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WITHDRAWAL UNDER ARTICLE 50 TEU: AN INTEGRATION-FRIENDLY PROCESS

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"European integration has brought peace and prosperity to Europe and allowed for an unprecedented level and scope of cooperation on matters of common interest in a rapidly changing world. Therefore, the Union's overall objective in these negotiations will be to preserve its interests, those of its citizens, its businesses and its Member States."[1]

Abstract

Article 50 TEU acknowledges the right of Member States to withdraw from the EU, and contains a specific procedure. It also constitutes the legal basis of an exceptional EU competence whose purpose is to ensure that a Member's departure is "orderly". This qualification entails the conclusion of an agreement between the parties on the terms of the withdrawal, but also presupposes that the withdrawal does not undermine the integrity of the EU legal order, while contributing to the fulfilment of the Union's integration objective. The unprecedented exercise of that competence has enriched the law of European integration: core components of the constitutional identity of the EU have been (re)affirmed, the role of its institutions bolstered, and Union membership law further articulated. Paradoxically, withdrawal may therefore be envisaged as an integration-friendly process.

1. Introduction

When a specific withdrawal clause was introduced into the EU Treaties, some feared that it would herald a process of European disintegration, should it ever

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1. European Council (Article 50), Guidelines of 29 April 2017 (hereinafter, "European Council, April Guidelines").

be triggered.[2] Yet, there have been few signs of fragmentation in the EU following the UK's activation of Article 50 TEU. On the contrary, this paper argues that, thus far, the withdrawal process has shown some *integration-friendly* features.

First, the withdrawal procedure is firmly embedded in the constitutional order of the Union. It involves EU institutions rather than Member States, and these institutions operate in the framework of the Union's institutional and substantive principles. Second, practice shows that Article 50 TEU has become the basis of an exceptional competence for the EU. Its essential purpose is to ensure an "orderly" withdrawal which safeguards the Union's constitutional integrity. Third, withdrawal has prompted a vigorous (re)affirmation of core principles underpinning the EU, further articulation of a distinct *Union membership law*, and a reflection on alternative ways in which European States can participate in the integration process. In short, the activation of Article 50 TEU amounts to a constitutional moment for the EU.

The following discussion is structured around the above propositions. It analyses the institutional framework of the withdrawal process and its place within the EU legal order (2). It then decrypts various aspects of the nascent body of *EU withdrawal law*, i.e. principles and procedures engineered by EU institutions to secure an "orderly" withdrawal (3). The last section establishes how the withdrawal process is enriching the law of European integration (4): not only is it respectful of the EU constitutional principles, it also contributes to their advancement and consolidation.

2. A procedure firmly embedded in EU constitutional law

It is the Union itself, through its institutions, that conducts the withdrawal negotiations with the departing State following a quasi-*communautaire* procedural arrangement (2.1.), thereby acting within the framework of EU law more generally (2.2.). As such, the withdrawal procedure contrasts with the inter-State mechanism of accession set out in Article 49 TEU. But it also differs from classic EU procedural devices. Article 50 TEU sets out a specific *hybrid* procedure comprising both the supranational production of an EU act in the form of a withdrawal agreement, and a significant, albeit indirect, influence of the Member States, through the European Council (2.3).

2. See, in this sense, amendments proposed by Elmer Brok et al. on behalf of the EPP Convention Group in the context of the Convention on the Future of Europe: "Suggestion for amendment of Article I-59" <european-convention.europa.eu/docs/Treaty/pdf/46/46_Art%20I%2059%20Brok%20EN.pdf> (all websites last visited 6 March 2018) and literature on the EU withdrawal clause; e.g. Hofmeister, "'Should I stay or should I go?' A critical analysis of the right to withdraw from the EU", 16 ELJ (2010), 589.

2.1. *Negotiations conducted by EU institutions*

Article 50 TEU acknowledges the right of each Member State to leave the EU. The process is formally activated when a member "decides to withdraw from the Union in accordance with its own constitutional requirements" and notifies the European Council "of its intention".[3] Once notified, the European Council establishes "guidelines" for the EU to negotiate an agreement with the Member State concerned to set out the arrangements for its withdrawal from the Union, taking account of the framework for its future relationship with the EU.

While this right to leave the Union is not new,[4] the way in which it is exercised certainly is. Following the introduction of Article 50 TEU in EU primary law, withdrawal is no longer governed by the general standards of international law, but by EU law itself.

Indeed, at the heart of the EU exit procedure is the negotiation of the terms of withdrawal. The EU exit clause thereby differs from standard withdrawal mechanisms,[5] which often consist of a mere duty for the departing State to notify the other parties, within a certain time before leaving.[6] The primary purpose of the Article 50 negotiation is to reach a consensual withdrawal and thus – to borrow the now established taxonomy – to strive to ensure a *soft* rather than *hard* exit. Formally, only the EU is bound by Article 50 TEU to engage in such a negotiation; since the right to exit is not conditional upon a deal,[7] the Member State intending to leave is by contrast not obliged to negotiate. Still, because it is a Member State until effective withdrawal, it remains bound by

3. The UK Prime Minister did so by submitting a letter to the President of the European Council on 29 March 2017.

4. See e.g. Lazowski, "Withdrawal from the European Union and alternatives to Membership", 37 EL Rev. (2012), 523; Medhi, "Brèves observations sur la consécration constitutionnelle d'un droit de retrait volontaire", in Demaret, Govaere and Hanf (Eds.), *30 Years of European Legal Studies at the College of Europe/30 ans d'études juridiques européennes au Collège d'Europe : Liber Professorum 1973/74–2003/04,* (PIE-Peter Lang, 2005).

5. On these international rules, see e.g. Schermers and Blokker, *International Institutional Law* 5th ed. (Martinus Nijhoff, 2011), Ch. 2.

6. See procedures envisaged in e.g. Art. 56 of the Vienna Convention on the Law of Treaties, Art. 7 of the Statute of the Council of Europe, Art. 56 of the EFTA Convention, Art. 127 of the EEA Agreement.

7. According to Art. 50(3) TEU: "[t]he Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement *or, failing that, two years after the notification referred to in paragraph 2,* unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period" (emphasis added).

the duty of cooperation,[8] which means that it should assist the EU in setting out the arrangements of its withdrawal.

Article 50(2) TEU foresees that the parties negotiate an agreement in accordance with Article 218(3) TFEU and within the framework set by the European Council Guidelines. The agreement is to be concluded by the Council, using qualified majority,[9] with the prior consent of the European Parliament. The clause thereby makes clear that, on the Union side, the process is driven by its institutions, and not by the Member States themselves, unlike the negotiation and conclusion of an accession treaty as stipulated in Article 49(2) TEU. The ensuing withdrawal agreement is not an inter-State treaty, but an *act* of the EU,[10] whose compatibility with the EU Treaties may be subject to the control of the European Court of Justice.

Following the UK decision to withdraw, the EU-driven character of the negotiations was amplified, notably by the incorporation of additional elements of the EU treaty-making procedure of Article 218 TFEU. For example, the 27 Heads of State or Government, meeting informally in December 2016 together with the Presidents of the European Commission and of the European Council (hereinafter "EU27+"), decided that the Commission would be appointed as the one and only negotiator of the withdrawal agreement,[11] an issue that the terms of Article 50 TEU left open. The Commission has henceforth played a more significant role in the process than prescribed by the exit clause, notably by proposing negotiation directives to the Council, which the latter subsequently adopted,[12] as envisaged by Article 218(2) and (4) TFEU. The same EU27+ meeting also stressed the role of the European Parliament, including the duty of other institutions involved to inform it "closely and regularly … throughout the negotiations", partly reflecting the terms of Article 218(10) TFEU whose importance has been

8. European Council, April Guidelines, part V. Indeed, as will become evident below, negotiating the terms of withdrawal is a prerequisite for the negotiation of the post-exit agreement(s). Practice also suggests that other non-legal pressures push the withdrawing State to negotiate the terms of its departure; the negative reactions to the "no deal is better than a bad deal" proposition of the UK Government, tend to prove the point.

9. Art. 50(2) TEU. Art. 50(4) TEU stipulates that such qualified majority is defined in accordance with Art. 238(3)(b) TFEU.

10. See, in this regard, Opinion 2/15, *Free trade Agreement with Singapore,* EU:C:2017:376, para 36.

11. See Annex, Statement of 15 Dec. 2016, para 3.

12. Council Decision authorizing the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union (22 May 2017).

bolstered by the European Court of Justice.[13] To be sure, the Parliament has not been a bystander in the EU-UK withdrawal negotiations, having instrumentalized its ability to reject the potential agreement, as foreseen in Article 50(2) TEU, with a view to exerting influence upstream.[14]

In sum, while Article 50 TEU limits the negotiators' recourse to Article 218 TFEU to its third paragraph (which lays down only a couple of elements of the treaty-making procedure, specifying that the Council adopts a decision authorizing the opening of negotiations and nominates the Union negotiator), various other elements of the EU treaty-making procedure have *de facto* been transplanted to the framework of the withdrawal negotiations. This evolution, to which one could also add the potential involvement of the Court of Justice by reference to Article 218(11) TFEU, typifies the significance of classic EU procedural constraints on the withdrawal process.

2.2. *A procedure governed by EU law*

The involvement of EU institutions, and the various procedural arrangements imported from the EU treaty-making procedure, confirm that the exit clause is firmly embedded in the EU legal order. As such, it is governed not only by the terms of Article 50 TEU, but also by the canons of EU constitutional law.

Hence, the general rules on the functioning of the EU institutional framework, as stipulated in e.g. Article 13(2) TEU and as interpreted and monitored by the European Court of Justice, determine the way the institutions operate in the context of Article 50 TEU. Each of them must act within the limits of the powers that the provision confers on it, and in conformity with the procedure, conditions and objectives set out therein. They should also practise mutual sincere cooperation, to help the Union fulfil its tasks. [15]

13. Pt 7 of Annex. See, in this regard, the ECJ's rulings in Case C-658/11, *Parliament* v. *Council (Mauritius)* EU:C:2014:2025, and Case C-263/14, *Parliament* v. *Council (Tanzania)* EU:C:2016:435.

14. See e.g. European Parliament, Negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union (5 April 2017), European Parliament, State of play of negotiations with the United Kingdom (3 Oct. 2017), European Parliament, State of play of negotiations with the United Kingdom (13 Dec. 2017), European Parliament, Resolution on the framework of the future EU-UK relationship (14 March 2018).

15. Hence, the Council must respect the prerogatives of the European Commission, as well as those of the European Parliament. See e.g. Case C-425/13, *Commission* v. *Council (Emissions trading scheme*), EU:C:2015:483; Case C-409/13, *Council* v. *Commission (Macro-Financial Assistance),* EU:C:2015:217; Case C-263/14, *Parliament* v. *Council (Tanzania)*; further on the application of these principles, e.g. Hillion, "Conferral, cooperation and balance in the institutional framework of the EU external action" in Cremona (Ed.) *Structural Principles of EU External Relations Law* (Hart publishing, 2018), p. 117.

Furthermore, the protagonists of the withdrawal negotiations must observe the distribution of competence between the Member States and the EU, in line with the principle of conferral of Article 5 TEU, and as spelled out in Articles 2–6 TFEU.[16] This obligation explains the distinction between the withdrawal process on the one hand, and the negotiation of a possible future agreement with the former Member State, on the other.[17] The EU cannot negotiate, let alone conclude, an external agreement with a Member State which, under EU law, does not formally have the authority to act, at least as long as it remains a Member State, *viz*. in areas of EU exclusive competence such as trade.[18] That the Union may empower a Member State to act in a field of EU exclusive competence under Article 2(1) TFEU would be of little assistance in this respect, as it is implausible that the EU would authorize a Member State to violate EU law.[19]

In establishing the terms of withdrawal, EU institutions must also act in line with the core function of the EU institutional framework as established by Article 13(1) TEU, namely to "promote [the EU] values, advance its objectives, serve its interests, those of its citizens and those of the Member States". Nothing in Article 50 TEU suggests that the context of the withdrawal process involves a departure from this mandate. In this context too, considering their general duty to practise sincere cooperation, the task of the institutions is to assist the Union in fulfilling the purpose of that particular provision, in consideration of the EU general aims and objectives as spelled out in Article 3 TEU.[20]

At one level, this entails that in negotiating the withdrawal agreement EU institutions must respect fundamental rights, as per the EU Charter of Fundamental Rights, and the general principles of Union law.[21] But at a more general level, the protagonists of Article 50 TEU must also aim at preserving

16. On competences, see e.g. Azoulai (Ed.), *The Question of Competence in the European Union* (OUP, 2014).

17. Cf. Eeckhout and Frantziou, "Brexit and Article 50 TEU: A constitutionalist reading", 54 CML Rev. (2017), 695.

18. Art. 3(1) TFEU. Further on the limited ability of the withdrawing State to negotiate, see Wessel, "Consequences of Brexit for international agreements concluded by the EU and its Member States", in this Special Issue.

19. For an example of such authorization, see e.g. Regulation 1219/2012/EU establishing transitional arrangements for bilateral investment agreements between Member States and third countries O.J. 2012, L 351/40.

20. Arts. 13(2) and 4(3) TEU. On the relevance of general objectives in the action of the Union and institutions, see e.g. Opinion 2/15, *FTA Singapore;* see also "Editorial Comments: Free and fair trade", (2018) 55 CML Rev. 371–385.

21. See Eeckhout and Franziou, op. cit. *supra* note 17.

the integrity of existing EU rules and principles. By empowering the institutions to negotiate the terms of a Member State's withdrawal from the EU, Article 50 TEU does not entrust them with a mandate to deviate from the substance of the EU *acquis*, but rather to manage the reduction of its *geographical* scope of application.[22]

An exit procedure that would involve the Member States as such, as in the accession context, would naturally be less constrained by EU institutional and substantive law. While they would still be bound by their EU law obligations,[23] Member States would have more leeway in the negotiations, the scope and nature of which would potentially allow broader modifications of the EU legal order. The 2016 settlement for the UK, as well as the way in which it was negotiated and agreed, is a case in point.[24]

Indeed, the use in Article 50(2) TEU of the phrase "arrangements for *its withdrawal*", rather than e.g. "for *their separation*", could be understood as circumscribing any modification of EU law entailed by withdrawal to that concerning the specific situation of the Member State having decided to leave the EU. In this perspective, adjustments to the *acquis* are conceivable only if technically necessary for the disentanglement of that State from the EU legal order. Given that the Union and its Member States insist that future members adopt the *acquis* as a precondition to accede, it would be paradoxical to allow the process whereby a Member State leaves the Union to affect the latter's legal integrity more significantly. To be sure, no adjustment to the EU *treaties* is conceivable in the context of Article 50 TEU, considering the supranational nature of the procedure it prescribes. Only a primary-law-making mechanism akin to Article 48 TEU or Article 49 TEU would formally allow such an alteration.

The notion that the EU withdrawal clause should be applied in compliance with the rules and objectives of the EU, and without interfering with the European integration process, has become even clearer since the clause was activated by the UK on 29 March 2017. In particular, the first set of European Council guidelines includes a remarkable emphasis on the EU principle of sincere cooperation:

22. Thus, the April Guidelines of the European Council underline (at para 4) that "the main purpose of the negotiations will be to ensure the United Kingdom's orderly withdrawal so as to reduce uncertainty and, to the extent possible, minimize disruption caused by this abrupt change".

23. See e.g. Hillion, "Negotiating Turkey's membership to the European Union. Can the Member States do as they please?" 3 EuConst (2007), 269.

24. See the arrangements on a "new settlement for the United Kingdom within the European Union", annexed to the European Council Conclusions of 18–19 Feb 2016; EUCO 1/16; and the incisive analysis by Simon, *"*Le « paquet britannique »: petits arrangements entre amis, ou du compromis à la compromission*"*, *Europe* 2016, Etude 3.

> "25. Until it leaves the Union, the United Kingdom remains a full Member of the European Union, subject to all rights and obligations set out in the Treaties and under EU law, including the principle of sincere cooperation. … 27. While the United Kingdom is still a member, all ongoing EU business must continue to proceed as smoothly as possible at 28. The European Council remains committed to drive forward with ambition the priorities the Union has set itself. Negotiations with the United Kingdom will be kept separate from ongoing Union business, and shall not interfere with its progress."

Both in law and practice, therefore, the procedure of Article 50 TEU is firmly embedded in the EU legal order. While the right to withdraw that it acknowledges is not in itself conditional upon acceptance by the EU, the exercise of that right is nevertheless subject to EU institutional and substantive rules, especially if the terms of withdrawal are negotiated.

2.3. *Member States' influence channelled through the European Council*

While the procedure of Article 50 TEU involves institutions, Member States are not entirely side-lined. In law and practice, they exert influence in/over the withdrawal process, although, and this is a critical qualification, essentially through the European Council. Member States thus operate through the EU institutional framework, confirming the EU-driven character of the withdrawal process.

The *Member State* component of the withdrawal process found its first expression in the statement of the Heads of State or Government and of the Presidents of the European Council and the Commission ("EU27+"), meeting in the wake of the June 2016 referendum, which contains various principles that were to govern the subsequent withdrawal process. For example, the statement emphasized the "need to organize the withdrawal of the UK from the EU in an orderly fashion", underlining that "[u]ntil the UK leaves the EU, EU law [would] continue… to apply to and within the UK, both when it comes to rights and obligations" as well as the notion that "[a]ccess to the Single Market requires acceptance of all four freedoms".[25]

A subsequent statement of the same informal EU27+ format included an annex that established additional procedural arrangements for the negotiations, and which articulated further means of Member States' influence on the then upcoming negotiation process.[26] It spelled out the role of

25. Informal meeting at 27 – Brussels, 29 June 2016 – Statement.
26. Statement after the informal meeting of the 27 Heads of State or government, 15 Dec. 2016.

the European Council in the process, explaining the purpose of its guidelines, namely to "define the framework for negotiations under Article 50 TEU and set out the overall positions and principles that the EU [would] pursue throughout the negotiation", while underlining that it would "remain permanently seized of the matter, and [would] update these guidelines in the course of the negotiations as necessary".[27]

Referring to other elements of Article 218 TFEU, and particularly its paragraph 4, the Annex also stipulated that "between the meetings of the European Council, the Council and Coreper, assisted by a dedicated Working Party with a permanent chair, [would] ensure that the negotiations are conducted in line with the European Council guidelines and the Council negotiating directives, and provide guidance to the Union negotiator",[28] while the latter would systematically report to the European Council, the Council and its preparatory bodies.

Before the formal activation of Article 50 TEU, the 27 EU Heads of State or Government therefore took the lead in framing the then impending withdrawal process, and in ensuring that Member States would continue to play a part therein. However, they did so together with the two presidents, and thus as "European Council (Art. 50)" [29] *avant la lettre*. Since the procedure of Article 50 TEU had not yet been triggered, the specific formations of the European Council and the Council meeting *à 27* (i.e. without the UK representative),[30] had not yet been formally established. The representatives of the 27 Member States could not therefore gather as European Council without the UK. And yet, in terms of composition and actions the early EU27+ engagement essentially anticipated what the European Council is mandated to do in the context of Article 50 TEU. It is indeed noticeable that in its subsequent guidelines, it endorsed the principles that EU27+ had enunciated in their statement of 29 June 2016, while equally approving the procedural arrangements annexed to the subsequent statement following the informal meeting of December 2016.[31]

The *Member State* element of the withdrawal process finds another expression in the significant role the European Council is deemed to play under Article 50 TEU. First, it establishes the guidelines by consensus and, second, it decides by unanimity whether withdrawal can be postponed, and thus whether the membership of the Member State having notified its intention to leave, can be prolonged. In practice, the European Council has

27. Ibid., para 1.
28. Para 4.
29. This is the way the European Council acting in the context of Art. 50 TEU has been referred to in official documents. See e.g. European Council, April Guidelines.
30. Art. 50(4) TEU.
31. European Council, April Guidelines.

also influenced the *overall conduct* of the withdrawal process, beyond what a textual interpretation of the Treaty procedure indicates. While the second paragraph of Article 50 TEU suggests that it intervenes by way of defining the guidelines before the withdrawal negotiations start, the European Council has, as mentioned above, "remain[ed] permanently seized of the matter", and has been able to "update these guidelines in the course of the negotiations as necessary".[32] In the same vein, and as will be further discussed in the next section, the European Council has articulated the conditions of the negotiations in a way that has significantly bolstered its own role. The initial guidelines thus foresaw that it would "monitor progress closely and determine when sufficient progress has been achieved to allow negotiations to proceed."[33]

The enhanced position of the European Council compensates for the formal absence of Member States in the withdrawal procedure since its activation. Its broadly formulated function in Article 50 TEU introduces a degree of flexibility in the exit procedure, as a counterpoint to the otherwise highly legalized process, as recalled above. Based on its critical and multifaceted role, it is indeed arguable that the European Council would also play a crucial part in handling a situation whereby the withdrawing Member State would decide to revoke its notification.[34]

That said, and this is equally significant for this discussion, in embodying the Member States' influence, the European Council nevertheless acts as a formal institution of the EU, bound to exercise its prerogatives in consideration of EU rules and interests.[35] Thus, its function within Article 50 TEU must be envisaged notably in the light of Article 15 TEU, whereby the European Council "shall provide the Union the necessary impetus for its development and shall define the general political directions and priorities thereof". It is also in this sense that one may read the notion in the guidelines that: "[t]hroughout these negotiations the Union will maintain its unity and act as one with the aim of reaching a result that is fair and equitable for all Member States and in the interest of its citizens".[36]

In sum, the critical role of the European Council counterbalances the "supranational" nature of the withdrawal procedure presented above, thereby giving it a distinct *hybrid* nature. This does not however diminish nor

32. European Council, April Guidelines, p. 2.

33. Ibid., para 4.

34. Further: see "Editorial Comments: Withdrawing from the ever closer union?", 53 CML Rev. (2016), 1491; Hillion, "Le retrait de l'Union européenne. Analyse juridique", (2016) RTDE, 719.

35. Case C-370/12, *Pringle*, EU:C:2012:756.

36. European Council, April Guidelines, p. 1.

undermine the EU as opposed to inter-State nature of the negotiations,[37] and of the withdrawal process more generally. On the contrary, while representing the Member States, the European Council has channelled and harnessed their influence with a view to pursuing the *EU interest*,[38] as the additional modalities of withdrawal it has articulated epitomize.

3. A legal basis to ensure an *orderly* withdrawal

While setting out the essential *procedural* requirements for a Member State's withdrawal, Article 50 TEU also provides the basis for EU institutions, and chiefly the European Council, to specify the *framework* for the negotiations. Since its activation, the withdrawal procedure has indeed been considerably enriched. Alongside the European Council guidelines, Council decisions, reports and proposals by the Commission, as well as resolutions of the European Parliament have all in different ways contributed to articulating the basic terms of Article 50 TEU, including its very purpose, namely to ensure that withdrawal is "orderly". Two elements of this nascent *EU withdrawal law* deserved particularly attention: the definition of Article 50 TEU as the foundation of an "exceptional horizontal" competence of the Union (3.1), and the introduction of conditionality in the application of Article 50 TEU (3.2).

3.1. *Basis for an "exceptional horizontal" and exclusive EU competence*

Following the European Council guidelines, the Council negotiating directives of May 2017 specified the *nature* and *scope* of the agreement to be negotiated and concluded under Article 50 TEU.[39] Sharing the interpretation put forward by the Commission in its earlier recommendation,[40] the Council

37. See in this respect the ECJ ruling in Case C-28/12, *Commission* v. *Council* (*Hybrid Act),* EU:C:2015:282.

38. On the use *vs.* avoidance of the EU institutional framework by the Member States, see "Editorial Comments: Union membership in times of crisis", 51 CML Rev. (2014), 1 and further discussion *infra*.

39. Council of the EU, Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union (22 May 2017), Part II.

40. Recommendation for a Council Decision authorizing the Commission to open negotiations on an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union; COM(2017)218.

held that the exit clause "confers" a "competence" upon the Union.[41] In using the language of *competence*, the two institutions underscored that Article 50 TEU, and particularly its second paragraph, represents more than a procedural device. The provision also constitutes an EU empowerment, with a specific purpose that the European Council envisaged as securing an "orderly withdrawal".[42]

The negotiating directives further specified that Article 50 TEU confers an "*exceptional horizontal* competence",[43] enabling the Union to negotiate and conclude the withdrawal agreement deemed to encompass "all matters necessary to arrange the withdrawal", although adding that "[t]his exceptional competence is of a *one-off nature* and strictly for the purposes of arranging the withdrawal from the Union", and that as a consequence, "[t]he exercise by the Union of this specific competence in the Agreement [would] *not affect in any way the distribution of competences* between the Union and the Member States as regards the adoption of any future instrument in the areas concerned" (emphases added).[44]

The Council thereby recognized that the EU may conclude the withdrawal agreement on the basis of Article 50 TEU, even if it were to cover areas beyond the scope of its exclusive competence. Yet in view of its one off-nature nature, the legal implications of such exceptional action are circumscribed: the conclusion of an Article 50 agreement could not have any pre-emptive effect as regard shared competence, as envisaged in Article 2(2) TFEU.

Nevertheless, the general formulation of the above proviso could also indicate that Article 50 TEU confers the competence for the Union to conclude the withdrawal agreement even if it were to cover areas falling outside *ordinary* EU competences altogether. It is perhaps also, if not primarily in this sense that Article 50 TEU establishes an "exceptional horizontal competence" of a "one-off" nature; in turn prompting the need to clarify and strictly limit its effects, as per the negotiating directives.

The all-encompassing scope of the withdrawal competence underlined by the negotiating directives indeed reflects the earlier guidelines of the European Council, and in turn the intention of the 27 Member States themselves. In establishing the core principles underpinning the negotiations, the European Council thus stipulated that:

41. Council of the EU, Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union (22 May 2017), Para 5.

42. See e.g. European Council, April Guidelines, p. 1.

43. Council of the EU, Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union (22 May 2017), Para 5.

44. Ibid.

> "The Union will approach the negotiations with *unified positions*, and will engage with the United Kingdom *exclusively through the channels set out in these guidelines and in the negotiating directives*. So as not to undercut the position of the Union, there will be *no separate negotiations between individual Member States and the United Kingdom on matters pertaining to the withdrawal* of the United Kingdom from the Union." (emphases added)[45]

By establishing that the Union alone would deal with "matters pertaining to the withdrawal" throughout the negotiations, the guidelines reflect a noticeable unity of views among the 27 Member States as regards the framing of the negotiations, and as to their role therein.[46] The European Council also institutionalizes the unity of action by binding the Member States for the entire process in favour of the Union, including by proscribing separate bilateral negotiations.[47] Reflecting the old logic of exclusivity,[48] such a position seems predicated on a basic functional concern, rather than grounded in extensive legal considerations regarding the nature of the competence involved in the negotiations. By rallying behind the Union, Member States essentially intended to reinforce its position in the negotiations, serving its *interests* in the management of what is an exceptional and risky exercise for the integration process.[49]

Such a commitment may have been facilitated by the fact, discussed earlier, that the European Council would remain seized for the duration of the negotiations, with the ability to adjust and update the guidelines, and in turn to correct the process if necessary. Indeed, as shown in the next section, it has considerably strengthened its influence on the course of the negotiations. But in doing so, its role is part and parcel of the exercise by the EU of its exceptional competence, thereby bringing home the point that the Member States' influence in the withdrawal process is firmly embedded in the EU legal order, and channelled through the European Council in the pursuit of the EU interest.

45. See e.g. European Council, April Guidelines, para 2.

46. It should be noted that the principle of unity was already spelled out in the EU27+ statement of 15 Dec. 2016, cited *supra* note 26.

47. Note however the specific paragraphs relating to Ireland (re the island of Ireland, para 11), Cyprus (re Sovereign Base Areas; para 12), and Spain (re territory of Gibraltar, para 24) in the April Guidelines, which thereby recognize specific bilateral aspects to the process.

48. See in particular, Opinion 1/75, *Local Cost Standard*, EU:C:1975:145.

49. It is arguable that, legally, the European Council Guidelines constrain the Member States based on the principle of sincere cooperation as understood by the ECJ in e.g. Case C-246/07 *Commission* v. *Sweden (Pfos)* EU:C:2010:203.

To be sure, the broad conception of Article 50 TEU, as an exceptional, horizontal, and indeed exclusive Union competence reflects the intention of the drafters of the EU exit clause to facilitate the conclusion of a withdrawal agreement, typified by its reliance on a TFEU procedure and involving the Council acting by qualified majority.[50] The broad EU empowerment is also key to an "orderly withdrawal", envisaged by the European Council as the ultimate purpose of the negotiations and which, in effect, emboldens the EU mandate under Article 50 TEU.[51]

The establishment of transitional arrangements as part of the withdrawal process, and their possible inclusion in the withdrawal agreement itself, provides a good illustration of the EU exceptional horizontal competence.

While Article 50 TEU does not explicitly foresee a possible recourse to such transitional arrangements, the initial European Council guidelines indicated that they could be set out "if in the interest of the Union", and provided they would be "clearly defined, limited in time, and subject to effective enforcement mechanisms". The same paragraph added that "[s]hould a time-limited prolongation of Union acquis be considered, this would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply."[52]

There are good reasons to envisage a post-exit transition period.[53] EU law prevents the departing State from negotiating other agreements with the EU and other international entities while still a member. Depending on their specific terms, transitional arrangements would by contrast enable such negotiations, making withdrawal less brutal, while possibly establishing bridges towards the foreseeable framework for the future relationship between the Union and the former Member State.

50. Considering the purpose of Art. 50 TEU, discussed above, namely to preserve the integrity of EU rules in the context of the withdrawal process, an *AETR* argument could also be made in support of the exclusive nature of the EU competence, insofar as individual interventions of Member State in the context of withdrawal negotiations could affect EU common rules understood here as the EU legal order as a whole. See, the rationale of the pre-emptive effect in Case 22/70, *Commission* v. *Council (AETR),* EU:C:1971:32.

51. On the significance of objectives in the articulation of EU competence, see E. Neframi (dir), *Objectifs et compétences de l'Union européenne* (Bruylant, 2012).

52. European Council, April Guidelines, para 6; see also European Council, (Article 50 TEU), Guidelines of 15 Dec. 2017 (hereinafter, "December Guidelines"), and Council of the EU, Supplementary directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union (29 Jan. 2018).

53. For a thorough analysis of the transitional arrangements under Art. 50 TEU, see Dougan, "An airbag for the crash test dummies? EU-UK negotiations for a post-withdrawal 'status quo' transitional regime under Article 50 TEU", in this Special Issue.

Transitional arrangements have indeed been an integral part of EU enlargement practice despite the silence of Article 49 TEU, precisely to facilitate the entry into force of the accession treaty both for the new Member State itself, and for the existing Member States, as well as for the Union. In contrast to the withdrawal process however, accession involves an inter-State negotiation, thus allowing broader discretion for the negotiators regarding the modalities of accession, and in turn the content of the ensuing treaty. The question could then be asked whether, considering the silence of Article 50 TEU on the matter, it could nevertheless provide the legal basis for the establishment of such arrangements.

The position of the EU has been that the transition, envisaged as a wholesale extension of the *acquis* to the post-exit UK,[54] should be included in the withdrawal agreement itself,[55] rather than in a separate instrument.[56] Such an incorporation is indeed consistent with the definition of Article 50 TEU as basis for a horizontal competence. But it is arguably supported by other legal arguments, which also substantiate the all-inclusive scope of the withdrawal competence based on Article 50 TEU, mentioned in the negotiating directive.[57] A transitional arrangement between the EU and the UK in the context of the withdrawal negotiations may legitimately be conceived as one of the (indeterminate) "arrangements for… withdrawal" envisaged by the provision. At the very least, it is intimately linked to the withdrawal process without which it would be devoid of purpose,[58] since its very legal existence is premised on, if not conditional upon the ultimate conclusion of the withdrawal agreement.[59]

54. European Council, December Guidelines, para 3.

55. See Council of the EU, Supplementary directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union (29 Jan. 2018).

56. Cf. Armstrong, "Implementing transition: Legal and political limits", (2017) CELS, University of Cambridge.

57. For an elaborate discussion of the possible limits on the use of Art. 50 TEU as legal basis for establishing such transitional arrangements, see Dougan, op. cit. *supra* note 52, esp section 5.

58. This terminology is used by the ECJ in its case law on conflict of legal basis, see e.g. Case C-263/14, *European Parliament* v. *Council (Tanzania)*, para 51.

59. European Council, December Guidelines; Council of the EU, Supplementary directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union (29 Jan 2018); Press statement by Michel Barnier following the publication of the draft Withdrawal Agreement between the EU and the UK (28 Feb. 2018). Ironically, the notion of "*implementation* period" which the UK Government has been keen on using to refer to the transitional arrangement, denotes even more explicitly its connection to the withdrawal agreement.

To be sure, were the transitional arrangements to be established outside the context of Article 50 TEU, alternative legal bases would have to be identified for their adoption, possibly involving shared competence and thus the possible need for a mixed arrangement. It would then be difficult if not impossible to conclude and ratify such an agreement before the UK effectively withdraws from the EU, thus depriving the transitional arrangement of any meaning. Conversely, a transitional arrangement entering into force at the same time as the withdrawal agreement would as such facilitate the disentanglement of the UK from the Union and, potentially, the move towards a new relationship. It would thereby contribute to ensuring "an orderly withdrawal", in line with the European Council guidelines.

All in all, Article 50 TEU is conceived as an all-encompassing competence, allowing the Union to address any matters related to withdrawal. While inherent in the terms of Article 50 TEU, such a broad empowerment has been invigorated by the European Council guidelines, based on the overall interest of the EU in securing an orderly withdrawal.

3.2. *A basis for additional principles and conditions structuring the withdrawal negotiations*

In setting the "overall positions and principles that the Union … pursue[s] throughout the negotiations",[60] the European Council also established a specific substantive framework within which the EU withdrawal competence was to be exercised. Buttressed by conditionality, a methodology the EU extensively used in the context of its enlargement policy, this framework has considerably circumscribed the space for actual negotiations, by delimiting the arrangements that would be acceptable for the EU.

Among the "core principles" framing the process, the European Council underlined that:

> "Preserving the integrity of the Single Market excludes participation based on a sector-by-sector approach. A non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member. In this context, the European Council welcomes the recognition by the British Government that the four freedoms of the Single Market are indivisible and that there can be no 'cherry picking'. The Union will preserve its autonomy as

60. European Council, April Guidelines, p. 2.

> regards its decision-making as well as the role of the Court of Justice of the European Union."[61]

The way in which such principles are formulated suggest that these essentially amount to EU "red lines". Preserving the integrity of both the Single market based on the indivisibility of the four freedoms, of Union membership rights and benefits, and of the EU institutional framework, is a *conditio sine qua non* for any acceptable EU settlement with the departing State.

While not expressly set out in the EU treaties, these principles reflect and articulate the specific features of the EU legal order which the European Council intends to safeguard. Some of those were already enunciated in the context of EU enlargement, particularly in the so-called Copenhagen criteria;[62] others, like the principle of autonomy, have also been referred to by the European Court of Justice, notably in its case law relating to the external action of the Union.[63] That the European Council should recall them to frame the EU negotiations with the UK might indeed purport, at least partly, to ensure that the final agreement would be legally acceptable, particularly if the Court were asked an opinion under Article 218(11) TFEU. In turn, their safeguard by the Court of Justice boosts their normative character in the negotiations, and thus the EU position *vis-à-vis* the departing State.

Having spelled out the EU red lines, the European Council further bolstered the normative significance of the "overall positions and principles" contained in the guidelines, by introducing sequencing and conditionality in the negotiations.[64] Not specified in Article 50 TEU, the so-called "*phased* approach", whereby priority was to be given to the "orderly withdrawal", further increased the EU leverage in the negotiations, and enhanced the probability of a deal being in line with its initial ambitions.

In the *first phase*, the parties were asked to address issues specifically related to the disentanglement of the UK from the Union and the effects of withdrawal on existing rights and obligations, viz. citizens' rights, the financial settlement and the implications of UK withdrawal for the island of Ireland. As underlined in the guidelines, the purpose of the negotiations was "to reduce uncertainty and to the extent possible*, minimize disruption* caused

61. Ibid., para 3. The European Council (Art. 50) recalled and reconfirmed these principles in its guidelines of 23 March 2018 (hereinafter "European Council, March guidelines"), underlining that they would also "have to be respected by the future relationship with the UK", see paras 2 and 7.

62. On these criteria, see Hillion, "The Copenhagen criteria and their progeny", in Hillion (Ed.), *EU Enlargement: A Legal Approach* (Hart publishing, 2004), p. 1.

63. e.g. notably in Opinion 2/13, *ECHR (II),* EU:C:2014:2454. Further see Dougan, op. cit. *supra* note 52.

64. European Council, April Guidelines, Part II.

by [the] abrupt change" (emphasis added). As subsequently made clear in the relevant position papers of the Commission, the EU thus essentially sought to safeguard existing rights related to those areas,[65] and in turn the integrity of EU rules and policies underpinning those rights, more generally.[66]

Only if and when the European Council considered that "sufficient progress" had been achieved in that first phase negotiations, could the parties proceed to the *second phase*, in the context of which they could hold preliminary and preparatory discussions on the framework for their future relations. The latter discussion, critical for the UK Government,[67] and indeed the withdrawal agreement as a whole, were thereby subordinated to the European Council's being content with the UK responses to the EU positions.

Although the expectations became clearer as the negotiations advanced, namely that progress on *all* three key disentanglement topics spelled out in the Guidelines was required,[68] the latter did not however specify what such "sufficient progress" entailed. This decision, and the criteria against which it would be taken, were essentially left to the European Council,[69] which thereby acquired considerable leverage in the negotiations. This leverage was even more substantial since the recognition that progress was satisfactory presupposed consensus among all members of the European Council. Ireland's threat, in autumn 2017 to block the move to phase 2 if there were too little progress on the border issue, is a case in point.[70]

65. Viz. those of EU citizens having moved to the UK and those of UK citizens having moved to other EU Member States, those of the 27 Member States and EU institutions to have the UK fulfil its financial commitments as Member State, and the right to an open border on the island of Ireland; see in this regard: Press statement by Michel Barnier following the fifth round of Article 50 negotiations with the United Kingdom (12 Oct. 2017), see also Communication from the Commission to the European Council (Article 50) on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union, COM(2017)784; and the Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, TF50(2017)19 – Commission to EU 27.

66. E.g. the integrity of EU citizenship law, the right to free movement on the island of Ireland, the integrity of EU policies financed by the Union on the basis of 28 Member States' financial commitments. Ibid.

67. See e.g. Theresa May, "The government's negotiating objectives for exiting the EU", Lancaster House (17 Jan. 2017), Theresa May, "A New Era of Cooperation and Partnership between the UK and the EU", Florence, (22 Sept. 2017).

68. See also European Council (Art. 50 TEU), Conclusions (20 Oct. 2017), para 3.

69. The EU chief negotiator and the Commission had a role in this respect too, albeit of an advisory nature. See e.g. Press statement by Michel Barnier cited *supra* note 65, in which the EU negotiator underlined: "as things stand at present, I am not able to recommend to the European Council next week to open discussions on the future relationship".

70. "Ireland threatens to block progress of Brexit talks over border issue", *The Guardian,* 17 Nov. 2017.

The decision of the European Council that progress had been sufficient for the negotiations to move to the second phase, led to the introduction of further sequencing,[71] suggesting that conditionality has progressively pervaded the whole negotiation process.[72] The second phase in effect began with consultations on possible transitional arrangements only,[73] postponing until March 2018 the discussion on the future relationship, the latter being subject to additional preconditions as a result.

First, the December guidelines which the European Council adopted for the second phase covered only the issue of transitional arrangements, and so did the second set of negotiating directives proposed by the Commission and subsequently adopted by the Council.[74] In other words, the discussion of the future relationship presupposed the adoption of additional guidelines.[75] Second, the European Council underlined that "negotiations in the second phase [could] only progress as long as all commitments undertaken during the first phase [would be] respected in full and translated faithfully into legal terms as quickly as possible",[76] while calling for "further clarity [by the UK] on its position" as regards the future relationship.[77]

Such a use of conditionality has strengthened the EU's hand in the negotiations, particularly in view of the ensuing multiplication of regular consensual decisions by the European Council for the process to move on. The introduction therein of potential veto rights is indeed remarkable, considering the terms and purpose of Article 50 TEU, discussed above. The hope of course, both for the EU and for the departing Member State given their shared interest in an agreement, is that such a veto power (legitimate in the case of Ireland, given the issue at hand) and indeed the threat to exercise it, would not be used, let alone abused. A nationalization of the EU withdrawal procedure

71. www.politico.eu/article/brexit-talks-phase-2-back-not-that-they-ever-went-away/.

72. Moreover, the principle highlighted in the April Guidelines that nothing is agreed until everything is agreed (para 2), entails that the actual establishment of a transitional arrangement is conditional upon the successful conclusion of the withdrawal agreement, of which it is part. Hence without a withdrawal deal, no transitional period, and indeed, no framework for the future partnership before withdrawal.

73. Though the negotiations on the "first phase" topics have continued too; see European Council, December Guidelines, para 1; EU Council, Supplementary directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union (29 Jan. 2018), para 8.

74. Ibid.

75. See European Council, December Guidelines, paras 6 and 9. The additional guidelines were adopted on 23 March 2018.

76. Ibid., para 1.

77. Ibid., para 9. Following the informal meeting of the 27 Heads of State of Government on 23 Feb. 2018, the President of the European Council indicated that he would propose draft guidelines to the European Council, meeting in March 2018, adding that "Our intention is to adopt these guidelines, whether the UK is ready with its vision of our future relations, or not".

would seriously impede the ability of the Union to ensure an orderly withdrawal, and would thus go against its interests.[78] It would equally contradict the purpose and terms of Article 50 TEU recalled above, the guidelines which, as alluded to above, insist on the "Union… maintain[ing] its unity and act[ing] as one with the aim of reaching a result that is fair and equitable for all Member States and in the interests of its citizens". And it would generally conflict with the obligation to cooperate with the other protagonists of the negotiations which binds the Member States and the European Council, to help the Union fulfilling its task, namely to conclude a withdrawal agreement to ensure an orderly withdrawal.

In this perspective, it may be wondered whether in effect, each and every member of the European Council holds the same veto right. Arguably, it is because the European Council Guidelines acknowledged the unique impact of the UK withdrawal on Ireland, that the latter was given a specific voice in the negotiation, on the particular issue of the border. Hence without a serious and legitimate concern being shared by other members in the European Council, it is unlikely that a single Member State could alone hold up the negotiations.

Clearly, the articulation of an additional procedural, substantive, and methodological framework of negotiations shows that the EU has not remained on the receiving end of the process. It has engaged actively to protect its interests,[79] and chiefly its constitutional integrity. Indeed thus far, the negotiations under Article 50 TEU have not involved a classic give-and-take dynamic.[80] The EU has on the whole set the agenda, the principles and conditions of the negotiations, and to a large extent their outcome. The terms for the disentanglement of a Member State from the EU, and thus the content of a withdrawal agreement, are predominantly defined in consideration of the canons of the EU legal order, including its objectives and interests, the withdrawing State thus being left with essentially two options: accept the EU

78. See, in this respect, Hillion, "Accession and Withdrawal in the law of the European Union" in Arnull and Chalmers (Eds.), *Oxford Handbook of European Law* (OUP, 2015) pp. 126. It should be recalled that in contrast to the accession context, the influence of the Member States in the framework of Art. 50 TEU, even by way of a veto, does not amount to holding up the outcome of the process: a veto would not prevent withdrawal, but only the conclusion of an agreement on its terms.

79. European Council, April Guidelines, p. 1

80. The language used by the EU chief negotiator is illustrative of this point. In his statement following the fifth round of negotiations, he declared that "The agreement that we are working towards will not be built on 'concessions'. This is not about making 'concessions' on the rights of citizens. This is not about making 'concessions' on the peace process in Northern Ireland. This is not about making 'concessions' on the thousands of investment projects and the men and women involved in them in Europe. In these complex and difficult negotiations, we have shared objectives, we have shared obligations, we have shared duties, and we will only succeed with shared solutions"; Press statement by Michel Barnier cited *supra* note 65.

terms, or decide not to engage in this discussion and leave the EU based on a hard exit. Such an EU engagement can indeed be explained by the broader constitutional dimension of withdrawal.

4. A contribution to the constitutional law of European integration?

The activation of Article 50 TEU prompted an evolution from what is *prima facie* a procedure permitting a Member State to leave the EU, to an EU competence to ensure an "orderly" disentanglement by reference to, and with a view to, safeguarding EU fundamentals. As will be suggested, the withdrawal process has thereby enriched the law of European integration: not only has it contributed to further articulation and deepening of the law of Union membership, it has also prompted a vigorous (re)affirmation of core constitutional principles of the EU (4.1). Indeed, withdrawal epitomizes the democratic premise of membership, and in turn triggers further reflection on alternative forms of participation in the European integration process (4.2).

4.1. *Withdrawal as catalyst for (re)affirmation of EU constitutional principles*

The substantive and institutional rules which, with the help of other institutions, the European Council has deployed in the context of Article 50 TEU not only frame the specific withdrawal negotiations at hand; they arguably have broader resonance for the law of European integration. Indeed, while Article 50 TEU does not in principle involve any modification of EU primary law, as accession does, withdrawal is not constitutionally neutral.

First, and at a basic level, it is plausible that the withdrawal rulebook developed in the context of the UK exit from the EU would govern any other (negotiated) departure based on Article 50 TEU, should there ever be one. In particular, the broad reliance on the procedural arrangements prescribed by Article 218 TFEU involving the Commission, combined with the emboldened role of the European Council, would in all probability be part of the institutional arrangements of any other withdrawal process. The same holds true for the application of Article 50 TEU as an EU horizontal competence, exercised to secure an orderly withdrawal, through strong conditionality, involving a phased negotiation, to preserve the integrity of the EU constitutional order. In sum, the ongoing elaboration of Article 50 TEU is tantamount to a nascent *EU withdrawal law*.

Second, the "core principles" which the European Council has emphasized in its guidelines as principles which the Union has to pursue throughout the

negotiations, arguably have significance beyond the context of withdrawal. In emphasizing core notions such as the autonomy of the EU decision-making, the integrity of the Single Market, and in turn the indivisibility of the four freedoms, the European Council forcefully reaffirms and/or articulates what its members see as principles underpinning European integration. They are (becoming) key components of the EU constitutional identity.[81] Whether the four freedoms are genuinely inseparable in economic and/or legal terms, as sometimes disputed,[82] is irrelevant, since there is consensus among the 27 that they should be, as a non-derogable principle of EU constitutional law.

The decision of a Member State to depart thus appears to have triggered a self-reflection among the remaining Member States on the fundamentals of the EU legal order and seemingly their reinvigorated loyalty thereto.[83] Termination of membership prompts efforts to define what it means to be a Member State, as opposed to a non-Member State. It is striking that the 27 could confidently reassert such fundamentals, only a few months after having agreed that some of the core tenets of the European integration process would no longer apply to the very State presently negotiating its departure from the EU, had it decided to stay in the Union.[84] Indeed, the principles which the European Council reaffirmed in its guidelines might have significance beyond the specific context of the UK withdrawal. In particular, they could also frame future internal discussions and reforms, including possibly on free movement rules, and as will be discussed in the next section, certainly for the future interactions between the EU and third parties.

Third, and building on the above contributions, the emerging EU withdrawal law is of particular constitutional significance since it methodologically draws from, but also legally complements the more established EU enlargement law, based on Article 49 TEU.[85] Despite basic differences in their legal foundations, withdrawal shares some similarities

81. Michel Barnier referred to this notion of identity in e.g. Press conference by Michel Barnier, EC Chief Negotiator for Article 50 Negotiations with the UK (28 Feb. 2018).

82. See e.g. Weatherill, "The several internal markets", 36 YEL (2017), 125.

83. In this respect, see Van Middelaar, "Brexit as the European Union's 'Machiavellian Moment' in this Special Issue.

84. See the arrangements on a "new settlement for the United Kingdom within the European Union", and Simon, op. cit., both at *supra* note 24. See also Open letter from CEDECE (Association d'Etudes Européennes) to the Presidents of the European Parliament, the European Council and the European Commission, "l'accord anti-brexit ou l'antichambre de la dilution de l'Union européenne", 2016.

85. On this, see the various contributions in Cremona (Ed.) *The Enlargement of the European Union* (OUP, 2003), Inglis and Ott (Eds.), *Handbook on European Enlargement* (T.M.C. Asser Press, 2002) and in Hillion (Ed.) *EU Enlargement: A Legal approach* (Hart publishing, 2004); see also Hillion, "EU enlargement" in Craig and de Búrca (Eds.), *The Evolution of EU Law* (OUP, 2011) p. 187.

with that of accession, both in the way in which it has been conducted and in its implications, engendering a broader *Union membership law*, governed by the canons of EU constitutional law.

The alluded connections between the EU accession and withdrawal processes would deserve more extended developments, going beyond the scope of this paper. The following paragraphs will merely flag up some illustrations.

Both enlargement and withdrawal have, in law but predominantly in practice, involved a far-reaching empowerment of EU institutions to pursue one essential goal: to preserve the constitutional integrity of the Union while organizing changes in its membership configuration. In the context of accession, such an EU competence has taken the form of a sophisticated enlargement policy whereby institutions – and in particular the Commission, based on a mandate from the European Council – have actively engaged with candidates' preparations to become fully operational Member States.[86] In the case of withdrawal, such an EU competence has been exercised in the context of the negotiations to set out the terms of the Member State's "orderly" withdrawal, viz. to settle the "disentanglement of the [withdrawing State] from the Union and from all the rights and obligations [that State] derives from commitments undertaken as a Member State",[87] as far as possible in line with the EU interest.

The respective accession and withdrawal related competences indeed involve a degree of methodological similarity, consisting in particular of the reliance on conditionality. Whether in the form of the Copenhagen criteria, or in the guidelines, the European Council has spelled out core principles that subordinate the outcomes of the respective processes, viz. membership or a withdrawal deal, to their compliance by the (acceding/withdrawing) State concerned. The candidate State must fulfil the Copenhagen criteria set out and monitored by the EU to be able to accede, whereas the withdrawing State must accept the core principles spelled out in the guidelines, to reach a withdrawal deal and indeed a new relationship with the Union. Both processes have thereby generated moments of introspection for the EU, and of reiteration of fundamentals, including the tenets of membership, which ought to be safeguarded.

The distinct and broadly formulated role of the European Council, working in tandem with the Commission,[88] is also common to both processes, and has

86. See literature cited in previous footnote.

87. European Council, April Guidelines, para 4.

88. As illustrated by the Communication from the Commission to the European Council (Article 50) on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union, COM(2017)784.

been critical to their evolution and convergence. By developing the respective frameworks beyond their treaty foundations with comparable arrangements, the European Council has in effect contributed to the emergence of a distinct *"Union membership" law* that is more deeply entrenched in the EU constitutional order as a result.[89] In these processes, the European Council has exercised a quasi-primary law-making power,[90] arguably made possible by the fact that it does represent the Member States while acting as a formal institution of the Union, in pursuance of the latter's own objectives and interests.[91]

The hallmarks of public international law – the mechanisms whereby a State accedes to, and withdraws from a treaty – are in the case of the EU part and parcel of the constitutional charter its founding treaties establish.[92] As discussed, they involve the institutions of the Union, and are determined in their application by the principles of the EU legal order. The articulation and application of the two membership-related processes, be they accession or withdrawal, formally take place in the context of EU law, not outside. This distinct category of EU constitutional law involves exceptional competences of the Union, both in terms of their all-encompassing scope, hybrid procedural arrangements, and constitutional implications. They also share the same purpose, notably preserving the European integration process, envisaged as the Union *interest*.

Indeed, the distinctiveness of this particular field of law, and of the EU competence it involves, lies in the latter reliance on the very notion of EU "interest".[93] The European Council guidelines contain several references thereto, starting with the very "Union's objective in the negotiations[being] to preserve its *interest*, those of its citizens, its businesses and its Member States" (emphasis added). Such a reliance impacts on the conception and exercise of the related competence, in the sense of having an enabling effect for the EU. The decision by the Member States to let the Union handle alone all matters related to withdrawal, as discussed above, is a case in point. The possible establishment of transitional arrangements, which the European Council

89. A notion that the Treaty establishing a Constitution for Europe had hinted at in its Title IX, which also included the provision on suspension of membership – now Art. 7 TEU – as third pillar of Union membership law.

90. Art. 49 TEU recognizes this when stipulating that "The conditions of eligibility agreed upon by the European Council shall be taken into account."

91. Indeed, in line with its role as articulated by the Treaty of Lisbon, see e.g. Art. 22(1) TEU.

92. See Hillion, "Negotiating Turkey's membership", op. cit. *supra* note 23.

93. The notion was formally introduced in the TEU by the Treaty of Lisbon in relation to the Union external action (Art. 3(5) TEU), as one of the determinants, alongside values, of the EU external action.

would consider, in the context of Article 50 TEU, if in the "interest of the Union", is another.[94]

In sum, the process based on Article 50 TEU has wider ramifications for the EU legal order. More than spelling out how a Member State can leave the Union, it positively contributes to enriching the law of European integration.

4.2. *A means for alternative participation in the integration process*

In hindsight, the incorporation of an exit clause in the TEU has offered guarantees for the EU legal order. Its activation has revealed the degree to which it is constitutionalized, in the sense of being subject to EU institutional and substantive constraints, while prompting a welcome reassertion of the fundamentals of the European integration process, and a commitment by the EU (and its Member States) to safeguarding them. In the last section of this discussion, the suggestion is made that the departure of a Member State also contributes to illuminate and invigorate other fundamentals of the European integration process: one is the voluntary character of membership, the second is the notion that participation in European integration may take alternative forms.

The activation and the ensuing application of the EU withdrawal clause uncover the democratic premise on which the European integration process and membership of the Union are based. The existence in EU law of an exit clause signals that the Union is based on voluntary partaking. As much as accession itself, withdrawal is the practical expression of the TFEU preamble's notion that (only) European peoples who "share [the founders'] ideal … join in their efforts".[95]

Seen in this perspective, withdrawal is not an expression of disintegration, but a manifestation of the premises on which the Union is based. A successful management by the EU of the withdrawal process is thus not only necessary for the Union's own functioning, it is a way to safeguard and even consolidate its constitutional integrity. An orderly withdrawal is the demonstration that the EU is consistent with its fundamentals, as encapsulated in Article 2 TEU, and in particular the respect for the rule of law and democracy.

Arguably, an orderly withdrawal does not only entail that the EU respects the democratic decision of one of its Member States to leave, and an engagement to disentangle it from the EU legal order in line with its core

94. See European Council, December Guidelines, para 4.

95. On the need for a magnanimous EU in Brexit negotiations, see Joseph Weiler's "Editorial: The Case for a Kinder, Gentler Brexit", 28 *European Journal of International Law* (2017),

principles.[96] It also involves the preparation of the post-exit relationship, as indicated in Article 50 TEU itself, but as equally mandated by EU law more broadly.

Withdrawal and indeed non-membership need not mechanically result in non-participation in, let alone rejection of, the European integration process. The network of EU association agreements with third European States *not* seeking membership, such as the Agreement on the EEA, or the EU bilateral arrangements with Switzerland, is a useful reminder of this point. The actual expression of "other peoples of Europe … shar[ing] [the founders'] ideal … *join[ing] in their efforts*" (emphasis added) may be manifold. While membership may have been envisaged as the predominant form of responding to this call for joining, it is not the only one, neither in law nor practice. It is indeed noteworthy that the French version of the verb "join" in the above-mentioned Preamble is "s'associer".

The introduction of Article 8 TEU by the Treaty of Lisbon should also be mentioned in this context.[97] Building upon the ad hoc European Neighbourhood Policy,[98] the provision establishes a specific mandate for the EU to develop a "special relationship" with neighbouring States, aimed at establishing an area of prosperity and stability based on EU values, and involving "the possibility of undertaking activities jointly". Read in the light of Article 21(1) TEU, Article 8 TEU confirms that the European integration

96. Conversely, the EU could not remain insensitive to the withdrawing State's decision, based on a democratic choice, no longer to withdraw, although this does not mean that the withdrawing State could *unilaterally* stop the EU withdrawal procedure; see "Editorial Comments: Withdrawing from the ever closer union?" 53 CML Rev. (2016),1491; Hillion, "Le retrait de l'Union européenne. Analyse juridique", (2016) RTDE, 719. Further on the thorny question of possible revocation of Art. 50 notification: Steve Weatherill vs Steve Peers, "Can an Article 50 notice of withdrawal from the EU be unilaterally revoked?" at <eulawanalysis.blogspot.nl/2018/01/can-article-50-notice-of-withdrawal.html>; Gatti, "Art. 50 TEU: A well-designed secession clause", (2017) *European Papers,* 159; and Closa Montero, "Is Article 50 reversible? On politics beyond legal doctrine", *VerfBlog,* 2017/1/04, <verfassungsblog.de/is-article-50-reversible-on-politics-beyond-legal-doctrine/> and the additional literature referred to therein.

97. See e.g. van Elsuwege and Petrov, "Article 8 TEU: towards a new generation of agreements with the neighbouring countries of the European Union*?"* 36 EL Rev. (2011), 688; Hillion, "The EU neighbourhood competence under Article 8 TEU", in Fabry (Ed.) *Thinking Strategically about the EU's external action* (Notre Europe – Jacques Delors Institute, 2013) p. 204.

98. See e.g. Cremona, "The European Neighbourhood Policy: More than a Partnership?" in Cremona (Ed.), *Developments in EU External Relations Law*; *Collected Courses of the Academy of European Law*, XIX/2, (OUP, 2008), p. 244; Cremona and Hillion, "*L'Union fait la force?* Potential and limits of the European Neighbourhood Policy as an integrated EU foreign and security policy", European University Institute Law Working Paper No. 39/2006; Blockmans, *The Obsolescence of the European Neighbourhood Policy* (SIEPS, 2017).

process and goal transcends the legal boundaries of the Union, and of its constituent States, and is open to different types of participation.

By definition, the withdrawing State becomes a (European) neighbour of the Union, falling within the ambit of Article 8 TEU,[99] and with which as a result the EU is bound to engage. This provision thus not only bolsters the normative basis for a *negotiated* withdrawal (or soft exit), it also points towards a strong post-withdrawal engagement by the Union towards the former Member State. From an EU law perspective too, leaving the EU does not mean leaving Europe – and its integration process.[100]

Disentanglement based on Article 50 TEU, involving transition in the meantime, combined with the perspective of a post-exit partnership, would thus be constitutive of a broader EU (external) *integration policy*. The Union engages in the transformation of a Member State into a third State, which may however continue to participate in the integration process. This, in a way, is what the EEA agreement has become: an integration agreement allowing an alternative form of participation for a European State not seeking full membership.[101]

Such an *integration policy* of the Union indeed remains predicated on two core conditions. First, alternative participation is alike membership, voluntary, and thus premised on the democratic choice of the protagonists. Second, and equally critical: any alternative form of participation would be determined by the general *finalité* of Article 8 TEU recalled above, as well as by the core principles which the European Council reaffirmed throughout the withdrawal process: e.g. the preservation of the integrity of the Single Market based on the four indivisible freedoms, the preservation of Union's institutional integrity based on the autonomy of its decision-making and the role of the European Court of Justice, and the preservation of the integrity of membership, whereby "a non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member".[102]

99. As recalled by several resolutions of the European Parliament, see e.g. Resolution on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union (5 April 2017), para 22.

100. Cf. e.g. Statement of UK Prime Minister to Parliament (9 Oct 2017).

101. *Utenfor og Innenfor – Norges avtaler med EU* [outside and inside – Norway's relations with the EU], NOU 2012:2 (17 Jan. 2012). See also Maresceau, "Les accords d'intégration dans les relations de proximité de l'Union européenne", in Blumann (Ed.), *Les frontières de l'Union européenne* (Bruylant, 2013), p. 151; Łazowski, "Enhanced multilateralism and enhanced bilateralism: Integration without membership in the European Union", 45 CML Rev., (2008) 1433.

102. See e.g. European Council, March Guidelines, para 7. It is noticeable that at para 2, the document reiterates the significance of the core principles beyond the strict context of withdrawal ("[t]he European Council recalls and reconfirms its guidelines of 29 April and 15

5. Concluding remarks

Article 50 TEU is not only a Treaty provision acknowledging the right of Member States to withdraw from the EU and the home of a specific EU-law-inspired procedure to make it happen. Its implementation reveals that it also constitutes the legal basis of an exceptional Union competence whose purpose is to ensure that the departure of a member is "orderly". Such a qualification not only entails the conclusion of an agreement between the parties on the terms of the withdrawal, as envisaged by Article 50 TEU, it also presupposes that the process does not undermine the integrity of the EU legal order. More, withdrawal should contribute to the fulfilment of the Union's integration objective. So far, the unprecedented and yet remarkably skilled exercise of that competence has indeed enriched the law of European integration: core components of the Union's constitutional identity have been (re)affirmed, the role of EU institutions bolstered, and Union membership law further articulated. In sum, and as paradoxical as it may sound, withdrawal may therefore be envisaged as an integration-friendly process.

December 2017, *which continue to apply in full and whose principles will have to be respected by the future relationship with the UK*" (emphasis added)).