

## Article 50 TEU: Withdrawal of a Member State from the EU

### SUMMARY

The right of a Member State to withdraw from the European Union was introduced for the first time with the Lisbon Treaty; the possibility of withdrawal was highly controversial before that. Article 50 TEU does not set down any substantive conditions for a Member State to be able to exercise its right to withdraw, rather it includes only procedural requirements. It provides for the negotiation of a withdrawal agreement between the EU and the withdrawing state, defining in particular the latter's future relationship with the Union. If no agreement is concluded within two years, that state's membership ends automatically, unless the European Council and the Member State concerned decide jointly to extend this period.

The legal consequence of a withdrawal from the EU is the end of the application of the EU Treaties (and the Protocols thereto) in the state concerned from that point on. EU law ceases to apply in the withdrawing state, although any national acts adopted in implementation or transposition of EU law would remain valid until the national authorities decide to amend or repeal them. A withdrawal agreement would need to address the phasing-out of EU financial programmes and other EU norms.

Experts agree that in order to replace EU law, specifically in any field of exclusive EU competence, the withdrawing state would need to enact substantial new legislation and that, in any case, complete isolation of the withdrawing state from the effects of the EU *acquis* would be impossible if there is to be a future relationship between former Member State and the EU. Furthermore, a withdrawal agreement could contain provisions on the transitional application of EU rules, in particular with regard to rights deriving from EU citizenship and to other rights deriving from EU law, which would otherwise extinguish with the withdrawal.



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**Article 50 – Treaty on European Union (TEU)**

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.

**The genesis and rationale of the withdrawal clause**

The right of a Member State to withdraw from the European Union was introduced for the first time with the Lisbon Treaty. Prior to that, the question of the right of withdrawal was highly controversial. Some authors had argued for the application of customary international law (*clausula rebus sic stantibus*, also established in Article 62 of the [Vienna Convention on the Law of the Treaties](#) providing for unilateral withdrawal from international treaties) within the EU framework. Moreover, several constitutional courts saw a unilateral right to withdraw from the EU as necessary in order to preserve national sovereignty.<sup>1</sup> Other authors denied the possibility of a Member State withdrawing unilaterally, but pointed to the role of the EU Member States as '**masters of the Treaties**', who could, in agreement, decide that a Member State can terminate its membership.

Other scholars rejected the possibility of withdrawal from the Union as a whole. The application of international law to fill in alleged gaps in the EU Treaties has been often seen as flawed, due to the specific character of the EU as a supranational organisation that drew from international law for its own creation but then established an autonomous legal order with its own rules.<sup>2</sup> Furthermore, **the creation – with the Maastricht Treaty – of the European Union as a permanent organisation, as now reflected in Articles 53 TEU and 356 TFEU, was understood by many to exclude the possibility of voluntary withdrawal from the Treaties.** The federal features of the EU and the materially constitutional content of the EU Treaties also tend to discount the possibility of a state terminating its EU membership.<sup>3</sup>

The inclusion of a right to withdraw from the Union in the Draft Constitutional Treaty was based on the premise that such a withdrawal would have been permissible anyway

through application of the general principles of international law. Therefore, a procedure under the Treaties, adjusted to the reality and needs of the EU and its Member States, instead of recurring to international law provisions, was deemed appropriate. That the introduction of the withdrawal clause was a compromise necessary in order to reach agreement on the Constitutional Treaty is clear from the [comments](#) attached to the draft provision (Article I-59) saying that it was a 'political signal to anyone inclined to argue that the Union is a rigid entity which it is impossible to leave'. The 'exit' clause was included unchanged in the Lisbon Treaty.

#### Greenland: no withdrawal precedent

In a referendum on 23 February 1982, Greenland decided – by 53% to 47% – to leave the then European Communities (EC). However, the 1985 'exit' of Greenland from the EC is legally speaking not a 'withdrawal' as Greenland was not a Member State of the EU but was, and remains, part of an EU Member State, Denmark. This is why its 'withdrawal' from the EC took place in the form of a **reduction of the territorial jurisdiction of the Treaties** through a Treaty change ratified by all Member States. Due to its former status as a colony and its geographical distance from the EU, Greenland became an 'associated overseas territory' (Article 204 TFEU) with special arrangements with the EU, particularly with regard to fisheries – it is given access to the single market for fisheries' products in return for EU fishermen's access to Greenland waters (Protocol 34 to the Treaties).

### Substantive conditions for a withdrawal

Relevant international-law provisions cannot be applied in parallel to Article 50 TEU. Rather, the procedure and consequences of a withdrawal from the EU are now governed by EU law and no recourse to international law is possible. This is all the more important as Article 50 TEU lowers the conditions for a withdrawal as stipulated under international law. Under Article 62 of the Vienna Convention, a state party can withdraw from a treaty only if there is a fundamental change of circumstances which has occurred compared to those existing at the time of the conclusion of that treaty. In contrast, **Article 50 TEU does not establish any substantive conditions** for a Member State to be able to exercise its right to withdrawal, but only procedural requirements. Expert opinions on the legal situation prior to the introduction of the withdrawal clause arguing that a withdrawal should be *ultima ratio* and that any Treaty changes should have priority, are not reflected in Article 50 – it does not require a Member State considering a withdrawal to first seek agreement on the amendment of the Treaties before triggering the withdrawal procedure. Commentators have criticised the mere procedural character of the withdrawal clause, which does not even oblige the withdrawing Member State to state formally a reason for its decision.<sup>4</sup>

### Procedure

The formal withdrawal process is initiated by a **notification** from the Member State wishing to withdraw to the European Council, declaring its intention to do so. The timing of this notification is entirely in the hand of the Member State concerned, and informal discussions could take place between it and other Member States and/or EU institutions prior to the notification. The European Council (without the participation of the Member State concerned) then provides guidelines for the negotiations between the EU and the state concerned, with the aim of concluding an **agreement** setting out concrete withdrawal arrangements. These arrangements should also cover the departing Member State's future relationship with the Union. The Union and the Member State wishing to withdraw have a time-frame of **two years** to agree on these

arrangements. After that, membership ends automatically, unless the European Council and the Member State concerned jointly decide to extend this period (Article 50(3) TEU).

The role of the **European Commission** in the withdrawal procedure is not entirely clear in the Treaties. According to Article 218(3) TFEU, the European Commission would make recommendations to the Council to open negotiations with the withdrawing state. As a general rule, the Commission negotiates agreements with third countries on behalf of the EU, but Article 218(3) leaves it open for the Council to nominate a different Union negotiator.

Before concluding the agreement, the **Council would need to obtain the European Parliament's consent** (Article 50(2) TEU). It should be noted that whilst, under Article 50(4) TEU, the member of the European Council or of the Council representing the withdrawing Member State does not participate in the discussions of the two institutions or in decisions concerning the withdrawal, no similar provision exists for Members of the European Parliament (MEPs) elected in the withdrawing Member State. This has led some to conclude that the Treaties therefore do not prevent MEPs elected in the Member State in question from participating either in debates in the Parliament and in its committees, or from voting on Parliament's motion to consent to the withdrawal agreement, given the role of MEPs as representing the Union's citizens as a whole and not only those of the Member State in which they were elected.<sup>5</sup>

The Council decides to conclude the agreement with a **'super qualified majority'**, without the participation of the state concerned. The qualified majority is defined in this case as at least 72% of the members of the Council, comprising at least 65% of the population of the Member States (without the withdrawing state) (Article 238(3)b TFEU).

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### Ratification by Member States

Unlike the accession of new Member States to the EU, the withdrawal of a Member State does not require ratification by the remaining Member States – Article 50(1) TEU mentions (in a declaratory way) only the decision of the withdrawing state, in accordance with its constitutional requirements. However, any Treaty changes or international agreements (such as a free trade agreement) that might be necessary as a consequence of the withdrawal agreement would need to be ratified by the remaining Member States in accordance with Article 48 TEU. **At the very least, Article 52 TEU on the territorial scope of the Treaties, which lists the Member States, would need to be amended, and Protocols concerning the withdrawing Member State revised or repealed.**

Whilst the representatives of the withdrawing state are excluded from discussions and decisions of the Council and European Council relating to the withdrawal, **there are no provisions in the Treaties prohibiting the withdrawing Member State from taking part in the adoption of any other EU act during the period between its giving formal notice under Article 50 and the date of its actual withdrawal from the EU.**



### The role of the Court of Justice

Again unlike accession treaties, the withdrawal agreement is not primary EU law, since it is concluded between the EU and the withdrawing state and not between the latter and the rest of the Member States.<sup>6</sup> **It is an international agreement and therefore subject to judicial review by the Court of Justice of the EU (CJEU). The Council decision to conclude the agreement could, for instance, be challenged before the CJEU through an action for annulment (Article 263 TFEU).** Furthermore, some argue for the possibility that the CJEU be requested to deliver an opinion on the draft withdrawal agreement's compatibility with EU law (Article 218(11) TFEU), whereas others maintain that since Article 50 TEU refers only to Article 218(3), this would not be possible.<sup>7</sup> Moreover, the domestic courts of the remaining Member States would be able to refer questions regarding the withdrawal agreement for preliminary ruling to the CJEU, whereas for the courts of the withdrawing state to have the same power, this would need to be expressly included in the withdrawal agreement.<sup>8</sup>

Some have proposed the use of the Article 50 procedure to force a renegotiation of a Member State's membership of the EU. In this context, the question could be posed as to whether – once a Member State has notified the European Council of its intention to withdraw from the EU, and a withdrawal agreement has been negotiated – it can, depending on the results of the negotiations, unilaterally **revoke its notification** and suspend the withdrawal procedure. Most [commentators](#) argue that this is impossible or at least [doubtful](#), from a legal point of view. Indeed Article 50 TEU does not expressly provide for the revocation of a notice of withdrawal and establishes that, once opened, the withdrawal process ends either within two years or later, if this deadline is extended by agreement.

Furthermore, it should be noted that the event triggering the withdrawal is the unilateral notification as such and not the agreement between the withdrawing state and the EU. The merely declaratory character of the withdrawal agreement for cancellation of membership derives from the fact that the withdrawal takes place even if an agreement is not concluded (Article 50(3) TEU).<sup>9</sup> This does not mean, however, that the withdrawal process could not be suspended, if there was mutual agreement between the withdrawing state, the remaining Member States and the EU institutions, rather than a unilateral revocation.<sup>10</sup>

### Consequences of a withdrawal and possible content of a withdrawal agreement

Under Article 50(3) TEU, the legal consequence of a withdrawal from the EU is the **end of the application of the Treaties and the Protocols thereto in the state concerned from that point on**. EU law ceases to apply in the state concerned, although any national acts adopted in implementation or transposition of EU law would remain valid until the national authorities decide to amend or repeal them. A withdrawal agreement would need to address the phasing-out of EU financial programmes and other EU norms. **Experts agree that, in order to replace EU law, specifically in any field of exclusive EU competence, the withdrawing state would need to enact substantial new legislation and that, in any case, a complete isolation of the withdrawing state from the effects of the EU *acquis* would be impossible if there were to be a future relationship between the former Member State and the EU.**<sup>11</sup> The rights and obligations deriving from the Treaties would therefore extinguish, at least to the extent agreed between the EU and the withdrawing state. In addition, agreements between the EU and third countries or international organisations, for example on trade, would also cease to apply to the withdrawing state, and it would thus need to negotiate alternative arrangements.



### Partial withdrawal?

Some commentators have proposed exploring the use of a withdrawal agreement to establish a new type of *à la carte* EU membership for the state concerned. Limits to such an arrangement would, according to them, need to be drawn so that the process does not amount to an abuse of Article 50 TEU. This could be the case if the state's reduced obligations under EU law (as a result of the 'partial withdrawal') were not reflected in limitations to its participation in EU decision-making.<sup>12</sup> However, Article 50 TEU does not seem to be the right legal instrument to achieve the goal of such a 'partial withdrawal', with the state concerned remaining a Member State of the EU, not least because Article 50 adopts a 'black or white' approach. Rather, a Treaty revision is seen by academic commentators as more appropriate for such an aim.<sup>13</sup>

Also discussed is the question of whether a 'partial withdrawal' could refer to part of the territory of a Member State, and therefore 'the Member State 'as a whole' does not withdraw but part of it 'remains' in the EU'. It should be noted however that the 'part of the Member State' in question would not itself be a sovereign state, and that it would never have been a formal member of the EU as a sovereign state (Article 1 TEU on the High Contracting Parties), so it could be argued that it cannot therefore 'remain' in the EU if the Member State itself withdraws.

### Transitional provisions on acquired rights

The arrangements for the withdrawal could aim at attenuating its consequences, including transitional application of some EU legislation in the withdrawing state, so as to protect any individual subjective rights based on them.

As regards the rights deriving from **EU citizenship**, some scholars have argued that EU citizenship can stand alone, detached from the nationality of a Member State, so that the nationals of the state in question would keep their Union citizenship even after its withdrawal from the EU.<sup>14</sup> This reasoning is based on the assumption that some of the nationals of a withdrawing state would lose their Union citizenship involuntarily in the case of withdrawal. This view however is not shared by the vast majority in literature, which regards EU citizenship as 'additional' to a Member-State's nationality (Article 20(1) TFEU) and without a free-standing character. Moreover, it should be noted that the decision to withdraw from the EU is taken according to the constitutional requirements of the state concerned and thus taking into account all possible consequences, including for the individual citizens of the withdrawing state.

Furthermore, some commentators believe that any contract-based rights would persist so long as the contracts remain valid,<sup>15</sup> although it could be expected that the withdrawal agreement would address such issues, in order to guarantee legal certainty. In this context, the agreement could also seek to address the status of the withdrawing state's citizens working (or having worked) for EU institutions.<sup>16</sup>

According to Article 28(a) of the [EU Staff Regulations](#),<sup>17</sup> 'An official may be appointed only on condition that: **he is a national of one of the Member States of the Union**, unless an exception is authorised by the appointing authority, and enjoys his full rights as a citizen;' The same applies to contractual staff. According to the Staff Regulations, an official **may be** required to resign where he ceases to fulfil the conditions laid down in Article 28(a), which includes the nationality requirement (Article 49 of the Staff Regulation).

### Institutional changes

Taking into account any arrangements made in the agreement between the EU and the withdrawing state as to their future relationship, **the EU Treaties remain valid for the rest of the Member States** and any amendments required as a consequence of the withdrawal would need to be made in accordance with the procedures established in Article 48 TEU.

The **composition of the EU institutions** could be expected to change as of the day the withdrawal takes effect, with members from the withdrawing state losing their seats in the various institutions and bodies, although transitional arrangements might be required for the period immediately after that date. The regular renewal of membership of one or more institutions would of course be complicated if this fell due during an ongoing Article 50 process.

As regards the **European Parliament**, since Article 14(2) TEU sets only the maximum number of MEPs, the size of the EP could simply be reduced by the number of MEPs previously attributed to the withdrawing Member State. The seats of the state in question could be redistributed among the remaining Member States, either immediately or following the next election, although the maximum 96 seats allocated to any one Member State (reached only by Germany at present) could not be exceeded without a change of Article 14(2) TEU.<sup>18</sup> The decision establishing the composition of the EP, including the distribution of the seats among the Member States, is adopted by the European Council on the initiative of the EP and with its consent (Article 14(2) TEU).<sup>19</sup> As with the other aspects mentioned above, this could be dealt with within a withdrawal agreement.

### Main references

P Nicolaides, *Withdrawal from the European Union: a typology of effects*, *Maastricht Journal* Vol. 20, 2013, pp. 209-219.

A Łazowski, [Withdrawal from the European Union and alternatives to membership](#) *European Law Review*, 2012, pp. 523-540.

H Hofmeister, ['Should I stay or should I go?' – a critical analysis of the right to withdraw from the EU](#), *European Law Journal*, Vol. 16, No 15, 2010, pp. 589-603.

### Endnotes

<sup>1</sup> See e.g. the [Maastricht ruling](#) of the German Federal Constitutional Court of 12.10.1993, BVerfG 89, pp. 155, 190. The Czech Constitutional Court also argued along these lines in its [ruling on the Lisbon Treaty of 3. 11. 2009](#).

<sup>2</sup> J Schwarze, 'Das allgemeine Völkerrecht in den innergemeinschaftlichen Rechtsbeziehungen', *Europarecht (EuR)* 1983, p. 1.

<sup>3</sup> *Ibidem*.

<sup>4</sup> J P Terhechte, ['Der Vertrag von Lissabon: Grundlegende Verfassungsurkunde der europäischen Rechtsgemeinschaft oder technischer Änderungsvertrag?'](#), *Europarecht* 2008, Heft 2, pp. 143, 152.

<sup>5</sup> C M Rieder, ['The withdrawal clause of the Lisbon Treaty in the light of EU citizenship: between disintegration and integration'](#), *Fordham International Law Journal*, Vol. 147, 2013, pp. 147, 158. Different opinion: A Łazowski, ['Withdrawal from the European Union and alternatives to membership'](#), *European Law Review*, 2012, pp. 523, 528.

<sup>6</sup> A Łazowski, 'Withdrawal from the European Union and alternatives to membership', *op. cit.*, pp. 529.

<sup>7</sup> C M Rieder, 'The withdrawal clause of the Lisbon Treaty in the light of EU citizenship', *op. cit.*, p. 157.

<sup>8</sup> A Łazowski, 'Withdrawal from the European Union and alternatives to membership', *op. cit.*, pp. 528, 529.

<sup>9</sup> This argument is also supported by the fact that the agreement is to be concluded between the EU and the state in question on the 'arrangements for its withdrawal', establishing in particular the framework for its future relationship with the Union (Article 50(2)), but not on the withdrawal itself. While the agreement is concluded in a bilateral relationship between the Union and the withdrawing state, the withdrawal itself is of a multilateral

nature, because it takes place within the relationship of the Member States among each other. See in this sense A F. Tatham, 'Don't mention divorce at the wedding, Darling!': EU accession and withdrawal after Lisbon, A Biondi, P Eeckhout, S Ripley (eds.), *EU law after Lisbon*, Oxford 2012, pp. 128. 152.

- <sup>10</sup> A Łazowski, 'Withdrawal from the European Union and alternatives to membership', *op. cit.*, p. 530.
- <sup>11</sup> P Nicolaides, '[Withdrawal from the European Union: a typology of effects](#)', *Maastricht Journal*, Vol. 20, 2013, pp. 209, 218.
- <sup>12</sup> O Dörr, 'Commentary to Article 50 TEU', para. 30, E Grabitz, M Hilf, M Nettesheim (eds.), *Das Recht der Europäischen Union: EUV/AEUV*, 57th ed., C H Beck, 2015.
- <sup>13</sup> J-C Piris, 'Constitutional pathways: which institutional and constitutional adjustments for the United Kingdom?', [United Kingdom's renegotiation of its constitutional relationship with the EU: agenda, politics and risks](#), EP Directorate-General for Internal Policies, Policy Department C, PE 536.489, December 2015, p. 19. See in the same compendium, on a possible 'partial membership status', B de Witte, 'Partial EU membership – which legal options and scenarios?', pp. 30 *et seq.*
- <sup>14</sup> C M Rieder, 'The withdrawal clause of the Lisbon Treaty in the light of EU citizenship', *op. cit.*, pp. 168-172.
- <sup>15</sup> P Nicolaides, 'Withdrawal from the European Union: a typology of effects', *op. cit.*, p. 214.
- <sup>16</sup> O Dörr, 'Commentary to Article 50 TEU', *op. cit.*, para. 29.
- <sup>17</sup> Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, as amended.
- <sup>18</sup> T Oliver, '[Europe without Britain – Assessing the impact on the European Union of a British withdrawal](#)', Stiftung Wissenschaft und Politik, German Institute for International and Security Affairs, Berlin, September 2013, p. 15.
- <sup>19</sup> See e.g. [European Council Decision 2013/312/EU](#) of 28 June 2013 redistributing the seats among the Member States while allocating seats to Croatia and not exceeding the maximum of 751 seats.

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