



**Reversing a Withdrawal Notification under Article 50  
TEU: Can the Member States Change their Mind?**

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# Reversing a Withdrawal Notification under Article 50 TEU: Can the Member States Change their Mind?

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## Abstract

The purpose of this paper is to determine whether a Member State of the EU may revoke its notice to withdraw from the Union under art.50 TEU. The answer to this question has significant practical implications for Brexit, both domestically and across Europe. While the reversibility of the British withdrawal notification has taken centre stage in the debate on Brexit, the matter has not been assessed in depth. The present paper suggests that interpreting art.50 TEU with reference to art.31 and art.32 of the Vienna Convention on the Law of Treaties permits a more systematic analysis of the subject than what has been offered so far by commentators and the English courts. Based on this analytical framework, the paper reviews the text and context of art.50 TEU, the general scheme of the Treaties, other rules of international law and the relevant preparatory work. All of these elements point in a single direction. Contrary to the position taken by the English courts in *Miller*, they confirm that a notice to withdraw issued under art.50 TEU is in fact reversible. In the light of these findings, it would be perfectly appropriate for national courts in other Member States, except those against whose decision there is no judicial remedy under national law, to decide that an art.50 TEU notification is revocable without referring the matter to the Court of Justice. However, as only the Court of Justice can provide an authoritative interpretation of art.50 TEU applicable across all Member States, it would be more appropriate, in the interests of legal certainty, if they were to submit this question to the Court of Justice under the preliminary ruling procedure.

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## Introduction

Can a Member State in the process of withdrawing from the EU in accordance with art.50 TEU change its mind before the withdrawal takes effect? This question has shot to prominence in the aftermath of the British referendum to leave the EU. The text of art.50 TEU does not address the point in express terms and opinion remains divided on the matter. According to Donald Tusk, the President of the European Council, “there are no legal barriers” that would prevent the UK from unilaterally revoking its withdrawal notification under art.50 TEU.<sup>1</sup> This assessment is shared by the EU Select Committee of the House of Lords<sup>2</sup> and a substantial number of commentators.<sup>3</sup> By contrast, in the case of *Miller*,<sup>4</sup> the parties were united in their submissions that a Member State does not have the power to revoke its notification to leave the EU. Appearing on behalf of the lead claimant, Lord Pannick QC boldly declared in the High Court that “there is no going back” once a withdrawal notification has been issued.<sup>5</sup> He was joined in this view by the Attorney

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1. D. Tusk, Keynote Address at the European Policy Center 20th Anniversary Conference, Reference I-127730 (13 October 2017) <http://ec.europa.eu/avservices/video/player.cfm?ref=I127730#> [Accessed 15 March 2017].

2. House of Lords EU Committee, *The Process of Withdrawing from the European Union*, Session 2015–16, HL Paper 138 (4 May 2016), pp.4–5.

3. E.g. P. Craig, “Brexit: A Drama in Six Acts” (2016) 41 *E.L. Rev.* 447, pp.464–465; T. Tridimas, “Article 50: An Endgame without an End?” (2016) 27 *King’s Law Journal* 297, pp.303–305; A. Thiele, “Der Austritt aus der EU: Hintergründe und rechtliche Rahmenbedingungen eines ‘Brexit’” (2016) 51 *Europarecht* 281, p.295; A. Wyrozumska, “Article 50”, in H.-J. Blanke and S. Mangiameli (Eds.), *The Treaty on European Union (TEU)* (Berlin Heidelberg: Springer, 2013), p.1410. See also P. Eeckhout and E. Frantziou, “Brexit and Article 50 TEU: A Constitutionalist Reading” UCL European Institute Working Paper (10 December 2016), pp.37–40, <http://www.ucl.ac.uk/european-institute/ei-publications/brexit-article-50.pdf> [Accessed 15 March 2017]; D. Edward et al., “In the Matter of Article 50 of the Treaty on European Union” (10 February 2017) at [44]–[55] [https://www.bindmans.com/uploads/files/documents/Final\\_Article\\_50\\_Opinion\\_10.2.17.pdf](https://www.bindmans.com/uploads/files/documents/Final_Article_50_Opinion_10.2.17.pdf) [Accessed 15 March 2017] and C. Streeten, “Putting the Toothpaste Back in the Tube: Can an Article 50 Notification Be Revoked?”, UK Constitutional Law Blog (13 July 2016) <https://ukconstitutionallaw.org/> [Accessed 15 March 2017].

4. *R. (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) and *R. (Miller and another) v. Secretary of State for Exiting the European Union* [2017] UKSC 5. The case turned on the question whether the Government is entitled, as a matter of domestic law, to give notice to withdraw from the EU without Parliament’s approval. The High Court held that the Government is not entitled to do so. The judgment was confirmed by the Supreme Court.

5. Lord Pannick QC, *Miller* [2016], Transcript, CO/3281/2016 and CO/3809/2016 (13 October 2016), p.18, <https://www.judiciary.gov.uk/wp-content/uploads/2016/10/20161013-all-day.pdf> [Accessed 15 March 2017]. See also Helen Mountfield QC, pp. 190–191 and Manjit Gill QC, *Miller* [2016], Transcript, CO/3281/2016 and CO/3809/2016 (17 October 2016), p.47, <https://www.judiciary.gov.uk/wp-content/uploads/2016/10/20161017->

General, who on behalf of the Secretary of State for Exiting the EU invited the court to proceed on the basis that a notification is indeed irreversible.<sup>6</sup> In its judgment delivered at first instance, the High Court accepted these submissions and held that, once given, notice to leave “will inevitably result in the complete withdrawal of the United Kingdom from membership of the European Union”.<sup>7</sup> On appeal, the Supreme Court proceeded on the same assumption without, however, formally deciding the matter.<sup>8</sup> The European Commission has taken a more ambivalent stance. In response to a written question tabled in the European Parliament, Commission President Jean-Claude Juncker stated that “[t]he Treaty does not provide a mechanism for a unilateral withdrawal of a notification under Article 50 of the Treaty on the European Union (TEU). Once the article 50 TEU is triggered, it is no longer a unilateral process.”<sup>9</sup> This merely confirms what is already evident—that the Treaty does not contain a mechanism for revoking a withdrawal notification and that, once initiated, the withdrawal process is not completely unilateral in character—without taking a position on the question of revocability.

The uncertainty surrounding the interpretation of art.50 TEU has significant implications for Brexit and beyond. The idea that Britain’s notification to leave the EU is irreversible has appealed to those who seek to shield the outcome of the Brexit referendum from future legal and

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[all-day.pdf](#) [Accessed 15 March 2017].

6. Jeremy Wright QC, *Miller* [2016], Transcript (17 October 2016), p.64. See also Written Case of the Secretary of State for Exiting the European Union, UKSC 2016/196 (18 November 2016) at [17]. ([https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/570778/Supreme\\_Court\\_Printed\\_Case\\_of\\_the\\_Secretary\\_of\\_State\\_for\\_Exiting\\_the\\_European\\_Union.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/570778/Supreme_Court_Printed_Case_of_the_Secretary_of_State_for_Exiting_the_European_Union.PDF) [Accessed 15 March 2017]. Government ministers have adopted the same position in public. See B. Kentish, “Brexit is ‘irrevocable’ once Government triggers Article 50, Lord Chancellor Liz Truss says”, *Independent* (19 February 2017) (<http://www.independent.co.uk/news/uk/politics/liz-truss-brexit-irrevocable-article-50-european-union-andrew-marr-show-justice-secretary-a7588106.html>) [Accessed 15 March 2017].

7. *Miller* [2016] at [11]. In separate proceedings, the Belfast High Court appeared to adopt the same position in *Re McCord’s Application* [2016] NIQB 85 at [23]. In support of this position, see J.V. Louis, “Le Droit de Retrait de l’Union Européenne” (2006) 42 *Cahiers de Droit Européen* 293, p.308. See also Jake Rylatt, “The Irrevocability of an Article 50 Notification: Lex Specialis and the Irrelevance of the Purported Customary Right to Unilaterally Revoke” (27 July 2016) <https://ukconstitutionallaw.org/> [Accessed 15 March 2017].

8. *Miller* [2017] at [26] and [104]. See also Lord Reed (dissenting) at [169]. The claimants shared the Government’s position on this point: see e.g. *Miller* [2016], Transcript, CO/3281/2016 and CO/3809/2016, pp.18 and 190–191 (13 October 2016) <https://www.judiciary.gov.uk/wp-content/uploads/2016/10/20161013-all-day.pdf> [Accessed 15 March 2017].

9. Answer given by President Juncker on behalf of the Commission, Parliamentary Question, P-008603/2016 (17 January 2017).

political challenge.<sup>10</sup> By arguing that withdrawal is inevitable once notice has been given, proponents of Brexit rely on art.50 TEU to ensure that the referendum result cannot be overturned should the British public change its mind. Meanwhile, the view that the withdrawal notice may be revoked has appealed to those who prefer to keep the door to Britain's continued EU membership open for as long as possible. Should it be possible to reverse the notice, the UK could reject the outcome of the withdrawal negotiations in favour of remaining a member of the Union after all. The British Government has ruled out this option at present.<sup>11</sup> However, should its position change, President Donald Tusk has suggested that it would be "acceptable for all European partners" if Britain were to retract its notice to leave.<sup>12</sup> Whilst some Member States have signalled that they would indeed accept such a change of heart,<sup>13</sup> it is by no means a foregone conclusion that all Member States would follow suit.

Amidst the political upheaval caused by Brexit in the UK and across Europe, the need for legal certainty is paramount. The question therefore remains: is a withdrawing Member State free to rescind its notification to leave the Union under art.50 TEU or is it obliged by the Treaties to follow its original decision through to its ultimate, though potentially no longer desired, conclusion? The purpose of this article is to answer this question by clarifying the position of the law. This task is complicated by several factors. The method of legal interpretation adopted by the Court of Justice of the European Union is dynamic and formulated at a high level of generality.<sup>14</sup> These features make it difficult to replicate with confidence in specific cases.<sup>15</sup> In the present context, this difficulty is compounded by the fact that no institutional and judicial precedents exist to guide the interpretation of art.50 TEU and that the main interpretative task in this respect is to resolve a question on which that provision is silent. Hampered by these difficulties, much of the

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10. E.g. J. Rees-Mogg, HC Deb 7 February 2017, vol. 621, col. 281; D. Davis, HC Deb 24 January 2017, vol. 620, col. 171.

11. J. Wright QC, *Miller* [2016], Transcript (17 October 2016), p.64 ("as a matter of firm policy, once given a notification will not in fact be withdrawn").

12. D. Tusk, Keynote Address (13 October 2017).

13. J. Watts, "Britons can still reverse Brexit after Article 50 and say 'we love you' to EU, Luxembourg PM says", *Independent* (9 March 2017) <http://www.independent.co.uk/news/uk/politics/brexit-latest-article-50-xavier-bettel-i-love-you-theresa-may-a7621091.html> [Accessed 15 March 2017]

14. E.g. in *Da Costa* (28 to 30-62) ECLI:EU:C:1963:6, p.38, the Court declared that the meaning of the Treaties has to be deduced from their "wording and spirit".

15. G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge: Cambridge University Press, 2002), pp.274–275.

discussion of art.50 TEU has been impressionistic and laden with policy considerations.<sup>16</sup>

Under these circumstances, recourse to the rules of interpretation set out in art.31 and art.32 of the Vienna Convention on the Law of Treaties of 1969 may facilitate a more systematic analysis of art.50 TEU.<sup>17</sup> To be clear, the interpretation of art.50 TEU is first and foremost a matter of EU law and I am not suggesting that the VCLT prevails over the rules of interpretation applicable under EU law. Rather, I am advancing three points. First, it is permissible to have recourse to the VCLT in the present context, bearing in mind the close affinity between the two interpretative frameworks, the dual legal character of the Treaties and the fact that art.50 TEU is concerned with terminating treaty relationships between the Member States. Second, interpreting art.50 TEU with reference to the “categories of arguments”<sup>18</sup> listed in art.31 and art.32 VCLT permits a more rigorous analysis of the subject than appeals to policy considerations do.<sup>19</sup> Third, the rules of interpretation laid down in the VCLT apply without prejudice to any relevant rules of EU law.<sup>20</sup> This means that in the interpretation of art.50 TEU, the relative weight given to the elements listed in art.31 and art.32 VCLT can, in fact must, be adjusted to reflect the canons of interpretation developed in EU law. Accordingly, in this paper, I propose to interpret art.50 TEU with reference to its terms, context, the object and purpose of the Treaties, other relevant rules of international law and supplementary rules of interpretation, as understood in art.31 and art.32 VCLT, but give weight to these different categories of arguments in line with the interpretative method developed by the Court of Justice. The analysis demonstrates that a Member State withdrawing from the EU pursuant to art.50 TEU is entitled to revoke its notification to leave.

### **Article 50 TEU: regulating the right to withdraw**

Before the Lisbon Treaty entered into force in 2009, neither the TEU nor the EC Treaty contained

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16. Cf. Craig, “Brexit: A Drama in Six Acts” (2016), pp.464–465; Tridimas, “Article 50: An Endgame without an End?” (2016), pp.303–305.

17. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 332 (23 May 1969).

18. The term is borrowed from J. Bengoetxea, L. Moral Soriano and N. McCormick, “Integration and Integrity in the Legal Reasoning of the European Court of Justice”, in G. de Búrca and J. H. H. Weiler (eds), *The European Court of Justice* (Oxford: Oxford University Press, 2001) 43, p.57. Categories of arguments refers to “what has to be looked at” during the process of interpretation.

19. Cf. S. Smismans, “About the Revocability of Withdrawal: Why the EU (Law) Interpretation of Article 50 Matters”, UK Constitutional Law Blog (29 November 2016) <https://ukconstitutionallaw.org/> [Accessed 15 March 2017]

20. Art.5 VCLT.

a provision regulating the withdrawal of a Member State from the Union in express terms. Opinion was divided whether or not the Member States retained the right to leave. This division mirrored a broader disagreement about the true nature of the EU. Authors stressing the supranational features of the Union tended to argue that any supposed right to withdraw was incompatible with the permanent and irreversible character of European integration, as reflected in the general scheme and specific provisions of the Treaties.<sup>21</sup> In particular, the fact that the Treaties were concluded for an “unlimited period”<sup>22</sup> was widely understood to exclude the right of unilateral withdrawal.<sup>23</sup> However, even the European Court of Justice had to concede that the unlimited duration of the Community did not preclude the Member States from amending the Treaties so as to expressly permit the repatriation of competences and, by necessary implication, the complete termination of their membership.<sup>24</sup> Authors mindful of the international law origins of the EU legal order were willing to go further and accept the possibility of withdrawal on the basis of the relevant rules of international law,<sup>25</sup> above all by common agreement of all Member States as foreseen in art.54(b) VCLT.<sup>26</sup> In its decision on the ratification of the Maastricht Treaty, the German Federal Constitutional Court took an even more assertive attitude and seemed to contemplate the possibility that a Member State could withdraw from the Treaties even by way of

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21. E.g. J.A. Hill, “The European Economic Community: The Right of Member State Withdrawal” (1982) 12 *Georgia Journal of International and Comparative Law* 335, pp.354–357; U. Everling, “Sind die Mitgliedstaaten der Europäischen Gemeinschaft noch Herren der Verträge? Zum Verhältnis von Europäischem Gemeinschaftsrecht und Völkerrecht”, in R. Bernhardt *et. al.* (eds) *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler* (Berlin Heidelberg: Springer, 1983) 173.

22. Art.356 TFEU and art.53 TEU.

23. E.g. M. Akehurst, “Withdrawal from International Organisations” (1979) 32 *Current Legal Problems* 143, pp.150–152; J.H.H. Weiler, “Alternatives to Withdrawal from an International Organization: The Case of the European Economic Community” (1985) 20 *Israel Law Review* 282, pp.284–287; M. Pechstein and C. Koenig, *Die Europäische Union*, 3<sup>rd</sup> edn (Tübingen: Mohr Siebeck, 2000), p.233. See also N. Feinberg, “Unilateral Withdrawal from an International Organization”, (1963) 39 *British Yearbook of International Law* 189.

24. *Commission v France* (7/71) ECLI:EU:C:1971:121 at [19]–[20].

25. E.g. A. Puttler, “Sind die Mitgliedstaaten noch ‘Herren’ der EU? Stellung und Einfluss der Mitgliedstaaten nach dem Entwurf des Verfassungsvertrages der Regierungskonferenz” (2004) 39 *Europarecht* 669, p.676; S. Berglund, “Prison or Voluntary Cooperation? The Possibility of Withdrawal from the European Union” (2006) 29 *Scandinavian Political Studies* 147, pp.150–151; N. A. Jaekel, “Das Recht des Austritts aus der Europäischen Union – zugleich zur Neuregelung des Austrittsrechts gem. Art. 50 EUV in der Fassung des Vertrages von Lissabon” (2010) 32 *Jura* 87, pp.87–88.

26. For a critical review of these arguments, see Wyrozumska, “Article 50” (2013), pp.1395–1402; M. Ludewig, *Beendigungstatbestände als notwendige und dynamische Elemente der Mitgliedschaft in internationalen Organisationen unter besonderer Berücksichtigung von Art. 50 EUV* (Frankfurt a.M.: Peter Land, 2015), pp.156–171.

a unilateral act.<sup>27</sup> However, these conflicting approaches were never conclusively resolved.

Whatever the position may have been before the Treaty of Lisbon, the right of unilateral withdrawal is now enshrined in art.50 TEU. The purpose of that clause is twofold. First, it recognises in express terms that the Member States are entitled to leave the Union, thereby putting to rest any lingering doubts about the existence of such a right.<sup>28</sup> In doing so, it also confirms that the Union is not an insoluble compact based on a permanent and irreversible transfer of sovereign powers.<sup>29</sup> This has led some commentators to portray art.50 TEU as a regressive step and question its compatibility with the traditional character of the Treaties.<sup>30</sup> An alternative assessment places art.50 TEU into a more positive light. By acknowledging that the Member States may leave the Union, the Lisbon Treaty pulls the rug from under the feet of those who claim that membership of the Union must inescapably lead to a European super-State and to the extinction of national sovereignty.<sup>31</sup> By not exercising their right to withdraw, the Member States in effect constantly reaffirm and legitimise their membership of the EU.

Second, art.50 TEU defines the procedure to be followed in the event of withdrawal. This procedure provides a fixed reference point among the tide of legal uncertainty that the exercise of the right to withdraw is set to unleash. In this respect, it should be borne in mind that the EU institutions and the Member States have limited means at their disposal to compel another Member State to remain a member of the Union against its will.<sup>32</sup> If exit cannot be prevented,<sup>33</sup> at least it can be regulated. As Jean-Claude Piris has suggested, art.50 TEU therefore may be understood as a “sort of ‘facilitating’ mechanism” for resolving otherwise irreconcilable differences between a

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27. *Maastricht*, BVerfGE 89, 155, p.190.

28. The pre-Lisbon debate is of limited relevance to the interpretation of art.50 TEU. See also *Miller* [2016] at [56].

29. Cf. *Costa v E.N.E.L* (Case 6-64) ECLI:EU:C:1964:66, pp.593–594; *Lisbon*, BVerfG, 30 June 2009, 2 BvE 2/08 at [329]. See J.-P. Piris, *The Constitution for Europe: A Legal Analysis* (Cambridge: Cambridge University Press, 2006), p.130.

30. J. Schwarze, “The Convention’s Draft Treaty Establishing a Constitution for Europe” (2003) 40 C.M.L.Rev. 1037, p.1040; T. Bruha and C. Nowak, “Recht auf Austritt aus der Europäischen Union? Anmerkungen zu Artikel 1-59 des Entwurfs eines Vertrages über eine Verfassung für Europa” (2004) 42 *Archiv des Völkerrechts* 1, pp.8–17; J. Zeh, “Recht auf Austritt” (2004) 7 *Zeitschrift für europarechtliche Studien* 173, p.204. See also Herbst, “Observations on the Right to Withdraw from the European Union: Who are the ‘Masters of the Treaties?’” (2005) 6 *German Law Journal* 1755, pp.1758–1759.

31. A. von Bogdandy, “Founding Principles”, in A. von Bogdandy and J. Bast (eds.) *Principles of European Constitutional Law* (Oxford: Hart, 2009) 11, p.52.

32. T.C. Hartley, *Constitutional Problems of the European Union* (Oxford: Hart, 1999), pp.164–165.

33. Cf. J.H.H. Weiler, “The Transformation of Europe” (1991) 100 *Yale Law Journal* 2403, pp.2412–2422.

Member State and the Union.<sup>34</sup> Pursuant to art.50(2) TEU, a Member State wishing to withdraw must notify the European Council of its intention. Following that notification, the European Council provides guidelines to the Council for negotiating and concluding an agreement between the Union and the withdrawing Member State. The agreement sets out the detailed arrangements for withdrawal. Under art.50(3) TEU, the Treaties cease to apply to the withdrawing Member State in one of three ways: upon the entry into force of the withdrawal agreement; failing that, two years after the withdrawal notification was made; or upon the expiry of any extension period unanimously decided by the European Council in agreement with the withdrawing Member State.

This framework imposes only limited substantive and procedural conditions on the withdrawing Member State. Once it has given notice under art.50(1) TEU in accordance with its own constitutional requirements, in essence, all that the withdrawing Member State is required to do before the Treaties cease to apply is to wait out the two-year period stipulated in art.50(2) TEU.<sup>35</sup> It is not required to justify its decision to leave.<sup>36</sup> Nor does art.50(2) TEU impose an express duty upon it to negotiate and conclude a withdrawal agreement with the Union.<sup>37</sup> At the most, the withdrawing Member State may be under an implied duty to negotiate such an agreement pursuant to the principle of sincere cooperation,<sup>38</sup> but this principle certainly does not oblige it to actually conclude an agreement with the EU.<sup>39</sup> In fact, art.50(3) provides that the conclusion and

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34. Piris, *Constitution for Europe* (2006), p.129. In greater detail, see Ludewig, *Beendigungstatbestände* (2015), pp.311–326. See also Puttler, “Sind die Mitgliedstaaten noch ‘Herren’ der EU?” (2004), p.678.

35. Zeh, “Recht auf Austritt” (2004), p.200; A. 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: Oxford University 2012) 128, p.152; C. Hillion, “Accession and Withdrawal in the Law of the European Union”, in D. Chalmers and A. Arnulf (eds) *The Oxford Handbook of European Union Law* (Oxford: Oxford University, 2015) 126, p.139.

36. *Lisbon*, BVerfG (30 June 2009) at [330]. This is widely accepted, e.g. W. Meng, “EUV Artikel 50”, in H. von der Groeben, J. Schwarze and A. Hatje (eds) *Europäisches Unionsrecht*, 7th edn (Baden-Baden, Nomos: 2015) at [5].

37. Whether it would be prudent to exit without a withdrawal agreement in place is a different matter. See Tatham, “EU Accession and Withdrawal” (2012), p.149.

38. Art.4(3) TEU. Cf. Zeh, “Recht auf Austritt” (2004), p.199. On the principle generally, see M. Klamert, *The Principle of Loyalty in EU Law* (Oxford: Oxford University Press, 2014).

39. Bearing in mind that art.50(4) TEU excludes the withdrawing Member State from taking part in the deliberations and decisions of the European Council and the Council, it cannot be subject to a legal duty to support the Union’s negotiation position either during the negotiating process or as formulated in any draft agreement. Rather, art.50(4) TEU entitles the withdrawing Member State to pursue its own national interest. It follows that the withdrawing Member State must be free to decide whether or not to conclude a withdrawal agreement. See also Thiele, “Der Austritt aus der EU” (2016), pp.295–297.

entry into force of a withdrawal agreement is not a necessary precondition for the withdrawal notice to take effect. The right to leave is therefore overwhelmingly unilateral in character.<sup>40</sup> This has attracted considerable criticism. Commentators have deplored the fact that art.50 TEU does not require the withdrawing Member State and the Union to make a final attempt to resolve their differences in order to avoid the loss of membership.<sup>41</sup> They have also expressed concern that the lack of more robust procedural safeguards opens the door to political brinkmanship and provides insufficient guidance on how to complete the withdrawal process.<sup>42</sup>

Amongst other things, art.50 TEU remains silent as to whether the withdrawing Member State may retract its notification to leave. Does this silence mean that such a right cannot be implied? Some think so. According to the authors of a widely read comment on the subject, accepting an implied power to retract would amount to “reading such a right into a text from which it is conspicuously absent”.<sup>43</sup> This is of course true, but hardly a compelling argument. It is in the nature of reasoning by way of implication that terms are read into the text from which they are absent. Yet reasoning by implication is a well-established method of legal interpretation in general and of European law more specifically.<sup>44</sup> In fact, it is fair to say that the European Court of Justice has made something of a name for itself by employing precisely this technique in its jurisprudence.<sup>45</sup> For instance, the initial silence of the Treaties on the subject of fundamental rights and the effect of customary international law in the EU legal order does not mean that respect for fundamental rights and customary international law could not have been a principle of EU law.<sup>46</sup>

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40. Cf. Tridimas, “Article 50: An Endgame without an End?” (2016), p.301.

41. R.J. Friel, “Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution” (2004) 53 I.C.L.Q. 407, p.426; Thiele, “Der Austritt aus der EU” (2016), pp.295–296.

42. Schwarze, “The Convention’s Draft Treaty Establishing a Constitution for Europe” (2003), p.1041; Friel, “Providing a Constitutional Framework for Withdrawal” (2004), p.426; Herbst, “Observations on the Right to Withdraw” (2005), pp.1758; J.P. Terhechte, “Der Vertrag von Lissabon: Grundlegende Verfassungsurkunde der europäischen Rechtsgemeinschaft oder technischer Änderungsvertrag?” (2008) 43 *Europarecht* 143, pp.152–153; H. Hofmeister “Should I Stay or Should I Go?—A Critical Analysis of the Right to Withdraw from the EU” (2010) 16 *European Law Journal* 589, pp.593–595; Tatham, “EU Accession and Withdrawal” (2012), pp.151.

43. N. Barber, T. Hickman and J. King, “Pulling the Article 50 ‘Trigger’: Parliament’s Indispensable Role”, UK Constitutional Law Blog (27 June 2016) <https://ukconstitutionallaw.org/> [Accessed 15 March 2017]

44. Conway, *The Limits of Legal Reasoning* (2002), pp.149–152. Cf. R. Gardiner, *Treaty Interpretation*, 2<sup>nd</sup> edn (Oxford: Oxford University Press, 2015), pp.165–167.

45. One need not look further than *Van Gend en Loos* (26/62) ECLI:EU:C:1963:1 [1963] E.C.R. 1, p.12. For another prominent example, see *Commission v Council (ERTA)* (22-70) ECLI:EU:C:1971:32 at [16].

46. Cf. *Stauder* (29-69) ECLI:EU:C:1969:57 at [7]; *Poulsen and Diva Navigation* (C-286/90) ECLI:EU:C:1992:453 at [9].

In *Miller*, Lord Pannick also submitted that art.50 TEU must necessarily exclude the right to retract a notification to leave because it makes “no mention of a power to withdraw”.<sup>47</sup> This argument misunderstands the legal character of European integration and puts the cart before the horse. The binding force of the Treaties depends on the consent of the Member States.<sup>48</sup> Competences not conferred upon the EU remain with the Member States.<sup>49</sup> Consequently, given that art.50 TEU recognises the right of a Member State to withdraw its consent to be bound by the Treaties, the exercise of that right can be subject only to those conditions which are either expressly stipulated in art.50 TEU or which derive from other relevant provisions of the Treaties by necessary implication. Put differently, the burden of proof is not on the withdrawing Member State to demonstrate that it has the legal capacity to retract its notification to leave in the exercise of its right of withdrawal, but it is for those who argue that it lacks this capacity to demonstrate that art.50 TEU or the Treaties actually exclude it.

In conclusion, the fact that art.50 TEU makes no express provision for reversing a withdrawal notification does not exclude the possibility that such a power may either be implied in art.50 TEU or that a Member State could derive that power from general international law and exercise it within the context of art.50 TEU, provided that doing so is compatible with its other obligations under the Treaties. Whether or not a withdrawing Member State is entitled to reverse its notice to leave is therefore a question to be resolved through the interpretation of art.50 TEU.

### **The applicable rules of interpretation**

It is a central tenet of the EU’s legal catechism that the founding Treaties of the European legal order are more than just ordinary international agreements. As the Court of Justice has explained in *Opinion 1/91*, in contrast to common international agreements which merely create reciprocal rights and obligations and do not provide for a transfer of sovereign rights, “the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law.”<sup>50</sup> The TEU therefore has a dual legal character. It is an international agreement in origin and form, yet at the same time also the “basic constitutional charter”<sup>51</sup> of a Union which itself “constitutes a new legal order of international

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47. Lord Pannick QC, *Miller* [2016], Transcript (13 October 2016), p.16.

48. Art.54 TEU and art.357 TFEU.

49. Art.4(1) and 5(2) TEU.

50. *European Economic Area* (Opinion 1/91) ECLI:EU:C:1991:490 at [21].

51. *Les Verts* (294/83) ECLI:EU:C:1986:166 at [23].

law”.<sup>52</sup> This duality means that the interpretation of art.50 TEU is governed EU law, but that the law of treaties remains relevant, in principle, too. The choice between the European interpretative method and the VCLT regime is not a strictly binary one.

The rules of international law governing the interpretation of treaties are set out in art.31 and art.32 VCLT.<sup>53</sup> It is widely understood that these provisions reflect customary international law.<sup>54</sup> They are applied as such both by the Court of Justice<sup>55</sup> and by national courts,<sup>56</sup> including in circumstances where the VCLT is not formally applicable.<sup>57</sup> Pursuant to art.31(1) VCLT

[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Art.31(3) VCLT stipulates that account must also be taken in certain circumstances of subsequent agreements and practice, as well as any relevant rules of international law applicable in the relations between the parties. Art.32 VCLT determines when recourse may be had to supplementary means of interpretation, including the preparatory work of a treaty.

Since the TEU is an international agreement, its operation is subject to the customary rules of the law of treaties as reflected in the VCLT.<sup>58</sup> As a matter of international law, the

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52. *Van Gend en Loos* (26/62), p.12.

53. Generally, see U. Linderfalk, *On The Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer, 2007); Gardiner, *Treaty Interpretation* (2015); A. Aust, *Modern Treaty Law and Practice*, 2<sup>nd</sup> edn (Cambridge: Cambridge University Press, 2007), pp.230–255; R. Kolb, *The Law of Treaties: An Introduction* (Cheltenham: Edward Elgar, 2016), pp.128–165.

54. *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* [1991] ICJ Reports 69 at [48] and, more recently, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgement (17 March 2016) at [35]. See Gardiner, *Treaty Interpretation* (2015), pp.13–20.

55. E.g. *Commission v Finland* (C-118/07) ECLI:EU:C:2009:715 at [39]; *Firma Brita GmbH* (C-386/08) ECLI:EU:C:2010:91 at [43]; Opinion of A.G. Cruz Villalón, *Demirkan* (C-221/11) ECLI:EU:C:2013:237 at [53]; *Europäische Schule München* (C-464/13 and C-465/13) ECLI:EU:C:2015:163 at [36]–[38].

56. E.g. *Gold Reserve Inc v Bolivarian Republic of Venezuela* [2016] EWHC 153 Comm at [21]. See also *Bahamas Oil Refining Company International Limited v The Owners of the Cape Bari Tankers Schiffahrts GmbH & Co KG (Bahamas)* [2016] UKPC 20 at [17].

57. Cf. *Anson v Commissioners for Her Majesty's Revenue and Customs* [2015] UKSC 44 at [54]; *Axel Walz* (C-63/09) ECLI:EU:C:2010:251 at [22]–[23].

58. This point has been recognized by the Court of Justice on successive occasions: cf. *Commission v Italy (Radio Valves)* (10/61) ECLI:EU:C:1962:2 [1962] C.M.L.R. 187, pp.197–198; *Opel Austria GmbH* (T-115/94) ECLI:EU:T:1997:3 at [89]–[94]; *ThyssenKrupp Nirosta GmbH* (C-352/09 P) ECLI:EU:C:2011:191 at [45]; *Commission v Portugal* (C-62/98) ECLI:EU:C:2000:358 at [44]; *Commission v Slovak Republic* (C-264/09) ECLI:EU:C:2011:580 at [41].

interpretation of art.50 TEU is therefore governed by the rules set out in art.31 and art.32 VCLT.<sup>59</sup> However, as is well known, the Court of Justice has developed its own distinct approach to the interpretation of the founding Treaties,<sup>60</sup> focusing on the “spirit, the general scheme and the wording” of the texts.<sup>61</sup> As the Court held in *CILFIT*

every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.<sup>62</sup>

Although reminiscent of the general rule of interpretation laid down in art.31 VCLT, the Court’s approach gives greater emphasis to the object and purpose of the Treaties<sup>63</sup> compared to what the VCLT regime warrants.<sup>64</sup> In addition, the Court tends to be reluctant in taking account of relevant

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See also Opinion of A.G. Jääskinen, *X and TBG* (C-24/12 and C-27/12) ECLI:EU:C:2014:1385 at [21].

59. This follows from the customary status of these provisions. But see H. Kutscher, *Methods of Interpretation as seen by a Judge at the Court of Justice* (Luxembourg: Court of Justice of the European Communities, 1976), p.31.

60. Among the classic studies on the subject, see P. Pescatore, “Les Objectifs de la Communauté Européenne comme Principes d’Interprétation dans la Jurisprudence de la Cour De Justice”, in *Miscellanea W.J. Ganshof van der Meersch*, Volume 2 (Bruylant: Brussels, 1972) 325; F. Dumon, *The Case-law of the Court of Justice: A Critical Examination of the Methods of Interpretation* (Luxembourg: Court of Justice of the European Communities, 1976); A. Bredimas, *Methods of Interpretation of Community Law* (Amsterdam: North Holland, 1978) and J. Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Oxford: Clarendon Press, 1983). For a more recent study, see Conway, *Limits of Legal Reasoning* (2002).

61. *Van Gend en Loos* (26/62), p.12.

62. *CILFIT* (283/81) ECLI:EU:C:1982:335 at [20]. See also Kutscher, *Methods of Interpretation* (1976), pp.5–6.

63. D. Verwey, *The European Community, the European Union and the International Law of Treaties* (The Hague: T.M.C Asser Press, 2004), pp.221–235; A. Arnulf, *The European Union and its Court of Justice*, 2<sup>nd</sup> edn (Oxford: Oxford University Press, 2006), pp.611–614; Gardiner, *Treaty Interpretation* (2015), pp.121–122. See also P.J. Kuijper, “The European Courts and the Law of Treaties: The Continuing Story”, in E. Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford, Oxford University Press, 2011) 256, pp.258–269.

64. Cf. Opinion of A.G. Cosmas, *Wijsenbeek* (C-378/97) ECLI:EU:C:1999:144 at [53]; Opinion of A.G. Jääskinen, *Hengartner and Gasser* (C-70/09) ECLI:EU:C:2010:289 at [44]–[45]. See also Bredimas, *Methods of Interpretation of Community Law* (1978), pp.178–179; P.J. Kuijper, “The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties 1969” (1998) 25 *Legal Issues of European Integration* 1, pp.2–4; J. Odermatt, “The Use of International Treaty Law by the Court of Justice of the European Union” (2015) 17 *Cambridge Yearbook of European Legal Studies* 121, pp.130–134.

instruments<sup>65</sup> and subsequent practice,<sup>66</sup> contrary to art.31(2) and (3) VCLT. Traditionally, it also makes more limited use of the supplementary means of interpretation under art.32 VCLT.<sup>67</sup>

Although marked differences exist between the Court's own interpretative approach and the relevant rules of the VCLT, these differences should not be overestimated.<sup>68</sup> As various studies have shown, the Court's interpretative method combines textual, contextual and dynamic elements.<sup>69</sup> This broadly corresponds to the main categories of arguments listed in art.31 VCLT. The affinity between the two interpretative frameworks is confirmed by the Court's case-law. The Court accepts that it is bound by art.31 and art.32 VCLT in the interpretation of agreements concluded by the EU with third parties. In some cases, the comparison of third party agreements with the founding Treaties has led it to apply the VCLT rules to the latter. In *Opinion 1/91*, it recalled that the terms of a treaty must be interpreted in the light of its object and purpose and proceeded to compare the respective contexts and objectives of the Agreement on the European Economic Area and the EEC Treaty.<sup>70</sup> In other cases, the Court found that the terms of third party agreements carry the same meaning as identical terms used in the EC Treaty.<sup>71</sup> This line of

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65. E.g. Opinion of A.G. Cosmas, *Wijsenbeek* (C-378/97) at [50]–[54]; Opinion of A.G. Poiares Maduro, *Sweden v Commission* (C-64/05 P) ECLI:EU:C:2007:433 at [34]. But see *Manjit Kaur* (C-192/99) ECLI:EU:C:2001:106 at [24].

66. *France v Commission* (C-327/91) ECLI:EU:C:1994:305 at [36]. See also Opinion of A.G. Jacobs, *Commission v Council (Convention on Nuclear Safety)* (C-29/99) ECLI:EU:C:2001:680 at [147].

67. Opinion of A.G. Mayras, *Reyners* (C-2/74) ECLI:EU:C:1974:59 [1974] E.C.R. 657, p.666. See Arnulf, *Court of Justice* (2006), pp.614–615.

68. Cf. N. Fennelly, “Legal Interpretation at the European Court of Justice” (1996) 20 *Fordham International Law Journal* 665, pp.668–672; J.I. Charney, “Is International Law Threatened by Multiple International Tribunals?” (1998) 271 *Recueil des Cours* 101, p.183. Bengoetxea, Moral Soriano and McCormick, “Integration and Integrity in the Legal Reasoning of the European Court of Justice” (2001), p.48 go as far as to suggest that there is nothing “particularly European about the way the ECJ proceeds to justify its decisions”.

69. E.g. R.-M. Chevallier, “Methods and Reasoning of the European Court in Its Interpretation of Community Law” (1964) 2 C.M.L.Rev. 21; Bredimas, *Methods of Interpretation of Community Law* (1978), pp.33–105; Bengoetxea, *The Legal Reasoning of the European Court of Justice* (1983), pp.233–262; A. A. Llorens, “The European Court of Justice, More than a Teleological Court” (1999) 2 *Cambridge Yearbook of European Legal Studies* 373, pp.374–383; Bengoetxea, Moral Soriano and McCormick, “Integration and Integrity in the Legal Reasoning of the European Court of Justice” (2001), p.57; G. Itzcovich, “The Interpretation of Community Law by the European Court of Justice” (2012) 10 *German Law Journal* 537; K. Lenaerts and J. A. Gutiérrez-Fons, “To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice” (2012) EUI Working Papers EL 2013/9.

70. *European Economic Area* (Opinion 1/91) at [14]–[21]. See also *Kupferberg* (104/81) ECLI:EU:C:1982:362 at [23]–[26]; *Metalsa* (C-312/91) ECLI:EU:C:1993:279 at [10]–[16]; *Demirkan* (C-221/11) ECLI:EU:C:2013:583 at [47]–[48].

71. *Pabst & Richarz KG* (Case 17/81) ECLI:EU:C:1982:129 at [26]–[27]; *Legros* (C-163/90)

jurisprudence confirms that the rules of interpretation set out in art.31 and art.32 VCLT are applicable, in principle, to the founding Treaties and that they may produce the same outcome as the Court's own interpretative approach.<sup>72</sup> In *Levin*, the Court of Justice went further and applied the general rule of interpretation laid down in art.31(1) VCLT to the EC Treaty directly.<sup>73</sup>

In the present context, recourse to the interpretative scheme set out in art.31 and art.32 VCLT in order to aid the interpretation of art.50 TEU under EU law is warranted for two reasons. First, it must be borne in mind that art.50 TEU is concerned with regulating a Member State's withdrawal from the Treaties. Like accession, ratification and revision,<sup>74</sup> the process of withdrawal brings to the fore the international law origin and form of the Treaties.<sup>75</sup> In *Miller*, the British Government submitted that notification to leave the EU is "an administrative step on the international law plane" governed by the principles of international law.<sup>76</sup> Although not persuaded by the Government's overall argument, the Supreme Court did agree that art.50 TEU "operates on the plane of international law".<sup>77</sup> Second, interpreting art.50 TEU with reference to the VCLT permits a more robust analysis than attempting to second guess the Court. Professor Stijn Smismans' call for an "EU (interest) interpretation" of art.50 TEU illustrates the point.<sup>78</sup> Smismans assumes that art.50 TEU leaves the withdrawing Member State in a weaker bargaining position than the remaining Member States. From this, he deduces that art.50 TEU must have been intended to favour the interests of the remaining Member States. It follows, in his view, that the withdrawing Member State cannot benefit from a unilateral right to revoke its withdrawal notification. In short, a unilateral right to revoke cannot exist as this would not serve the interests

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ECLI:EU:C:1992:326 at [23]–[27]; *Texaco A/S* (C-114/95 and C-115/95) ECLI:EU:C:1997:371 at [28]–[32]; *Jany* (C-268/99) ECLI:EU:C:2001:616 at [35]–[39].

72. In this respect, it should be recalled that the institutions, including the Court, are bound as a matter of customary international law to apply the rules of interpretation set out in the VCLT to agreements concluded between the EU and third parties. Applying different rules to such agreements could potentially result in a breach of the EU's international obligations. Consequently, whenever the Court extends the meaning given to a term found in the Treaties to a similar or identical term found in a third party agreement, the Court can only do so on the assumption that its own interpretative approach leads to the same outcome as the application of art.31 and art.32 VCLT—or else it would be applying its distinct interpretative method to the third party agreement in breach of customary international law.

73. *Levin* (53/81) ECLI:EU:C:1982:105 at [9].

74. Arts 48, 49 and 54 TEU.

75. Cf. *Commission v Malta* (C-508/08) ECLI:EU:C:2010:392 at [56].

76. Detailed Grounds of Resistance on Behalf of the Secretary of State, C0/3809/2016; C0/3281/2016 (2 September 2016) at [8].

77. *Miller* [2017] at [69].

78. Smismans, "About the Revocability of Withdrawal" (29 November 2016).

of the EU. Adopting “*une certaine idée de l’Europe*”<sup>79</sup> as the leitmotif of interpretation allows policy considerations to masquerade as legal analysis all too easily. This is neither compelling nor, unless it comes from the Court of Justice itself, authoritative. Under these circumstances, art.31 and art.32 VCLT provide a more robust analytical framework that permits the different aspects of art.50 TEU to be assessed systematically. Accordingly, in the section below I will review the terms and context of art.50 TEU, the object and purpose of the Treaties, other relevant rules of international law and the relevant preparatory works. Once again, it is important to underline that this analysis is designed to assist the interpretation of art.50 TEU as a matter of EU law, not to displace it.

### **The interpretation of Article 50 TEU**

As noted earlier, art.50 TEU is silent on the reversibility of a withdrawal notification issued by a Member State. The task therefore is to determine whether the power to retract a notification is implied in art.50 TEU or, if it not, whether the TEU prevents a Member State from deriving such a power under general international law, assuming such a power exists, and exercising it in the context of art.50 TEU.

#### *The terms of Article 50 TEU*

Read in isolation, there is nothing in the wording of art.50 TEU to imply that a Member State may revoke its notification to leave the EU. Neither the language nor the substantive or procedural aspects of the provision compel that conclusion. However, it has been suggested that the terms of art.50 are incompatible with revoking a notification to leave and therefore must exclude such a power. According to Lord Pannick QC, “the very possibility of a power to withdraw a notification would frustrate...Article 50(3), which sets out in the clearest possible terms, what the consequences are of giving the notification under Article 50(2).”<sup>80</sup> This argument is based on two false assumptions.

The first assumption is that, once set in motion, the process laid out in art.50 TEU must inevitably end in terminating the applicability of the Treaties to the withdrawing Member State and the loss of its EU membership.<sup>81</sup> But this overlooks the fact that the withdrawal process does not actually have to reach its ultimate conclusion. The withdrawing Member State’s departure from

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79. P. Pescatore, “The Doctrine of ‘Direct Effect’: An Infant Disease of Community Law” (1983) 8 *E.L. Rev.* 155, p.157.

80. Lord Pannick QC, *Miller* [2016], Transcript (13 October 2016), pp.16–17.

81. Lord Pannick QC, *Miller* [2016], Transcript (18 October 2016), p.58.

the EU does not depend on the conclusion of a withdrawal agreement.<sup>82</sup> As we saw, art.50(3) TEU stipulates that the withdrawal becomes effective two years after the notification to leave was given, should a withdrawal agreement not materialise before that date. However, this two-year period may be extended by the European Council acting with the agreement of the withdrawing Member State. This extension is not subject to any conditions. Consequently, the two sides may agree to extend the two-year period repeatedly and for any length of time before the notification takes effect.<sup>83</sup> Given that the withdrawal notification could be suspended indefinitely by common agreement,<sup>84</sup> the procedure laid down in art.50(3) TEU does not, as a matter of principle, have to end in the Member State's departure from the Union. Whether or not the Member States are likely to agree to such an indefinite suspension is immaterial. The point is that art.50(3) TEU does not *compel* the parties to pursue the withdrawal process to its ultimate conclusion.

The second assumption is that a power to retract would frustrate the process set out in art.50(3) TEU. This is a non sequitur. The process in art.50(3) TEU is set in motion when a Member State issues a notification to withdraw under art.50(2) TEU. It is important to underline that it is this notification, and not any other act, which terminates the applicability of the Treaties. In particular, the Member State's withdrawal from the Treaties does not depend on the conclusion of a withdrawal agreement. At any rate, it is questionable whether an agreement between the withdrawing Member State and the EU would be capable of terminating the applicability of the Treaties to the withdrawing Member State at all.<sup>85</sup> This is so because the EU itself is not a party to the TEU and TFEU. Consequently, the process set out in art.50(3) TEU is entirely procedural in character: it provides for a delay of two years, or longer if an extension period is put in place, before the withdrawal notification becomes effective.<sup>86</sup> Contrary to what Lord Pannick QC

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82. This is widely accepted, e.g. C. Calliess, "Art. 50 EUV", in C. Calliess and M. Ruffert (eds), *EUV/AEUV Kommentar: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtscharta*, 5th edn (München, Beck: 2016) at [5]. Interpretations to the contrary are unconvincing, as they contradict the plain language of art.50(3) TEU. See A. Łazowski, "Withdrawal from the European Union and Alternatives to Membership" (2012) 37 *E.L. Rev.* 523, pp.526–528.

83. See also A. Łazowski, "Unilateral Withdrawal from the EU: Realistic Scenario or a Folly?" (2016) 23 *Journal of European Public Policy* 1294, p.1296. But see Louis, "Le Droit de Retrait" (2006), p.308.

84. This point suggests that the withdrawal process could be *terminated* by common agreement. However, this does not answer the original question whether the withdrawing may Member State terminate the process unilaterally.

85. Bruha and Nowak, "Recht auf Austritt" (2004), p.7; O. Dörr, "Art. 5 [Austritt aus der Union]", in E. Grabitz, M. Hilf and M. Nettesheim (eds), *Das Recht der Europäischen Union: EUV/AEUV* (München: Beck, 2016), p.5.

86. Such delays are a common feature of the procedures governing the withdrawal of States from international organisations. See D. Marie-Claude, "Le retrait des membres des Organisations internationales de la famille des

suggests, a power to revoke the notification would not frustrate the legal consequences attached to it by art.50(3) TEU, since the *only* legal consequence that art.50(3) TEU imposes on the withdrawing Member State is this two-year delay before its notification takes effect. The only thing that a power to revoke would frustrate is the withdrawal notification itself. But this merely points the inquiry back at the original question: can a Member State unilaterally retract its notice to leave the EU? It is certainly not good enough to reply that it is not permissible to retract a notification because doing so would amount to retracting the notification.<sup>87</sup>

Consequently, there is nothing in the language of art.50 TEU, read on its own terms, which necessarily implies the existence of power to reverse the withdrawal notification, but there is nothing in that language which excludes this power either.

### *The context*

The right to leave the EU does not exist in a normative vacuum. The terms of art.50 TEU have to be interpreted within their context or, to use the terminology preferred by the Court of Justice, with regard to the “whole scheme” of the TEU.<sup>88</sup> Context for these purposes includes the entire text of the TEU and the TFEU,<sup>89</sup> including their preambles and annexes, as well as the declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.<sup>90</sup>

The right to withdraw from the EU sits uneasily with certain provisions of the Treaties. The preambles of both the TEU and the TFEU recall the Member States’ determination to create an “an ever closer union among the peoples of Europe”. The preamble of the TEU also records

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Nations Unies” (1994) 40 *Annuaire français de droit international* 106, pp.114–115.

87. As a matter of international law, a State may commit itself to a certain course of action by way of a unilateral declaration. Whether or not a State has in fact undertaken a unilateral legal commitment “all depends on the intention of the State in question”, as the International Court of Justice pointed out in *Case concerning the Frontier Dispute (Burkina Faso v Republic of Mali)* [1986] ICJ Reports 573 at [39]. This is not particularly helpful in the present context. It suggests that a withdrawing Member State could commit itself not to reverse its withdrawal notification if it is clear that it intended to commit itself in this manner. However, this does not clarify whether the terms of art.50 TEU otherwise permit a Member State to retract its notification to leave.

88. *Commission v Council (ERTA)* (22-70) at [15].

89. Although separate instruments, the TEU and TFEU have the same legal value and jointly constitute the foundation of the EU (art.1 TEU and art.1(1) TFEU). It is preferable to consider them as each other’s context within the meaning of art.31(2)(a) VCLT. Treating them as a single treaty within the definition of art.2(1)(a) VCLT would fail to acknowledge their distinct existence, while treating them as “relevant rules of international law applicable in the relations between the parties” within the meaning of art.31(3)(c) VCLT would fail to express their close relationship.

90. Art.31(2)(b) VCLT. See *Manjit Kaur* (C-192/99) at [24].

their resolve to “mark a new stage in the process of European integration undertaken with the establishment of the European Communities”. Art.1 TEU repeats these principles, and thus underlines their significance, by declaring that “[t]his Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe”. This statement indicates that the overall objective of the TEU is to serve as a framework for the process of ever closer European integration. The unlimited duration of the Treaties suggests that membership in this process is meant to be permanent.<sup>91</sup> Clearly, the introduction of a unilateral right to withdraw from the EU is difficult to reconcile with the preferred course and lasting nature of European integration.

Other provisions of the TEU point in a different direction, however. The Treaty of Lisbon has given pride of place to the principle of conferral. The principle confirms that the Union must act within the limits of the competences conferred upon it by the Member States and that competences not conferred upon the EU remain with the Member States.<sup>92</sup> Declaration 18 appended to the Lisbon Treaty recalls these points and adds that it is for the Member States to adjust the scope of the competences conferred upon the EU. What emerges from these provisions is that the Union’s legal capacities are based on the consent of its Member States and that the authority to increase or decrease their scope, often described as *Kompetenz-Kompetenz*, remains firmly within the hands of national governments. These constitutional principles are further confirmed by art.48 TEU, which requires ratification or approval by all Member States of any amendments made to the Treaties before they can enter into effect.<sup>93</sup> Art.50 TEU takes the principles of consent and conferral to their logical conclusion by expressly confirming the right of the Member States to unilaterally extract themselves from the applicability of the Treaties and thereby regain the right to exercise their sovereign powers in full.

At first sight, the provisions of the Treaties calling for closer integration, coupled with the duty of sincere cooperation,<sup>94</sup> might suggest that art.50 TEU should be interpreted in a restrictive manner. For instance, it has been argued that a withdrawing Member State is bound by the Union’s values, as defined in art.2 TEU, with regard to the modalities of its exit from the EU.<sup>95</sup> This is unobjectionable as a statement of general principle. However, neither the values listed in art.2 TEU nor other general principles of EU law may impose additional substantive or procedural conditions

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91. Art.53 TEU and art.356 TFEU.

92. Art.4(1) and art.5(2) TEU.

93. Art.48(4) and (6) TEU.

94. Art.4(3) TEU.

95. Tatham, “EU Accession and Withdrawal” (2012), pp.148–149.

on the exercise of the right to leave which would contradict its unilateral character.<sup>96</sup> This is so because the right to leave in essence amounts to a right to repudiate the principle of closer integration proclaimed in art.1 TEU. As the English Court of Appeal held in *Shindler*:

a decision by a Member State to withdraw from the EU is an exercise of national sovereignty of a special kind for which the TEU has made the express provision that this may be done in accordance with a Member State's own constitutional requirements.<sup>97</sup>

While a withdrawing Member State remains bound by the Treaties until its notice to leave takes effect, it would contradict the language and purpose of art.50 to rely on other provisions of the Treaties to impose conditions on the withdrawing Member State beyond those expressly mentioned in art.50 TEU. For example, it is a step too far to suggest that the principle of respect for democracy found in art.2 TEU requires a Member State to hold a successful referendum before it may give notice to leave pursuant to art.50(1) TEU.<sup>98</sup> Such a precondition contradicts the TEU's deference to the withdrawing Member State's *own* constitutional requirements.<sup>99</sup> The right to leave the EU is not merely an exception to the commitment to closer integration which, like all exceptions, must be interpreted narrowly.<sup>100</sup> Rather, it expresses a Member State's right to completely negate the consent that hitherto sustained its commitment to ever closer union.

The foregoing assessment has significant implications for the reversibility of the notice to withdraw. The analysis of the wording of art.50 TEU has revealed that its immediate purpose is to confirm in express terms that the Member States are entitled to leave the EU and to lay down the procedure governing the exercise of that right. When interpreted in its context, it emerges that the broader purpose of art.50 TEU within the general scheme of the Treaties is to permit the principles of consent and conferral to supersede the overall objective of ever closer union. The significance of this point is twofold. First, it confirms that the unilateral character of the right to leave the EU is a manifestation of State sovereignty.<sup>101</sup> Since the legal effect of the withdrawal notification

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96. See also *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469 at [14].

97. *Shindler* [2016] EWCA Civ 469 at [16].

98. Tatham, "EU Accession and Withdrawal" (2012), p.149.

99. *Lisbon*, BVerfG (30 June 2009) at [330]. Besides, it takes some dubious legal alchemy to distil a requirement so specific as a referendum from a value so general as respect for democracy.

100. This point is overlooked by Zeh, "Recht auf Austritt" (2004), pp.207–209. Cf. Hofmeister "Should I Stay or Should I Go?" (2010), pp.595–597.

101. As the German Federal Constitutional Court put it, "right to withdraw underlines the Member States' sovereignty", *Lisbon*, BVerfG (30 June 2009) at [329].

derives from the sovereign will of the withdrawing Member State, it stands to reason that the Member State concerned may extinguish the notification before it takes effect through a contrary expression of its will. Put differently, if the Treaties accept that a Member State is sufficiently sovereign to withdraw from the process of ever closer union by way of a unilateral act, they must also accept that it is sufficiently sovereign to retract that act before it takes effect. Second, it confirms that it would be inappropriate to interpret the right to withdraw in a way that subjects its exercise to additional substantive or procedural conditions not imposed by art.50 TEU. While it is a settled principle that the effectiveness of the Treaties cannot be “defeated by unilateral provisions of Member States”,<sup>102</sup> in the present context it is the effectiveness of art.50 TEU itself which would be defeated if additional conditions were imposed upon the unilateral exercise of the withdrawing Member State’s will.<sup>103</sup> Other applicable rules of EU law, including the general principles of European law, may inform *how* the withdrawal process should be conducted, but they cannot alter the scope of the right to withdraw. Accordingly, the context of art.50 TEU strongly suggests that its terms must be interpreted to imply, or in any event not to exclude, the right to retract a withdrawal notification.

#### *Object and purpose*

Identifying the object and purpose of an international agreement is a notoriously difficult and elusive task.<sup>104</sup> In the present instance, the case-law of the Court of Justice offers some welcome assistance. The Court of Justice has on numerous occasions compared the object and purpose of the EC Treaty with the object and purpose of other international agreements. For this purpose, the Court typically draws on the preamble, aims and key terms of the agreements concerned.<sup>105</sup> With regard to the EC Treaty, the Court has found that its aim is “the establishment of a common market involving the elimination of all obstacles to trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal

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102. *Reyners* (2-74) ECLI:EU:C:1974:68 at [50].

103. Cf. H. Lauterpacht, “Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties” (1949) 26 *British Yearbook of International Law* 48.

104. See J. Klabbbers, “Some Problems Regarding the Object and Purpose of Treaties” (1997) 8 *Finnish Yearbook of International Law* 138; I. Buffard and K. Zemanek, “The ‘Object and Purpose’ of a Treaty: An Enigma?” (1998) 3 *Austrian Review of International and European Law* 311.

105. E.g. *Legros* (C-163/90) at [24]; *Barkoci and Malik* (C-257/99) ECLI:EU:C:2001:491 at [53]; *Głoszczyk* (C-63/99) ECLI:EU:C:2001:488 at [50]. See also *LATA* (C-344/04) ECLI:EU:C:2006:10 at [41] and *Intertanko* (308/06) ECLI:EU:C:2008:312 at [54]-[65].

market”.<sup>106</sup> In *Opinion 1/91*, the Court declared in more general terms that the Treaty aims “to achieve economic integration leading to the establishment of an internal market and economic and monetary union”.<sup>107</sup>

As we saw earlier, its preamble and art.1 suggest that the overall objective of the TEU is to serve as a framework for ever closer union. Specifically, the TEU marks a new stage in the process of European integration by building upon the establishment of the European Community and extending the reach of integration into new areas. The preamble repeatedly emphasises the determination of the Member States to strengthen their collaboration, including by “deepen[ing] the solidarity between their peoples”, “achiev[ing] the strengthening and the convergence of their economies”, “reinforcing the European identity” and “establishing an area of freedom, security and justice”. Accordingly, the object and purpose of the TEU can be defined as the establishment of the European Union, on which the Member States have conferred certain competences,<sup>108</sup> in order to create an ever closer union among the peoples of Europe,<sup>109</sup> in particular by promoting peace, the Union’s values and the well-being of its peoples; establishing an area of freedom, security and justice without internal frontiers; establishing an internal market; promoting economic, social and territorial cohesion and solidarity among Member States; and upholding and promoting the Union’s values and interests in its relations with the wider world.<sup>110</sup>

It is in the nature of a unilateral right to withdraw that it contradicts the overall object and purpose of the TEU. However, the same cannot be said about the power to reverse a notification to withdraw. Recognising that a Member State may change its mind not only gives effect to the principles of consent and conferral, but it also provides the withdrawing Member State with an opportunity to restore its commitment to the process of European integration. Affording the Member State with such an opportunity is particularly important given that art.50 TEU does not require the parties to resolve their differences in an attempt to avoid the loss of membership. By contrast, denying that a Member State may change its mind renders its exit from the EU a foregone conclusion, unless the European Council agrees to suspend the withdrawal process indefinitely. Accordingly, interpreted in the light of the object and purpose of the Treaties, the terms of art.50 TEU must be understood as implying the power to revoke a notification to withdraw. Only this interpretation is compatible both with the purpose of art.50 TEU and with the object and purpose

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106. *Metalsa* (C-312/91) at [15].

107. *European Economic Area* (Opinion 1/91) at [17].

108. Art.1 TEU.

109. Cf. Pescatore, “Les Objectifs de la Communauté Européenne” (1972), pp.351–360.

110. Cf. art.2 TEU.

of the TEU as a whole, while denying the existence of a power to revoke a withdrawal notification contradicts both.

*Other relevant rules of international law*

Pursuant to art.31(3)(c) VCLT, account must be taken in the interpretation of the TEU of “any relevant rules of international law applicable in the relations between the parties”. In the present context, the relevance of this rule is reinforced by the principle that the EU must respect international law in the exercise of its powers.<sup>111</sup> One of the aims of the Union is to contribute to “the strict observance and the development of international law” in its relations with the wider world.<sup>112</sup> The institutions are therefore bound to observe international law in its entirety when they adopt legal acts under the Treaties.<sup>113</sup> Secondary acts of EU law adopted in breach of the applicable rules of international law may be annulled by the Court.<sup>114</sup> Different considerations apply to the founding Treaties, however. Treaty rules generally prevail over rules of customary international law.<sup>115</sup> Moreover, since the founding Treaties are constitutional in character, the Court has ruled that obligations imposed by other international agreements cannot prejudice their core principles.<sup>116</sup> It follows from these points that a Member State cannot rely on customary or conventional rules of international law in order to justify revoking its withdrawal notification should this be incompatible with art.50 TEU. However, we have found that the such a power *is* compatible with art.50 TEU and must be implied in its terms. Consequently, if international law were to recognise that parties to a treaty may retract notifications of withdrawal, this power would not only have to be taken into account in the interpretation and application of art.50 TEU, but it could also be adduced as an “additional basis” for the obligations incumbent upon the Member States and the institutions to accept the reversal of a withdrawal notification as a matter of EU law.<sup>117</sup> As the analysis below shows, international law does recognize the existence of such a power.

According to art.68 VCLT, a “notification or instrument provided for in articles 65 or 67 may be revoked at any time before it takes effect”. While art.65 VCLT is not relevant in the present

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111. *Poulsen and Diva Navigation* (C-286/90) at [9].

112. Art.3(5) TEU. See also art.21(1) and art.21(2)(b) TEU and art.214(2) TFEU.

113. *Air Transport Association of America* (C-366/10) ECLI:EU:C:2011:864 at [101].

114. *Opel Austria GmbH* (T-115/94) at [90]–[94]; *Racke* (C-162/96) ECLI:EU:C:1998:293 at [45]–[57].

115. Institut de Droit International, “Problems Arising from a Succession of Codification Conventions on a Particular Subject” (1995-I) 66 *Annuaire de l’Institut de Droit International* 245, p.248. See also *Amoco v Islamic Republic of Iran* (1988) 27 *International Legal Materials* 1316 at [112].

116. *Kadi and Al Barakaat* (C-402/05 P and C-415/05 P) ECLI:EU:C:2008:461 at [285].

117. See *Greece v Commission* (C-203/07 P) ECLI:EU:C:2008:606 at [64].

context, art.67 VCLT declares that an act withdrawing from a treaty pursuant to its provisions shall be carried out through an instrument communicated to the other parties. In the present context, it follows from art.68 VCLT that a withdrawal notification issued in accordance with art.50 TEU may be revoked at any time before it takes effect. However, this is not the end of the analysis. Since not all Member States of the EU are parties to the Vienna Convention,<sup>118</sup> art.68 VCLT is not applicable between all of them as a matter of treaty law. A cautious approach to art.31(3)(c) VCLT suggests that art.68 VCLT should therefore only be taken into account in the interpretation of art.50 TEU if it reflects customary international law.<sup>119</sup> As the customary nature of art.68 VCLT has not been authoritatively settled, it is necessary to briefly investigate this question.

At first sight, the fact that art.68 VCLT is one of the procedural rules contained in Section 4 of Part V of the VCLT might suggest that it cannot be of a customary character. The rules in Section 4 are widely considered to be examples of the progressive development of the law of treaties rather than a codification of pre-existing customary rules.<sup>120</sup> However, unlike certain related provisions, art.68 VCLT has not generated any significant disagreement within the International Law Commission.<sup>121</sup> It has attracted only few comments from governments<sup>122</sup> and was eventually adopted without a dissenting vote.<sup>123</sup> The latter point in particular may indicate that it is customary

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118. Two Member States, France and Romania, are not parties to the VCLT.

119. However, it should be emphasised that such an approach may be *overly* cautious and that a robust argument may be made that the VCLT should be taken into account as a matter of treaty law. See C. McLachlan, “The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention” (2005) 54 I.C.L.Q. 279, pp.313–315. It has been suggested by Smismans, “About the Revocability of Withdrawal” (29 November 2016) that art.68 VCLT is not relevant in the present context, as it was not meant to apply to international organizations. This overlooks that the VCLT is binding upon the vast majority of the Member States, that the Treaties are international agreements concluded between the Member States and that art.5 VCLT specifically extends the applicability of the Convention to treaties setting up international organizations.

120. E.g. 714<sup>th</sup> Meeting (4 July 1963), in *Yearbook of the International Law Commission* (1963), Volume I, 280 at [54]; 864<sup>th</sup> Meeting (6 June 1966), in *Yearbook of the International Law Commission* (1966), Volume I(2), 148 at [65]; Czechoslovakia at 70<sup>th</sup> Meeting, Committee of the Whole (14 May 1968), in United Nations, *Official Records of the United Nations Conference on the Law of Treaties*, First Session (New York: United Nations, 1969) 414 at [8]. See also *Racke* (C-162/96) at [59] and the Opinion of A.G. Jacobs, *Racke* (C-162/96) ECLI:EU:C:1997:582 at [96].

121. See 698<sup>th</sup> Meeting (12 June 1963), in *Yearbook of the International Law Commission* (1963), Volume I, 163 at [21]–[66]; 864<sup>th</sup> Meeting (6 June 1966) at [74]–[82].

122. Comments by Governments on the Draft Articles on the Law of Treaties drawn up by the Commission at its Fourteenth, Fifteenth and Sixteenth Session, *Yearbook of the International Law Commission* (1966), Volume II, 279, p.324 (Poland), p.341 (Sweden) and pp. 355–356 (United States of America).

123. The draft was adopted at diplomatic conference by 94 votes to none, with eight abstentions. See 28<sup>th</sup>

in nature.<sup>124</sup> Against this, it has been argued that the customary character of art.68 VCLT cannot be divorced from the status of art.67 VCLT, given the intimate relationship between these two provisions.<sup>125</sup> To the extent that art.67(2) VCLT does not reflect custom, art.68 VCLT cannot reflect custom either, or so the argument goes.<sup>126</sup> This reasoning is misguided. Art.68 VCLT defines its scope of application by referring to art.67 VCLT. However, this reference should not be understood to imply that the power to revoke a withdrawal notification derives from the terms of art.67 VCLT.<sup>127</sup> As the drafting history of the VCLT demonstrates, that power derives directly from the authority to withdraw from a treaty.

At one stage during the drafting process, the text of what later became the VCLT included, in the form of draft art.38, a set of rules designed to regulate how treaties may be terminated through the operation of their own provisions. Draft art.38(3)(a) declared that a treaty ceases to apply to a party withdrawing from it in conformity with the terms of the treaty “as from the date upon which the...withdrawal takes effect”.<sup>128</sup> Eventually, the whole of draft art.38 was deleted<sup>129</sup> as most of its terms were considered self-evident and therefore superfluous.<sup>130</sup> A suggestion to incorporate draft art.38(3)(a) into what is now art.67(2) VCLT was not followed up.<sup>131</sup> Originally, draft art.24, which subsequently evolved into art.67(2) VCLT, stipulated that a notice to withdraw

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Plenary Meeting (16 May 1969), in United Nations, *Official Records of the United Nations Conference on the Law of Treaties*, Second Session (New York: United Nations, 1970) 153, p.157.

124. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, Advisory Opinion [1971] ICJ Reports 47 at [94].

125. A. Tzanakopoulos, “Article 68”, in O. Corten and P. Klein (eds), *The Vienna Conventions on the Law of Treaties* (Oxford: Oxford University Press, 2011) 1564, p.1565.

126. Tzanakopoulos, “Article 68” (2011), p.1565. For a more favourable assessment of the customary nature of art.68 VCLT, see H. Krieger, “Article 68”, in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (Berlin Heidelberg: Springer, 2012) 1173, p.1173.

127. In any event, the duty imposed by art.67(2) VCLT to give notice “through an instrument communicated to all parties” is superseded, through the operation of art.5 VCLT, by the conflicting requirement of art.50(2) TEU to address the notification to the European Council.

128. Draft Articles adopted by the Commission, A/CN.4/L.117 and Add.1 (7 January 1965), p.35.

129. 836<sup>th</sup> Meeting (21 January 1966), in *Yearbook of the International Law Commission* (1966), Volume I(1), 91 at [53].

130. Fifth Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur (15 November 1965), in *Yearbook of the International Law Commission* (1966), Volume II, 1, p.25; Report of the International Law Commission covering the Work of its Fifteenth Session (6 May–12 July 1963), in *Yearbook of the International Law Commission* (1966), Volume II, 189, p.200.

131. 836<sup>th</sup> Meeting (21 January 1966), at [53]. Cf. 828<sup>th</sup> Meeting (11 January 1966), in *Yearbook of the International Law Commission* (1966), Volume I(1), 36 at [76] and [82].

had to specify the date upon which it was to take effect.<sup>132</sup> However, this requirement too was deleted as the provision was considered too elaborate and mostly self-evident.<sup>133</sup> The revised version of draft art.24 confined itself to making two fundamental points. Draft art.24(1) provided that a notice to withdraw had to be communicated in a formal manner, while draft art.24(2) declared that a notice could be revoked at any time before it took effect, unless the treaty provided otherwise.<sup>134</sup> Subsequently, draft art.24 was renumbered<sup>135</sup> and split into two separate provisions.<sup>136</sup> Draft art.24(1) became draft art.50 and then art.67(2) VCLT, while draft art.24(2) became draft art.50 (*bis*) and finally art.68 VCLT.

The evolution of these provisions demonstrates the existence of a broad consensus within the International Law Commission, shared by governments commenting on the drafts, that the date upon which a notice to withdraw takes effect may be fixed either by the treaty itself or by the withdrawing State, subject to the provisions of the treaty and possibly a duty to provide a minimum period of notice.<sup>137</sup> Provisions asserting this principle in express terms were omitted from the draft text because they were considered to be self-evident. However, the principle is inherent in the VCLT, including in art.54 VCLT. Pursuant to this article, a party may unilaterally withdraw from a treaty either in conformity with its provisions under art.54(a) VCLT or at any time with the consent of all parties under art.54(b) VCLT. This is significant for two reasons.

First, the authority to withdraw from a treaty in accordance with art.54 VCLT derives from the party's capacity to conclude treaties,<sup>138</sup> which itself is an attribute of its sovereignty.<sup>139</sup> This means that a party's right to determine the date upon which its notice to withdraw will take

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132. Art.24(1)(d), Second Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur (20 March, 10 April, 30 April and 5 June 1963), in *Yearbook of the International Law Commission* (1963), Volume II, 36, p.86.

133. See the discussion in 698<sup>th</sup> Meeting (12 June 1963) at [20]–[66].

134. 714<sup>th</sup> Meeting (4 July 1963) at [10].

135. 720<sup>th</sup> Meeting, 11 July 1963, in *Yearbook of the International Law Commission* (1963), Volume I, 314, p.328.

136. 864<sup>th</sup> Meeting (6 June 1966) at [51]–[82].

137. Second Report on the Law of Treaties by G.G. Fitzmaurice, Special Rapporteur (15 March 1957), in *Yearbook of the International Law Commission* (1957), Volume II, 16, p.34. To similar effect, see Opinion of the Legal Adviser of the International Labour Office (17 August 1977), in *United Nations Juridical Yearbook* (1977), 248, pp.248–250.

138. Art.6 VCLT. See Second Report on the Law of Treaties by G.G. Fitzmaurice, Special Rapporteur (15 March 1957), in *Yearbook of the International Law Commission* (1957), Volume II, 16, p.34 and Second Report on the Law of Treaties, by Sir Humphrey Waldock (1963), p.85. See also A. McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), p.506.

139. *S.S. Wimbledon* [1923] PCIJ, Ser. A., No. 1, p.25. See also Separate Opinion of Judge El-Erian, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion [1980] ICJ Reports 73, p.170.

effect is based on its treaty-making capacity. This explains why the International Law Commission's commentary to the predecessor of art.68 VCLT declared that "the right to revoke the notice is really implicit in the fact that it is not to become effective until a certain date".<sup>140</sup> Since the right to set the date upon which a withdrawal notice becomes effective is based on the capacity to conclude treaties, what the commentary really meant, as was pointed out during the drafting process, was that "the right to revoke should be implicit in the power to give notice, unless the treaty itself provided otherwise".<sup>141</sup> In the final analysis, the authority to revoke a notice to withdraw from a treaty thus derives directly from the State's capacity to make, and unmake, treaties. Second, the status of art.68 VCLT is closely tied to that of art.54 VCLT. Since art.54 VCLT gives effect to the principle of *pacta sunt servanda* and the capacity of States to conclude treaties,<sup>142</sup> its customary status is beyond doubt.<sup>143</sup> Since art.68 VCLT in turn gives effect to art.54 VCLT, it too reflects customary international law. This is confirmed by State practice<sup>144</sup> and the practice of international organisations,<sup>145</sup> which accepts the reversibility of notifications to withdraw from a treaty. It is worth highlighting that the High Court of South Africa recently ordered the President and certain Ministers of the Republic of South Africa to revoke South Africa's notification to withdraw from the International Criminal Court despite the fact that, much like art.50 TEU, the relevant provision of the Rome Statute is silent on revocability of a withdrawal notification.<sup>146</sup> In

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140. Draft Articles on the Law of Treaties with Commentaries, in *Yearbook of the International Law Commission* (1966), Volume II, 187, p.264. See also Draft Articles on the Law of Treaties, in *Yearbook of the International Law Commission* (1963), Volume II, 189, p.214.

141. 698<sup>th</sup> Meeting, 12 June 1963, in *Yearbook of the International Law Commission* (1963), Volume I, 136 at [33].

142. Art.6 and art.26 VCLT.

143. M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden Boston: Martinus Nijhoff, 2009), p.689; V. Chapaux, "Article 54", in Corten and Klein (eds), *The Vienna Conventions* (2011) 1236, p.1237–1241; T. Giegerich, "Article 54", in Dörr and Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (2012) 945, pp.948–949.

144. E.g. US Withdrawal of Denunciation of the Warsaw Convention (14 May 1966) in (1966) 54 *Department of State Bulletin* 955; Letter Containing Notice of Withdrawal from the International Labour Organisation (5 November 1975) in (1975) 14 *International Legal Materials* 1582, pp.1582 and 1584. For more recent examples, see Gambia: Withdrawal of Notification of Withdrawal, UN Doc. C.N.62.2017.TREATIES-XVIII.10 (10 February 2017); South Africa: Withdrawal of Notification of Withdrawal, UN Doc. C.N.121.2017.TREATIES-XVIII.10 (7 March 2017).

145. E.g. *Consequences of the Withdrawal of a Member State*, Report by the Director-General, UNESCO (8 January 1985), in *United Nations Juridical Yearbook* (1985) 156 at [16], [18] and [22]. See also E. Osieke, *Constitutional Law and Practice in the International Labour Organisation* (Dordrecht: Martinus Nijhoff, 1985), p.36 and H.G. Schermes and N.M. Blokker, *International Institutional Law: Unity Within Diversity*, 5<sup>th</sup> edn (Leiden: Martinus Nijhoff, 2011), pp.100–101.

146. *Democratic Alliance v. Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* [2017] ZAGPPHC 53 at [84]. Cf. art.127, Rome Statute of the International

its submissions to the High Court, the South African Government specifically invoked art.68 VCLT in support of its power to revoke its notice to withdraw from the Rome Statute.<sup>147</sup> This is highly significant for our purposes, since South Africa is not a party to the VCLT and neither are all members of the International Criminal Court.<sup>148</sup> No party appears to have objected to the South African reversal.

The customary status of art.68 VCLT has two implications in the present context. First, art.68 VCLT has to be taken into account in the interpretation of art.50 TEU in accordance with art.31(3)(c) VCLT. This duty is confirmed by the Court's case-law, which stipulates that "EU law must be read in the light of the relevant rules of international law".<sup>149</sup> Interpreting art.50 TEU in the light of the customary rule expressed in art.68 VCLT strengthens our earlier conclusion that a right to revoke is implicit in art.50 TEU. Second, the right to revoke a withdrawal notification which the Member States enjoy under customary international law exists and applies in parallel to the corresponding right that they derive from art.50 TEU.<sup>150</sup> Since the EU and its institutions are bound to respect relevant rules of customary international law in the exercise of their powers,<sup>151</sup> they are under an obligation to give effect to this customary rule when they act in the context of art.50 TEU. Consequently, customary international law constitutes a distinct and additional basis for the obligations incumbent on the institutions and the other Member States under EU law to accept a withdrawing Member State's right to terminate the withdrawal process prematurely.<sup>152</sup>

#### *Supplementary means of interpretation*

Pursuant to art.32 VCLT, recourse may be had to the preparatory work of art.50 TEU in order to confirm the interpretation that has emerged from the preceding analysis. While it must be recalled that the Community courts have traditionally been reluctant to make extensive use of preparatory works for the purposes of interpretation,<sup>153</sup> relying on the *travaux* to confirm, rather than establish,

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Criminal Court, 2187 U.N.T.S. 90 (17 July 1998).

147. Respondents' Heads of Argument, Case No. 83145/2016 (5 and 6 December 2016) at [55].

148. This means that both the South African Government and the High Court accepted that art.68 VCLT reflects customary international law.

149. *Hungary v. Slovakia* (C-364/10) ECLI:EU:C:2012:630 at [44].

150. Cf. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Reports 14 at [179].

151. E.g. *Air Transport Association of America* (C-366/10) at [101].

152. See *Greece v Commission* (C-203/07 P) at [64].

153. See Arnall, *Court of Justice* (2006), pp.614–615.

the meaning of art.50 TEU should not raise any serious objections.<sup>154</sup> All the more so, since the EU courts have shown themselves more willing to rely on preparatory works more recently,<sup>155</sup> thereby further narrowing the gap between their own interpretative approach and the VCLT.

The preparatory work of the intergovernmental conference which drew up the Treaty of Lisbon is not in the public domain. However, art.50 TEU reproduces art.I-59 of the Draft Treaty Establishing a Constitution for Europe prepared by the European Convention,<sup>156</sup> subject to certain relatively limited modifications. The negotiating history of art.I-59 establishes that the right to withdraw from the Union was intended to be unilateral in character. Amendments attempting to tie this right to substantive conditions or to the successful conclusion of a withdrawal agreement were rejected.<sup>157</sup> As a note prepared by the Praesidium of the European Convention explained, “it was felt that such an agreement should not constitute a condition for withdrawal so as not to void the concept of voluntary withdrawal of its substance”.<sup>158</sup> The Praesidium also recalled that the “procedure laid down in this provision draws on the procedure in the Vienna Convention on the Law of Treaties.”<sup>159</sup> The Member States clearly shared this desire to safeguard the voluntary and unilateral character of the right to withdraw. It is worth noting that art.I-59(2) originally directed the European Council to “examine” the notification issued by a Member State. This requirement was rejected by the Member States and was not reproduced in art.I-60(2) of the Treaty establishing a Constitution for Europe.

The significance of this preparatory work is that it fully confirms the interpretation and conclusions reached earlier. Art.50 TEU was designed to expressly recognise that the Member States enjoy a unilateral right to withdraw from the Treaties and to regulate the procedure governing the exercise of this right in a way that does not detract from its essentially unilateral

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154. Indeed, this reflects the way in which the Court of Justice is using *travaux*. See S. Miettinen and M. Kettunen, “Travaux to the EU Treaties: Preparatory Work as a Source of EU Law” (2015) 17 *Cambridge Yearbook of European Legal Studies* 145.

155. E.g. Opinion of A.G. Sharpston, *Nawras Bolbol* (C-31/09) ECLI:EU:C:2010:351 at [40]–[44]; *Inuit Tapiriit Kanatami* (T-18/10) ECLI:EU:T:2011:419 at [49]; *Pringle* (C-370/12) ECLI:EU:C:2012:756 at [135]. See S. Schonberg and K. Frick “Finishing, Refining, Polishing: On the Use of Travaux Préparatoires as an Aid to the Interpretation of Community Legislation”, (2003) 28 *E.L. Rev.* 149.

156. European Convention, Draft Treaty Establishing a Constitution for Europe, CONV 850/03 (18 July 2003).

157. For an overview of the different proposals, see Secretariat of the European Convention, Summary Sheet of Proposals for Amendments concerning Union Membership: Draft Articles Relating to Title X of Part One (Articles 43 to 46), CONV 672/03 (14 April 2003), pp.10–12. See also Wyrozumska, “Article 50” (2013), pp.1402–1406.

158. Praesidium, Title X: Union Membership, CONV 648/03 (2 April 2003), p.9.

159. Praesidium, Title X: Union Membership (2 April 2003), p.9.

nature. In particular, there is no evidence in the preparatory work to support the view that art.50 TEU was “deliberately designed” to avoid the possibility that a Member State may reverse its withdrawal notification.<sup>160</sup> Denying that possibility not only contradicts the expressly stated intentions of the drafters, but also their admission that art.50 TEU draws upon the procedure set out in the VCLT. In the absence of any indications to the contrary, it must be presumed that art.50 TEU was designed to be compatible with the relevant provisions of the Vienna Convention, including art.68 VCLT.

### *Assessment*

All strands of the interpretation point in a single direction: a notice to withdraw from the EU is reversible. Nothing in the Treaties and the negotiating history of art.50 TEU expressly or implicitly denies the right to revoke a notice to leave the EU. On the contrary, the general scheme of the Treaties, the object and purpose of the TEU, the applicable rules of customary international law and the preparatory work confirm the existence of such a right. Given that the literal, historical and teleological methods of interpretation<sup>161</sup> produce the same result, the relative weight to be accorded to the different categories of arguments reviewed in the preceding sections is of secondary importance.

These findings raise two procedural questions. First, are there any formal requirements that a Member State wishing to rescind its withdrawal notification must comply with? Revoking a withdrawal notification is a formal treaty act. As such, it should be submitted in written form,<sup>162</sup> just like the original notification itself. Since a withdrawing Member State is not bound to justify its decision to leave the Union, it need not justify its decision to revoke the withdrawal notification either, though in practice it might be expedient to offer an explanation.<sup>163</sup> The notice should be addressed to the European Council in its capacity as the recipient of the original notification under art.50(2) TEU.

Second, is a Member State entitled to submit a second withdrawal notification after it has revoked an earlier one? The text of art.50 TEU certainly does not preclude this. If a Member State is entitled to change its mind once, there is no reason, in principle, why it should not be entitled to do so twice. However, starting and stopping the withdrawal process on a repeated basis might enable the Member State concerned to circumvent the procedural limits, in particular the two-year

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160. Lord Pannick QC, *Miller* [2016], Transcript (13 October 2016), p.16.

161. Cf. *Inuit Tapiriit Kanatami* (T-18/10) at [40]; *Mühlleitner* (C-190/11) ECLI:EU:C:2012:542 at [34].

162. To this effect, see 864<sup>th</sup> Meeting (6 June 1966) at [78].

163. See e.g. South Africa: Withdrawal of Notification of Withdrawal (7 March 2017).

time period, laid down in art.50 TEU. Although it seems unlikely that a Member State would risk the political fallout that such a course of action would entail, the potential for abuse does exist, at least in theory. However, this is not a sufficient reason to call into question the right to revoke a withdrawal notification itself.<sup>164</sup> As I have shown, this right exists as a matter of law, independently of policy considerations. Moreover, as already noted, the application of art.50 TEU is subject to other rules, including the principle of sincere cooperation. Repeatedly initiating the withdrawal process would disrupt the functioning of the EU and thus constitute a measure “which could jeopardise the attainment of the Union’s objectives” within the meaning of art.4(3) TEU.<sup>165</sup> It follows that a Member State must refrain from such action. Moreover, to the extent that the principle of sincere cooperation incorporates the principle of good faith,<sup>166</sup> a Member State may initiate and terminate the art.50 TEU process only with the genuine intention of leaving the EU or retaining its membership, but not with the aim of achieving a negotiating advantage.<sup>167</sup> Should a Member State fail to comply with these principles, it may open itself up to infringement proceedings under art.258 TFEU.

## Conclusion

A systematic application of the rules governing the interpretation of the TEU yields a conclusion free from any doubt and ambiguity: a Member State may revoke its notification to withdraw from the EU made pursuant to art.50 TEU before it takes effect. This result confirms the position of the Member States as the “masters of the Treaties”.<sup>168</sup> The continued applicability of the Treaties is predicated upon their continued consent. They may withdraw that consent by means of a unilateral notice expressing their sovereign will. Due to its unilateral nature, they may also abandon this decision by revoking their original notice to withdraw. A systematic interpretation also reveals that the reversibility of a notice to leave gives effect not only to the principles of consent and conferral, but also to the object and purpose of the TEU. In fact, recognising that a withdrawing

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164. See also Craig, “Brexit: A Drama in Six Acts” (2016) at 464.

165. The specific obligation imposed by the principle of sincere cooperation depends on the particular context: *Deutsche Grammophon Gesellschaft mbH* (Case 78-70) ECLI:EU:C:1971:59 at [5].

166. Cf. Opinion of A.G. Sharpston, *Commission v Malta* (C-508/08) ECLI:EU:C:2010:392 at [49]–[77]; Opinion of A.G. Mazák, *Greece v Commission* (C-203/07 P) ECLI:EU:C:2008:270 at [83]. See G. de Baere and T. Roes, “EU Loyalty as Good Faith” (2015) 64 I.C.L.Q. 829, pp.837–855.

167. See also D. Edward et al., “In the Matter of Article 50 of the Treaty on European Union” at [58]–[59]; Eeckhout and Frantziou, “Brexit and Article 50 TEU: A Constitutionalist Reading”, pp.40–41.

168. *Lisbon*, BVerfG (30 June 2009) at [298].

Member State may revoke its notification is the only interpretation of art.50 TEU that is capable of reconciling respect for the sovereignty of the Member States with the objective of “ever closer union”.

This conclusion contradicts the decision of the High Court in *Miller* that once a Member State gives notice to withdraw, its exit from the EU is inevitable.<sup>169</sup> It is unfortunate that the High Court did not benefit from more detailed submissions on this point. It is also unfortunate that it accepted the parties’ submissions without assessing their strength. Had it done so, it should have realized that they are not tenable. Even more regrettable is the fact that the Supreme Court decided to base its judgment on the assumption that a withdrawal notification may be reversed.<sup>170</sup> Whether the Supreme Court was entitled to proceed in this way is open to question.<sup>171</sup> In principle, a national court is not bound to investigate a point of EU law on its own motion where the parties have excluded that point from the ambit of their dispute.<sup>172</sup> Nor is a national court bound to refer a question of EU law to the Court of Justice for a preliminary ruling under art.267 TFEU if that question has no bearing on the outcome of the case before it.<sup>173</sup> These principles would have entitled the Supreme Court to refrain from deciding the reversibility issue, or from referring it to the Court of Justice, had it declared that question to be irrelevant to the proceedings and left it there. This is not, however, what the Supreme Court did. Instead of simply dismissing the question, it proceeded on the assumption that the notice to leave is irrevocable.<sup>174</sup> While its pronouncements on this point therefore carry no more authority than an untested assumption, it is questionable whether it was appropriate for the Supreme Court to venture even this far, rather than studiously refraining from taking any view on the matter whatsoever, considering the question in full on its own motion or deferring it to the Court of Justice for a preliminary ruling. One unfortunate consequence of the Supreme Court’s half-hearted position was to create the impression, in some minds, that it did in fact rule that a withdrawal notice made under art.50 TEU is irrevocable.<sup>175</sup>

Ultimately, it is for the Court of Justice of the European Union to provide an authoritative interpretation of art.50 TEU. Proceedings have been initiated before the Irish courts to obtain

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169. *Miller* [2016] at [11].

170. *Miller* [2017] at [26].

171. Cf. A. Miglio, “Of courts, politics, and EU law: the UK Supreme Court’s failure to refer and its consequences”, SIDI Blog (30 January 2017) <http://www.sidiblog.org/2017/01/30/of-courts-politics-and-eu-law-the-uk-supreme-courts-failure-to-refer-and-its-consequences/> [Accessed 15 March 2017]

172. *Van Schijndel and van Veen* (C-430/93 and C-431/93) ECLI:EU:C:1995:441 at [21]–[22].

173. *CILFIT* (283/81) at [10].

174. *Miller* [2017] at [26].

175. E.g. Sir Oliver Letwin, HC Deb 31 January 2017, Vol. 620, col. 870.

such a ruling by way of the preliminary reference procedure.<sup>176</sup> As I have shown in this paper, a systematic analysis of art.50 TEU leaves no doubt about its meaning. In fact, a strong case can be made that in this instance the “correct application of [EU] law [is] so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved”.<sup>177</sup> The fact that it takes a sustained effort to arrive at the correct meaning of art.50 TEU does not mean that it falls short of this requirement. What matters is not the extent or complexity of the task of interpretation, but whether or not it is capable of arriving at a result that is so obvious as to leave no scope for reasonable doubt.<sup>178</sup> A national court would be perfectly entitled to conclude that a withdrawal notification issued under art.50 TEU is revocable even without having to refer this question to the Court of Justice. However, national courts against whose decisions there is no judicial remedy under national law would have to be satisfied that “the matter is equally obvious to the courts of the other Member States and to the Court of Justice.”<sup>179</sup> Whilst this test does not require complete uniformity at the national level, the court of one Member State is unlikely to clear this hurdle where conflicting decisions have been adopted by the courts of other Member States.<sup>180</sup> Consequently, the fact that the Supreme Court of the UK has assumed that a withdrawal notification is not revocable means that national courts of last instance in other Member States are on safer ground if they refer this question to the Court of Justice for a preliminary ruling. In any event, given that only the Court of Justice can provide an authoritative interpretation of art.50 TEU that applies across all Member States, including to the UK, it would be more appropriate if national courts at any level were to submit this question to the Court of Justice under the preliminary ruling procedure. That would provide a welcome measure of legal certainty and could open up new avenues for political debate currently closed off by an untenable interpretation of art.50 TEU that has prevailed in the English courts.

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176. J. Maugham, “Is Article 50 reversible? A primer on the Dublin case” (17 January 2017) <https://waitingfortax.com/2017/01/17/is-article-50-reversible-a-primer-on-the-dublin-case/> [Accessed 15 March 2017]

177. *CILFIT* (283/81) at [16].

178. See Opinion of A.G. Stix-Hackl, *Intermodal Transports* (C-495/03) ECLI:EU:C:2005:552 at [86]–[89].

179. *CILFIT* (283/81) at [16].

180. *Ferreira da Silva e Brito* (C-160/14) ECLI:EU:C:2015:565 at [41]–[43].



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