

WITHDRAWAL FROM THE EUROPEAN UNION: A TYPOLOGY OF EFFECTS

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ABSTRACT

This paper examines Article 50 TEU and develops a typology of the possible effects of the withdrawal of a Member State from the EU. Because Article 50 TEU refers to a negotiated, post-exit, relationship between the withdrawing Member State and the Union, the typology focuses on the effects that may be experienced by the withdrawing Member State. Not all of the identified effects are of equal importance and not all of them must necessarily materialize. Their occurrence and magnitude will very much depend on the exit negotiations and the agreed post-exit relationship between that Member State and the EU. The paper also argues that withdrawal is unlikely to lead to the severing of all links with the EU or confer real policy independence to the withdrawing country. Moreover, non-application of EU law will require substantial re-legislation in the withdrawing country. The withdrawing country is unlikely to be insulated from developments in EU law.

Keywords: Article 50 TEU; negotiations; withdrawal

§1. INTRODUCTION

It used to be thought that membership of the European Union was like a traditional marriage with no possibility for divorce. This state of affairs has changed with the coming into force of the Treaty of Lisbon on 1 December 2009. Member States can now opt for amicable divorce. Article 50 TEU provides that ‘any Member State may decide to withdraw from the Union’ on the basis of a negotiated ‘arrangement’.

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¹ A. Łazowski, ‘How to withdraw from the European Union? Confronting hard reality’, *CEPS Commentary*, 16 January 2013; A. Łazowski, ‘Withdrawal from the European Union and Alternatives to Membership’, 37 *European Law Review* 5 (2012), p. 523–540; V. Miller, *In Brief: Leaving the European Union* (Library of the House of Commons, London 2011).

Until the UK began mooting its wish to renegotiate the terms of its membership, Article 50 TEU did not receive much attention in the academic literature. The few attempts to examine the modalities of possible withdrawal have shown that this is an intrinsically difficult if not outright impossible task.¹ The reason for this difficulty is that no one can know the terms of withdrawal, the negotiated arrangement and the nature of the post-exit relationship between the withdrawing Member State and the EU. While entry into the EU, for example, has a clear final destination – assumption of the obligations arising from the *acquis* – the final destination of withdrawal is not specified. According to Article 50 TEU the ‘arrangements for the withdrawal’ of a Member State shall take account of ‘the framework for its future relationship with the Union’. That future relationship is undefined and probably undefinable before the parties actually sit at the negotiating table.

In view of these uncertainties, the purpose of this paper is to produce a typology of the main effects and consequences of withdrawal from the EU. The paper proposes 10 categories of likely effects without attempting to attach relative weight or significance to these categories.

The paper is developed as follows. The next section analyses the wording of Article 50 TEU and considers the options and challenges for a withdrawing Member State. It suggests that in comparison to the accession procedure, the withdrawal procedure appears to be relatively easy and faster. Formally, leaving the EU seems to be easier than entering the EU. This creates a paradox. It is easier to leave the EU but the final destination of the exit trip is unknown. By contrast, it is more difficult to enter the EU but both the route and the final destination of the accession trip are well mapped. Then the paper proposes a typology of effects and defines 10 categories of possible effects. The penultimate section is a case study on the opt-out from police and criminal justice matters that the UK is expected to request.

This case study, which is based on a very recent report of the UK House of Lords EU Committee, lends support to the three main themes of this paper. First, it is neither possible, nor desirable for a withdrawing country to get rid of all EU-based legislation. Second, non-application of EU law will require substantial re-legislation in the withdrawing country. Third, the fact that a country formally leaves the EU will not mean that it will stop being affected by developments in EU law. In a nutshell, withdrawal is a formal act which is unlikely to sever all links with the EU or confer real policy independence to the withdrawing country.

§2. IS EXIT FORMALLY EASIER THAN ENTRY?

Article 50 TEU provides the following:

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.

Article 50 TEU appears to define the following stages of a negotiated and presumably amicable withdrawal:

1. Formal notice: The withdrawing Member State must first send a formal notice to the European Council.
2. Adoption of negotiating guidelines: The European Council issues guidelines on the basis of which the Council negotiates the terms of exit and future relationship between the EU and that Member State.
3. Negotiated arrangement: The terms of exit and post-exit relationship are negotiated by the EU on the basis of recommendations by the Commission (Article 218(3) TFEU) and the Council decides by a qualified majority after receiving the consent of the European Parliament.

It is instructive to note a number of significant differences between Article 49 TEU and Article 50 TEU. First, the role of the Commission is minimal. Whereas under Article 49 TEU, the Commission provides opinions (*avis*) on the suitability of the candidate country and on the impact of its accession on the functioning of the Union itself, in Article 50 TEU, the Council decides without having to consult the Commission.

The Commission only provides recommendations with respect to the 'opening of negotiations' (Article 218(3) TFEU).

Second, whereas the Commission has always negotiated with candidate countries on behalf of the EU, Article 50 TEU refers to Article 218(3) TFEU which provides that the Council nominates the 'Union negotiator'. So it possible that the negotiator may not be the Commission. This raises a question mark as to who will protect the interests of the Union as a whole.

Third, while the accession procedure of Article 49 TEU is not limited in time, withdrawal negotiations must be concluded within two years.

Fourth, whereas entry of a new Member State is decided on the basis of unanimity, exit of an existing Member State will be decided by the Council according to qualified majority.

Fifth, whereas entry of a new Member State requires the consent of the Parliament, acting by a majority of its component members, an exit only requires the consent of Parliament. Article 50 TEU does not explicitly stipulate a majority of component members, so consent would require only the majority of votes cast.

Lastly, with the exception of the withdrawing Member State itself, there is no reference to ratification of the result of the exit negotiations.

Apart from the case of Greenland in 1985, the EU has no experience in managing the exit of a Member State. The case of Greenland offers no guidance because of its dependence on Denmark and its almost exclusive reliance on fish. Nothing of substance had to be changed in the Treaties when Greenland left. Moreover, hardly anything had to put in place to govern the post-exit relations of Greenland with the EU because Greenland's interests are still represented via Denmark and Greenland's major concern was to exercise exclusive rights over fisheries. Nothing else mattered as much.

It appears from the brief comparison of entry and exit procedures that exit is in theory easier than entry. There are fewer and less difficult hurdles to overcome. Perhaps the reason is that a Member State that is determined to leave the EU cannot ultimately be prevented from doing so. Although the Vienna Convention on the Law of International Treaties, 1969, stipulates that withdrawal has in principle to be provided explicitly in the first place [Article 54], it also provides that a contracting party may withdraw from a treaty which does not have a withdrawal clause when all parties to the treaty agree. Normally, a three-month notice is required. In addition, the Convention does recognize the possibility that a contracting party may withdraw unilaterally from a treaty that has no exit clause due to a 'fundamental change in circumstances' which 'constituted an essential basis of the consent of the parties to be bound by the treaty' (Article 62). States may withdraw without the agreement of the other parties to a treaty if the parties intended to allow the possibility of denouncing the treaty or withdrawing from it, or if 'a right of denunciation or withdrawal may be implied by the nature of the treaty' (Article 56).

When considering the requirements and procedure of entry into the EU in relation to those of exit from the EU, a paradox arises. Whereas the purpose of entry is clear, the procedure is long and arduous. By contrast, exit appears to be easy even though its final

destination is undefined and uncertain. The next section explains why the nature and consequences of exit are nebulous.

§3. THE UNDEFINABLE NATURE OF EXIT

There is little academic literature on Article 50 TEU. This is not surprising because until the UK voiced its intention to re-negotiate the terms of its membership, the withdrawal provision was considered to be no more than a theoretical option. Most of the existing literature is also speculative.²

The heart of the problem is that Article 50 TEU itself does not just provide for negotiations on the conditions of withdrawal from the EU but also for the establishment of a new ‘framework’ of a ‘future relationship’ between the withdrawing Member State and the EU.

Some commentators on Article 50 TEU consider that a withdrawing Member State would probably seek to have access to the internal market in a relationship similar to that of Norway and the other members of the EEA.³ That may indeed be both a feasible and desirable alternative to full membership. But, of course, no one knows whether that option which has applied to countries that stopped short of entering fully the EU is also realistic for a country that leaves the EU. Once a Member State starts shedding the multiple layers of obligations in the *acquis* there is no *a priori* reason that it must stop at the boundaries of EEA membership as defined today or whether to shed more (for example, sub-EEA membership) or less (super-EEA membership).

Rather than speculate as to what a Member State may consider as a desirable post-exit relationship with the EU, this section concentrates on the nature of the legal impact that is likely to occur when EU law ‘ceases to apply’ to the withdrawing Member State. In other words, it is assumed that there is a complete exit. Ten different types of legal impact are identified below.

A. SUSPENSION OF DIRECTLY APPLICABLE EU LAW

The most immediate manifestation of the ceasing of the application of EU law will be the suspension of all regulations which have direct effect. The withdrawing country will be relieved from many obligations that have a ‘nuisance’ element, such as the provision

² See P. Athanassiou, ‘Withdrawal and Expulsion from the EU and EMU: Some Reflections’, *European Central Bank Legal Working Papers Series* No. 10 (2009); J. Herbst, ‘Observations on the Right to Withdraw from the European Union: Who are the “Masters of the Treaties”?’ , 6 *German Law Journal* 11 (2005), p. 1755–1760; H. Hofmeister, ‘Should I Stay or Should I Go? – A Critical Analysis of the Right to Withdraw from the EU’, 16 *European Law Journal* 5 (2010), p. 589–603; A. Łazowski, *CEPS Commentary*; A. Łazowski, 37 *European Law Review* 5 (2012) p. 523–540.

³ A. Łazowski, 37 *European Law Review* 5 (2012), p. 523–540.

of statistics to Eurostat, the submission of economic programmes in the framework of macro-economic coordination or the preparation of annual reports on the amount of state aid granted.

B. ENDING OF RIGHTS OF ACCESS

The most extensive impact of exit is likely to be the ending of the right of access to the internal EU market and the corresponding ending of the obligation of the withdrawing Member State to offer unrestricted access to its own market. Given their respective WTO memberships, the withdrawing Member State and the EU will be delegated to MFN status.

C. DIFFERENTIAL TREATMENT

Given the extent of integration between the economies of Member States, withdrawal will not mean the end of the presence of nationals and companies from other Member States in the economy of the withdrawing Member State and vice versa. Companies normally establish local presence through subsidiaries or registered offices. These legal forms of commercial presence give them legal rights that can be exercised even after the ceasing of the application of EU law. The same presumably will apply to nationals of other Member States and the nationals of the withdrawing Member State working abroad who are employed on the basis of temporary or permanent contracts. As long as these contracts remain valid, they will be able to exercise acquired rights that emanate from them.⁴ However, this will also create a situation of differential treatment between established and newly arrived nationals and companies who will not be able to draw on rights conferred by EU law. Presumably, the nationals and companies of the withdrawing Member State who are newly arrived in other Member States will receive equivalent treatment.

D. ANNULMENT OR MAINTENANCE OF TRANSPOSED EU LAW

In the case of EU rules which are applied through enabling national law, as for example in the case of transposed directives, the withdrawing country will have to decide whether to leave them in place or delete them. Withdrawal does not entail either an obligation to remove all vestiges of EU law or that continued enforcement of transposed EU rules is necessarily contrary to the interests of the withdrawing country.

E. REPLACEMENT OF EU LAW OR LEGAL LACUNAE

Since withdrawal does not mean that all rules emanating from Brussels must necessarily be discarded, the withdrawing country will have to decide whether to replace with its own

⁴ A. Aust, *Modern Treaty Law and Practice* (Cambridge University Press, Cambridge 2000).

laws EU rules that will cease to apply to it. For example, a withdrawing country will not have to carry out the EU-mandated environmental impact assessments, but why would it be in its interests not to protect its environment? Perhaps ironically, the ceasing of the application of EU law will in all likelihood lead to substantial increase in legislative activity. The following examples indicate the dilemmas that will face the withdrawing country. They are taken from policy areas where the EU enjoys exclusive competence. This suggests that at minimum the withdrawing Member State will have to re-legislate in these fields.

1. Example 1: Trade defence

In the field of trade, Regulation 1225/2009 lays down the EU anti-dumping rules. No Member State maintains its own anti-dumping rules. The withdrawing Member State will have to decide whether to adopt its own rules, possibly copying those of the EU. In that eventuality, it will also have to assign to a domestic authority the investigative tasks currently carried out by the Commission.

2. Example 2: Trade and other international agreements

The withdrawing country will also have to decide whether to assume any of the obligations that emanate from trade agreements between the EU and third countries and secure them through the negotiation of bilateral agreements with those third countries. Given that the EU has probably the largest network of trade agreements in the world, the task for the withdrawing country will be daunting. But in other fields too there will be need for either re-negotiation or establishment of completely new arrangements (for example, air transport rights negotiated by the EU). Withdrawal from the EU will certainly affect non-EU countries as well.

3. Example 3: National state aid control

In the field of state aid, Article 108(3) TFEU and Regulation 659/99 require public authorities to notify all new state aid to the Commission for approval. No Member State has any national authority responsible for authorizing aid precisely because the Commission has the exclusive power to assess the compatibility of aid with the internal market (Member States have authorities for coordinating state aid but not for authorizing). If a Member State leaves the EU, it will not have to comply with EU state aid rules, but it will have to decide whether to allow its public authorities to compete against each other via state aid. If it would decide to impose a conditional prohibition such as that of Article 107(1) TFEU, then it would have to designate an authority to take over the role of the Commission and would still have to decide whether to adopt rules on compatibility which are similar to those of Commission guidelines.

F. NEW NATIONAL POLICIES

The three most expensive EU policies are the common agricultural policy, the regional/cohesion policy and the research policy. The withdrawing country will not have to contribute to the EU budget to support these three policies, but at the same time its farmers, poor regions and researchers in universities and companies will not be eligible for EU funds. The withdrawing Member State will have to decide whether to replace those policies and, if yes, at which modalities and rates of support.

G. NEW NATIONAL INSTITUTIONS

New national laws and policies will require new institutions to enforce them or new competences to be granted to existing institutions. If, for example, the withdrawing Member State introduces state aid rules of its own, an authority will have to be made responsible to assess new state aid measures.

H. MANAGING EUROPEAN PUBLIC GOODS

Even in the extreme case where a Member State would not want to retain a preferential relationship with the EU after it leaves the EU, it would still have to face the geographic, economic and political reality of its proximity to the EU. There are genuine public goods shared by EU Member States and significant cross-border externalities. The point here is not whether a withdrawing country would want to maintain close economic and political links with the EU. Rather, it is about the management of resources that will necessarily have to be done even after exit from the EU and the tackling of problems that cannot be avoided even after withdrawing from the EU. The examples that immediately spring to mind are fisheries, atmospheric pollution and ceilings on CO₂ emissions, cross-border interconnection of trans-European transport, energy and communication networks, battling of money laundering, arms trafficking and other forms of cross-border illegal activities.

I. NATIONAL CURRENCY

A withdrawing Member State that is also a member of the Eurozone will have to adopt a new national currency. The exchange rate between the new currency and the euro will depend on whether the withdrawing Member State has healthy public finances or whether it is debt laden. In the latter case, its new currency will almost certainly depreciate significantly against the euro. Then the servicing of euro-denominated debt will become costlier and perhaps impossible. This is the reason why a Eurozone member is unlikely to leave voluntarily and if it leaves it is likely at the same time to default on its obligations. Since this has never happened in the EU, the legal consequences are

unimaginable. It certainly cannot be the subject of protracted withdrawal negotiations because markets will react instantaneously and, therefore, any agreement is likely to be hasty and incomplete.

J. FUTURE INTERPRETATION OF LAW WHICH IS BASED ON EU PRINCIPLES

In addition to the above problems that will arise immediately upon exit from the EU, there will be other problems linked to the interpretation and evolution of EU law. Even where Member States have their own laws, such as competition, or rules such as the precautionary principle in risk prevention, they follow the interpretation of the Court of Justice to prevent conflicts between EU and domestic law. Suppose a Member State leaves the EU and then soon afterwards the Court of Justice delivers a new judgment that departs substantially from previous case law. How should the courts in the former Member State respond to the new interpretation? Ignore it or adopt it? It would be sensible to adopt it unless there are overwhelming considerations to the contrary.

§4. A CASE STUDY: OPTING OUT OF JUSTICE AND HOME AFFAIRS

Recently the UK has signalled both its wish to re-negotiate the terms of its membership and its intention to opt out from legislation on justice and criminal matters. Article 10 of Protocol 36 grants to the UK the right, five years after the entry into force of the Lisbon Treaty, to notify to the Council that it does not accept to be bound by a number of measures in the field of police cooperation and judicial cooperation in criminal matters. Article 10(4) of Protocol 36 then provides that the relevant acts ‘shall cease to apply’ to the UK. The language used in Article 50 TEU and Protocol 36 is strikingly similar. The UK submits a notification to the Council and certain parts of EU law cease to apply to it. It is therefore worth examining how the UK itself has defined the expected impact of the ceasing of the application of EU law.

The issue of contention concerns about 130 acts of cooperation on police and criminal matters. If the UK opts out it will not be subject to the jurisdiction of the Court of Justice or the enforcement powers of the European Commission. On 23 April 2013, the House of Lords EU Committee published a report entitled *EU police and criminal justice measures: The UK’s 2014 opt-out decision*. It states that:

the decision on the opt-out is one of great significance, with far-reaching implications not only for the UK but also for the other Member States and the EU as a whole. Cross-border

cooperation on policing and criminal justice matters is an essential element in tackling security threats such as terrorism and organised crime in the twenty-first century.⁵

Not surprisingly, those in favour of the opt-out based their arguments on the need for the UK to protect its autonomy both in terms of future policy development and in terms of judicial independence. Those in favour of staying in stressed, on the one hand, the benefits of cooperation with other EU countries in terms of enhanced security and the 'benefits of legal clarity and the stronger and more consistent application of EU measures across the EU' from being subject to the jurisdiction of the Court of Justice.⁶ On the other, they warned of the harm that would be suffered in case of opting out, namely the loss of influence over EU decisions on police and criminal matters.

Regardless of the validity and relative significance of these different points of view, for the purposes of this paper three issues are of more direct relevance. First, the Committee concluded:

that the concerns of proponents of opting out, in particular as regards the role of the CJEU, were not supported by the evidence we received and did not provide a convincing reason for exercising the opt-out. We have failed to identify any significant, objective, justification for avoiding the jurisdiction of the CJEU over the pre-Lisbon PCJ measures in the UK and note that the Government appeared to share that view in respect of the number of post-Lisbon PCJ measures to which they have opted in. Indeed, we believe that the CJEU has an important role to play, alongside Member States' domestic courts, in safeguarding the rights of citizens and upholding the rule of law.⁷

The last two quotations lend support to the view that uniform interpretation and application of EU law is beneficial to Member States. However, indirectly they also indicate that the Committee believed that irrespective of whether the UK would choose to remain in or leave this area of EU law, it could not stop the Court of Justice from interpreting EU law and that its interpretations would affect the UK as well, regardless of whether it was in or out. In the event that the UK would opt out, UK courts would still have to consider the case law of the Court of Justice and avoid conflicting interpretations concerning similar situations. This underlines the fact that withdrawal from the EU does not necessarily mean that the legal system of the withdrawing country will be able to ignore the evolution of EU case law.

Indeed the second issue in the work of the House of Lords EU Committee that is of direct relevance to this paper is that its report also considers the various options that would be open to the UK in case of an opt out. Some of them require the introduction

⁵ UK House of Lords, EU Committee, *EU police and criminal justice measures: The UK's 2014 opt-out decision*, p. 7.

⁶ *Ibid.*, p. 7.

⁷ *Ibid.*, p. 8.

of autonomous UK rules. This also underlines the fact that non-application of EU law will in reality require re-legislation.

Lastly, when the Committee considered the various alternative scenarios that would be available to the UK such as annulment of EU-based measures, it in fact concluded that many of those that were incorporated in UK law did not have to be annulled because they corresponded to principles and safeguarded rights that were very much embedded in the UK legal system. Once more we see that non-application of EU law does not mean that EU law already transposed or incorporated in national law must necessarily be deleted. Withdrawal of a country from the EU does not have to remove law that originated in Brussels.

§5. CONCLUSIONS

This paper has sought to develop a typology for categorizing the various possible effects of withdrawal from the EU. Not all of these possible effects are of equal importance and not all of them must necessarily materialize. Their emergence and magnitude will very much depend on the withdrawal negotiations and the post-exit relationship between the withdrawing Member State and the EU.

The paper has explained that withdrawal is a formal act that is unlikely to sever all links with the EU or confer real policy independence to the withdrawing country. It is neither possible, nor desirable for a withdrawing country to get rid of all EU-based legislation. Moreover, non-application of EU law will require substantial re-legislation in the withdrawing country. Lastly, the fact that a country formally leaves the EU will not mean that it will stop being affected by developments in EU law.