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Uppsala Faculty of Law
Working Paper 2016:3

Article 50 EU Treaty: Is the “ever closer union” cracking?

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Abstract

There is no doubt that the “Six”, founders of the European Communities in the 1950s, were committed to the concept of “an ever closer union among the peoples of Europe” and that this was profoundly felt. The Communities have been successful in achieving their tasks, but the ambitious treaties on Political and Defence communities failed in 1954, although the former has been improved in the EU of today. It must be asked whether the old feeling about an ever closer union, once existed almost 70 years ago in the closed quarters of the “Six”, still remains in a Union having rapidly expanded to 28 members. The EU has become a mini-UN in Europe, although more legally sophisticated, thus simply warranting an exit clause. As the EU stands today it may have achieved most of what the founding “Six” once had in mind.

The pertinent issue is, how close the ever closer union can become without there being repelling forces, which certainly exist, e.g. the Brexit. The concept is under pressure: 1) the very size of the union as to the number of members, which is still supposed to increase 2) the exemption in the British renegotiations from the concept 3) article 50 itself bringing in public international law and 4) the rise of “national particularism”. The legal complications are immense including both public international law and internal EU law. The repercussions in the future upon the EU would thus be pure guesswork.

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Article 50 EU Treaty: Is the “ever closer union” cracking?

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Contents

1	Introduction to issues	4
1.1	Treaty History	4
1.2	On the legal features of the EC/EU Treaties	7
2	Article 50 at a casual reading	14
2.1	The unilateral right to withdraw and some consequences	14
2.2	Notification	24
2.3	Negotiations	25
2.4	The time limit	26
2.5	Procedures and decisions by EU-bodies	27
3	Article 50 causing problems	28
3.1	Political setting	29
3.2	Some further legal issues	30
3.2.1	Changes of the basic Treaties	30
3.2.2	The competence of the Court	31
3.2.3	The legal position of the withdrawing state	33
3.2.4	The British Case	34
4	Some conclusions on (the lost?) ”ever closer union”	48

1 Introduction to issues

1.1 Treaty History

After the Second World War, Europe was laid in ruins and the political systems of government had made bankruptcy, save for Great Britain whose public institutions had survived. The military occupation of Germany was a no long-term solution, because occupation is normally seen as a temporary measure lasting a few years awaiting political settlements. To the support of Europe came the Marshall aid from the United States amounting today to about 12 billion dollars, administrated by the Organization for European Economic Cooperation (OEEC) founded in 1948, which later became OECD with an extended membership. The first European initiative to remedy the situation on the European Continent was the Schuman-plan, which was the first step to integrate the European states under a new (international) legal order and which resulted in the Coal and Steel Treaty setting up a new international organization (*Communauté de charbon et de l'acier* – CECA; the French language version was the only authentic). The concrete objective was to integrate these industries into a common market and at the same time to gain control over any possible German rearmament attempts; these products were crucial at that point of time for armaments. The Treaty entered into force on 25 July 1952 and its validity had been set for a period of time of 50 years, and thus it expired in 2002. This international organization has been wound up and surplus funds transferred to research institutes in these areas.¹ The founding states were the “Six”: Belgium, France, the German Federal Republic, Italy, Luxembourg and the Netherlands.

Concerning the long term and more idealistic aims of the Treaty, the text in the Preamble was rather brief on these issues, besides advocating world peace, practical achievements in Europe and the raising of the standard of living. On this basis it was resolved:

“...to substitute for age-old rivalries the merging of their essential interests; to create, by establishing an *economic community* (italics added!), the basis for a broader and deeper community among peoples long divided

¹ As per the Nice Treaty 2000.

by bloody conflicts; and to lay the foundations for institutions which will give direction to a destiny henceforward shared”.

Evidently, the text implied the creation of an *economic community* as a means for a broader and deeper community among the peoples of Europe. It took some time before the economic community came into existence, that is the *European Economic Community (EEC)* and also the *European Atomic Energy Community (Euratom)*. The treaties establishing these two international organizations were signed in Rome on 25 March 1957 and came into force on the first of January 1958. The EEC Treaty set up a Common Market embracing the now classic four freedoms which were supported by a number of various policies (see article 3 original Treaty), and the Euratom a specific Nuclear Common Market; its Treaty lacks obvious political goals.

Subsequent to the CECA Treaty the founding six states tried to create a defence community (*Communauté européenne de défense – CED*), treaty signed in 1952, and also a European Political Community (*Communauté politique européenne*), treaty signed in 1953, which both failed when the French National Assembly refused to even discuss the defence treaty on 30 August 1954, because of the fact that it also included a re-armament of Germany. Already in 1946 the UK, France and Belgium had entered into a military defence alliance on renewed German aggression, and in 1948 the Western European Union (WEU) was created by a treaty in Brussels reflecting these concerns in creating a collective self-defence as well as fencing off the aggressive Soviet Union. Amendments were made in 1954 to the Brussels Treaty to allow for the Federal Germany’s participation, which paved the way for its membership in the NATO in 1955. The WEU was eventually dissolved in 2011 overtaken by subsequent events. The defence community still does not exist and the NATO remains the backbone for military defence. The embryo to a political union was brought about by the Single European Act in 1986, however, placed outside the Communities as was the more elaborate EU Treaty as per Maastricht in 1993. Finally, it was placed inside the *new* EU as per the Lisbon Treaty in 2007, however, with special legal features.

Concerning the treaty history one should not forget that the Communities have been enlarged at several times, at present seven

times, now embracing 28 member states a size which obviously makes it more difficult to amend the existing treaties in an international governmental conference. On each occasion of enlargement there have been the necessary amendments (or as article 49 EU Treaty now reads “adjustments” which seems to allow for a broader interpretation of what may be changed than before) to the Treaties in order to accommodate the new members.² In addition to those changes, more general amendments have been made by the budgetary treaties from the 1970s, the Single European Act (1986), Maastricht Treaty (1993), including at the same time the creation of the European Union (EU) by the EU Treaty as an appendix to the Communities, the Amsterdam Treaty (1997), the Nice Treaty (2001) and finally at this point of time the Lisbon Treaty (2007), which established a *new* EU, although building on the previous EC and EU Treaties.³ The so *reformed* Treaties entered into force on the first of December 2009.⁴

In the Preamble of the EEC Treaty, first indent, the founding states declared their determination “to lay the foundation of *an ever closer union among the peoples of Europe* (italics added!)” – evidently a text more outspoken than the one quoted from the CECA Treaty (“deeper community”) now retained in the same place in the Treaty on the Functioning of the EU as well as included in preamble of the EU Treaty. Generally, the Preamble of the EEC Treaty and its first articles occupied themselves more with economic and social matters than the world peace a fact, which may be explained by the time element, namely that ten years had elapsed since the end of the war when the negotiations started in Messina (Italy) in 1955. The parties resolved accordingly “by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts”. It should also be remembered that in 1955 the Cold War was a most salient reality.

It would seem that to “join in their efforts” do not automatically imply a membership of each and every state in Europe regardless

² See Tatham, A.F., “Don’t Mention Divorce at the Wedding, Darling!”: EU Accession and Withdrawal after Lisbon, *EU Law After Lisbon* (eds. Biondi, Eeckhout & Ripley), OUP 2012.

³ The EEC became the EC in the Maastricht Treaty.

⁴ The EU Treaty and the Treaty on the Functioning of the EU.

of how Europe is defined, because a number of other means could serve well to the stated objective such as various free trade and cooperation agreements – in some cases as a precursor for membership. However, considering all the efforts made by the members in developing the Communities primarily by means of amending the original treaties and finally the transformation of the previous EC and EU Treaties into the *new* EU as per the Lisbon Treaty, it is evident that the founding states generally have been faithful to their stated objective of an ever closer union as included in the original EEC Treaty – certainly expressing a feeling that was deeply felt at that time. The pertinent issue today is, however, whether this still holds good, particularly in view of the unhampered enlargement of the Union and the exit clause in article 50 of the EU Treaty. Only the Euratom Treaty has been intact, save for necessary adaptations to accommodate new members.

1.2 On the legal features of the EC/EU Treaties

All international treaties are based upon customary international law for their validity, although this law has been straitened up by the work of the International Law Commission (ILC) in its mission to codify general international law with an element of progression, of which one project later became the Vienna Convention on the Law of Treaties 1969 (Vienna Convention).⁵ The implication is (with reference to the “progressive element”) that *not all* provisions in the Convention may reflect international law as it actually stands today, but the impact of the Convention (hardly not in its entirety) on customary international law must, however, not be neglected.

Both the EEC and Euratom Treaties as later amended did not contain any clauses for denouncing the Treaties; on the contrary rather, since it was stated in article 240 in the EEC Treaty that “[t]his Treaty is concluded for an unlimited period of time”.⁶ The same is provided in the Euratom Treaty, article 208 (although there are such treaties also at the same time including a termination clause). These circumstances taken together with the “ever closer

⁵ See the UN Charter article 13(1) according to which the Assembly may initiate studies for the purpose of “the progressive development of international law and its codification”.

⁶ The now applicable articles in this respect are article 53 EU Treaty, and article 356 Treaty on the Functioning of the EU.

union” objective in the EEC Treaty may, however, have given the impression that the Treaties could not be denounced and would thus survive forever. This impression was further amplified by the rulings of the Community Court or the European Court of Justice (Court/ECJ).

The Vienna Convention is very much concerned with the validity of treaties and their continuance in force (Part V Invalidity, termination and suspension of the operation of treaties), and the grounds for invalidating a treaty are restricted to those enumerated in the Convention (articles 46-53). Concerning the termination of a treaty, it is obvious that a state may do so according to the provisions in the treaty concerned or by the consent of all the other parties (article 54). Issues may arise, however, when considering article 56, which reads:

“DENUNCIATION OF OR WITHDRAWAL FROM A TREATY CONTAINING NO PROVISION REGARDING TERMINATION, DENUNCIATION OR WITHDRAWAL

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

- (a) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or
- (b) A right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1”.

Considering the elements of an “unlimited period” and an “ever closer union”, it may seem difficult to contend that either possibility in article 56(1) unilaterally can be invoked by a member state, *provided*, of course, that article 56 actually reflects existing customary international law; member states having ratified the Convention would of course be bound by it. In view of the treaty objectives and the actual texts of the EU Treaties, it seems impossible generally to invoke the *clausula rebus sic stantibus* (Vienna Convention, arti-

cle 62).⁷ The only possibility remaining then, would be that all the other EU members agreed upon the withdrawal of a member. It is not difficult to conceive, however, a rather different legal and political situation, if several members, perhaps at the same time, announced their intention to withdraw. Accordingly, it seems not possible to “lock in” states for any longer periods of time in being parties to treaties against their political will and intentions; this seems to follow from the very nature of the international society as ultimately being based upon contractual law in one form or the other. Denunciation unilaterally appears therefore, yet, always possible. Thus the existence of article 50 EU Treaty furnishing specific rules for withdrawal confirms rather the content of general international law and also its general application to the EU Treaties.

The Court’s contribution is related to the concept of *self-contained regimes* in enhancing European integration.⁸ Each and every international organization or a special regime created according to a treaty is given its own rules of governance in accordance with its founding international instrument. All these creatures thus come into being on the basis of general international law. The issue is how much of general international law will remain as applicable *within* a specific regime; if it is the matter of a small portion such as within the EU, it is common to talk about a self-contained regime; another issue but related is how treaties concluded by an international organization may be allowed to permeate its own treaty system.⁹ Any proposition that such a regime has disconnected itself totally from general international law is, of course, not true, which also is shown by the constant use of that law to repeatedly change/amend the EC/EU Treaties such as lately as per the Lisbon Treaty.

⁷ A special situation may occur, if the matter would be a new treaty revision of the existing two EU Treaties or a new accession treaty and one or more states refused to sign or ratify the new treaty. This would create a situation where actions by different groups of members are difficult to forecast and, consequently, would become pure speculations.

⁸ Bruno, S. & Pulkowski, D., “Of Planets and the Universe: Self-contained Regimes in International Law”, *EJIL* 2006, pp. 483–529, Simma, B., “Self-contained regimes”, *NYIL* 1985, pp. 111–36, and Marschik, A., *Subsysteme im Völkerrecht – Ist die Europäische Union ein ‘self-contained regime’?*, Berlin 1997, and by the same author “Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System”, *EJIL* 1998, pp. 212–39. The expression was used with regard to diplomatic law by ICJ in the case *Concerning United States Diplomatic and Consular Staff in Teheran* (United States v. Iran), ICJ Reports, p. 3 at motive 86.

⁹ *International Law as Law of the European Union*, edited by Enzo Cannizzaro, Paolo Palchetti, and Ramses Wessel, Martinus Nijhoff Publishers 2011.

The EU is probably the most complete self-contained regime existing today, where the application of general international law has been excluded to a very great extent, *although* concepts from general international law have been borrowed such as self-executing rules have become rules with direct effect,¹⁰ the supremacy of international law (EC/EU Law) over domestic law (see article 27 Vienna Convention),¹¹ and international responsibility of the members according to the *Francoovich*-formula.¹² Evidently, notions in general international law have been adopted and ingeniously and skillfully adapted to the needs of now the EU Law (only the French original version of the cases quoted in footnote 13 gives full credit to the ideas expressed).¹³ It should be recalled that many of first judges sitting in the Community Court were very skilled persons in public international law. The persuasive attitude and reasoning by the Court has not, however, legally changed the EU as being a public international law creature and the EU's general dependency upon general international law, but the Court has developed a most sophisticated legal system within a "bubble" or sub-system of inter-

¹⁰ *Jurisdiction of the Courts of Danzig* (Advisory Opinion), *PCIJ*, 1928 *Series B*, No. 15, p. 1.

¹¹ Article 27 reads: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46". The latter article deals with "Provisions of internal law regarding competence to conclude treaties".

¹² *Chorzow Factory Case*, Jurisdiction, (Germany v. Poland), *PCIJ*, 1927 *Series A*, No. 9, p. 21. For the application in EC Law, see Joined cases C-6/90 and C-9/90, *Francoovich and Danila Bonifaci and others/ Italian Republic* [1991] *ECR* I-5357.

¹³ Case 26/62, *van Gend & Loos*, *Rec.* 1963:3, at p. 23: "que cette conception se trouve confirmée par le préambule du traité qui, au-delà des gouvernements, vise *les peuples*, et de façon plus concrète par la création d'organes qui institutionnalisent des droits souverains dont l'exercice affecte aussi bien les États", and qu'il faut conclure de cet état de choses que la Communauté constitue *un nouvel ordre juridique de droit international*, au profit duquel les États ont limité, bien que dans des domaines restreints, leurs droits souverains, et dont les sujets sont non seulement les États membres mais également leurs ressortissants; membres que leurs *citoyens*".

See further "Revisiting Van Gend en Loos: A Joint Symposium with the International Journal of Constitutional Law", *EJIL* 2014, No. 1.

Case 6/64, *Costa/E.N.E.L.*, *Rec.* 1964:1141, at p. 1158: "attendu qu'à *la différence des traités internationaux ordinaires*, le traité de la C.E.E. a institué un ordre juridique propre, intégré au système juridique des États membres lors de l'entrée en vigueur du traité et qui s'impose à leurs juridictions; and at p. 1159: " qu'en effet, en instituant *une Communauté de durée illimitée*, dotée d'institutions propres, de la personnalité, de la capacité juridique, d'une capacité de représentation internationale et plus particulièrement de pouvoir réels issus d'une limitation de compétence ou d'un transfert d'attributions des États à la Communauté, ceux-ci ont limité, bien que dans des domaines restreints, leurs droits souverains et créé ainsi un corps de droit applicable à *leurs ressortissants* et à eux-mêmes. (Italics have been added to the texts above).

national law created on the basis of the legal instruments of the said international organizations.

As many treaties also the EEC/EC Treaty (article 227) and later the EU Treaties provide for inter-state actions by members before the Court (article 259 Treaty on the functioning of the EU) but a remedy which has very seldom been used and has not included the issue of international responsibility;¹⁴ such a remedy also exists in the European Convention on Human Rights (ECHR) but these cases are also there very rare (article 33). Considering EU Law the question may be asked whether international responsibility fully will be applied in an inter-state action or if it will be curbed and moderated to suit EU needs in such actions. This was actually done to the original *Francovich*-formula in the *Brasserie du Pêcheur and Factortame* Case and later in others.¹⁵ The inter-state action involving international responsibility may be conceived to possibly occur in cases of members’ withdrawal from the Union. In the relations between the new EU, as a legal subject of international law, and third states public international law applies – be it conventional or customary.¹⁶ This is also true between EU members beyond the EU Treaties and with third states provided that new international agreements do not conflict with EU Law; for treaties entered into before becoming members, such treaties are preserved by article 351 in the Treaty on the Functioning of the EU.

In conclusion at this very point, it is contended that treaties may generally be unilaterally denounced (treaties setting out territorial boundaries may call for special attention and considerations, see Vienna Convention article 62(2)(a)), provided that prescribed treaty procedures are followed, or failing such prescriptions that proper notifications are served to the other contracting parties and that good faith as a general principle in public international law is maintained in any ensuing negotiations. It appears thus generally true as the saying goes, attributed to Charles de Gaulle: “Les traités, voyez

¹⁴ See, for example, 58/77, *Ireland/France*, O.J. 1977 No. C 142, p. 8, and 141/78, *France/United Kingdom* [1979] ECR 2923, and more recently C-364/10, *Hungary/ Slovakia*, ECLI:EU:C:2012:630.

¹⁵ C-6 & 9/90, *Francovich/Italy* [1991] ECR I-5357, and C-46 & 48/93, *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029.

¹⁶ See, for example, Mac Leod *et al.*, *The External Relations of the European Communities*, OUP 1996, and Verwey, D., *The European Community, the European Union and the Law of Treaties*, TMC Asser Press, the Hague 2004.

vous, sont comme les jeunes filles et comme les roses: ça dure ce que ça dure”, thus also including the “solidarity clause” (article 10 EC/4(3) EU) being only operational within the EU Treaties when these actually are in force relative to a member. Evidently, this expression attributed to Charles de Gaulle applies also to the EU Treaties.¹⁷

Furthermore, it is noted here, that the once proposed Treaty establishing a Constitution for Europe introduced the clause on members’ withdrawal from the Union (article I-60).¹⁸ The Treaty failed to be duly ratified owing to referenda in France and the Netherlands, which rejected it. It should also be noted that the expression “an ever closer union among the peoples of Europe” is missing in that Treaty, although the text in the Preamble expressed similar considerations.¹⁹ It reappears, however, per the Lisbon Treaty, in the Preamble of the EU Treaty: ”RESOLVED to continue the process of creating an ever closer union among the peoples of Europe”.²⁰ Certainly, it is an open question why the withdrawal clause at all was included in view of what thus was resolved. In fact, the explanation may be very simple in considering the very ambitious Constitution Treaty, namely that for political reasons in the negotiation process (as said on initiative of the former French President Giscard d’Estaing) it was felt necessary to provide for an exit clause. This may be sufficient to note here.

¹⁷ It should be recalled that Great Britain already has had a referendum in 1975 arranged by the then Prime Minister Harold Wilson on whether to stay or leave the EEC following upon so-called re-negotiations of the terms of its membership. The whole exercise turned very much around solving domestic political problems, and was labelled “for home-consumption”. By diplomatic efforts there was no intergovernmental conference to change the treaties. The question of whether it was possible to withdraw from the then three international organizations (the European Communities) was not an issue. Note also here that the more spectacular events relating to the Communities/EU have been caused by crises in domestic politics.

¹⁸ See, for example, Grosclaude, L., “La clause de retrait du Traité établissant une Constitution pour l’Europe: réflexions sur un possible marché de dupes”, *RTDEur* 2005, pp. 533-48, Herbst, J., “Observations on the Right to Withdraw from the European Union: Who are the ‘Masters of the Treaties’”, *GLJ* 2005, pp. 1755-60, Louis, J-V, “Le droit de retrait de l’Union Européenne”, *Cahiers de droit européen* 2006, pp. 293-314, and Mehdi, R., “Brèves observations sur la consécration constitutionnelle d’un droit de retrait volontaire”, *30 Years of European Legal Studies at the College of Europe* (eds. Demaret, Govaere & Hanf), Brussels 2005, pp. 113-26.

¹⁹ In part II of the Treaty it re-appears: “THE CHARTER OF FUNDAMENTAL RIGHTS OF THE UNION, PREAMBLE, The peoples of Europe, in creating an ever closer union among them”. The expression is also found in the Final Act relating the Charter.

²⁰ See also article 1, section 2, in the EU Treaty.

Once introduced into the EU context, the same reasons as mentioned above may explain why article 60 was almost copied into the Lisbon Treaty, save for some procedural alterations. Evidently, the fiction of the random profit provided by the ECJ in the 1960s and also later (*e.g.* the *Simmenthal* Case)²¹ could not any longer be upheld in a Union consisting of 28 members. The close quarters that once existed have evidently ceased to exist. To put it very bluntly, the EU can now be considered to be more or less a regional UN with Agencies, however, legally very far more sophisticated. One element of salient importance seems to be the lowering of the threshold for a qualified majority (article 16 EU Treaty) thus warranting the exit clause, because a state cannot allow itself to be frequently out-voted. In such a context the withdrawal clause may appear as clearly appropriate, although it opens for the re-joining of a member (article 49), which once has withdrawn (article 50(5) EU Treaty). In any case, the treaty matters would be immensely complicated at an exit and a subsequent rejoining.

Finally, it is noted that there is no expulsion clause in the EU Treaties which would be a fatal contradiction to the “ever closer union” concept. What there is, is the possibility to suspend the rights of a member under the Treaties (EU Treaty, article 7, and article 354, Treaty on the Functioning of the EU), when it is in a serious and persistent breach of the values stated in article 2 EU Treaty such as democracy and human rights. The paramount issue is, of course, the temporal aspect, namely for how long a period the member at fault could be suspended; a long period suspending rights extensively would more or less amount to an expulsion. A provision on expulsion would indeed be extremely difficult to reconcile with the concept of the “ever closer union”.²² The question is how close the union could become; the ultimate closeness would, of course, be the creation of a federal state, a state of affairs, which is for many reason totally excluded. Yet, the issue remains to be answered where the limit goes with regard to how much of closeness there could be in actual terms even in a self-contained regime as the EU.

²¹ Case 106/77, *Amministrazione delle Finanze dello Stato/Simmenthal* [1978] ECR 629.

²² For example, a member state of the UN could be expelled according to article 6 in the UN Charter by the General Assembly upon recommendation from the Security Council.

2 Article 50 at a casual reading

2.1 The unilateral right to withdraw and some consequences

Considering the ensuing discussion it seems appropriate for convenience to quote article 50 as it stands:

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

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

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

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

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

It is evident that the first paragraph simply states unequivocally the existence of the unilateral right of each and every member state to withdraw from the Union, thus implying that the EU and/or the other members cannot stop a member's withdrawal. The withdrawal also appears completely unconditional considering the two

years time limit in paragraph 3, so long as article 50 in other respects is observed by the withdrawing state; any disputes, instigated before the ECJ prior to the notification according to paragraph 2, under the EU Treaties are clearly dealt with in accordance with the established treaty remedies. However, the jurisdiction of the ECJ seems to some extent to be limited concerning article 50, and would primarily relate to the internal procedures of the EU institutions, besides the compatibility of the envisaged withdrawal agreements with the EU Treaties.

The point in denouncing a treaty is evidently to terminate all the obligations of the state concerned, and article 50(1) is the proper remedy envisaged by the EU Treaty to do just that. This means that the starting point is the EU Treaties, and not public international law in general. So far so good, as this very right is concerned, but that right is not lacking problems and ambiguities both with regard to substance and procedure. The new Union has in the first place to be defined in both political and legal terms, or in other words: *What is the member actually withdrawing from?* According to the EU Treaty, article 1, section 3 it is explicitly stated: “The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union”. Evidently, these two treaties will lapse in case of a withdrawal. However, this does not end the matter.

What is abundantly clear is, however, that the old EEC/EC and EU Treaties as previously amended from the Single European Act up to and including the Nice Treaty were re-written by the Lisbon Treaty (the reform treaty) to a great extent inspired by the Treaty Establishing a Constitution for Europe. The so two reformed treaties, they now establish the foundation of a *new* international organization, namely the European Union.²³ Accordingly, the new EU is not a state, nor was the EC.²⁴ The legal personality of the new Union is endowed in article in 47 of the EU Treaty. It is also clear from the new EU Treaty article 1, section 3, that the new legal person of the EU “shall replace and succeed the European Community”. Consequently, the new EU has inherited all the rights and obligations of the EC to the extent third parties concerned have

²³ Article 1, section 3, EU Treaty.

²⁴ *Opinion* 2/13, 14 October 2014 on Accession by the EU to the ECHR (ECLI:EU:C:2014:2303, motive 156: “... the EU is, under international law, precluded by its very nature from being considered a State”.

consented, and the old EEC/EC as a legal person has simply ceased to exist. It is a rather rare occurrence that one international organization succeeds to another, *e.g.* the Organization for European Economic Cooperation (OEEC) was taken over in 1961 by the Organization for Economic Cooperation and Development (OECD).

Since the EU according to the Maastricht Treaty as later amended did not possess a legal personality of its own, there was nobody the new EU could succeed to here.²⁵ The acts adopted with reference to the former EU Treaty were in reality international agreements entered into by the representatives of the member states meeting *within* the EC Council, thus not constituting that very council;²⁶ those acts could be internationally legally binding, politically binding or just statements of facts.²⁷ Whether these acts are relevant or legally binding in the exit context requires a closer examination of each individual act from the point of view of international law. However, in Protocol 36 to the Lisbon Treaty, article 9, transitional measures are provided which basically preserve the legal effects of those acts until changed or repealed regardless of whether an EC institution or member states have acted upon the former EU Treaty, Titles V and VII.²⁸ Those transitional provisions indicate the awareness of the intricate legal issues involved without going into the profound real issues. These international

²⁵ Lysén, G., *Framework decisions*, SIFIR No. 18, Iustus 2006.

²⁶ Note that the name of the EC Council was changed by Council Decision 93/591, O.J. 1993 L 281/18, into the Council of the European Union without there was any legal basis for doing so, because the two councils had not *legally* been merged. See the Merger Treaty which entered into force on 1 July 1967 concerning the merger of the Councils and the Commissions of the three Community Treaties.

²⁷ See Jeske, A.-K., “Die falsche Verwendung des Begriffs ‘Europäische Union’”, *NJW* 2001, pp. 1986-87, at p. 1987: “Der Begriff ‘Europäische Union’ hat geradezu Konjunktur und wird immer dann benutzt, wenn auch nur ein entfernter Zusammenhang mit Büssel besteht ... so heisst es dann ‘EU-Richtlinie’, wo eine Richtlinie der Europäischen Gemeinschaft gemeint ist, oder man spricht von dem EU-Gesetzgeber und der Rechtsetzung der EU”.

²⁸ “The legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of the Treaty on European Union”. Those provisions are clearly addressed to the present members, but the view may look quite different from the perspective of the withdrawing state, because decisions under the former EU Treaty do not change their original legal nature by means of the transitional stipulations only applicable EU members. The agreements mentioned may be terminated.

agreements themselves – as far as they are legally binding – entered into by the member states *within* the EC Council seem thus still to be valid international law between the members beyond the EU Treaties as per Lisbon. Accordingly, they have to be terminated under international law, if so desired by the member(s) in an exit position.

Superficially, the withdrawal by a member of the EU may seem to come close to the termination of a membership in a club occupied with whatever the subject may be. In the first place the two founding treaties of the Union would cease to be binding upon the withdrawing member. However, the issue may be raised if all the previous “amending treaties” entered into by the EC/EU members would have any importance for the withdrawing member, because these treaties have never been abrogated or in any sense been terminated. Issues may have to be dealt with. To these Treaties there were appended a number of binding protocols and volumes of common and unilateral declarations. It would go far beyond the intent of this article to scrutinize all these documents whose validity, interest and importance would vary immensely with the withdrawing member concerned. In the final end, it may be found that some instruments are still binding and have to be denounced if so needed or have become irrelevant or otherwise obsolete. Perhaps some instruments as to their very content may be a matter of negotiations in order to remain in force (article 50(2)) on the part of the withdrawing member. The importance of various declarations may be of dubious value but may not, indeed, wholly lack pertinence.

Furthermore, the new EU does not only consist of the international organization with the same name, but there are a number of bodies, agencies and institutions surrounding the EU in a huge cluster.²⁹ These creatures have different legal status and also different legal bases. The issue that arises here is, of course, how the withdrawing state may relate to all these phenomena; roughly they may be divided into four categories.

²⁹ See *The Agency Phenomenon in the European Union: Emergence, Institutionalization and Everyday Decision-Making*, edited by Madalina Busuioc, Martijn Groenleer, and Jarle Trondal, Manchester University Press 2012, and Bergström, C. F., “Shaping the new system for delegation of powers to EU agencies: *United Kingdom v. European Parliament and Council (Short selling)*”, *CMLRev* 2015, pp. 219–242.

First. Already in the original EEC Treaty the European Investment Bank (EIB), having its own legal personality, was established (now article 308 in the Treaty on the Functioning of the EU), and membership is exclusively reserved for the member states of the EU. Another example of a separate legal entity created by one of the treaties is, of course, the European Central Bank (ECB) now in article 282(3) of the Treaty on the Functioning of the EU in the context of the European Monetary Union (EMU).

Second. The EC Agencies have been created by means of Council regulations and granted legal personality such as the *European Fisheries Control Agency*, where it is stated in the basic regulation (article 18(1)): “The Agency shall be a body of the Community. *It shall have legal personality* (italics added!)” (Council Regulation (EC) No. 68/2005 on 26 April 2005). The same goes, as a further example, for the *Community plant variety Office* (Council Regulation (EC) No. 2100/94 on 27 July 1994). These creatures, created by Council regulations, are evidently legal subjects of public international law owing to the fact that they have been *directly derived* from an international treaty. They may also come close to a classic international organization in some respects in that there is an Administrative Board composed of representatives of the member states and six representatives of the Commission. Indeed, they are very innovative and special legal subjects of public international law. An issue might be what would happen to the personality and the agency, if the regulation were revoked/repealed or even annulled by the Court. The intriguing issue is if an agency still could survive on its own means and merits, because of its established independence legally and financially as a part of international law. The legal personality of the agency would certainly cease to exist, if a winding-up for liquidation by the EU as its creator according to normal procedures took place, indeed, the most likely event to occur in reality.

Third. There are various institutes, with or without their own legal personality -such as the *European Foundation for the improvement of living and working conditions* which does not seem, however, to have been granted legal personality (Council Regulation (EEC) No. 1365/75 on 26 May 1975).

It is to be noted, however, that EU secondary legislation/acts derived from the founding Treaties would lapse with them relative

to the withdrawing member. All these agencies and institutes emanate from the now non-existing international organization of the EC, succeeded by the new EU since 2009, by means of enactments of *unilateral character* (regulations), and would by logic not remain binding on the withdrawing member. However, there seems to be some uncertainties tainted to these independent agencies and other bodies, because of their special and often technical tasks that they perform for the common good, which is something to be approached in the context of a withdrawal agreement, and the legal issue is whether a withdrawing member still could remain a member of the independent agencies, because of their special legal nature and functions.

Fourth. Europol, Eurojust and European Defence Agency (EDA) are simply public international law creations. Europol is especially interesting from that point of view in that the organization originally was created by the Europol Convention, which finally came into force in October 1998 upon ratification by the then all 15 EU member states. The Convention was later substituted by EU Council decision on 6 April 2009 establishing the *European Police Office (Europol)* (2009/371/JHA), that is to say an international agreement concluded between the member states within the EC Council under the former EU Treaty; evidently less a cumbersome procedure than the approval from all the national parliaments in the member states. The Europol as of the decision is considered to be the legal successor to the one established by the Convention. According to article 2 in the decision, Europol has legal personality.

Eurojust was established by Council decision on 28 February 2002 (2002/187/JHA) and granted legal personality. The legal basis in the then EU Treaty was articles 31 and 34(2)(c) dealing with criminal matters. The legal personality of the agency is established in article 1: “This Decision establishes a unit, referred to as ‘Eurojust’, as a body of the Union. *Eurojust shall have legal personality* (italics added!)”.

The *European Defence Agency* was established by Council Joint Action 2004/551/CFSP on 12 July 2004, with reference to article 14 in the former EU Treaty. Concerning the legal personality of the Agency it is stated in “whereas 15”:

“The Agency *should* have the *legal personality necessary to perform its functions and attain its objectives* (italics added!), while maintaining close links with the Council and fully respecting the responsibilities of the European Union and its institutions”.

This tenor is retained in article 6 dealing with the legal personality and echoing the wording found in the UN Charter, article 104. The differences between the manners to express the existence of legal personality of the agencies should be noted. The wording relative to the EDA reminds of those used in the 1940th, *i.e.* not to allow too much power to be attributed to the organization created in giving a feeling amongst its member states of not giving away too much power (see for a similar wording as to the personality, *e.g.* the FAO in 1943).

Concerning the governance of the EDA it is clear from article 4 that it “shall operate under the authority and the political supervision of the Council”. There is also a Steering Board, which is “composed of one representative of each participating Member State (article 8), evidently something akin to a general assembly.

The Europol, Eurojust and the EDA are thus creations decided upon in inter-governmental conferences by the member states of the EU, and they are not created by unilateral acts stemming from the bodies of an international organization. Since the Union is based on the two EU Treaties, and they will inevitably lapse at a withdrawal, the issue still remains if participation also will cease in the three mentioned bodies. It is submitted that this will not be the case concerning Europol, EDA and Eurojust, because these entities are founded upon treaties between the member states using their own competence beyond both the previous and present EU Treaties.

A somewhat queer case is the *Euratom* being separate from the two reformed Treaties and having its own legal personality; since this Treaty stands alone from the two founding ones of the new EU and the CECA has ceased to exist (accordingly, there is only one Community left), this situation poses the question if a withdrawing member still could be a party to the Euratom, unless the Union is automatically so defined so as also to include this Treaty – thus excluding a withdrawing member. However, the material tasks of the Euratom are, indeed, rather special with agreements, for ex-

ample, with the IAEA connecting to the Treaty on Nonproliferation of nuclear weapons, circumstances which may call for special considerations. Accordingly, it is not to be wholly excluded that a withdrawing state still could be a member or a sort of the Euratom.

The EC, now succeeded by the new EU, and the Euratom have concluded thousands of international agreements with third states and international organizations. However, these agreements fall into two different categories, clean EU agreements solely based on the competences provided in the Treaties, and the so-called *mixed agreements* a type of agreement which seems not be excluded by article 50(2). In the latter case the competences of the EC/EU have not covered all of the content of the agreement concerned which has as a necessity caused the members to add their own competences. Additionally, as a complicating element, the borderline between the competences of the EU and its members may and have changed over time in favor of the former. Nevertheless, formally both the EU and its members are bound by the whole agreement concerned, although with split competences over the subject matters of the agreement according to EU Law. In the UN Convention on the Law of the Sea (UNCLOS), Annex IX deals with the participation of international organizations such as the EU, where the EU is required to state its competence (article 5(2)). A withdrawing state from the EU, having duly ratified the UNCLOS, would still be a party to that Convention after its withdrawal from the EU, where the national competence would cover the Convention in its entirety. Accordingly, the withdrawing state may still on principle remain a party to all the mixed agreements as it deems fit, *unless* the agreement itself preclude continued participation by the withdrawing state such as in the EU Central America Association Agreement. Most complicated matters would certainly arise depending on the agreements concerned.

In conclusion at this point it may be said that the unequivocal and unilateral right of each and every member state to withdraw from the Union involves much more than the termination of the two founding treaties of the new EU and the lapse of the legal derivative acts from these Treaties; clearly, more complicated than leaving the local golf club. It seems to be a matter of disentanglement by the withdrawing state on a much greater scale, which may take decades to accomplish, regardless of whether a clean slate is

desired or still sticking to entities where participation is wanted or simply continue to participate in other cases. In many instances negotiations seem necessary in particular with regard to the EC agencies, which have been created by means of regulations. A withdrawing member would also have to re-negotiate many international agreements, for example trade agreements with third countries at present covered by EU agreements.³⁰

Since the right to withdraw is a unilateral right, the relationship between the withdrawing state and EU Law is immaterial after the two years time limit or has changed upon the conclusion of the withdrawal agreement. Any cases pending before the ECJ prior to the notification do not seem to cause any problems as to the Court's jurisdiction and rendering of rulings, although subject matters may have become irrelevant.

Cases instituted before the Court *after* the notification might, for example, give cause to issues of admissibility, because of the wording that EU Law shall “apply” during the two years period or the “application” of that Law will cease upon entering into force of the withdrawal agreement. It seems implied here that there is a difference between “application” of EU Law and being legally bound by treaty obligations as per ratification to perform according to the EU Treaties (*pacta sunt servanda*). Consequently, there appears to be two different states of affairs here. An element of uncertainty has thus been introduced, and in such a case a sort of temporal law defined as “application” only may be applicable.

Articles 2 (values of the EU) and article 7 (breaches of article 2 with suspension of a member's rights) cannot stop a withdrawal regardless of a political turmoil in the withdrawing state so long as the withdrawing state follows article 50 as well as public international law as applicable (note the possibility to re-join in article 50(5)). Any other view would render the unilateral right to withdraw meaningless, if the right initiated by the notification in fact was subject to the discretion of the European Council under some kind of arbitrary “admissibility test”, possibly ending up before the

³⁰ See Koutrakos, P., “Negotiating International Trade Treaties after Brexit”, *ELRev* 2016, pp. 475-78.

ECJ.³¹ Such events would be incompatible with the plain wording of article 50(1), besides that the European Council has not been entrusted with such powers in article 50 or else wherein the EU Treaties. This article is within the jurisdiction of the Court, which has, indeed, no competence to censure the application of national constitutional law as to the notification, in particularly so, when it is explicitly stated in article 50(1) that the decision to withdraw shall follow the constitutional requirements of the withdrawing state - evidently, a wholly domestic matter, including any renderings from a constitutional court.

Finally, the last part of the single sentence in article 50(1), already touched upon, ends with the following wording: ”in accordance with its own constitutional requirements”. What else could there be? The statehood-concept assumes some kind of an internal legal order (domestic law – whatever its content), and only that order may prescribe how a state should act on the international level, because the fourth requirement for statehood is the capacity to maintain international relations. Article 46 Vienna Convention (see also article 47) not only presumes an internal legal order but it also says that breaches of that order normally will not affect the expressed consent to be bound by a treaty; the same must reasonably also apply to the termination of treaties. What a state may do or not do on the international plane, *e.g.* with respect to concluding treaties, the permitted subject matters of treaties, to terminate trea-

³¹ Cf. Hillion, Ch., “Accession and withdrawal in the Law of the European Union”, *European Union Law* (eds. Arnulf & Chalmers), pp. 126-52 at p. 137: “It is thus contended that the domestic decision to withdraw is implicitly subject to EU requirements too, notably that it conforms to the values of Article 2 TEU”. Hillion pursues the same view in “Leaving the European Union, the Union Way, A legal analysis of Article 50 TEU”, *SIEPS, European Policy Analysis* 2016:8, p. 2: “The European Council ... should therefore be assured that the latter [national decision to withdraw] conforms to the state’s internal constitutional requirements”. Contrary to Hillion’s view it is not a matter that the notification must be “acknowledged” by the European Council, because once that Council has been notified, the requirement in article 50(1) is satisfied. The European Council has simply not got the power to undertake a legal review of the constitutional order of any member state relative to the decision to withdraw which results in the formal notification.

Furthermore Hillion (p. 3) contends that a withdrawing member in breach of article 2 in the EU Treaty with rights suspended under article 7 the same Treaty may have its withdrawal “withheld in order to protect the rights and interests of other Member States”. First, this view is manifestly contrary to article 50, because there are no conditions attached to a withdrawal in that article. Second, there are many means provided in the Treaties to safeguard the interests of the remaining members such as article 259 in the Treaty on the Functioning of the EU.

ties and how to act under various treaties, is exclusively determined by domestic law, although *pacta sunt servanda* applies and must always be respected with regard to contracted obligations (articles 26 and 27 Vienna Convention).

In the EU context this state of affairs is abundantly evidenced by the German Constitutional Court (*Bundesverfassungsgericht*) in its decision on the Lisbon Treaty on 30 June 2009, a decision, which provoked constitutional changes in strengthening the national German parliament (*Bundestag*).³² The same goes for the United Kingdom in amending the European Union Act 2008 in stating (Chapter 7 at 6.1):

“A Minister of the Crown may not vote in favour of or otherwise support a decision under any of the following unless Parliamentary approval has been given in accordance with this section...”.

Also the Danish Supreme Court has a firm hold of the position of the EU Treaties in Denmark.³³

Evidently, the wording about constitutional requirements is simply a superfluous pleonasm; any referendum as to a withdrawal is solely a matter for the national government/parliament. It should finally be noted that referenda have taken place not only in the acceding state concerning its own membership (*e.g.* Norway voting against membership) but also in order to approve the accession of new members that occurred when France in 1972 held a referendum to let in Great Britain, Ireland and Denmark as members. The French Constitution was changed in 2005 to require referenda in all cases of new members post-2007 – primarily directed against a Turkish accession to the EU.

2.2 Notification

According article 50(2) first sentence, a member having decided to withdraw shall notify the European Council of its intention. However, there is no specific form prescribed for such a notification, in

³² BverfG, 2 BvE 2/08.

³³ Olsen, H. P., “The Danish Supreme Court’s decision on the constitutionality of Denmark’s ratification of the Lisbon Treaty”, *CMLRev* 2013, pp. 1489-1503.

other words any form or manner would do – orally in open session of the European Council or in writing addressed to it. Not every minister in a national government may do so, because it is clearly stated in the Vienna Convention article 7 on *Full powers* (see also article 2 -*Use of terms*), reflecting customary law, that only Heads of State, Heads of Government and Foreign Ministers by virtue of their positions represent their state without having to produce evidence to that fact, and they may perform all acts relative to the conclusion of treaties (article 7(2)(a)). Consequently, if one of those persons subsequent to a full and extensive dinner party “drops” a mail to the president of the European Council proclaiming the member’s withdrawal, the issue may be raised whether this or any other notifications might be withdrawn.

Apparently, it is the matter of a unilateral declaration, which may be legally binding if so intended in accordance with the principle *actor regit actum*, and, since the context is a legal one, it must be assumed that the notification also has that character. If so, this means that the notification only may be “revoked” on grounds for invalidity of legal acts by analogy to what is provided in the Vienna Convention on the invalidity of treaties, articles 46-53, where constitutional issues may be invoked, error on the part of the member, corruption or coercion of a representative of a member. Where in the Vienna Convention when the personal judgment is influenced by alcohol in sending a mail to the European Council is difficult to tell. However, in the final end the so notified members of the European Council may always agree by discretion upon a common action, namely to disregard any notification upon request from the notifying member.

2.3 Negotiations

Article 50(2) also presumes negotiations (appearing as an obligation on the part of the EU) between the withdrawing state and the EU, as an international legal subject, in accordance with the guidelines drawn up by the European Council in setting out the arrangements for the withdrawal and the future relationship with the EU. There are no indications in article 50 on the content of the envisaged agreement; evidently, this matter has been left open to the parties (withdrawing member and the EU). This means that the withdraw-

ing state already at this state of affairs is considered as a third party to the EU or at least becoming one because of the notification; thus the legal relationship between the withdrawing member and the EU has changed. Some indications of the nature of the withdrawal agreement and future relationship may be found in articles 3(5) and 8 in the EU Treaty as well as securing its values expressed in article 2; a withdrawal agreement would seem to become a most comprehensive one. There is no point in trying to guess what an agreement might contain as to its substance, which would depend on the actual parties concerned. It should also be noted that the withdrawal agreement does not change the two basic treaties of the EU but is subject as any treaty concluded by the EU with a third party to legal review by the Court as to its compatibility with EU Law. Should there be incompatibilities, the agreement may only enter into force subsequent to amendments of the EU Treaties (article 218(11) Treaty on the Functioning of the EU).

The adoption of guidelines or the failure to do so, does not seem *per se* to produce any legal consequences relative to the withdrawing member, but certainly political. In the case of a failure on the part of the EU, the withdrawing member could institute proceeding before the Court according to article 265 Treaty on the Functioning of the EU concerning the omission to act on the part of the EU. Since the right to withdraw is a unilateral right, that right cannot be affected by any action undertaken by the Council, even if the Council would consider the member to be in breach, for example, of its obligations in article 2 in the EU Treaty on the values of the Union, although such circumstances may certainly affect the content of the envisaged agreement.

2.4 The time limit

In article 50(3) it is stated that “[t]he Treaties shall cease to *apply* (italics added!)” to the withdrawing state, either upon the coming into force of the withdrawal agreement, or after two years following upon the notification unless that period is extended upon common agreement. However, nothing is said about the point of time when the legal obligations under the Treaties shall cease to exist (the issue has been touched upon above). One way of looking upon the situation is to presume that the legally binding effect of

EU Law lapses upon the very the notification and that EU Law is then applied temporarily only as a new obligation by the withdrawing member as provided in paragraph 3.

If no agreement is reached, the provisional application of the Treaties will lapse at the end of the two years period. It seems not necessary for the withdrawing state to repeal all EU Law beyond what should still apply according to a withdrawal agreement, should such an agreement be concluded, nor in the case where there is no such agreement (there is evidently a free choice in this respect). Accordingly, EU Law could independently be applied as the withdrawing member deems fit together with its own unilateral measures, save for what would be required in the case there is withdrawal agreement.

2.5 Procedures and decisions by EU-bodies

As already mentioned the European Council is the addressee of the notification of withdrawal on behalf of the EU and adopts the guidelines for the negotiations of the withdrawal agreement which is negotiated in accordance with article 218(3) of the Treaty on the Functioning of the EU which means that the Commission shall submit proposals (subject, as it seems, to what the European Council may have arrived at) to the Council which adopts a decision to open negotiations; the agreement is then concluded by the Council on behalf of the EU, acting by a qualified majority following upon the consent of the European Parliament. The qualified majority is defined in article 238(3)(b) in the Treaty on the Functioning of the EU; this means that no member may veto the withdrawal agreement or agreements as such, if the required majority exist. However, if it is in fact a mixed agreement, matters may become complicated and take extensive time in that all remaining members must ratify the agreement; moreover, if one or more members refuse to do so, there is implicitly a veto to the exit of a member. Accordingly, the issue is whether the withdrawal agreement could remain a pure EU agreement only; the type of agreement is not specified in article 50 EU Treaty.

From article 218(5) it follows that the withdrawal agreement may be applied provisionally before coming into force, but the EU Treaties do not explain the practical implications of such an appli-

cation a fact, which is left to the agreement itself to dispose of. The withdrawing member may not participate in the discussions in the European Council or in the Council, or in decisions concerning it (article 50(4) EU Treaty). This seems quite natural, since the withdrawing state is in a way a third party during the transitional period but until its end it nevertheless remains a sort of a member participating in all other matters and thus influencing, for example, legislation which may not become applicable to it. In reality, however, the situation may not be that clear and easily solved. It is noted that the UK has relinquish its Council presidency in the second half of 2017. It is further doubtful how the Council would function in the case of a “mass” exit, *i.e.* a substantial number of members’ withdrawals.

In the case of new members acceding to the EU there is an intergovernmental conference to deal with the conditions of admission and adjustments of the Treaties and an admission treaty is concluded between the newcomer and the existing members. Nothing is provided in the Treaties with regard to adjustments of the basic Treaties in the case of withdrawal, and it would seem necessary to call an inter-governmental conference of the remaining member states to review the two basic Treaties as to consequential changes surfacing from the withdrawal which indeed may be to open the Pandora’s box concerning demands for more extensive treaty changes so generated by the withdrawal as origin. In such circumstances many things could happen but would only become speculations at present.

3 Article 50 causing problems³⁴

Merely a causal reading of article 50 EU Treaty unravels a number of intricate legal issues. Accordingly, the withdrawal of a member, or even more serious a substantial number of states, perhaps at the same time, will cause numerous problems of both legal and practical nature; any such list would be rather lengthy.³⁵ Some issues are, however, brought forward below.

³⁴ See generally, Craig, P., *The Lisbon Treaty-law, politics and treaty reform*, OUP 2010, Hofmeister H., “Should I stay or Should I Go? – A Critical Analysis of the Right to Withdraw From the EU”, *European Law Journal* 2010, pp 589-03, Piris, J.-C., *The Lisbon Treaty: A legal and political analysis*, CUP 2010. Lazowski, Adam, “Withdrawal from the European Union and Alternatives to Membership”, *ELRev* 2012, pp. 523-540.

³⁵ See “Editorial: Brexit: the Age of Uncertainty”, *ELRev* 2016, pp. 445-46.

3.1 Political setting

The very rapid enlargement of the EU (inserting clear and obvious tensions into the EU system) was not conditioned on any useful contributions by the new members from the perspective of economic growth, democracy, the rule of law and advanced systems on human rights (see the Copenhagen Criteria for admission).³⁶ The reason was simply political, that was to take advantage of the downfall of the Soviet Union and expand the EU eastwards. The idea was that any deficits would be cured once in the Union. Evidently, this policy has lately encountered serious problems with regard to Ukraine. Georgia in 2008 is an example of a misjudged legal situation, political ambitions and economy. No conclusions from previous scenarios or similar situations (note the Cuban crisis in 1962) seem as yet to have been drawn relative to Ukraine and other countries in that region – all more or less feeble as to state structure and far from meeting the criteria for EU membership although there are five Partnerships to assist. There is in this context an obvious lack of cunningness on the part of the EU, and also its members, indeed, very much pursuing their own policies. The strategy followed seems to be devoid of any diplomatic “finesse”. It seems safe to say that the EU expansion eastwards has encroached upon Russian interests, in particular from the geographical point of view, circumstances which may have contributed to the annexation of Crimea and the involvement in Ukraine both of which from a legal point must be condemned, although the circumstances on the ground as to ethnicity, language, and culture are far more complicated than generally appreciated.

Yet, after the recent rapid enlargement, the program of an even larger EU nevertheless seems to continue. Accordingly, it is certainly proper to ask the question where Europe ends and Asia begins. In pursuing the official enlargement policy, it is evident that the content of the concept of the “ever closer union” will rapidly decrease and be diluted with an increasing number of new members, and substantially augment the possibility, eventually, of a mass exit of members (now facilitated by article 50 EU Treaty) to form something else such as a EU 2.0.

³⁶ http://eur-lex.europa.eu/summary/glossary/accession_criteria_copenhagen.html.

3.2 Some further legal issues

It has as yet never happened that a member has left the EU, but the special status of Greenland and claims for independence provoked all members to enter into a special agreement on this matter in 1985, *i.e.* the changed application of EU Law – a kind of withdrawal of a territorial part of a member. Also Algeria should be mentioned in this context, which had been an integral part of France since 1830 and as a consequence also a territorial part of the EC. In 1962 Algeria became an independent state, and thus constituted a third party to the EC. Note here article 355(6) in the Treaty on the Functioning of the EU, which makes it easier to change the status of oversea possessions of France, the Netherlands and Denmark.

3.2.1 Changes of the basic Treaties

If a member leaves the EU, this fact undoubtedly provokes changes to the EU Treaties, for example, as regards defining qualified majority and budget contributions. Such a treaty is, however, not envisaged in article 50 EU Treaty. The question may be asked if it is the ordinary revision procedure for amending the Treaties that should be applied (article 48) a procedure, which is complicated and cumbersome thus appearing ill-suited for the task at hand, or perhaps article 49 on accession may apply in a reversed fashion. In either case there is no remedy if one or more state should fail to ratify more than that the matter according to article 48 may be referred to the European Council. If a national parliament refuses to ratify, there is nothing the European Council could do. The simplified revision procedure (article 48) applies only to the provisions of Part Three of the Treaty on the Functioning of the EU on policies and internal actions, while such matters as definition of qualified majority and budgetary provisions are placed in Part Six of the said Treaty on institutional and financial provisions, besides the articles on the institutions in the EU Treaty

How much that must be changed may be debated, but a number of changes simply must be done, although a number of protocols and declarations would become obsolete. Once opening the Pandora's box for revision of the EU Treaties caused by the withdrawing state, it seems more than uncertain what else than consequen-

tial changes might follow in the ensuing negotiations between the remaining members.

EU membership is certainly a precondition for joining the Euro, which is actually so assumed for all members unless having an exception (article 139 Treaty on the Functioning of the EU), but the intriguing issue is if a state, which withdraws as an EU member, still can remain in the monetary union. In 2009 the ECB found in a working paper that: “a member state’s exit from the EMU, without a parallel withdrawal from the EU, would be legally impossible”.³⁷ This may be seriously doubted for many reasons, because the membership of the Union is certainly a precondition for the Euro but not the reverse it would seem, owing to the fact that not all EU members are also members of the EMU (whatever the grounds for exception are). Monetary unions of various constructions have existed in history and still exist which causes the question, if a withdrawing member being a Euro country still might remain in the EMU. As far as the treaty texts are concerned, it would appear, that such a state of affairs might not be thought totally impossible to achieve by mean of a protocol containing suitable provisions (cf. the EIB).

It seems also possible that a member of the EMU could be allowed to leave the Euro with the consent of the other EMU members, but if this withdrawal implied changes to the two basic EU Treaties or legally binding protocols, all members of the EU would have to approve in a lengthy ratification process. The simplest way would, of course, be to find that a Euro country did not any longer fulfil the conditions for entering and was granted exception.

3.2.2 The competence of the Court

Regardless of the views on the legal effect(s) of the notification to withdraw, as mentioned above, it appears, however, certain that EU Law at least must *apply* to the withdrawing state during two years following upon the notification, if no agreement before that time is reached. A consequence of that fact would be that the Court will retain its jurisdiction during that period of time as laid down in the EU Treaties, for example, with regard to preliminary

³⁷ Athanassiou, Ph., *Withdrawal and expulsion from the EU and EMU, Some reflections*, Legal Working Paper Series, No. 10, European Central Bank, December 2009, p. 4.

rulings, although one may perhaps envisage unforeseen complications following from the withdrawal. However, articles 258 on the part of the Commission together with article 260 (“enforcement action”) and article 259 in the Treaty on the Functioning of the EU on the part of members provide, as indicated above, a far more interesting perspective in this context on the public international law level. As is well known and happens quite often, the EU Commission sues member states before the Court, when a member has failed in its duty to fulfil its obligations under the Treaties.³⁸

Article 259 has been used very seldom, because the members prefer the Commission to act under article 258 instead of members suing each other. Evidently, members suing each other under article 259 would be damaging on current political relations among them. However, political considerations may change upon a notification of withdrawal making the withdrawing state already a “third party”. In fact, the matter is about breaking up a “marriage”, and states may then be more inclined to start proceedings -not only to have breaches of treaty duties established but they may as well invoke rules of international responsibility in international law demanding monetary compensation (withdrawing member or remaining member(s)). As yet, such a case has never occurred before the Court, and it seems a bit nebulous how it would hand down such a case.³⁹ Finally at this very point, it is noted that there seems to be no recourse for the withdrawing member or any member at all, as far as the Treaties go, to sue the EU for monetary compensation, unless articles 268/340, section 2, on the matter of non-contractual liability of the EU would apply; an issue which is most uncertain and which would not rest on public international law but general principles common to the laws of the members as interpreted by the Court in its case law.⁴⁰ However, one might not wholly exclude situations, in which the international responsibility of the EU might be invoked.

³⁸ The European Commission launched 893 new procedures in 2014 by sending a letter of formal notice according to article 258. *Report from the Commission -Monitoring the Application of Union Law: 2014 Annual Report*, European Commission, 9 July 2015.

³⁹ See also article 273 Treaty on the Functioning of the EU on the Court’s competence, which gives a very different setting: “The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties”.

⁴⁰ Lysén, G., “Articles 235/288, Section 2, EC Treaty: Still of Constitutional Importance, if There Ever Were Any?”, *Swedish Studies in European Law*, 2007, pp. 129-44.

3.2.3 The legal position of the withdrawing state

A withdrawing member does not enter into a legal or political void on the international level but has a choice to make as to its future international relations. The first and most likely option would be to explore the possibility of concluding a satisfactory withdrawal agreement with the EU. Whether this would be a difficult matter or not would depend on the circumstances of the case at hand. As far as the EU is concerned the European Council shall issue guidelines for the EU negotiations, and there is nothing in the Treaties indicating what actual content such agreement should have besides articles 3(5) and 8 in the EU Treaty where the latter states that agreements with neighboring countries should aim to “establish an area of prosperity and good neighborliness, founded on the values of the Union and characterized by close and peaceful relations based on cooperation”; this means that the EU has a *carte blanche* to negotiate any kind of agreement(s) suitable for the EU-objectives, and, of course, not incompatible with two EU Treaties. Perhaps the series of free trade agreements between the EU and Switzerland could serve as a model or at least as a point of departure.⁴¹

Membership in the European Free Trade Association (EFTA) and the European Economic Area (EEA) could be an alternative, which would provoke two more treaties – accession treaty to the EFTA by the withdrawing member and a treaty to join the EEA, including the EU with its members plus the EEA countries as parties. In such a context, also the EEA may be changed and in favor of the EFTA states in considering a possible changed balance of power.

The break up of a member state has no precedence as yet, even if the case was topical in the Scottish referendum in 2014.⁴² However, this matter does not seem wholly to have been removed from the Scottish agenda. A complex situation of extraordinary dignity would have occurred if the Scots had voted in favor to become an independent state seeking membership in the EU at the same time as the British had withdrawn (Brexit). The legal complexity had reached new peaks and kept lawyers busy for decades. One thing appears certain, however, regardless of British withdrawal or not, namely that Scotland as a new state would have had to apply for

⁴¹ Van Elsuwege, P. & Petrov, R. “Article 8 TEU: Towards a New Generation of Agreements with the Countries of the European Union?”, *ELRev* 2011, pp. 688-703.

⁴² See, for example, the report from the Secretary for Scotland presented to the British Parliament in 2013: *Scotland analysis: Devolution and the implications of Scottish independence*, in particular Annex A written by professors James Crawford and Allan Boyle.

membership in the EU according to article 49 EU Treaty. How quickly and smoothly that process might have become (or may become) is open to speculation in view of the political landscape. A Brexit may indeed spur the Scots to seek independence with the ambition to join the EU.⁴³

3.2.4 The British Case

If the (now former) British Prime Minister Cameron pursues his policy (which he did indeed), having won the election in 2015, to re-negotiate, which *inter alia* could include further opt-outs, Britain's terms of membership in the EU and put the result to a referendum in 2017 at the latest, it appeared uncertain what would happen.⁴⁴ Also a British exit was clearly in the cards then, since the British Parliament on 9 June 2015 with great majority voted in favor of holding a referendum on the British EU-membership before the end of 2017.

If Mr. Cameron was successful in his re-negotiation, or withdrew with a good withdrawal agreement, Britain would be able to set a precedence for other members, which also may consider that the EU had become too big, too expansive and want to re-call the essentials of the Common Market/Internal Market including the customs union and a common trade policy and also some other forms of co-operation felt necessary or useful. In such a case the implications for the now existing EU may become devastating causing wholly unforeseen changes to policies and treaties. Even if the new conditions for Britain as a member are set out in a special protocol instead of direct changes in the two founding treaties, the approval of all the other members' national parliaments is still necessary, probably also at least including referenda in Denmark and Ireland. Indeed, it seems most unlikely that Britain would be content with some kind of political declaration only.

On the 18-19 February 2016 the British re-negotiations of its terms for membership for remaining in the EU actually took place in Brussels, and an "agreement" was reached within the European Council in the form of its adopted Conclusions from the meeting

⁴³ See, for example, Edward, D. & Shuibhne, N. N., "While Europe's eye is Fix'd on Mighty Things: Implications of the Brexit Vote for Scotland", *ELRev* 2016, pp. 481-83.

⁴⁴ *Britain's Future in Europe, Reform, Renegotiations, Repatriation or Secession?*, ed. Emerson., *Center for European Policy Studies*, London 2015.

encompassing other items as well.⁴⁵ The British affair was first to be dealt with and to which there were enclosed seven Annexes, of which Annex 1 is entitled *Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union*. In the Conclusions on this item it is clarified in point 3(iii) that: “this Decision (that is Annex 1) is legally binding, and may be amended or repealed only by common accord of the Heads of State or Government of the Member States of the European Union”. In other words, the members of the European Council entered into an international agreement beyond the EU Law system. A few observations should be made of relevant issues for this treatise.

Subsequent to a rather lengthy preamble in Annex 1, Section A addresses the relationship between Euro-countries and non such countries (see further Annex II), and it is stated in paragraph 7: ”The substance of this Section will be incorporated into the Treaties at the time of their next revision in accordance with the relevant provisions of the Treaties and the respective constitutional requirements of the Member States”. The obvious question is, of course, when the Treaties will be revised next time, because there is no as yet agreed a schedule for such an event.

In the same Annex, Section B deals with Competitiveness, and Section C spells out the following on “Sovereignty” (para. 1):

“It is recognised that the *United Kingdom*, in the light of the specific situation it has under the Treaties, *is not committed to further political integration into the European Union* (italics added!) The substance of this will be incorporated into the Treaties at the time of their next revision in accordance with the relevant provisions of the Treaties and the respective constitutional requirements of the Member States, so as to make it clear that *the references to ever closer union do not apply to the United Kingdom* (italics added!)”.

It is evident that the deletion of the concept of the “ever closer union” so as not to apply to Great Britain is a monumental strike to the basic philosophy very much driving the European integration as well as removing any further political integration. In the

⁴⁵ <http://www.consilium.europa.eu/en/press/press-releases/2016/02/19-euco-conclusions>.

further part of Section C (para. 1) it is ascertained that the expression “ever closer union” does “not offer a legal basis for extending the scope of any provision of the Treaties or of EU secondary legislation”, and that it does not “alter the limits of Union competence governed by the principle of conferral, or the use of Union competence governed by the principles of subsidiarity and proportionality”. Accordingly, formally viewed, at least, the objective of an ever closer union may nevertheless be achieved by the means *already* provided in the Treaties, save for the part of political integration. However, it cannot be denied that the expression is as yet and has been a fundamental tool, or a driving engine for approaching the Treaties and giving them their specific interpretation, although initially borrowing some notions from public international law as mentioned above.

Also this part shall in substance be incorporated into the Treaties at some future point of time. At that juncture, whenever occurring, also other members may prefer to assume the same or a similar standing as Great Britain. The breakdown of the Schengen *acquis*, at least partially, in view of the mass immigration to EU, may serve as a potent incentive for halting the process encouraged by the said expression.

Section D deals with social benefits and free movements workers, and the non-discrimination between nationals of the members has been a cornerstone to the classic four freedoms established by the old EEC Treaty. The first part sets out the present rules, including the already existing exceptions and restrictions, which however seem not to have been systematically and effectively employed by members. In paragraph 2(a) the Commission is practically ordered to submit a proposal to amend EC Regulation No. 883/2004 to the effect to index the export of child benefits.⁴⁶ In paragraph 2(b), it is included an amendment to EU Regulation No. 492/2011 relating to “a pull factor arising from a Member State’s in-work benefits regime in providing “for an alert and safeguard mechanism that responds to situations of inflow of workers from other Member States of an exceptional magnitude over an extend-

⁴⁶ Cf. Article 7(2) EU Treaty: “Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide”. The contemplated amendments to the two regulations seem difficult to reconcile with the prerogatives of the Commission (articles 293-4).

ed period of time, including as a result of past policies following previous EU enlargements”. In actual terms this means:

The Council would authorize that Member State to limit the access of newly arriving EU workers to non-contributory in-work benefits for a total period of up to four years from the commencement of employment. The limitation should be graduated, from an initial complete exclusion but gradually increasing access to such benefits to take account of the growing connection of the worker with the labor market of the host Member State. The authorization would have a limited duration and apply to EU workers newly arriving during a period of 7 years.

According to paragraph 3 concerning future enlargement of the Union appropriate transitional measures on the matter of free movement of persons will be included in the Act of Accession concerned.

In Section E (para. 2) it is stated that the decision (Annex 1) will take effect the same day as Britain informs the Secretary-General of the Council that Britain will remain a member of the Union.

Annex III is a declaration by the European Council on Competitiveness, and Annex IV is in the form of a declaration on the part of the Commission entitled “on a subsidiarity implementation mechanism and a burden reduction implementation”. In substance it is the matter, that [“t]he Commission will establish a mechanism to review the body of existing EU legislation for its compliance with the principle of subsidiarity and proportionality, building on existing processes and with a view to ensuring the full implementation of this principle”. Annexes V (indexation) and VI (safe-guard mechanism), and Annex VII (abuse of rights) are declaration on the part of the Commission.

Whether this package would satisfy the British voters for staying in the Union as to be expressed in a referendum scheduled for 23 June 2016 has now been answered in the negative. The result of the referendum is that 51,9% voted in favor of a Brexit while 48,1% preferred to stay in the EU which makes a difference of only 3,8%. It is also to be noted that in Scotland about 62% of the voters favored to remain in the EU, which immediately has spurred Scottish ambitions to become a state of its own seeking EU-membership.

In addition, Sinn Fein has raised the issue of uniting Ireland and Northern Ireland where the latter voted by 55,8% to stay in the EU. Also the quarrel between the UK and Spain about the legal status of Gibraltar has surfaced where the stay in the EU votes amounted to 95%.

What has happened is, that Britain has re-negotiated its terms of membership, and finally voted for Brexit.⁴⁷ Mr. Cameron declared on early morning 24 June 2016 that he will resign in October during the party congress of the conservative and the new Prime Minister will take over and start the procedures under article 50 in the EU Treaty. However, Mrs. Theresa May became the new Prime Minister already on 13 July 2016. The “Six” old founding states meeting in Berlin on 25 June 2016 urged Britain to immediately start its withdrawal. *It must be recalled that a member state has not withdrawn from the EU simply by holding a non-legally binding referendum on the matter, but the notification must be made according to article 50(1) EU Treaty in order to start the process towards that end.* Consequently, there may be quite a lot of uncertainty from a political point of view owing to domestic politics, including constitutional issues, before the required notification is made, if made at all eventually; this may take quite a lot of time, but the time period cannot be limitless. If the referendum had been a legally binding opinion, the government may be obliged to act, if the constitution concerned says so (see, for example, the system in Switzerland). Accordingly, it is a matter for domestic politics under the state’s constitution to interpret and give expression to a referendum in political and legal terms. For practical reasons it appears appropriate that talks between the EU and the member on the exit course take place *before* a formal notification according to article 50(1) EU Treaty is made.⁴⁸

The re-negotiations, not provided for in the EU Treaties, have already significantly impacted the Union as to its very fundamentals – a new possibility for other members has been created that cannot be revoked, removed or made undone in the future.

In the British case there are still the re-negotiated terms of membership in the EU, which only can be revoked or changed by a unanimous agreement by all members or will lapse upon a formal

⁴⁷ Craig, P., “Brexit a Drama in Six Acts”, *ELRev* 2016, pp. 447-68.

⁴⁸ See, for example, Barnard, C., “The Practicalities of Leaving the EU”, *ELRev* 2016, pp. 484-86.

notification. In fact the British government will always be seen to have had three options at its disposal: accept the new terms of membership, reject them and go on as before (which might not be that easy) or start the withdrawal process by notifying the European Council. It is a matter for the British Government and also the Parliament according to a High Court decision on 3 November 2016 (appealed to Supreme Court) to interpret and give political and legal effect to the referendum; thus the Government cannot terminate the EU Treaties without the consent of the Parliament. Moreover, nothing prevents the 27 members to meet in a “private” conference outside and beyond the EU institutions to take stock of the result of the British referendum or hold other consultations in any form. Any possible effects of “contamination” amongst the other 27 members by the renegotiated terms of membership or the Brexit referendum remain still to be seen; they may take some time before surfacing, perhaps one occasion might be during the negotiations with Britain about the agreement envisaged in article 50(2) and another during the inevitable subsequent changes of the EU Treaties.⁴⁹

Finally, it is noted that various opinion polls reported in the newspapers show that there is a drive for referenda in some other member states whether to leave or stay in the EU. All this taken together should be an alarm clock for the EU institutions and the 27 members to re-think the position of the EU and its future direction. Perhaps the crucial question is what the real tasks of the EU should be in the world of today and not the one that existed 70 years ago. Merely to continue on the same track as before does not seem to be a proper and valid option.

3.3 EU objectives and predicaments

One of the essential ideas by creating the three European Communities was that their members would be so intertwined from a ma-

⁴⁹ Concerning the actual effects of a Brexit opinions differ, see for example, De Grauwe, P., “Why the European Union Will Benefit from Brexit”, <https://www.socialeurope.eu/2016/02/why-the-european-union-will-benefit-from-brexite>, and Bond, I. et al, “Europe after Brexit: Unleashed or undone?” (Center for European Reform 2016, <http://www.cer.org.uk/publications/archive/policy-brief/2016/europe-after-brexite-unleashed-or-undone>). See also Nicolaidis, P., “Withdrawal from the European Union: A Typology of Effects”, *Maastricht Journal of European and Comparative Law* 2013, pp. 209.

terial economic point of view but as an effect thereof also political-ly implying that no one could afford to leave; thus preserving the peace in Europe, furthering prosperity and preclude damaging unilateral armaments of states. All this is not wholly true, because of the French and British nuclear weaponry, which could put the whole of Europe (including the Russian part) into ashes in less than an hour, although such action is inhibited in many ways and contained within the NATO. As far as the EU is concerned, on the other hand, article 4(2) last sentence in the EU Treaty is explicit in stating: “In particular, national security remains the sole responsibility of each Member State”.⁵⁰ Furthermore, it remains to be seen how strong article 42(7) EU Treaty stands in view of the French appeal for assistance in its war against the Islamic State.⁵¹ It is impossible at present to predict what the said article actually will embrace in real terms. Indeed, certainly something quite far from the four freedoms in the EEC/EC Treaty; in times of terrorism, substance and policies may change very rapidly. By tradition, however, the NATO has been the back-bone of the European defence, where Britain perhaps is the strongest military power of the EU members, while the EU has devoted itself to the “soft” values such as the Common Market/Internal Market and the international trade relations of the EU sometimes with a touch of foreign policy. It does not seem likely that a Brexit would affect the co-operation within the NATO or any co-operation between the EU and the NATO owing to the simple fact that the NATO embraces a number of important states not being members also of the EU.

Furthermore, the extremely complicated situation involving now a number of treaties to be concluded or changed as the consequence of a withdrawal was once upon a time probably of less importance, if even thought of at all. Evidently, there is *now* a clear tension built into the EU Treaties between the “ever closer union” concept and the exit clause which seems to be irreconcilable and to which should be added the suspension of a member’s rights under the Treaties, at the extreme amounting to a kind of expulsion. Additionally, quite recently so agreed, Great Britain will be exempted

⁵⁰ On national security matters, see also articles 346-8 in the Treaty on the Functioning of the EU.

⁵¹ Note also the “Solidarity Clause”, article 222 in the Treaty on the Functioning of the EU. See also article 46(1) EU Treaty and Protocol (No 10) on permanent structured cooperation established by article 42 of the Treaty on the European Union.

from the notion. The great number of members itself is certainly a factor, which does not facilitate solutions to any problems. The issue is, to what extent, if at all, these tensions will or have already affected the activities of the institutions, including the expansive and creative streaks of the ECJ, since the Lisbon Treaty. These circumstances would merit its own study by political science researchers, although a few observations still should be made here.

As far as the Court is concerned, it pursued its line of reasoning as laid down in its early cases quoted in footnote 13 in its *Opinion 2/13* on the draft agreement for the EU accession to the European Convention on Human Rights.⁵² It is worthwhile to cite motive 167 to show the exact wording of the Court to be compared to the quoted texts in the said footnote:

“These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a ‘process of creating an ever closer union among the peoples of Europe’”.

This characterization led the Court to conclude in motive 194 the following:

“In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of *mutual trust* (italics added!) between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law”.

Consequently, it is hardly astonishing (quite unobjectionable from a purely legal point of view) that the conclusion by the full Court was

⁵² *Opinion 2/13*, 14 October 2014 on Accession by the EU to the ECHR (ECLI:EU:C:2014:2303).

that the agreement was incompatible with article 6(2) in the EU Treaty (“Such accession shall not affect the Union’s competences as defined in the Treaties”) or with Protocol No. 8 relating to article 6(2) of the EU Treaty. The interesting expression is, however, “mutual trust” which appears five times in the *Opinion*, and it peaked in the *Melloni* Case.⁵³

The said case is a preliminary ruling according to article 267 in Treaty on the Functioning of the EU upon request by *Tribunal Constitucional* in Spain concerning the validity of article 4a (1) in Council Framework Decision 2002/584/JHA on 13 June 2002 concerning the European arrest warrant and the surrender procedures between member states,⁵⁴ as amended by Council Framework Decision 2009/299/JHA on 26 February 2009.⁵⁵ Competent authorities in Italy had issued an arrest warrant for the execution of a prison sentence of ten years (bankruptcy fraud) rendered by a judgment *in absentia* against Mr. Melloni. The Spanish court asked whether article 4a (1) precluded “national judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant conditional upon the conviction in question being open to review, in order to guarantee the rights of defence of the person requested under the warrant”. If it did so preclude, the issue arose if the Charter of Fundamental Rights of the European Union (Charter) could change the situation with reference to the requirements of a “fair trial”.

First. The Court concluded in the affirmative on the first question concerning article 4a (1) (motive 40), which seemed very much to have been the result of the actual text in the Decision. *Second,* the Court found that the Decision did not infringe “the requirements under articles 47 and 48(2) of the Charter” (motive 54). *Third.* The Court rejected the use of article 53 in the Charter as a means for making an arrest warrant conditional upon the opening to legal review in the member state having issued the warrant in order to guarantee the rights of defence. The Court said in motive 63 concerning article 53 that its application by a member “would undermine the principles of *mutual trust* and recognition which that deci-

⁵³ C-399/11, *Stefano Melloni/Ministerio Fiscal*, ECLI:EU:C:2013:107.

⁵⁴ OJ 2002 L 190, p.1.

⁵⁵ OJ 2009 L 81, p.24.

sion purports to uphold and would, therefore, compromise the efficacy of that framework decision”.

It is, of course, self-evident that the criminal law systems of the 28 members may differ quite a lot as to substance and also to procedure, and these systems are one of the core exponents of the members’ culture, moral values etc. The institution of the arrest warrant is evidently a political attempt to patch over significant material differences, thereby creating a number of problems, with the effect that the Decision bars substantial and procedural objections to a warrant to the disadvantage of the defence. A quite astonishing fact is that the Decision as amended, which in fact is an international agreement between the members within the framework of the *previous* EU Treaty as pointed out above, was given such a heavy weight compared to the rights in the Charter which, according to article 6(1) in the new EU Treaty as per Lisbon (entered into force on 1 December 2009), “shall have the same legal value as the Treaties”. Accordingly, the Charter should have taken precedence over the Decision.⁵⁶ Thus the Court could easily have found article 4a (1) incompatible with articles 47 and 48(2) in the Charter or allowed the use of article 53. Instead, the Court followed the idealistic ambitions of the politicians expressed by the Decisions and patched over the inconvenient disparities of law and facts with the concept of “mutual trust” – evidently drawn from the notion of an ever closer union – which brings little legal comfort to individuals in this instance.⁵⁷ The arrest warrant certainly has its merits but the flaws must not be ignored but be corrected by the Charter in order *inter alia* to secure the rights of the defence.

To a certain extent this has also been done by the Court in a preliminary ruling requested by *Hanseatisches Oberlandesgericht in Bremen*,⁵⁸ on the interpretation of Article 1(3), Article 5 and Article

⁵⁶ See Vienna Convention article 30(3) on successive treaties between the same parties.

⁵⁷ It may be said that the Strasbourg Court has a more realistic approach in using the “margin of appreciation”, thus *not at all costs* being “burden” by the ever closer union concept, in stating: “Where [...] there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider” (*Evans v. Great Britain*, Application 6339/05, 10 April 2007, Grand Chamber, motive 77 (2007-I)).

⁵⁸ Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi* (C-404/15) and *Robert Caldaru* (C-659/15 PPU), ECLI:EU:C:2016:198.

6(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. The issue is whether a member may refuse to surrender a person to the member state having issued the arrest warrant, if the surrender would violate fundamental rights of the persons concerned such as inhuman or degrading treatment (article 3 ECHR, and article 4 of the EU Charter), for example systematic overcrowding of prisons of the state issuing the warrant, also including detention conditions. This problem is not limited to Hungary and Romania, which were the states concerned in this ruling by the Court but also Italy. The High Court of Justice of the United Kingdom had refused to surrender a prisoner to Italy on the basis of the 2003 Extradition Act (*Hayle Abdi Badre v. Court of Florence, Italy* (2014) EWHC 614). In focus was article 1(3) in the Framework decision on arrest warrants, which explicitly states: “This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [EU]”. If each and every member state could refuse to surrender persons to another member with references to deficiencies *in general* with regard to the conditions in the prisons of that state, the principle of mutual trust so strongly advocated by the Court in the *Melloni* Case and the principle of mutual recognition would more or less collapse.

The Court said in motive 91 that “a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member State cannot lead, in itself, to the refusal to execute a European arrest warrant”. Instead, the Court brought the matter to become an issue in the individual case, whether fundamental rights as to torture or to inhuman or degrading treatment or punishment were violated. A rather heavy burden was placed on the executing state to investigate the facts of the individual case. In conclusion the Court found in motive 104: “The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. *If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end*” (italics added!) From a practical point of view it is indeed difficult to see how the Court’s findings as to obtaining all the necessary information efficiently could operate in

reality. Nevertheless, the Court gave an opening to national authorities to eventually terminate the surrendering of person on an individual basis. This ruling is indeed a blow to the “mutual trust” doctrine and also to the ever closer union concept; indeed, it is a victory for upholding fundamental rights under the EU Charter.

Finally here, two further cases should be mentioned. The case of *Spain/Council* concerned the annulment of a decision on enhanced cooperation in the area of the creation of unitary patent protection.⁵⁹ Spain lost the case by a strict legal reasoning on the part of the Court to which there is not much to add. The project of the Unitary Patent would provide the same protection in all member states, which requires the establishment of the Unified Patent Court (UPC) for enforcement. The UPC is supposed to come into being by a multilateral agreement between the participating members outside the EU structure. This case was followed by *Spain/Parliament and Council*,⁶⁰ concerning the annulment of the regulation on the Creation of unitary patent protection where the Advocate-General Yves Bot found with reference to article 4(3) in the EU Treaty: “By refraining from ratifying the UPC Agreement, the participating Member States would infringe the principle of sincere cooperation in that they would be jeopardizing the attainment of the Union’s harmonization and uniform protection objectives”, while the Court abstained from any such far-reaching conclusions and preferred also in this case a strict legal analysis.

As noted frequently above, the EU has expanded rapidly to 28 member states, and that fact is also certainly a cause for tensions among members such as in the case of the arrest warrant as brought forward above, in particular considering the different political, cultural, legal and economic situations still prevailing in the former communist countries. There is clearly a contradiction between further enlargement of the EU and the “ever closer union” of which the latter is clearly related to the material intensity of the closeness. The European Council realized this as early as in 1993, where it emphasized that enlargement should relate to “the Union’s capacity to absorb new members, while maintaining the momentum of European integration in the general interest of both the

⁵⁹ Joined Cases C-274/11 and C-295/11, ECLI:EU:C:2013:240.

⁶⁰ C-146/13, ECLI:EU:C:2015:298.

Union and the candidate countries”.⁶¹ Retrospectively, it seems that this course of action has hardly been followed, and the so-called “absorption capacity” was overestimated.⁶² Indeed, political sentiments were let to prevail over facts of reality. In such a big “club” still having the intention to expand, an exit clause is simply compelling, but will also serve as an extra bargaining chip, *e.g.* to slow down or halt progress towards closer union, in addition to the ubiquitous implied veto of members, when vital matters of national interests are concerned.

Two current and dividing issues among members of a salient standing are the *Euro crisis* essentially provoked by the global financial crisis in 2008 exposing the weakness of the common currency of the Euro, in particular hitting the weak Greek state structure, and the extreme pressure on EU members by *mass immigration* from the Middle East and Africa in particular during the autumn of 2015 so far, also as well including refugees in the traditional sense (Geneva Convention regarding the Status of Refugees, 1951).⁶³ The second issue is, of course, of a delicate nature as it may be, as well as any solution to the problems,⁶⁴ but nevertheless it is appropriate to recall article 3(3) *in fine* in the EU Treaty: “It [EU] shall respect its rich cultural and linguistic diversity, and shall *ensure that Europe’s cultural heritage is safeguarded and enhanced* (italics added!)”;⁶⁵ evidently, this might serve as a ground that could be used in attacking EU regulations on matters relative to a common immigration/refugee policy.

There are two cases pending before the Court touching on these subject matters, namely C-643/15, *Slovak Republic/Council of the European Union*, action brought on 2 December 2015 seeking the annulment of Council Decision (EU) 2015/1601 on 22 September 2015 establishing provisional measures in the area of international

⁶¹ Presidency Conclusions, Copenhagen European Council, 21-22 June 1993.

⁶² See for a discussion, *Reconciling “Deepening” and “Widening” of the European Union*, eds. Blockmans & Prechal, T.M.C. Asser Press/Cambridge University Press 2007.

⁶³ 189 UNTS 137.

⁶⁴ See http://europa.eu/rapid/press-release_MEMO-16-963_en.htm?locale=en on the EU-Turkey Agreement on migration to the EU, Brussels, 19 March 2016 that is in real terms to stop the influx.

⁶⁵ Note also article 4(2) EU Treaty whose implications politically and legally seem as yet unclear: “The Union shall respect the equality of Member States before the Treaties as well as their *national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government* (italics added!)”.

protection for the benefit of Italy and Greece (the migration and refugee quota system), and C-647/15, *Hungary/Council of the European Union*, action brought on 3 December 2015 also seeking the annulment of the same Council Decision. The decision is in both cases attacked on formal grounds only, *inter alia* for breach of the principle of subsidiarity. By the Lisbon Treaty the national parliaments have been given a more extensive role in the EU, see article 12 in the EU Treaty, Protocol No. 1, and article 81(3) in the Treaty on the Functioning of the EU.

Both cases may be seen as exponents of what is called “national particularism”, meaning to create more political space for members to maneuver in favor of national interests, while still legally complying with the EU Treaties, clearly indicating repelling forces to the ever closer union concept. This behavior may run counter to the spirit expressed in article 4(3) in the EU Treaty on Union loyalty. The sentiments behind the expression of an ever closer union were certainly once upon a time deeply felt amongst the “Six” founding states after the war. However, in a club of 28 members a little more than 70 years after the end of the war, it is perhaps not to be expected that the same feelings may still persist in strength as they once did. If the tendency shown by Hungary in particular, the result may eventually become a state of affairs where the EU Treaties will be seen more as ordinary treaties lacking to a considerable extent the special feeling once upon a time attached to them and their appearance of being something out of the ordinary in the world of treaties.

The question that in the final end cannot be avoided is, if there is still a sort of “absorption factor” both with regard to the number of members and the extent of immigration before there is a breach of the EU Treaty; in such circumstances “solidarity”, “mutual trust” and “ever closer union” may be at a very serious peril.

Finally, it is noted from media in general, that the EU Commission is less active in submitting proposals for new legislation, besides repealing old, which has caused the European Parliament to complain of less to do.

4 Some conclusions on (the lost?) ”ever closer union”

It goes without saying that any further enlargement of the Union would seriously be damaging to the concept of “an ever closer union”, if the concept is understood in a *material* sense. Politically, it may be viewed quite differently. Accordingly, the closeness as to substance should be the prime objective of a purposeful consolidation and mending of inadequacies among the present members, if “an ever closer union” is to be taken seriously. Such an objective presents, however, a number of real problems, in particularly considering the EMU and any common EU immigration policy. The ultimate question is indeed how close “the ever closer” could become in a material sense before repelling forces may come in to play in the opposite direction. It is not, however, to be excluded that such forces already have gradually grown where the present position of Great Britain may provide the prime example of the work of such forces.

Full recognition must be given to the ECJ in promoting European integration during all the years since the coming into force of the three Community Treaties, which were rather special of their time as to contents and objectives. The issue is whether the Court will pursue its old time dictums in circumstances completely apart from those that once existed in the closed quarters of the “Six” but now a big club as a mini-UN in Europe. Unfortunately, the Court seems to do just that as evidenced in the *Melloni* Case in stretching too far beyond present circumstances, thus in reality undermining the *mutual trust* amongst members, *i.e.* perhaps the key element in the concept of “an ever closer union”, which it indeed purports to promote. It seems that the Court is at a crossroad now. Certainly, it is true that the legal branch may be a forerunner of legal and social changes, provided, of course, that the Court still in its approach is based on tangible realities – both politically and materially with a reasonable prospect of success.

Originally, the Court had a solid basis in public international law to draw upon in skillfully forming Community Law; this seems not to be the case today (the basic job has already been done) and very much owing also to the fact that the Lisbon Treaty is too complex and contradictory in terms, in addition to the EU courts being

composed of too many judges representing too many legal traditions. There is a salient issue about the structure and composition of the EU courts in particular relative to the concept of “an ever closer union”, once upon a time expressing a very profound feeling amongst the “Six” founding states. It is doubtful whether this original feeling can persist in a EU of 28 members without being diluted or misconceived or even questioned by “national particularism”.

As far as the politicians are concerned, doubts may be launched as to their awareness of the seriousness of both the factual and legal situations. The diversity of political interests thus pointing in various directions seems to confirm that fact – evidently detrimental to the objective of material closeness.

Moreover, it may be said that the EU is facing its most serious problems during its existence – in fact its very existence might be at stake in its present form. The exemption included in the British renegotiations from the concept of the “ever closer union” amongst members is certainly a blatant blow to the very basis upon which European integration has as yet been founded; article 50 EU Treaty has here served as a powerful tool to further British interests. The problems related to the Euro and the mass immigration still remain nevertheless to be solved.

Furthermore, the Union has not yet cracked, and the “ever closer union” as the supreme guide for various actions under the Treaties still exists but is shaken, however, as yet not stirred as it seems, although there are already serious cracks and dents inflicted upon the Union, where article 50 EU Treaty serves as an amplifier in situations of crises, and thus there are still dangerous fields to tread. Even if the Brexit does not occur with its unforeseen repercussions on the Union, the negotiated British opt-outs in a protocol or direct changes in the Treaties has altered the present EU substantially, and other members may be inclined to follow suit. In summary it may be said that the concept of “an ever closer union” is under pressure by four elements: 1) the size of the union as to the number of members, which is still supposed to increase 2) the exemption in the British renegotiations from the concept 3) the very article 50 itself and 4) the “national particularism”. The repercussions of these elements upon the European Union (law and policy) would at present be pure guesswork.

Consequently, it appears that the present forms for European co-operation and integration as per the EU today may not last forever as if they were cut in stone. It might be so, that the present EU perhaps on a general basis already has accomplished the purposes once upon a time contemplated in the original EEC Treaty and also gone far beyond (the failed treaties following the CECA should be recalled here) – thus the occurrence of repelling forces, but yet there are common problems to be solved. Apparently, there is a kind of contradiction in these findings whose solutions perhaps are not to be found in the concept of the “ever closer union” only. The implied threat of article 50 to the EU might bring about necessary and useful changes, besides that members holding up integration may leave.

As the final point, the European integration remains constantly an exciting subject to study, both legally and politically whatever may happen next. Therefore, it remains to be seen how the Euro crisis is finally solved as well as the issue of mass immigration to the Union, and last but not least the Brexit, wholly or partially. Whatever the political solutions may be in the future, they nevertheless have to be reflected in legal instruments that can be dissected scrupulously to the enjoyment of all lawyers busy in this field.

