of investment and limiting effects as a result of previous Europeanisation can be assumed to be smaller for large Member States.<sup>64</sup>

The determination of the threatening actor contributes to establishing the credibility of the threat. The transformation of the negotiation into a two-level game in which a powerful domestic constituency can acquiesce to the results of a negotiation increases greatly the credibility of the threat. The paradoxical weakness of the government vis-à-vis this domestic constituency may also enhance the credibility of its threat and the readiness of other parties to negotiate.<sup>65</sup>

In summary, the provision has an anti-equality bias<sup>66</sup> which a counterfactual question elucidates: can the EU cope with the withdrawal of 'certain' Member States better than others? For instance, could the euro, the eurozone and even the EU withstand a hypothetical withdrawal of Germany? Accordingly, the provision has a different meaning depending on which state implements it and how this is done: even if withdrawal becomes legally feasible, political and economic considerations will nevertheless condition it as a realistic option.<sup>67</sup>

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<sup>59</sup> Helfer (n. 22), 1600; Georg Ress, 'Ex ante safeguards against ex post opportunities in international treaties' (1994) *Journal of Institutional and theoretical economy*, 279.

<sup>60</sup> Helfer (n. 22), 1601.

<sup>61</sup> Lechner and Ohr (n. 51), 373

<sup>62</sup> Peter Kurrill-Klitgaard, 'Opting-out: the constitutional economics of exit' (2002) 61(1) *American Journal of Economics and Society*, 123–158.

<sup>63</sup> Lechner and Ohr (n. 51), 371.

<sup>64</sup> Following the reasoning on Europeanisation, Berglund argues that old Member States which have been shaped by membership for a larger period might find it more difficult to withdraw than more recent Member States (Berglund (n. 56), 157).

<sup>65</sup> Thomas Schelling, *The Strategy of Conflict* (Harvard MA: Harvard University Press, 1960).

<sup>66</sup> Tatham (n. 8), 152; Hofmeister (n. 12), 598.

<sup>67</sup> Hofmeister (n. 12); Berglund (n.8), 148.

### *e. Spill-over effects*

The exercise of the right of withdrawal even once makes it more credible for other actors to activate the provision in future, thus lowering any cost associated with its activation. In fact, the Danish and Irish governments, both bounded by referendum traditions in EU matters, opposed the inclusion of the provision in the 2004 Draft Constitution since both countries feared that it would incentivise their domestic Eurosceptic groups.<sup>68</sup> On the occasion of the 2016 UK referendum, groups in other Member States voiced their desire to hold similar referenda.<sup>69</sup> This has led to an inconclusive debate on spill-over effects: some wonder whether Article 50 will lead to the gradual fragmentation of what was supposed to be an ever closer union,<sup>70</sup> warning of other alternative undesirable consequences such as cherry-picking, Europe *a la carte* or some sort of regressive, gradual disintegration.<sup>71</sup> Others in turn suggest that somewhat paradoxically, the withdrawal procedure may contribute to the EU's aim of an 'ever closer Union among the peoples of Europe', precisely by making it possible for states to withdraw if the integration process becomes untenable.<sup>72</sup>

## **V. The rationale for exit. Why would a state seek exit?**

The large state bias inherent to the exit provision anticipates a crucial question in discussing withdrawal: why would a member state wish to withdraw? In more precise terms, what political and/or economic reasons would make a state wish to withdraw from the European Union? In utilitarian terms, decisions for withdrawal can emerge when exogenous or endogenous factors alter the cost-benefit calculation.<sup>73</sup> Rather than being separate, both factors act simultaneously.

a. Withdrawal as a response to a change of exogenous factors. The difference between EU membership and an external position is the decisive of the question of whether membership is benefit-maximising.<sup>74</sup> In the early 1990s Buchanan argued that economic integration areas cannot be definitive and flexible membership was therefore needed to accommodate market developments.<sup>75</sup> If there exist alternatives outside the organization, states with good alternatives for trade beyond a given regional organization can make demand on the other potential members. These other members must comply with the demands of the state with outside options to prevent it from exiting the agreement.<sup>76</sup> This option is asymmetrical for states depending on their size: exit options can create larger cost for smaller states. Once an agreement is created, it is often costlier for a small state to opt out even if it would have preferred no agreement at all.

If exogenous factors trigger exit, then, formal exit provisions, in themselves, cannot be interpreted as triggers. Thus, Gray and Slapin question the extent to which these formal provisions can contain exit when confronting those exogenous pull factors. A significant body of literature argues that the existence of real incentives outside of the organization (rather than formal provisions) explains

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<sup>68</sup> D. Spinant. 'Giscard Forum Set to Unveil Controversial EU "Exit clause"' (2003) 9 *European Voice*.

<sup>69</sup> Tara Palmeri and Kate Day, 'Brexit could lead to Czexit' (23 February, 2016) *Politico* <[www.politico.eu/article/brexit-could-lead-czexit-tomas-prouza/](http://www.politico.eu/article/brexit-could-lead-czexit-tomas-prouza/)>, accessed 5 June 2016.

<sup>70</sup> Hofmeister (n. 12)

<sup>71</sup> See Brok et al on behalf of the EPP Convention Group, 'Suggestion for amendment of Article I-59' <[http://european-convention.europa.eu/docs/Treaty/pdf/46/46\\_Art%20I%2059%20Brok%20EN.pdf](http://european-convention.europa.eu/docs/Treaty/pdf/46/46_Art%20I%2059%20Brok%20EN.pdf)>, accessed 5 June 2015.

<sup>72</sup> Hillion (n. 14 and n. 21).

<sup>73</sup> Lechner and Ohr (n. 51), 360.

<sup>74</sup> Ibid.

<sup>75</sup> James M. Buchanan 'Europe's constitutional opportunity', in *Europe's constitutional future* (London: Institute of Economic Affairs, 1990)

<sup>76</sup> Julia Gray and Jonathan Slapin 'Exit Options and the Effectiveness of Regional Economic Organizations' (2013) 1(2) *Political Science Research and Methods*, 281–303 at 285

changes internal dynamics.<sup>77</sup> On the one hand, when at least one state within a proposed organisation can make a credible threat of exit – or has reasonable prospects of trade beyond the organisation – the organisation may be less effective.<sup>78</sup> In contrast, if countries within a regional economic organisation have fewer options for world trade beyond the regional organisation, they will develop strong institutions and make substantial use of them.

b. A second utilitarian reason for withdrawal responds to endogenous factors and, specifically, losing a say (i.e. control on decision-making and its outcomes). Using a rational choice approach and drawing on the analogy with secession of marginalised regions,<sup>79</sup> Lechner and Ohr have interpreted the threat as an hypothetical response to qualified majority voting (QMV) losses: withdrawal is an alternative for any state which perceives an accumulation of instances of being outvoted under QMV.<sup>80</sup> These authors elaborate on two scenarios in which withdrawal becomes meaningful: either the benefit of being sovereign outside the EU is regarded as more valuable than the alternative or membership in another regional area is regarded as potentially more beneficial than EU membership. Withdrawal can be considered an option in either both scenario.<sup>81</sup> They conclude optimistically that the right of secession set out in the Lisbon Treaty is all-in-all a helpful institutional adaptation to meet the challenges besetting today's European Union.<sup>82</sup> As the evidence set out in the next section demonstrates, losses in terms of 'decisional-power' do not account rationally for dissatisfaction in the UK case.

c. Beyond these instrumental, utility-based considerations, identity has acquired enormous value in explaining satisfaction and/or dissatisfaction with the EU and, hence, it may also explain the push for exit. Hooghe and Marks have argued that citizens' attitudes towards the EU must be understood not only in terms of their economic interests but primarily in terms of the perceived challenge to their identity that the EU can pose. The opening up of decisional arenas such as referendums permit citizens to be rearranged away from their tradition alignments within the party system to lines of conflict defined by support/rejection of the EU.<sup>83</sup> Decisions based on imperfect, incomplete or totally wrong information about the functioning of the EU and the costs and benefits for the UK were clearly in evidence in the 2016 UK referendum, making identity-based explanations a powerful alternative to understand decisions.

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<sup>77</sup> Ken Binmore, 'Bargaining and Coalitions', in Alvin E. Roth (ed.), *Game-Theoretic Models of Bargaining* (Cambridge: CUP, 1985) pp. 295–322; Abhinay Muthoo. 'On the Strategic Role of Outside Options in Bilateral Bargaining' (1995) 43(2) *Operations Research*, 292–7; Erik Voeten, 'Outside Options and the Logic of Security Council Action' (2001) 95(4) *American Political Science Review*, 845–58; Jonathan B. Slapin, 'Exit, Voice, and Cooperation: Bargaining Power in International Organization and Federal Systems' (2009) 21(2) *Journal of Theoretical Politics*, 187–211; Songying Fang and Kristopher W. Ramsey, 'Outside Options and Burden-sharing in Nonbinding Alliances' (2010) 63(2) *Political Research Quarterly*, 188–202.

<sup>78</sup> Jenna Bednar, 'Valuing Exit Options' (2007) 37(2) *Publius: The Journal of Federalism*, 190–208; John Odell and Barry Eichengreen, 'The United States, the ITO, and the WTO: Exit Options, Agent Slack, and Presidential Leadership', in Anne Krueger (ed.) *The WTO as an International Organization* (Chicago, IL: University of Chicago Press, 1989), pp. 189–209.

<sup>79</sup> Thus, Alesina et al. argue that regions whose preferences are not considered adequately by the central decision-making bodies may have an incentive to leave Alesina, Alberto, Enrico Spolaore, and Romain Wacziarg, 'Economic Integration and Political Disintegration' (2000) 90(5) *American Economic Review*, 1276–96.

<sup>80</sup> Lechner and Ohr (n. 51), 360.

<sup>81</sup> Lechner and Ohr (n. 51), 361.

<sup>82</sup> Lechner and Ohr (n. 51), 373.

<sup>83</sup> Liesbet Hooghe and Gary Marks A postfunctionalist theory of European integration: from permissive consensus to constraining dissensus' (2016) 39 *British Journal of Political Science*, 1–23

## VI. Enter loyalty

The revision of the reasons for seeking exit and the effects of the explicit withdrawal provision pave the way to advancing beyond the binary relationship between exit and voice. Alongside these mechanisms, Hirschman included a third, i.e. loyalty which he defined as *the extent to which customer-members are willing to trade off the certainty of exit against the uncertainties of an improvement in the deteriorated product*. This definition connotes a utilitarian (rather than specifically moral) foundation for action. Loyalty is important in any organisation since, according to Hirschman, it fulfils a key function: it can neutralise within certain limits the tendency of the most quality-conscious customers or members to be the first to exit.<sup>84</sup> As a result of loyalty, these potentially most influential customers and members will stay on longer than they would ordinarily, in the hope or rather reasoned expectation that improvement or reform can be achieved ‘from within’. Thus loyalty, far from being irrational, can serve the socially useful purpose of preventing deterioration from becoming cumulative, as it so often is when there is no barrier to exit.<sup>85</sup> For Hirschman, loyalty is a key concept in the battle between exit and voice because, as a result of it, members may be locked into their organisations a little longer and thus use choose to use the voice option with greater determination and resourcefulness than they would otherwise have done.<sup>86</sup>

Hirschman presents a two-way relationship between voice and loyalty (i.e. loyalty increases the tendency to seek voice and having ‘voice’ increases loyalty). But he only shows a *one-way* relationship going from loyalty to exit. For him, loyalty or specific institutional barriers to exit are particularly functional whenever the effective use of voice requires a great deal of social inventiveness, while exit is an available, yet not wholly effective, option.<sup>87</sup> Note that exit being an available and yet not a wholly effective option is a good description of the situation of a Member State of the EU.

The second direction the relationship between exit and loyalty can take is important to extracting the meaning of withdrawal provisions. What happens when formalised and explicit exit enters the scene? What is the effect of increasing exit (i.e. making it less costly) on loyalty? My response is a straightforward one: easier exit options undermine loyalty. Taking the specific case of withdrawal provisions, they undermine loyalty in two ways: firstly, they grant legal certainty (next to facticity) to the full exit option and, because of this, also make it a more credible option. Those purely opposing EU membership can immediately argue that, with respect to the relative legal uncertainty of the previous situation, explicit withdrawal creates a clearly-defined legal outcome and the procedure to achieve it. This reduces the costs of the exit option even if only in the sense that the ultimate legal case against it disappears (and citizens do not need to be convinced of the legality of this option and opposing constituencies cannot blame it as illegal). Making the provision explicit (perceptible beforehand as an implicit possibility) makes its use more credible as well as the threat of its use. The costs of activating the formerly purely political exit option decrease.

Second, an explicit and easier exit option permits a discursive construction of ‘product deterioration’ which may not be necessarily be based on a loyal interpretation of the situation (and let us recall that loyalty is defined as the propensity to look for solutions to product deterioration *within* an organisation). A loyalist interpretation of product deterioration leads to demands for reform (i.e. voice) rather than to the exercise of exit. The Cecchini *Report on the Cost of non-Europe* (1988)<sup>88</sup> provides the archetype of a loyal diagnosis of product deterioration. Starting with the diagnosis of the problems in the functioning of the single market in the 1970s and 1980s, the Report valued the

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<sup>84</sup> Hirschman (n.2), 79.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid., 82.

<sup>87</sup> Ibid., 81.

<sup>88</sup> Paolo Cecchini, Michel Catinat and Alexis Jacquemin *The European Challenge, 1992: The Benefits of a Single Market* (London: Gower, 1988).

possible gains through common action at the EU level for achieving the single market. The SEA responded to this diagnosis by introducing the 1992 programme and a number of additional mechanisms such as harmonisation and the extensive introduction of mutual recognition of standards plus the adoption of qualified majority voting for market-related measures. The success of the strategy means that today, the Cost of Non Europe Reports<sup>89</sup> follow the same approach of evaluating gains and/or the realisation of a public good through common action at the EU level. Note that the approach may also apply when the diagnosis recommends the suppression of EU competence: this is possible, for instance, with the CAP.

The existence of the exit option transforms diagnosis into an exercise in which changing preferences based on considerations such as identity can substitute the clear identification of ‘product deterioration’. Thus, in the case of the UK process, examination of the hypothetical defects in the EU’s economic constitution<sup>90</sup> have been found, in reality, ill-founded (and a poor rationale for leaving the Union).<sup>91</sup> Similarly, diagnosis of the EU’s ‘creeping competence’ and its alleged attempt constantly to overreach its powers are not confirmed by empirical scrutiny. This suspicion caused the Dutch and British ‘review of competences’: the British government reviewed all the competences of the European Union on the basis of evidence submitted by independent stakeholders, producing reviews in thirty-two policy areas over the period 2013–2015. After two UK government reports, the findings confirm that there is little or no case for a repatriation of EU competences.<sup>92</sup> Similarly, the Bank of England concluded that EU membership probably increased the dynamism of the UK economy and its ability to grow. It also noticed that flexibility in applying EU rules was respected for

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<sup>89</sup> Joseph Dunne, ‘Mapping the Cost of Non-Europe, 2014–19’ (2014) European Added Value Unit European Parliamentary Research Service, <[www.europarl.europa.eu/the-secretary-general/resource/static/files/files/mapping-the-cost-of-non-europe--march-2014-.pdf](http://www.europarl.europa.eu/the-secretary-general/resource/static/files/files/mapping-the-cost-of-non-europe--march-2014-.pdf)>, accessed 5 June 2015.

<sup>90</sup> A CER Report summarised the standard critique of the UK’s membership of the EU into the following arguments: 1. The EU does little to open markets on the continent, and so creates few opportunities for British exporters. It follows that leaving the EU would have little impact on Britain’s European trade. 2. EU rules tie up the British economy in red tape, and constrain the UK’s ability to tap faster-growing markets outside Europe. A British exit would boost output by reducing the burden of regulation on business, and by freeing Britain to sign more free trade agreements with countries outside Europe. 3. If Britain left the EU, it would win back its net contribution to the EU’s budget, which the Treasury estimates will be 0.5 per cent of GDP per year between 2014 and 2020. 4. Immigration from the EU diminishes Britons’ employment prospects, and requires the British taxpayer to subsidise public services and provide welfare benefits for newcomers. ‘The economic consequences of leaving the EU – The final report of the CER commission on the UK and the EU single market Centre for European Reform’ (June 2014) <[www.cer.org.uk/sites/default/files/publications/attachments/pdf/2014/report\\_smc\\_final\\_report\\_june2014-9013.pdf](http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2014/report_smc_final_report_june2014-9013.pdf)>, accessed 5 June 2015.

<sup>91</sup> The same Report concludes that there are four reasons why these claims are ill-founded, and are a poor rationale for leaving the Union. First, the level of economic integration between the UK and the rest of the EU is very high, so healthy doses of competition and investment from elsewhere in the EU help to raise British productivity. Second, EU rules do not place large burdens on the British economy as a whole, or large constraints upon British exports to countries outside Europe: ‘Brexit’ would not be an economic liberation. Third, EU markets are of such importance to national prosperity that after a vote to leave, British negotiators would try to secure access to them. The experience of countries like Norway shows that this would involve accepting many of the rules of the single market, and a contribution to the EU’s budget, but with little influence on EU decision-making. Fourth, there is little evidence that migrants from elsewhere in the EU reduce Britons’ job prospects or their wages. A smaller proportion of EU immigrants receive benefits than do Britons, and EU migrants are net contributors to the public finances, helping to pay for the pensions and healthcare of an ageing society.

<sup>92</sup> Michael Emerson, Steven Blockmans, Steve Peers and Michael Wriglesworth, ‘British Balance of Competence Reviews, Part II: Again, a huge contradiction between the evidence and Eurosceptic populism’ (June 2014) *EPIN* Paper No. 40. They argue, moreover, that for the UK in particular the EU has shown considerable flexibility in agreeing to special arrangements, such as in the policies they reviewed on asylum, non-EU immigration and civil judicial cooperation. In other areas reviewed, such as the single market for goods, external trade, transport, environment, climate change and research, they found a good fit between the EU’s policies and UK priorities, with the EU being perceived by stakeholders as an ‘amplifier’ of British interests.

national regulators and supervisors.<sup>93</sup> These examples refute the ‘disloyal’ construction of the product deterioration diagnosis.

Alternatively, how real is the loss of voice as the trigger for a withdrawal demand? In relation to the UK, Simon Hix and his collaborators have shown that the UK has not been marginalised on average in the making of EU laws. Moreover, the UK has been more closely aligned to the final outcomes more often than most other governments and this is true also for issues of greater salience for the UK government. In fact, the UK government’s preferences were the fourth closest to the final policy outcomes.<sup>94</sup> When looking at the patterns of voting within the Council, records suggest that there has been a significant shift in the position of the UK government when comparing 2004–2009 to 2009–2015, with the UK government voting against the majority more often in the later period and being on the losing side more than any other state. Yet the UK was part of the winning majority 87% of the cases (without neglecting the fact that most decisions are, in fact, adopted by consensus).<sup>95</sup> As for the EP, an analysis of MEP voting patterns (2009–2014) shows that British MEPs were less likely to be on the winning side than MEPs from any other Member State. But far from being evidence of marginalisation, the reason for these results is that the three main political groups dominated voting and the number of British MEPs in these groups declined as result of the departure of British conservatives from the EPP and fewer British MEPs being elected from parties aligned to ALDE and the S&D.<sup>96</sup> Again, Hix et al. show that British MEPs did reasonably well in some policy areas the UK cares about, such as the internal market, international trade and international development, but are most often marginalised in budgetary issues. This results largely from the British conservatives leaving the EPP and the increase in UKIP MEPs (who are almost always on the losing side).<sup>97</sup> But even in this situation, British MEPs have managed to capture a number of powerful agenda-setting positions; for instance, a Brit has chaired the powerful internal market committee since 2004.<sup>98</sup>

In summary, formalisation of the exit provision has provided space for a ‘disloyal’ (in Hirschman’s sense) portrayal of the EU’s ‘declining performance’ which empirical evidence does not confirm. As the authors of the Report<sup>99</sup> quoted above conclude, ‘declining performance’ may exist: at a more detailed level, there can be individual actions or laws which might be done better or not at all. In this context, voice would be understood as a strong demand for correction. This form of declining performance is hardly a rationale for secession.

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<sup>93</sup> Bank of England, ‘EU membership and the Bank of England’ (October 2015) <[www.bankofengland.co.uk/publications/Documents/speeches/2015/euboe211015.pdf](http://www.bankofengland.co.uk/publications/Documents/speeches/2015/euboe211015.pdf)>, accessed 5 June 2016.

<sup>94</sup> He uses data on approval of EU legislation between 1996 and 2008. Data do not cover international treaties nor legislative acts adopted after 2008. [Hix refers to Lord Lawson writing in the Times on May 2013: ‘we are doomed to being consistently outvoted by the Eurozone bloc’] Simon Hix ‘Is the UK marginalised in the EU?’ (2015) <<http://blogs.lse.ac.uk/europpblog/2015/10/20/is-the-uk-marginalised-in-the-eu/>>, accessed 5 June 2016.

<sup>95</sup> Hix and Hagemann include both ‘no’ and ‘abstentions’ as opposition votes. Caveat: the UK government might be more willing than other governments publically to register its opposition to EU decisions [changes in patterns of opposition may also be related to change of government in the UK] ‘Does the UK win or lose in the Council of Ministers?’ (2015) <<http://blogs.lse.ac.uk/europpblog/2015/11/02/does-the-uk-win-or-lose-in-the-council-of-ministers/>>, accessed 5 June 2016.

<sup>96</sup> Simon Hix, ‘UK MEPs lose most in the European Parliament’ (2015) <<http://ukandeu.ac.uk/explainers/uk-meps-lose-most-in-the-european-parliament/>>, accessed 5 June 2016.

<sup>97</sup> Simon Hix, ‘UK influence in Europe series: The policy successes (and failures) of British MEPs’ (2016) <<http://blogs.lse.ac.uk/europpblog/2016/01/12/uk-influence-in-europe-series-the-policy-successes-and-failures-of-british-meps/>>, accessed 5 June 2016.

<sup>98</sup> Simon Hix and Giacomo Benedetto, ‘Do British MEPs get key positions of power in the Europe?’ (2016) <[www.theguardian.com/news/datablog/2016/feb/04/do-uk-meps-get-key-positions-of-power-in-europe](http://www.theguardian.com/news/datablog/2016/feb/04/do-uk-meps-get-key-positions-of-power-in-europe)>, accessed 5 June 2016.

<sup>99</sup> The economic consequences of leaving the EU (n. 94).

## VII. The change of the voice mechanism: seeking selective exit

Section 4 has outlined a typology of effects which connects with the discussion in Section 6 on the hypothetical reasons for withdrawal. This section in turn discusses how the interaction between specifically the strategic effects and the dis-loyal construction of the diagnosis affects how actors define ‘voice’ and the relationship between exit and voice. The explicit reference to exit ***changes the voice mechanism itself***. Weiler described the consolidation of EU secondary legislation and its attached principles in exchange for an increased participation of the member states in decision making.

The newly formalised exit constructs a different voice mechanism (let us recall that voice, for Hirschmann, was a messy and unclear mechanism in the domain of politics): ‘voice’ acquires the sense of acquiring some right for calling for the renegotiation (meaning *ex post* derogation) of the EU *acquis* and/or the terms of membership in the EU. In this respect, Article 50 can be read in connection with Article 48(2) which establishes that proposals for amending the treaties ‘*may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties*’. Article 48(2) was negotiated at the same time as the new withdrawal provisions. Voice then turns into demands to address the discursively constructed ‘declining performance’ through a reduction of the Union’s scope of activity. And this marks a transformation of the relationship between exit and the closure of selective exit with which Weiler characterised the EU: while in Weiler’s analysis voice remained a mechanism for guaranteeing intergovernmental control of decision making, Article 50 allows states to gain voice by obtaining unilateral derogations and exemptions from previously unanimously agreed common policies.

For the moment, the rigidity of the Article 48 procedures protects the EU from unilateral de-constitutionalisation attempts. However, it does not discourage seeking alternative arrangements, as happened with the package negotiated and agreed with the UK government in February 2015. The threat of withdrawal thus forced the Union to enter into the negotiation of a ‘reform’ without using the Article 48 procedure (which implies *inter alia* a Convention). And a single Member State has been able to unilaterally establish the agenda.

Are there real prospects of these voice demands (equal to unilateral *ex post* derogations) being successful? The chances of this voice strategy succeeding are slim. The threat of exit matters if it is credible and if its exercise imposes costs onto the remaining members.<sup>100</sup> Certainly, a withdrawing state may gain some negotiating power through a strategy of ‘defiance’<sup>101</sup> since the period between announcement and effective withdrawal creates opportunities for blackmail. The withdrawing state will remain part of the EU decision-making process and it may be tempted to use this as a tool to secure more beneficial terms in the withdrawal agreement. It may also be tempted to exercise some sort of legal detachment (see above). In this respect, the EU’s responses (for instance, an infringement procedure) would be increasingly ineffective.

One potential cost for remaining members is the damage that an exit inflicts on the abandoned institutional structure (its credibility or its capacity).<sup>102</sup> The exit of the UK, however, would not undermine the EU’s credibility, because there is substantial information about the benefits of EU membership [which contradicts and potentially disarms the Eurosceptic denunciation of the EU’s decline in performance]. Of course, Eurosceptics may conjure up a scenario in which the UK’s exit causes the EU to plunge into a new age of protectionism. Nonetheless, it would appear that the advocates of a British exit grossly overestimate its impact on the remaining members as well as their willingness to accommodate the British with substantial institutional reforms.

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<sup>100</sup> I am grateful to Maraijke Kleine for drawing my attention to this point.

<sup>101</sup> A. Lazowski, *Withdrawal from the European Union. A Legal Appraisal* (Edward Elgar Publishing 2016).

<sup>102</sup> For a similar argument see, e.g. Mareike Kleine, *Informal Governance in the European Union. How Governments Make International Organizations Work* (Ithaca, NY: Cornell University Press, 2013), chapter 1.



## **VIII. Conclusions**

The introduction of Article 50 of the Treaty of Lisbon has subtly transformed the relationship between the voice and exit mechanisms that Weiler described in 1992. The explicit provision enables attempts to undermine loyalty by making it cheaper to level un-loyal criticism against the EU. But it has also allowed a transforming voice into demands for the degradation of the Union. Discussing the eventual introduction of a right to withdrawal in state constitutions, Cass Sunstein warned that Constitutions ought not to include a right to secede:

To place such a right in a founding document would increase the risks of ethnic and factional struggle; reduce the prospects for compromise and deliberation in government; raise dramatically the stakes of day-to-day political decisions; introduce irrelevant and illegitimate considerations into those decisions; create dangers of blackmail, strategic behaviour, and exploitation; and, most generally, endanger the prospects for long-term self-governance. Constitutionalism addresses precisely these kind of risks.<sup>103</sup>

Similarly, Hirschman also warned that ‘once the exit mechanism is readily available, the contribution of voice’ – that is of the political process – ‘to such matters is likely to be and remain limited’.<sup>104</sup> The conclusions of these two scholars along with the analysis provided in this chapter and the lessons learned from the UK experience show that the withdrawal provision in Article 50 is not the EU’s greatest contribution to global constitutionalism.

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<sup>103</sup> Cass R. Sunstein, ‘Constitutionalism and Secession,’ (1991) 58(2) *University of Chicago Law Review*, Article 9, <<http://chicagounbound.uchicago.edu/uclrev/vol58/iss2/9>>, accessed 5 June 2015.

<sup>104</sup> Hirschman (n. 5), 95

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